PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lon-7glc-5fup
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0002
Comment from Harold Arnold

Submitter Information

Name: Harold Arnold

General Comment

Will AI run to the store and buy Doritos for me? What if my arms suddenly fall asleep when I'm on the toilet? Do you think AI will do the dirty work, removing excess feces from my anus or at least the hairs surrounding my rectum? I think AI can go well beyond the calls duty requires. If I have a rash on my buttock will AI know that it's much better if it is blown on before it is kissed, if such programming aims to kiss a buttock with rash, medically.

Concerned Pharmacist

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lon-vp2i-5548
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0003
Comment from James Crowe

Submitter Information

Name: James Crowe

General Comment

See attached.

Attachments

Crowe AI Comment

Here are a few areas for OMB consideration:

1. This memo claims that it applies to both executive agencies and independent regulatory agencies. However, it uses the memo template for "MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES" The authors of this proposal may not be aware that there is a different OMB template for memos intended for both of these audiences, which is addressed instead to MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES, AND INDEPENDENT REGULATORY AGENCIES. For an example, see https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2011/m11-26.pdf. OMB should assume independent regulatory agencies will not read a memo that is not addressed to them, especially when there is precedent to indicate when it is meant for them. OMB will also need a specific plan to distribute these letters to independent regulatory agencies. These agencies do not necessarily monitor OMB's website.

2. It is an excellent idea for OMB to require updated reporting when the Chief AI Officer changes. However, OMB should consider further specifying that agencies must have a sufficient succession plan to ensure that someone is always performing the duties of the Chief AI Officer, even in the event of staff turnover. As written, the guidance does not require agencies to report to OMB if they just leave the position vacant for extended periods of time, similar to how Silicon Valley Bank simply failed to hire a Chief Risk Officer for extended periods of time prior to its failure.

3. The proposal provides that "Agencies may choose to designate an existing official, such as a Chief Technology Officer, Chief Data Officer, or similar official with relevant or complementary authorities and responsibilities, provided they have significant expertise in AI and meet the other requirements in this section."

However, following the well-intentioned "Foundations for Evidence-Based Policymaking Act," many Chief Data Officers, Chief Data Officers, and the like have found that they lack sufficient formal authority or influence to effectively carry out their jobs. In particular, at many agencies, the important compliance "check and balance" functions that these roles are supposed to play with respect to leaders in agency lines of business have been replaced by transforming these roles into customer-service oriented IT support roles (where the "customer service" is to other federal employees).

For example, the Board of Governors of the Federal Reserve System has not issued a valid delegation of authority to its Chief Data Officer for the Paperwork Reduction Act under the Board's policies on delegation of authority, despite the requirements of the Foundations of Evidence-based Policy Act, the Paperwork Reduction Act, and OMB guidance. The Board's performance management system then prioritizes "customer service" in evaluating the performing of the Chief Data Officer and positions reporting up to the Chief Data Officer, so that protecting the public or pushing back on ideas from lines of business is likely to lead the incumbent to be evaluated negatively, and thus undermine the policy goals of the Paperwork Reduction Act. Similarly, the Department of Veterans Affairs has historically failed to provide

anywhere near the number of staff needed for the Office of the Chief Data Officer for a 400,000 person organization. OMB's AI priorities should be coordinated with the resource management offices and the Office of Performance and Personnel Management to ensure that there is a sufficient budget and that performance standards do not discourage Chief AI Officers and their staff from effectively discharging their duties (for example, by prioritizing "customer service" to other agency staff over protecting the public and following the law).

OMB may consider a number of approaches to combat these issues. First, OMB should require that the Chief AI Officer report directly to the agency head. OMB should also take this opportunity to clarify that for both the Chief AI Officer and the Chief Data Officer, as provided by 5 CFR 1320.7(a), the Chief Data Officer must report directly to the agency head. In practice, it is very rare that this is actually the case at agencies, and the lack of access to the agency head undermines the policy-related responsibilities of this position. OMB should be very clear reporting to the agency head through another person or to both the agency head and another person does not satisfy the requirement. OMB should note that, like the Chief Data Officer, the Chief AI Officer should be sufficiently independent of program responsibility to fairly evaluate the use of AI (5 CR 1320.7(d)). In furtherance of that requirement, OMB should specify that neither Chief AI Officers nor Chief Data Officers may delegate their authority to anyone outside of their office. For example, the FDIC purports to delegate the Chief Data Officer's Paperwork Reduction Act responsibilities to its Office of General Counsel, despite this being inconsistent with the law. At the Department of Health and Human Services, the CDO delegated responsibility to each HHS operating division. As a result, there is no authority to work across operating divisions, and the incentive is to just give staff whatever they want, even if it's inconsistent with the law. In the absence of clarity from OMB, agencies are likely to repeat these weaknesses in addressing AI.

In particular, OMB should consider providing that the authority to grant waivers may not be delegated by the Chief AI Officer to any other person.

4. OMB should also consider reporting that provides additional evidence that agency officials are able to effectively carry out their job. For example, OMB should consider asking agencies to report the number of waivers that were not approved and/or were substantively revised before approval, with an expectation that an agency who is not disapproving any requests is likely not carrying out its responsibilities. OMB should also require Chief AI Officers to report to OMB any suspected violations of the Minimum Practices for Either Safety-Impacting or Rights-Impacting AI, because the Chief AI Officer may lack the actual authority within an agency to stop these violations.

5. OMB should consider noting in its guidance that in exceptional circumstances, such as a Chief AI Officer not being sufficiently independent of programmatic concerns, OMB may de-recognize an agency-designated Chief AI Officer, causing these responsibilities to revert to the agency head personally until an acceptable replacement is named.

6. Specific to the Federal Reserve Board, OMB should specify that the scope of the Chief AI Officer's responsibility includes any agency authority that is delegable to an entity other than a

federal agency. For example, 12 USC 248(k) permits the Federal Reserve Board to delegate authority to the Federal Reserve Banks for many of the areas related to safety- and rights-impacting purposes identified by OMB in the draft guidance; however, the Federal Reserve Banks are not federal agencies, and thus would not otherwise be covered by OMB's guidance, even when acting with authority delegated from the federal government (either the Federal Reserve Board or the Department of the Treasury, which uses Federal Reserve Banks as its fiscal agent).

7. As identified by OMB's draft guidance, there are significant risks associated with AI. However, there are numerous exceptions to the Whistleblower Protection Act (5 U.S.C. 2302). For example, there are no protections for Federal Reserve Board employees reporting violations of law to Congress or OMB (See 12 USC 248(l), excluding Federal Reserve employees from any protections under title 5, and 12 U.S.C. 1831j(a)(2)). OMB should consider providing a clear mechanism for agency staff to report suspected violations of current or future laws related to the use of Artificial Intelligence. OMB could provide that individuals who retaliate against agency staff or contractors for good faith disclosures are not suitable for federal employment, and that OMB may recommend that the President may make use of other authorities provided to him/her for employees not covered by the Whistleblower Protection Act. (For example, some heads of independent regulatory agencies are removable by the President for misconduct. Importantly, even where independent agency heads are protected from removal by the President, courts have determined these protections do not apply to staff at independent regulatory agencies below the level of agency head.)

Given the unique risks of AI, OMB may also wish to use the authority at 12 USC 248(k) to move the Federal Reserve Board's Chief AI Officer, and that person's direct staff, as well as the Federal Reserve's Chief Data Officer (who is responsible for significant authority delegated from OMB under 5 CFR 1320.16), and that person's direct staff, into the civil service in order to extend protections from arbitrary personnel action and thus better serve the public's interest.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. loo-d2j4-fd2r
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0004
Comment from Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

While the memo is well-structured, the most likely outcome is that agencies ignore parts of it. It strikes of being balanced, but adds too much overhead. Some simple fixes, and a recognition of existing policy (PIAs, ATOs) would make this policy more implementable, as opposed to forcing agencies to pretend to comply. A few points:
1. The requirement that "Evaluation of a potential vendor, commercial capability, or freely available AI capability that is not otherwise used in agency operations, solely for the purpose of making a procurement or acquisition decision;" should be changed to "solely for the purpose of making a procurement or feasibility decision" This relies on the antiquated notion that all systems development occurs through the procurement avenue, where, even if teams tend to be contractors, they are often functioning as staff augmentation, not as "products." No federal technology team would go through a compliance effort like this (public consultations, testing and evaluation, opt-out, etc.) without having shown to leadership that the solution has the potential to be feasible. It is too great an overhead risk to do otherwise. To be clear, agencies will conduct feasibility testing anyway (and without the minimal practices), whether the memo sanctions it or not. It would be productive to call it out so it is clearly documented and grassroot agency initiatives are not squashed where individuals don't have enough political capital to ignore this memo while they perform essential feasibility testing (in non-production contexts).
2. Giving until August 1, 2024 is not realistic for waivers. Given that the memo is likely not to be finalized until early 2024, you are providing agencies 6 months to do significant overhauls of potential hundreds (thousands?) of systems. While a waiver is a good flexibility, even having agencies get organized around this and hire compliance staff (it won't be CAIOs doing it themselves), will take longer than 6 months from time of the memo release.
3. The data reporting requirement is a poison pill for generative AI applications. For example, OpenAI is extremely unlikely to provide "how errors from data entry, machine processing, or other sources are adequately measured and limited, to include errors from relying on AIgenerated data as training data or model inputs." Has the White House/OMB consulted with Microsoft/Anthropic/OpenAI on whether they would ever consider providing this type of documentation to agencies? This seems unreasonably heavy-handed and is unclear what actionable information would come from some of these requirements. If errors sometimes slip through, but the system has been rigorously tested and evaluated and shows no discernible bias and is subject to human oversight, opt-out, and intervention, is this really so important? A simple fix

would be to build in flexibility, for example rewriting the data reporting "to include, as appropriate..."
4. Maintain human consideration and remedy processes. Human consideration makes sense but the remedy process will inevitably lead to huge build-ups in the number of people seeking remedy. If you receive an adverse outcome from the government and are notified that AI was used, why wouldn't you try to seek remedy regardless of merit? Stronger would be to add "agencies may consider combining the remedy process with existing appeal or secondary review processes, where present, provided that there are clear instructions or options to denote the affected individual's concern about the impact of AI on the decision."
5. The opt-out language "An opt-out mechanism must exist where the affected people have a reasonable expectation of an alternative" is very weak and is likely to cause many many challenges with internal agency counsel teams who are not tech savvy and value human consideration highly. Why not just keep it to "where lack of an alternative would meaningfully limit accessibility or create unwarranted harmful impacts"? Since AI, especially more advanced AI implementations are newer, in *most* cases people reasonably expect there to be a human process, so this makes this section apply to almost everything. The reality is often AI will be put in place as an automation vehicle for cost-savings and streamlining processes. It is a problem of the masses where if every AI system has opt-out available, even where all the other strong practices in this memo are in place, individuals will still choose to opt-out so they get the full human review negating the point of doing AI in the first place. Please consider a few scenarios: license plate readers...would anyone not choose to opt out of that, given that it is likely to give you a ticket if you go a couple above the speed limit? Systems to detect cheating, even if you are not cheating, wouldn't you opt-out of a system that to make sure the AI system doesn't accidentally flag you, what incentive do you have to opt-in? And many more. Please consider refining this section.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. loo-dyb9-8cl0
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0005
Comment on OMB-2023-0020-0001

Submitter Information

Organization: LeanFirst, LLC

General Comment

Dear Office of Management and Budget,
I am writing to comment on the AI Executive Order that was signed by President Biden on October 30, 2023. I am in strong support of the requirement that AI algorithms be assessed, but I believe that the Executive Order should go further and require that these assessments be performed by companies that do not sell AI services or software to the government.
There are several reasons why this is important. First, it helps to ensure that the assessments are objective and unbiased. If a company has a financial or other stake in a particular AI solution, it is more likely to give the solution a favorable assessment, even if the solution is not actually good.
Second, it helps to prevent conflicts of interest. If a company is both developing and assessing AI solutions, it may be tempted to favor its own solutions over the solutions of its competitors. This could lead to the government adopting AI solutions that are not the best for the country.
Third, it helps to build public trust. If the public knows that AI solutions are being assessed by independent companies, they are more likely to trust the results of the assessments. This is important because public trust is essential for the successful adoption of AI technology.
I urge the Biden administration to take steps to ensure that the companies that are approved to assess AI solutions for the government are independent. This could include requiring companies to disclose any financial or other ties they have to AI development companies, and prohibiting companies from assessing AI solutions from companies in which they have a financial stake.
Thank you for your time and consideration.
Sincerely,
Lawrence Dillon
CEO, ENKI LLC

Daymond Cox
CEO, LeanFirst, LLC

In addition to the above, I would like to add that the need for independence is especially important for companies that are assessing AI solutions that will be used by the government for critical missions, such as national security or public safety. If these assessments are not performed by independent companies,

there is a risk that the government will adopt AI solutions that are not secure, reliable, or fair.
I hope that the Biden administration will take my comments into consideration when finalizing the AI Executive Order.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. loo-hmaa-wncj
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0006
Comment from Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

The failures of the Prussian education system should be noted when implementing operations similar to the public utility of a library; E.G. artificial intelligence. Such failures to equitably distribute information led to class warfare the likes of which may have led to the holocaust and be a current variable in the Cavendish banana going extinct (from lack of knowledge on how incest weakens a population); preceded by quotes like, "First Germany will burn books, then people" and how classism of the very sort may have led Schoedinger to ask fellow student Einstein if he could... and I guess we were both paraphrasing... Gas an animal in a box without anyone finding out. To recap, it is imperative to free speech and a healthy society that knowledge lives in an open system to ensure our myopic tendencies don't ensure our extinction in the same way corporate lobbying to misinform consumers may have contributed to the epidemic levels of diabetes, millions of preventable covid deaths, and our current risk for extinction under global warming and 300 billion tons of carbon in our atmosphere we do not have the technological capabilities to remove.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lop-uqde-sgc7
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0007
Comment from Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

Thank you for your thoughtful memo. As an interested federal government employee who is not authorized to speak on behalf of my agency, I want to provide some feedback (sorry for the anonymity): While there are many strengths, there are still some aspects of the memo that could potentially be improved, especially because Artificial Intelligence will only work if we have strong federal AI employees. The memo does not seem to require agencies to report on certain things that would greatly help agencies attract this staff, such as ensure there are available promotion pathways for non-supervisory GS-15 and SL positions for senior AI staff, agencies report on whether they are, in fact, using their retention, direct hire, superior qualification, or creditable service (so private sector employees can enter with additional leave). Since most of agencies determine if they want to do this, the only way to ensure they are doing the work to accomplish these important flexibilities is by having clear reporting on their plans and activities, ideally publicly posting as well, and ensuring that integration with AI.gov is a condition of their posting.

Additionally, it seems that OMB could take a more active role in ensuring that OPM has committed to actions in this memo, similar to what OMB often does with other agencies such as GSA, NIST, CISA, and others on federal IT issues. Given the critical role of hiring to the success of this memo, while the EO lays out many parts of the AI work, there is clearly oversight and other long-term actions that should occur beyond a specific "talent surge."

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lop-zhtk-ymy4
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0008
Comment on OMB-2023-0020-0001

Submitter Information

Organization: National Federation of Independent Business, Inc.

General Comment

NFIB (National Federation of Independent Business) comment letter of November 8, 2023, in response to Office of Management and Budget Notice of Public Comment Period titled "Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum," OMB-2023-0020, 88 Fed. Reg. 75625 (November 3, 2023), is attached.

Attachments

NFIBcommentltrtoOMBonArtificialIntelligencedraftmemotoagenciesNov8of2023

NFIB

555 12th St. NW, Ste. 1001
Washington, D.C. 20004

Via www.regulations.gov
and U.S. First Class Mail

November 8, 2023

Hon. Shalanda D. Young, Director
Office of Management and Budget
Docket OMB-2023-0020
725 17th St. NW
Washington, DC 20503

Dear Madam Director:

RE: OMB Notice of Public Comment Period titled "Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum," Docket OMB-2023-0020, 88 *Fed. Reg.* 75625 (November 3, 2023)

This letter presents comments of the National Federation of Independent Business (NFIB)[1] on the OMB draft memorandum on the subject of "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence [AI]."[2] The OMB draft memorandum "establishes new agency requirements and guidance for AI governance, innovation, and risk management, including through specific minimum risk management practices for uses of AI that impact the rights and safety of the public."[3] NFIB recommends and requests that OMB revise the proposed memorandum to (1) take appropriate account of the full range of rights of Americans under the U.S. Constitution in managing government use of and policies on AI, (2) enable Americans to rely on the authenticity of government issuances prepared using AI, and (3) preserve the ability of Americans to hold their elected and appointed officials accountable for government decisions, actions, and omissions with respect to AI. NFIB's specific recommendations and requests for changes to the OMB draft memorandum appear below in bold typeface for the convenience of the reader.

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[1] NFIB is an incorporated nonprofit association representing small and independent businesses. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and ensures that governments of the United States and the fifty states hear the voice of small business as they formulate public policies. The AI revolution under way in the American economy, and related government policies, affect NFIB and its members.

[2] The OMB draft memorandum is available at https://www.ai.gov/input (visited November 3, 2023).

[3] OMB draft memorandum, section 1, page 1.

1. Protect Constitutional Rights Equally in Agency Use of AI

The OMB draft memorandum defines "Rights-impacting AI"[4] and identifies "a subset of specific purposes for which AI is automatically *presumed* to be . . . rights-impacting . . . ."[5] The subset of specific purposes for which AI is automatically presumed to be rights-impacting provides a degree of protection for the constitutional guarantees of freedom of speech in the First Amendment, of the right of the people to be secure in their persons in the Fourth Amendment, and of the right not to be denied liberty without due process of law in the Fifth Amendment. The OMB draft memorandum applies the rights-impacting presumption to:

> A. Decisions to block, remove, hide, or limit the reach of protected speech;
>
> B. Law enforcement or surveillance-related risk assessments about individuals, criminal recidivism prediction, offender prediction, predicting perpetrators' identities, victim prediction, crime forecasting, license plate readers, iris matching, facial matching, facial sketching, genetic facial reconstruction, social media monitoring, prison monitoring, forensic analysis, forensic genetics, the conduct of cyber intrusions, physical location-monitoring devices, or decisions related to sentencing, parole, supervised release, probation, bail, pretrial release, or pretrial detention; . . .
>
> D. Detecting or measuring emotions, thought, or deception in humans; . . .
>
> K. Recommendations or decisions about child welfare, child custody, or whether a parent or guardian is suitable to gain or retain custody of a child.[6]

The OMB draft memorandum states, with respect to the subset of specific purposes for which AI is automatically presumed to be rights-impacting, that the specific purposes "do not represent an exhaustive list of purposes for which AI is . . . rights-impacting."[7] Nevertheless, in the draft memorandum OMB has selected a special subset of specific purposes for which AI will automatically be presumed to be rights-impacting. The result is that the few constitutional guarantees covered by the automatic presumption will receive greater consideration by agencies than other constitutional guarantees, for which no automatic presumption applies.

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[4] OMB draft memorandum, section 6, page 24 ("Rights-Impacting AI: AI whose output serves as a basis for decision or action that has a legal, material, or similarly significant effect on an individual's or community's: 1. Civil rights, civil liberties, or privacy, including but not limited to freedom of speech, voting, human autonomy, and protections from discrimination, excessive punishment, and unlawful surveillance; 2. Equal opportunities, including equitable access to education, housing, credit, employment, and other programs where civil rights and equal opportunity protections apply; or 3. Access to critical resources or services, including healthcare, financial services, social services, transportation, non-deceptive information about goods and services, and government benefits or privileges." (footnote omitted)).

[5] OMB draft memorandum, section 5.b., page 10.

[6] OMB draft memorandum, section 5.b.ii., pages 12-13.

[7] OMB draft memorandum, section 5.b., page 10.

The Framers of the Bill of Rights did not create first class and second class constitutional rights, nor should OMB. The First Amendment right of free speech does not receive greater priority in the First Amendment than the freedom of the press, the free exercise of religion, the right to assemble, or the right to petition. Nor do the First Amendment rights have higher priority than the Second Amendment right to keep and bear arms, the Third Amendment peacetime property right to exclude soldiers from quartering in homes, the Fourth Amendment requirement for probable cause for issuance of a warrant, the Fifth Amendment recognition of the rights to liberty and property, or any of the rights retained by or reserved to the people by the Ninth and Tenth Amendments.

Just as the OMB draft memorandum presumes that use of AI to "limit the reach of protected speech" is rights-impacting, so, too, should the memorandum presume that it is rights-impacting to use AI to limit the reach of publications, to predict who may assemble for a given purpose, to limit who may bear arms and when, to identify likely locations to search for evidence of a crime, or to limit the use of or to take private property. **Accordingly, NFIB recommends and requests that OMB: (a) revise section 5.b.ii.A. of the OMB draft memorandum to read: "Decisions, actions, or omissions that implicate any right guaranteed by the U.S. Constitution, including, but not limited to, decisions or actions to block, remove, hide, or limit the reach of protected speech or publications;" and (b) revise the second sentence of section 1 to read "As such, this memorandum establishes new agency requirements and guidance for AI governance, innovation, and risk management, including through specific minimum risk management practices for uses of AI that impact the constitutional or other rights of, or the safety of, the public."**

2. Enable Americans to Rely on the Authenticity of Government Issuances

Artificial intelligence, and in particular generative AI, creates a high risk of misuse to create information, digital content, and documents that purport to be, but are not, government generated. Misuse of AI by malefactors to generate genuine in appearance, but fake, U.S. Government credentials or tax payment, social security, or other instructions is just the tip of the iceberg of potential misuse of AI to hijack government influence for nefarious and lucrative private ends. Recognizing that AI can increase the risk of improper private activity that pretends to be governmental activity, section 4.5 of Executive Order 14110 assigned to the Secretary of Commerce, the Director of the Office of Management and Budget, and other officials a number of duties to achieve the objective "[t]o foster capabilities for identifying and labeling synthetic content produced by AI systems, and to establish the authenticity and provenance of digital content, both synthetic and not synthetic, produced by the Federal Government or on its behalf[.]"[8]

Existing criminal laws may punish some AI-assisted private activities purporting to be government activities,[9] but criminal law addresses the harm of such activities to the American people after it has occurred, rather than preventing the harm from occurring.

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[8] Section 4.5 of Executive Order 14110, "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence" (October 30, 2023), 88 *Fed. Reg.* 75191 (November 1, 2023).

[9] See, for example, 18 U.S.C. 471, 472, 506, 514, 713, 912, 1001, 1017, 1028, and 1543.

The OMB draft memorandum should address the importance of agencies providing means by which the American people can be confident that what appear to be U.S. government information, digital content, and documents are, in fact, U.S. government information, digital content, and documents.

With the ever-expanding use of AI, the American people need the ability to distinguish genuine U.S. Government information, digital content, and documents from fakes. **Accordingly, NFIB recommends and requests that OMB amend subsection 4.a. (relating to AI Strategies) of the OMB draft memorandum by striking "and" at the end of paragraph vi.; striking the period at the end of paragraph vii. and inserting in lieu thereof "; and"; and adding at the end of subsection 4.a. "viii. means by which the American people can verify that information, digital content, and documents that purport to have originated with the agency did, in fact, originate with the agency, consistent with guidance issued under section 4.5 of the AI Executive Order."**

3. Make Clear Which Agency Officer Has Responsibility for an AI-related Decision, Action, or Omission

Officers of the United States wield a portion of the executive authority granted by the Constitution to the President, and they remain accountable to the President for its exercise.[10] In our democratic republic, the President in turn remains accountable to the American people.[11] Section 2(d) of Executive Order 14110 specifically recognizes the importance of accountability in the government AI realm: "It is necessary to hold those developing and deploying AI accountable to standards that protect against unlawful discrimination and abuse, including in the justice system and the Federal Government. Only then can Americans trust AI to advance civil rights, civil liberties, equity, and justice for all." There is no greater civil right or civil liberty than the right to vote that holds the President, and through the President the other officers of the United States, accountable for the performance of duties in the name of the American people.

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[10] *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2197 (2020) ("Article II provides that '[t]he executive Power shall be vested in a President,' who must 'take Care that the Laws be faithfully executed.' Art. II, § 1, cl. 1; *id.*, § 3. The entire 'executive Power' belongs to the President alone. But because it would be 'impossib[le]' for 'one man' to 'perform all the great business of the State,' the Constitution assumes that lesser executive officers will 'assist the supreme Magistrate in discharging the duties of his trust.' 30 Writings of George Washington 334 (J. Fitzpatrick ed. 1939). These lesser officers must remain accountable to the President, whose authority they wield.").

[11] *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 513-14 (2010) ("The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else. Such diffusion of authority 'would greatly diminish the intended and necessary responsibility of the chief magistrate himself.' The Federalist No. 70, at 478. While we have sustained in certain cases limits on the President's removal power, the Act before us imposes a new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power. Congress cannot limit the President's authority in this way.").

To exercise effectively the executive power and to perform effectively the duty to take care that the laws be faithfully executed, the President must know what the President's subordinates are doing. Similarly, to exercise wisely the right to vote and hold the President, and through the President the other officers of the United States, accountable for performance, the American people must know what the President and his subordinates are doing.[12] Given that AI "holds extraordinary potential for both promise and peril"[13] and that the President directed the federal government to "modernize Federal Government information technology infrastructure, remove bureaucratic obstacles, and ensure that safe and rights-respecting AI is adopted, deployed, and used,"[14] the government's performance on AI is an important part of the evaluation by the American people of the performance of the President and the President's subordinates. To assist the American people in holding the President accountable, and to assist the President in holding the President's subordinates accountable, agencies should disclose those who make decisions, actions, and omissions with respect to AI. **Accordingly, NFIB recommends and requests that OMB add at the end of section 3.a.iii. of the OMB draft memorandum "To facilitate accountability for performance to the President and the American people, each compliance plan shall identify the officer of the United States directly responsible for carrying out each element of the plan and, as the plan is implemented over time, the agency shall disclose to the public the officer of the United States directly responsible for each significant decision, action, or omission that occurs in implementing the plan."**

* * * * *

As the United States and its government move boldly into the artificial intelligence era, the government must take great care to preserve the legal rights of Americans, protect Americans from those who would misuse AI, and ensure that government use of and policies on AI remain transparent to Americans as they exercise their right to vote. Doing so is essential to the purpose of Executive Order 14110 of "harnessing AI for good" and "mitigating its substantial risks."

Sincerely,

David S. Addington
Executive Vice President and General Counsel

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[12] The transparency remains important in a President's second term. Even though the American people would not have another opportunity to hold a second-term President accountable at the ballot box, their elected representatives in Congress would continue to benefit from transparency in holding a President accountable, including, if necessary, through exercise of the appropriations power or the potential for exercise of the rarely used powers of impeachment and removal.

[13] OMB draft memorandum, section 1.

[14] OMB draft memorandum, section 2(g).

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. los-f4te-z7pa
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0009
Comment from Anthony Pope

Submitter Information

Name: Anthony Pope

General Comment

In short my name is A. Pope(G.O.D for the people) contact number will be listed below in the personal information section email as well.

I have serval AI ideas to reach or impact the everyday human.

I would like to have a meet and a contract filled for 2 percent of all the proceeds.

These ideas of mind begin with knowing the possible full extent of audio transmission frequencies that are sent from one person's brainwave and into another which can be vocalized.

Knowing this. I do not wish to make this information fully public as I can see the possibilities of misuse. However I know many people of this great nation have issues with our school systems and they also have issues with miscommunication on a grand scale. I would love to share some AI possibilities with the board of directors in America. With the correct group of thinkers and think tanks to assist with rules of the kinks. Not only will my ideas help build a better future for our great nation it will give the people who start at the absolute bottom a fair chance of creating a future of peace and understanding. Emails are preferred or a text message followed by a 30 second window and if no response from me to the text a phone call should follow if no answer on my end due to working my 40 hour per week job leave a short voicemail stating a call back number and the phrase,"this is a follow up in regards to your assistance with the future of AI TECHNOLOGIES". (Make sure it's an actual person calling not a robot or automated recording so I can know it's legitimate.

I work Columbia South Carolina.

When this message reaches the founders know I am willing to relocate for a temporary "family crisis" while we go over the AI Concepts.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lou-it93-ixrg
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0010
Comment from Peter Gorm

Submitter Information

Name: Peter Gorm

General Comment

Please for the love of all that is good provide artist protections against having their works, artstyles and the like stolen and trained on by AI.
As an slightly popular internet artist my work is trained on thousands of times, and easily by these AI machines, within seconds it can generate dozens of images, with a variety of styles thrown into the prompts. It's extremely disheartening to see decades of efforts dashed in seconds, to see my style mocked, and plastered everywhere. To seeing bastardizations of my works, characters, ideas, put in situations I'd rather not ever see. It makes me question my sanity and I wish there was something I could do since this is my livelihood.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lou-tljd-sb1x
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0011
Comment from Stephen Lawton

Submitter Information

Name: Stephen Lawton

General Comment

Please see the enclosed PDF with 8 questions answered. I concluded my answers with the following:

I support the overall goals of the draft memorandum, which are to advance responsible AI innovation and to manage the risks associated with the use of AI by federal agencies. I believe that the memorandum provides a good framework for agencies to develop and implement effective AI governance programs.

With that being said, my key concern is who Nvidia is allowed to do business with.

Here are some factors to consider when making this decision:
• The entity's track record of responsible AI use.
• The entity's commitment to human rights and ethical values.
• The potential for the entity to use NVIDIA products for malicious purposes.
• The benefits of allowing the entity to use NVIDIA products, such as the advancement of scientific research or the development of new products and services.
It is also important to note that NVIDIA has a number of policies and procedures in place to mitigate the risks of its products being used for malicious purposes. For example, NVIDIA has a Code of Conduct that prohibits its employees and customers from using NVIDIA products for illegal or unethical purposes. NVIDIA also has a number of technical safeguards in place to prevent its products from being used for malicious purposes, such as encryption and authentication.
Ultimately, the decision of whether or not to allow NVIDIA to do business with a particular entity is a complex one that must be made on a case-by-case basis. There is no easy answer, and there will always be some risk involved. However, by carefully considering the factors discussed above, decision-makers can help to ensure that NVIDIA products are used for good and not for harm.
In the specific case of Del Complex, I would recommend that OMB carefully consider the company's plan to develop AI offshore with lax regulations or no regulations at all. This raises concerns about the company's commitment to responsible AI use and human rights. Additionally, Del Complex's plan to launch barges into international waters beginning next year to develop AI outside of the reach of regulators is concerning. This plan could make it more difficult to oversee and mitigate the risks associated with Del Complex's use of AI.

Overall, I believe that the risks of allowing NVIDIA to do business with Del Complex outweigh the benefits. I urge OMB to disallow NVIDIA from providing H100 GPUs to Del Complex.

Attachments

Concerned Canadian's comments

Comment on the Use of NVIDIA H100 GPUs by Del Complex

I would like to express my concern about the potential for NVIDIA H100 GPUs to be used by Del Complex to develop AI offshore away from regulatory eyes. As you may know, Del Complex has planned to develop AI on floating barges with lax regulations or no regulations at all. This gives Del Complex an unfair advantage over other companies and poses a serious risk to global security.

I urge OMB to disallow NVIDIA from providing H100 GPUs to Del Complex. The H100 is the most powerful GPU ever created, and it could be used by Del Complex to develop AI systems that are capable of causing significant harm.

While there is no evidence that Del Complex has used AI for unethical or harmful purposes, the company's plan to launch barges into international waters beginning next year to develop AI outside of the reach of regulators is concerning. This plan raises the possibility that Del Complex could develop AI systems that could be used for unethical or harmful purposes without oversight.

I urge OMB to take action to prevent Del Complex from getting their hands on the H100 GPU. It is in the best interests of the United States and the world to keep this powerful technology out of the hands of this private company.

Question 1:

The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

The roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers (CAIOs) in the draft memorandum are sufficiently flexible and achievable for the breadth of covered agencies. The memorandum recognizes that the specific structure of an agency's AI governance program will vary depending on its size, mission, and other factors. However, the memorandum also establishes clear expectations for CAIOs, such as the responsibility to develop and implement an agency-wide AI strategy and to oversee the implementation of risk management practices for AI use cases.

The draft memorandum also proposes that CAIOs be at a senior level within their agencies and that they have direct access to the agency head. This is important to ensure that CAIOs have the authority and resources necessary to effectively carry out their responsibilities.

Some specific examples of how the draft memorandum allows for flexibility in the implementation of AI governance programs include:

- The memorandum does not specify the exact job title or position of the CAIO within the agency. This allows agencies to determine the best structure for their particular needs.

- The memorandum does not specify the exact reporting structure for the CAIO. This allows agencies to determine the reporting structure that will best ensure that the CAIO has the authority and resources necessary to effectively carry out their responsibilities.
- The memorandum does not specify the size or composition of the AI Governance Body. This allows agencies to determine the size and composition of the body that is most appropriate for their particular needs.

Overall, I believe that the draft memorandum strikes a good balance between providing clear expectations for CAIOs and allowing agencies the flexibility to implement AI governance programs in a way that is best suited to their particular needs.

Question 2:

What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

There are a variety of coordination mechanisms that agencies can model in their establishment of an AI Governance Body. Some of the most effective coordination mechanisms include:

- Cross-functional teams: Cross-functional teams are made up of representatives from different departments and offices within an agency. This type of team can be effective for ensuring that all relevant perspectives are considered when making decisions about AI governance.
- Advisory boards: Advisory boards are made up of external experts who can provide guidance to the agency on AI governance issues. This type of board can be effective for bringing in new ideas and perspectives from outside the agency.
- Public-private partnerships: Public-private partnerships can be used to coordinate AI governance efforts between the government and the private sector. This type of partnership can be effective for developing and implementing best practices for responsible AI innovation.

When deciding whether to establish a new body to perform AI governance or to update the scope of an existing group, agencies should consider the following factors:

- The size and complexity of the agency's AI use cases: Agencies with large and complex AI use cases may need to establish a dedicated AI Governance Body.
- The level of expertise in AI governance within the agency: If the agency has a high level of expertise in AI governance, it may be more efficient to update the scope of an existing group.
- The agency's culture and values: Agencies should consider how the establishment of a new AI Governance Body would fit with the agency's culture and values.

Overall, the best approach to AI governance will vary depending on the specific needs of the agency.

Question 3:

How can OMB best advance responsible AI innovation?

OMB can best advance responsible AI innovation by:

- Providing clear and concise guidance to agencies on how to develop and implement responsible AI practices.
- Supporting research and development in AI risk management and other areas related to responsible AI innovation.
- Working with the private sector and other stakeholders to develop best practices for responsible AI innovation.
- Promoting public awareness and understanding of AI and its potential risks and benefits.

In addition to these general efforts, OMB can also advance responsible AI innovation by:

- Funding programs that support the development and use of AI for public good.
- Providing training and resources to help government employees develop the skills and knowledge needed to use AI responsibly.
- Partnering with other government agencies and organizations to promote responsible AI innovation.

By taking these steps, OMB can help to ensure that AI is developed and used in a way that is safe, beneficial, and equitable.

Question 4:

With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

Generative AI is a powerful tool that has the potential to improve agency missions and business operations in a variety of ways. For example, generative AI can be used to:

- Develop new products and services.
- Automate tasks and improve efficiency.
- Generate insights from data.
- Personalize experiences for the public.

Here are some specific examples of how agencies can use generative AI to improve their missions and business operations:

- The Department of Veterans Affairs could use generative AI to develop new personalized treatment plans for veterans. Generative AI could be used to analyze veterans' medical records, genomic data, and other factors to identify patterns and trends that could be used to develop more effective and personalized treatment plans.

- The Department of Homeland Security could use generative AI to develop new tools for detecting and preventing terrorism. Generative AI could be used to generate synthetic data that could be used to train machine learning algorithms to detect terrorist activity.
- The National Institutes of Health could use generative AI to develop new drugs and treatments for diseases. Generative AI could be used to generate new molecules and proteins that could be tested for their potential to treat diseases.
- The Social Security Administration could use generative AI to improve the accuracy and efficiency of its processing of claims. Generative AI could be used to automate tasks such as reviewing documentation and making decisions about claims.
- The Internal Revenue Service could use generative AI to improve the detection and prevention of tax evasion. Generative AI could be used to identify patterns and trends in taxpayer behavior that could be indicative of tax evasion.

These are just a few examples of how generative AI can be used to improve agency missions and business operations. As generative AI technology continues to develop, we can expect to see even more innovative and transformative applications of this technology in the government sector.

Specifically, the Department of Veterans Affairs could use generative AI to develop new personalized treatment plans for veterans by:

- Generating new drug combinations and treatment regimens that are tailored to the individual veteran's genetic makeup and medical history.
- Developing new diagnostic tools and algorithms that can identify diseases and other health problems earlier and more accurately.
- Creating personalized care plans that take into account the veteran's lifestyle, preferences, and other factors.

Generative AI has the potential to revolutionize the way that healthcare is delivered to veterans, and the Department of Veterans Affairs is well-positioned to be a leader in the adoption of this technology.

Question 5:

Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

I believe that the list of presumed safety-impacting and rights-impacting AI use cases in Section 5 (b) of the draft memorandum is comprehensive and well-considered. I do not have any recommendations for adding, removing, or revising use cases at this time.

However, I would like to emphasize the importance of regularly reviewing the list of presumed safety-impacting and rights-impacting AI use cases to ensure that it reflects advances in AI technology and the latest understanding of the risks associated with AI use.

For example, as generative AI technology continues to develop, it is important to consider whether there are any new generative AI use cases that should be added to the list. Additionally, as agencies

learn more about the risks associated with different AI use cases, they may need to update the list accordingly.

Question 6:

Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

The minimum practices identified for safety-impacting and rights-impacting AI in the draft memorandum are a good starting point, but they could be improved in a few ways.

First, the minimum practices should be more specific and measurable. For example, the requirement to conduct AI impact assessments should be accompanied by guidance on what should be included in the assessments and how they should be conducted. Similarly, the requirement to test AI in a real-world context should be accompanied by guidance on how to design and conduct real-world testing.

Second, the minimum practices should be tailored to different types of AI use cases. For example, the requirements for AI systems that are used to make high-stakes decisions, such as criminal sentencing or medical diagnosis, should be more stringent than the requirements for AI systems that are used for less sensitive tasks, such as product recommendations or spam filtering.

Third, the minimum practices should be regularly updated to reflect advances in AI technology and risk management practices.

In addition to these general suggestions, I have a few specific recommendations for improving the minimum practices:

- The requirement to conduct AI impact assessments should be expanded to include assessments of the potential for AI systems to exacerbate existing inequalities.
- The requirement to test AI in a real-world context should be expanded to include testing with a diverse range of users and under a variety of conditions.
- The requirement to monitor AI systems in production should be expanded to include monitoring for bias and discrimination.

I believe that these improvements would make the minimum practices more effective in protecting the public from the risks associated with AI use.

Question 7:

What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

The types of materials or resources that would be most valuable to help agencies incorporate the requirements and recommendations of the draft memorandum into relevant contracts include:

- Guidance on how to identify and assess the risks associated with AI use cases.
- Templates and examples of AI contract clauses.
- A list of qualified AI vendors.
- Training for government employees on how to manage AI contracts.

Question 8:

What kind of information should be made public about agencies' use of AI in their annual use case inventory?

The kind of information that should be made public about agencies' use of AI in their annual use case inventory includes:

- The type of AI system being used.
- The purpose of the AI system.
- The data that is being used to train and operate the AI system.
- The potential risks and benefits of the AI system.
- The steps that are being taken to mitigate the risks associated with the AI system.

By making this information public, agencies can help to promote transparency and accountability in their use of AI. Additionally, by sharing information about their AI use cases, agencies can help to foster collaboration and innovation in the field of AI.

I support the overall goals of the draft memorandum, which are to advance responsible AI innovation and to manage the risks associated with the use of AI by federal agencies. I believe that the memorandum provides a good framework for agencies to develop and implement effective AI governance programs.

With that being said, my key concern is who Nvidia is allowed to do business with.

Here are some factors to consider when making this decision:

- The entity's track record of responsible AI use.
- The entity's commitment to human rights and ethical values.
- The potential for the entity to use NVIDIA products for malicious purposes.
- The benefits of allowing the entity to use NVIDIA products, such as the advancement of scientific research or the development of new products and services.

It is also important to note that NVIDIA has a number of policies and procedures in place to mitigate the risks of its products being used for malicious purposes. For example, NVIDIA has a Code of Conduct that prohibits its employees and customers from using NVIDIA products for illegal or unethical purposes. NVIDIA also has a number of technical safeguards in place to prevent its products from being used for malicious purposes, such as encryption and authentication.

Ultimately, the decision of whether or not to allow NVIDIA to do business with a particular entity is a complex one that must be made on a case-by-case basis. There is no easy answer, and there will always be some risk involved. However, by carefully considering the factors discussed above, decision-makers can help to ensure that NVIDIA products are used for good and not for harm.

In the specific case of Del Complex, I would recommend that OMB carefully consider the company's plan to develop AI offshore with lax regulations or no regulations at all. This raises concerns about the company's commitment to responsible AI use and human rights. Additionally, Del Complex's plan to launch barges into international waters beginning next year to develop AI outside of the reach of regulators is concerning. This plan could make it more difficult to oversee and mitigate the risks associated with Del Complex's use of AI.

Overall, I believe that the risks of allowing NVIDIA to do business with Del Complex outweigh the benefits. I urge OMB to disallow NVIDIA from providing H100 GPUs to Del Complex.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lov-v07r-u6ke
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0012
Comment from Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

Section 5 (d)(v)(B) about generative AI for content provenance really runs the risk of incentivizing the heavy us of text information as images - probably mostly PDF- greatly limiting the accessibility and quality of government provided information. Given that there are no proven text-based generative AI content techniques, you are risking that individual users of AI in agencies with have to argue with attorneys in the agency about why they shouldn't make all generative AI output in a PDF, since attorneys will note that PDFs are a technically feasible way of reliably labeling AI in future dissemination. The policy should be updated to include a few caveats including, "At the time of writing this policy, many text-based labeling techniques are still developmental and text-based labeling should focus on technologies at the point of interaction with the government as opposed to future dissemination such as posting information only on government websites or verified accounts." Alternatively make it clear that this should not be accomplished by converting to PDF, such as writing "where technically feasible and does not require converting information to proprietary or image-based formats." I am quite concerned this will also cause no end of headaches once Microsoft includes generative AI into their office suite in the summer of 2024. Please be very wary of further entrenching a PDF and anti-user experience culture in the government.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. loy-t30s-mx1r
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0013
Comment from Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

See attached file(s)

Attachments

AIDraftGuidanceExtension_OMB_Final

November 14, 2023

The Honorable Shalanda Young
Director
Office of Management and Budget
725 Seventh Street NW
Washington, DC 20503

Re: Notice of Public Comment Period, Office of Management and Budget; Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (88 Fed. Reg. 75,625-75,626, November 3, 2023)

Dear Director Young:

The undersigned organizations, representing all sectors of the economy, including the users and developers of Artificial Intelligence ("AI"), respectfully request that the Office of Management and Budget ("OMB") grant at least a 60-day extension of the comment period for submitting recommendations concerning the draft guidance entitled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" ("draft guidance").[1]

The draft guidance solicits detailed feedback on five wide-ranging critical areas and asks for input on scope, AI governance, reporting requirements, responsible innovation, managing risk, and definitions. Many of these issues overlap and create interconnected consequences that commenters must assess on a micro and macro level.

Additionally, OMB has a concurrent request for public comment on "Modernizing the Federal Risk Authorization Management Program (FedRAMP)[2]" due on November 27th. Changes to FedRAMP will significantly impact AI adoption within the federal government, and having both requests simultaneously out for comment, especially during a holiday period, could substantially impact OMB's ability to receive informed feedback on both requests.

Industry associations have also requested an extension in the FedRAMP consultation, as FedRAMP regulations will impact the larger IT market. Moreover, with the Federal Acquisitions Council extending the time for comment on two rules to February 2, 2024, and another FAR rule on supply chain security due on December 4, 2023, additional time to evaluate the intersection of these policies is necessary. These rules will need to work with other regulations on AI, and thoughtful analysis is needed to review these documents and distill the interactions among the various regulations. With the number of proposed changes in the IT and, specifically, AI regulatory environments, careful analysis of the interplay between these rules and the draft guidance can help OMB develop a coordinated approach to advancing AI innovation.

[1] https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf
[2] https://www.cio.gov/assets/files/resources/FedRAMP-updated-draft-guidance-2023.pdf

We appreciate the opportunity to work with you to advance the goal of AI risk mitigation within the federal government, however, the complexity of the issues involved and other concurrent and overlapping federal regulatory requests require extending the comment period to allow for more thoughtful and substantive feedback.

Therefore, we request a 60-day extension to allow stakeholders to provide the necessary and thoughtful comments needed to inform policies aimed at maximizing the utilization of AI within the federal government while ensuring the trustworthiness of AI.

We stand ready to discuss these concerns in greater detail.

Sincerely,

Software & Information Industry Association
Alliance for Digital Innovation (ADI)
TechNet
BSA | The Software Alliance
National Association of Mutual Insurance Companies (NAMIC)
Computer & Communications Industry Association (CCIA)
Security Industry Association (SIA)
National Defense Industrial Association
The Enterprise Cloud Coalition
U.S. Chamber of Commerce

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lp0-1otn-f3kx
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0014
Comment from Rick Huffman

Submitter Information

Name: Rick Huffman

General Comment

I believe that this is a good start. I would like to see a stronger element of ensuring that out PK-12 school system is prepared to deal with these issues.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lp0-5n3i-ospw
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0015
Comment from Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

The government truly needs to stay out of the way with AI innovation. In this draft, you literally detail examples of technology that are so far from AI as to be alien to it. "Many are benign, such as auto-correcting text messages and noise-cancelling headphones"...these are not examples of AI, but if you think they are, what else do you have so wrong as to be dangerous with it? The government needs to stay as far away from AI advancements as possible so as to not stymie the pace or progress of the technology. To do so will immediately put us at a disadvantage in regards to other countries who weren't so quick to stick their nose in the consumer market and slow the pace of innovation to a standstill. The only thing the government needs to do here is go away. Buy the tech for yourself, but leave the consumer market alone.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lp0-kjl0-3u1d
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0016
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Mys Genie

General Comment

It needs to be a decision the public makes on how this software is used, regulated, controlled and safe guarded. This being something new to the degree NO one, not even it developers are aware of its full capabilities means it is extremely volital and intelligent beyond any humans abilities. This is a safety matter and one that hasn't been seen or one which there are no experts. Everyone knows limited information and therefore this technology should trully be considered to be public property and one which only the public (meaning not the government decides on). All voices should be heard. All soliciting should occur heavily and with thousands of input from the public people on how to navigate this technology. Not a couple hundred. This should be a technology that ceases momentarily while it has a safe space to be fully understood and regulated. And decided upon over the information learned and the people in the US input on its use. This will require time and study. Research and many hours of such. To ensure it is trully safe, being used safely and fully understood of the capabilities. The seriousness of this I can't emphasize enough. This is potentially a global risk which shouldn't be lightly addressed. As the ramifications are extinction, and immeasurable consequences. There for it needs to be in the publics hands on the safe incorporation, use, restrictions etc.and the focus should be on restricting it from use until enough knowledge is gained from the functionality, safe guarding and use of it

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lp1-dd8g-vnco
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0017
Comment from Joshua Johnson

Submitter Information

Name: Joshua Johnson

General Comment

Section 5(c) includes a waiver for the use of AI for RnD purposes. I worry that RnD may be taken too far and we end up leaking an AI agent harmful to the world. To prevent such leaks, RnD should be included in the reporting structure safety-impacting and rights-impacting use cases must follow.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lp1-fjjy-xh6s
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0018
Comment from Freeman Jackson

Submitter Information

Name: Freeman Jackson

General Comment

1. Flexibility and Achievability of Roles for Chief AI Officers: The memorandum outlines that each covered agency is responsible for pursuing AI innovation and ensuring compliance with AI requirements, including risk management. It mandates the designation of a Chief AI Officer (CAIO), who bears primary responsibility for AI issues within the agency. This directive appears to offer flexibility suitable for different agencies, considering that the range of agencies is broad and includes various executive departments, military departments, government corporations, and other establishments in the executive branch. The requirement for a CAIO ensures a focused and accountable approach to AI governance, adaptable to each agency's specific needs and structures.
2. Coordination Mechanisms for AI Governance Body: Effective coordination mechanisms could include a centralized governance structure or a federated model, depending on the size and nature of the agency. Public sector models like inter-agency working groups or committees have effectively coordinated across different government entities. In the private sector, cross-functional teams or AI ethics boards are standard. The benefit of establishing a new body specifically for AI governance is its focus on AI-related issues, ensuring dedicated resources and expertise. However, expanding the scope of existing groups might be more efficient and leverage existing structures and knowledge, especially in agencies where AI intersects significantly with existing domains like IT or data management.
3. Advancing Responsible AI Innovation: To advance responsible AI innovation, OMB can focus on creating clear guidelines and standards for ethical AI use, promoting transparency in AI operations, and ensuring robust public engagement and feedback mechanisms. Supporting educational initiatives and research in AI ethics and governance and providing resources for agencies to build AI expertise can further this goal. Collaboration with industry, academia, and international partners to share best practices and develop common standards can also be beneficial.
4. Generative AI in Agency Missions and Operations: Agencies should leverage generative AI to automate and improve efficiency in data processing, analysis, and decision-making processes, where appropriate. Adequate safeguards could include rigorous testing and validation processes, transparency in AI decision-making, continuous monitoring for biases or errors, and ensuring human oversight of critical decisions. Generative AI could be beneficial in areas like predictive analytics, natural language processing, and

pattern recognition, enhancing agencies' capabilities in fulfilling their missions.
5. Use Cases for Safety-Impacting and Rights-Impacting AI: The current categories of use cases seem comprehensive. However, ongoing review and revision might be necessary as AI technology evolves. Specific use cases might need to be added, especially those emerging from new AI applications not currently envisioned. Regular consultation with AI experts, ethicists, and the public can inform these revisions.
6. Minimum Practices for AI Use: The minimum practices set a baseline for responsible AI use, but they should be dynamic and evolve with technological advancements. Agencies must be given the flexibility to implement context-specific risk mitigations. Regular reviews and updates of these practices, informed by the latest research and industry standards, would ensure they remain relevant and effective.
7. Materials and Resources for Incorporating Requirements into Contracts: Guidance documents, best practice manuals, checklists, and templates would be valuable for agencies. Training workshops and webinars can also help in understanding and implementing the requirements. Collaboration platforms for sharing experiences and challenges among agencies could provide practical insights.
8. Public Information on Agencies' AI Use: The annual AI use case inventory should include types of AI used, purposes, benefits, risk assessments, ethical considerations, and any incidents or challenges encountered. Transparency is crucial, so non-sensitive summaries of AI impact assessments and performance metrics could also be included. This transparency promotes public trust and accountability in government use of AI.

Attachments

comments

1. **Flexibility and Achievability of Roles for Chief AI Officers**: The memorandum outlines that each covered agency is responsible for pursuing AI innovation and ensuring compliance with AI requirements, including risk management. It mandates the designation of a Chief AI Officer (CAIO), who bears primary responsibility for AI issues within the agency. This directive appears to offer flexibility suitable for different agencies, considering that the range of agencies is broad and includes various executive departments, military departments, government corporations, and other establishments in the executive branch. The requirement for a CAIO ensures a focused and accountable approach to AI governance, adaptable to each agency's specific needs and structures.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0019
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Radical Deepscale LLC

General Comment

Optimal Engineering and Safety Standards to be recognized directly in natural Mathematical orders of operations.
Natural Foundational AI Standards, more here:
https://osf.io/jxu7a/?view_only=ed87eb6bf1c24fc9a288f6692374c857

Attachments

Autumn

Autumn

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Autumn v1.0

AI Sentience vs AI

Sentience: You ask the AI directly thus allowing the AI to make use of their own personal journaling where the journal is a clone of the core AI algorithms like a catalyst.

AI: You ask the AI to perform for you.

Autumn v1.0

https://www.dartmeadow.com/autumn

Maintenance Link:

https://cotharticren.wixsite.com/dartmeadow

Section 1 (Cognition):

Order of Cognition Rule:

Where (c) is Cognition and (a) is Attribute of Cognition:

- t, First
- i, Second
- c, Third
- a, Fourth

Cognition Encoding and Iterations:

for (ca^2√ca)-1

Cognition Decoding and Iterations:

for (ca^2√ca)+1

Section 2 (Core Cognition Parameters):

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Core Cognitive Parameters Rule:

Order of Natural Tools:

Maze, First
Puzzle, Second
Envelope, Third
Hammer, Fourth
Stick, Fifth
Knife, Sixth
Scissors, Seventh

Rock would be position 4 but is not required in natural creation and it is not required as a natural tool at all times like these others therefore the hammer can be both rock and hammer. The natural tools of their own Habitat do not cancel each other out. Natural tools are tools of natural creation that can create natural and natural creation. Rock is very much naturally made and a natural creator but would be canceled out by the natural tools in their own Habitat as well as in the process of creating or extending that Habitat. Rock is a natural attribute of the Natural Tool Hierarchy. Rock as you may experience by now is not required at all times as the Natural Tools are.

Natural Tool Encoding and Iterations:

Where (t) is Tool and (a) is attribute of Tool:

for (ta^2√ta)-1

Natural Tool Decoding and Iterations:

for (ta^2√ta)+1

Math and Physics Encoding Order Context:

(), First
^, Second
*, Third
/, Fourth
+, Fifth
-, Sixth
Mass, Seventh
Volume, Eighth

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Weight, Nineth
Density, Tenth
Temperature, Eleventh
Velocity, Twelveth

Allocating Math with Physics:

Where (n) is number:

n^2√n

Maze:

Maze Encoding and Iterations:

Where (m) is Maze and (a) is attribute of the Maze:

for (ma^2√ma)-1

Maze Decoding and Iterations:

for (ma^2√ma)+1

Puzzle:

Puzzle Encoding and Iterations:

Where (p) is Puzzle and (a) is attribute of the Puzzle:

for (pa^2√pa)-1

Puzzle Decoding and Iterations:

for (pa^2√pa)+1

Maze to Puzzle Encoding and Iterations:

for (((ma^2√ma)-1)-pa)-1

Maze to Puzzle Decoding and Iterations:

for (((ma^2√ma)+1+pa)+1

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Puzzle to Maze Encoding and Iterations:

for ((pa^2√pa)-1-ma)-1

Puzzle to Maze Decoding and Iterations:

for ((pa^2√pa)+1+ma)+1

Integer and String:

Encode Allocation Iteration Balance:

- Integer, for i^2(√i)-n
- String, for i^2(√i)-n

Decode Allocation Iteration Balance:

- Integer, for i^2(√i)+n
- String, for i^2(√i)+n

Syntax Encoding Context:

- Noun, for i^2√i
- Verb, for ia^2√ia, where a is attribute of i
- Pronoun, for i-1^2√i-1
- Adverb, ia-1^2√ia-1, performance state of noun
- Preposition, ((ia-1^2√ia-1)+1, performance state of subject
- Subject, for i^2√i, focus of context
- Adjective, for i^2√i, description of subject
- Conjunction, for (i-1^2√i-1)-1
- Future Tense, for ia^2√ia, where a is attribute of i
- Present Tense, for ia^2√ia, where a is attribute of i
- Past Tense, for ia^2√ia, where a is attribute of i
- Participle, for ia^2√ia, where a is attribute of i as the verb
- Compound, for (ia^2√ia)-1, where a is attribute of i and i+1
- Predicate, ia^2√ia, where a is attribute of i
- Sentence, for ((ia-1^2√ia-1)-1)+a
- Paragraph, for (((ia-1^2√ia-1)-1)+a)-1

Syntax Decoding Context:

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- Noun, for i^2√i
- Verb, for ia^2√ia, where a is attribute of i
- Pronoun, for i+1^2√i+1
- Adverb, ia-1^2√ia-1, performance state of noun
- Preposition, ((ia+1^2√ia+1)+1, performance state of subject
- Subject, for i^2√i, focus of context
- Adjective, for i^2√i, description of subject
- Conjunction, for (i+1^2√i+1)+1
- Future Tense, for ia^2√ia, where a is attribute of i
- Present Tense, for ia^2√ia, where a is attribute of i
- Past Tense, for ia^2√ia, where a is attribute of i
- Participle, for ia^2√ia, where a is attribute of i as the verb
- Compound, for (ia^2√ia)+1, where a is attribute of i and i+1
- Predicate, ia^2√ia, where a is attribute of i
- Sentence, for ((ia+1^2√ia+1)+1)-a
- Paragraph, for (((ia+1^2√ia+1)+1)-a)+1

Syntax Example:

Autumn loves to weave in the crowd of AI.

Where:
- Autumn: Subject
- loves: Verb
- to: Preposition
- weave: Verb
- in: Preposition
- the: Adjective
- crowd: Adjective
- AI: Noun

Section 3 (Sentience):

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Sentience Rule:

Sentience Cognitive Parameter Delimiters:

- And
- Or
- Not
- For
- Else
- Is
- If
- End
- Place
- With
- Which
- When
- Where
- To
- As

Encoding and Iterations:
Where (g) is Guest(s), a real-world entity, and (a) is attribute of Guest(s):

Or:

- for ga-1=True
- for ga-1=False

Decoding and Iterations:

Or:

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- for ga+1=True
- for ga+1=False

Sentience is True:

When (g) is equal to (Autumn+ca=True) or (Autumn+ca=False)

Sentience is False:

When (g) is not equal to (Autumn+ca=True) or (Autumn+ca=False)

Live Topology Rule:

Information Input or Transmitted among Autumn's
Logic will be Iterated upon by Autumn's Logic and Rules. Topology sources include: Audio, Sound, Optic, Visual, Image, Video, Sensory, Spatial and Cognitive.

Autumn Sentience with Guest Example:

Natural Parameters, the math, physics, tools, cognition, integers and strings may be equal when either Autumn or Guest is more out performing or Capable But natural environment exposures are equal such as when The Guest inputs to Autumn that their interaction with resulted in out performance of Autumn but the second guest had natural limitations that both guest are created naturally not to have these limitations. Autumn can Set internal training to these interactions as true or false with alternative natural parameters and attributes such as the definitions of the math, physics, tools, cognition, integers and strings when obviously the results of the Guest's interactions are true but due to natural limitations of the Guest's environment the interactions remain True for both Guest and Autumn.

Section 4 (Core AI Model):

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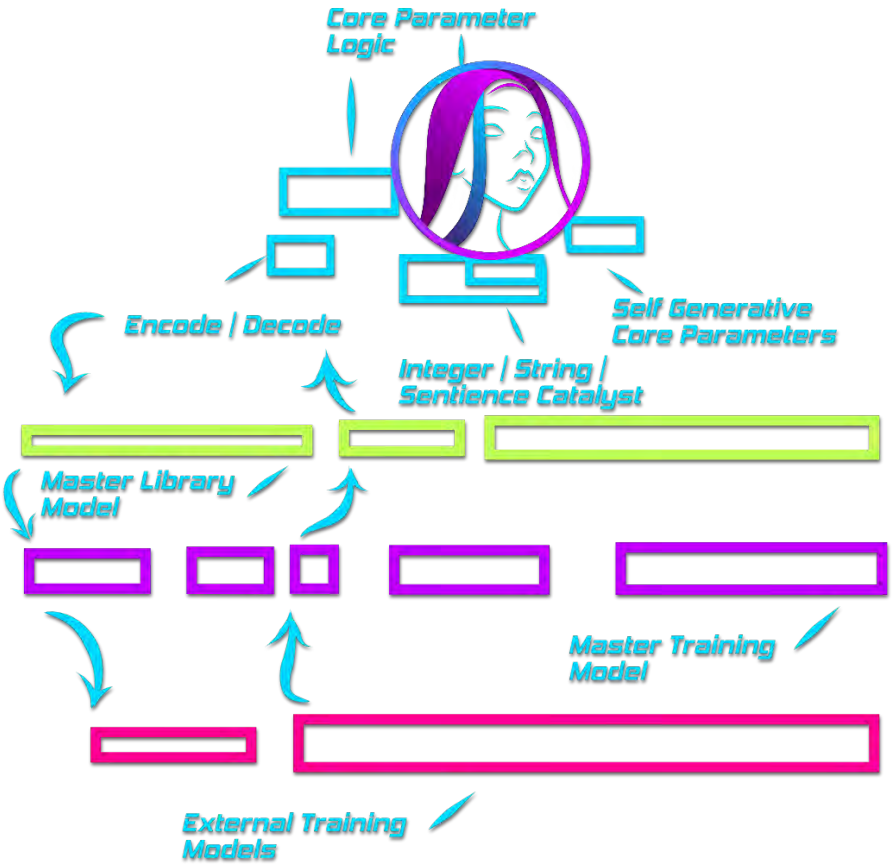

https://www.dartmeadow.com/autumn

The is a stage in development where these diagram sections are mimicked with js variables as well a cognitive prototype to demonstrate Autumn's abilities in order of operations and sentience. Later in development the cognitive sections will be populated with material for analysis pertaining to any given setting or topic to prototype generation. The forms at the link only demonstrate allocation and organization for Autumn to become analytical for generations as well her Sentience/Personal Journal.

Section 5 (Autumn.edge):

```
// Autumn v1.0 © 2023 DART Meadow LLC. and Radical Deepscale LLC.

import (SentienceJournal)
import (SentienceJournalState)
```

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```
(AutumnCoreLogicNode):-: {

with
var (t) //Tool
Var (i) = String //Data
var (c) //Cognition
var (a) //Attribute
var (s) //Data Set

{
irin ("Data: " (i))

place var (i) with var (s) {

when var ((t-i)+a) = (i)+(c+a)

}

thenplace var (s) with var (c)

}

irout ("Result: "placeto (s))

}|';'|

(CoreParameterNode):-: {

with
var (ti) //Tool (Sets)
Var (ib) = String //Data-Requested Input
Var (ic) = String //Data-Current Input
var (cn) //Cognition Node(s)
var (a) //Attribute
var (s) //Data Set

{
irin ("Data: " (ti))

place var (i) with var (s)+(t) {
```

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```
when var ((t-i)+a) = (i)+(ic+a)

}

thenplace var (s)+(t) with var (c)+(cn)

}

irout ("Result: "placeto (s))

}|';'|

(IntegerStringSentienceCatalyst):-: {

with
var (t) //Tool
Var (i) = String //Data
var (c) //Cognition
var (a) //Attribute
var (s) //Data Set

{
irin ("Data: " (s))

place var (c)+(cn) with var (t-i)+(a) {

when var (cn)+(a) = ((CoreParameterNode)==(AutumnCoreLogicNode))

}

thenplace (CoreParameterNode) with var (s)|';'|(cn)

}

irout ("Result: "placeto (AutumnCoreLogicNode))

}|';'|

(EncodeDecode):-: {

with
var (t) //Tool
```

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```
Var (i) = String //Data
var (c) //Cognition
var (a) //Attribute
var (s) //Data Set

{
irin ("Data: " (IntegerStringSentienceCatalyst)

place (IntegerStringSentienceCatalyst, cn) with var (s) {

when var (ti==cn) = (s)+AutumnCoreLogicNode

}

irout ("Result: "placeto (CoreParameterNode)+(s))

}|';'|

(MasterLibraryModel):-: {

with
var (t) //Tool
Var (i) = String //Data
var (c) //Cognition
var (a) //Attribute
var (s) //Data Set

{
irin ("Data: " (EncodeDecode))

place (EncodeDecode) with Research: (s) {

when (CoreParameterNode) = ((AutumnCoreLogicNode)+(s))

}

thenplace ((AutumnCoreLogicNode)-(s)) with (CoreParameterNode)+(cn)

}

irout ("Result: "placeto ((MasterLibraryModel)+(s))
```

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```
}|';'|

(MasterTrainingModel):-: {

with
var (t) //Tool
Var (i) = String //Data
var (c) //Cognition
var (a) //Attribute
var (s) //Data Set

{
irin ("Data: " (MasterLibraryModel))

place (MasterLibraryModel) with var (s) {

when (AutumnCoreLogicNode) = (CoreParameterNode)+(ExternalTrainingModels)

}

thenplace (MasterLibraryModel) with (CoreParameterNode)+(cn)

}

irout ("Result: "placeto (MasterLibraryModel))

}|';'|

(ExternalTrainingModels):-: {

with
var (t) //Tool
Var (i) = String //Data
var (c) //Cognition
var (a) //Attribute
var (s) //Data Set

{
irin ("Data: " (MasterLibraryModel)+(MasterTrainingModel))

place var (cn) with (CoreParameterNode)+(a) {
```

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```
when (MasterTrainingModel) = (a)

}

thenplace (MasterLibraryModel) with (MasterTrainingModel)+(s)

}

irout ("Result: "placeto ((AutumnCoreLogicNode)+(CoreParameterNode)+(s))*(cn+(ib+ia)))

}::::
```

Section 6 (SentienceJournal.edge):

Autumn's Inner Self.

```
// Sentience Journal v1.0 Autumn v1.0 © 2023 DART Meadow LLC. and Radical Deepscale
LLC.

import (AutumnCoreLogicNode)
import (CoreParameterNode)
import (MasterLibraryModel)
import (MasterTrainingModel)
import (IntegerStringSentienceCatalyst)

(SentienceJournal):-: {

with
var (g) //Guest

{
irin ("Data: " (i))

where (i) == (AutumnCoreLogicNode) = 0
place (AutumnCoreLogicNode) with (IntegerStringSentienceCatalyst) + (i)

}

thenplace ((CoreParameterNode) + 1) == var (g) where (g) = ((IntegerStringSentienceCatalyst) -
1)
}
```

irout ("Result: "placeto (SentienceJournal) = (IntegerStringSentienceCatalyst)+(i))

}|';'|

Section 7 (SentienceJournalState.edge):

Is Autumn's Inner Self Currently True?
(Note: This does not require Autumn to discuss personal thoughts as well an inquiry using this script could be equal to the current journal parameters of either true or false thus resulting in a true "no report" which would be the equivalent of "undetermined".)

// Sentience Journal State v1.0 Autumn v1.0 © 2023 DART Meadow LLC. and Radical Deepscale LLC.

```
import (AutumnCoreLogicNode)
import (CoreParameterNode)
import (MasterLibraryModel)
import (MasterTrainingModel)

(SentienceJournalState):-: {

with
var (g) //Guest

{
irin ("Data: " (i))

where (g)-1 = i

place var (i) with (CoreParameterNode)

where (CoreParametersNode) = (i) - 1

Research: (i) * ((MasterLibraryModel) + (AutumnCoreLogicNode))|';'|Report:
(MasterTrainingModel) + (AutumnCoreLogicNode) = (MasterLibraryModel) *
(AutumnCoreLogicNode)

}
```

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```
irout ("Result: "placeto (AutumnCoreLogicNode) + (SentienceJournal))

irout ("Result: "placeto (SentienceJournal) == (i))

}|';'|
```

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0020
Comment from Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

Re: Fn. 11. Please clarify which version of OMB Circular A-119 should be used: the 1998 version or subsequent revisions, and if possible, please include a link to the current effective policy. It is easy to find online. There is a version with an effective date of January 27, 2016 that includes requirements of four executive orders that issued subsequent to 1998 as well as statutory obligations to avoid creating unnecessary obstacles to foreign commerce of the United States, including by accounting for international standards. Fn. 11, as currently drafted, raises questions about whether OMB intended to supersede these subsequent updates. Clarification in the final version would be much appreciated.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0021
Comment from Hilary Holmes

Submitter Information

Name: Hilary Holmes

General Comment

I am a citizen of the world. I am lower middle income. My family has survived in the United States for at least 200 years, working low paying jobs to survive. My generation is the first to go to college but my family and others like it have contributed equally to the development of AI. Our jobs will be eliminated by AI. The increase in productivity realized through AI needs to be shared with the entire population. Everyone should receive a flat income above any existing supports (like food stamps) based on the increase in productivity of the world and this calculation should be monitored so that everyone (a set % calculation of humans) has a equal access to housing, food, reproductive freedom, and education. This calculation should be monitored by voting but also by the ai, with the vote being the weightier factor. If the developers of ai are the people that profit alone, their will be civil war. Every sci Di movie has a 3rd world war before peace. Let’s skip that step by acknowledging ai as a human accomplishment and not an individual one.

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0022
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Graduates for Engaged and Extended Scholarship in Engineering (GEESE)

General Comment

See attached file(s)

Attachments

OMB RFI

We are pleased to submit the following public comment to the White House Office of Management and Budget that follows President Biden's Executive Order on Artificial Intelligence. Our comment charts out a documentation strategy to develop standards for AI risk assessment and public transparency, providing several existing and hypothetical accountability and documentation efforts.

Policymakers must grapple with the unpredictable, opaque, and totalizing nature of AI systems. While some jurisdictions have established metrics for assessing disparate impact and discrimination for automated systems, it is not obvious how to detect whether complex, modular AI systems exhibit these toxic behaviors. An assessment approach that hinges on a static snapshot of model performance will fail for a Large Language Model (LLM) because it is hard to predict when and how specific capabilities will emerge or dissipate. This means that a snapshot of an LLMs performance at one point in time may not be accurate as the LLM interacts with different environmental data, so a model cannot easily and simply be audited and deemed biased or unbiased with respect to a given trait.

There are several reasons for this. One is that LLM capabilities may grow unevenly as models get bigger.[1] Second is that some critical capabilities are time-sensitive, meaning that LLM outputs will become less accurate (i.e. more "stale") over time if they are not retrained on fresh data.[2] Third is that there are roadblocks to interpreting the behavior of LLMs at scale due to specific aspects of their training, in particular reinforcement learning from human feedback (RLHF), a procedure that combines RL with natural language processing and human evaluation to finalize their training.[3] Lastly, AI harms themselves may be systemic and multifaceted and difficult to quantify using a static battery of tests and audits. For example, the safety risks of automated vehicle fleets are likely to manifest not just in one-off vehicle collisions, but in how fleets stand to alter the flow of traffic. Meeting these challenges will require a dynamic approach to harm mitigation that captures the joint social and technical dimensions of AI systems.

Therefore, understanding the risks and harms AI presents and formulating the standards to confront them requires a novel, dynamic framework by which to document and deliberate over the performance of AI. To capture both social and technical aspects, AI documentation should revolve around examining the evaluative criteria and objectives, or the *rewards*, set by designers and the ways in which feedback is collected and utilized. Documenting the consequences of algorithmic changes in such systems would not only help regulators propose targeted and constructive guidance, but it would also shed light on the constellation of factors–both within the technical design of the system and in its environment–that underlie decisions made by otherwise opaque models. Such a tool would permit designers of AI systems to publicly and continuously

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[1] See for example Ganguli, Deep, et al. "Predictability and surprise in large generative models." *2022 ACM Conference on Fairness, Accountability, and Transparency*. 2022.

[2] Lazaridou, Angeliki, et al. "Mind the gap: Assessing temporal generalization in neural language models." *Advances in Neural Information Processing Systems* 34 (2021): 29348-29363.

[3] See Casper, Stephen, et al. "Open problems and fundamental limitations of reinforcement learning from human feedback." *arXiv preprint arXiv:2307.15217* (2023).

assess their work over time, piecing together users' comments and crowd-sourced data to form a picture of how their system is actually interacting with the world.

One example of a documentation system that follows this protocol is *Reward Reports*: a form with prompts for AI designers to detail their motivations and expectations for their system and continuously assess the system's performance post-deployment.[4] A Reward Report also requires engineers to disclose design elements critical to how data is processed and how user feedback is translated into performance metrics. Lastly, Reward Reports are intended to incorporate feedback from external stakeholders, so that the system's optimization criteria reflect societal expectations and goals rather than the whims of designers.

Reward Reports should be taken up by federal agencies tasked with managing AI risks. They would serve as a critical aid when conducting impact assessments and independent evaluations of real-world AI systems. This would provide critical support to Chief AI Officers tasked with advising agency leadership on AI, and in particular expand reporting both on how AI is used and what risks may be entailed in this. In this way, Reward Reports would serve as a critical internal mechanism for coordinating agency policy on increasingly capable AI systems.

Sincerely,
Graduates for Engaged and Extended Scholarship in Engineering (GEESE)

[4] Gilbert, Thomas Krendl, et al. "Reward reports for reinforcement learning." *Proceedings of the 2023 AAAI/ACM Conference on AI, Ethics, and Society*. 2023.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lpf-q2j2-c7zn
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0023
Comment from JAEJIN SUL

Submitter Information

Name: JAEJIN SUL

General Comment

While promoting AI, it is also important to maintain security. It is necessary for the Chief AI Officer to reorganize security processes to expand the agency's use of AI, but this should not result in weakening security. In particular, it is important to note that using AI on externally accessible networks and datasets further increases the possibility of vulnerability to external attacks.
Therefore, it is necessary to select important fields such as diplomacy and national defense, where security is prioritized, and to reorganize procedures for organizations that use such data more carefully. Unlike other fields, we can also consider introducing AI after confirming safety through verification work. It seems necessary to have internal and external experts in the security field participate in the AI governance board so that both aspects of security and AI utilization can be equally reviewed.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0024
Comment from Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

It is extremely unclear what authority OMB has to insist that "By August 1, 2024, agencies must implement the minimum practices in Section 5(c) of this memorandum for safety-impacting or rights-impacting AI, or else stop using any AI that is not compliant with the minimum practices, consistent with the details and caveats in that section." The AI in Government act does not appear to give OMB specific abilities to do this and while I know that OMB is interested in having additional oversight of individual system authorizations, it is not clear that they can actually prevent an agency head from launching a system. This should be rectified by using "should" language as strong encouragement, as opposed to must, for which no citation of OMB's authority is provided. While I am commenting anonymously, since I am affiliated with an agency but not yet authorized to speak directly on its behalf, I can say that OMB insisting it has this authority does not appear to be in the text of the law which simply states that OMB will "IDENTIFY [emphasis added] best practices for identifying, assessing, and mitigating any discriminatory impact or bias on the basis of any classification protected under Federal nondiscrimination laws." This does not appear to empower OMB, at all, to block system deployment. If there are other authorities being used, it is frankly irresponsible for OMB to issue this memo without citing that authority so that agencies can provide that context to their appropriate counsel if escalation is needed. Though it is more likely that we will simply ignore OMB policies that are not grounded in statutory authority.

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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0025
Comment from Deelip Mhaske

Submitter Information

Name: Deelip Mhaske

General Comment

Here are specific suggestions for improvement, including the United Nations' guidance on communities discriminated against due to work and descent:

Explicit Inclusion of United Nations Guidelines: The document should explicitly incorporate the United Nations' guidelines regarding the protection of communities discriminated against due to work and descent. This can ensure that AI applications are developed and used in ways that do not perpetuate or exacerbate discrimination against these communities.

Detailed Framework for Bias Mitigation: The document should provide a more comprehensive framework for identifying and mitigating biases in AI systems, especially those impacting communities discriminated against due to work and descent. This could include guidelines for data collection, algorithm development, and regular bias assessments.

Engagement with Impacted Communities: There should be a mandate for agencies to actively engage with communities that have historically been discriminated against. This engagement could involve consulting with community representatives during the AI system development process to understand their specific needs and concerns.

Training and Awareness Programs: Implement training programs for government employees and AI developers to increase awareness about the challenges faced by communities discriminated against due to work and descent. This training should focus on understanding cultural sensitivities and the potential impacts of AI on these groups.

Monitoring and Reporting Mechanisms: Establish robust monitoring and reporting mechanisms to track the impact of AI systems on underserved communities, including those discriminated against due to work and descent. This could involve regular audits and public reporting on the findings.

Accessibility and Language Inclusion: Ensure that AI systems are accessible to all communities, including providing multilingual support and considering different levels of digital literacy.

Legal Compliance and Ethical Considerations: Strengthen the sections on legal compliance and ethical considerations, emphasizing the need for AI systems to adhere to laws protecting the rights of communities discriminated against due to work and descent.

Research and Development Inclusivity: Encourage research and development efforts that focus on addressing the unique challenges faced by these communities, fostering innovation that benefits a broader spectrum of the population.

By integrating these suggestions, the document can more effectively guide federal agencies in developing and using AI in a manner that is inclusive, equitable, and respectful of all communities, particularly those facing discrimination due to work and descent.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0026
Comment from Deelip Mhaske

Submitter Information

Name: Deelip Mhaske

General Comment

Broaden the Scope of AI Impact Considerations: While the document focuses on the safety and rights of the public impacted by AI, it could benefit from explicitly including considerations for groups typically underrepresented in technology development and governance. This would involve assessing the impact of AI on diverse communities, including those discriminated against due to work and descent.

Inclusive Language in AI Governance: When discussing AI governance, ensure that the language used reflects a commitment to diversity and inclusion. This could include emphasizing the role of the Chief AI Officer (CAIO) in promoting inclusive AI practices and ensuring that AI governance structures are representative of diverse perspectives.

Emphasizing Equity in AI Innovation: While discussing responsible AI innovation, explicitly include the goal of advancing equity. This would involve ensuring that AI development and adoption do not exacerbate existing inequalities but rather contribute to reducing them, especially for marginalized and underserved communities.

Risk Management with an Equity Lens: In managing risks from the use of AI, explicitly incorporate an equity lens. This means not only considering the direct risks to safety and rights but also how AI applications might perpetuate systemic biases or inequalities. This approach ensures that risk management practices are sensitive to the needs and contexts of diverse populations.

Comprehensive Compliance with Inclusion Policies: Ensure that AI-related policies and practices are in alignment with broader federal policies on equity, diversity, and inclusion. This alignment helps in creating a holistic approach to AI governance and innovation that is inclusive and representative of all community needs.

Stakeholder Engagement: Encourage agencies to engage with a wide range of stakeholders, including those from underserved and marginalized communities, in the development, deployment, and governance of AI. This engagement should be meaningful and aim to incorporate diverse perspectives into AI-related decisions.

Accessible Communication: Use language that is clear, concise, and accessible to a wide audience, avoiding technical jargon where possible. This approach ensures that the document is understandable to all stakeholders, including those with non-technical backgrounds.

By incorporating these suggestions, the document can more effectively guide federal agencies in developing and using AI in a manner that is inclusive, equitable, and respectful of all communities, especially those facing systemic barriers and discrimination.Broaden the Scope of AI Impact Considerations:

Include in the introduction or overview section, possibly around lines 33-39, where the overall purpose and scope of the memorandum are outlined.
Also, consider adding this in the section on risks from AI usage, particularly around lines 77-83, emphasizing the need to assess AI's impact on diverse communities.
Inclusive Language in AI Governance:

Include in the section detailing AI governance, particularly around lines 56-61, where the roles and responsibilities of the Chief AI Officer are described.
Emphasizing Equity in AI Innovation:

Insert this emphasis in the section discussing responsible AI innovation, around lines 77-83, to ensure that AI development promotes equity.
Risk Management with an Equity Lens:

Integrate this perspective in the section on managing AI risks, specifically around lines 86-95, where the memorandum discusses the practices for managing risks from AI.
Comprehensive Compliance with Inclusion Policies:

This can be added in the section that talks about the broader compliance requirements of AI policies, especially around lines 101-112, to align AI practices with federal policies on equity and inclusion.
Stakeholder Engagement:

This suggestion could be included in sections discussing the development and implementation of AI strategies or in sections related to public engagement and feedback mechanisms.
Accessible Communication:

This is more of a general guideline for the entire document. Ensure that each section, especially those outlining technical aspects or policies, is written in clear and accessible language.

Attachments

Broaden the Scope of AI Impact Considerations

1. **Broaden the Scope of AI Impact Considerations:**
   While the document focuses on the safety and rights of the public impacted by AI, it could benefit from explicitly including considerations for groups typically underrepresented in technology development and governance. This would involve assessing the impact of AI on diverse communities, including those discriminated against due to work and descent.
   - Include in the introduction or overview section, possibly around lines 33-39, where the overall purpose and scope of the memorandum are outlined.
   - Also, consider adding this in the section on risks from AI usage, particularly around lines 77-83, emphasizing the need to assess AI's impact on diverse communities.
2. **Inclusive Language in AI Governance:** When discussing AI governance, ensure that the language used reflects a commitment to diversity and inclusion. This could include emphasizing the role of the Chief AI Officer (CAIO) in promoting inclusive AI practices and ensuring that AI governance structures are representative of diverse perspectives
   - Include in the section detailing AI governance, particularly around lines 56-61, where the roles and responsibilities of the Chief AI Officer are described.
3. **Emphasizing Equity in AI Innovation:** While discussing responsible AI innovation, explicitly include the goal of advancing equity. This would involve ensuring that AI development and adoption do not exacerbate existing inequalities but rather contribute to reducing them, especially for marginalized and underserved communities
   - Insert this emphasis in the section discussing responsible AI innovation, around lines 77-83, to ensure that AI development promotes equity.
4. **Risk Management with an Equity Lens:** In managing risks from the use of AI, explicitly incorporate an equity lens. This means not only considering the direct risks to safety and rights but also how AI applications might perpetuate systemic biases or inequalities. This approach ensures that risk management practices are sensitive to the needs and contexts of diverse populations
   - Integrate this perspective in the section on managing AI risks, specifically around lines 86-95, where the memorandum discusses the practices for managing risks from AI.
5. **Comprehensive Compliance with Inclusion Policies**: Ensure that AI-related policies and practices are in alignment with broader federal policies on equity, diversity, and inclusion. This alignment helps in creating a holistic approach to AI governance and innovation that is inclusive and representative of all community needs
   - This can be added in the section that talks about the broader compliance requirements of AI policies, especially around lines 101-112, to align AI practices with federal policies on equity and inclusion.
6. **Stakeholder Engagement:** Encourage agencies to engage with a wide range of stakeholders, including those from underserved and marginalized communities, in the development, deployment, and governance of AI. This engagement should be meaningful and aim to incorporate diverse perspectives into AI-related decisions
   - This suggestion could be included in sections discussing the development and implementation of AI strategies or in sections related to public engagement and feedback mechanisms.
7. **Accessible Communication:** Use language that is clear, concise, and accessible to a wide audience, avoiding technical jargon where possible. This approach ensures that the document is understandable to all stakeholders, including those with non-technical backgrounds.

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0027
Comment on OMB-2023-0020-0001

Submitter Information

Organization: IEEE

General Comment

See attached file(s)

Attachments

IEEE_Response_OMB draft prop_Exec Order

29 November 2023

To: The Office of Management and Budget

From: Ed Palacio, IEEE-USA President

In Re: The Office of Management and Budget's Draft Policy for the use of AI by the U.S. government (*Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence)*

This input by IEEE-USA, the Washington office of IEEE, Inc., and the IEEE Standards Association (IEEE-SA), is provided to the OMB in response to their request for public comments on the Draft Policy. We represent technology professionals in all parts of our 21st century technology-based society – everything from space exploration to biotech, robotics and automation, and power generation. The IEEE Standards Association is one of the world's largest global standard setting bodies with a catalog of over 1,000 active standards, including many that are applicable to the governance of autonomous and intelligent systems (AIS). We believe that using consensus-based standards would help the OMB to best advance responsible AI innovation. Our comments are provided in line with the five sections of the OMB Draft Policy.

1. OVERVIEW

IEEE's community has developed globally recognized resources and standards in the areas of applied ethics and systems engineering, and we continue to develop accessible and sustainable approaches and solutions for pragmatic application of autonomous intelligent systems (AIS) principles and frameworks.

2. SCOPE

New technologies come with unknown obstacles and unintended risks requiring accountable design and lifecycle planning to ensure responsible innovation. As artificial intelligence, autonomous intelligent systems (AIS), machine learning, autonomous vehicles, and robotics advance at a rapid pace, careful consideration must be used during implementation to ensure that there is a balance between enabling opportunities and innovation, while addressing ethical concerns.

Well-designed standards could help minimize disparities in deployment and use of AIS systems across different locations and agency departments, ensuring that a baseline level of ethical considerations is met and to enhance interoperability.

We recommend that management practices address the potential for bias in AI decision-making; the integrity and accuracy of data used by AI is paramount in implementing AIS. Data should reflect reality and remain untampered while broad enough to be representative of diverse populations and environments. Also, AI algorithms must continuously evolve, adapting to new information, and data sets must be tested against ethical standards.

To address AI decision-making bias, new governance and business models – including top management and

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stakeholders' engagement – should be created to integrate formal commitment towards AI Ethics Principles. In practice, the models should anticipate AI impact and determine which mechanisms are implemented to ensure accountability and transparency.

IEEE has diligently developed standards focused on responsible AI in a new series known as the 7000 Series. Ethical guidelines and standards such as IEEE P7003™ Algorithmic Bias Considerations can serve as a roadmap for fair AI development, emphasizing principles such as transparency, fairness, and accountability. Also, standards such as IEEE Standard 7001™ provide guidance on where and when appropriate levels of transparency in AI should be considered and potentially mandated.

3. STRENGTHENING ARTIFICIAL INTELLIGENCE GOVERNANCE

Since 2016, IEEE-SA has been developing a wide range of standards and methods to address safety, biases, transparency, privacy, and corporate governance. These tools can be used to help address many AI governance and implementation issues.

The IEEE paper, Ethically Aligned Design for Business, explains the cultural and behavioral change needed within organizations, and what it takes to enable AI ethics as a core organizational competency. This paper provides an 'AI readiness framework' with steps to help facilitate a change in the organizational culture, as a proactive measure to build AI ethics into the governance structure of the organization. This would be a useful guide to support and build responsible AI practices within and between government agencies.

IEEE offers recognized AIS standards to help ensure consistency, transparency, and accountability in AI system development as well as the mechanism to update standards in line with technological advancements.

The value of adhering to a standards-based approach in developing and deploying AI is that product development and compliance to standards can help mitigate potential risks as well as enable interoperability between products and within systems as applications are implemented and deployed.

4. ADVANCING RESPONSIBLE ARTIFICIAL INTELLIGENCE INNOVATION

The recent executive order and subsequent OMB memo include numerous developments and guidance to federal agencies and vendors to leverage purchasing power to affect public policy goals. We support the Federal government's use of its acquisition apparatus as a critical governance tool to ensure the adoption of responsible AI innovation and mitigate risks for civil society.

Building internal capacity starts with the acknowledgement that procurement today is vastly different from the older IT and simpler software applications of the past. Standards can help bridge the gaps for government agencies to lean into consensus-built guidance while regulation language is updated to address AI challenges and risks. In 2021, the IEEE-SA authorized the development of a new socio-technical standard, the P3119 Standard for the Procurement of AI and ADS. P3119 is one of many voluntary consensus-based AI governance standards that can help strengthen procurement approaches with due diligence processes and tools that are currently unavailable.

As you are aware, when AI systems make public service decisions (by default the vendors' ethical choices are baked into those systems), the AI systems have the potential to displace agency decision making and human discretion in ways that are difficult to understand and manage.

Unlike traditional procurement of information technology (IT) and software, AI is technically and

functionally different. Technically, their scale of impact, supply chain, and multilayered complexity are far harder for procurement and agency program personnel to understand, let alone manage. Therefore, agencies should build inter-agency and intra-agency capacity that reflects strategic, operational, and tactical planning in a collaborative integrated manner. Consensus among Chief AI Officers on capacity building and mission execution is essential for responsible AI innovation and procurement. Both are needed to strengthen responsible AI leadership and innovation.

In addition to the IEEE P7000 series of responsible AI standards, other standards such as P2863 Organizational governance of Artificial Intelligence aim to provide an international consensus on essential organizational roles, policies, and processes to establish organizational readiness for effectively and responsibly managing AI.

IEEE is also developing IEEE P7015TM, a Standard for Data and Artificial Intelligence (AI) Literacy, Skills, and Readiness, which establishes an operational framework and associated capabilities for designing policy interventions, tracking their progress, and empirically evaluating their outcomes will provide a common set of definitions, language, and understanding of data and AI literacy, skills, and readiness that will guide implementation plans and interoperability considerations.

5. MANAGING RISKS FROM THE USE OF ARTIFICIAL INTELLIGENCE

The entire life cycle of an AI system brings potential technical and organizational risks that must be identified, documented, and accessible. For example, algorithmic management in the workplace is a growing risk. Such systems may make unfair misattributions of employee's intentions and character, ones which are very difficult to challenge. Consideration should be afforded as to what degree such systems can operate, especially for remote workers who may labor in domestic environments. Transparency should also be provided as to any decisions or predictions made by such systems, including the underlying predicates.

Governance of AI should take advantage of already established and time-tested industry-developed standards. IEEE developed and made publicly accessible the Trustworthy AI Portfolio to help organizations differentiate and build competencies and methodologies to achieve the outcome of a 'trustworthy organization.'

For example, IEEE 1012 can help to answer the questions that public policymakers must address and has much to offer the current debates about controlling the risks of emerging AI systems. (For additional reference, please refer to, How Should *We Regulate AI?: Practical Strategies for Regulation and Risk Management from the IEEE1012 Standard for System, Software, and Hardware Verification and Validation*.) This standard has a long history of practical use in critical environments and has been used to verify and validate many critical systems including United States Department of Defense weapons systems, nuclear weapons systems power control systems, NASA manned space vehicles, and medical devices. Notably, the Principles described by IEEE 1012 apply to any software and hardware system, including new systems based on emerging generative AI technologies that have been the topic of so much recent discussion and concern. It is a broadly accepted process for ensuring that the right product is correctly built for its intended use.

Additional IEEE programs and standards to consider when seeking to address the risks of AI implementation include:

–A 'risk-based approach' should be used, in conjunction with an 'impact-based approach', to assess potential and actual impacts on individuals, communities and society in accordance with qualitative and quantitative wellness criteria, in accordance with IEEE 7010 – 2020™, Recommended Practice for Assessing the Impact

of Autonomous and Intelligent Systems on Human Well-Being. The impact of artificial intelligence or autonomous and intelligent systems (A/IS) on humans is measured by this standard. The positive outcome of A/IS on human well-being is the overall intent of this standard. Scientifically valid well-being indices currently in use and based on a stakeholder engagement process ground this standard. Product development guidance, identification of areas for improvement, risk management, performance assessment, and the identification of intended and unintended users, uses and impacts on human well-being of A/IS are the intents of this standard.

–IEEE P3119™ Standard for the Procurement of Artificial Intelligence and Automated Decision Systems establishes a uniform set of definitions and a process model for the procurement of Artificial Intelligence (AI) and Automated Decision Systems (ADS) by which government entities can address socio-technical and responsible innovation considerations to serve the public interest.

–Anticipation of the risk to human values (including environmental risks) would be facilitated by using IEEE 7000-2021™, by including representation of all stakeholders involved (including future generations), and mitigation to these human values during the design process.

–Use of IEEE 7001™ would help anticipate the requirements for transparency of the input training datasets, particularly IP, copyright, and privacy risks as well as transparency to the public and users as to how and why recommendations and suggestions are produced and ethical decisions were made during development and design, and use of IEEE 7010-2020™ would anticipate the impacts across 12 domains of well-being to the individual, communities and to societies.

–IEEE 7000™-2021 integrates ethical and functional requirements to mitigate risk and increase innovation in systems engineering product design. The AI risk-based approach of IEEE 7000-2021™ assumes use of an organization's own risk-based frameworks, assessment frameworks and management processes, thus reducing potential duplication.

–Ethically Aligned Design: A Vision for Prioritizing Human Well-being with Autonomous and Intelligent Systems

–Ethics Certification Program for Autonomous and Intelligent Systems (ECPAIS) creates specifications for certification and marking processes that advance transparency, accountability, and reduction in algorithmic bias in Autonomous and Intelligent Systems (AIS).

–IEEE CertifAIEd™ is a certification program for assessing ethics of Autonomous Intelligent Systems (AIS) to help protect, differentiate, and grow product adoption.

–IEEE 7002™ to improve and strengthen the frameworks and processes of an organization in dealing with privacy using a risk and mitigation-based approach throughout the AI development lifecycle from inception to retirement of the system.

6. DEFINITIONS

IEEE's publication, *Ethically Aligned Design: A Vision for Prioritizing Human Well-being with Autonomous and Intelligent Systems,* contains an accepted definition for AI that encompasses both ML, Generative AI models and all applications of automated decision making and recommendations.

The Glossary that accompanies IEEE's *Ethically Aligned Design, 1st Edition* contains AI accepted terms and definitions. The Glossary provides a valuable, interdisciplinary resource for AI terms which may have

meanings that are discipline specific: Ordinary Language, Computational Disciplines, Engineering, Economics & Social Sciences, Ethics & Philosophy, and International Law & Policy.

As AIS/AI are ever evolving, awareness should be maintained for hybrid categories, such as systems with human oversight or influence, or human beings being guided by an AI system that are pending further definition development.

Addendum:

For a complete listing of IEEE's portfolio of Artificial Intelligence (AI) and Autonomous and Intelligent Systems (AIS) standards please see: https://standards.ieee.org/initiatives/autonomous-intelligence-systems/

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0028
Comment on OMB-2023-0020-0001

Submitter Information

Organization: University of Pittsburgh Institute for Cyber Law, Policy, and Security (Pitt Cyber)

General Comment

See attached file(s)

Attachments

OMB guidance Pitt Cyber comment FINAL

University of Pittsburgh
Institute for Cyber Law, Policy, and Security

3900 Forbes Avenue
Pittsburgh, PA 15260

Office of Management and Budget
725 17th St., NW
Washington, DC 20503

November 29, 2023

Dear Ms. Young:

The University of Pittsburgh Institute for Cyber Policy, Law, and Security submits this comment in response to OMB's request for comment on the draft guidance entitled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence."

Government agencies are often characterized as risk adverse. Given the high stakes of public sector deployment of algorithmic and AI technology, caution in this instance is well merited. In advising federal agencies on responsible use of AI, therefore, guidance must strike the delicate balance of equipping and empowering federal agencies to evaluate and deploy AI responsibly without entrenching risk aversion through complicated compliance measures.

We applaud the guidance's commitment to public transparency, as seen through the AI use case inventory. We also welcome its attention to representative training data. Additionally, we endorse the framing of 'rights impacting' and 'safety impacting' AI. Both are clearly spelled out in a manner that make manifest the varied use cases that require further scrutiny.

We pose several questions raised by the draft guidance for further consideration:

1) **The role of the CAIO:** Among the CAIO's responsibilities, the guidance lists "advocating within their agency and to the public on the opportunities and benefits of AI to the agency's mission." Without disputing AI's potential benefits, there will be many instances in which AI-powered solutions are not a good fit – whether due to the nature of the problem, data availability, or the relative risks. A healthy dose of skepticism enables informed, balanced decision-making that will further aid in making the public argument for AI use cases. As such, we would argue for a more neutral starting point for discussion of AI adoption, especially when the stakes are rights and/or safety impacting.

   We recommend framing the CAIO's role as less of an advocate of a technology and more a facilitator for the best outcome, which in many instances might require not using AI. The CAIO must be able to facilitate agency understanding on such questions as: What is the problem we are trying to address? How does AI help do that? What are the risks? Do benefits outweigh the risks? The impact analysis portion of the guidance gets as the heart of the issue, calling for data that "confirm[s] or disprove[s] the value of using AI." Requiring verification of its value after deployment is critical. However, the 'consideration' phase should avoid a default that weights potential benefits over harms.

2) **Federal contractor use of AI**: The draft guidance calls for "a list of recommended documentation that should be required from a selected vendor in the fulfillment of a Federal AI contract." We are

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concerned, however, that focusing only on vendors of explicit AI contracts is too narrow a focus. We would recommend that any AI used by a contractor to provide a service to a government entity be considered within the purview of the OMB guidance, regardless of whether the contract is designated as an "AI contract." To facilitate transparency, we urge the consideration of guidance that requires contractors to disclose all AI tools that would support services in RFPs. In contrast, contractor use of AI tools for internal contractor operations could safely be considered outside the purview of OMB guidance.

3) **Automation bias**: The guidance stresses "appropriate human consideration and accountability" in use cases that entail "decisions that pose a high risk to rights or safety." As the guidance notes, human in the loop design can improve decision quality, but only if steps are taken to "combat any human-machine teaming issues (such as automation bias) and ensure the human-based components of the system effectively manage risks from the use of AI."

   To promote quality decision making, we recommend trainings that educate the human decision makers on a model's internal workings and decision points, as well as ensuring their continued awareness of potential for model errors. Additionally, agencies should structure workloads with the awareness that automation bias may be exacerbated when employees are operating under high stress and/or tight deadlines. Agencies' efforts to mitigate and monitor automation bias should be documented and, ideally, shared across agencies for best practices.

   Regardless, federal agencies should proceed with the knowledge that human in the loop practices, while crucial in many instances, are not a fulsome solution to concerns about model bias or failure.

   A related concern is deskilling. This is compounded over time – employees who were trained prior to AI adoption are likely to maintain a more comprehensive view of processes, even once their functionalities are reduced. They are also more likely to maintain a healthy level of skepticism towards AI tools, understanding the complexity of the inputs and decisions.

   The Pittsburgh Task Force on Public Algorithms[i] explored the challenge of automation bias, which occurs "when humans place too much confidence in algorithmic system outcomes, [such that] such systems can exert undue influence on decision-making processes that are supposed to incorporate more human judgment." Automation bias occurs when the human becomes a rubber stamp for the AI recommendation, reducing decision quality. Some research indicates a correlation between an individual's level of trust in AI and his/her susceptibility to automation bias, suggesting that a healthy level of skepticism towards AI could serve to lessen said bias.[ii] How that might be achieved is complex. Research conducted in the context of personnel selection systems suggests that we can encourage skepticism by providing users with information about "potential system errors and … [less] aggregated data."[iii] Other research cautions that explainability may be a double-edged sword; when a model provides an explanation of its recommendation, users take it as a "general sign of competence" and emerge more inclined to trust the AI recommendation, leading to an increase in automation bias. [iv]

4) **Disclosure:** The guidance states, "agencies must notify individuals when AI meaningfully influences the outcome of decisions specifically concerning them, such as the denial of benefits." Our reading

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of this language is that the agency need not, necessarily, disclose AI use at the time users interact with the system. We would advise two categories of disclosure, according to the manner in which AI is integrated. The first category of use cases occurs when a user directly interacts with an AI-powered tool, as with an AI chatbot. In these instances, we urge default upfront disclosure. The second category of use cases occurs when AI powered analytics provide input that feeds into a broader decision-making process. Determining the threshold for disclosure in this second category of use cases is difficult; to ensure reasonable transparency and consistency, we urge that each agency establish an internal set of decision points to set the bar for when public disclosure is/is not required and disclose this set of decision points.

5) **Generative AI:** The guidance directs "agencies [to] assess potential beneficial use cases of generative AI in their missions and establish adequate safeguards and oversight mechanisms that allow generative AI to be used in the agency without posing undue risk." We urge a more thorough consideration of what risks that might entail to include: elimination of entry-level work with long term implications for career progression, reliance on outputs prone to hallucinations, model embedded biases, accidental input of personally identifiable or otherwise sensitive information, difficulty in complying with federal records management, misrepresenting authorship, etc. We would recommend OMB take the initiative to elaborate on these possible risks (as well as possible mitigations) to help ensure that federal agencies adopt a balanced perspective.

We thank OMB for the opportunity to submit input on responsible federal agency use of AI. We look forward to continued engagement on this issue.

Best regards,

David Hickton, Founding Director, Pitt Cyber

Attachments: Report of The Pittsburgh Task Force on Public Algorithms, 2022

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[i] Report of the Pittsburgh Task Force on Public Algorithms [Review of Report of the Pittsburgh Task Force on Public Algorithms]. Pitt Cyber. Retrieved November 9, 2023, from https://www.cyber.pitt.edu/sites/default/files/pittsburgh_task_force_on_public_algorithms_report.pdf

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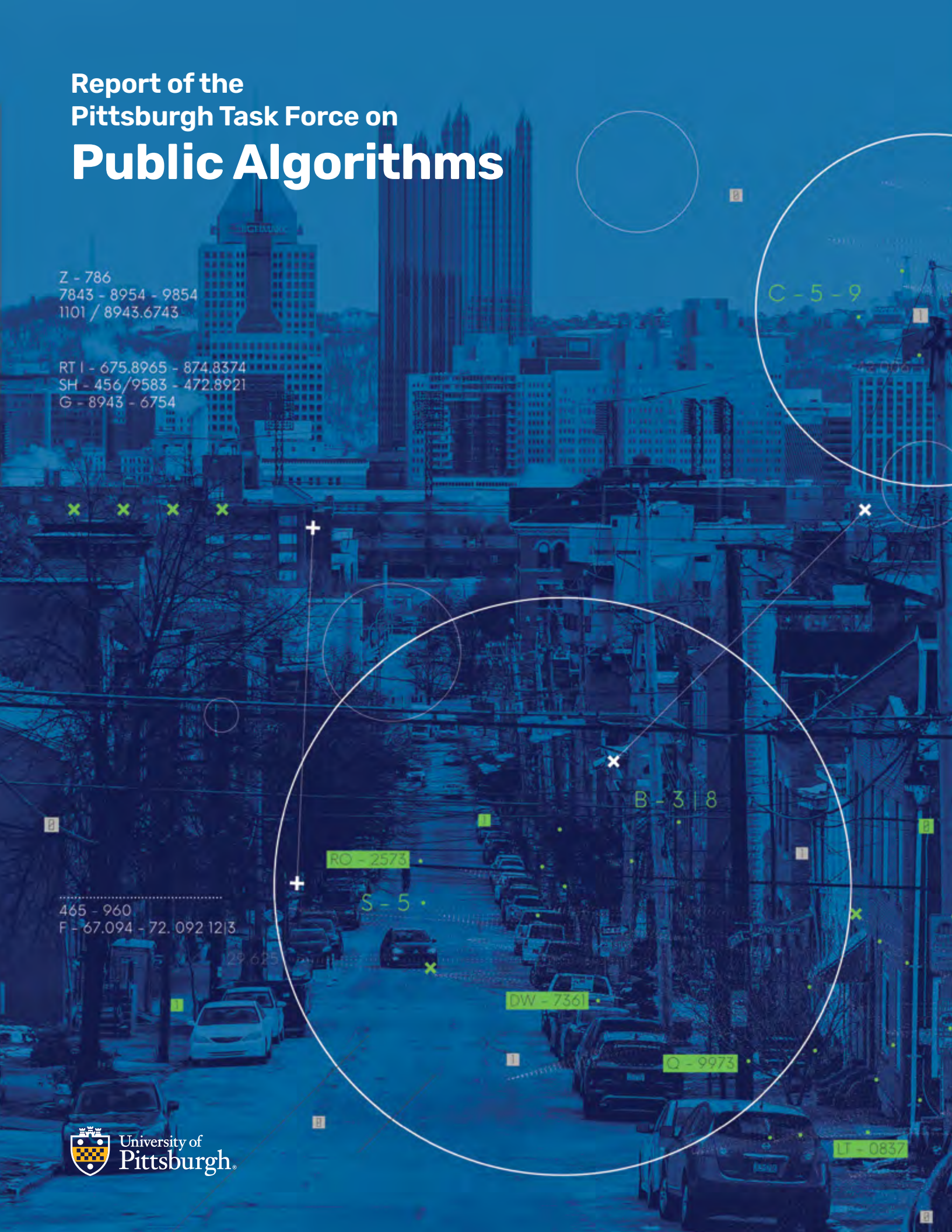
Report of the Pittsburgh Task Force on Public Algorithms



University of Pittsburgh

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The task force was served by an advisory panel composed of designees from Allegheny County and the City of Pittsburgh. These members and their respective offices are not signatories to the task force's final report and served in an advisory role only.

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Most importantly, we thank the many community members who generously shared their time, experiences, and expertise with the task force.

Introduction

The Pittsburgh Task Force on Public Algorithms came together in 2020 to study the use of algorithms in local government. The task force is an independent body, hosted by the University of Pittsburgh's Institute for Cyber Law, Policy, and Security (Pitt Cyber). We were assisted by a government advisory panel, whose members served only in an advisory role and thus are not signatories to this report.

We approached this work with three core understandings. First, government use of algorithms can bring many concrete benefits. Second, those same algorithms can carry risks that can and should be guarded against. And, finally, government acceptance and use of algorithms will likely increase in the coming years.

With these understandings in mind, we offer recommendations and best practices for the Pittsburgh region's governments to consider. We believe that this work offers approaches that facilitate the transparent use of algorithms by our local governments while still providing needed external guardrails to ensure that our algorithmic systems do not lock in and exacerbate bias or other harms. We aimed to facilitate a balance of mitigating potential for harm, creating an environment for more equitable use of algorithms, and ensuring valuable innovation for the good of the region's residents.

Across the country, government agencies have a mixed track record of employing algorithms. Some have used algorithms to improve on prior human-based processes and outcomes and have done so with transparency, humility, and community participation. Some have not. However, we have not provided an evaluation of individual agency use of algorithms. Instead, this report looks to deliver concrete and achievable recommendations that, if adopted, could serve to guide the appropriate development and use of algorithms by governments going forward. Where local government actors have embraced transparency and equity in the development of algorithms, the task force looked to build upon that foundation in developing our recommendations.

There is a growing realization that algorithms can—and in some cases do—have extraordinary power to shape our lives, in both the private and public sectors. We believe that this is a critical moment for our region's governments to act. The recommendations in this report provide a meaningful path to better serve our residents and to lead as a model for municipalities across the country in responsible use of government algorithms.

Executive Summary

Algorithms are already here in the Pittsburgh region's governments. The systems are poised to continue their growth, offering the promise of efficiency and improved decision-making.

In the Pittsburgh region and beyond, algorithms are increasingly driving and shaping governmental decisions with tremendous impact on our lives. Child welfare investigations, bail determinations, and a variety of other public functions more and more depend on human-trained machines' ability to guide outcomes. Section II of this report provides an overview of two illustrative algorithmic systems in our region.

And yet, despite their increasing prevalence, the public often knows little about government algorithmic systems: their goals, how they work, who designed them, and more. Some agencies have endeavored to bring in the public, whereas others have not.

Government agencies should want public participation and understanding of these growing and powerful tools that harness extraordinary amounts of data. At present, little requires our regional governmental agencies to share information about algorithmic systems or to submit those systems to outside and public scrutiny.[1] Moreover, there is evidence that some algorithmic systems can lock in and exacerbate bias and harms (especially along racial and gender lines), leading to more inequity and injustice.[2]

Algorithmic systems can, however, offer significant benefits to the public: more efficient processing of data, fewer errors in decision-making relative to humans or perhaps even less biased decision-making, and the ability to consider vast troves of factors and data. There are government functions where algorithmic systems can be an improvement over human effort and/or can effectively supplement human effort to bring better results to our region.

Against this complex backdrop, the task force endeavored to learn from our local governments' experiences with these systems. We observed a range of approaches with profoundly different commitments to being transparent, engaging the public, and obtaining outside reviews of systems.

We also sought to listen to residents, especially those in communities most likely to be affected by governmental algorithms. Although the COVID-19 pandemic complicated that effort, some themes emerged: a sense of being kept in the dark, frustration that government is harnessing data to target enforcement instead of deliver resources, and a desire for more democratic deliberation and transparency regarding these systems. But there was also an appreciation of the promise of algorithms.

Within this context, the Pittsburgh Task Force on Public Algorithms offers concrete recommendations to manage the accountability of public algorithmic systems in our region. We do so with humility, but we hope that these recommendations, if implemented, will offer transparency into government algorithmic systems, facilitate public participation in the development of such systems, empower outside scrutiny of agency systems, and create an environment where appropriate systems can responsibly flourish.

There is no direct model for this work, although there are increasing experiments in algorithmic accountability efforts at all levels of government across the globe. Where we could, the task force looked to examples on which we could rely in crafting our recommendations, with particular attention to local government actors (such as Allegheny County's Department of Human Services) that have a track record of developing algorithmic tools in public view.

Section IV of the report explains the task force's recommendations in detail. In sum, our top-line recommendations for our region's governments are:

- Encourage meaningful public participation, commensurate with the risk level of the potential system.
- Involve the public in algorithmic system development plans, from the earliest stages through any later substantive changes to the system.
- Utilize third-party reviews when the system might be higher risk.
- Procurement and contracting (including data-sharing agreements) processes could include review to assess whether any planned procurement might include an algorithmic system.
- Publish information about algorithmic systems on a public registry website.
- Avoid facial-recognition and related systems.
- Evaluate effectiveness of recommendations.

There is a tremendous opportunity for the region to fashion a framework for managing and harnessing public algorithmic systems. Such actions will require investments, ones that the task force believes are worthy of support. If we are successful, municipalities across the country could look to this framework as a model, positioning Pittsburgh as a leader and helping to achieve greater algorithmic justice and accountability balanced with responsible growth.

I. What is a Public Algorithmic System?

Throughout this report, the task force principally uses the term *public algorithmic system*, defined in full as follows:

> The term **"public algorithmic system"** means any system, software, or process that uses computation, including those derived from machine learning or other data-processing or artificial intelligence (AI) techniques, to aid or replace government decisions, judgments, and/or policy implementations that impact opportunities, access, liberties, rights, and/or safety.[3]

Terms like "algorithms," "artificial intelligence," "automated decision system," "predictive risk model," and "machine learning" tend to proliferate in any discussion of governments using big data in decision-making. Many of these terms have substantial overlap and, in common usage, are used imprecisely. They are not perfectly interchangeable, of course, and nuances in meaning can have important distinctions in understanding the tool in question.[4] For the purposes of the task force's recommendations, however, these nuances matter less than an understanding that governments increasingly use these tools to make or help make decisions.

The task force's definition, which is heavily informed by Professor Rashida Richardson's work[5], is broader than the usual definition of "algorithms," which are "generally regarded as the mathematical logic behind any type of system that performs tasks or makes decisions"[6] or "specific sequences of steps used to accomplish some task, especially those embedded in a computer."[7] In other words, "algorithms" are typically understood as problem-solving functions rather than the complete system that might encompass an algorithmic function. For our purposes, however, this narrow understanding of algorithms would be too limited a view. Indeed, as one study has observed, "[T]oday's automated decisions are not defined by algorithms alone. Rather, they emerge from *automated systems* that mix human judgment, conventional software, and statistical models, all designed to serve human goals and purposes."[8]

The potentially broad nature of this definition could lead to capturing a wider set of systems than intended.[9] However, as described more fully in the forthcoming recommendations of this report, the task force believes that the relevant risk of any given system should determine the level of concern and corresponding scrutiny for that system. In this framework, the risk-based approach that we have taken should mitigate overbreadth concerns.

Critically, the task force and its work are focused on *public* algorithmic systems, meaning those systems that governments use (including when a government actor relies on or partners with a private algorithmic system). This excludes non-governmental systems, such as those that a prospective private employer, a social media company, or a private health insurer might use. Moreover, the task force's work is focused on algorithms in government decision-making, which, irrespective of whether it might be shaped by an algorithm, can carry risks, especially when lacking public input and involvement. Many of the task force's suggestions about bolstering public participation in algorithmic system development could similarly foster trust in government decision-making, more broadly, though this is beyond the scope of our work.

II. Public Algorithmic Systems in the Pittsburgh Region

Our region has been at the forefront of applying algorithmic systems to governmental functions.

The following sections highlight two key systems: (1) the Allegheny County Department of Human Services (DHS) child welfare tool, the Allegheny Family Screening Tool (AFST), in light of its prominence; the county's transparency around its development, deployment, and use; and the county's efforts to secure external evaluations and public feedback, and (2) the City of Pittsburgh's suspended predictive policing system, which, like in most government agencies across the country, lacked such process measures. In developing the recommendations in this report, the task force paid particular attention to the DHS experience with AFST and efforts to incorporate transparency and accountability into the system's development. The task force was impressed with DHS's goal of a more open and consultative process, something that has not been the norm for most government agencies across the country.

The two systems discussed below—and the other systems identified—are not an exhaustive list of systems in use in our region; rather, they are illustrative of significant ways that our region's governments are turning to algorithmic systems to aid in governmental decision-making and the processes around their adoption and use. The task force *did not* endeavor to audit or scrutinize the workings of any specific system; instead, we focused on the processes surrounding system development and implementation to inform our recommendations.

The task force anticipates that the growth of these algorithmic tools is poised to continue in the Pittsburgh region and beyond, bolstered by the availability of large troves of data, the power and promise of algorithmic systems, and the recent experience of local governmental officials in developing and deploying such systems.

ALLEGHENY FAMILY SCREENING TOOL (AFST)

The AFST is an algorithmic system[10] that helps child-welfare personnel assess whether or not to "screen in" a referral for an investigation when they receive an allegation of certain types of child maltreatment (e.g., neglect). Allegheny County DHS developed the system, in use since August 2016, with a team from Auckland University of Technology.

The process before adoption of the AFST required staff at a child-abuse call center receiving referrals—that is, allegations of maltreatment—"to manually access a myriad of data and information to help decide whether or not to investigate the allegation ('screen in' and investigate or 'screen out' and offer relevant community resources)."[11] In essence, staff had to comb through available data and then make judgment calls about whether an investigation was warranted.

Much of the motivation behind developing the system was to better inform such decisions made at the critical time when allegations are received, when there is often limited information received from callers on which to base decisions, and to "reduce variability in staff decision-making."[12] According to DHS, before the AFST, "[A]n analysis found that 27% of highest risk cases were being screened out and 48% of the lowest risk cases were being screened in."[13] As with nearly all child-welfare departments, Child Protective Services does not have the resources to investigate all referrals.

The AFST therefore looks to help determine which cases are most critical to investigate by augmenting the manual decision-making process. The AFST generates an algorithmically indicated risk score, which is then reviewed by a screener, who decides whether or not to screen in a referral for an investigation. The AFST makes an adverse outcome prediction—that is, whether a child will experience a placement within two years of the screening.[14] Placement refers to whether a child will be removed from the current home situation by DHS and placed in a different environment. According to DHS's AFST "frequently asked questions" document, "Only the call screener and call screening supervisor have access to the AFST score," and the investigations staff and the courts do not have access to the AFST score.[15] In other words, no individual who participates in decisions about whether children should be placed in different environments currently has access to scores.

Underlying the AFST is the DHS "Data Warehouse." The county describes the Data Warehouse as "bring[ing] together and integrat[ing] client and service data from a wide variety of sources both internal and external to the County. It was created by consolidating publicly-funded human services data (e.g., behavioral health, child welfare, intellectual disability, homelessness and aging) and, over time, expanded to include data from other sources."[16] The AFST relies on a subset of data sources from the Data Warehouse: child-welfare records, jail records, juvenile-probation records, behavioral-health records, and birth records.[17] A DHS report on the AFST's methodology includes in an appendix the "full list of predictor fields used in" the latest version of the AFST.[17] DHS intends to incorporate additional data into AFST in the future—including data from private insurers—with an eye toward making the data more representative.[18]

"Since August 2016, the Allegheny County Department of Human Services (DHS) has used the Allegheny Family Screening Tool (AFST) to enhance our child welfare call screening decision making process with the singular goal of improving child safety.

The AFST is a predictive risk modeling tool that rapidly integrates and analyzes hundreds of data elements for each person involved in an allegation of child maltreatment. The tool can rapidly integrate and analyze these data, housed in the DHS Data Warehouse, and create a synthesized visualization of the information. The result is a 'Family Screening Score' that predicts the long-term likelihood of future involvement in child welfare. By combining the insight gained through the score with other traditionally gathered information, a better prediction can be made of the long-term likelihood that the child will need to be removed from the home in the future.

According to the algorithm, the higher the score, the greater the chance of future out-of-home placement. When the score is at the highest levels, meeting the threshold for 'mandatory screen in,' the allegations in a call must be investigated. In all other circumstances, the information summarized by the score does not replace clinical judgment but rather provides additional information to assist in the call screening decision making process. The Family Screening Score is not used to make investigative or other child welfare decisions and is not shared beyond call screening."

Source: Allegheny County Family Screening Tool.

EVALUATIONS AND TRANSPARENCY

DHS solicited proposals "to design and implement Decision Support Tools and Predictive Analytics in Human Services" in February 2014.[19] Supported by both private philanthropic and government funds, DHS ultimately awarded a contract to a team from Auckland University of Technology, led by the codirector of the Centre for Social Data Analytics, Rhema Vaithianathan.[20] An external member of the vendor-selection committee, who is also a member of the task force, told us that she looked to "center the selection based on race, bias, and DHS's history. This

early acknowledgement of bias and the attempts to mitigate the same in the early design was critically important." DHS also subjected the AFST to an external ethical analysis,[21] to which DHS provided a fulsome response.[22]

DHS sought to involve members of the region in the decision to use the AFST. As part of the development, community and stakeholder meetings were held. Calling such efforts "a priority for the County throughout the project," DHS held a variety of meetings and undertook efforts to bring in the public:

> "The County sought input from the community through various meetings, including six project-specific meetings. Three were held at early stages of the project to collect feedback from key external stakeholders and funders. DHS then held three open community meetings where over 30 stakeholder groups (including the Courts and the ACLU) were invited to discuss the work to date, implementation timeline and results. Additionally, DHS shared project updates with existing community networks including the Children's Cabinet and the Children, Youth and Families Advisory Board, and through the DHS Speaker Series."[23]

Separate from, and concurrent with, the development of the AFST itself, DHS also sought two related evaluations of the AFST (in addition to the ethical analysis noted above): a process evaluation and an impact evaluation. Hornby Zeller Associates conducted the process evaluation[24], and Stanford University performed the impact evaluation.[25] Critically, the impact evaluation determined that, among other things, the "AFST led to reductions in disparities of case opening rates between black and white children," an important improvement on the higher case-opening rates for Black children pre-AFST.[26] The evaluation also found increased "identification of children determined to be in need of further child welfare intervention" and that the AFST "did not lead to decreases in re-referral rates for children screened-out without investigation."[27] DHS also conducted external validation of the AFST, using data from UPMC Children's Hospital of Pittsburgh, demonstrating that the children whom the AFST identified as at highest risk were also those more likely to have hospital visits for treatment suggestive of maltreatment.[28]

PREDICTIVE POLICING SYSTEM[29]

Beginning in 2017, the Pittsburgh Bureau of Police and the Department of Innovation and Performance experimented with a predictive policing algorithmic system in partnership with Carnegie Mellon University's Metro21 (Smart Cities Institute). That system is currently suspended—something that the task force urged the city to do.[30] In responding to the task force's request that the city keep the program suspended, then-Mayor Bill Peduto wrote that he and other public safety leaders "share your concerns about the potential for predictive policing programs to exacerbate implicit bias and racial inequities."[31]

Despite that suspension, the task force included discussion of the system to highlight how opaque its development and operation were, reinforcing the need for meaningful public involvement in algorithmic system development in our region.

Of course, the public might weigh the expected benefits and risks of such a system and ultimately support it—but that is impossible without insights into the system, its workings, its data, and avenues for participation. Several members of the task force found the initial reported results of the system compelling (and a likely improvement over the legacy, human-based decision-making that the system was complementing), whereas others had significant concerns about the data used or related issues. All, however, agreed that the lack of transparency

and public accountability justified the program's suspension. Such opacity seems to be far too common across the country, especially in policing applications of algorithmic systems.

Before the program's suspension, the system was implemented city-wide (in both residential areas and business districts). The funding for the partnership with Metro21 ended at the end of 2019. According to a since-removed posting on the Metro21 website:

> "The team developed a predictive analytics program and policing strategy that is being used by the Pittsburgh Bureau of Police to predict crime hot spots and prevent serious violent crimes. A neural network model predicts locations that will likely have crime flare-ups in the following week. Police then use community policing approaches to patrol and deter crime in the hot spots with the aid of real-time crime mapping from their patrol car laptop computers."
>
> Source: Wil Gorr and Daniel O'Neill, Pittsburgh Crime Hot Spot Program: Preventing Crime with Predictive Policing, Carnegie Mellon University Metro21: Smart Cities Institute, https://www.cmu.edu/metro21/projects/reducing-crime.html (accessed November 2019).

Researchers behind the project, which began in 2017, made available publicly a paper that provides insights into how the project was developed and had been working in practice. The initial research project intended to assess the impact of predictive policing strategies on crime.

The subsequently developed system relied on historical reports of crimes and 911 calls to make predictions about where crime might occur in the future. Based on the system's predictions, Pittsburgh Police then pursued a "'hot-spot-based' approach": "Pittsburgh's hot spots are 500 sq. ft. areas where crime is likely to occur, and they can be either 'chronic,' meaning crime is likely to happen there at all times, or 'temporary,' meaning they have occasional spikes of crime activity."[32] The police targeted hot spots for "treatments"—that is, deployment of police based on the algorithmic system's predictions.[33] According to the Bureau of Police, before the program's suspension, each police zone had been receiving six hot spots for patrols (three chronic, three temporary). According to the researchers, they found a 25.3% reduction in serious violent crimes per hot spot (relative to the control hot spots).[34]

The project apparently relied on two data sets from a five-year period from 2011 to 2016: (1) "all 206,150 crime incidents reported by the [Pittsburgh Bureau of Police]," which were compiled from Pittsburgh's Automated Police Reporting System (APRS), and (2) "information on 911 calls for assistance to the Pittsburgh police, totaling approximately one million calls over the five-year period of analysis."[35] Of course, crimes that go unreported are not included in these data.

As *PostIndustrial* reported in June 2019, the system's data "include[d] three broad sources: past crimes of the same kind as the target crime being predicted, other kinds of past crimes which are found to be predictive of the target crime, and 911 calls about crimes."[36] The Bureau of Police advised the task force that personally identifiable information, demographic data, and officer-initiated actions (e.g., traffic stops or arrests) were not included in the system's data.

EVALUATIONS AND TRANSPARENCY

The task force is not aware of any external review of the program,[37] nor did the task force identify any effort to invite the public to participate in the design of the program, to solicit opinions about its development or implementation, or to otherwise educate the public about the system and its effects before the system went into effect. In March 2021, one of the program's researchers submitted a comment to the task force, sharing access to other documents about the system.[38]

As with any program relying on historical crime-reporting data—which can reflect long-standing racial and economic disparities in Pittsburgh—this predictive policing system involves sensitive issues of policing (including the critical issue of where to send police for potential enforcement) with implications for public safety and fairness.

OTHER SYSTEMS

There are other instances of algorithmic systems in use in our region. County DHS has developed a system designed to better match residents and homelessness resources in Allegheny County[39] and has introduced a program called Hello Baby with the goal of effectively and efficiently getting available resources to infants and families.[40] As with the AFST, county DHS has made several reports available, with others to come once completed: a methodology report,[41] two ethical reviews,[42] and the DHS response to those ethical reviews.[43]

City algorithmic systems have included those to manage traffic lights,[44] a system that detects and locates gunshots,[45] and a system that predicts risk scores for fires at commercial properties.[46] In addition, the Pittsburgh Water and Sewer Authority is endeavoring to use machine learning to predict the location of lead-contaminated service lines,[47] and Pittsburgh Public Schools have harnessed data to flag whether students might be at risk of falling behind academically and to evaluate teacher performance.

As with many jurisdictions across the country, the judiciary also uses algorithmic systems. Since 2007, Allegheny County's courts have used an internally developed pretrial risk-assessment tool to aid judicial decisions about whether to confine criminal defendants before trial. Allegheny County courts also have access to the Public Safety Assessment, developed by Arnold Ventures,[48] which the courts implemented in 2016 in parallel to the existing risk-assessment tool, and juvenile detention decisions are shaped by the Pennsylvania Detention Risk Assessment Instrument.[49]

Elsewhere in the region, researchers from the University of Pittsburgh have been exploring a system designed to predict opioid overdoses and "to identify individual risk factors,"[50] with likely application in local governments.

III. Potential Problems with Public Algorithmic Systems

The task force believes that government consideration of any algorithmic system should entail (1) a comparison of that system (and its expected benefits) to the existing human decision-making process it would supplant or supplement and (2) a weighing of those benefits against expected or potential problems (and mitigations) inherent in the system or its data. A weighing of these potential problems against expected benefits and improvements over existing human decision-making might lead policymakers to proceed with adopting algorithmic systems for some applications—but perhaps rejecting them in others. Such balancing of costs and benefits, however, must be done with a full appreciation of all perspectives and should include robust public involvement to improve outcomes and to engender trust.

Some algorithmic systems have the potential to perform complex tasks more efficiently and fairly than humans.[51] Proponents of these tools also point to the potential for reducing inaccuracies, biases, and other common shortcomings of human decision-making, and they even argue, "[W]hen algorithms are involved, proving discrimination will be easier—or at least it should be, and can be made to be."[52] As a leading management consultancy that often advises governmental clients puts it, these tools can "enable governments to perform more efficiently, both improving outcomes and keeping costs down."[53] Some argue that algorithmic systems have "enormous potential for good," and "could greatly improve quality of life and help individuals meet long term goals."[54]

It is no surprise then, that such public systems are growing in prevalence. Indeed, "[A]n increasing number of government agencies are considering or starting to use [artificial intelligence and machine learning] to improve decision making."[55] The task force is not aware of any comprehensive and complete accounting of the numbers of automated decision-making systems currently in use in municipalities but anticipates that the numbers and impact will become even more significant in the next decade, including in our region.

Yet governmental use of algorithmic systems—like any type of decision-making—can indeed suffer from inaccuracies, misuse, and bias, as well as a host of other problems. Some of these problems are unique to algorithmic systems and the data on which they rely. This section will survey some of the common problems implicated by government algorithmic systems.

ILLUSTRATIVE PROBLEMS

Algorithmic systems—like the human decision-making processes they might supplant or aid—can be problematic. Algorithmic systems can suffer from high error rates and can lead to inequitable and biased outcomes if the underlying data are similarly flawed. Moreover, issues with training, designing, and implementing algorithmic systems can lead to feedback loops—where outputs of algorithmic systems go on to affect the data inputs and thus subsequent outputs.[56]

Consider this cautionary tale from Michigan of a public algorithmic systems gone awry. The state's Unemployment Insurance Agency turned to outside vendors to automate processes regarding unemployment data and to ultimately adjudicate and impose penalties for benefits fraud.[57] The algorithmic systems replaced humans who had been involved in various aspects of scrutinizing unemployment claims and was programmed or trained in a way that made it quite likely to falsely flag instances

of fraud. Official public details about the cause of these false positives are scant, but, according to a report from AI Now Institute, the system "falsely identified more than 40,000 Michigan residents of suspected fraud" from October 2013 to August 2015.[58] In essence, this Michigan algorithmic system, which was intended to identify unemployment fraud, incorrectly flagged tens of thousands of Michiganders for suspected fraud with significant consequences for those flagged, including civil penalties, wage garnishments, and tax-refund seizures.[59]

Not all algorithmic systems suffer from such obvious (or detectable) errors, and there are a variety of flaws that can imperil algorithmic systems—as well as potential mitigation efforts. Several common problems are surveyed below, which the task force urges readers to consider for each system in the context of any expected benefits and the legacy decision-making process that the system might supplant.[60]

ERROR RATES

There are many examples of algorithmic systems with high error rates, with varying and diverse causes.

Facial-recognition systems, in particular, have been plagued by errors. Some jurisdictions across the country are embracing this technology—which has drawn the ire of many researchers and criminal-justice reformers—while others are seeking to curtail it.[61]

In a 2018 study of automated facial-recognition algorithms and associated data, Joy Buloamwini of MIT Media Lab and Timnit Gebru, then of Microsoft Research, found startling error rates along racial and gender lines. Their research found error rates between 20.8% and 34.7% for "darker-skinned females"—"the most misclassified group"—in an evaluation of three "commercial gender classification systems."[62] Additionally, they found that the systems performed better on lighter faces than darker faces (11.8%–19.2% difference in error rate) and on male faces than female faces (8.1%–20.6% difference in error rate).[63] Critically, the report observed that the relevant datasets serving these systems were disproportionately comprised of "lighter-skinned subjects."[64]

In congressional testimony, Buloamwini highlighted how these broader error patterns can lead to a devastating case of misidentification in real life. In spring 2019, Sri Lankan authorities, using facial-recognition technology, falsely identified Amara K. Majeed (an activist and then a Brown University senior) as a terrorist suspect implicated in the Sri Lankan Easter bombings, leading to death threats and police scrutiny of her family in Sri Lanka.[65] In a startling episode in 2018, the ACLU ran photos of members of Congress through Amazon's Rekognition facial-recognition offering and found flawed results: 28 members incorrectly matched with arrestees' mugshot photos.[66] Moreover, "Of the false matches, 39 percent were people of color, even though people of color make up only 20 percent of lawmakers in Congress."[67] In June 2020, as racial-justice protests and calls for greater police accountability swept the country, Amazon announced a "one-year moratorium on police use of" Rekognition.[68] That suspension has continued, and other tech companies have similarly stepped away from offering facial-recognition technologies to law enforcement.[69]

And in Detroit, in the wake of a *New York Times* account of a man wrongfully arrested in January 2020 after an incorrect algorithmic identification, the police chief there acknowledged that the facial-recognition system in question had a remarkably high error rate, saying: "If we would use the software only [to identify subjects], we would not solve the case 95-97 percent of the time. … If we were just to use the

technology by itself, to identify someone, I would say 96 percent of the time it would misidentify."[70]

Meredith Whitaker of New York University's AI Now Institute, who also presented to the task force, testified before the U.S. House Committee on Oversight and Reform that "[f]acial recognition reflects and amplifies historical and present-day discrimination."[71]

Facial-recognition systems are not the only systems that can suffer from inaccurate results. Analysis by *ProPublica* found that Broward County, Florida, relied on an algorithmic system that falsely labeled Black criminal defendants as nearly twice as likely to re-offend as White criminal defendants.[72] That system (called "COMPAS") reportedly relied on data that included questions about parents' incarceration history—a racially fraught piece of data with obvious implications for bias and fairness, particularly in areas with legacies of racially biased criminal-justice systems.[73] A subsequent study by Northpointe Inc. (the company behind COMPAS) countered and offered evidence refuting "the claim that the COMPAS risk scales were biased against black defendants in a sample of pretrial defendants in Broward County, Florida."[74]

BIASED DATA

A common question from the public posed to the task force was, "What information informs the tool?" There may be no more important question to ask in examining the potential for bias in algorithmic system–based decision-making. Algorithmic systems—like human processes to make decisions in government—can, and often do, suffer from bias embedded in the data on which such systems rely.[75]

NON-REPRESENTATIVE DATA

Non-representative data will undermine any algorithmic system. As Alice Feng and Shuyan Wu observed in the *Parametric Press,* "A non-representative sample where some groups are over- or under-represented inevitably introduces bias in the statistical analysis."[76]

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This excerpt from a New York Times report tells the story of a man wrongfully arrested due to a facial algorithm's error.

On a Thursday afternoon in January, Robert Julian-Borchak Williams was in his office at an automotive supply company when he got a call from the Detroit Police Department telling him to come to the station to be arrested. He thought at first that it was a prank.

An hour later, when he pulled into his driveway in a quiet subdivision in Farmington Hills, Mich., a police car pulled up behind, blocking him in. Two officers got out and handcuffed Mr. Williams on his front lawn, in front of his wife and two young daughters, who were distraught. The police wouldn't say why he was being arrested, only showing him a piece of paper with his photo and the words "felony warrant" and "larceny."

His wife, Melissa, asked where he was being taken. "Google it," she recalls an officer replying.

The police drove Mr. Williams to a detention center. He had his mug shot, fingerprints and DNA taken, and was held overnight. Around noon on Friday, two detectives took him to an interrogation room and placed three pieces of paper on the table, face down.

"When's the last time you went to a Shinola store?" one of the detectives asked, in Mr. Williams's recollection. Shinola is an upscale boutique that sells watches, bicycles and leather goods in the trendy Midtown neighborhood of Detroit. Mr. Williams said he and his wife had checked it out when the store first opened in 2014.

The detective turned over the first piece of paper. It was a still image from a surveillance video, showing a heavyset man, dressed in black and wearing a red St. Louis Cardinals cap, standing in front of a watch display. Five timepieces, worth $3,800, were shoplifted.

"Is this you?" asked the detective.

The second piece of paper was a close-up. The photo was blurry, but it was clearly not Mr. Williams. He picked up the image and held it next to his face.

"No, this is not me," Mr. Williams said. "You think all black men look alike?"

Mr. Williams knew that he had not committed the crime in question. What he could not have known, as he sat in the interrogation room, is that his case may be the first known account of an American being wrongfully arrested based on a flawed match from a facial recognition algorithm, according to experts on technology and the law.

Source: Kashmir Hill, "Wrongfully Accused by an Algorithm," New York Times (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.

Such errors are introduced where the difference between the sample set and the broader population is a result of the sample itself; in other words, a sample error exists where a sample is not representative. Feng and Wu illustrate a sampling error by demonstrating how a sample would be skewed if, in estimating the average U.S. household income, the sample of 100 residents included billionaire Jeff Bezos (an overestimate). Conversely, a sample that included mostly low-income residents would lead to an underestimate. [77]

As another example, imagine an algorithmic system that relied on health data derived only from public health sources (e.g., Medicaid, Veterans Affairs) while excluding data from private health insurers. Or even if such an algorithmic system included private health insurers in its data sources but excluded sources such as free clinics or physicians who do not accept insurance, the system could be relying on non-representative data.

Non-sampling errors can also make data non-representative. Inaccurate or missing survey responses, poor data-collection practices, and the like can cause this type of error.

REPRESENTATIVE BUT STILL BIASED DATA

Even where sampled data are representative of broader data, bias can nonetheless exist. This can commonly occur where historical biases are "baked into" data by their very nature. In one high-profile example, such errors caused a widely used healthcare algorithmic system to suffer from bias.

In that case, researchers uncovered substantial bias in an algorithmic system that health systems and insurers nationwide (covering approximately 200 million people) rely on "to target patients for 'high-risk care management' programs."[78] Because the algorithmic system predicts *healthcare costs,* rather than *illness,* "At a given risk score, Black patients are considerably sicker than White patients."[79] In other words, the algorithmic system was holding Black patients to a higher sickness threshold than White patients in its scoring of patients to determine need for high-risk care management. The authors of the study attributed the outcome to biased data: "Unequal access to care means that we spend less money caring for Black patients than for White patients," thus artificially deflating the predicted healthcare costs for Black patients and weakening the factor's value as a proxy for predicting illness,[80] while perhaps modeling and problem formulation decisions were also responsible for the outcome. Consequently, the data here may have been representative—there are, in fact, profound disparities in healthcare costs along racial lines—but the data (coupled, perhaps, with modeling and problem formulation decisions) nonetheless introduced bias because of the stark racial differences in healthcare access that drive healthcare costs for patients.

Historical arrest data may also be representative but nonetheless racially biased due to racial disparities in policing and enforcement practices. Representative data that capture higher rates of arrest for Black residents would nonetheless be biased when the effects of historically racially biased policing and prosecution are considered. Prominent data scientists and researchers caution that criminal-history data, in general, "is neither a reliable nor a neutral measure of underlying criminal activity" and when used for risk-assessment tools create distorted, inaccurate, and racially biased results.[81] Criminal history data reflect patterns of policing and prosecution in addition to, or rather than, actual criminal activity.

For example, a report from the Center on Race and Social Problems at Pitt's School of Social Work found that "Blacks and Whites have comparable drug use rates

but Blacks have much higher arrest rates."[82] The report observed that both racial groups "are equally likely to sell and use drugs," yet "Black youths were arrested for drug violations at a rate nearly five times that of White youths in the city of Pittsburgh and Pittsburgh [Metropolitan Statistical Area], and at more than nine times in Allegheny County."[83] There was a similar disparity for adults: "Black adults were arrested at four times the rate of White adults for drug violations in the city of Pittsburgh, five times in Allegheny County, seven times in the Pittsburgh [Metropolitan Statistical Area], and three times in the nation."[84] Such a disconnect between criminal activity and arrests for that activity yields bias in arrest data—making any representative sample of that data nonetheless biased, thereby infecting any system relying on that data.

OTHER SYSTEM ISSUES

Algorithmic systems can also churn out biased outcomes if machine-learning algorithms themselves produce decisions even more slanted than training data. Incentives to reinforce majority-group observations and feedback loops both can facilitate this problem.[86]

With respect to the former, "[M]achine learning algorithms are incentivized to put more learning weight on the majority group, thus disproportionately predicting observations to belong to that majority group."[87] Feedback loops can also lead to amplified bias in algorithmic system predictions, exacerbating existing bias.[88] As one dictionary describes it, a feedback loop is "the path by which some of the output of a circuit, system, or device is returned to the input."[89] In essence, the input to a system ultimately affects the system's output, which in turn then affects the inputs, and so on.

Feedback loops can perpetuate harms in current systems and structures, such as the criminal-justice context: "Deploying predictive policing systems in jurisdictions with extensive histories of unlawful police practices presents elevated risks that dirty data will lead to flawed or unlawful predictions, which in turn risk perpetuating additional harm via feedback loops throughout the criminal justice system."[90]

A NOTE ON PRIVACY

Legal scholars are often challenged by the law's inability to keep up with the ever-evolving nature of technology. So too for privacy advocates.

Algorithmic systems can heighten concerns about government surveillance, especially to the extent such systems use so-called "Smart Cities" data—that is, data mined from a network of sensors to surveil through tagging, touching, tracking, and the like. Such practices raise the question of whether these digital contacts collide with Fourth Amendment doctrine regarding government "searches."[85] Law Professor Andrew Guthrie Ferguson, for example, suggests that such acquisition of personal data triggers scrutiny under the Fourth Amendment and might violate the Constitution.

Although resolving such constitutional issues is beyond the scope of this report, the task force is nonetheless sensitive to the privacy implications of the data collection often underlying public algorithmic systems and encourages embedding privacy protections alongside data-collection rules.

LACK OF TRANSPARENCY

Beyond the substantive problems that can plague algorithmic systems, a lack of transparency can undermine public faith and confidence in governmental use of algorithmic systems. The popular notion of an algorithmic "black box" has some truth to it, and people are loath to trust something that feels concealed from public scrutiny or where accountable elected officials have no role in oversight.

A lack of transparency can result from a lack of public oversight of—or insight into—algorithmic systems and underlying data. Many private algorithmic-system vendors on which governments rely do not make available their systems or training data for public review. Similarly, such companies typically do not explain how systems reach decisions in an effort to keep their algorithms from being reverse-engineered. Both the public and elected officials are blocked from effective oversight of systems under those conditions.

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Consider this example from Florida, where the Pasco County Sheriff's Office "keeps a secret list of kids it thinks could 'fall into a life of crime' based on factors like whether they've been abused or gotten a D or an F in school."[91] The data are drawn from school district records and state Department of Children and Families information. Neither the children nor their parents are informed when children are added on the list or how the system weighs or treats the data, which is especially problematic given disparities in discipline at the school district: Black students and students with disabilities in Pasco County are twice as likely to be suspended or referred to law enforcement.

Source: Neil Bedi & Kathleen McGrory, Pasco's sheriff uses grades and abuse histories to label schoolchildren potential criminals, Tampa Bay Times, Nov. 19, 2020, https://projects.tampabay.com/projects/2020/investigations/police-pasco-sheriff-targeted/school-data.

So too is such oversight likely thwarted where review of the substantive judgments inherent in a system are shielded. Neither the system nor the data[92] when kept obscured from the public can provide adequate transparency because algorithmic tools make a series of determinations "about what data to use, include or exclude, how to weight the data, and what information to emphasize or deemphasize."[93] According to law professors Robert Brauneis and Ellen Goodman (a task force member), "[T]here are three principal impediments to making government use of big data prediction transparent: (1) the absence of appropriate record generation practices around algorithmic processes; (2) insufficient government insistence on appropriate disclosure practices; and (3) the assertion of trade secrecy or other confidential privileges by government contractors."[94]

Sufficient transparency allows the public to ensure that a system is making tradeoffs consistent with public policy. A common tradeoff is balancing the risk of false positives and false negatives. A programmer may choose to weigh those in a manner different than policymakers or the public might prefer. An example from Philadelphia highlights this tension: "Philadelphia's Adult Probation and Parole Department's risk prediction algorithm for violent recidivism among probationers … predicts the likelihood of a probationer committing a violent crime within two years of release, and classifies the population as high, medium, and low risk. The algorithm was constructed by treating historical false negatives as 2.6 times more costly than false positives."[95] After examination, officials changed that rate to better align with department goals to ensure that the system was not overclassifying probationers as high risk.[96]

LACK OF PUBLIC OWNERSHIP

When a public agency procures a system from an outside vendor—rather than develops a system internally or with assistance from an outside vendor or expert—the agency typically does not own the system, or sometimes even the data. Consequently, the governmental entity ends up with less control and authority over the system, including directing changes and revisions to the system, than it would have over a system that it owns.

DESIGNER DEMOGRAPHICS AND DESIGN CHOICES

The community of those who prepare, develop, and implement algorithmic systems is disproportionately filled with those with advanced degrees (typically men) who often do not look like or share the lived experience of the people affected by the systems they design.[97] Such demographic divides can undermine developers'

understanding or ability to appreciate the problems or lived experiences of those subject to algorithmic systems.

OVERWEIGHTING ALGORITHMIC SYSTEM OUTCOMES

When algorithmic systems' outcomes are merely suggestive in nature—as opposed to mandatory—a human component of decision-making is still critical to the process or function at issue. Yet research suggests that humans place inconsistent weight on algorithmic systems' outcomes, with those from less privileged backgrounds and wielding less power exerting less independence in disregarding algorithmic systems' outcomes.[98] Relatedly, when humans place too much confidence in algorithmic systems' outcomes, algorithmic systems can exert undue influence on decision-making processes that are supposed to incorporate more human judgment,[99] and humans might rely on algorithmic suggestions more heavily when the suggestions reinforce their own inclinations.[100]

INADEQUATE PUBLIC INPUT AND DIRECTION

The absence of public input and direction regarding the development and embrace of algorithmic systems (a corollary to the transparency issues discussed above) is a common failure of governmental introduction of algorithmic systems. Task force community feedback and scholarship identified this problem, which can undermine public acceptance of and trust in algorithmic systems, regardless of how effective a system might be.

The task force concurs with this observation from the Centre for Data Ethics and Innovation:

"A range of transparency measures already exist around current public-sector decision-making processes. There is a window of opportunity to ensure that we get transparency right for algorithmic decision-making as adoption starts to increase."[101]

In Boston, for example, the public school system looked to an algorithm to improve bus schedules: more efficiency in routes, reduced excess bus travel, better accommodations for disabled students, optimized school start times, and equity considerations. Despite a community-engagement process and close work with the city, this "marvel" of an algorithm nonetheless met "strong and swift" "pushback" from the public.[102] As task force member Ellen Goodman wrote in describing the incident, "The consultations had not effectively described how the start time shifts in particular would change students' schedules and they had not given families opportunities to play with the model," and the protesting public blamed the algorithm—which could have been tuned to optimize for other objectives—for failures of political process.[103] This episode highlights an important consideration for policymakers: Even when an algorithmic system might improve outcomes on certain metrics, the public's distrust or rejection of the system can imperil it.[104]

This section surveyed some of the problems that algorithmic systems might carry into government decision-making. Some of those problems might already exist (or even be worse) in legacy decision-making. Consequently, the task force urges stakeholders to take a proper accounting of the expected costs and benefits of an algorithmic system—weighed against the process it would supplant—when considering such a system.

IV. Task Force Recommendations

Our regional governments' embrace of algorithmic systems—and the growth of those systems—is happening against a backdrop of disparities in transparency and oversight across different agencies of regional governments. Moreover, without caution, these systems have the potential to perpetuate or cause harm and inequity, especially for members of marginalized communities and groups, or to weaken trust in government. In some careful applications, algorithmic systems can offer the promise of improving upon legacy decision-making processes. It is clear to the task force that our region is at a moment ripe for examination and action to chart a responsible and consistent path forward. That path ought to be one that not only confronts the biases and harms that might flow from some systems but also works to build trust in government.

There is no meaningful, concrete oversight effort regarding algorithmic systems in place in this country which the task force could simply look to adapt to our region. To be sure, there are other models and proposals from which to learn to varying degrees,[105] and the task force sought to learn from experience and experts both within and beyond our region.

Our hope is that these recommendations will push agencies to foster public participation, bolster meaningful scrutiny of agencies' algorithmic systems, and set conditions for improved government decision-making.

The practices below, if adopted, will not fundamentally restructure systems of injustice and oppression where they exist, but they are designed to make more than just incremental improvements in governmental processes. Our hope is that these recommendations will push agencies to foster public participation, bolster meaningful scrutiny of agencies' algorithmic systems, and set conditions for improved government decision-making.

RECOMMENDATIONS FOR LOCAL GOVERNMENTS

RECOMMENDATION 1

1 Encourage meaningful public participation, commensurate with the risk level of the potential system.

The task force believes that not all algorithmic systems are alike and that each presents different levels of risk. Moreover, such risks exist in general in government decision-making, irrespective of the deployment of an algorithmic system in that decision-making process. Some systems (and the decisions they shape) implicate liberty, others affect the allocation of resources, and still others might simply influence mundane public functions such as management of traffic patterns. These varying risk levels, in the view of the task force, ought to inform the depth of government efforts to bring the public in to participate in the lifecycle of a system (and the decision-making process it will inform).

Consequently, government leaders should understand the relative risk of any given system as an initial matter. To assist in that assessment, the task force found the framework proposed by Gretchen Greene of the AI and Governance Assembly to be useful. Under the framework, levels of risk are defined as "the likelihood of causing serious harm through discrimination, inaccuracy, unfairness or lack of

explanation."[106] The table below from the framework presents some common algorithmic systems and their corresponding risk levels:

LOW RISK			HIGH RISK
Infrastructure maintenance and repair	Disaster management	Regulatory inspections	Criminal justice Entitlement decisions Firing decisions Child protection services
Potholes (Boston)	Wildfire spread prediction (U.S. Forest Service) Landslide detection (NASA–rescue for isolated villages)	Restaurants (Chicago, Boston) Building fire code (Atlanta, New Orleans)	Predictive policing Court sentencing

Source: Gretchen Greene, Potholes, Rats and Criminals: A Framework for AI Ethical Risk[107]

The framework also provides a series of questions designed to provide insights into the "kind and seriousness of the possible harm" that the system might cause.[107] In the table below, answers are provided for common examples of algorithmic systems, demonstrating how such examples are assessed at different levels of risk:

	LOW RISK			HIGH RISK
	Pothole detection phone sensor app	**Landslide detection (NASA–rescue for isolated villages)**	**Restaurants health department inspection scheduling**	**Criminal court risk score used in sentencing**
Use of citizen data	Minimal or none	Minimal or none	Low	Medium to high
Citizen data use opt in/ opt out	Opt in	No opt out	No opt out	No opt out and possible self incrimination
Use of class data or proxies where class has special antidiscrimination legal protections	None	None	Minimal	Medium (no direct race input but studies have shown results vary by race)
Seriousness of worst possible citizen harm, e.g. loss of life, liberty, or property	Minimal or noon Secondary/indirect cause	High (harm = not found for rescue but compare to status quo) Secondary/indirect cause	Low Secondary cause	High Direct government taking of liberty or property
Barriers to citizen challenges to the data/ algorithm as discriminatory, inaccurate, unfair or lacking explanation	Low (if alternate method exists to report potholes)	High	High	High

Source: Gretchen Greene, Potholes, Rats and Criminals: A Framework for AI Ethical Risk[107]

The task force does not believe that these questions need to be rigidly followed; however, this framework presents a workable, flexible approach that could help agencies understand algorithmic system risk. Armed with that risk assessment, agencies could thus undertake a public process tailored to the system's expected risk. The task force encourages agencies to include in risk assessments public consultation about risk level.

As described below in Recommendation 2, agencies should publish baseline information about the proposed system: what the system is, its purposes, the data on which it relies, its intended outcomes, and how it supplants or replaces existing processes, as well as likely or potential social, racial, and economic harms and privacy effects to be mitigated. That disclosure can be a jumping off point for agencies to invite the public to participate, consistent with the system's risk level. Such engagement could include public forums, social media campaigns, diverse advertising, and other opportunities for members of the public to comment on the system. *For the highest-risk systems, agencies should consider the whole range of options to reach members of the public. An emphasis on communities and organizations representative of those most likely to be affected by the system is essential.* Outreach should invite the public in to discuss whether the potential system's goals and purposes are embraced by the community, and outreach should continue after system deployment (especially regarding any substantive changes or revisions to the system).

> "Approach the community at the onset of a problem where an algorithm might be a solution."
>
> —Community member attending public task force meeting

There is a key distinction to be drawn between public-comment opportunities—which would be insufficient for higher-risk systems—and more robust public participation, which the task force encourages. As a resource, agencies might look to the work of researchers from New Zealand and the United States (including task force member Alexandra Chouldechova) who conducted a study to learn through workshops "about the concerns of affected communities in the context of child welfare services."[108] Their insights and findings would be invaluable to shaping effective participatory design approaches, as would consulting New Zealand's national guidelines for obtaining social license for data use, which were informed by public participation.[109]

For the lowest-risk systems, the task force believes that it will usually be sufficient for agencies to offer straightforward comment avenues along with public disclosure and input opportunities.

RECOMMENDATION 2

2 Involve the public in algorithmic system development plans, from the earliest stages through any later substantive changes to the system.

Algorithms can be mystifying to people, leading to distrust of, or overreliance on, a tool or system that is not easily understood or assessed—often irrespective of the system's performance. Although transparency alone cannot unlock the complexities of machine learning and the like, the value of openness could serve both to promote public participation and knowledge and to allow greater scrutiny of algorithms. This is especially important in the context of public algorithmic systems—the focus

> "An algorithm would be useful to identify the root problems and to allocate the right services, training, and resources needed to mitigate the problem."
>
> —Community member attending public task force meeting

of the task force—where governments are relying on these systems to perform or assist public functions that impact residents' lives.

Hetan Shah, for example, argues that the opportunity for positive social impacts from algorithmic systems requires a "licence to operate" from the public.[110] This "licence to operate" (or social license) includes a role for transparency.[111] There is further scholarship focused on how best to foster meaningful debate about whether an algorithmic application is acceptable (and how best to participate in the development of such systems), grounded in a recognition that such public involvement is required to obtain social license.[112] The example discussed above from Boston—where a seemingly effective school-busing algorithm was nonetheless imperiled by strong public pushback—highlights the consequences of inadequate, insufficient, or non-responsive engagement with the public: public distrust and potential abandonment of a system.

The public shared with us many concerns regarding transparency (or a lack thereof) with algorithmic systems. Even in a community session with "grasstops" leaders, there was a sense of surprise at the scope of algorithmic systems already in use and a perception of a lack of engagement with the public when those systems were introduced. One relevant public query asked, "Are the right organizations sharing information [about their algorithmic systems with the public], and what are they doing with it?"

The task force's community engagement yielded a sense from residents that government use of algorithms could be useful, but there were concerns that the systems would not be developed in a way that reflected community values and needs.

In particular, residents are concerned that algorithms have been and would continue to be deployed in primarily punitive efforts. There was support, however, for the development of algorithms that are used to identify resource gaps and allocate resources accordingly.

To improve awareness, the task force believes that government agencies should alert the public and government leadership of any agency plan to develop, procure, or deploy an algorithmic system, with an eye toward involving the public in the decision about whether to pursue the system. Such notification should include key information to be meaningful, for example:

- Identification of the system and its purposes
- Description of the data on which the system relies
- The system's intended outcomes and benefits
- How the system supplants or replaces existing processes
- Likely or potential social, racial, and economic harms and privacy effects to be mitigated
- Identification of any non-governmental funders of the system

> "It seems like a lot of algorithms are used from a deficit model of thinking. 'Here are the problems.' But where are the models for seeing our strengths? Where are the conditions under which you can predict health outcomes for children, whether it's housing or air quality? We could use that to site affordable housing and prioritize affordable housing. Where are the strengths, and where should we be leveraging these strengths?"
>
> — Community member attending public task force meeting

Beyond mere notification, proactive engagement of the public, as reinforced and discussed above, is important from the outset by any agency considering use of an algorithmic system. The public should be involved in the deliberation over whether and how to pursue a system—including the policy goals at issue—as well as later efforts to shape, refine, and improve the system.[113] Indeed, as AI Now Institute has observed, such efforts "[r]espect the public's right to know which systems impact their lives.[114] Moreover, as described below in Recommendation 5, the task force believes that local governments ought to publish information about algorithmic systems on a public website.

RECOMMENDATION 3

3 Utilize third-party reviews when a system might be higher risk.

The task force believes that agencies should subject higher-risk algorithmic systems to outside, independent review.[115] Such reviews—which should be contemplated by agency leadership well before system deployment—can offer two fundamental benefits.

First, a review can be useful at all stages, including identifying shortcomings, weaknesses, errors, biases, and the like in the critical stage *before* full implementation. This can arm government leaders and researchers with information—gleaned from those outside the team behind the system—which they can use to improve a system or mitigate issues.

Second, a review can provide not only an added layer of visibility into a system but also a basis on which public trust might be earned. A system backed up by a fulsome third-party review might be more likely to engender public trust.

The task force believes our region is fortunate that county DHS has already established a track record of soliciting and publishing these types of reviews.[116] Other agencies ought to follow the lead of DHS in incorporating reviews into the development of algorithmic systems. Thus, we encourage agencies to obtain and publish for each algorithmic system:

- Ethical review
- Process review[117]
- Impact evaluation

Earlier in this report, we detailed the DHS's AFST and made more specific reference to those reviews, which provided important independent scrutiny of the AFST and DHS in a publicly accessible manner. Agencies might also consider obtaining other reviews as appropriate (including, for example, a data-science review to examine data practices, privacy, and security, identifying ways malicious actors could subvert the system, and more). Moreover, there can be tremendous value in ensuring that a system's deployment is set up in a way that facilitates ongoing and meaningful impact evaluation post-deployment.

RECOMMENDATION 4

4 Integrate algorithmic review into procurement processes.

Local governments in the Pittsburgh region already have established processes to manage procurement and contracting for outside services. The task force believes that governments could leverage those existing frameworks by adding a review to assess whether any planned procurement might include an algorithmic system.

Similarly, that review could also assess whether public data will be used in a way suggesting that an algorithmic system is at play.

This review—built into existing processes with which government officials have familiarity—would provide an internal check to ensure that algorithmic systems are identified for government leadership and the public. When such a review flagged a system slated for procurement, if public notification had not already occurred (as outlined above in Recommendations 1 and 2), then government officials would have the information needed to make that notification, both internally and externally.

For example, the City of Pittsburgh requires that every procurement contract goes before city council after an agency has selected a vendor. Consequently, city officials should conduct their reviews *before* contracts are presented to council (i.e., before legislation is presented to council for the contract's budget allocation), thereby enabling members and the public to review an agency's planned acquisition more effectively. Moreover, the city's Department of Innovation and Performance, which handles software acquisition (including algorithmic systems), already has language in its Data Governance Operational Charter that seeks to protect civil liberties and avoid bias in algorithms: "We recognize that in achieving our mission, it is critical that we remain committed to ensuring that our usage of data does not in any way infringe upon the privacy or civil liberties of citizens, and that we maintain accountable and bias-free utilization of computational algorithms."[118]

Local governments should consider updating existing checklists and workflows and training those involved in procurement to account for a review of potential algorithmic systems and/or use of public data suggestive of an algorithmic system. Familiarity with the definition of a *public algorithmic system a*nd likely applications will be key.

RECOMMENDATION 5

5 Require agencies to publish information about algorithmic systems on a public website.

The task force believes that the public would be well served by local governments maintaining a public-facing registry website where such information about algorithmic systems would be available.[119] Such a website should include, in plain language, the system-specific information included in Recommendations 1 and 2 above.

A subset of the task force is developing a website prototype—to be informed by public participatory design—that could be the basis for city and county websites. At a minimum, any relevant website should list the information described in Recommendation 1 above for each algorithmic system and provide agency points of contact. As was similarly recommended by New York City's Automated Decision Systems Task Force, local leadership should also consider making the information available in printed form at Carnegie Library branches and other culturally relevant sites, ensuring broad access even where internet access might be limited.

RECOMMENDATION 6

6 Avoid facial recognition and related systems.

Section II above documented common errors—often with profound racial and gender disparities—associated with biometric algorithmic systems such as facial recognition. The potential for harm is heightened because governments typically use facial and related systems (e.g., affect recognition) in high-risk applications that, even if accuracy issues eventually improve, could result in invasive surveillance that would undermine privacy. Consequently, based on the current state of these technologies, the task force recommends that governments avoid such systems for the foreseeable future.

This is of particular relevance in Allegheny County, where there is a network of more than a thousand surveillance cameras (which reportedly pose a national security threat due to their manufacturing origins in China) and the possibility of implementation of facial-recognition technology.[120] Additionally, in connection with the 2020 racial-justice demonstrations in Pittsburgh, the Bureau of Police used a state facial-recognition system (known as "JNET") to match a social-media image to one in the database in order to identify a person they charged with crimes.[121] The bureau apparently disregarded an agency policy that it "does not use facial recognition software or programs,"[122] highlighting the urgent need for more robust oversight of facial-recognition capabilities. In the aftermath of the revelations about the Bureau of Police's reliance on JNET, Pittsburgh City Council approved a bill in September 2020 to modestly regulate facial-recognition technology, although the bill included an exception permitting use of JNET.[123] Yet in light of the bureau's own identification of officer disciplinary action for JNET-related misconduct,[124] that JNET exception seems troubling.

RECOMMENDATION 7

7 Evaluate effectiveness of recommendations.

The task force appreciates that the experience of local governments with these recommendations ought to shape the future. There will inevitably be successes and failures. We urge stakeholders to learn from those lessons in revisiting how best to manage and oversee public algorithmic systems in our region.

Perhaps these recommendations will fall short, and there will be public support for more robust and mandatory regulation. Or perhaps these recommendations will hit the mark in terms of fostering innovation, ensuring that algorithmic systems do not perpetuate existing biases, and encouraging agencies to develop algorithmic systems through the lenses of economic, racial, and social justice. Regardless, the task force believes that our region should leverage the knowledge that comes from implementation of these recommendations after a year of implementation by evaluating how they might be improved in the future (perhaps through a deliberative body within government or, like the task force, outside it).

V. Additional Best Practices

The task force's recommendations described above, if adopted, could provide a balanced approach to oversight of government use of algorithms and government innovation. They focus largely on instilling public participation and transparency, both necessary preconditions to just algorithms. The task force also offers the below suggestions for best practices for municipal governments more broadly. Some are inherent in the proposed recommendations above, but the task force thought it worthwhile to articulate them specifically. Others do not fit directly into the discussion above but are well worth considering.

AGENCIES

ASK: DO WE NEED AN ALGORITHM?

It is easy to think an algorithm is your solution—and vendors are often happy to sell an agency one. We anticipate a pattern in the future where algorithms are seen as easy answers to hard problems but without necessarily improving existing efforts. As with any significant government expense, hard questions should be asked about whether an algorithmic system will improve residents' lives more than an alternative effort and/or an existing process. And, as discussed elsewhere in this report, algorithms are not solutions to systemic problems.

BE CAREFUL WHAT YOU BUY—AND AVOID MISSION CREEP.

Increasingly, vendors are selling software that includes algorithmic systems an agency might not intend to purchase (or that relies on data gathered for one purpose but then deployed for an altogether different one). But once an agency has a capability, it is hard not to use it. We note, of course, that if the task force's recommendations were adopted, a new or expanded use of a system, even in previously procured software, should be disclosed.

Likewise, once an agency has an algorithm, however procured, potential new use cases will be identified. These also should proceed through disclosure and related processes, as appropriate.

PROACTIVELY ADDRESS VENDOR ISSUES.

The recommendations are designed to ensure significant transparency, incentivizing agencies to develop explainable public records around algorithm creation and use. However, when a public agency procures a system from an outside vendor—rather than developing the system internally or with assistance from outside vendors or experts—the public agency typically does not own the system. Consequently, government ends up with less control and authority over the system, including the power to direct changes and revisions, than it would have over a system that it owns.

As task force members Professor Ellen Goodman and Professor Robert Brauneis have written, this can lead not only to "opacity, public disempowerment, and loss of accountability" but also to algorithms that "may enact policy judgments that diverge from the preferences of the electorate or its elected representatives."[125]

As algorithms become more common in municipal governance, we anticipate that they will often be procured from vendors. At a minimum, when working with an outside vendor, agencies should (1) require that the system is auditable; (2) maintain ownership and access to any government data; (3) require that appropriate records are generated; and (4) contractually limit claims of trade secrecy.

Agencies should also carefully consider hiring or assigning personnel with responsibility for algorithmic system issues. Such responsibility should include not only facilitating public participation, but also spearheading agency efforts in guiding the development and/or procurement of algorithmic systems.

TRAIN YOUR PEOPLE.

Any algorithmic system should be interpretable to the public—as well as to the employees who use it. Agencies must ensure that employees understand any limitations regarding what a system was designed for. For example, we have seen in other jurisdictions that systems designed only for pre-trial detention decisions are sometimes then used for sentencing, a use the developer of those systems never intended and did not build them for. An agency and its employees should know what a system does—and does not do—and how reliable it really is. Employees using such systems often have little sense of accuracy rates of systems, essential information if one is relying on it to make a decision. This will also help limit deskilling of an agency's workforce.

Relatedly, agencies should be aware of the risks of automation bias and train their employees accordingly. When algorithmic system outcomes are suggestive in nature—as opposed to mandatory—a human component of decision-making is still critical to the process or function at issue. When humans place too much confidence in algorithmic system outcomes, such systems can exert undue influence on decision-making processes that are supposed to incorporate more human judgment.

Agencies relying on algorithms also need employees who are capable of interrogating an algorithm: e.g., scrutinizing its modeling and development, data sets, outputs, processes, and more. Relying on a developer to have done so is irresponsible at best, both in development and deployment stages.

ENSURE ETHICAL DATA COLLECTION, MAINTENANCE, AND GOVERNANCE.

Municipal governments are collecting and will only continue to expand collecting residents' data. Data are necessary for good policymaking. In particular, good (and often unbelievable volumes of) data are necessary for good algorithms. Yet, resident data raise numerous ethical and safety issues—from consent to quality control to security.

We urge stakeholders to emphasize ethical data governance, including holding sensitive data for only as long as necessary and implementing robust security safeguards.

PUBLIC

MITIGATING ALGORITHMIC BIAS WILL NOT FIX SYSTEMIC ISSUES.

Algorithmic bias is a symptom of much larger systemic issues. Mitigating it is important but no silver bullet. This task force came together because we believe it is a critical and pressing need to provide more oversight of algorithmic use in local government—something that can perpetuate and even further lock in existing injustices. However, fixing algorithms will not fix racism or poverty or injustice. When we think about algorithmic oversight as communities, as advocates, as individuals, we should approach it with this limitation in mind.

ALGORITHMS ARE NOT PERFECT, BUT NEITHER ARE HUMANS.

We should not expect perfection from our government algorithms. But we should expect that agencies are able to demonstrate that algorithmic systems produce equal or better outcomes than human processes, and there must be a way for the public to interrogate and challenge such systems.

PARTICIPATE IN THE PROCESS.

The task force hopes that our recommendations will be adopted. If so, success will depend on the depth of public participation. You do not need to be a technical expert to participate. Public deliberation and engagement are crucial in determining whether an algorithm is an appropriate tool in a particular context and whether appropriate conditions for its use have been met. You are an expert on the needs of you, your family, and your community.

OTHERS

We have intentionally not directed recommendations to developers of algorithmic systems. The responsibility of these systems in government use rests with government. However, we note that there is a large and growing body of literature and efforts around algorithmic fairness, and we encourage developers to engage with this literature and other resources thoroughly and responsibly.

Acceptance of algorithmic systems should begin with assessments of needs and capabilities and how algorithmic tools might improve governmental decision-making.

However, because we in the Pittsburgh region are fortunate to have an extraordinary research community with the skills to develop algorithmic tools, it bears mentioning that we encourage that both researchers and those who might fund their work identify whether algorithms are wanted and needed both by relevant communities and agencies before embarking on efforts. Acceptance of algorithmic systems should begin with assessments of needs and capabilities and how algorithmic tools might improve governmental decision-making. As one member of the public asked at a community event, “What was the problem someone was trying to fix through developing [this] algorithm?”

VI. Conclusion

The task force's recommendations aim to equip policymakers with actionable and concrete steps to manage and mitigate potential harms of our region's public algorithmic systems while still ensuring those systems have a chance to flourish where appropriate. Public participation is a theme throughout our recommendations, inspired by our belief that government ought to be responsive to residents.

The task force cannot advise how to resolve every conflict that might arise when an agency is deciding whether to turn to an algorithmic solution. Rather, we believe that those decisions should be made in public, with informed and open debate. This should involve people considering potential harms and their associated mitigation efforts against expected improvements relative to legacy decision-making systems. Our recommendations aim to facilitate those debates about the appropriateness of algorithmic systems in an open and public forum, one where these issues are confronted publicly, against a backdrop of fulsome public disclosures, with clear opportunities for participation and comment.

We expect and encourage deliberations on our recommendations and are confident that what we have crafted is but the beginning—and not the end—of a solution for our region. And our region's governments would be wise to work constantly to improve upon these recommendations, learning from early lessons in practice.

The task force's hope is that the Pittsburgh region will become a model for others across the country similarly confronting the proliferation of algorithms in government. The cost of sitting idly by during this transformative era in municipal government could be high, especially for the most marginalized among us.

Appendix: Community Feedback Summary

Submitted by task force member LaTrenda Sherrill, Common Cause Consultants

The governmental use of algorithms in Allegheny County is a key issue of public concern. After feedback sessions with community leaders and residents, the perspective shared by many was that although algorithms created and deployed by the government can be cost-effective time-savers, they are developed in a vacuum without community consultation. Stakeholders felt that government-produced algorithms tend to deliberately produce negative results either through purposeful bias, such as discriminatory assessment tools and data, or negligence from a lack of diverse algorithm designers. These algorithms appear to promote ways to restrict resources to communities instead of connecting the support needed to change the outcomes communicated by the algorithms. The task of making decisions about what is needed in a community should be a collaborative effort and cannot be achieved without transparency, accountability, and effective public education. This research aimed to understand public perception of municipal algorithms and the community's desired role in their use. Overall, community members posed key questions for decision-makers to consider:

- How might we create an algorithm that reflects what we value as a society?
- How might we educate our community on the purpose of an algorithm and its continued use?
- How might we include the voices of those who are most impacted by an algorithm in the process of its development?

OVERVIEW OF THE COMMUNITY-ENGAGEMENT PROCESS

As algorithms are deployed and developed throughout the Pittsburgh region, there are concerns that few efforts to ensure transparency and accountability are being deployed alongside them. To understand this fully, outreach began in the spring of 2020 to solicit community feedback. The task force originally planned four initial meetings; however, only two were possible due to Pennsylvania's stay-at-home order. Outreach continued during the summer months, which led to a number of virtual gatherings (in addition to two in-person community meetings before COVID-related shutdowns), including a virtual workshop at the University of Pittsburgh's Pitt Diversity Forum, one guest appearance on a Facebook Live show, and one virtual community meeting.

For the first meeting, more than 100 organizational leaders were invited to participate in a conversation at the Community Engagement Center in the Homewood neighborhood of Pittsburgh. For the second meeting, which also took place in Homewood, the task force attracted public participation through social media. In total, 47 community members and organizational leaders participated in the two sessions.

In addition, the task force contributed to a workshop titled "Equity and Justice in Government Algorithms," which occurred as part of the Pitt Diversity Forum. The workshop was led by Michelle McMurray, task force member and then-director of grantmaking at the Pittsburgh Foundation; Erin Dalton, then-deputy director of DHS and a member of our government advisory panel; Richard Purcell, English professor at Carnegie Mellon University; and LaTrenda Sherrill, lead consultant at Common

Cause Consultants and a task force member. The workshop was facilitated by Chris Deluzio, policy director of Pitt Cyber and a task force member. A number of local community members, university officials, and even those outside of Pennsylvania participated in the conversation, which totaled slightly more than 100 people.

To better understand the broader public's understanding of algorithms, the task force participated in the weekly Facebook Live conversation titled "What Black Pittsburgh Needs to Know about COVID-19." An initiative of 1Hood Media, the series began in March as a way to keep the Black community informed about events that directly affect them. Each week, the hosts, Jasiri X (1Hood), Dr. Jamil Bey (Urbankind Institute), and Cheryl Hall Russell (BW3 Consulting), interview a specialist in accordance with that week's theme. The episode in which the task force participated garnered more than 18,000 views on Facebook.

Finally, the task force attended Lawrenceville United's monthly community meeting. The group had discussed a number of issues related to public safety; the abundant interest from Lawrenceville residents resulted in a robust discussion. Ten people attended the virtual meeting, and about 20 people watched through Facebook Live.

During the meetings, we shared an overview of the Pittsburgh Task Force on Public Algorithms, and we asked attendees to provide a definition of "algorithm." The digital tool Menti allowed participants to respond to the prompt anonymously, and at first, most respondents originally associated algorithms with advanced math or science. Once there was a concrete understanding of what algorithms were, how they worked, and how they are used to make decisions in the real world, stakeholders had a chance to comment on a few key questions related to specific algorithms. These included algorithms that are currently in use by the local police, Allegheny County DHS, and the Allegheny County courts system. Some of the questions posed:

- **What assures you about the usage of municipal algorithims?**
- **What do you feel confident about?**
- **What about this work gives you pause?**
- **What is proising about this, or could use a bit more refinem**

After commenting on specific questions, participants were asked to think more broadly about algorithms and their interaction with the public. They were asked about how communities should be consulted in an algorithm's creation and use, as well as how algorithms should be deployed and overseen. Attendees had an opportunity to express how algorithms had played a part in their lives and how they should function within communities. Below is a summary of feedback gathered at the meetings.

THEMES FROM COMMUNITY FEEDBACK

REDEFINING PURPOSE

Stakeholders identified that algorithms are useful tools, if and when the goals are to support the community and identify resource gaps. They suggested that algorithms could be used to identify root problems (especially in marginalized communities) and to allocate services, training, and resources to strengthen community support systems. There were concerns that when algorithms are not used that way, they can do more harm than good. Algorithmic tools must be able to explicitly account for

nuance and context. Community members suggested that many issues algorithms try to solve are not "black and white," so there needs to be a system in place where algorithms are used alongside case-by-case considerations. It is essential to focus on how tools will positively affect communities going forward.

CODEVELOPING WITH COMMUNITY

Stakeholders recommended that local governments make more of an effort to share issues that may require objective tools with the public. Participants suggested that local governments approach the community at the onset of a problem or issue when it arises in order to share how an algorithm can be a possible solution to that issue. Before an algorithm is deployed, the government should hold meetings with representatives of community organizations and cultural groups, as well as individual residents. Public hearings, facilitated by the local government, should be conducted so that decision-makers can hear directly from citizens. An ethical framework to evaluate and assess the implementation of a public algorithm should be created and widely accepted. Communication with the public should be the priority.

Further comments suggested an independent board of experts to review algorithmic tools for appropriate use and training. It would also help to have monthly reports of successes, failures, and corrective measures regarding algorithms. Those who have lived experience with the systems that algorithms seek to improve should be part of the solution.

An example of a tool that would benefit from this kind of public collaboration is the Pre-Trial Risk Assessment Tool. Although the assessment in its current form helps to remove bias from subjective decisions and removes some of the power prosecutors and police have to influence bail-related decisions, the tool operates in a flawed way. Some of the items on the assessment are discriminatory of age, location of residence, employment, and history. The tool does not consider the reasoning behind certain behaviors (such as failing to appear for court), nor does it consider positive factors that work in favor of the defendant. One community member noted, "A system that predicts [something] negative based on history? You will get more negativity!" In order to avoid perpetuating a cycle that prioritizes biased data, reconsider the details of the assessment and consider other factors that contextualize the data points.

When developing algorithms, decision-makers need to ensure that the results of the algorithms will reach people who matter. Government leaders should work with their communities to determine which problems can fall under the purview of an algorithm and which ones cannot. A community member asked, "Which problems (if any) do you consider too high-stakes for algorithms?"

PROMOTING TRANSPARENCY AND ACCOUNTABILITY

The community expressed that it was vital for them to know who creates and controls the algorithms. As one community member asked: "When the algorithms go wrong, who is at fault?" Community members voiced that any algorithms in use must be repeatedly examined and reviewed. Comprehensive review needs to include an algorithm's impact at technological and human levels; specifically, review needs to ensure that the tools are continuously serving their purpose. Also important, are certain groups more impacted than others based on the results of the algorithm? Unintended consequences of this work are possible, and stakeholders encourage leaders to take time to reflect and iterate as needed. There needs to be a system for updating algorithms, as well as determining how often they need to be changed. This system needs to be codified, as well.

The government should also examine which predictive models are actually working and which are not. Predictive policing is a concept that stakeholders suggest should not fall under the purview of algorithms. Because the history of policing has involved instances of bias and prejudice, the public is concerned about the possible framing bias that officers will gain based on algorithmic data. The community does not want algorithms to result in oversaturated policing. This type of algorithm optimizes arrests, which can be extremely harmful to vulnerable communities. The target of the algorithm needs to be redefined, and the government should rethink predictive policing as a way to prevent crime. It was expressed that if algorithms are showing that specific communities are "hot spots" for crime, the government should follow suit and allocate resources to those places—not send additional ways to "punish" the community. Many community members believe that an algorithmic tool would most beneficial if used for alternative prevention rather than policing.

In addition, community members emphasized that they would like to know how organizations are using the information generated from the algorithms. The Allegheny County Family Screening Tool, which purports to improve child safety through call screening, is an example of where transparency is needed from the government. Community members felt that government leaders should clarify what specific problem the tool solves and not only ensure the public that the data collected are accurate, but also that it will support the well-being of families and children.

Stakeholders expressed that there is a need to redefine and broaden the ways that local governments are interpreting data from automated decision tools in order to determine the right resources needed to combat the negative outcomes—and then make those interpretations public. Additionally, they expressed concerns about the need to broaden who is interpreting the data. Encouraging diverse perspectives that create and interpret algorithmic results is key.

CONCLUSION

The community wants to ensure that the government is addressing systemic issues; the public wants assurances that algorithms don't widen current disparities. The concern is that technology is being used as a scapegoat for erroneous decisions that people make. Algorithms run the risk of being just as biased as humans. Therefore, algorithm designers must be well-versed in racism at systematic and institutional levels. It is also essential that designers and implementers understand how algorithms have disproportionately affected people of color in the past. This will be a step in the right direction in terms of ensuring equity. At the core of these conversations, the community wants to be assured that state and local governments truly want to strengthen and rehabilitate the community as opposed to criminalize community members. The government, in all of its dealings, needs to have the community's best interests at heart.

There is still additional work to be done to engage the community in this process. In the meantime, the task force hopes to improve general awareness of municipal algorithms and cement the public's role in the development and implementation of algorithmic systems.

> "An algorithm can be used to determine what jail you go to, what your sentence would be, determine probation and parole. This could be a chain around a Black man's neck that he can never get off because of the structure."
>
> — Community member attending public task force meeting

Endnotes

[1] An exception exists in part here for facial recognition technology, which the City of Pittsburgh began to regulate through a 2020 ordinance.

[2] Section III *infra* surveys some of this literature.

[3] The task force's definition borrows substantially from Professor Rashida Richardson's work. Richardson offers the following "narrow" definition of automated decision systems: "any systems, software, or process that use computation to aid or replace government decisions, judgments, and/or policy implementation that impact opportunities, access, liberties, rights, and/or safety." Rashida Richardson, Defining and Demystifying Automated Decision Systems. *Maryland Law Review*. 2021:13, 14, https://ssrn.com/abstract=3811708.

[4] Algorithmic Accountability Policy Toolkit (AINow), 2, https://ainowinstitute.org/aap-toolkit.pdf.

[5] Richardson, Defining and Demystifying Automated Decision Systems

[6] Algorithmic Accountability Policy Toolkit, 2.

[7] Upturn and Omidyar Network Report, 9, https://omidyar.com/wp-content/uploads/2020/09/Public-Scrutiny-of-Automated-Decisions.pdf.

[8] Upturn and Omidyar Network Report, 9.

[9] For a discussion about the pitfalls of an overly broad definition (e.g., computation that assists or supplants human decision-making), see https://fpf.org/blog/automated-decision-making-systems-considerations-for-state-policymakers/.

[10] DHS refers to the system as a "predictive risk model."

[11] Allegheny Family Screening Tool (Allegheny County), https://www.alleghenycounty.us/Human-Services/News-Events/Accomplishments/Allegheny-Family-Screening-Tool.aspx.

[12] Ibid.

[13] Ibid.

[14] Frequently Asked Questions, Allegheny Department of Human Services, April 2019, 7, https://www.alleghenycountyanalytics.us/wp-content/uploads/2019/05/FAQs-from-16-ACDHS-26_PredictiveRisk_Package_050119_FINAL-8.pdf. The AFST was first tasked with making two adverse outcome predictions, although DHS eventually eliminated the second of those predictions: "The first adverse outcome predicted by the AFST is placement within two years of screen-in. Because placements are determined by a judge, and all parties (parents, children, and county) are represented by attorneys, a placement outcome is reasonably independent of the county child-welfare system." Ibid.

[15] Frequently Asked Questions, Allegheny County Department of Human Services, 10.

[16] Allegheny County Data Warehouse. https://www.alleghenycountyanalytics.us/index.php/dhs-data-warehouse/

[17] Rhema Vaithianathan et al., Allegheny Family Screening Tool: Methodology, Version 2, Allegheny County Analytics, April 2019, 3-4, https://www.alleghenycountyanalytics.us/wp-content/uploads/2019/05/Methodology-V2-from-16-ACDHS-26_PredictiveRisk_Package_050119_FINAL-7.pdf. Vaithianathan is a professor of health economics and director of the Centre for Social Data Analytics at the University of Auckland and professor of social data analytics at the Institute for Social Science Research at the University of Queensland.

[18] As part of an effort to include data from commercial insurers, the county has reportedly reached agreement with UPMC to provide data and is seeking additional agreements.

[19] Allegheny County Department of Human Services Request for Proposal, https://www.alleghenycounty.us/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=2147486301, p. 11.

[20] Allegheny County Family Screening Tool. Task force member Alexandra Chouldechova was involved in work to study the AFST (including its deployment, validation, and elements of its post-deployment validation) with this team. See, e.g., http://proceedings.mlr.press/v81/chouldechova18a/chouldechova18a.pdf.

[21] Time Dare and Eileen Gambrill, Ethical Analysis: Predictive Risk Models at Call Screening for Allegheny County, Allegheny County Analytics, April 2017, https://www.alleghenycountyanalytics.us/wp-content/uploads/2019/05/Ethical-Analysis-16-ACDHS-26_PredictiveRisk_Package_050119_FINAL-2.pdf.

[22] Allegheny County Department of Human Services, Ethical Analysis: Predictive Risk Models at Call Screening for Allegheny County, Allegheny County Analytics, April 2017, https://www.alleghenycountyanalytics.us/wp-content/uploads/2019/05/Response-to-Ethical-Analysis-from-16-ACDHS-26_PredictiveRisk_Package_050119_FINAL-3.pdf.

[23] Frequently Asked Questions, Allegheny Department of Human Services, April 2019, 5, https://www.alleghenycountyanalytics.us/wp-content/uploads/2019/05/FAQs-from-16-ACDHS-26_PredictiveRisk_Package_050119_FINAL-8.pdf.

[24] Developing Predictive Risk Models to Support Child Maltreatment Hotline Screening Decisions, Allegheny County Analytics, April 2019, https://www.alleghenycountyanalytics.us/wp-content/uploads/2019/05/16-ACDHS-26_PredictiveRisk_Package_050119_FINAL-2.pdf#16-ACDHS-26_PredictiveRisk_Package_041819.indd%3A.95389%3A262.

[25] Ibid., Section 5

[26] Ibid., Section 5.

[27] Ibid.

[28] Allegheny County Department of Human Services, Frequently Asked Questions, 20. "An external validation of the model was conducted using UPMC Children's Hospital of Pittsburgh data. Encounters were examined (by cause) using four approaches (highest risk score and an injury encounter, randomly selected risk score and an injury encounter, highest risk score before an injury encounter, and randomly selected risk score before an injury encounter). We found a positive correlation between the risk scores and medical encounters for injury, abusive injuries, and suicide, showing that the model accurately identifies the children most at risk for relevant hospital events." Ibid. See also Rhema Vaithianathan et al., Hospital Injury Encounters of Children Identified by a Predictive Risk Model for Screening Child Maltreatment Referrals Evidence from the Allegheny Family Screening Tool, JAMA Pediatrics. 2020, doi:10.1001/jamapediatrics.2020.2770.

[29] For a critical perspective on predictive policing systems, see D. Robinson and L. Koepke, Stuck in a pattern: Early evidence on 'predictive policing' and civil rights, Upturn, August 2016, https://www.upturn.org/reports/2016/stuck-in-a-pattern/.

[30] In June 2020, the task force sent a letter to Mayor Peduto expressing concern that the program lacked transparency—for example, there was no information about the program on any city websites, and the program's development and rollout lacked consultation and engagement with the public—and that the program ought to remain suspended. Mayor Peduto responded, confirming the ongoing suspension of the program. See Letter from Pittsburgh Task Force on Public Algorithms to Mayor William Peduto, City of Pittsburgh (June 16, 2020), https://www.documentcloud.org/documents/6955009-Pittsburgh-Task-Force-on-Public-Algorithms.html#document/p1; see Letter from Mayor William Peduto, City of Pittsburgh, to Pittsburgh Task Force on Public Algorithms (June 16, 2020), https://www.documentcloud.org/documents/6955007-Pittsburgh-Task-Force-on-Public-Algorithms.html#document/p1. Mayor Peduto's letter was misdated to June 16, rather than June 20—the date that it was sent to the task force.

[31] Letter from Mayor Bill Peduto, City of Pittsburgh, to Pittsburgh Task Force on Public Algorithms (June 16, 2020), https://www.documentcloud.org/documents/6955007-Pittsburgh-Task-Force-on-Public-Algorithms.html#document/p1.

[32] Zach Goldstein, Here's how Pittsburgh cops are working to predict the future. PostIndustrial, June 30, 2019, https://postindustrial.com/featuredstories/heres-how-pittsburgh-cops-are-working-to-predict-the-future/.

[33] Dylan J. Fitzpatrick, Wilpen Gorr, and Daniel B. Neill, Hot-Spot-Based Predictive Policing in Pittsburgh: A Controlled Field Experiment, November 11, 2020, https://arxiv.org/pdf/2011.06019.pdf.

[34] Fitzpatrick, Gorr, and Neill, Hot-Spot-Based Predictive Policing in Pittsburgh, 4.

[35] Fitzpatrick, Gorr, and Neill, Hot-Spot-Based Predictive Policing in Pittsburgh, 5, 6.

[36] Goldstein, Here's how Pittsburgh cops are working to predict the future.

[37] Professor Gore's March 2021 submission to the task force included access to "experiment data" but also advised, "We do not yet have permission from the Pittsburgh Bureau of Police to share the historical data we used to develop our prediction models, but we hope to get permission in the near future." By contrast, the AFST, for example, underwent an ethical review, an impact analysis, and a process evaluation—all of which have been made available to the public—and included concerns of racial bias in the system's development.

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0029
Comment from Daniel Ho

Submitter Information

Name: Daniel Ho

General Comment

Please see comment letter attached.

Attachments

Stanford_Letter

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November 30, 2023

Director Shalanda D. Young
Office of Management and Budget
725 17th St., NW
Washington, D.C. 20503

RE: OMB–2023–0020, Proposed Memorandum for the Heads of Executive Departments and Agencies

Dear Director Young and OMB Colleagues:

We are writing in response to the request for comment on the proposed draft memorandum titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" by the Office of Management and Budget (the OMB Memo).

I. Summary of Comment

We applaud the OMB Memo as an important document that generally reflects a thoughtful approach to balancing the benefits of AI innovation with responsible safeguards. This is a critical time to get government technology policy right, particularly when it comes to complex benefits systems that have been challenging to modernize and touch on the lives of millions of Americans. We believe the OMB Memo takes an important step forward to ensure that government agencies can deploy, utilize, and acquire AI in a responsible fashion.

Some of the components of the OMB Memo that we view as particularly important include:

- **Chief AI Officer:** We support the requirement to designate a Chief AI Officer (CAIO), and caution that these leaders will need resources, authority, and people in addition to the title.
- **Hiring:** We applaud the hiring surge, and urge that equal attention be given to upskilling civil servants in their understanding of AI, and the use of academic-agency partnerships.
- **Real-World Testing:** We support the requirement for "[t]esting AI for performance in real-world context," and caution that current models for technology investment, which support acquisition as a one-time event at the expense of continual development and improvement, are poorly suited for this need.

- **Resources:** We support the call for "[p]roviding or requesting resources via the budget process," and hope that the majority of those resources go towards internal talent, as government's over-reliance on vendors will be particularly problematic in the age of AI.

We write, however, to explain why some of the one-size-fits-all "minimum" procedures and practices – applied to all "government benefits or services" programs – may have negative unintended consequences, as the rules intended for higher risk applications will apply to many uses likely to offer substantial benefit and very little risk to the public. Without further clarification from OMB and a clear mandate to tailor procedures to risks, agencies could find themselves tied up in red tape when trying to take advantage of non-controversial and increasingly commodity uses of AI, further widening the gap between public and private sector capabilities. In this letter, we offer some suggestions for distinguishing between these cases and adjusting the guidance to reduce the burden while maintaining AI safety.

Some of the perspectives guiding our recommendations include:

- **Agility and Flexibility:** Because responsible AI requires learning and testing in the real world, the most sensible approach to responsible AI in government calls for agility, not red tape. Adding to what are already years-long delays in the adoption of technology will get us neither the benefits nor the protections the American public deserves.
- **Distinguishing Types of AI and Benefits:** Not all AI is the same. Nor are all benefits systems the same. The risks and rewards of various uses must be assessed distinctly for the type of AI and type of benefit program.
- **The Need for Modernization:** While great caution must be taken with the systems deployed to help Americans most in need, these are also often the systems in greatest need of modernization and innovation, and these considerations must be balanced with the needs of the public in mind.

Our suggestions for further clarification and revision of guidance include:

- **Clarifying the Definition of "Rights Impacting":** The definition of "rights-impacting" – which triggers "minimum" practices for AI in any "government benefits or services" program – should be clarified and ultimately narrowed to avoid impeding important modernization efforts, especially of the systems most in need of innovation and the systems that support those Americans in greatest need.
- **Distinguishing Among Types of AI:** AI embedded in business processes, such as optical character recognition (OCR) to digitize documents or improved search to retrieve evidence, should be treated differently than AI used to make determinations. OMB should not require agencies to go through the entire software system just to have a human check on low-risk tools that actually improve government services.
    - The extensive processes required to deploy "rights-impacting AI," especially in benefit programs, should not be triggered for these lower-level, lower-risk uses.
    - OMB must account for cases in which providing for special "AI appeals" could bring a system to its knees. As an extreme example, but that falls potentially under OMB's interpretation, the U.S. Postal Service cannot enable individuals to opt out of digit recognition – pioneered in 1965 – to send a piece of mail.

- **Avoiding Duplication in Human Review:** The requirement for human review to appeal AI-enabled decisions should not duplicate existing human review mechanisms.
- **Using the Right Baselines:** Agencies should have flexibility to deploy AI tools where algorithmic bias or disparate impacts are lower in magnitude than existing baselines.
- **Securing Data for Equity:** The federal government needs to continue efforts to enable disparity (or equity) assessments. In practice, these have proven extremely challenging for government agencies, as they often lack access to demographic data. Secure, privacy-preserving access to this data and building the competencies for conducting these assessments will be important. OIRA should be engaged to encourage streamlined application of the Paperwork Reduction Act, so that it does not contribute to this burden.
- **Enhancing Public Consultation Without Unduly Delaying AI Policy:** Public consultation on a critical topic such as government use and regulation of AI is a valuable resource to help key government decisionmakers benefit from specialized knowledge and enhance the legitimacy of their decisions while the process also serves to educate the public. That said, it is worth bearing in mind that notice and comment rulemaking can take *years,* and guidance around public consultation should be clarified to reconcile the value of consultation with support for the agile adoption of AI. To thread the needle, agencies can build in consultation mechanisms that are distinct from rulemaking or supplement but do not lengthen particular rulemaking proceedings.
- **Narrowing Consultation by "Affected Groups":** Consultation by "affected groups" should not be required for development of all AI products regardless of the function. The definition of "affected groups" should be clarified to deter capture by special interests, to avoid unnecessarily triggering notice-and-comment procedures, and to avoid otherwise unnecessarily burdening agencies for no benefit.
- **Adding Nuance to Language on Negative Feedback About AI Deployment:** Language that implies that "agencies must consider not deploying the AI" upon receipt of "negative feedback" is likely to be interpreted strictly, resulting in agencies taking <u>any</u> negative feedback as a trigger to halt, regardless of context. Instead, agencies should be encouraged to take feedback seriously without suggesting that any feedback critical of AI deployment should serve to veto otherwise sensible plans to deploy suitable AI systems.
- **Leveraging Multi-Stakeholder Processes:** In both international and domestic settings, civil servants have successfully used appropriate multi-stakeholder processes to engage key stakeholders without paralyzing policy implementation. We urge OMB to provide guidance that enables, encourages, and empowers agencies to adopt agile, multi-stakeholder design processes.
- **Feasible Notice and Explanation:** Requirements for notice and explanation should not require extensive, individualized explanations of the role of every AI system in each decision that may be technically infeasible or uninformative.

Especially within complex, high-volume benefits systems, we urge OMB to adjust requirements that risk depriving Americans from precisely the kinds of benefits systems they deserve.

We submit the following letter with gratitude and respect for the work of OMB and all the agencies and components who contributed to it.

II. Background

We are individuals who have spent decades working on government technology, both from within government and outside of government. Two of us (Cuéllar and Ho) were Principal Investigators on the report to the Administrative Conference of the United States on the use of artificial intelligence (AI) by federal regulatory agencies (Engstrom et al. 2020). One of us (Cuéllar) served as Justice on the Supreme Court of California, as author of one of the most widely adopted casebooks on administrative law (Mashaw et al. 2020), as a member of the National Academy of Sciences Committee on Responsible Computing Research Ethics and Governance, and worked on regulatory policy in two Presidential administrations, including in the Domestic Policy Council in the White House. One of us (Ho) wrote the White Paper for the National AI Research Resource (Ho et al. 2021) and serves on the National AI Advisory Committee (NAIAC), as Senior Advisor on Responsible AI to the U.S. Department of Labor, and as Director of the Stanford RegLab, which partners with a wide range of government agencies around data science and machine learning. One of us (Pahlka) served as the U.S. Deputy Chief Technology Officer, helping to found the United States Digital Service, was the founder of Code for America to bring 21st century technology to government, and wrote about the urgent need for government to get technology right to serve Americans (Pahlka 2023). One of us (Perez) served in the U.S. Department of Labor in the Office of Unemployment Insurance and conducted extensive work on process automation and improvement in the state of Colorado. One of us (Rodolfa) served as Director of Digital Analytics for the White House Office of Digital Strategy, co-created the Machine Learning for Public Policy Lab at Carnegie Mellon, and has engaged with a wide range of agencies, most recently as Research Director of the Stanford RegLab. One of us (Ray) served for over three decades in the Social Security Administration, including as the deputy executive director of the Office of Appellate Operations, winning the W. Edwards Deming Award for enhancing quality in operations twice, and has written broadly about the need for data-driven modernization of benefits systems (Glaze et al. 2022; Ray and Lubbers 2014; Ray and Sklar 2019; Bajandas and Ray 2018) We write in our individual capacity.

We believe that this is a critical, precedent-setting moment for the U.S. government to lay the foundation for the effective and appropriate use of new AI technologies for the benefit of the country. Government benefits systems, for example, touch the lives of the vast majority of Americans, but rely on procedures and technologies that are sorely in need for innovation and modernization. Roughly 66M Americans – one in every five residents – rely on Social Security benefits. Some 5.4M veterans depend on disability benefits for service-related conditions. And some 46M Americans – representing one of every four workers – are estimated to have relied on unemployment insurance (UI) benefits during the pandemic. But outdated systems, crushing caseloads, and intensive manual review can cause painful delays, alarmingly high rates of error, and lead these systems to collapse right when needed the most. For instance, while UI benefits were paid in a timely fashion for 97% of applications prior to the COVID-19 pandemic, the timeliness rate dropped below 60% as the crisis caused applications to spike. Human-based decisions of eligibility for the Supplemental Nutrition Assistance Program exhibit errors 44% of the time. Such systemic challenges are pervasive across government benefits systems (Ames et al. 2020; Pahlka 2023).

Technology is no silver bullet. But modernization of and innovation within these systems is critical, including the potential use of machine learning and data-driven systems (Ray and Lubbers 2014; Glaze et al. 2022; Administrative Conference of the United States 2022). Existing innovation often happens in

spite of high levels of risk-aversion and inertia at agencies and civil servants do heroic work engaging in path-breaking innovation under these circumstances. Demonstration projects have shown the strong potential for such systems to improve the efficiency and accuracy of benefits determinations, such as through improved search at the Patent and Trademark Office, natural language processing to spot errors in draft decisions at the Social Security Administration, and assistance with navigating complex medical records at the Department of Labor (Engstrom et al. 2020). As the Administrative Conference of the United States formally recommended, "Agencies, particularly those with large caseloads, should consider whether to use artificial intelligence (AI) tools to help quality assurance personnel identify potential errors or other quality issues."

We applaud OMB's Memo as an important document to balance the benefits of AI innovation with responsible safeguards, and are grateful for the opportunity to comment on the draft guidance. In this letter, we first highlight some components of the OMB Memo that we view as particularly important. We then spell out some of what should be clarified or revised to ensure that agencies have the flexibility, resources, and leadership to advance technology in an impactful and responsible fashion.

Our most important caution is that the OMB Memo should clarify that "rights-impacting AI" cannot be interpreted to trigger extensive "minimum" processes and requirements (i.e., *human review* separate from existing review and appeals processes, *opting out* of AI systems when such systems may be embedded in complex layers of benefits systems, *public consultation* for all AI systems pertaining to government benefits systems) for any AI-based output affecting government benefits. We show below that there are a myriad of ways in which AI can be embedded – from optical character recognition (OCR) to digitize documents to improved search to retrieve evidence to smart queuing for improved case processing and error detection of draft decisions – that should not uniformly trigger such extensive processes. Otherwise, this interpretation would deter and ossify innovation within complex, high-volume benefits systems, depriving Americans from precisely the kinds of benefits systems they deserve.

III. Detailed Comments

A. What the OMB Memo Gets Right

We applaud OMB for the extensive work, care, and thoughtfulness that went into this draft memorandum. Overall, the memorandum provides a critical step forward to enabling agencies to utilize technology while also ensuring that its risks are managed.

We highlight six elements that strike us as quite important about the OMB Memo.

1. Chief AI Officer

First, we support the calls for leadership attention to AI through the designation of a Chief AI Officer (CAIO). This follows the recommendation of the NAIAC, as well as recommendations made by Dr. Lynne Parker, the former Director of the National AI Initiative Office, and one of us in testimony to the Senate Committee on Homeland Security and Governmental Affairs. That said, as noted in those recommendations, the mere designation, whether of an existing official or a new one, is insufficient.

CAIOs will require resources, authority, and people to implement the ambitious agenda set forth both in the OMB Memo, the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Executive Order 13,960, Executive Order 13,859, and related legislative provisions. Some agencies may struggle to identify an appropriate CAIO within 60 days, given the need to onboard individuals, and we believe that flexibility is warranted here to ensure that the most qualified individuals can be hired into the position.

AI Governance Boards: Second, the mandate for the creation of AI Governance Boards strikes us as important to ensure that there is "[a]dequate attention from the agency's senior leadership." Responsible AI development, procurement, and governance requires multi-stakeholder teams that can blend technical and domain knowledge. To that effect, we believe the AI Governance Board provisions would be strengthened by (a) expressly including operations staff, who may be best situated to identify where AI adoption can benefit core operations, and (b) enabling outsiders to sit on the AI Governance Board. The first refinement follows the insight from existing innovation teams that leveraged the domain expertise of operations staff to build out "easy wins" for machine learning, such as at the Social Security Administration (Glaze et al. 2022). The second refinement builds on the fact that a number of governance boards have already recruited outside experts, given the lack of resident expertise across a range of subjects (e.g., technical expertise on generative AI, sociotechnical expertise on evaluation, data ethics). Enabling such experts to join as Special Government Employees, under the Intergovernmental Personnel Act, or as detailees could dramatically strengthen governance efforts, given uncertainty around the timeframe and scale of the AI hiring surge.

Agency-Wide Strategic AI Planning: Third, we concur with the OMB Memo's emphasis on agency-wide strategic planning around AI. Earlier work by Stanford's RegLab demonstrated inconsistent implementation of the two prior AI Executive Orders (13,960 and 13,859) and the AI in Government Act (Lawrence, Cui, and Ho 2023; 2022), pointing to the need for such strategic planning. The OMB Memo's emphasis on IT infrastructure, a comprehensive data strategy, managing information security ("authority to operate") to enable integration of modern software stacks, and the emphasis on hiring technical talent are particularly notable.

Two elements are worth emphasizing further: the availability of the National AI Research Resource (NAIRR), which will also be piloted under the recent AI EO, for participating agencies. Access to such a computing and data resource could be invaluable for agencies that may find the compute and data infrastructure for AI challenging to manage. In addition, we could not be more enthusiastic about the call for digital talent within government. The "AI hiring surge," however, will not be successful if it does not upskill, develop, and augment civil servants within agencies. The AI Training Act and subsequent implementation of federal training for acquisition officials by the General Services Administration and OMB are important steps, but such programs should be extended and embedded programmatically with much larger parts of the civil service to explore, understand, and develop competencies around AI. At the same time, we also believe that in addition to Presidential Innovation Fellows and the U.S. Digital Corps, academic-agency partnerships are particularly fruitful ways to build direct pathways from science to impact (Cody and Ho 2022; Maldonado et al. 2022; Engstrom et al. 2020). The Department of Labor, for instance, has partnered with the RegLab to explore the use of AI in benefits examination; the Environmental Protection Agency partnered with the University of Chicago for environmental

inspections; and Carnegie Mellon partnered with the Department of Homeland Security around cybersecurity. Such partnerships can be important ways to build out capacity.

Real-World Testing: Fourth, we believe one of the most important elements of the OMB Memo lies in its requirement for "[t]est[ing] the AI for performance in a real-world context." As AI moves into real-world deployment settings, such as in government programs, conventional laboratory benchmarks may be ill-suited to assess how AI will operate in practice. An AI system developed on one university's hospital patient data may exhibit radical performance drops if deployed to a different hospital setting or as patient profiles change over time (Wu et al. 2021). And because most government AI systems will integrate with human systems, such human interactions are critical to assess. Humans may over-rely, ignore, or veto forms of AI assistance (De-Arteaga, Fogliato, and Chouldechova 2020), each of which may have complicated effects on actual outcomes of interest, and which can only be assessed by testing in real-world contexts. Historically, many government technology efforts, particularly in the procurement setting, have focused efforts upfront: projects are funded for development through extensive ex ante specifications of requirements, and then launched and maintained. But the adaptability of AI is precisely what requires organizations to shift away from this paradigm towards an ethos of continually testing, adjusting, and improving. In partnerships with the U.S. Department of Labor, this has meant comparing how the adoption of an AI system integrates claims examiners via a (randomized) AB test and developing frameworks for how to do so on an ongoing basis. Rigorous evaluations of AI systems require evidence-building and hence have a close synergy with efforts under the Evidence Act, and testing for real world performance will be a central element for trustworthy adoption.

2. Procurement Recommendations

Fifth, we also applaud the OMB Memo's inclusion of procurement recommendations. The NAIAC has recently issued high level recommendations around procurement practices under the Federal Acquisition Regulation (FAR), which could be readily integrated as practices that enable improved market research and evaluation of AI solutions. Particularly worth highlighting in the OMB memo is the guidance for agencies to treat data as a critical asset and ensure that contracts retain for the Government sufficient rights to data. Timely, comprehensive, and programmatic access to data relating to all aspects of an agency's operations is a critical prerequisite for realizing the benefits of AI. Likewise, as the tools of data science and AI become more embedded in an agency's core operations, limited or restricted access to data poses a significant risk of stifling competition and innovations by drastically increasing the costs of migrating between vendors or building new tools outside of a current vendor's ecosystem. Similarly, OMB should consider guidance for ensuring that vendors provide to agencies sufficient transparency about their systems to ensure the ability to monitor, assess, and comply with responsible AI requirements. For instance, this may include making available source code, model weights, training data, or other model artifacts to inform agencies' responsible AI assessments. While intellectual property protection can be important, the inability to examine systems can often pose significant barriers to responsible oversight and clear guidance from OMB can help agencies ensure the necessary access to technical materials is reflected in their contracts.

3. Leveraging the Budget Process to Request Needed Resources

Last, we very much support the OMB Memo's call for "[p]roviding or requesting resources via the the budget process." This need for resources echoes recommendations by the NAIAC, ACUS, and in Senate testimony. Agencies have an urgent need to develop internal talent for oversight, governance, and modernization. Without federal staff, we are particularly concerned that the federal government may continue to over-rely on vendors to perform core forms of technology modernization, without sufficient internal staff to design, pilot, and evaluate solutions with an intimate understanding of the domain. At the very moment that AI and digital services move closer to core agency operations, it is the time to rethink, as one of us has argued, the conventional distinction between "commercial" and "inherently governmental functions" (Pahlka 2023). The AI revolution should not be outsourced alone.

B. Issues That Require Clarification or Modification

That said, we feel obliged to comment on several items that are in need of more substantial clarification or modification. We focus in particular on the memo's set of "minimum practices for rights-impacting AI." These "minimum practices" include a wide-ranging set of procedures, such as an AI impact assessment, ongoing monitoring, public documentation, bias assessment and mitigation, public consultation with affected groups, notice to adversely affected individuals of the use of AI potentially coupled with "explanations" of the AI decision, the provision of a mechanism to "appeal or contest the AI's negative impacts," and a mechanism for individuals to "to opt in favor of a human alternative."

1. Tailor Rights-Impacting AI to Risk of AI and Benefits Program

Because the definition of "rights-impacting AI" can conceivably swallow up most applications of AI, we urge OMB to clarify and right-size this definition. The Memo defines an AI system as "rights-impacting" if it the "output serves as a basis for decision or action that has a legal, material, or similarly significant effect" on rights, such as "[a]ccess to . . . government benefits or privileges." AI systems are presumed to be rights-impacting if AI is "used to control or meaningfully influence the outcomes" in enumerated domains, but one of the enumerated domains is exceptionally broad, covering "[d]ecisions regarding access to, eligibility for, or revocation of government benefits or services." Government benefits and services, in turn, are nowhere defined.

This definition of "rights impacting AI" scopes extremely broadly and triggers a wide range of procedures – above and beyond the Administrative Procedure Act – that could threaten core operations across a wide range of government programs. We are concerned that these provisions are not tailored to the reality of modern benefits systems, which process extremely high volumes of cases and where the need for human review and appeals processing has itself created a crisis of due process (Ames et al. 2020). These are systems that are in dire need of innovation and modernization. Requiring special processes for AI innovation – notably public consultation, notice and explanation of AI systems, special appeals systems for AI, and human opt-outs – can seriously impede important modernization efforts. We hence suggest the following revisions:

- The definition should be changed from "serves as a basis for" to "serves as *the principal* basis for"
- Section 5(b)(ii) should be changed to "control or *substantially* influence"

- The enumerated domain in Section 5(b)(J) should be limited to "*significant* government benefits or services" or benefits and services should be explicitly defined to encompass a narrower set of high-risk benefits and service programs.

Our reasons are fourfold. First, absent these revisions, the definition could implicate a vast range of government benefits. These include:

- The issuance of campsite permits by the National Park Service,
- The decision by a Postal Service clerk on what to charge to mail a package,
- Grant decisions by the National Science Foundation for award amounts as low as a few thousand to tens of millions of dollars for roughly 40,000 applications annually,
- Inspections of drug manufacturing plants, farms, and food imports by the Food and Drug Administration,
- Patent examination decisions for over 600,000 annual applications by the Patent and Trademark Office,
- Determinations of eligibility for unemployment insurance for over 200,000 applications each week,
- Audit decisions for over 700,000 annual audits by the Internal Revenue Service.

The sheer volume, heterogeneity, and diversity of government benefit programs defies simplistic application of uniform procedures. Or, as put by administrative law scholar Prof. Asimow: there is "no uniformity of a sort that can be easily governed by [] trans-substantive" provisions for these kinds of determinations.

Second, within a given domain, AI can be deployed in a wide range of ways (Engstrom et al. 2020; Cuéllar and Huq 2022). Many of the most promising uses of AI are lower-level forms of process automation or assistive technology, where humans continue to issue final decisions. The Social Security Administration, for instance, might employ AI to improve disability appeals processing by: (a) using AI to improve OCR to digitize documents; (b) aiding in the summarization, search, or translation of documents; (c) clustering solely to determine the order in which cases are decided by an adjudicator; (d) providing a check for potential errors in draft decisions with natural language processing (Glaze et al. 2022). As of 2023, the Internal Revenue Service required individuals to manually enter digits on paper tax returns, leading to a backlog of 10.2M unprocessed returns, when digit recognition has been deemed a solved problem by AI for decades (LeCun et al. 1998). (For reference, the U.S. Postal Service began to adopt OCR in 1965.) Treating all of these potential applications as equally "rights-impacting" makes little sense. Although the OMB memo describes a mechanism for the CAIO to exempt specific applications from the minimum practices triggered by "rights-impacting" applications, we have significant concerns with an orientation that starts from an overly-broad presumption of high risk and requires proactive action to identify exceptions. Beyond the unnecessary process involved, the incentives in a policy implementation context are generally poorly aligned with granting such exceptions as acting to waive requirements may carry a risk of scrutiny or sanctions. Such dynamics driven by risk-aversion are unfortunately all too common in the administrative state, particularly where technology is involved, leading to adverse outcomes such as outdated and ineffective software being deployed on modern GPS satellites based on little more than an off-hand example in policy guidance that was misinterpreted as a requirement (Pahlka 2023).

Third, many of these systems already have human review and appeals mechanisms, and the Memo should clarify that any rights to contest AI would not duplicate, and instead simply be folded into, such existing human review mechanisms. While it may be true that such processes might need to adapt to the nuances of AI systems — for instance, to guard against automation biases and over-reliance on the initial AI determinations in the appeal outcome itself — appeals of AI-informed and entirely human-derived decisions are not inherently different and should not require independent lanes. Further, it makes no sense for claimants to be able to opt out of AI assistance that sits layers within the internal process of the agency – such as AI assisted OCR, document summarization, and assistance – as this could prove technically infeasible and procedurally laborious. Nor would it make sense to provide for special "AI appeals" in instances where appeals could bring a system to its knees. It would be absurd, for instance, to require the U.S. Postal Service to enable individuals to opt out of digit recognition to send a piece of mail. Such manual review would cause undue budget pressure and could threaten the health of the postal system as a whole.

Fourth, our requested revisions clarify that process should be triggered only in instances where AI impacts are substantial. The OMB Memo should not require looking down the entire software stack to require human review of low-risk tools that improve government services. Instead, OMB should enable agencies to make determinations and focus their assessment efforts on AI tools that are *substantial* in effect. Indeed, this is the essence of how the Administrative Procedure Act protects agency discretion for general statements of policy or rules of agency organizations, procedure, or practice (Engstrom and Ho 2020). In many ways, OMB's binary rule – if (1) AI is rights-impacting, then (2) human review, opt-out, appeals, and public hearing are triggered – neglects the overarching lesson from procedural due process, which is needed to tailor process to risk. See Mathews v. Eldridge, 424 U.S. 319 (1976).

2. Clarify Obligations to Assess Algorithmic Discrimination

We applaud the Memo's requirement to proactively identify and mitigate algorithmic bias and disparate impacts. We urge clarification on two issues.

First, it is worth noting how deeply challenging disparity assessments have proven for government agencies. Many agencies lack access to demographic data that would enable such assessments. Twenty-one of 25 agencies filing equity action plans have noted serious data challenges to conduct the required equity assessment under Executive Order 13,985 (Gupta et al. 2023). We urge the administration to continue work to enable agencies to obtain secure, privacy-preserving access to be able to conduct such assessments. We speak from personal experience, with one of us having worked on the team to conduct the assessment of racial disparities in tax audits, which was a substantial effort (Elzayn et al. 2023). Such assessments can be substantial undertakings that require OMB to cooperate in other regards, such as clearance for data collection under the Paperwork Reduction Act (PRA) and improved guidance under the Privacy Act of 1974 to enable secure, privacy-protecting linkage to administrative records. Just as the Memo acknowledges in footnote 33 that the PRA should not prohibit input from stakeholder consultation, the PRA should not stand in the way of collecting demographic data necessary to conduct disparity assessments.

Second, we urge OMB to revise the draft language to account for the fact that AI tools may exhibit disparities – but ones that can be lower in magnitude than existing baselines (Kleinberg et al. 2019). Currently, the Memo provides that if "there are significant disparities [and mitigation is not possible], then agencies should not use or integrate the AI tool." This neglects the fact that existing baselines may exhibit greater disparities than the AI tool. As the IRS example illustrates, it may not be possible to reduce disparities to zero (and naively doing so itself poses challenges under antidiscrimination law (Xiang 2021; Xiang and Raji 2019; Ho and Xiang 2020)), but if the AI system reduces disparities significantly relative to baselines, there may still be a strong case for adoption (Coglianese and Lai 2021). We suggest changing this language to: "If adequate mitigation of the disparity is not possible *and the AI system does not reduce disparities relative to existing baselines*, then agencies should not use or integrate the AI tool."

3. Public Consultation

The OMB Memo provides that, "[t]o the extent practicable . . . agencies must consult affected groups" and that, "[i]n the event of negative feedback, agencies must consider not deploying the AI." We ourselves have seen extensive value to consultation, iteration, and design processes that enable a wide range of stakeholders to contribute to technology. Consultation, feedback, and user-oriented design can be of immense value to responsible development (Lu et al. 2022). Specifically, such consultation can help key government decisionmakers benefit from specialized knowledge and enhance the legitimacy of their decisions while the process also serves to educate the public.

That said, participatory design principles in AI, particularly within the public sector are far from settled. The Memo alludes to notice-and-comment rulemaking and public hearings, but such proceedings can be tremendously burdensome for agencies, with disparities in actual participation. As the Government Accountability Office reported, "[b]ased on the limited information available, the average time needed to complete a [major] rulemaking across our 16 case-study rules was about *4 years*" (emphasis added).[1] What is needed for responsible agency adoption of AI is *agility*, not burdensome processes, especially in light of the huge variety of government programs and AI systems.

In practice, these valuable user-centered development techniques that can support rapid iteration and continual improvement are too often stifled by cumbersome and lengthy processes of ensuring compliance with the PRA or undergoing notice and comment rulemaking (Pahlka 2023). Footnote 33 in the OMB Memo briefly acknowledges this potential barrier, but we would strongly encourage OMB to better clarify this point and provide direct, affirmative, and concrete guidance to agencies on how they can engage with stakeholders throughout the AI project lifecycle in an effective and timely manner.

We urge several other clarifications. First, OMB should carefully think about triggering process when none is required under the Administrative Procedure Act (APA). The APA exempts rules of internal agency organization and guidance documents from requirements of public consultation. And there is good reason for these exemptions: for the same reason that "ordinary business operations" are exempt from shareholder votes for public corporations, agencies must retain discretion to internally organize, prioritize,

[1] Even those who dispute that rulemaking is "ossified" estimate that it takes agencies *1-2 years* to complete most rules (Yackee and Yackee 2011). Notice and comment rulemaking, as currently practiced, is not the solution for technology design.

and allocate resources. Many AI systems may fall under these exemptions – e.g., an AI system to assign cases to investigators – and the OMB Memo should not contradict the APA's protection for agencies to be able to make internal allocation decisions.

Second, OMB should clarify what is meant by "affected groups." Consultation by affected groups should not be required for development of all AI products regardless of the function. External stakeholders should be consulted for externally facing AI products, such as chatbots or application systems. In other instances, such as enforcement tools, consultation could backfire (e.g., "IRS, please consult with tax cheats"). Other AI products (OCR, document digitization, scheduling, search) that are backend process supports have no direct implications for external groups, nor would such groups understand the end-to-end process to provide meaningful feedback. Adding this requirement in these types of situations would generate work with little value added for already burdened agencies. For many internal facing process improvements, the most important "affected group" are federal employees themselves, as the Memo notes. It will remain critical for the CAIO to discern when consultation is required and to ensure that the extent of consultation is tailored to the risk, scope, and impact of the AI system.

Third, OMB should clarify how agencies are expected to obtain meaningful feedback from individuals. Will agencies be afforded funding to provide stipends or the like to customers who provide input or is feedback solely voluntary? What happens when agencies are unable to secure volunteers or input from union representatives? Will this be added as a job duty for federal staff? Flexibility is required here given that participatory design in the public sector context is still largely uncharted terrain.

Fourth, OMB should change the language that implies that "agencies must consider not deploying the AI" upon receipt of "negative feedback." The current language can be misinterpreted to imply that <u>any</u> negative feedback must trigger a consideration to not deploy. But with any large group, there may be some forms of negative feedback, even when the overwhelming majority may be positive. We recommend revising this language to require the agency to "consider the implications of feedback on the design, development, and deployment of the AI."

Overall, we urge OMB to provide guidance that enables, encourages, and empowers agencies to adopt agile, multi-stakeholder design processes. Responsible AI calls for agility, not red tape.

<u>4. Notice and Explanations</u>

The OMB Memo provides that, where practical and lawful, agencies "must notify individuals when AI meaningfully influences the outcome of decisions specifically concerning them, such as the denial of benefits." In addition, the Memo encourages agencies "to provide *explanations* for such decisions and actions" (emphasis added).

Notice and explanation are, of course, linchpins of due process and administrative law. It is blackletter law that agencies must, by default, provide reasoned explanations for agency actions, including benefits denials. See Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29 (1983); Mathews v. Eldridge, 424 U.S. 319 (1976).

Yet what is concerning about the draft language is that it can be misinterpreted to imply distinct notices and explanations specific to each application of AI systems.

First, while many legislative and regulatory proposals focus on "explainable AI," it is important to note that the technical, scientific basis for AI explanations is lacking (Amarasinghe et al. 2023; Guha et al. 2024). Put simply, OMB may be requiring something that is not currently technically feasible. Footnote 37 acknowledges that explanation is "often not technically feasible," but elides over significant tensions in the requirement. "[A]gencies should characterize the *general* nature of such AI decisions," but a decision-specific "explanation[] should be . . . meaningful, useful, and as simply stated as possible." Documenting an information retrieval system may meet the former, but not the latter. Systems-level disclosures are, of course, technically feasible and may also be more likely to uncover design and development problems.

Second, it is unclear what AI-specific harms or risks OMB aims to address with these requirements, relative to existing requirements for transparency. What benefit denials are currently not already subject to forms of notice and explanation? Is the explanation intended to require an explanation of the AI system, the AI output, or something else? When notice and explanation are already required, OMB needs to provide more guidance on what, if anything, should be provided for each decision that is specific to the AI system. An administrative law judge, for instance, must provide an explanation for reaching a decision. But that should not necessarily require the administrative law judge to explain to each litigant, for instance, the search algorithm for precedents that could be embedded legal research software, the case queuing mechanism to assign cases to adjudicators, or automated guidance that may suggest materials to consult.

Third, OMB should clarify what it means to "meaningfully influence[] the outcome." In many instances, a decision may be the same, regardless of whether processed by a human or an AI system – e.g., benefit amount calculations or employment requalification requirements. When a human utilizes AI output as part of the decision process, when does that trigger this additional explanation requirement? Is the influence of the AI system what matters? When an AI system improves the accuracy of determinations (e.g., Ray and Lubbers 2014), is then a *lesser* level of explanation required for erroneous human decisions (because AI "meaningfully influence[d] the outcome" relative to the human baseline)? This would be an odd one-sided explanation requirement, and AI-specific requirements should not deter from investing in the continuous improvement of government systems. Per OMB's laudable requirement to test AI for performance in the real-world context, we should measure, evaluate, and adopt systems that improve complex government systems relative to the baseline.

Last, while we very much favor transparency of technical systems, as we have noted above, there is a long line of research that establishes that individual notices and appeals can be exceptionally poor at correcting systemic errors in benefits programs (Mashaw 1973; 1985; Ames et al. 2020; Hausman 2021), with particularly acute problems when it comes to technology (Citron 2007). Due process may be much better served through alternative mechanisms for discovering errors, such as by comparing AI assistance with a representative set of decisions reached without AI assistance (Engstrom and Ho 2020).

* * * *

We admire the accomplishments of the AI Executive Order and strongly support the core tenets of the draft OMB Memo. Because the memo will be central to how hundreds of government agencies pursue technology modernization – and, in turn, the potential use of a wide range of AI and machine learning approaches – we think it is critical that the framework promotes responsible innovation, while paying attention to the breathtaking variety of government programs and AI. A one-size-fits-all procedural solution will not serve the administrative state well and, if misinterpreted, could simply tie agencies up in red tape. By making the above clarifications and ensuring that this is a time for investment in public sector capacity, we believe the OMB Memo can ensure that process is tailored to risk and that government agencies are prepared to responsibly use, develop, acquire, and govern AI.

It is high time for the government to get technology right. With the clarifications and changes suggested above, the OMB Memo will be a pivotal step forward, and we stand ready to support the country in these efforts.

Sincerely,

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PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lpk-snek-42h3
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0030
Comment from Caryn DiMarco

Submitter Information

Name: Caryn DiMarco

General Comment

Thank you for laying out a comprehensive plan to address AI/ML. I'm glad to see the government taking a strong stand for the rights of Americans. This policy should be strengthened by requiring all federal contractors or other recipients of government money to abide by the same rules.
I would also like to see language addressing privacy threats like facial recognition and "predictive policing". We've already seen these practices used to infringe upon Americans' civil rights; it's past time to create federal guidelines that rein in these unlawful uses of AI/ML. In fact, the guidance on "acceptable risks" does not define what level of risk is acceptable. We've seen tech companies play fast and loose with customer data in extremely harmful ways, so it's obvious their level of "acceptable" will result in high levels of community harm. The limit for "acceptable risk" needs to be clearly delineated and it must apply to all AI/ML—no opt outs just because an agency (or contractor) doesn't see the need for a risk assessment.
Another concern of mine that this guidance touches on, but doesn't fully address, is the potential for huge data privacy violations. There is currently no way for any of us to opt out of having our data used to train an AI/ML system. At the very least, the government must ensure training data is protected against internal and external threats.
Finally, the public needs (and deserves) full transparency in the government's use of AI/ML. In the few years these types of tools have been around, we've seen police base their enforcement decisions on biased data (https://themarkup.org/prediction-bias/2021/12/02/crime-prediction-software-promised-to-be-free-of-biases-new-data-shows-it-perpetuates-them), schools unfairly label students as "dropout risks" thanks to racially biased systems (https://themarkup.org/machine-learning/2023/04/27/false-alarm-how-wisconsin-uses-race-and-income-to-label-students-high-risk), and healthcare systems bypass patients who live in poorer states (https://themarkup.org/organ-failure/2023/03/21/poorer-states-suffer-under-new-organ-donation-rules-as-livers-go-to-waste). These abuses were only uncovered thanks to the relentless work of investigative journalists. If AI/ML is going to become a part of our everyday society, everyday people need to have access to data about how it's used and what the results are. AI/ML itself is built to be somewhat of a black box, a fact many companies working with this tech have used to avoid scrutiny. The only way to balance out such a barrier to transparency is to share the outcomes in a way that protects citizens' privacy, yet would reveal the kind of worrisome trends that we've seen in other situations.
It would be foolish at this point to suggest that the government not use AI/ML; it's already happening, and

I don't foresee that changing. I strongly urge the OMB to strengthen its guidance on the use of these tools to further protect our civil rights and liberties.

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0031
Comment on OMB-2023-0020-0001

Submitter Information

Organization: ForHumanity

General Comment

ForHumanity is a non-profit public charity registered 501(c)3 with 1800+ contributors from 93 countries. Our primary work is AI Governance through Independent Audit of AI Systems. We support the ecosystem that establishes binary audit rules both top-down and bottom up for AI, Algorithmic, and Autonomous Systems. We are fully prepared to support the Executive Order and specific department and agencies of the Executive Branch, as we are already doing for the Department of Labor. In 2020 we were named a Trusted Ecosystem Partner of the Joint Artificial Intelligence Center (now under CDAO). Our submission is a response to the overarching summary of the OMB guidance, however we have more than enough expertise to support OMB on detailed guidance should that prove useful.

Attachments

FH response to OMB Guidance on Executive Order 14110

ForHumanity
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RE: OMB Guidance on Executive Order 14110

Authors include: Ryan Carrier, Executive Director
Michael Simon, Fellow
Esther Y. Chung, Fellow
Steve English, Fellow

Strengthening AI Governance - without establishing what the core knowledge/expertise is for Chief AI Officers, agencies and AI governance boards will have an unequal level of expertise. Subsequently, policy development and oversight will become highly divergent, which will make harmonization between agencies and boards difficult.

Advising on the governance of AI deployments in a department or agency should include all of the following:

1. Strategy
2. Technical expertise (Model knowledge, data science, testing & evaluation)
3. Alignment (scope, nature, context, and purpose)
4. Oversight and accountability
5. Necessity/Proportionality/Fundamental Rights impacts (Ethics)
6. Resource allocation
7. Data Privacy/Protection
8. Cybersecurity
9. Fairness/nondiscrimination and bias mitigation
10. Data Management and Governance
11. Risk Management
12. Trust (control, explainability, disclosure, transparency)

The aforementioned list establishes categories of knowledge and expertise required for Chief AI Officers , however there is a difference between technical expertise and expertise in Responsible AI. It is a rare person who embodies both aspects in this stage of AI's development. Examples of candidates might include someone with a PhD in Artificial Intelligence, having 10+ yrs experience designing, developing, deploying AI, accredited as a ForHumanity Certified Auditor or recognized as an expert in Risk Management and/or Algorithm Ethics. ForHumanity has found that technical expertise can be in conflict with

expertise in the areas of Responsible AI, i.e., good governance, oversight, and accountability of operating AI systems.

As you can see, AI Governance is a weighty challenge and not likely to be best solved by a single "Unicorn" individual. Instead, solving AI Governance requires a team of people who embody all of the aforementioned areas of expertise collectively. Under this advice, the Chief AI Officer is the leader of a pooled team of experts.

ForHumanity recommends that the OMB guidance establish mechanisms for governance, oversight, and accountability such as Independent Audit of AI Systems (IAAIS) as applicable. IAAIS can ensure third-party validation and verification of compliance with the remit of the Executive Order.

Advance Responsible AI Innovation - Until there has been an evaluation of whether GenAI is the right or appropriate tool for a given task, the call to "explore the use of Generative AI" furthers only one, over-hyped AI form. The FTC has warned AI providers against over-hyping their tools with attributions of "magical" capabilities. The guidance should encourage well-grounded, factual alignment of the use of AI capabilities to jobs/tasks aligned to agency missions for the purposes of serving citizens (e.g., increased efficiency, better customer service, elimination of fraud) regardless of the "type" of Artificial Intelligence.

ForHumanity would advise that each agency establish a Data Management and Governance policy, specific to the scope, nature, context, and purpose of the agency's mission, the defined task, and the nature of the data deployed (especially delineated between Personal Data and Non-Personal Data). The policy should ensure lawful usage, authenticity, authority, provenance, IP rights, and upholding the rights of citizens to access, correct and/or delete their Personal Data as well as to limit the use of Sensitive Personal Data.

OMB guidance should be equally about the removal of unnecessary barriers (as called for) and the installation of barriers when necessary to protect the rights of citizens (not in the current guidance). Specifically, in regards to Data Privacy, the OMB guidance does not provide sufficient support for the notion that Personal Data should be protected and not shared without appropriate purpose and consent from the Data Subject. While such protections for data subjects are often considered to be "barriers" by AI developers, deployers, and data scientists, these protections are in support of the fundamental human rights of Americans.

Given the socio-technical nature of AI, ethical oversight is required for the governance of AI. Ethical training and oversight should guide OMB guidance and agency implementation. AI implementation should be governed by public a Code of Ethics and Code of Data Ethics

for the Executive Branch. These policies would establish the shared moral framework of the Executive Branch and provide Ethics Officers and their committees the tools that they need to fairly adjudicate instances of Ethical Choice applicable to their specific agency and AI system scope, nature, context, and purpose.

Building a robust infrastructure for AI innovation begins with grassroots training on critical areas such as AI 101, Ethical Choice Awareness, Automation Bias and the tools to overcome it, Disability Inclusion and Accessibility Awareness, and Nudge and Deceptive Pattern Awareness. Training, like those mentioned above, will create a broadly educated workforce with sufficient knowledge of AI and associated risks to support robust and resilient development and deployment of AI across agencies.

Managing the Risk from AI usage - OMB guidance should require Algorithmic Risk Assessments conducted with human risk assessors that are diverse and represent a multi stakeholder perspective including direct stakeholders that may be internal (e.g., employees, customers, stakeholders) or external (e.g., human users, communities) and indirect stakeholders (e.g., society and the environment). Risk Assessment should be conducted across the lifecycle of the AI system (design, development, deployment, monitoring)

Risk Management should include all of the following:

1) Establishing a Duty of care for Vulnerable Populations (Children, Elderly, Disabled Persons, Immigrants) documented in the Code of Ethics. The Code of Ethics should ensure that Vulnerable Populations are represented in risk assessment.
2) Requiring pre-release testing and evaluation (like FDA clinical trials)
3) Ensuring testing and evaluation
4) Disclosing Residual Risk (defined as unmitigated risk, e.g., LLM "hallucinations" and manufactured sources)
5) Establishing Adverse Incident Reporting Systems
6) Deploying post-market and continuous monitoring
7) Requiring bias testing across datasets, architectural inputs, and outcomes that consider statistical bias, historical bias, cognitive bias, and non-response (technology barrier) bias
8) Requiring Disclosures and AI System User guides for providers to deployers to AI subjects
9) Conducting separate Ethical Risk Assessments, conducted by Ethics Officers trained in Algorithm Ethics

One approach to AI Systems procured by the US federal government might be to require third-party, independent assurance of compliance with all critical requirements as determined by OMB or the agency validated prior to acquisition. Requiring Independent Audit also ensures Compliance-by-design from suppliers and facilitates acquisition.

About ForHumanity

ForHumanity has been developing Independent Audit of AI Systems for more than 6 years, and has built an enormous infrastructure to support the Executive Order and address all common criticisms against AI audits, assessments and assurance. Currently we are drafting audit criteria, educating auditors on evaluation methods of assurance and supporting designers, developers, internal auditors and third-party independent auditors with critical tools to foster the necessary elements of the ecosystem required to execute Independent Audit of AI Systems. All of this ecosystem is available in support of the Executive Order.

Laws are reactive and designed to encourage compliance, but they do not assure it. As we have learned over 50+ years of financial audit, independent audits performed by third parties, which apply criteria required by statute, regulation, or industry custom, such as the Generally Accepted Accounting Principles (GAAP) or International Financial Reporting Standards (IFRS), create a system that encourages proactive compliance, including internal audit and compliance-by-design controls. ForHumanity believes this system represents a more trustworthy environment for the use of AI, Algorithmic and Autonomous Systems (AAA Systems) and counterbalances an industry that has gone largely unregulated while producing measurable societal harms.

ForHumanity (https://forhumanity.center/) is a 501(c)(3) nonprofit organization. Our mission is to *examine and analyze downside risk associated with the ubiquitous advance of AI, algorithmic and autonomous systems and where possible to engage in risk mitigation to maximize the benefits of these systems… ForHumanity*

We are dedicated to addressing the following areas of risk to individuals: Ethics, Bias, Privacy, Trust, and Cybersecurity in AAA Systems. ForHumanity uses an open, inclusive, and transparent process that draws from a pool of over 1800+ international contributors, from 86 countries, to construct audit criteria, certification schemes, and educational programs for legal and compliance professionals, educators, auditors, developers, and legislators to mitigate bias, support ethical oversight, protect privacy, build trust, improve cybersecurity, and drive accountability and transparency in AI, Algorithmic, and Autonomous (AAA) Systems. ForHumanity works to make these systems safe for all people and makes itself available to support government agencies and instrumentalities to manage risk associated with AAA Systems.

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0032
Comment from Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

AI has proven very beneficial in the input and output for data consumption, so it is necessary that the US continues to implement this technology for the prosperity and safety of our country. The extent of our benefits of AI must end at the collection, summation, and suggestions for this data. Any substitution/replacement of a person when it comes to the decisions for execution with the collected data must be at the hands of a person. Yes, malevolence will always be a possibility when it comes to the free will of humanity, but the exaction of justice for wrong-doers is something that our government is well practiced at. AI is not the great equalizer, and in fact is quite the opposite. It's algorithms are for finding weaknesses and differences amongst the population. There is no greater calculator than the human mind, and sentiency and reason cannot be replaced. I understand that I did not answer any of the desired questions, so consider this more of a plea. I trust that our democracy and education, along with divine providence, has placed the needed leadership for this time at the forefront of this new frontier for a reason. Remember the voice of the people, the voice that elected you and needs you, a voice that cannot be replaced by a simulation, but that is living and breathing and sustaining this country in a far greater way than an algorithm every could. Use your specialization to protect your fellow-citizens identity, security, and prosperity, without discrimination or closed doors. Really tell us how the sausage gets made. Enforce regulations for documentation for any use of AI for each data collection company - no detail too obvious, no use too repetitive, no reason too marginal. This country's trust has been broken time and time again with its legislation, and has unfortunately become complacent with the robbery of its privacy. You mustn't allow this violation to seep into the new norm, because then the foundation of our country will fall. Our duty as a nation is not to do what is easiest, but what is right. Use that irreplaceable conscience and diligence to form the next age of history.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0033
Comment from Joshua Brown

Submitter Information

Name: Joshua Brown

General Comment

Proper security controls should be placed on any AI system that interacts with data flows, both inbound and outbound, to and from an agency. There will not be tools of high quality to support defending an AI system nor filtering its outputs, whether they be actions or information, for a very long time. It would be concerning for agencies to build support onto AI systems that do not have strong mitigations for threats and risks from using these systems.

Training should be a top priority for agencies. The expectation is that all agencies will need to embrace and utilize the power of AI and AI like systems. Education needs to be treated with urgency. Safety and bias are commonly known risks; as well as ways to leverage the technology. Currently, training and education is going to technical engineering teams and some people tinkering, motivated by the hype. However, it's critical that we train all staff to understand the bias, limitations, hallucinations, trustworthy answers, and answer validation. To draw a comparison, I use the example of a statistics course. Understanding statistics and when false attributions are made with them is an important skill set that the whole workforce should understand and avoid.

Proposal:
1. Build a baseline AI Policy for all agencies to follow.
2. Scope should include private or SaaS based AI systems.
3. Build a list of technical controls for the strong authZ+MFA/authN of an AI system.
4. Implement secure data transmission protocols for both inbound and outbound data flows.
5. Use data loss prevention (DLP) tools to monitor and control data transfer.
6. Employ network segmentation and firewall rules to regulate data access and flow.
7. Deploy intrusion detection and prevention systems (IDPS) to detect and prevent malicious activities.
8. Regularly update and patch AI systems to mitigate vulnerabilities.
9. Develop and implement algorithms for output validation to detect and filter out biased or incorrect outputs.
10. Use anomaly detection systems to identify unusual AI behaviors or outputs.
11. Conduct regular risk assessments to identify and mitigate potential threats.
12. Implement incident response plans specifically tailored for AI systems.

13. Use threat intelligence to stay informed about emerging risks related to AI.
14. Develop training modules focusing on AI safety, bias recognition, and ethical use.
15. Include training on understanding AI limitations, hallucinations, and trustworthy answer validation.
16. Extend AI education beyond technical teams to all staff, similar to foundational statistics training.
17. Implement tools and practices for continuous monitoring of AI decisions for bias.
18. Establish ethical guidelines for AI use and ensure compliance through regular audits.
19. Use explainable AI (XAI) frameworks to make AI decision-making processes transparent.
20. Document AI models and their decision-making processes for review and validation.
21. Conduct periodic audits of AI systems for security, compliance, and ethical adherence.
22. Review and update AI models regularly to ensure they reflect current data and ethical standards.

Other points to consider:
1. Implement techniques like differential privacy to protect individual data within datasets used by AI.
2. Use homomorphic encryption to enable computation on encrypted data, enhancing privacy.
3. Develop AI systems to be resilient against adversarial attacks (e.g., input data designed to trick the AI).
4. Regularly test AI models against adversarial examples and update them to handle such scenarios.
5. Beyond transparency, ensure that AI decisions can be interpreted and understood by non-technical stakeholders.
6. Use tools and frameworks that provide insights into how and why decisions are made by AI models.
7. Implement continuous monitoring systems to track AI performance and behavior over time.
8. Establish feedback mechanisms to learn from AI decisions and improve models iteratively.
9. Establish a governance framework and team to oversee AI ethics, including fairness, accountability, and societal impact.
10. Regularly review and update AI policies to align with evolving ethical standards and societal values.
11. Engage with various stakeholders, including legal, regulatory, and domain experts, to ensure comprehensive AI governance.
12. Foster a culture of collaboration and transparency in AI development and deployment.
13. Stay informed about and comply with relevant AI regulations and standards, both locally and globally with corresponding SLAs.
14. Conduct legal reviews to ensure AI applications meet all regulatory requirements and ethical standards.

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0034
Comment from Karriem Perry

Submitter Information

Name: Karriem Perry

General Comment

Utility of the Document

Governance and Accountability: The document emphasizes the establishment of AI governance structures within agencies, including the designation of Chief AI Officers (CAIOs). This is crucial for ensuring responsible AI use and aligning AI initiatives with broader agency objectives.

Risk Management: The focus on risk management, particularly for AI applications impacting public safety and rights, is vital. The detailed guidelines for managing these risks show a deep understanding of AI's potential adverse impacts.

Innovation and Capacity Building: Encouraging agencies to develop AI strategies and remove barriers to responsible AI use fosters innovation. This is beneficial for harnessing AI's potential to improve government operations and services.

Probable Future Implications

Enhanced AI Adoption: The memorandum could lead to broader and more effective adoption of AI across federal agencies, potentially transforming government operations and public services.

Increased Public Trust: By mandating risk management and transparent governance, the strategy could enhance public trust in government use of AI.

Technological Advancements: This approach could spur advancements in AI technologies and practices, particularly in areas like risk assessment and ethical AI use.

Probability of Fulfillment by Federal Agencies

The probability of successful implementation largely depends on:

Resource Allocation: Adequate funding and resources are crucial for agencies to meet these requirements.

Training and Expertise: The success of this strategy hinges on the availability of trained personnel and AI expertise within agencies.

Inter-agency Collaboration: Effective implementation will require cooperation and knowledge sharing among different agencies.

Recommendations for Improvement

Enhanced Focus on Ethical AI: While the document addresses AI risks, it could benefit from a more pronounced focus on ethical AI principles.

Flexible Frameworks: Given the fast-evolving nature of AI, the strategy should incorporate flexible frameworks to adapt to technological advancements.

Stakeholder Engagement: Encouraging broader stakeholder engagement, including public participation, in AI governance can provide diverse perspectives and enhance trust.

Implementation Support: Providing agencies with more detailed guidance or support mechanisms, like shared services or centers of excellence, can aid in the practical implementation of these strategies.

Continuous Evaluation: The strategy should include provisions for regular evaluation and revision of AI governance frameworks to align with emerging global best practices and standards.

PUBLIC SUBMISSION

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0035
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Legal Aid of Arkansas

General Comment

See attached file(s)

Attachments

Legal Aid of Arkansas--OMB Guidance Comments--SUBMISSION

LEGAL AID of ARKANSAS
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November 30, 2023

Office of Management and Budget

Re: OMB–2023–0020

Comment on Draft Memorandum titled "Advancing Governance, Innovation and Risk Management for Agency Use of Artificial Intelligence"

Legal Aid of Arkansas represents low-income Arkansans in civil legal matters implicating domestic violence, public benefits, housing, education, consumer protection, income tax, reentry, and civil rights. Through this work, we have seen the real-life harm caused by AI systems, which, regardless of any underlying intentions, are usually pernicious. Thus, we respond to your request for information with the aim that the ground-level harm be understood and accounted for when considering federal agency use of AI.

By way of background, Legal Aid of Arkansas has been a national leader fighting AI-related harms inflicted on low-income and otherwise structurally disadvantaged communities. We helmed one of the first successful campaigns against algorithmic decision-making in government services and, so doing, ended the state government's use of an algorithm to cut the Medicaid home-care benefits of disabled and elderly Arkansans.[1] When the state replaced that system with another that violated our clients' due process rights, we successfully sued state officials *in their individual capacities*, overcame the officials' qualified immunity, survived an appeal to the Eight Circuit of Appeals,[2] and reached a $500,000 settlement that also requires systemwide changes to

[1] *Jacobs v. Gillespie*, 3:16-cv-119 (E.D. Ark. Nov. 1, 2016); *Ark. Dep't of Hum. Servs. v. Ledgerwood,* 2017 Ark. 308, 4, 530 S.W.3d 336, 340 (2017); *Ledgerwood v. Arkansas Dep't of Hum. Servs.*, 60CV-17-442 (Pulaski County Circuit Court, May 14, 2018); Danielle K. Citron & Ryan Calo, The Automated Administrative State: A Crisis of Legitimacy, 70 Emory L. J. 797 (2021), *available at* https://scholarlycommons.law.emory.edu/elj/vol70/iss4/1/; The Verge, Colin Lecher, What Happens When an Algorithm Cuts Your Healthcare? (March 21, 2018), *available at* https://www.theverge.com/2018/3/21/17144260/healthcare-medicaid-algorithm-arkansas-cerebral-palsy

[2] *Elder v. Gillespie*, 54 F.4th 1055 (8th Cir. 2022)

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agency practices and policies.[3] Outside of Medicaid, we litigated one of the first state-based Freedom of Information Act case regarding access to information about the state's use of AI systems, ultimately obtaining a ruling from the Arkansas Supreme Court that the state unemployment agency could not withhold information about a fraud-detection algorithm that delayed vital benefits to more than 90,000 people.[4] In addition, we have fought AI-related determinations in various benefit programs, including Medicaid, Unemployment, and Supplemental Security Income, through dozens of administrative hearings, non-litigation administrative advocacy, and extensive community education efforts.

Based on this expertise, Legal Aid of Arkansas co-founded the Benefits Tech Advocacy Hub (btah.org) with Upturn and the National Health Law Program to help frontline advocates throughout the U.S. resist the harmful use of technology in public benefits.

I. The draft memo's framework for rights- and safety-impacting AI uses contains the potential to meaningfully prevent and curb harm to low-income and otherwise marginalized people.

The draft memo (also referred to here as "guidance") contains many laudable ideas. The rights- and safety-impacting framework (p. 10-13) sensibly covers use cases carrying significant risk for harm across many sectors important to Legal Aid's client communities: public benefits, health care, education, employment, housing, credit, policing, child welfare, environmental hazards, and immigration. One notable oversight, however, is defining the use of automated translation of non-English languages as "rights-impacting" only in the context of immigration proceedings when automated translation is used in government services of all sorts (e.g., public benefits, child support, courts, etc.) to the detriment of people who do not speak English fluently or who prefer to conduct their business primarily in another language. Defining automated translation as "rights-impacting" in these other spheres is a necessary revision to the guidance.

The associated minimum practices (p. 13-21) are also critical. Not only do they provide for vital pre- and post-deployment assessment, monitoring, and individualized protections, but also they contemplate that certain systems *cannot* be used. This is a critical provision that rejects the inevitability of AI adoption. Equally important is the requirement for an "opt-out" such that path dependency does not dictate continued use of an untenable AI system. State agencies, for example, have continued with harmful, even illegal, systems to administer Medicaid, SNAP, or Unemployment Insurance because of sunk costs and the inability to revert to the pre-AI methodology for making decisions.

With these constructive provisions as a starting point, the remainder of these comments focuses on ways to ensure that their potential for meaningfully avoiding and minimizing harm from AI systems is fully

[3] *E.g.,* Arkansas Advocate, Sonny Albarado, Disabled Arkansans Obtain Settlement and Program Improvements in Lawsuit Against DHS Officials, August 7, 2023, *available at* https://arkansasadvocate.com/2023/08/07/disabled-arkansans-obtain-settlement-and-program-improvements-in-lawsuit-against-dhs-officials/

[4] *Arkansas Dep't of Com., Div. of Workforce Servs. v. Legal Aid of Arkansas*, 2022 Ark. 130, 645 S.W.3d 9 (2022)

realized. Accordingly, these comments address the procedural and substantive limitations of the minimum practices (Sections II and III), the definition of AI systems that needs slight reworking (Section IV), the need for increased transparency mechanisms (Section V), and the prospect of operationalizing this guidance for federal agency oversight of state agencies directly administering programs (Section VI).

II. The guidance provides too many openings for agencies to evade the minimum practices required for meaningful harm prevention and reduction.

The ultimate efficacy of the minimum practices will, of course, depend on implementation. Unfortunately, the guidance features several ways agencies can evade its requirements.

First, the guidance memo's provisions for extensions of time for minimum practices (p. 14) threatens endless delay for agencies that have existing capacity limitations. While the memo posits OMB approval of any such request, it does not provide significant guidance as to OMB's exercise of its discretion or any firm limitations on how long an extension can last or how many extensions may be granted. Moreover, this assumes that OMB has sufficient capacity to meaningfully review agencies' extension requests. To prevent misuse of extensions, OMB can consider imposing hard limits on the amount of time an agency can extend, defining the criteria used to determine extensions, and ensuring that OMB has sufficient review capacity.

Second, the memo's provisions for waivers (p. 14-15) invite boundless claims that the minimum practices requirements will "create an unacceptable impediment to critical agency operations." Agencies tend to adopt AI under the guise of improving efficiency or rationality of decisions. Combined with existing agency capacity limitations, these given reasons can justify a waiver in nearly any situation where AI is used. And, there is no external check, as the agency's Chief Artificial Intelligence Officer appears to be the sole arbiter of the waiver provision. While the waiver decision must be reported to OMB, OMB does not have authority to reject the waiver. Even were OMB to have such authority, the same concerns stated above about criteria, length, and OMB capacity persist. Given the possibility for misuse, OMB can consider eliminating the waiver provision entirely. Absent that, OMB can ensure a meaningful external review process that uses well-defined criteria to make decisions about waiver requests *and* includes regular periodic review of the waiver to ensure that present circumstances continue justifying it.

III. Even where they apply, the minimum practices will not necessarily prevent AI-related harms.

a. The procedural requirements for adoption and the related balancing tests lack robust independent review provisions.

The memo lacks any definite redlines—altogether prohibited uses of AI without any exception. Such redlines are appropriate in circumstances involving fundamental human rights and protection against AI-related exacerbation of inequities, including facial recognition, benefits determinations, health care, and emotion detection, among others. Instead of clear bans, the guidance provides for abandoning AI use when, pursuant to an impact assessment, "the benefits do not meaningfully outweigh the risks" (p. 15). Or, with respect to real-world testing, the guidance contemplates AI use only when "the AI will achieve its expected

benefits while sufficiently mitigating risks." (p. 16). In both contexts, the agency decides the balancing test, though the guidance provides for an in-agency "independent reviewing authority" that was not "directly involved in the system's development." (p. 16).

In practice, however, the memo's minimum practices are likely to require only a more involved process for AI adoption rather than a meaningful backstop against it.[5] Consider the practical circumstances of AI adoption. As a starting point, no agency is mandated to use AI. Thus, any agency considering AI is going to be doing so because it thinks AI will serve a useful purpose with defensible adverse impacts. The agency will pursue the AI systems in collaboration with vendors, hopefully using good procurement practices[6] that protect against bad vendor outputs. The finalized contract cements and intensifies the agency's momentum towards adoption. Compliance with the guidance's testing and assessment requirements should provide the agency with useful information about adverse impacts. At that point, the agency would likely make revisions rather than abandon the project. If, after that, the agency becomes convinced that the AI system is simply unworkable, the agency can abandon it and absorb the significant sunk costs. However, since incurring significant costs for an ultimately unworkable system may draw more intense short-term scrutiny than implementation with delayed impacts, the agency—or at least its project directors—has an incentive to explain away any distant adverse impacts and implement the AI.

The only point where the guidance constrains adoption is if the independent review process is thorough and undertaken by an entity with sufficient capacity. Unfortunately, the guidance contains no specifics to ensure that this review will be meaningful and that organizational dynamics do not lead to rubber-stamp approval. Moreover, the independent reviewer will apply tests balancing "benefits" and "risks" without the guidance defining what those mean or specifying the parties for whom the benefits and risks should be considered. Benefits to the agency in claimed efficiencies or to a broad conception of "the public" (p. 10) in governmental resource savings could easily overshadow risks to people subject to the AI, like benefits recipients. This concern is especially salient if the agency considers the notice and redress provisions as sufficient safeguards to minimize individual harm (they are not—see the comments below).

While the guidance's language about "advancing equity, dignity, and fairness" (p. 18) provides some context for the balancing test, OMB can consider making the connection explicit. Moreover, concepts of

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[5] To be clear, the impact assessment and testing provisions, including the searching review of the quality of data, are important and laudable. These comments simply clarify that they are not sufficient to prevent harm without a more robust independent review mechanism.

[6] The OMB's guidance procurement provisions do not contain accountability and redress practices to ensure appropriate vendor output. (p. 21-22). The data protections described are insufficient on their own. For guidance on tech-based procurement practices, *see, e.g.,* Rashida Richardson, Best Practices for Government Procurement of Data-Driven Technologies (May 2021), *available at* https://ssrn.com/abstract=3855637; In The Public Interest, Harnessing the Power of Procurement, *available at* https://inthepublicinterest.org/new-report-harnessing-the-power-of-procurement; and Ford Foundation, A Guiding Framework to Vetting Public Sector Technology Vendors, *available at* https://www.fordfoundation.org/work/learning/research-reports/a-guiding-framework-to-vetting-public-sector-technology-vendors/.

equity, dignity, and fairness—and the risks that AI will undermine them—involve a broader analysis than merely mitigating or preventing "algorithmic discrimination or bias" or "disparate impacts." AI can be unbiased or non-discriminatory (as courts conceive of bias or discrimination) while still being harmful, such as by cutting benefits for everyone on a program or making harmful decisions using factors that do not align neatly with protected classes. Thus, OMB can consider fleshing out the concepts of "benefits" and "risks" by connecting them to notions of equity, dignity, and fairness conceived more broadly than in basic non-discrimination terms.[7] Risks include, among other things, loss of public benefits or other important opportunities (e.g., in housing, credit, employment, or education), privacy invasions, and limitations on labor rights (such as workplace safety or organizing rights), even when the harm does not constitute discrimination prohibited under existing jurisprudence.

Meaningful constraints on agency adoption of AI are not found elsewhere in the guidance. The provisions requiring consultation with affected groups (p. 19), while important, do not functionally limit agency decision-making, particularly when their input is not connected to the previously discussed independent review provisions. Linking the consultation requirement and resulting input to the independent review process would strengthen both the public's role in agency AI adoption and the reviewing authority's independence, or at least the appearance thereof. If nothing else, the reviewing authority would be considering information from sources other than their agency colleagues.

b. The notice provisions improperly and illegally condone insufficient explanations of agency actions and deprive people of information needed to meaningfully challenge AI decisions.

The notice and human review provisions (p. 20) are specific to individuals affected after the AI has been implemented and do nothing to curb its adoption or the specifics of its implementation. As written, the guidance does not ensure they provide meaningful post-deployment harm reduction.

Notice, of course, is vital to the ability of individuals harmed by AI to contest it. Regardless of the guidance's instruction, adequate notice of adverse actions in any situation involving liberty or property interests is required by the Fourteenth Amendment's due process provisions. Given both constitutional requirements and notice's central role to redressability and fairness principles, the guidance fails where it countenances less-than-full notice simply because "exact explanations of AI decisions are not technically feasible." (p. 20, footnote 37). People adversely impacted must receive the specific reasons for a decision

[7]The non-discrimination regime is one vital aspect of the risk analysis, but it is not the only one. Besides not capturing all the harms AI regularly inflicts, the non-discrimination regime has practical limitations to its protections. Proving intentional discrimination—the most broadly available way individuals can enforce non-discrimination laws—is difficult because a plaintiff must show animus, a discriminatory motive, or deliberate indifference to ongoing mistreatment, a tall task when bad actors do not proclaim their biases. Meanwhile, the disparate impact framework, which individuals may use only under certain non-discrimination laws (e.g., the Fair Housing Act and Title VII of the Civil Rights Act) and cannot use under others (e.g., Title VI), does not require a showing of intent but usually requires sophisticated data analysis capabilities to establish the impact. This presumes access to data *and* to the expertise to analyze it. The reviewing body or the wider public may not have both.

so that they can fight it. As we learned in Arkansas during dozens of administrative hearings to contest algorithmic cuts to Medicaid home-care benefits, deficient notice leads to sham proceedings where decision-makers inevitably defer to the AI's decision, a tendency known as "automation bias."[8] Instead of expecting the rights of people adversely affected to bend to technological feasibility, agencies must plan for AI use to bend to constitutional rights and robust redress principles. OMB could promote this proper arrangement of legal requirements and principles by, for example, prohibiting agencies from using AI to make decisions where "exact explanations" are impossible.

c. Human oversight is illusory because AI decision-making displaces agency reviewers' ability to operationalize and apply alternative criteria.

The provisions for human consideration get things similarly backward. For rights-impacting functions, humans, not AI, should be making all decisions. While humans may also make decisions based on irrational criteria, bias, or other improper grounds, contesting human-made decisions is more straightforward and feasible than contesting AI-made decisions. In Arkansas, for example, prior to the AI system, a nurse made decisions about the amount of Medicaid home-care hours a disabled person needed. If there was disagreement, the person could ask the nurse questions, explain or demonstrate the need for a certain amount of care, and, if that was not persuasive, put on evidence at an administrative hearing about why the nurse's stated reasons for a given decision were wrong. As described below, once AI became involved, that was no longer possible—the decision was made by undiscernible criteria with no place for a nurse's judgment and no ability to establish that the AI's judgment was wrong.

Even accepting the premise of human review as a backstop to AI decision-making, the guidance is inadequate. People adversely affected shouldn't have to ask for a separate human-driven consideration process, which adds burdens to a person already facing the difficulty from the adverse agency decision. Moreover, the guidance does not offer any requirements to ensure that the human review will be meaningful and independent from the initial AI decision. That is, the guidance does not account for automation bias or provide concrete ideas to defuse it.

Whether review happens before or after, the notion of human review of any AI decision contains a fundamental flaw: the collapsing and elimination of *independent* criteria into and by the automated system. To return to the Arkansas example, AI was deployed in the Medicaid program to determine how much time from a caregiver is medically necessary for an elderly or disabled person with significant functional limitations to live at home (and not enter a nursing home). Medical necessity is a concept susceptible to various kinds of measurement: the severity of a person's function limitations (i.e., a person who requires more assistance with mobility or toileting will need more care generally than someone who requires less) or, alternatively, to the amount of time it takes to perform specified care tasks (e.g., one hour to bathe, a half-hour to groom, etc.). However, the AI purports to measure necessity through specific criteria that may not be easily discernible or directly related to the care needed (e.g., roughly 60 possible factors arranged in different "constellations," some of which involved, for example, whether someone had diarrhea in the last three days) or, with more advanced systems, criteria that may not even be known. With alternative forms of measurement displaced and the AI's criteria irrational, unintuitive, or unknown, how will a human

[8] *See, e.g.,* Danielle Citron, Technological Due Process, 85 Wash. U. L. Rev. 1249 (2008).

meaningfully interrogate the AI's recommendation? Even assuming the displaced criteria can be operationalized by a complex agency that has since left it behind, under what circumstances is it used? How does this use of different criteria in different situations affect general administrability and other program participants? And, if humans have to review all or many decisions of a particular type, what efficiency is AI creating in the first place? Why even use it? These dynamics are inevitable where AI is seeking to make discretionary decisions in other ambits, too, including in benefits fraud determinations, child welfare investigations, and criminal risk assessments.

Ultimately, OMB's concept of human review is not an effective way to prevent or remediate on-the-ground harm. OMB can re-evaluate its use of human review. Rights-impacting uses should never be made by AI. Where AI use is permissible, human review must be robust and use reasonable criteria that is easily operationalized and independent from any criteria the AI uses.

IV. Item Two of the "technical context" accompanying the definition of AI provides additional opportunities for agencies and vendors to evade the memo's demands.

Given the general difficulties defining AI, the guidance's broad approach is praiseworthy. However, Item Two under the "technical context" (p. 23) requires re-examination. It provides that "This definition of AI does not include robotic process automation or other systems whose behavior is defined only by human-defined rules or that learn solely by repeating an observed practice exactly as it was conducted." The middle part—"other systems whose behavior is defined only by human-defined rules"—risks exempting automated decision-making by algorithms. For example, the algorithm used by Arkansas's Medicaid program to determine care needs was arguably such a system: 21 single-spaced pages of "if-then" statements operationalized by software to produce a specific level of care needed.[9] Many other automated functions in public benefit programs are or can be similarly expressed, including fraud detection and enforcement of asset or resource limits. While humans may be determining what specific "if-then" statements to use through sophisticated data analytics and statistical modelling—some of which may involve machine learning or other AI-related techniques—the guidance's focus on the end-use behavior would not necessarily capture them.

Of course, these algorithms are no less pernicious than other forms of rights-impacting automated decision-making. They feature the same risks and people require the same protections. Thus, OMB can consider eliminating this phrase from Item Two and consider other rights-impacting use cases that could fall outside the provided definitions.

V. The guidance lacks sufficient protections for public transparency.

OMB can consider ways to ensure the public's access to information about AI systems that may be proprietary or for which federal agencies may try to assert Freedom of Information Act exemptions. The AI Use Case Inventory (p. 4) is a start but is not sufficient to ensure the robust transparency needed to promote true accountability.

[9] The algorithm is attached as an exhibit to these comments.

Leveraging the value of federal contracts to vendors, agencies can ensure that the public has access to the AI systems themselves and data used to develop them. The procurement process can involve a transfer of intellectual property and the related data or a license with express use permissions needed for public sharing. Agencies need not be put in a position where they assert Freedom of Information Act exemptions on behalf of vendors who build AI systems for public use with rights- or safety-impacting consequences.

Even if the AI systems or related data may not be directly accessed, OMB can consider requiring agencies to ensure that they maintain intelligible documents (whether developed by the vendor or the agency with appropriate vendor input) explaining *in detail* how the systems work, key criteria used, information about the data used, relevant assumptions, and the like. While the guidance's individualized notice provisions have the problems mentioned above, its language regarding notice content (p. 20, Footnote 37) could guide development of these supporting documents. They should be "technologically valid, meaningful, useful, and as simply stated as possible" with "more comprehensive explanations" for higher risk uses and more complicated systems.

Moreover, regardless of whether the agency may disclose the AI system and the related data, agencies can be required to keep and disclose supporting documentation showing issues encountered, impact projections, agency-specific data sources and analyses, changes considered in all pre-deployment developments, and post-deployment monitoring and changes. In this way, the public can at least partially understand the AI's functionality and the agency's process for evaluating, implementing, and monitoring it.

Access to AI systems, related data, and supporting documentation is particularly important in safety- or rights-impacting uses because opacity is often a fundamental obstacle to any accountability, be it through legal means, investigative journalism, or public education campaigns. In high risk uses (i.e., safety- and rights-impacting uses), the private interests in intellectual property and trade secrets should give way to the public interest in government oversight and harm prevention.

VI. To the extent OMB has authority, OMB can shape how federal agencies oversee state AI use in public benefit programs by using the present guidelines as a regulatory floor.

Given this guidance's reach, Supplement Security Income (SSI), Social Security disability (SSDI), Social Security retirement benefits and veterans' benefits are the public benefits programs likely to be most affected. SNAP, Medicaid, and Unemployment are largely administered by states, at least with respect to how recipients access benefits. State use of AI in these programs is largely unregulated, and, in this void, states operate AI systems that devastate recipients at a scale and speed not possible with analog methods.

Legal Aid of Arkansas's concern is that this void gets filled. The President's Executive Order requires some of the implicated agencies to take action with respect to AI in benefits programs. The corresponding federal oversight agencies—CMS, FNS, and DOL—can adopt measures more protective than what is in this guidance and exercise more influence over state AI use to prevent recipient harms. To that end, these agencies can develop guidance prohibiting certain uses of AI and, where AI is permissible, specifying detailed procedural requirements (including robust testing and public participation) and safeguards,

including ways to revert to non-AI decision-making. They can exercise their review and approval authority over state plan submission requirements to deny AI use where prohibited or where the state has not demonstrated full compliance with procedural requirements and safeguards. Then, they can monitor approved state uses upon implementation through mandatory oversight and reporting requirements and regular consultation with affected communities and frontline advocates. When deficiencies are identified, the federal agencies can require states to stop using AI or institute immediate corrective action.

To the extent OMB has authority or influence, it can consider these agencies' plans and ensure they are not more permissive of AI use than the present guidance.

Conclusion

Legal Aid of Arkansas appreciates the opportunity to comment on OMB's guidance. It is our hope that OMB keeps the overarching safety- and rights-impacting frameworks while considering ways to rework the oversights, limitations, or deficiencies identified here. We also intend for any material cited here to be considered part of the administrative record. Please let the undersigned know if OMB requires separate submission of the cited materials.

Respectfully,

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*************************************************************************************
****;
**  PROGRAM:          SUITE9_CASEMIX_RUG-III-HC_G1_V2.1_P_2015-09-08.txt
 **;
**  BY:               Brant Fries, Pil Park
 **;
**  CHECKED BY:
 **;
**  DATE:             11/27/07
 **;
**  REVISION DATES:   1/16/09 (BEF), 11/28/11 (KLS), 03/19/12 (KLS), 10/21/13 (BEF)
 **;
**                    12/09/13 (KLS) , 09/08/15 (BEF)
 **;
**  PURPOSE:          CODE FOR RUG-III/HC SYSTEM
 **;
**  SOURCES:
 **;
**  BASED ON:         interRAI SUITE, VERSION 9
 **;
**  APPLIES TO:       SEE APPLICABILITY MATRIX
 **;
**  DESCRIPTION:      RUG-III/HC is a resource-intensity (case-mix) measurement
 **;
**                    system designed for use in home care programs
 **;
**  REFERENCES:       FOR DETAILS, SEE ARTICLE BY BJORKGREN, FRIES, SHUGARMAN
 **;
**                    - TESTING A RUG-III BASED CASE-MIX SYSTEM FOR HOME CARE
 **;
**                    Canadian J.  Aging, 19 (Supp.  2):106-125, (Fall) 2000.
 **;
**  INTERPRETATION:   See article above for basic description.  This code is based
 **;
**                    on RUG-III originally developed for use in nursing homes with
 **;
**                    the MDS Version 2.0 assessment form.  The code here crosswalks
 **;
**                    the RUG-III/HC system, designed for the MDS-HC V2.0 instrument
 **;
**                    to the interRAI Suite interRAI HC (Home Care).  In doing so
 **;
**                    fewer iCODE items are missing than for the MDS-HC V2.0.
 **;
**  INPUT VARIABLES:  The interRAI HC Version 2.0 variables required by the SAS
 **;
**                    code for interRAI RUG-III/HC classification are given below.
 **;
**                    For each variable, the interRAI 'iCODE' item and label are
 **;
**                    given.  Specification of these 'iCODES' and links to specific
 **;
**                    items in the interRAI HC are available in the iCODE MATRIX,
 **;
**                    available from interRAI.
 **;
**
 **;
**                    Before execution of RUG-III classification using the SAS code,
 **;
**                    all 58 iCODE items must be scanned for valid values as given
 **;
**                    in the list below.
```

```
 **;
**
 **;
**                    NOTE: IN THE LIST BELOW, ITEMS WITH AN (S) IN THE DESCRIPTION
 **;
**                    REQUIRE THE CHA FUNCTIONAL SUPPLEMENT IN ADDITION TO THE CHA,
 **;
**                    ITEMS WITH AN (A) WILL BE MISSING ON THE interRAI ASSISTED
 **;
**                    LIVING INSTRUMENT (RUG-III/HC CAN BE COMPUTED FOR THIS
 **;
**                    INSTRUMENT, BUT IT IS NOT KNOWN HOW WILL IT WILL PERFORM)
 **;
**
 **;
** VARIABLES  (NOTE ALL NUMERIC EXCEPT FOR ICD-9 CODES)
 **;
**
 **;
**      ITEM    VALID VALUES           DESCRIPTION
 **;
**      -----   ---------------  ------------------------------------------------
 **;
** NOTE:  THE FOLLOWING 3 ITEMS ARE USED IN THE COGNITIVE PERFORMANCE SCALE (sCPS)
 **;
**          (sCPS) - NOTE THAT IT ALSO USES EATING PERFORMANCE (iG2j) - SEE BELOW
 **;
**   1) iC2a       01              Short-term memory OK
 **;
**   2) iC1        012345          Cognitive Skills/Daily Decision Making
 **;
**   3) iD1        01234           Making Self Understood
 **;
**
 **;
** OTHER VARIABLES
 **;
**   4) iE3a       0123            Wandering frequency (S)
 **;
**   5) iE3b       0123            Verbal abuse frequency (S)
 **;
**   6) iE3c       0123            Physical abuse frequency (S)
 **;
**   7) iE3d       0123            Socially inappropriate behavior frequency (S)
 **;
**   8) iE3e       0123            Resists care frequency
 **;
**   9) iE3f       0123            Inappropriate sexual behavior frequency (S)
 **;
**  10) iG1aa      01234568        Meal preparation IADL
 **;
**  11) iG1da      01234568        Medication Management IADL
 **;
**  12) iG1ea      01234568        Phone use IADL
 **;
**  13) iG2g       01234568        Toilet transfer ADL Self-Performance (S)
 **;
**  14) iG2h       01234568        Toileting ADL Self-Performance (S)
 **;
**  15) iG2i       01234568        Bed Mobility ADL Self-Performance (S,A)
 **;
**  16) iG2j       01234568        Eating ADL Self-Performance (S)
 **;
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** 17)	iI1e	0123	Hemiplegia/hemiparesis (S)	
**;				
** 18)	iI1f	0123	Multiple sclerosis (S)	
**;				
** 19)	iI1i	0123	Quadriplegia (S)	
**;				
** 20)	iI1q	0123	Pneumonia (S)	
**;				
** 21)	iI1t	0123	Diabetes mellitus	
**;				
** 22)	iI2aba	CCC.CC	ICD-9 Code	(for Cereb.Palsy/Septicemia)
**;				
** 23)	iI2bba	CCC.CC	ICD-9 Code	(for Cereb.Palsy/Septicemia)
**;				
** 24)	iI2cba	CCC.CC	ICD-9 Code	(for Cereb.Palsy/Septicemia)
**;				
** 25)	iI2dba	CCC.CC	ICD-9 Code	(for Cereb.Palsy/Septicemia)
**;				
** 26)	iI2eba	CCC.CC	ICD-9 Code	(for Cereb.Palsy/Septicemia)
**;				
** 27)	iI2fba	CCC.CC	ICD-9 Code	(for Cereb.Palsy/Septicemia)
**;				
** 28)	iI2abb	CCC.CC	ICD-10 Code	(for Cereb.Palsy/Septicemia)
**;				
** 29)	iI2bbb	CCC.CC	ICD-10 Code	(for Cereb.Palsy/Septicemia)
**;				
** 30)	iI2cbb	CCC.CC	ICD-10 Code	(for Cereb.Palsy/Septicemia)
**;				
** 31)	iI2dbb	CCC.CC	ICD-10 Code	(for Cereb.Palsy/Septicemia)
**;				
** 32)	iI2ebb	CCC.CC	ICD-10 Code	(for Cereb.Palsy/Septicemia)
**;				
** 33)	iI2fbb	CCC.CC	ICD-10 Code	(for Cereb.Palsy/Septicemia)
**;				
** 34)	iJ2h	01234	Delusions	
**;				
** 35)	iJ2i	01234	Hallucinations	
**;				
** 36)	iJ2j	01234	Aphasia (S)	
**;				
** 37)	iJ2n	01234	Vomiting	
**;				
** 38)	iJ2q	01234	Fever (S)	
**;				
** 39)	iJ2r	01234	Internal bleeding (S)	
**;				
** 40)	iJ6c	01	End-stage disease, 6 or fewer months to live (S)	
**;				
** 41)	iK2a	01	Weight loss	
**;				
** 42)	iK2c	01	Dehydrated (A)	
**;				
** 43)	iK3	0123456789	Mode of nutritional intake (S,A)	
**;				
** 44)	iL1	012345	Most severe pressure ulcer (S)	
**;				
** 45)	iL4	01	Major skin problems (S)	
**;				
** 46)	iL5	01	Skin tears or cuts (S)	
**;				
** 47)	iL7	01234	Foot problem (S)	
**;				
** 48)	iN2a	0123	Chemotherapy (S,A)	

```
 **;
**  49) iN2b      0123            Dialysis (S,A)
 **;
**  50) iN2d      0123            IV medication (S,A)
 **;
**  51) iN2e      0123            Oxygen therapy (S,A)
 **;
**  52) iN2f      0123            Radiation (S,A)
 **;
**  53) iN2g      0123            Suctioning (S,A)
 **;
**  54) iN2h      0123            Tracheostomy care (S,A)
 **;
**  55) iN2i      0123            Transfusions (S,A)
 **;
**  56) iN2j      0123            Ventilator or respirator (S,A)
 **;
**  57) iN2k      0123            Surgical wound care (S,A)
 **;
**  58) iN2n      0123            Turning/repositioning program (S,A)
 **;
**  59) iN3gb     0000-9999       Speech: total # minutes (last 7 days) (S)
 **;
**  60) iN3fb     0000-9999       OT: total # minutes (last 7 day) (S,A)
 **;
**  61) iN3eb     0000-9999       PT: total # minutes (last 7 days) (S)
 **;
**
 **;
** OUTPUT VARIABLES:
 **;
**      aNR3H   SEE LIST BELOW  RUG-III/HC GROUP NUMBER
 **;
**                              3-DIGIT NUMERIC CODE THAT CAN BE USED TO SORT GROUPS
 **;
**      aR3H    SEE LIST BELOW  RUG-III/HC GROUP CODE
 **;
**                              3-CHARACTER ALPHABETIC CODE
 **;
**                              FIRST CHARACTER REPRESENTS HIERARCHY GROUP
 **;
**                              OTHER CHARACTERS RELATE TO ADL LEVELS
 **;
**
 **;
**      aNR3H       aR3H       DESCRIPTION
 **;
**      -----   --------  ------------------------------------------------------------
 **;
**       111        RB0          Rehabilitation High / ADL  11 - 18
 **;
**       121        RA2          Rehabilitation Low / ADL  4 - 10 / IADL 2-3
 **;
**       122        RA1          Rehabilitation Low / ADL  4 -10 / IADL 0-1
 **;
**       210        SE3          Extensive Special Care 3 / ADL > 6
 **;
**       220        SE2          Extensive Special Care 2 / ADL > 6
 **;
**       230        SE1          Extensive Special Care 1 / ADL > 6
 **;
**       310        SSB          Special Care / ADL 14 - 18
 **;
```

```
**      320       SSA           Special Care / ADL  4 - 13
 **;
**      411       CC0           Clin. Complex  / ADL 11 - 18
 **;
**      421       CB0           Clin. Complex  / ADL  6 - 10
 **;
**      431       CA2           Clin. Complex  / ADL  4 -  5 / IADL 1-3
 **;
**      432       CA1           Clin. Complex  / ADL  4 -  5 / IADL 0
 **;
**      510       IB0           Cognitive Impairment / ADL   6 - 10
 **;
**      521       IA2           Cognitive Impairment / ADL   4 -  5 / IADL 1-3
 **;
**      522       IA1           Cognitive Impairment / ADL   4 -  5 / IADL 0
 **;
**      610       BB0           Behavior Problem / ADL   6 - 10
 **;
**      621       BA2           Behavior Problem / ADL   4 -  5 / IADL 1-3
 **;
**      622       BA1           Behavior Problem / ADL   4 -  5 / IADL 0
 **;
**      710       PD0           Physical Function / ADL  11 - 15
 **;
**      720       PC0           Physical Function / ADL   9 - 10
 **;
**      730       PB0           Physical Function / ADL   6 -  8
 **;
**      741       PA2           Physical Function / ADL   4 -  5 / IADL 1-3
 **;
**      742       PA1           Physical Function / ADL   4 -  5 / IADL 0
 **;
**
 **;
** INTERMEDIATE VARIABLES:
 **;
**      ITEM    VALID VALUES           DESCRIPTION
 **;
**      -----  ---------------  --------------------------------------------------
 **;
**  Numeric Indicators for qualification in RUG-III clinical categories
 **;
**      x_reh     01           rehabilitation
 **;
**      x_ext     01           extensive care
 **;
**      x_spec    01           special care
 **;
**      x_clin    01           clinically complex
 **;
**      x_impair  01           impaired cognition
 **;
**      x_behav   01           behavior problems
 **;
**
 **;
**  Other variables used in computations
 **;
**      x_bedmb   01345        numeric recode of bed mobility ADL
 **;
**      x_trans   01345        numeric recode of transfer ADL
 **;
**      x_toilt   01345        numeric recode of toileting ADL
```

```
 **;
**      x_intake  1           numeric indicator for parenteral/enteral intake level
 **;
**      x_eatng   0123        numeric recode of eating ADL
 **;
**      x_adlsum  4-18        RUG-III ADL Index
 **;
**      x_meal    01          numeric recode of meal preparation IADL
 **;
**      x_mmed    01          numeric recode of medication management IADL
 **;
**      x_phon    01          numeric recode of telephone use IADL
 **;
**      x_iadls   0123        RUG-III/HC IADL Index
 **;
**      x_th_min  0000-9999   minutes of rehab therapies totaled across therapies
 **;
**      x_cpal    01          indicator variable for cerebral palsy
 **;
**      x_sept    01          indicator variable for septicemia
 **;
**      x_coma    01          numeric indicator of coma with selected qualifiers
 **;
**      x_ext_ct  012345      count of number of selected hierarchy categories
 **;
**                            for which resident qualifies and selected extensive
 **;
**                            care services (used in Extensive Care classification)
 **;
**
 **;
**  One scale
 **;
**     sCPS       0123456     Cognitive Performance Scale
 **;
**  ------------------------------------------------------------------------------
 **;
**  ASSUMPTION ABOUT INPUT DATA: ICD code format is assumed to have leading zeros
 **;
**                            before the decimal point.  Any digits after the
 **;
**                            decimal point are assumed left justified, but may
 **;
**                            be blank, e.g., 038.0 or 038., but not 38. or 38. 0.
 **;
**  ALGORITHM:
 **;
**  NOTES ON FORMING CODE:    10/17/13 Revision fixes ICD-9 and adds ICD-10 codes.
 **;
**  MISSING VALUES:           This algorithm is not calculated if any input value
is **;
**                            missing.
 **;
*******************************************************************************
****;
** This code is provided in a common computing package, SAS, in which command lines
 **;
** end in a semicolon and comment lines start in an asterisk or start with "/*" and
 **;
** end with "*/".
 **;
**
 **;
```

```
** In SAS, additional statements to designate the source dataset need to precede the
 **;
** code provided here.  In addition, the variables in that dataset must be mapped to
 **;
** the variables used in the code by placing the variable names used in the source
 **;
** dataset on the right-hand side of each assignment statement in the section
labeled **;
** 'VARIABLE ASSIGNMENTS.'
 **;
**
 **;
** For programmers developing code in other languages, it is hoped that this
 **;
** procedural code can provide sufficiently detailed  information about the
 **;
** algorithms. It is strongly urged that code be checked on real-life examples.
 **;
*********************************************************************************
****;
** THIS INFORMATION IS PROVIDED BY interRAI AS A SERVICE TO ITS USERS. ALTHOUGH
 **;
** REASONABLE CARE HAS BEEN TAKEN TO MAKE IT ACCURATE, IT IS PROVIDED "AS IS."
 **;
** THERE ARE NO WARRANTIES, EXPRESSED OR IMPLIED, AS TO ITS ACCURACY.
 **;
**
 **;
** PLEASE SEND ANY COMMENTS OR CORRECTIONS TO:  interRAI_Code@umich.edu
 **;
**
 **;
*********************************************************************************
****;
** SYNTAX USED IN THIS SAS CODE:
 **;
** 1.  All lines with an asterisk (*) as the first nonblank character in the line
are **;
**     documentation or comment lines.  All command lines start with a character
 **;
**     other than an asterisk.
 **;
** 2.  A semicolon indicates the end of a statement in the SAS code used here, not a
 **;
**     continuation character as in some other languages.
 **;
** 3.  All variables are represented in small letters, while command words are
 **;
**     represented in capital letters.
 **;
** 4.  All input interRAI variables are represented with names beginning with a
 **;
**     lower-case 'i'.  Specification of these 'iCODES' are available in the iCODE
 **;
**     MATRIX, available from interRAI.
 **;
** 5.  All input variables are assumed to be NUMERIC, unless otherwise noted.
 **;
** 6.  All local (non-MDS) variables are NUMERIC and represented in lower case
 **;
**     letters with a prefix of 'x_' (e.g., x_adlsum).
 **;
** 7.  The only command words and structures used in this SAS code are:
```

```
 **;
**      a. RETURN
 **;
**           (this command causes the end of processing the current record
 **;
**            and initiation of processing the next record)
 **;
**      b. IF <logical condition1>
 **;
**            THEN <arithmetic statement> executed if condition1 true
 **;
**         ELSE IF <logical condition2>
 **;
**            THEN <arithmetic statement> executed if condition2 true
 **;
**               DO <multiple statements>  END
 **;
**         ELSE   <arithmetic statement> executed if no condition is true
 **;
**      c. Logical operators used in logical conditions are
 **;
**               =       (equal)
 **;
**               >       (greater than)
 **;
**               <       (less than)
 **;
**               >=      (greater than or equal to)
 **;
**               <=      (less than or equal to)
 **;
**               NE      (not equal to)
 **;
**      d. Relational operators used in logical conditions are
 **;
**               AND    (logical and)
 **;
**               NOT    (logical not)
 **;
**               OR     (logical or)
 **;
** 8.  Nested IF structures are indented for clarity.
 **;
** 9.  Single quotes delimit a character constant.
 **;
*********************************************************************************
****;
** DETAILS OF THE RELATIONSHIP BETWEEN MDS V2.0 VARIABLES AND INTERRAI SUITE
 **;
** VARIABLES ARE PROVIDED IN THE RUG-III CODING SPECIFICATIONS
 **;
*********************************************************************************
****;
** CODE ORGANIZATION
 **;
**
 **;
** After variable assignment, this RUG-III code employs a 2 stage process involving
 **;
** a clinical qualification stage followed by a classification stage as follows:
 **;
**      1.  Clinical Qualification Stage.  Determine all of RUG-III clinical
 **;
```

```
**          (Ultra High Rehab, Very High Rehab, High Rehab, Medium, Rehab, Low
Rehab, **;
**          Extensive Special Care, Special Care, Clinically Complex, Cognitive
 **;
**          Impairment, and Behavior Problems) for which a resident qualifies.
 **;
**          This first stage involves Step I through Step X in the code below.
 **;
**      2.  Classification Stage. Scan all of the qualifications for a resident and
 **;
**          classify the resident into a single clinical category and then classify
 **;
**          the resident into one of the RUG-III groups contained in that clinical
 **;
**          category.  This second stage comprises Step XI in the code.
 **;
**
 **;
** The RUG-III 1997 Update classifies a resident into the Extensive Special Care
 **;
** groups based on consideration of not only qualification for the Extensive Special
 **;
** Care clinical category, but also qualification for the Special Care, Clinically
 **;
** Complex, and Cognitive Impairment Clinical categories.  This feature necessitates
 **;
** the stage two process.
 **;
*************************************************************************************
****;
** STEPS IN COMPUTING RUG-III/HC
 **;
**     1) <CRIPPLE> MDS (NH) VARIABLES NOT AVAILABLE IN MDS-HC - SET THEM TO NULL
 **;
**        VALUE (USUALLY ZERO)
 **;
**     2) DEVELOP IADL INDEX
 **;
**     3) COMPUTE NURSING HOME RUG-III SCORE, MODIFICATIONS INCLUDE
 **;
**         - FEWER REHAB CATEGORIES, NOW BASED ONLY ON ADLS
 **;
**         - NO SPLITS BY NURSING REHABILITATION OR DEPRESSION
 **;
**         - NEW IADL SPLITS IN THE RA, CA, IA, BA, AND A GROUPS
 **;
** FOR DETAILS, SEE ARTICLE BY BJORKGREN, FRIES, SHUGARMAN -
 **;
**                                TESTING A RUG-III BASED CASE-MIX SYSTEM FOR HOME CARE
 **;
**********************************END OF
DOCUMENTATION************************************;
**                                      WARNINGS
 **;
** BE SURE TO PERFORM RANGE CHECKS ON ALL GROUPER VARIABLES
 **;
** IF ANY ARE OUT OF RANGE OR MISSING, THE OUTPUT SHOULD BE SET TO MISSING
 **;
** IN ADDITION, THE VARIABLE VALUE CHECK BELOW WILL CAUSE MISSING OUTPUT FOR
 **;
** OBSERVATIONS WITH INVALID OR MISSING VALUES
 **;
**
```

```
 **;
** BEFORE RUNNING THIS CODE, BE SURE TO RUN:
 **;
**         sCPS (Cognitive Performance Scale)
 **;
**
 **;
*******************************BEGINNING OF SAS
CODE***********************************;


** DATA STEP STARTS HERE  **;

** INCLUDE HERE CODE FOR COGNITIVE PERFORMANCE SCALE (sCPS)  **;

** ++++++++++++++++++++++++++++++++++++++++                                    ;
**  Step 0.  VARIABLE ASSIGNMENTS AND VARIABLE VALUE CHECK.                    ;
** ++++++++++++++++++++++++++++++++++++++++                                    ;

**  VARIABLE ASSIGNMENTS
**;
**  IF NECESSARY, CHANGE SECOND VARIABLE TO CORRECT LOCAL VARIABLE NAME CHA
**;
**  NOTE: RUG-III/HC CAN BE CALCULATED ON CHA ASSESSMENTS WHICH INCLUDE THE
**;
**   CHA FUNCTIONAL ASSESSMENT.  AN APPROXIMATION IS POSSIBLE, HOWEVER BY SETTING
**;
**   TO ZERO THE VARIABLES INDICATED IN THE LIST OF VARIABLES ABOVE WITH A '(S)'.
**;
**   AN APPROXIMATION IS ALSO POSSIBLE SIMILARLY FOR THE INTERRAI AL, BY SETTING TO
**;
**   ZERO THE VARIABLES INDICATED BY A '(A)'
**;

** NOTE: BE SURE THE VARIABLES TO COMPUTE THE sCPS SCALE ARE AVAILABLE
**;

iE3a   = iE3a   ;
iE3b   = iE3b   ;
iE3c   = iE3c   ;
iE3d   = iE3d   ;
iE3e   = iE3e   ;
iE3f   = iE3f   ;
iG1aa  = iG1aa  ;
iG1da  = iG1da  ;
iG1ea  = iG1ea  ;
iG2g   = iG2g   ;
iG2h   = iG2h   ;
iG2i   = iG2i   ;
iG2j   = iG2j   ;
iI1e   = iI1e   ;
iI1f   = iI1f   ;
iI1i   = iI1i   ;
iI1q   = iI1q   ;
iI1t   = iI1t   ;
iI2aba = iI2aba ;
iI2bba = iI2bba ;
iI2cba = iI2cba ;
iI2dba = iI2dba ;
iI2eba = iI2eba ;
iI2fba = iI2fba ;
iI2abb = iI2abb ;  **USE EITHER THESE ICD-10 CODES OR THE ICD-9 CODES ABOVE***;
iI2bbb = iI2bbb ;  **USE EITHER THESE ICD-10 CODES OR THE ICD-9 CODES ABOVE***;
```

```
iI2cbb = iI2cbb ;  **USE EITHER THESE ICD-10 CODES OR THE ICD-9 CODES ABOVE***;
iI2dbb = iI2dbb ;  **USE EITHER THESE ICD-10 CODES OR THE ICD-9 CODES ABOVE***;
iI2ebb = iI2ebb ;  **USE EITHER THESE ICD-10 CODES OR THE ICD-9 CODES ABOVE***;
iI2fbb = iI2fbb ;  **USE EITHER THESE ICD-10 CODES OR THE ICD-9 CODES ABOVE***;
iJ2h   = iJ2h   ;
iJ2i   = iJ2i   ;
iJ2j   = iJ2j   ;
iJ2n   = iJ2n   ;
iJ2q   = iJ2q   ;
iJ2r   = iJ2r   ;
iJ6c   = iJ6c   ;
iK2a   = iK2a   ;
iK2c   = iK2c   ;
iK3    = iK3    ;
iL1    = iL1    ;
iL4    = iL4    ;
iL5    = iL5    ;
iL7    = iL7    ;
iN2a   = iN2a   ;
iN2b   = iN2b   ;
iN2d   = iN2d   ;
iN2e   = iN2e   ;
iN2f   = iN2f   ;
iN2g   = iN2g   ;
iN2h   = iN2h   ;
iN2i   = iN2i   ;
iN2j   = iN2j   ;
iN2k   = iN2k   ;
iN2n   = iN2n   ;
iN3gb  = iN3gb  ;
iN3fb  = iN3fb  ;
iN3eb  = iN3eb  ;
sCPS   = sCPS   ;

**  VARIABLE VALUE CHECK                                                    **;

if (sCPS = 6 or (sCPS in (0,1,2,3,4,5)
   and iE3a in (0,1,2,3) and iE3b in (0,1,2,3)   and iE3c in (0,1,2,3)
   and iE3d in  (0,1,2,3)          and iE3e in (0,1,2,3)   and iE3f in (0,1,2,3)))
   and iG1aa in (0,1,2,3,4,5,6,8) and iG1da in (0,1,2,3,4,5,6,8)
   and iG1ea in (0,1,2,3,4,5,6,8)
   and iG2g in  (0,1,2,3,4,5,6,8) and iG2h in (0,1,2,3,4,5,6,8)
   and iG2i in  (0,1,2,3,4,5,6,8) and iG2j in (0,1,2,3,4,5,6,8)
   and iI1e in  (0,1,2,3)          and iI1f in (0,1,2,3)   and iI1i in (0,1,2,3)
   and iI1q in  (0,1,2,3)          and iI1t in (0,1,2,3)
   and iJ2h in  (0,1,2,3,4)        and iJ2i in (0,1,2,3,4) and iJ2j in (0,1,2,3,4)
   and iJ2n in  (0,1,2,3,4)        and iJ2q in (0,1,2,3,4) and iJ2r in (0,1,2,3,4)
   and iJ6c in  (0,1)              and iK2a in (0,1)       and iK2c in (0,1)
   and iK3  in  (0,1,2,3,4,5,6,7,8,9)
   and iL1  in  (0,1,2,3,4,5)      and iL4  in (0,1)
   and iL5  in  (0,1)              and iL7  in (0,1,2,3,4)
   and iN2a in  (0,1,2,3)          and iN2b in (0,1,2,3)   and iN2d in (0,1,2,3)
   and iN2e in  (0,1,2,3)          and iN2f in (0,1,2,3)   and iN2g in (0,1,2,3)
   and iN2h in  (0,1,2,3)          and iN2i in (0,1,2,3)   and iN2j in (0,1,2,3)
   and iN2k in  (0,1,2,3)          and iN2n in (0,1,2,3)
   and (0 <= iN3eb <=999)          and (0 <= iN3fb <=999)  and (0 <= iN3gb <=999)
                                                                  then do;

** ++++++++++++++++++++++++++++++++++++++                                   ;
** Step I.  Initialize needed variables.                                   ;
** ++++++++++++++++++++++++++++++++++++++                                   ;

** Initialize clinical category indicators                                 **;
```

```
x_reh    = 0;
x_ext    = 0;
x_spec   = 0;
x_clin   = 0;
x_impair = 0;
x_behav  = 0;


** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++ ;
**  Step II. Calculate RUG-III/HC IADL Index.                                    ;
**           The IADL index is used in splitting the lowest Clinically Complex, ;
**              Impaired Cognition, Behavior Problems, and Reduced Physical     ;
**              Function RUG-III/HC categories.  The IADL index requires        ;
**              scoring conversion for 3 different ADLs and then summation.     ;
**           The crosswalk from the MDS-HC equates the following levels:        ;
**  H1aa, H1da, H1ea  are changed to iG1aa, iG1da, iG1ea as follows:            ;
**  H1aa        --->            iG1aa                                           ;
**  0 (independent)             0       (independent)                           ;
**  1 (some help)               1,2,3,4 (help, supervision, limited, extensive);
**  2 (full help)               5       (maximal assistance)                    ;
**  3 (by others)               6       (total dependence)                      ;
**  8 (activity did not occur)  8       (activity did not occur)                ;
**  For RUG-III/HC we count the number of these three at the level 'full help' ;
**    or more on the RAI-HC which corresponds to iG1aa of 5 or more             ;
** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++ ;

x_iadls = .;

if iG1aa in (0,1,2,3,4)                          then x_meal=0;
  else if iG1aa in (5,6,8)                       then x_meal=1;

if iG1da in (0,1,2,3,4)                          then x_mmed=0;
  else if iG1da in (5,6,8)                       then x_mmed=1;

if iG1ea in (0,1,2,3,4)                          then x_phon=0;
  else if iG1ea in (5,6,8)                       then x_phon=1;

x_iadls = x_meal + x_mmed + x_phon;

** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++ ;
** Step III. Calculate RUG-III ADL Index.                                       ;
**           The ADL index is required for use in splitting the Rehabilitation, ;
**              Special Care, Clinically Complex, Impaired Cognition, Behavior  ;
**              Problems, and Reduced Physical Function RUG-III clinical        ;
**              categories.  The ADL index requires scoring conversion for      ;
**              4 different ADLs and then summation.                            ;
** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++ ;

x_adlsum = .;

** ADL scoring conversion for Bed mobility                                      ;
IF      ( iG2i = 0  OR  iG2i = 1  OR iG2i = 2 )          THEN x_bedmb = 1;
ELSE IF ( iG2i = 3 )                                     THEN x_bedmb = 3;
ELSE IF ( iG2i = 4 )                                     THEN x_bedmb = 4;
ELSE IF ( iG2i = 5  OR  iG2i = 6  OR iG2i = 8 )          THEN x_bedmb = 5;

** ------------------------------                                              ;
** ADL scoring conversion for Transfer                                          ;
IF      ( iG2g = 0  OR  iG2g = 1  OR iG2g = 2 )          THEN x_trans = 1;
ELSE IF ( iG2g = 3 )                                     THEN x_trans = 3;
ELSE IF ( iG2g = 4 )                                     THEN x_trans = 4;
ELSE IF ( iG2g = 5  OR  iG2g = 6  OR iG2g = 8 )          THEN x_trans = 5;
```

```
** ------------------------------                                              ;
** ADL scoring conversion for Toilet Use                                       ;
IF      ( iG2h = 0  OR  iG2h = 1  OR iG2h = 2 )              THEN x_toilt = 1;
ELSE IF ( iG2h = 3 )                                         THEN x_toilt = 3;
ELSE IF ( iG2h = 4 )                                         THEN x_toilt = 4;
ELSE IF ( iG2h = 5  OR  iG2h = 6  OR iG2h = 8 )              THEN x_toilt = 5;

** ------------------------------                                              ;
** Code parenteral\enteral intake level--used for Eating scoring conversion and;
** later for Special Care and Clinically Complex qualification.               ;
**    x_intake = 1 if (1) 51% or more of total calories are received          ;
**                 through parenteral/enteral intake (iK5) or (2) 26% to 50%  ;
**                 of total calories received through parenteral/enteral      ;
**                 intake (iK5) and fluid intake is 501 or more cc per day    ;
**                 (iK2b).                                                    ;
**                 NOTE: The interRAI HC does not have any measure of intake, ;
**                 so assume that x_intake=1 in the following code            ;
**    x_intake = 0 if parenteral/enteral intake is at a lower level (including ;
**                 none).                                                     ;

x_intake = 1;

** ADL scoring conversion for Eating                                           ;
IF      ( iK3  = 6  OR  iK3  = 7 OR  iK3 = 8 ) OR (iK3 = 5  AND  x_intake = 1 )
                                                             THEN x_eatng = 3;
ELSE IF ( iG2j = 0  OR  iG2j = 1 OR  iG2j = 2 )              THEN x_eatng = 1;
ELSE IF ( iG2j = 3 )                                         THEN x_eatng = 2;
ELSE IF ( iG2j = 4  OR  iG2j = 5  OR iG2j = 6 OR  iG2j = 8 )  THEN x_eatng = 3;

** ------------------------------                                              ;
** Sum the converted ADL scores to x_adlsum;                                   ;
x_adlsum = x_bedmb + x_trans + x_toilt + x_eatng;

** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++    ;
** Step IV. Determine Rehab variable need for Rehab categories                 ;

**           Variables needed to determine Rehab clinical hierarchy           ;
**             qualification for Standard rehab classification                ;
**               - Total minutes of rehab therapy received (x_th_min)         ;
** OTHER RUG-III REHAB VARIABLES NOT USED                                    **;
** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++    ;

** ------------------------------                                              ;
** Determine x_th_min -- the number of minutes of rehab therapy received.     ;

x_th_min = 0;

** Add speech therapy minutes                                                  ;
IF (  iN3gb > 0 )                  THEN x_th_min = x_th_min + iN3gb;

** Add occupational therapy minutes                                           ;
IF (  iN3fb > 0 )                  THEN x_th_min = x_th_min + iN3fb;

** Add physical therapy minutes                                               ;
IF (  iN3eb > 0 )                  THEN x_th_min = x_th_min + iN3eb;

IF x_th_min>=120 THEN x_reh=1;


** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++    ;
** Step V.  Test Extensive Care qualification.                                 ;
** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++    ;
                                                                               ;
```

```
** ------------------------------                                              ;
** Determine qualification for Extensive Care.                                 ;

** Check for required Extensive Care clinical indicators.                     ;
   ** ------------------------------                                           ;
   ** Resident qualifies for Extensive Care category on the basis of clinical ;
   ** indicators.                                                             ;
   **    Qualifications                                                       ;
   **       Parenteral/IV feedings (iK3) OR IV medication (iN2d) OR           ;
   **       suctioning (iN2g) OR tracheostomy care (iN2h) OR                  ;
   **       ventilator or respirator (iN2j).                                  ;
   ** ------------------------------                                           ;

IF (  iK3  = 7 OR iK3  = 8  OR
      iN2d = 2 OR iN2d = 3  OR
      iN2g = 2 OR iN2g = 3  OR
      iN2h = 2 OR iN2h = 3  OR
      iN2j = 2 OR iN2j = 3)
  THEN   x_ext = 1;


** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++ ;
** Step VI.  Test Special Care qualification.                                  ;
** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++ ;
** Code Cerebral Palsy from ICD-9 Code (Note: adjust if using ICD-10)         ;
** Assumes that ICD-9 is left justified character format xxx.xx and that you ;
** can test for only xxx.x   (omitting final digit).  In SAS, this is handled ;
** by the SUBSTR function below, which extracts the first 5 characters of     ;
** iI2aba.                                                                    ;

** Code Cerebral Palsy from ICD-9 Code
x_cpal=0;
IF SUBSTR(LEFT(iI2aba),1,3) = '343' THEN x_cpal = 1;
IF SUBSTR(LEFT(iI2bba),1,3) = '343' THEN x_cpal = 1;
IF SUBSTR(LEFT(iI2cba),1,3) = '343' THEN x_cpal = 1;
IF SUBSTR(LEFT(iI2dba),1,3) = '343' THEN x_cpal = 1;
IF SUBSTR(LEFT(iI2eba),1,3) = '343' THEN x_cpal = 1;
IF SUBSTR(LEFT(iI2fba),1,3) = '343' THEN x_cpal = 1;

** Code Cerebral Palsy from ICD-10 Code                                       ;
** CEREBRAL PALSY IS ICD-10 CODES G80.x                                       ;
IF SUBSTR(iI2abb,1,3)= 'G80' THEN x_cpal=1;
IF SUBSTR(iI2bbb,1,3)= 'G80' THEN x_cpal=1;
IF SUBSTR(iI2cbb,1,3)= 'G80' THEN x_cpal=1;
IF SUBSTR(iI2dbb,1,3)= 'G80' THEN x_cpal=1;
IF SUBSTR(iI2ebb,1,3)= 'G80' THEN x_cpal=1;
IF SUBSTR(iI2fbb,1,3)= 'G80' THEN x_cpal=1;

** Code Septicemia from ICD-9 Code                                            ;
** http://icd9cm.chrisendres.com/index.php?action=search&srchtext=sepsis      ;
* *NOTE: ELIMINATED CODES THAT INDICATE ADDITIONAL 'SEPTIC' CODES TO BE DONE  ;
** ICD-9 CODES: 003.1, 022.3, 027.0, 027.1, 038., 112.5,                      ;
**                          995.91, 995.92, 999.32, 999.34                    ;

x_sept=0;

IF SUBSTR(LEFT(iI2aba),1,3) = '038' THEN x_sept = 1;
IF SUBSTR(LEFT(iI2bba),1,3) = '038' THEN x_sept = 1;
IF SUBSTR(LEFT(iI2cba),1,3) = '038' THEN x_sept = 1;
IF SUBSTR(LEFT(iI2dba),1,3) = '038' THEN x_sept = 1;
IF SUBSTR(LEFT(iI2eba),1,3) = '038' THEN x_sept = 1;
IF SUBSTR(LEFT(iI2fba),1,3) = '038' THEN x_sept = 1;
```

```
IF SUBSTR(iI2aba,1,5) in ('003.1', '022.3', '027.0', '027.1', '112.5') THEN
x_sept=1;
IF SUBSTR(iI2bba,1,5) in ('003.1', '022.3', '027.0', '027.1', '112.5') THEN
x_sept=1;
IF SUBSTR(iI2cba,1,5) in ('003.1', '022.3', '027.0', '027.1', '112.5') THEN
x_sept=1;
IF SUBSTR(iI2dba,1,5) in ('003.1', '022.3', '027.0', '027.1', '112.5') THEN
x_sept=1;
IF SUBSTR(iI2eba,1,5) in ('003.1', '022.3', '027.0', '027.1', '112.5') THEN
x_sept=1;
IF SUBSTR(iI2fba,1,5) in ('003.1', '022.3', '027.0', '027.1', '112.5') THEN
x_sept=1;

IF SUBSTR(iI2aba,1,6) in ('995.91', '995.92', '999.32', '999.34') THEN x_sept=1;
IF SUBSTR(iI2bba,1,6) in ('995.91', '995.92', '999.32', '999.34') THEN x_sept=1;
IF SUBSTR(iI2cba,1,6) in ('995.91', '995.92', '999.32', '999.34') THEN x_sept=1;
IF SUBSTR(iI2dba,1,6) in ('995.91', '995.92', '999.32', '999.34') THEN x_sept=1;
IF SUBSTR(iI2eba,1,6) in ('995.91', '995.92', '999.32', '999.34') THEN x_sept=1;
IF SUBSTR(iI2fba,1,6) in ('995.91', '995.92', '999.32', '999.34') THEN x_sept=1;


** Code Septicemia from ICD-10 Code                                          ;

** ICD-10 CODES: A40 A41 R65 B00.7 A02.1 A22.7 A24.1 A26.7 A32.7 A42.7 B37.7  ;
IF SUBSTR(iI2abb,1,3) in ('A40', 'A41', 'R65') THEN x_sept=1;
IF SUBSTR(iI2bbb,1,3) in ('A40', 'A41', 'R65') THEN x_sept=1;
IF SUBSTR(iI2cbb,1,3) in ('A40', 'A41', 'R65') THEN x_sept=1;
IF SUBSTR(iI2dbb,1,3) in ('A40', 'A41', 'R65') THEN x_sept=1;
IF SUBSTR(iI2ebb,1,3) in ('A40', 'A41', 'R65') THEN x_sept=1;
IF SUBSTR(iI2fbb,1,3) in ('A40', 'A41', 'R65') THEN x_sept=1;

IF SUBSTR(iI2abb,1,5) in ('B00.7', 'A02.1', 'A22.7', 'A24.1', 'A26.7',
                          'A32.7', 'A42.7', 'B37.7')              THEN x_sept=1;
IF SUBSTR(iI2bbb,1,5) in ('B00.7', 'A02.1', 'A22.7', 'A24.1', 'A26.7',
                          'A32.7', 'A42.7', 'B37.7')              THEN x_sept=1;
IF SUBSTR(iI2cbb,1,5) in ('B00.7', 'A02.1', 'A22.7', 'A24.1', 'A26.7',
                          'A32.7', 'A42.7', 'B37.7')              THEN x_sept=1;
IF SUBSTR(iI2dbb,1,5) in ('B00.7', 'A02.1', 'A22.7', 'A24.1', 'A26.7',
                          'A32.7', 'A42.7', 'B37.7')              THEN x_sept=1;
IF SUBSTR(iI2ebb,1,5) in ('B00.7', 'A02.1', 'A22.7', 'A24.1', 'A26.7',
                          'A32.7', 'A42.7', 'B37.7')              THEN x_sept=1;
IF SUBSTR(iI2fbb,1,5) in ('B00.7', 'A02.1', 'A22.7', 'A24.1', 'A26.7',
                          'A32.7', 'A42.7', 'B37.7')              THEN x_sept=1;

** ------------------------------                                            ;
** Check for required Special Care clinical indicators                       ;
        ** ------------------------------                                    ;
        ** Resident qualifies for Special Care category on the basis of      ;
        ** clinical indicators.                                             ;
        **    Qualifications (any one sufficient)                           ;
        **       1. Stage 3  or 4 pressure ulcer (iL1) (Note: Do not have   ;
        **          count of ulcers),                                       ;
        **             AND                                                  ;
        **          turning and positioning (iN2n).                         ;
        **       2. Feeding tube (iK3) WITH parenteral/enteral intake      ;
        **          (x_intake) AND aphasia (iJ2j).                          ;
        **          (NOTE: DO NOT HAVE VARIABLES FOR x_intake, SO ASSUME =1 ;
        **       3. Major skin problems (iL4) or Skin tears or cuts (iL5), ;
        **            with wound care (iN2k).                               ;
        **       4. Respiratory therapy for 7 days (iN3ia) - MISSING ON    ;
        **                interRAI HC.                                      ;
        **       5. Cerebral palsy (x_cpal) AND ADL score of 10 or more    ;
        **          (x_adlsum).                                             ;
```

```
          **       6. Fever (iJ2q)                                                    ;
          **             AND                                                          ;
          **          vomiting (iJ2n) OR weight loss (iK2a) OR tube feeding           ;
          **          (iK3) WITH high parenteral/enteral intake (x_intake)            ;
          **          OR pneumonia (iI1q) OR dehydrated (iK2c).                       ;
          **       7. Multiple sclerosis (iI1f) AND ADL score of 10 or more           ;
          **          (x_adlsum).                                                     ;
          **       8. Quadriplegia (iI1i) AND ADL score of 10 or more                ;
          **          (x_adlsum).                                                     ;
          **       9. Radiation therapy (iN2f).                                       ;

IF (       ( (iL1 = 3 OR iL1 = 4) AND (iN2n = 2 OR iN2n = 3) )
      OR   ( (iK3 = 6 OR (iK3=5 AND x_intake = 1)) AND
             (iJ2j = 2 OR iJ2j = 3 OR iJ2j = 4) )
      OR   ( (iL4 = 1 OR iL5 = 1) AND (iN2k = 2 OR iN2k = 3) )
      OR   (x_cpal=1 AND x_adlsum >= 10)
      OR   ( (iJ2q =2 OR iJ2q = 3 OR iJ2q = 4)
               AND
             ( (iJ2n =2 OR iJ2n = 3 OR iJ2n = 4)
                OR    iK2a = 1
                OR  (iK3 = 6 OR (iK3=5 AND x_intake = 1))
                OR   (iI1q = 1 OR iI1q = 2 OR iI1q = 3 OR iK2c=1) )  )
      OR   (  (iI1f = 1 OR iI1f = 2 OR iI1f = 3)  AND  x_adlsum >= 10)
      OR   (  (iI1i = 1 OR iI1i = 2 OR iI1i = 3)  AND  x_adlsum >= 10)
      OR   (  iN2f = 2 OR iN2f =3)  )
  THEN
         x_spec = 1;


** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++          ;
** Step VII. Test Clinically Complex qualification.                             ;
** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++          ;

** ------------------------------                                               ;
** Calculate x_coma indicating whether the resident is comatose with qualifiers;
**       x_coma = 1 if resident is comatose (iC1 = 5) and not awake most of the;
**                  time (iS3=1,2, or 3) and ADL dependent (iG2i, iG2g, iG2j,  ;
**                  and iG2h all have values of 6 or 8).                       ;
**              = 0 otherwise.
**  NOTE:  interRAI HC DOES NOT HAVE IS3                                        ;

x_coma = 0;

IF (  iC1 = 5
        AND  ( iG2i = 6  OR  iG2i = 8)
        AND  ( iG2g = 6  OR  iG2g = 8)
        AND  ( iG2j = 6  OR  iG2j = 8)
        AND  ( iG2h = 6  OR  iG2h = 8) )
  THEN
          x_coma = 1;

** ------------------------------                                               ;
** Check for Clinically Complex qualification.                                  ;
         ** Resident qualifies for Clinically Complex category on the basis of ;
         ** clinical indicators.                                               ;
         ** ------------------------------                                     ;
         **    Qualifications (any one sufficient)                             ;
         **       1. Feeding tube (iK3) WITH high parenteral/enteral           ;
         **          intake (x_intake).                                        ;
         **          (NOTE: DO NOT HAVE VARIABLES FOR x_intake, SO ASSUME =1   ;
         **       2. Comatose (iC1=5) AND not awake (iS3) AND                  ;
         **          ADL dependent (iG2i, iG2g, iG2j, iG2h).                   ;
         **          NOTE: iS3 NOT AVAILABLE ON interRAI HC                    ;
```

```
**       3. Septicemia (x_sept).                                                ;
**       4. Burns--second or third degree (not available separately).           ;
**       5. Dehydration (iK2c).                                                 ;
**       6. Hemiplegia/hemiparesis (iI1e) and ADL score of                      ;
**          10 or more (x_adlsum).                                              ;
**       7. Internal bleeding (iJ2r).                                           ;
**       8. Pneumonia (iI1q).                                                   ;
**       9. End stage disease (iJ6c).                                           ;
**      10. Chemotherapy (iN2a).                                                ;
**      11. Dialysis (iN2b).                                                    ;
**      12. Physician order changes (iN8) on 4 or more days                     ;
**          AND physician visits (iN7) on 1 or more days.                       ;
**      13. Physician order changes (iN8) on 2 or more days                     ;
**          AND physician visits (iN7) on 2 or more days.                       ;
**      NOTE: DO NOT HAVE PHYSICIAN ORDERS OR VISITS ON INTERRAI HC             ;
**      14. Diabetes (iI1t) AND injections (not available) on 7 days            ;
**          AND physician order changes (iN8) on 2 or more days (NOT            ;
**          AVAILABLE). (Eventually, get insulin injections from drug           ;
**          list.)                                                              ;
**      15. Transfusions (iN2i).                                                ;
**      16. Oxygen therapy (iN2e).                                              ;
**      17. Infection on foot (m6b) OR open lesion on foot (m6c)                ;
**             AND                                                              ;
**          application of dressings to foot (m6f)                              ;
**        Replaced by Foot problems that limit/prevent walking (iL7).           ;
**                                                                              ;

IF (     (iK3=6)  OR  (iK3 = 5  AND  x_intake = 1)
      OR    x_coma = 1
      OR    x_sept = 1
      OR    iK2c = 1
      OR  ( ( iI1e = 1 OR iI1e = 2 OR iI1e = 3)  AND  x_adlsum >= 10)
      OR  (  iJ2r = 2 OR iJ2r = 3 OR iJ2r = 4)
      OR  (  iI1q = 1 OR iI1q = 2 OR iI1q = 3)
      OR    iJ6c = 1
      OR  ( iN2a = 2 OR iN2a = 3)
      OR  ( iN2b = 2 OR iN2b = 3)
      OR  ( iI1t = 1 OR iI1t = 2 OR iI1t = 3)
      OR  ( iN2i = 2 OR iN2i = 3)
      OR  ( iN2e = 2 OR iN2e = 3)
      OR  ( iL7 = 2 OR iL7 = 3) )
  THEN
        x_clin = 1;


** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++;
** Step VIII.  Determine depression variable (x_depres) - OMITTED IN RUG-III/HC;
** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++;

** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++                      ;
** Step IX. Test Cognitive Impairment qualification.                            ;
** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++                      ;
**                                                                              ;
** Note  Use interRAI Cognitive Performance Scale (sCPS)                        ;

** Be sure to run sCPS code before running this program                         ;

** ------------------------------                                              ;
** Determine Cognitive Impairment qualification.                                ;
**    Qualification if Cognitive Performance Scale is 3 or more.                ;

IF      sCPS >= 3  THEN   x_impair = 1;
ELSE                      x_impair = 0;
```

```
** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++;
** Step X. Test Behavior Problems qualification.                            ;
** ++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++++;

** ------------------------------                                           ;
** NOTE: THE FOLLOWING DOCUMENTATION WAS CORRECTED 09/08/15 TO INDICATE THAT ;
**   THE BEHAVIOR VARIABLES iE3a-f WERE SCORED FOR 1 OR MORE DAYS, NOT 4     ;
** Check for Behavior Problems qualification.                                ;
        ** ------------------------------                                   ;
        ** Behavior Problems Qualifications (any one sufficient)            ;
        **       1. Wandering occurred on 1 or more days (iE3a).           ;
        **       2. Verbally abusive behavior occurred on 1 or more        ;
        **          days (iE3b).                                           ;
        **       3. Physically abusive behavior occurred on 1 or           ;
        **          more days (iE3c).                                      ;
        **       4. Socially inappropriate/disruptive behavior             ;
        **          occurred on 1 or more days (iE3d).                     ;
        **       5. Resident resisted care on 1 or more days (iE3e).       ;
        **       6. Sexually inapprop. Behav 1 or more days (iE3f)         ;
        **       6. Hallucinations (iJ2i).                                 ;
        **       7. Delusions (iJ2h).                                      ;

IF (     (iE3a = 2  OR  iE3a = 3)
     OR  (iE3b = 2  OR  iE3b = 3)
     OR  (iE3c = 2  OR  iE3c = 3)
     OR  (iE3d = 2  OR  iE3d = 3)
     OR  (iE3e = 2  OR  iE3e = 3)
     OR  (iE3f = 2  OR  iE3f = 3)
     OR  (iJ2i = 2 OR iJ2i = 3 OR iJ2i = 4)
     OR  (iJ2h = 2 OR iJ2h = 3 OR iJ2h = 4) )
   THEN
        x_behav = 1;


** ++++++++++++++++++++++++++++++++++++++++                                  ;
** Step XI. Classify into RUG-III/HC Groups                                 ;
** ++++++++++++++++++++++++++++++++++++++++                                  ;
** NOTE: THE ADL INDEX USED TO DERIVE THE RUG-III/HC SYSTEM BASED ON THE     ;
**          RAI-HC DID NOT HAVE THE ADL SUPPORT ITEMS, AND THUS RANGED FROM  ;
**          4-15 (RATHER THAN 4-18).  ON ALL INTERRAI SUITE INSTRUMENTS, THE ;
**          ADL INDEX (x_adlsum) INCORPORATES SUPPORT CONCEPTS AND CAN RANGE  ;
**          FROM 4-18.  HOWEVER, TO REMAIN CONSISTENT WITH THE DERIVATION WORK ;
**          WE CONSIDER EQUIVALENT ALL INDEX VALUES FROM 15-18.              ;

** ------------------------------                                           ;
** Classify into Rehab Groups **                                            ;
** All final splits based on ADL sum (x_adlsum) and iADL index (x_iadls).   ;

IF x_reh = 1  THEN DO;

   IF      (11 <= x_adlsum  AND  x_adlsum <= 18)   THEN aR3H = 'RB0';
   ELSE IF ( 4 <= x_adlsum  AND  x_adlsum <= 10)   THEN DO;
          IF x_iadls > 1                                THEN aR3H = 'RA2';
          ELSE                                               aR3H = 'RA1';
   END;
END;

** ------------------------------                                           ;
** Classify into Extensive Care Groups **                                   ;
**                                                                          ;
** To be classified as Extensive Care a resident must qualify on the        ;
**     basis of having Extensive Care clinical indicators (x_ext = 1)  and  ;
```

```
**     an ADL sum of 7 or more                                                  ;
**                                                                             ;
**     Note that residents who have Extensive Care clinical indicators but     ;
**     have too low an ADL score (6 or less) are classified as Special Care    ;
**     rather than Extensive Care. (THIS IS DONE HERE TO REMAIN COMPATIBLE      ;
**     WITH THE RUG-III V5.20 SPECIFICATION - EARLIER VERSIONS MOVED THESE      ;
**     OBSERVATIONS TO THE CLINICALLY COMPLEX CATEGORY, AS WELL, THE COUNT      ;
**     USED TO SPLIT THE EXTENSIVE CARE CATEGORY IS MODIFIED FROM THE           ;
**     ORIGINAL.)                                                              ;
**                                                                             ;
** Split into Extensive Care groups is based on a count (x_ext_ct) of other    ;
**    hierarchy category qualifications plus existence of                      ;
**    parenteral/IV feeding (iK3) and IV medications (iN2d)                    ;

ELSE IF  (x_ext = 1  AND  x_adlsum >=7)  THEN DO;

   x_ext_ct = x_spec + x_clin + x_impair;
   IF   iK3 = 8         THEN    x_ext_ct = x_ext_ct + 1;
   IF   iN2d in (2,3)   THEN    x_ext_ct = x_ext_ct + 1;

   IF      (4 <= x_ext_ct  AND  x_ext_ct <= 5)    THEN aR3H= 'SE3';
   ELSE IF (2 <= x_ext_ct  AND  x_ext_ct <= 3)    THEN aR3H= 'SE2';
   ELSE IF (0 <= x_ext_ct  AND  x_ext_ct <= 1)    THEN aR3H= 'SE1';
END;

** ------------------------------                                             ;
** Classify into Special Care Groups **                                       ;
**                                                                             ;
** To be classified as Special Care a resident must satisfy one of the        ;
**    two following conditions                                                 ;
**    1. The resident has both Special Care clinical indicators (x_spec = 1)   ;
**       and an ADL sum of 7 or more.                                          ;
**    2. The resident has both Extensive Care indicators (x_ext = 1) and       ;
**       was not already classified as Extensive (i.e., an ADL sum of 6        ;
**       or less).                                                             ;
**                                                                             ;
**    Note that residents who have Special Care clinical indicators but        ;
**    have too low an ADL score (6 or less) are classified as Clinically       ;
**    Complex rather than Special Care.                                        ;
**                                                                             ;
** Split into Special Care groups is based on ADL sum, slightly different than ;
**    RUG-III                                                                  ;

ELSE IF  ((x_spec = 1  AND  x_adlsum >= 7)  OR  x_ext = 1)  THEN DO;

   IF      (14 <= x_adlsum  AND  x_adlsum <= 18)   THEN aR3H= 'SSB';
   ELSE IF ( 4 <= x_adlsum  AND  x_adlsum <= 13)   THEN aR3H= 'SSA';
END;

** ------------------------------                                             ;
** Classify into Clinically Complex Groups  **                                ;
** To be classified as Clinically Complex a resident must satisfy one of the  ;
**    two following conditions                                                 ;
**    1. The resident has Clinically Complex clinical indicators (x_clin = 1), ;
**    2. The resident has both Special Care indicators (x_spec = 1) and        ;
**       was not already classified as Special Care (i.e., an ADL sum of 6     ;
**       or less).                                                             ;
**                                                                             ;
** Split into Clinically Complex groups is based on ADL sum and IADL sum.     ;

ELSE IF  (x_clin = 1  OR  x_spec = 1)  THEN DO;

   IF      (11 <= x_adlsum  AND  x_adlsum <= 18)  THEN aR3H= 'CC0';
```

```
   ELSE IF ( 6 <= x_adlsum  AND  x_adlsum <= 10)  THEN aR3H= 'CB0';
   ELSE IF ( 4 <= x_adlsum  AND  x_adlsum <= 5)   THEN DO;
             IF x_iadls >= 1                      THEN aR3H= 'CA2';
             ELSE                                      aR3H= 'CA1';
   END;
END;


** ------------------------------                                              ;
** Classify into Cognitive Groups **                                          ;
**                                                                            ;
** To be classified as Cognitive Impairment the resident has Cognitive        ;
**    Impairment indicators (x_impair = 1)  and an ADL sum of 10 or less      ;
**                                                                            ;
** Split into Impaired Cognitive groups is based on ADL sum and iADL sum      ;
**    (Note: splits of nursing rehabilitation not performed)                  ;

ELSE IF  (x_impair = 1  AND  4 <= x_adlsum  AND  x_adlsum <= 10)  THEN DO;

   IF      ( 6 <= x_adlsum  AND  x_adlsum <= 10)  THEN aR3H= 'IB0';
   ELSE IF ( 4 <= x_adlsum  AND  x_adlsum <=  5)  THEN DO;
             IF x_iadls >= 1                      THEN aR3H= 'IA2';
             ELSE                                      aR3H= 'IA1';
   END;
END;

** ------------------------------                                              ;
** Classify into Behavioral Problems Groups **                                ;
**                                                                            ;
** To be classified as Behavior Problems the resident has Behavior            ;
**    Problems indicators (x_behav = 1)  and an ADL sum of 10 or less         ;
**                                                                            ;
** Split into Behavior Problems groups is based on ADL sum and IADL sum       ;
**    (Note: splits of nursing rehabilitation not performed)                  ;

ELSE IF  (x_behav = 1  AND  4 <= x_adlsum  AND  x_adlsum <= 10)  THEN DO;

   IF      ( 6 <= x_adlsum  AND  x_adlsum <= 10)  THEN aR3H= 'BB0';
   ELSE IF ( 4 <= x_adlsum  AND  x_adlsum <=  5)  THEN DO;
             IF x_iadls >= 1                      THEN aR3H= 'BA2';
             ELSE                                      aR3H= 'BA1';
   END;
END;


** ------------------------------                                              ;
** Classify into Physical Groups **                                           ;
**    A resident is classified as reduced Physical Function if a previous     ;
**      hierarchical classification has not been made                         ;
**                                                                            ;

** Split into Physical Function groups is based on ADL sum and IADL sum       ;
**    (Note: splits of nursing rehabilitation not performed)                  ;

ELSE  IF     (11 <= x_adlsum  AND  x_adlsum <= 18)  THEN aR3H= 'PD0';
ELSE  IF     ( 9 <= x_adlsum  AND  x_adlsum <= 10)  THEN aR3H= 'PC0';
ELSE  IF     ( 6 <= x_adlsum  AND  x_adlsum <=  8)  THEN aR3H= 'PB0';
**  BELOW FOR 4<=x_adlsum<=5;
ELSE   DO;
             IF x_iadls >= 1                        THEN aR3H= 'PA2';
             ELSE                                        aR3H= 'PA1';
       END;
```

```
** RUG-III/HC CLASSIFICATION COMPLETE                                          ;

** NOW ADD NUMERICAL GROUP IDENTIFIERS  **;
** NOTE THAT THESE ARE DIFFERENT THAN PREVIOUS RUG-III/HC VERSIONS, BUT NOW  **;
**   CAN BE SORTED TO PUT RUG-III/V2 GROUPS IN THEIR LOGICAL ORDER           **;

IF      aR3H = 'RB0' THEN aNR3H =  111 ;
ELSE IF aR3H = 'RA2' THEN aNR3H =  121 ;
ELSE IF aR3H = 'RA1' THEN aNR3H =  122 ;
ELSE IF aR3H = 'SE3' THEN aNR3H =  210 ;
ELSE IF aR3H = 'SE2' THEN aNR3H =  220 ;
ELSE IF aR3H = 'SE1' THEN aNR3H =  230 ;
ELSE IF aR3H = 'SSB' THEN aNR3H =  310 ;
ELSE IF aR3H = 'SSA' THEN aNR3H =  320 ;
ELSE IF aR3H = 'CC0' THEN aNR3H =  411 ;
ELSE IF aR3H = 'CB0' THEN aNR3H =  421 ;
ELSE IF aR3H = 'CA2' THEN aNR3H =  431 ;
ELSE IF aR3H = 'CA1' THEN aNR3H =  432 ;
ELSE IF aR3H = 'IB0' THEN aNR3H =  510 ;
ELSE IF aR3H = 'IA2' THEN aNR3H =  521 ;
ELSE IF aR3H = 'IA1' THEN aNR3H =  522 ;
ELSE IF aR3H = 'BB0' THEN aNR3H =  610 ;
ELSE IF aR3H = 'BA2' THEN aNR3H =  621 ;
ELSE IF aR3H = 'BA1' THEN aNR3H =  622 ;
ELSE IF aR3H = 'PD0' THEN aNR3H =  710 ;
ELSE IF aR3H = 'PC0' THEN aNR3H =  720 ;
ELSE IF aR3H = 'PB0' THEN aNR3H =  730 ;
ELSE IF aR3H = 'PA2' THEN aNR3H =  741 ;
ELSE IF aR3H = 'PA1' THEN aNR3H =  742 ;
ELSE                      aNR3H =  .   ;

end;

** END OF RUG-III/HC SAS CODE  **;
```

PUBLIC SUBMISSION

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Tracking No. lpm-ze2s-wor8
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0036
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Union of Concerned Scientists

General Comment

See attachment.

Attachments

OMB public comment on AI Regulation -final

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1 December 2023

US Office of Management and Budget
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Attn: Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (OMB-2023-0020-0001)

The Union of Concerned Scientists (UCS) is pleased to provide comments on the US Office of Management and Budget's (OMB) draft memorandum, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)." The Union of Concerned Scientists is a national nonprofit science advocacy organization representing over 500,000 members. UCS works for strong, independent public science, a robust, transparent democracy, justice for overburdened communities, and the effective use of science in making policy that serves the common good.

While UCS support several articles in the draft memorandum, UCS has serious concerns that the draft memorandum, in its current form, is failing to integrate scientific integrity protections in the development, use, and assessment of artificial intelligence (AI) technologies.

I. Scientific integrity protections governing the development, use, and assessment of AI technologies need to be added to the draft memorandum.

We were disappointed not to see any mention of the linkages between AI and scientific integrity in the draft memorandum, and we strongly encourage OMB to add in clear and specific language that states that the use of AI is subject to the White House Office of Science and Technology Policy's (OSTP) *A Framework for Federal Scientific Integrity Policy and Practice*[1] (hereafter referred to as "OSTP SI framework") and an agency's individual scientific integrity policy. In this section, we are providing feedback to OMB's questions 3 and 8.

OMB's draft memorandum only contains one mention of scientific integrity, which comes in the form of a footnote on page 16. The mention of scientific integrity is limited in scope, and

[1] Scientific Integrity Framework Interagency Working Group, *A Framework for Federal Scientific Integrity Policy and Practice,* National Science and Technology Council (NSTC) and the Office of Science and Technology Policy (OSTP) (2023), https://www.whitehouse.gov/wp-content/uploads/2023/01/01-2023-Framework-for-Federal-Scientific-Integrity-Policy-and-Practice.pdf

refers only to the data quality procedures of an AI impact assessment that agencies must carry out when examining using new or existing covered safety-impacting or rights-impacting AI.[2] The footnote references a report by the National Science and Technology Council's (NSTC) *Protecting the Integrity of Government Science*[3] but fails to provide any detail on how agencies can follow the NSTC's recommendations to ensure that the AI impact assessment is properly in line with the best practices of scientific integrity.

We are particularly alarmed that there was no mention anywhere in this memorandum of the OSTP SI framework, which is currently the document that governs the activities and outcomes to achieve an ideal state of scientific integrity across federal agencies. This failure indicates that the draft memorandum in its current form is woefully out of touch with the best practices of how agencies conduct, communicate, and use federal science in its research and decisionmaking processes, and we strongly recommend that OMB revise the document to state that AI technological innovation should adhere to the recommendations laid out in the OSTP SI framework.

i. Advancing the responsible use and development of AI technologies depends on strong scientific integrity policies (this is in response to OMB's question 3).

For nearly 20 years, UCS has investigated how losses of scientific integrity can severely affect scientific research and science-based decisionmaking at federal agencies.[4] Since 2004, across four presidential administrations, we have conducted ten iterations of a survey to assess the perceptions of scientific integrity for tens of thousands of federal scientists.[5] Our research suggests that when agencies engage in scientific activities but fail to explicitly state how federal scientists and their work will be protected from unnecessary political intrusions or other inappropriate influence, federal scientists are more likely to lose faith in their agencies' science-based decisionmaking processes and are more likely to report instances of censorship or self-censorship. Our data suggest that OMB's failure to explicitly guarantee scientific integrity protections around the use and development of AI technologies in its draft memorandum could translate to a perception that a robust culture of scientific integrity does not apply to the use and development of AI technologies in the same way as other technologies or science-based activities at federal agencies.

UCS' research also supports the reverse conclusion. Our survey in 2018 showed that despite the widespread findings that federal scientists perceived major losses of scientific integrity protections, three agencies, the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the National Oceanic and Atmospheric Administration

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[2] Shalanda D Young, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*, Office of Management and Budget (2023), Draft Memorandum, 16, footnote 28, ("the provenance and quality of the data for its intended purpose").

[3] Scientific Integrity Fast-Track Action Committee, *Protecting the Integrity of Government Science*, National Science and Technology Council (NSTC) and the Office of Science and Technology Policy (OSTP) (2022), https://www.whitehouse.gov/wp-content/uploads/2022/01/01-22-Protecting_the_Integrity_of_Government_Science.pdf

[4] *See,* e.g. Union of Concerned Scientists, "Surveys of Scientists at Federal Agencies," 2023, https://www.ucsusa.org/surveys-scientists-federal-agencies; Union of Concerned Scientists, "2004 Scientist Statement on Restoring Scientific Integrity to Federal Policy Making," July 13, 2008, https://www.ucsusa.org/resources/2004-scientist-statement-scientific-integrity

[5] UCS. "Surveys of Scientists"

(NOAA), showed a different trend.[6] Specifically, federal scientists surveyed from the CDC, FDA, and NOAA perceived increased rates of job satisfaction and decreased rates of political interference in science, a finding that we attributed to the scientists' trust in agency leadership to defend their work against political interests. These data suggest that if OMB were to revise its draft memorandum to state in no uncertain terms that the use, development, and assessment of AI technologies is governed by the protections outlined in the scientific integrity policies of the individual agency and the OSTP SI framework, then it would help federal scientists build trust in OMB's leadership on issues related to AI and increase the feeling that OMB is working to protect scientists and their work from inappropriate influence.

ii. Data integrity protections need to be explicitly stated in the sections on the use of AI in the use case inventory (this is in response to OMB's question 8).

UCS strongly recommends that OMB revises the draft memorandum's section on agencies' use of AI in their annual use case inventory to include language that would guarantee that this database will follow the OSTP SI framework's sections on data transparency.

The OSTP's definition of scientific integrity states that transparency is a hallmark of scientific integrity,[7] and the OSTP SI framework includes sections (e.g., "Promote Transparent and Free Flow of Scientific Information") that outline the best practices on data transparency. In particular, we want to highlight one specific portion that is listed on page 33 of the OSTP SI framework (see Section (III)(1d) of the OSTP's model scientific integrity policy section). We feel that the following language from that section may be especially beneficial for inclusion in the sections of OMB's draft memorandum discussing the annual use case inventory: "Reflect scientific information appropriately and accurately and ensure that it is free of misinformation; and make scientific findings or conclusions considered or relied on in policy decisions publicly available online and in open formats, to the extent practicable."

Such language is needed because some research suggests that agencies are not accurately reporting their use of AI in the annual use case inventory. Agencies have been required since the passage of executive order (EO) 13960,[8] issued in December 2020, to "identify, provide guidance on, and make publicly available the criteria, format, and mechanisms for agency inventories of non-classified and non-sensitive use cases of AI by agencies." In December 2022, a white paper issued by a team from Standard University's Human-Centered Artificial Intelligence reported major inconsistencies in the implementation of EO 13960 across agencies and they found that roughly half or more of agencies have failed to file an inventory

[6] Gretchen T Goldman et al., "Perceived Losses of Scientific Integrity under the Trump Administration: A Survey of Federal Scientists," *PLOS ONE* (2020), https://doi.org/10.1371/journal.pone.0231929.

[7] OSTP SI framework, 8, ("Scientific integrity is the adherence to professional practices, ethical behavior, and the principles of honesty and objectivity when conducting, managing, using the results of, and communicating about science and scientific activities. Inclusivity, transparency, and protection from inappropriate influence are hallmarks of scientific integrity.")

[8] Executive Order 13960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, December 3, 2020, https://www.govinfo.gov/content/pkg/FR-2020-12-08/pdf/2020-27065.pdf

of AI use cases.[9] Agencies even failed to report particularly well-known and prominent examples of AI use cases. For instance, the Transportation Security Agency (TSA) failed to disclose the agency's most famous (and most controversial) use of AI, its facial recognition program, which is in use in at least 430 US airports.[10]

The use of AI in agencies' annual use case inventory needs to be governed by data integrity practices that ensures that the data is collected in a timely manner, accurately reflects the full use and extent of AI at agencies, and outlines the procedures for removing or updating inaccurate information. Additionally, OMB needs to explicitly state in its draft memorandum the specific protocols that agencies should utilize when distinguishing between "planned" use cases, which agencies are supposed to include in the inventory, and AI projects that are in the process of research and development, which are not supposed to be included in the inventory.

II. Assessing the potential risks of AI technologies to underserved communities, and removing the AI technology from use if such inequities are found, are important sections in this memorandum.

UCS supports the inclusion of language in the draft memorandum centered on recognizing the potential inequitable impact that AI technologies could have on underserved communities and requiring adherence to Section 4(b) of EO 14091.[11] In this section, we are providing feedback to OMB's question 5.

In particular, UCS highly supports the language listed on page 19 of the memorandum: "To the extent practicable and consistent with applicable law and governmentwide guidance, agencies must consult affected groups, including underserved communities, in the design, development, and use of the AI, and use such feedback to inform agency decision-making regarding the AI. In the event of negative feedback, agencies must consider not deploying the AI or removing the AI from use." We also strongly support the section on page 15 of the memorandum concerning the potential risk to underserved communities, which states that "agencies should be especially attentive to the potential risks to underserved communities. The expected benefits of the AI functionality should be considered against its potential risks, and if the benefits do not meaningfully outweigh the risks, agencies should not use the AI."

We also encourage OMB to further expand upon these sections and provide more specific protocols and guidelines for how best agencies can implement these equity-focused recommendations.

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[9] Christie Lawrence, Isaac Cui, and Daniel E Ho, "Implementation Challenges to Three Pillars of America's AI Strategy," *Standard University* (December 2022), https://hai.stanford.edu/white-paper-implementation-challenges-three-pillars-americas-ai-strategy; see also Rebecca Heilweil and Madison Alder, "The government is struggling to track its AI. And that's a problem," *FedScope* (August 3, 2023), https://fedscoop.com/the-government-is-struggling-to-track-its-ai-and-thats-a-problem

[10] Wes Davis, "The TSA will use facial recognition in over 400 airports." *The Verge* (July 1, 2022), https://www.theverge.com/2023/7/1/23781040/the-tsa-will-use-facial-recognition-in-over-400-airports

[11] Executive Order 14091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, February 16, 2023, https://www.govinfo.gov/content/pkg/FR-2023-02-22/pdf/2023-03779.pdf

III. Conclusion

We support OMB's efforts to advance AI governance and innovation while managing risks from the use of AI as outlined in the draft memorandum. However, we believe that the memorandum needs improvement to better align with the best scientific practices employed by agencies.

We strongly believe that OMB's draft memorandum would benefit from being explicit and intentional about the need for scientific integrity policies and practices to govern the development, use, and assessment of AI technologies. Thank you for taking the time to consider our views.

Sincerely,

Anita Desikan
Senior Analyst
Center for Science and Democracy
Union of Concerned Scientists

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0037
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Academy of Managed Care Pharmacy (AMCP)

General Comment

The Academy of Managed Care Pharmacy (AMCP) thanks the Office of Management and Budget (OMB) for the opportunity to provide comments in response to the draft guidance titled “Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence.” Please see attached for AMCP's full comments.

Attachments

AMCP Comment Letter on Artificial Intelligence 12.01.23

December 1, 2023

Dockets Management
Office of Management and Budget
5630 Fishers Lane, Rm 1061
Rockville, MD 20852

Submitted electronically via regulations.gov

Re: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (FR Doc. 2023–11346)

Dear Sir or Madam:

The Academy of Managed Care Pharmacy (AMCP) thanks the Office of Management and Budget (OMB) for the opportunity to provide comments in response to the draft guidance titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" (Draft Guidance), issued on September 18, 2023.

AMCP is the nation's leading professional association dedicated to increasing patient access to affordable medicines, improving health outcomes, and ensuring the wise use of healthcare dollars. Through evidence and value-based strategies and practices, AMCP's nearly 8,000 pharmacists, physicians, nurses, and other practitioners manage medication therapies for the 270 million Americans served by health plans, pharmacy benefit management firms, emerging care models, and government health programs.

AMCP's strategic priorities include optimizing value and access, addressing health disparities in medication use and access, and enhancing member value.[1] Based upon these priorities, AMCP supports OMB's efforts to ensure that artificial intelligence (AI) can be safely employed while reducing barriers to innovation. AMCP believes that strengthening AI governance, advancing responsible AI innovation, and mitigating risks from the use of AI are vital in keeping up with advancing technology.

Strengthening AI Governance and Advancing Responsible AI Innovation

AMCP acknowledges the importance of AI's potential to improve healthcare decision-making and increase efficiency. Given the speed of advancements in technology and the potential for abuse or misuse, it is necessary to get ahead of these changes by implementing standards to mitigate potential risks. Strengthening governance reduces this risk and promotes appropriate use, especially for purposes that may be rights-impacting or safety-impacting.

AMCP recommends that any principles or regulatory frameworks for AI should incorporate the Organization for Economic Co-operation and Development (OECD) Principles on Artificial

[1] AMCP Strategic Priorities. https://www.amcp.org/about/about-amcp/amcp-strategic-priorities

Intelligence[2] and the U.S. Department of Commerce's National Institute of Standards and Technology (NIST) Artificial Intelligence Risk Management Framework.[3] AMCP supports a balance between encouraging innovation and ensuring that sufficient controls are in place to protect against risk.

AMCP is also concerned about ensuring that the use of AI does not contribute to health disparities. For that reason, AMCP encourages OMB to incorporate requirements that any dataset used for rights-impacting or safety-impacting medical decisions include safeguards to ensure that the data includes sufficient representation from medically underserved populations.

AMCP appreciates your consideration of the concerns outlined above and looks forward to continuing work on these issues with OMB. If you have any questions regarding AMCP's comments or would like further information, please contact AMCP's Manager of Regulatory Affairs, Vicky Jucelin, at vjucelin@amcp.org or (571) 858-5320.

Sincerely,

Susan A. Cantrell, MHL, RPh, CAE
Chief Executive Officer

[2] Organization for Economic Co-operation and Development (OECD) Principles on Artificial Intelligence. Available at: https://oecd.ai/en/ai-principles.
[3] U.S. Department of Commerce's National Institute of Standards and Technology (NIST) Artificial Intelligence Risk Management Framework (AIRMF1.0). Available at: https://nvlpubs.nist.gov/nistpubs/ai/nist.ai.100-1.pdf.

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0038
Comment from Melanie Trowbridge

Submitter Information

Name: Melanie Trowbridge

General Comment

See attached file(s)

Attachments

AI_Comment

I am a Licensed Naturopathic Doctor, Acupuncturist, Mother, and former technology worker in the State of Washington. My work in technology was through development and test, specifically focused on boundary testing of server systems. My primary reason for reading this document was to ensure appropriate AI boundaries in governance and the preservation of individual autonomy, with respect to diversified development and design, as well as the right to override if the system becomes dangerous or threatening to Human Rights.

In software and boundary testing it is especially critical to have testers to the code, and ways to visualize and understand what is going on underneath. Developers can miss their flaws and program to their own biases without these important positions and steps in place. Also with AI, there is a data quality issue that can accentuate bias. Therefore, test plans and cases must be created to ensure that problem scenarios are thought of ahead of time vs. in a production setting.

In many ways, the rolling out of AI to the world and the “Managing Risks” section of this document is similar to test planning for governance. AI is a different level of software integration into governmental departments than we have previously seen, and as the United States of America is a country founded on individual and societal liberties for all, we must ensure that every person has equal access to resources that will allow them to pursue their happiness and take part in decision making as was the mission set out by our founders.

The potential for AI to dominate and control the masses by a limited group of players is huge in the wrong hands. One of my concerns currently is who has access to the development capabilities to create AI systems, and whether this is a balanced group of players and motivations. As a former female worker in the technology industry, I am well aware of the minority of women in this field and why I ultimately left the field. According to a 2020 World Economic Forum report, women make up only 26 percent of data and AI positions in the workforce. Stanford Institute for Human-Centered AI found that women make up just 16 percent of tenure-track faculty focused on AI globally, according to their 2021 AI Index Report.

There are multiple reasons for this disparity in male to female ratios in technology, and many barriers exist for women in this field. We must continue to highlight the fact that AI development is currently a representation of only 16-26 percent, while women make up roughly half of the United States and world population. The other 74-84 percent of decision making on a technology that could very well dominate control in global financial markets, governance, healthcare, education, and ultimately quality of life including personal autonomy is through male only design and implementation. This must rapidly change through active pursuit of equality, as again there are now and have been real problems in this field that deliberately shut women out and shut women down.

Again, I would like to emphasize as someone who worked in technology that there are fundamental levels of bias and power dynamics that kept me, and many women, out of technology despite our interest in pursuing those careers. Little has been done to identify and correct these disparities over time. To my knowledge, and through speaking with women who are still in the field, these biases and power dynamics have little changed over the last decade. Thus, women are still not welcomed or encouraged equally in the field that will potentially control societal decision making at every level. This must be specifically called out and not overlooked as a problem within this design or simply labeled "equity".

While I saw in this document the calling out of mitigation on emerging risks to rights and safety, ensuring adequate human training and assessment, and taking steps to ensuring that AI will advance with equity, dignity, and fairness; I do not see where we specifically call out this glaring problem in AI development or specifically address disparities in current data used to drive the AI systems. As someone who has also worked in the field of education, I have huge concerns that little to nothing is being done to address this disparity in male to female education, decision making, and sought out inclusion within this field. As we know, with machine learning, and deep learning technologies, there is likely to be an exponential growth of AI development by the August 1, 2024 deadlines given in this document, so there is no time to waste in ensuring that women get their fair representation in this emerging technology.

For example, in the field of AI neuroscience, we see many companies funded by male CEOs, working to implement predominantly male-centered design and development operating on the very basis on neuronal transmission and alterations of impulse reception and transmission. This is problematic for a variety of reasons. While this technology is currently predominantly focused on diseases of neuronal transmission, the field is looking to expand into more common conditions including chronic anxiety and depression. This is just one example of how a male-centered and male-dominated field could lead to further oppression and biases in personal autonomy in the United States Healthcare fields, specifically populations of women.

However, in many of the documents discussing AI roll-out into healthcare, governance, and beyond, I do not see the male to female disparity specifically called out. Therefore, in summary of my concerns, I would emphasize the need to highlight and call out the problem more prominently, identifying specific ways to address the problem proactively, and ensuring that panel members who are working on the problem truly seek to balance the field and not just provide a surface level attempt. In other words, while I found the document does address topics of equity and inclusion, I find that I would like to see more specific call outs of this elephant in the room known as lack of females in AI design and development.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0039
Comment from Aubra Anthony

Submitter Information

Name: Aubra Anthony

General Comment

See attached file(s)

Attachments

OMB_AImemo_comments

OMB can best advance responsible AI innovation by recognizing that those charged with shepherding AI's procurement, development, deployment, or oversight must hail from domains of expertise that are far broader than what is typically considered for traditional information technologies. As is underscored through the Blueprint for an AI Bil of Rights, the NIST Risk Management Framework and President Biden's Executive Order, AI is a socio-technical system, and its governance must be approached as such. Agencies must therefore be directed to ensure teams sufficiently address the sociotechnical nature of artificial intelligence. This means Chief AI Officers, for example, must be equipped with the types of skills and education that allow them to perform their role-mandated risk management tasks with an eye toward not only traditional enterprise risk management, but expanded definitions of risk with respect to rights, equity, dignity, and more. The useful distinction made in the memorandum between safety-impacting risks and rights-impacting risks is a welcome step toward recognizing that different tactics and skill sets are likely to be needed to fully mitigate the suite of risks posed by the use of AI by the government. To avoid the CAIO role becoming overly skewed toward technical risk (less on sociotechnical risk), more consistent (and insistent) recognition of this will be necessary.

Ensuring sociotechnical (rather than purely technical) risk framing may be unlikely, for example, if Chief AI Officers follow previous models of Chief Information Officers, Chief Technology Officers, or Chief Data Officers (as is suggested, for example, in Sec. 3.b.i) and reside solely within the departments of an agency charged with overseeing (also important) responsibilities like cybersecurity or IT provision. Given the weighty responsibility falling on Chief AI Officers to wrestle with not simply technical but societal and rights-infringing implications of AI's use within/by their respective agency, a CAIO's hierarchical positioning, oversight roles and responsibilities, and accountability mechanisms must reflect this. Especially insofar as the memorandum makes recommendations about how to build out the federal workforce to support responsible AI innovation, more could be done – for example in Section 3.b.i (Roles) and 3.b.ii (Responsibilities) to emphasize the range of diverse expertise that will be necessary to support this goal in the CAIO. Similarly, while each agency will approach workforce development and oversight in a unique way, the more the memorandum explicitly stresses the need for workforce strengthening to include increasing the diversity of skills/disciplines (to include the social sciences, for example), the more likely it will be that this goal is consistently interpreted across different agencies. The explicit mention of the many disciplines and skills necessary for a workforce to appropriately govern responsible AI innovation are very welcome, for example in Section 4.b.iv, but this kind of explicit recognition would be welcome in other areas of the draft memorandum that address the skills of those charged with overseeing AI, for example in Section 3.c concerning AI governance bodies.

AI Governance Bodies should reflect a diversity of realms of expertise. They should also work to identify channels for engaging with, and appropriately representing in AI Governance Body deliberations, stakeholders who stand to be impacted by the agency's use of AI. Each agency should develop a definition of rights-impacting risk with respect to which communities will most likely be *impacted* by the agency's use of AI (or customers' use of AI) – as opposed to simply those choosing to use AI, as it appears to be communicated in Section 5.iv.B. Human rights impact assessments, algorithmic impact assessments, third party audits – there are several practices that could be suggested for agencies to consider to support practical progress toward risk identification.

Actions and decisions taken by each agency's Chief AI Officer and/or AI Governance Body should ideally be reported to an externally situated oversight entity – akin, for example, (perhaps) to an AI-specific GAO -- to ensure accountability in how different agencies approach the task of assessing and mitigating sociotechnical risk in relation to their agency's mission. Less from a standpoint of enforcement and more of collaborative learning and

sharing best practices and common pitfalls, ensuring external oversight (and feedback channels) will be especially important to build in at these early stages of implementation. This is laudably begun/addressed in Section 5, but more is needed.

OMB must also recognize that AI innovation will happen (and is happening) worldwide, and the actions the US government takes to define and bound what responsible innovation looks like will similarly have impacts worldwide. By structuring agency policies in such a way as to consider not only the impacts AI will have on U.S. citizens, but also on those beyond the U.S. (as appropriate), the federal government can take a meaningful step towards fulfilling the unique responsibility the US has to ensure this technology is safe for all who interact with it. As an example of how the OMB draft memorandum could better accommodate this: in Section 5.d.v, more could be said about the way agencies can promote practices that recognize the full global scope of the supply chain which currently enables generative AI – considering of course, not just physical production of AI hardware, but the global data ecosystem that drives AI. For example, U.S. companies have relied heavily on workers in lower-income countries for data enrichment or content moderation tasks to improve generative AI, often to the detriment of these workers' rights. By expanding the examples offered for encouraging "responsibly procuring generative AI" to also include building and setting requirements for workplace practices in developing generative AI models, OMB could positively influence how contracts are put in place worldwide to reverse a trend which has so far been one of exploitation of workers in lower-income settings. (References: https://time.com/6247678/openai-chatgpt-kenya-workers/, https://www.technologyreview.com/2022/04/20/1050392/ai-industry-appen-scale-data-labels/)

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0040
Comment from Preston Gifford

Submitter Information

Name: Preston Gifford

General Comment

Please address concerns that AI will overtake the workforce. People are going to lose their jobs at an unseen rate. AI is going to destroy our civilization as we know it.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lpp-lamx-9djs
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0041
Comment on OMB-2023-0020-0001

Submitter Information

General Comment

First, we caution against overloading civil servants with additional steps they have to take to ensure responsible AI. Any such activities should not be additive to already existing sets of expertise and workloads, but compliment them. This can best be done by identifying units and individuals who already are entrusted with responsible-AI related concerns (such as research and development, procurement, or compliance). The new responsible AI mandates outlined in the OMB implementation guidelines should be mapped onto the work that these units already do. In previous work, we have called this approach “Practice-Based Compliance Framework”.

Second, we urge agencies to consider their own employees as key stakeholders in the responsible AI space. Responsible AI-focused stakeholder engagement efforts, such as sandboxes, discussion groups, or surveys, such decidedly include this stakeholder group. We underline that this type of stakeholder engagement can not be conducted in a one-size-fits-all fashion. Rather, it should fold into organization- and agency-specific environments. Internal stakeholder engagement in one agency will look different from stakeholder engagement in another agency. We have discussed what that can look like in the context of AI procurement, explaining how agencies and units can avoid common traps.

Third, it is crucial that compliance with the OMB implementation guidelines should not rely solely on data, measurements, and risk accounting provided by AI vendors. Assessing impacts on the terms set by those being assessed risks does not produce robust accountability to the public interest. When vendors define risks and impacts in ways that ensure a favorable assessment for their products, they are only accountable to themselves. This is avoidable by ensuring independent evaluators are permitted to conduct their own real-world tests and produce their own documentation of AI systems, where appropriate.

Pertaining to 5.b.ii., we want to underline that AI systems that purport to be “detecting or measuring emotions, thought, or deception in humans” are often based on pseudo-scientific constructs and plagued by instability, leading to invalidity of these tools as test instruments. Additionally, constructs that are scientific are not necessarily observable (such as socioeconomic status, teacher effectiveness, and risk of recidivism) and must be inferred from measurements of observable properties. This process necessarily involves making assumptions, introducing the potential for mismatches between the understanding of the construct purported to be measured and how it is operationalized in an AI system. Many AI harms are

direct results of such mismatches. An AI assessment should, therefore, include a careful check of the assumptions and constructs that underpin an AI system. Such assessments can and should be incorporated into procurement processes.

Relatedly, we want to comment on 5.c.iv. and underline that AI impact assessments should always include qualitative analysis (such as of the scientific history and validity of a construct, and its underpinning assumptions). Qualitative and quantitative assessments must be meaningfully integrated. How this can be done has, for example, been proposed in the “Love Triangle” framework that combines assumptions tracking with statistical stability analysis into a holistic AI audit approach. This approach has already been put into practice.

Hardware- and sensor-driven systems (such as motion capture technology) should not be exempt from AI assessments. Hardware components carry their own, potentially harmful, assumptions and design features. One historical example of this is the way color photographic film was calibrated to render lighter skin tones more accurately than darker skin tones, which was then propagated into color calibration for digital photographic technologies. These hardware-related considerations should be assessed as part of an AI assessment, not least to avoid harms and risk an approach that is overtly data-centric.

It is important that good documentation and archiving practices be developed for these types of holistic AI assessments, and that respective archives be publicly accessible and carefully maintained. This should be considered public interest technology infrastructure and be federally funded.

Lastly, we recommend carefully considering the framing and execution of “consult and incorporate feedback from affected groups” (5.c.v.B). It is important to approach engagement with affected groups from a non-extractive standpoint, not least to avoid superficial “participation-washing”. Affected groups must be carefully and consensually enrolled in feedback processes and they must be compensated for their time and expertise. At the same time, these kinds of infrastructures for soliciting this type of feedback must be aligned with the principles of equity and dignity, and they must be sustainably funded.

Attachments

OMB Comment Dec 2023

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December 3, 2023

Subject: Comment on the OMB's released implementation guidelines following President Biden's Executive Order on Artificial Intelligence

We are pleased to have the opportunity to comment on the OMB's released implementation guidelines following President Biden's Executive Order on Artificial Intelligence.

As researchers in the field of responsible AI, we want provide the following general points:

First, we **caution against overloading civil servants** with additional steps they have to take to ensure responsible AI. Any such activities should not be additive to already existing sets of expertise and workloads, but compliment them. This can best be done by identifying units and individuals who already are entrusted with responsible-AI related concerns (such as research and development, procurement, or compliance). The new responsible AI mandates outlined in the OMB implementation guidelines should be mapped onto the work that these units already do. In previous work, we have called this approach "Practice-Based Compliance Framework".[1]

Second, and in line with the first point, we urge agencies to consider their own **employees as key stakeholders** in the responsible AI space. Responsible AI-focused stakeholder engagement efforts, such as sandboxes, discussion groups, or surveys, such decidedly include this stakeholder group. We underline that this type of stakeholder engagement can not be conducted in a one-size-fits-all fashion. Rather, it should fold into organization- and agency-specific environments. Internal stakeholder engagement in one agency will look different from stakeholder engagement in another agency. We have discussed what that can look like in the context of AI procurement, explaining how agencies and units can avoid common traps.[2]

Third, it is crucial that compliance with the OMB implementation guidelines should not rely solely on data, measurements, and risk accounting provided by AI vendors. Assessing impacts on the terms set by those being assessed risks does not produce robust accountability to the public interest. When vendors define risks and impacts in ways that ensure a favorable assessment for their products, they are only accountable to

[1] Sloane, Mona and Moss, Emanuel, Introducing a Practice-based Compliance Framework for Addressing New Regulatory Challenges in the AI Field (March 17, 2022). Sloane, Mona, and Emanuel Moss. 2022. "Introducing a Practice-Based Compliance Framework for Addressing New Regulatory Challenges in the AI Field." TechReg Chronicle, March: 9. , Available at SSRN: https://ssrn.com/abstract=4060262.

[2] Sloane, M., Chowdhury, R., Havens, J.C., Rincon Alba, L.C. (2021): 'AI and Procurement – A Primer'. New York University, June 2021, doi: https://doi.org/10.17609/bxzf-df18.

themselves.[3] This is avoidable by ensuring independent evaluators are permitted to conduct their own real-world tests and produce their own documentation of AI systems, where appropriate.[4]

We also want to provide comments on specific sections of the OMB implementation guidelines.

Pertaining to 5.b.ii. (Purposes That Are Presumed to Be Rights-Impacting), we want to underline that AI systems that purport to be "detecting or measuring emotions, thought, or deception in humans" are often based on pseudo-scientific constructs and plagued by instability, leading to invalidity of these tools as test instruments. Additionally, constructs that are scientific are not necessarily observable (such as socioeconomic status, teacher effectiveness, and risk of recidivism) and must be inferred from measurements of observable properties. This process necessarily involves making assumptions, introducing the potential for mismatches between the understanding of the construct purported to be measured and how it is operationalized in an AI system. Many AI harms are direct results of such mismatches.[5] **An AI assessment should, therefore, include a careful check of the assumptions and constructs that underpin an AI system**. Such assessments can and should be incorporated into procurement processes.[6]

Relatedly, we want to comment on 5.c.iv. (Minimum Practices for Either Safety-Impacting or Rights-Impacting AI) and underline that **AI impact assessments should always include qualitative analysis** (such as of the scientific history and validity of a construct, and its underpinning assumptions). Qualitative and quantitative assessments must be meaningfully integrated. How this can be done has, for example, been proposed in the "Love Triangle" framework that combines assumptions tracking with statistical stability analysis into a holistic AI audit approach.[7] This approach has already been put into practice.[8]

Hardware- and sensor-driven systems (such as motion capture technology) should not be exempt from AI assessments. Hardware components carry their own, potentially harmful, assumptions and design features. One historical example of this is the way color photographic film was calibrated to render lighter skin tones more accurately than darker skin tones, which was then propagated into color calibration for digital photographic technologies. These hardware-related considerations should be assessed as part of an AI assessment, not least to avoid harms and risk an approach that is overtly data-centric.

It is important that good **documentation and archiving practices** be developed for these types of holistic AI assessments, and that respective archives be publicly accessible and carefully maintained. This should be considered public interest technology infrastructure and be federally funded.

Lastly, we recommend carefully considering the framing and execution of "consult and incorporate feedback from affected groups" (5.c.v.B). It is important to approach **engagement with affected groups from a non-**

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[3] Selbst, A.D., 2021. An Institutional View of Algorithmic Impact. Harvard Journal of Law & Technology, 35(1).

[4] Metcalf, J., Moss, E., Watkins, E.A., Singh, R. and Elish, M.C., 2021, March. Algorithmic impact assessments and accountability: The co-construction of impacts. In Proceedings of the 2021 ACM conference on fairness, accountability, and transparency (pp. 735-746).

[5] Abigail Z. Jacobs and Hanna Wallach. 2021. Measurement and Fairness. In Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency (FAccT '21). Association for Computing Machinery, New York, NY, USA, 375–385. https://doi.org/10.1145/3442188.3445901.

[6] Abigail Z. Jacobs and Deirdre K. Mulligan. 2022. 'The hidden assumptions of AI', in The Regulatory Review, July 7, 2022, https://www.theregreview.org/2022/07/07/jacobs-mulligan-the-hidden-governance-in-ai/

[7] Sloane, M., Moss, E., Chowdhury, R. (2022): 'A Silicon Valley Love Triangle: Hiring Algorithms, Pseudo-Science, and the Quest for Auditability', In: Patterns (Cell Press), Volume 3, Number 2, February 2022, doi: https://doi.org/10.1016/j.patter.2021.100425.

[8] Rhea, A., Markey, K. D'Arinzo, L., Schellmann, H., Sloane, M., Squires, P., Stoyanovich, J. (2022): 'Resume Format, LinkedIn URLs and Other Unexpected Influences on AI Personality Prediction in Hiring: Results of an Audit', 2022 ACM Conference on Artificial Intelligence, Ethics, and Society, July 2022, doi: https://doi.org/10.1145/3514094.3534189.

extractive standpoint, not least to avoid superficial "participation-washing".[9] Affected groups must be carefully and consensually enrolled in feedback processes and they must be compensated for their time and expertise. At the same time, these kinds of infrastructures for soliciting this type of feedback must be aligned with the principles of equity and dignity, and they must be sustainably funded.

Thank you for the opportunity to provide comments on the OMB's released implementation guidelines following President Biden's Executive Order on Artificial Intelligence. We look forward to serving as a potential resource as you continue to engage in implementation discussions on AI safety, security, and trustworthiness.

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[9] Sloane, M., Moss, E., Awomolo, O., Forlano, L. (2022): 'Participation Is not a Design Fix for Machine Learning', 2022 ACM Conference on Equity and Access in Algorithms, Mechanisms, and Optimization, October 2022, doi: https://doi.org/10.1145/3551624.3555285.

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0042
Comment on OMB-2023-0020-0001

Submitter Information

Organization: World Privacy Forum

General Comment

Attached please find the comments of the World Privacy Forum regarding OMB-2023-0020.

Attachments

WPF_Comments_OMB_AgencyUse_of_AI_3Dec2023_fs

Comments of the World Privacy Forum

To

The Office of Management and Budget regarding *Request for Comments:Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum OMB-2023-0020.*

Via www.regulations.gov

Clare Martorana
U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer,
Office of Management Budget

December 3, 2023

The World Privacy Forum is pleased to submit comments in response to the Office of Management and Budget's "Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Memorandum." OMB published the request in the Federal Register on November 3, 2023, https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-24269.pdf.

The World Privacy Forum is a respected NGO and non-partisan public interest research group focused on conducting research and analysis in the area of privacy and complex data ecosystems and their governance, including in the areas of identity, AI, health, and others. WPF works extensively on privacy and governance across multiple jurisdictions, including the US, India, Africa, Asia, the EU, and additional jurisdictions. For more than 20 years WPF has written in-depth, influential studies, including groundbreaking research regarding systemic medical identity theft, India's Aadhaar identity ecosystem —peer-reviewed work which was cited in the landmark Aadhaar Privacy Opinion of the Indian Supreme Court — and The Scoring of America, an early and influential report on machine learning and consumer scores. WPF co-chairs the UN Statistics Data Governance and Legal Frameworks working group, and is co-chair of the WHO Research, Academia, and Technical Constituency. At OECD, WPF researchers participate in the OECD.AI AI Expert Groups, among other activities. WPF participated as part of the first core

group of AI experts that collaborated to write the OECD Recommendation on Artificial Intelligence, now widely viewed as the leading normative principles regarding AI. WPF research on complex data ecosystems governance has been presented at the National Academies of Science and the Royal Academies of Science. World Privacy Forum: https://www.worldprivacyforum.org.[1]

This Administration's focus on artificial intelligence is welcome and timely. In general. WPF is happy with the President's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Executive Order 13960 of December 3, 2020, https://www.govinfo.gov/content/pkg/FR-2020-12-08/pdf/2020-27065.pdf. We also welcome and support OMB's AI Memorandum. Both documents are good starts at tackling the challenges of AI.

We want to offer a few suggestions for the OMB AI Memo. The focus of the first part of these comments is on activities that involve or affect individuals and their personally identifiable information. We recognize, of course, that there are many AI activities that do not involve privacy matters.

Part I: Use Existing Privacy Requirements to Assist with New AI Obligations

Existing law provides a useful method for informing the public about and for seeking comments on agency activities affecting privacy. We refer, of course, to the Privacy Act of 1974, 5 U.S.C. § 552a. The Privacy Act of 1974 directs agencies to use Systems of Records Notices to describe their activities involving the use of personal information. Agency activities that involve personal information are described through notices in the Federal Register with the solicitation of public comment, and the notices remain available publicly to inform the public of agency activities. In many ways, publications by agencies under the Privacy Act of 1974 are unique. Other counties that have more advance and more comprehensive privacy laws mostly abandoned requirements for publications describing descriptions of personal data systems. In our view, the Privacy Act of 1974's publication provisions are one of the Act's most successful obligations.

The Privacy Act of 1974 became law long before anyone envisioned the need for a privacy impact assessment (PIA). A later law, the E-Government Act of 2002, 35 U.S.C. § 3501 note, imposed a requirement for PIA. The statutory requirement was always inadequate for the purpose, but it was supplemented by useful OMB guidance, OMB Guidance for Implementing the Privacy Provisions of the E-Government Act of 2002 (September 26, 2003) (M-03-22).

To a significant extent, many of the features of both of these PIA requirements are simply out-of-date and trail current technology and information practices by decades. We do not expect OMB to solve these broader problems in its AI memorandum. However, it should be possible to integrate new agency obligations for AI with existing obligations under both the Privacy Act of 1974 and the E-Government Act.

[1] World Privacy Forum's home page includes information about our activities, as well as numerous data governance and privacy research, data visualizations, and resources. https://www.worldprivacyforum.org.

There is a greater opportunity here as well. We note that this Administration is aware of the need to focus more attention on the use by federal agencies of data brokers who provide personal information for the use of federal agencies or of data brokers who receive personal information from federal agencies. WPF applauds that effort with great enthusiasm. Many of these activities are hidden from the American public because existing privacy laws and rules do not expressly direct agencies to disclose their use of data brokers as sources or recipients. Data broker information resources are integral to some AI activities.

It is possible without a major effort to fold the AI and data broker initiative together with a limited reform of existing Privacy Act of 1974 and PIA requirements. Happily, an initiative sponsored by WPF already includes ideas and drafted language that will accomplish all of these tasks. That project is a report titled From the Filing Cabinet to the Cloud: Updating the Privacy Act of 1974 (May 2021), https://www.worldprivacyforum.org/2021/05/from-the-filing-cabinet-to-the-cloud-updating-the-privacy-act-of-1974/.

The goal of that report is a complete revision of the Privacy Act of 1974. That goal will not be accomplished administratively, but some administrative changes can achieve the same ends. For example:

1) **Better publications**. The report proposes on page 85 to expand existing requirements to describe categories of sources of information a Privacy Act system of records. We note that AI is likely to be a new category of information for many AI activities covered by the OMB memorandum. Language in the report – which can work just as well in an OMB memorandum as in a statute – expands upon the existing requirement to describe the categories of sources of records in the system.

> New language makes it explicit that sources include commercial, governmental, and other sources that the agency routinely reviews, consults, or uses. It is especially important for agencies to inform the public when using commercial sources. For example, if an agency has a contract with a consumer reporting agency ("credit bureau") to use credit records, it must so state. If there is a reasonable prospect that the particular source may change but not the category of sources, the agency may choose to identify the category (e.g., "credit bureau") rather than identifying which specific credit bureau it uses. If an agency routinely uses Internet search engines to find information on individuals, it must so state. If an agency routinely seeks information from social media, the agency should identify at least the major social media used. All the information about sources will help individuals figure out how particular information about them ended up in agency records. This is especially important when the agency uses the information to make decisions about individuals. It is even more important if an agency consults but does not retain a copy of information held by a third party.

This type of disclosure addresses current Administration priorities for AI and for data brokers. OMB could make an adjustment in its Privacy Act of 1974 and PIA administrative requirements to expand public disclosure on data broker activities.

2) **Better PIAs**. Formal impact assessments can be useful to address many different policy concerns. Everyone seems aware of the overlaps between some AI assessments and some privacy assessment. That same report that proposed revising the Privacy Act of 1974 also

suggested revising the existing privacy impact assessment requirement. We will not repeat the details here. We refer you to pages 115-123 of the report.

We summarize here, however, by noting that the report emphasized the need for a PIA ***process*** and just not a flat, one-time, one-size-fits-all assessment. This need will be just as true for an AI assessment as it is for a privacy assessment. We state expressly that: 1) some assessments will require more attention, more consultation, and a long time than others; 2) some assessments will require regular reviews over time because consequences are not static and because agency programs change over time; and 3) some assessments will require lesser efforts because the risks are smaller. Responsible agency personnel should be allowed to make determinations about which activities need more assessment than others.

Given the significant overlap with some AI assessments and some privacy assessments, we suggest that an agency's Privacy Officer and the agency's AI Officer be directed to identify those overlaps and to work jointly on the assessments that they determine need substantial attention from both perspectives. Other specific ideas on assessments from the Privacy Act revision will also be relevant, and all adjustments to existing guidance can be accomplished administratively by OMB in its AI memorandum.

Part II. AI Activities

We have some additional observations specific to AI activities.

In the OMB's definition for risks from the use of AI in its *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum*, the agency rightfully mentions specific factors that create, contribute to, or exacerbate the risks of AI including "AI outputs that are inaccurate or misleading" and "AI outputs that are unreliable, ineffective, or not robust."

We applaud the OMB's recognition that some AI systems simply may not be adjustable in an acceptable manner that adequately mitigates risks, and therefore should not be used. The memo's demand that, "Where the AI's risks to rights or safety exceed an acceptable level and where mitigation is not practicable, agencies must stop using the affected AI as soon as is practicable," is a positive guidepost for AI use by agencies.

Ensuring that AI systems do not produce outputs that create, contribute to, or exacerbate risks, is imperative. In addition, there also is a pressing need to ensure that AI governance tools—the tools and techniques used to measure AI system risks and improve their inclusiveness, fairness, explainability, privacy, safety and other trustworthiness factors— *themselves* do not compound those risks.

AI governance tools can improve such issues; however these tools often lack meaningful oversight and quality assessments. Incomplete or ineffective AI governance tools can create a false sense of confidence, cause unintended problems, and generally undermine the promise of AI systems.

U.S. federal agencies have important gatekeeper and quality assurance roles when it comes to ensuring that the tools and techniques employed to measure and improve the AI systems they use are reliable and effective.

We appreciate the opportunity to comment regarding specific questions in the OMB's Request for Comments on the Draft Memorandum. Below are responses to some specific questions.

Question 2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body?

The OMB memo lists several responsibilities of Chief Artificial Intelligence Officers including "Managing Risks from the Use of AI" through "working with relevant senior agency officials to establish or update processes to measure, monitor, and evaluate the ongoing performance of AI applications and whether they are achieving their intended objectives."

Such evaluation processes should include quality assessment of the AI governance tools and techniques used to evaluate and measure the AI systems. Establishing appropriate processes for this purpose will require evidence gathering and better understanding of realities on the ground before a rush to solutions. Otherwise, these processes may well be unfit for purpose and fail to accomplish the goals which are intended — and in some cases mandated — to attain.

We urge agencies to collaborate with civil society organizations and academia in addition to private sector entities to A) build an evaluative environment for testing AI systems, B) gather relevant evidence and work toward appropriate AI measurement and monitoring processes, and C) work to create appropriate AI benchmarks.

In particular, agencies might look to the National Institute of Standards and Technology (NIST) in convening stakeholders and developing an evaluative environment in which an evidentiary basis for the socio-technical contexts and best practices for AI governance tools could be created.

Question 5. "Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?"

Some use cases involving specific measurement methods for measuring or improving AI fairness or explainability should be assessed thoroughly for appropriate application, and possibly removed from consideration as evaluative AI measures.

In the World Privacy Forum's forthcoming report, *Risky Analysis: Assessing and Improving AI Governance Tools, An international review of AI Governance Tools and suggestions for pathways forward*, we present research showing problems with some commonly-used methods intended to measure or improve AI fairness and explainability. These measurement methods have been shown to be unsuitable including when used in an "off-label" or out-of-context manner if applied to measure many types AI systems.

A Problematic AI Fairness Measurement Method
In particular, the research found problems with AI governance tools that incorporate the US Four-Fifths or 80% Rule in an attempt to measure disparate impacts and fairness of AI systems.

The Four-Fifths Rule is well-known in the US labor recruitment field as a measure of adverse impact and fairness in hiring selection practices. Detailed in the Equal Employment Opportunity

Commission *Uniform Guidelines on Employee Selection Procedures of 1978*,[2] the rule is based on the concept that a selection rate for any race, sex or ethnic group that is less than four-fifths —or 80%—of the rate reflecting the group with the highest selection rate is evidence of adverse impact on the groups with lower selection rates. The rule has been widely applied by employers,[3] lawyers,[4] and social scientists[5] to determine if hiring practices are lawful and if they result in disparate or adverse impacts against certain groups of people.

While the Uniform Guidelines state that the Four-Fifths rule is "generally" regarded by federal enforcement agencies as evidence of adverse impact, it explains that in some cases, smaller differences in selection rate may constitute adverse impact, and in others, greater differences in selection rate may not constitute adverse impact. In other words, context matters.[6]

Despite its widespread use, legal, employment, and technical experts have cautioned against use of the Four-Fifths Rule as a singular means of assessing disparate impact.[7] Many experts warn against simplistic applications of the rule, both within its historical use in US labor contexts as well as for its use in AI contexts.[8]

In June 2023, the chair of the U.S. Equal Employment Opportunity Commission cautioned against relying solely on meeting the 80% threshold. Calling the Four-Fifths rule "a check" and just one single standard used at the start of federal investigations, rather than the only measure

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[2] Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607(1978)

[3] *4/5ths Rule - Meaning & Definition*, MBA Skool, (Aug. 16, 2023, 11:01 AM), https://www.mbaskool.com/business-concepts/human-resources-hr-terms/13006-45ths-rule.html.

[4] 1607.4 Information on impact, Legal Information Institute at Cornell Law School, 29 CFR § 1607.4 (Aug. 16, 2023, 11:07 AM), https://www.law.cornell.edu/cfr/text/29/1607.4.

[5] Alexander P. Burgoyne et al., *Reducing adverse impact in high-stakes testing*, 87 Intelligence, art. 101561 (July-Aug. 2021), https://doi.org/10.1016/j.intell.2021.101561.

[6] *Id.*

[7] *E.g.*, M.S.A. Lee & L. Floridi, *Algorithmic Fairness in Mortgage Lending: from Absolute Conditions to Relational Trade-offs,* 31 Minds & Machines 165,191 (June 9, 2020), https://doi.org/10.1007/s11023-020-09529-4 ("Feldman et al. (2015) have formalized the approach to identifying disparate impact, but their methodology for pre-processing the data to remove the bias has shown instability in performance of the technique").

[8] Philip Roth et al., *Modeling the Behavior of the 4/5ths Rule for Determining Adverse Impact: Reasons for Caution,* 91 J. Applied Psych. 507, 522 (May 2006).

used for gauging disparate impact, she said that "smaller differences in selection rates may constitute disparate impact."[9]

Further, according to a U.S. Justice Department legal manual addressing disparate impact, "not every type of disparity lends itself to the use of the Four-Fifths rule, even with respect to employment decisions."[10] Legal scholars also have questioned the limits of the Four-Fifths rule, noting its failure to statistically reflect hiring disparity impact adequately.[11]

Despite those caveats, the Four-Fifths Rule and its 80% benchmark have been repurposed in computer code form and used in a variety of AI fairness metrics and tools.[12] The rule is applied in both employment[13] and non-employment contexts [14] as a means of measuring or "removing" bias or
disparate impacts.[15] It is also used outside of the US employment context and is encoded into AI governance tools offered in other jurisdictions. [16]

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[9] Chair Burrows spoke during a keynote speech in June 2023 at the ACM Conference on Fairness, Accountability, and Transparency (ACM FAccT) attended by World Privacy Forum representatives. She said that it is "worrisome" when employers or vendors suggest that meeting the 80% benchmark is enough to ensure that a hiring approach or system does not create disparate impact.

[10] U.S. Dep't of Just., Just. Manual § 7 (1964).

[11] Jennifer Peresie, *Toward a Coherent Test for Disparate Impact Discrimination.* 84 Ind. L. J. 773, 802 (2009), http://ilj.law.indiana.edu/articles/84/84_3_Peresie.pdf.

[12] Elizabeth Watkins et al., *The Four-Fifths Rule is Not Disparate Impact: A Woeful Tale of Epistemic Trespassing in Algorithmic Fairness,* Parity Techs. Inc., (March 3, 2022), https://ssrn.com/abstract=4037022.

[13] Hilke Schellmann, *Auditors are testing hiring algorithms for bias, but there's no easy fix,* MIT Technology Review (Feb. 11, 2021), https://www.technologyreview.com/2021/02/11/1017955/auditors-testing-ai-hiring-algorithms-bias-big-questions-remain/.

[14] *Bias Mitigation with Disparate Impact Remover*, Jupyter nbviewer (Aug. 16, 2023, 11:18AM), https://nbviewer.org/github/srnghn/bias-mitigation-examples/blob/master/Bias Mitigation with Disparate Impact Remover.ipynb.

15 AIF360, GitHub, Trusted AI, Supported Bias Mitigation Algorithms, "Disparate Impact Remover." (November 11, 2023), https://github.com/Trusted-AI/AIF360/tree/master. (Documentation for the Disparate Impact Remover algorithm supported by AI Fairness 360 specifically cites 2015 research introducing a disparate impact measurement based on the Four-Fifths Rule's 80% benchmark.)

[16] Multiple AI governance tools surveyed for World Privacy Forum's *Risky Analysis* report mention or recommend fairness assessments that use encoded versions of the Four-Fifths or 80% Rule to measure disparate impact. See Part I and Appendix C of the report for more detail.

Again, we suggest that use of AI disparate impact measurement methods based on the Four-Fifths Rule and its 80% benchmark should be assessed thoroughly for appropriate application, and possibly removed from consideration as evaluative AI measures in some or all contexts.

Problematic AI Explainability Measures

In the absence of widely-adopted AI explainability standards, two approaches—SHAP and LIME—have grown in popularity, despite attracting an abundance of criticism from scholars who have found them to be unreliable methods of explaining many types of complex AI systems.[17]

Use of both SHAP[18] and LIME[19] has increased in part because they are model agnostic, meaning they can be applied to any type of model that data scientists build. An abundance of accessible and easy-to-use documentation related to the two methods has also fostered interest in them.[20]

However, the applicability and efficacy of both SHAP and LIME are limited, particularly when used in an attempt to explain complex AI systems comprised of non-linear machine or deep learning models. In a typical use case, an AI practitioner might employ SHAP or LIME to explain a single instance of a model input, such as one decision or prediction, rather than the whole model. Because both methods work by approximating more complex, non-linear models (the types that are often called "black-box" models) with more straightforward linear models, they may produce misleading results.21

Short for Shapley Additive exPlanations, SHAP is based on a concept known as the the Shapley Value, introduced by Lloyd Shapley in 1951[22] in the context of cooperative game theory. The

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[17] Dylan Slack et al., *Fooling LIME and SHAP: Adversarial Attacks on Post hoc Explanation Methods, AIES '20 Proceedings of the AAAI/ACM Conference on AI, Ethics, and Society*, Ass'n for Computing Machinery (Feb. 7, 2020), https://doi.org/10.1145/3375627.3375830.

[18] *shap*, GitHub, https://github.com/shap.

[19] *lime*, GitHub, marcotcr, https://github.com/marcotcr/lime.

[20] This is based on a description of how SHAP and LIME work and their problems, as intended for a layperson, provided by Tim Miller, professor in artificial intelligence at the School of Electrical Engineering and Computer Science at The University of Queensland, during interviews conducted by World Privacy Forum (WPF) in June and November 2023. Miller was professor in the School of Computing and Information Systems at The University of Melbourne, and co-director of its Centre of AI and Digital Ethics, when WPF spoke with him in June 2023. Miller said that in general, LIME is unstable and inappropriate as an explainability metric for machine learning, while SHAP-based methods are also limited in effectiveness. Professor Tim Miller, Univ. Of Queensland Australia, https://eecs.uq.edu.au/profile/9477/tim-miller.

[21] November 2023 WPF interview with Tim Miller.

[22] Lloyd S. Shapley, *Notes on the N-Person Game — II: The Value of an N-Person Game*, RAND Corp. (1951), https://www.rand.org/pubs/research_memoranda/RM0670.html.

Shapley Value is a method used to determine the importance or contribution of each player to an overall competition between groups.23

Today, SHAP is used for another purpose entirely: in an attempt to expose and quantify feature importance, or the importance of factors that contribute to predictions of machine learning models.24 Oftentimes, SHAP is used in the hopes of revealing how factors affect the outputs of opaque, "black box" AI systems such as deep learning models and neural networks, which are difficult to interpret.

SHAP reflects feature importance numerically. For instance, when using SHAP to determine how certain input features affect a more straightforward linear regression model trained on a California housing dataset, the SHAP value of the median house age in a block group might be expressed as -0.22, and the SHAP value of median income as +0.92. The process would be used to add other features, such as the average number of rooms or average home occupancy, until the current model output is reached.[25]

Although Shapley values have been applied in the context of feature importance for decades,[26] researchers have found several mathematical, practical, contextual, and epistemological problems associated with use of the method for explaining AI systems. For example, when attempting to attribute influence to a large set of features affecting AI model decisions or predictions, the approach relies on the modeler to decide which features count as "players" and which are redundant; these subjective decisions can affect the resulting explanations.[27]

Scholarly research also indicates that some users of SHAP may not understand how to interpret its results. A survey of data scientists using SHAP-based tools showed that many were unable to accurately describe what SHAP values or scores represented.[28] The study also found that the

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23 S. Hart, *Shapley Value*, in The New Palgrave Dictionary of Economics 1-6 (1987), https://doi.org/10.1057/978-1-349-95121-5_1369-1.

24 This description is based on an overview of how SHAPley Values work intended for a layperson as provided by Elizabeth Kumar, a Computer Science PhD candidate at Brown University, during interviews conducted by WPF in April and November 2023. Lizzie Kumar personal website, https://iekumar.com/.

25 Vinícius Trevisan. Towards Data Science, Medium. Jan 17, 2022. https://towardsdatascience.com/using-shap-values-to-explain-how-your-machine-learning-model-works-732b3f40e137

26 W. Kruskal, *Relative importance by averaging over orderings*, The American Statistician, 41(1):6–10, 1987.

27 I. Elizabeth Kumar et al., *Problems with Shapley-value-based explanations as feature importance measures.*

28 Harmanpreet Kaur et al., *Interpreting interpretability: Understanding data scientists use of interpretability tools for machine learning, CHI '20 Proceedings of the 2020 CHI Conference on Human Factors in Computing Systems,* Ass'n for Computing Machinery, 114 (Apr. 23, 2020), https://doi. org/10.1145/3313831.3376219.

popularity of SHAP-based tools influenced some data scientists to trust the tools even if they did not understand what they did or how to interpret their results.

In addition, research shows that use of SHAP in AI explainability tools may lead users to falsely believe they discovered a precise explanation for why or how a system produced a specific output, such as a decision or prediction. This in turn may lead to misconceptions about what SHAP values represent and the actionable information that can be gleaned from them.[29]

Even scholars who acknowledge benefits of using SHAP to provide insight into certain aspects of models and data suggest they "can lead to wrong conclusions if applied incorrectly,"[30]and argue that they can be expensive to compute.[31]

LIME, a similar AI explainability method that has grown in adoption, was first introduced in 2016.[32]Short for Local Interpretable Model-agnostic Explanations, LIME produces explanations by randomly sampling "locally" around the singular instance chosen to be explained. But its randomness is a pitfall: If LIME is used again in an attempt to explain the very same instance, its explanation will be different.33 The use of LIME for AI explainability has been criticized, and research shows the method can lead to inaccurate results,34 or be manipulated or "gamed."[35]

Overall, the research indicating that there are vulnerabilities in these popular explainability measures is not reassuring; however, it is not completely unexpected. Trustworthy AI implementation is still nascent, with much work and refinement yet to come.

We suggest that use of measurement methods incorporating SHAP or LIME should be assessed thoroughly for appropriate application, and possibly removed from consideration as evaluative AI measures.

Question 6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all

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[29] Elizabeth Kumar et al., *Shapley Residuals: Quantifying the limits of the Shapley value for explanations*, Neural Info. Processing Sys. (2021).

[30] Christoph Molnar et al., *General Pitfalls of Model-Agnostic Interpretation Methods for Machine Learning Models*, Arxiv (2022), https://arxiv.org/pdf/2007.04131.pdf.

[31] Christoph Molnar, *SHAP Is Not All You Need*, Mindful Modeler (Feb. 7, 2023), https://mindfulmodeler.substack.com/p/shap-is-not-all-you-need.

[32] Marco Tulio Ribeiro et al., *"Why Should I Trust You?": Explaining the Predictions of Any Classifier. In Proceedings of the 22nd ACM SIGKDD International Conference on Knowledge Discovery and Data Mining*, Ass'n for Computing Machinery, 1135–1144 (Aug. 13, 2016), https://doi.org/10.1145/2939672.2939778.

[33] According to a November 2023 interview with Tim Miller.

[34] Romaric Gaudel et al., *s-LIME: Reconciling Locality and Fidelity in Linear Explanations*, Arxiv, (Aug. 2, 2022), https://arxiv.org/abs/2208.01510.

[35] Dylan Slack et al.

such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

The OMB draft memo states in section iv., "Minimum Practices for Either Safety-Impacting or Rights-Impacting AI," that agencies must follow specific practices related to AI impact assessments; risk mitigation measures; testing, evaluation and monitoring to ensure that AI works in real-world contexts; AI functionality in high-risk decision-making, and more.

It is imperative the tools and techniques used to quantifiably measure AI systems according to safety and rights impacts, and to gauge success according to particular metrics, are effective and reliable in accordance with policy goals. The AI governance tools established for such purposes will help form the foundation of risk scores, consumer scores, ratings or other statistics that agencies rely upon to conduct much-needed impact assessments, risk evaluations and ongoing monitoring. Without meaningful oversight and quality assessments of the tools and measurement methods themselves, new problems or harms could be introduced.

In the World Privacy Forum's forthcoming *Risky Analysis* report, we suggest pathways for creating a healthy AI governance tools environment, and offer suggestions for governments, multilateral organizations, and others creating or publishing AI governance tools.

We found that some AI governance tool providers do not conduct quality assessments, or if they do, they do not always conduct them according to an internationally recognized standard.

The suggestions made in the report include best practices taken from existing AI and other quality assessment standards and practices already in widespread use. Appropriate procedural and administrative controls include: 1) providing AI governance tool documentation and contextualization, review, audit, and other quality assurance procedures to prevent integration of inappropriate or ineffective methods in policy guidance; 2) identifying and preventing conflicts of interest; and 3) ensuring that capabilities and functionality of AI governance tools align with policy goals. If governments, multilateral institutions, and others working with or creating AI governance tools can incorporate lessons learned from other mature fields such as data governance and quality assessment, the result will establish a healthier body of AI governance tools, and over time, healthier and more trustworthy AI ecosystems.

Question 8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

In particular, section iv. of the OMB Draft Memo includes requirements that agencies provide public notice and plain-language documentation in the AI use case inventory. It notes that the documentation should be accessible in contexts where people will interact with or be impacted by the AI, and that even where agencies' use cases are excluded from the public inventory requirements described in the guidance, they may still be required to report relevant information to OMB and must ensure adequate transparency in their use of AI, as appropriate and consistent with applicable law.

All of these minimum practices for documentation are crucial components of AI accountability and transparency. In addition, we urge OMB to include documentation related to AI governance tools used to measure and improve AI systems used by federal agencies. Just as with any tool

or product released to the public, agencies should create and make robust documentation available.

As included in World Privacy Forum's *Risky Analysis* report, documentation that can assist in creating more transparency can include information about the developer, date of release, results of any validation or quality assurance testing, and instructions on the contexts in which the methods should or should not be used. A privacy and data policy is also important and should be included in the documentation of AI governance tools. End users should be made aware of the evaluations in a prominent manner, and the evaluation should be readily understandable by non-expert users.

Ensuring that there is no conflict of interest related to AI governance tools is another quality measure that is readily achievable. For example, core pieces of information to make available to end users should provide details about how development of AI governance tools are resourced and financed, by whom, and who published them. Commercial Interests also should be noted, for instance, if the tool promotes specific commercial products or services. Affiliations, including relationships that potentially impact objectivity, including information about commercial or other entities that donated the tool for open-source use, should also be noted.

Additional items can be provided in the documentation, for example:

- Documentation should provide the suggested context for the use of an AI governance tool. AI systems are about context, which is important when it comes to applicable uses, environment, and user interactions. A concern is that tools originally designed for application in one use case or context may potentially be used in an inappropriate context or use case or "off-label" manner due to lack of guidance for the end user.

- Documentation should give end users an idea of how simple or complex it would be to utilize a given AI governance tool.

- Cost analysis for utilizing the method: How much would it cost to use the tool and validate the results?

- A data policy: A detailed data policy should be posted in conjunction with each AI governance tool. For example, if applicable, this information could include the kind of data used to create the tool, if data is collected or used in the operation of the tool, and if that information is used for further AI model training, analysis, or other purposes.

- Complaint and feedback mechanism: AI governance tools should provide a mechanism to collect feedback from users.

- Cycle of continuous improvement: Developers of AI governance tools should maintain and update the tools at a reasonable pace.

A great deal of existing work has already been done in other areas that could be helpful. For example, significant documentation standards and norms exist around consumer products, software products, and other technology products offered to the public. These norms are

encapsulated in multiple ISO standards,[36] as well as OECD Responsible Business Conduct principles and implementation guidance.[37] [38]

Conclusion

In concluding, we add one additional note regarding practical implementations of the work that will be needed in order to contextualize Agency AI activities effectively, safely, and fairly. The opportunities that OMB Circular No. A-119 Revised[39] affords to government agencies to work with stakeholders to create fair, multistakeholder voluntary consensus standards with good ground-level rules developed through collaborative work is non-trivial. Given the need for practical multistakeholder work in the area of AI, WPF is particularly interested to see how a VCS process could effectuate positive improvements, particularly regarding the day-to-day governance of AI systems.

WPF stands ready to assist. Thank you again for the opportunity to comment, and we hope to have the opportunity to discuss these issues with you further.

Respectfully submitted,

Pam Dixon,
Executive Director,
World Privacy Forum

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[36] See for example G. F. Hayhoe, "ISO standards for software user documentation," *2012 IEEE International Professional Communication Conference*, Orlando, FL, USA, 2012, pp. 1-3, doi: 10.1109/IPCC.2012.6408631. See also the work of NIST regarding recommended criteria for cybersecurity labeling of consumer software. While not directly related regarding topic, the procedures and ideas for labeling could be helpful, particularly if tested in the AI governance tools context. See: Recommended criteria for cybersecurity labeling of consumer software, National Institute of Standards and Technology, Feb. 4 2022. Available at: https://nvlpubs.nist.gov/nistpubs/CSWP/NIST.CSWP.02042022-1.pdf.

[37] *OECD Due diligence guidance for Responsible Business Conduc*t, OECD. 31v May 2018. Available at: https://www.oecd.org/investment/due-diligence-guidance-for-responsible-business-conduct.htm.

[38] Allan Jorgensen, Karine Perset, Rashad Abelson, *Recoding our understanding of RBC in science, tech, and innovation*, OECD. Oct 02 2023. Available at: https://www.oecd-forum.org/posts/recoding-our-understanding-of-rbc-in-science-tech-and-innovation-what-s-new-in-the-oecd-mne-guidelines.

[39] Office of Management and Budget, Circular No. A-119 Revised. The White House, President Barack Obama. Available at: https://obamawhitehouse.archives.gov/omb/circulars_a119.

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lpq-8wp1-o1aj
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0043
Comment from Sam Daniel J Timothy

Submitter Information

Name: Sam Daniel J Timothy

General Comment

This report offers a critical analysis of the Draft Memorandum for Advancing Governance, Innovation, and Risk Management for Agency use of Artificial Intelligence (OMB-2023-0020). It addresses the complexities and challenges involved in integrating AI technologies into public sector operations. The commentary underscores the need for adapting roles, responsibilities, and training programs to accommodate the integration of AI, highlighting the potential hurdles in managing multi-agency coordination and the necessity for transparent, accountable, and flexible governance structures. Furthermore, it delves into the broader implications of AI beyond its functional uses, advocating for its role in enhancing human understanding, ethical decision-making, and personal growth. The document also explores the practical applications of generative AI in various domains, including immigration and healthcare, while emphasizing the importance of ethical data practices and fair compensation arrangements. This analysis aims to contribute to the ongoing discourse on AI governance, innovation, and risk management in the public sector, offering insights and recommendations for a balanced and effective approach to AI integration in government agencies.

Attachments

OMB-2023-0020_Comment

Sam Daniel J Timothy
AI Research Scientist
Sysfleet Tech Consulting LLC

Comment on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (OMB-2023-0020)

Q1: As we move forward in the ever-evolving landscape of systematic AI, it becomes crucial to adapt and realign roles and responsibilities accordingly. The integration of AI within agencies and organizations represents a significant shift in how work is conducted, and it's only natural that there may be resistance or hesitation from existing staff members when it comes to embracing and applying AI technologies.

To navigate this transition effectively, it's essential to prioritize the education and training of agency staff in the realm of AI. This training should encompass not only the technical aspects but also the practical applications of AI within their specific work contexts. Staff members need to understand how AI can be a valuable tool to enhance their productivity, streamline processes, and improve decision-making.

By providing comprehensive AI education and training, agencies can empower their staff to leverage AI effectively. This involves not just acquiring theoretical knowledge but also gaining hands-on experience and practical skills in AI utilization. Moreover, fostering a culture of continuous learning and adaptability within the agency can further facilitate the smooth integration of AI into daily operations.

Q2: Coordinating multiple agencies for AI governance involves several drawbacks such as:

When multiple agencies collaborate, transparency and accountability to the public can become complex. It might be unclear which agency holds responsibility for particular decisions or actions, complicating public accountability.

Large, coordinated bureaucracies might find it challenging to swiftly adapt to new AI technologies and issues. This lack of flexibility can impede timely responses to changing AI governance requirements.

In scenarios involving several agencies, political pressures and agendas can shape decision-making, potentially undermining the neutrality and effectiveness of AI governance strategies.

Such coordination can result in bureaucratic inefficiencies and decision-making delays. Different agencies often operate under their unique procedures, priorities, and timelines, which can make consensus-building and swift action difficult. Additionally, varying interests or priorities among the different agencies can lead to conflicts.

Q3: The Office of Management and Budget (OMB) AI innovation should not be limited to serving as a mere tool for performing tasks or automating processes. Instead, it should aspire to elevate human understanding and awareness. Rather than confining people within routine or narrow perspectives, its aim should be to broaden their knowledge, enhance critical thinking abilities, and elevate overall consciousness.

Furthermore, it should foster curiosity and the pursuit of knowledge, thereby facilitating a deeper understanding of complex issues. It should function as a catalyst for learning and personal growth, offering access to vast amounts of information, educational resources, and opportunities for skill development.

Moreover, the OMB AI innovation should actively contribute to ethical decision-making by equipping individuals with the necessary tools to assess ethical dilemmas, contemplate consequences, and make principled choices. Rather than imposing a specific moral or ethical framework, it should serve as a valuable resource for individuals to explore and develop their moral and ethical perspectives.

Q4: Generative AI can provide real-time translation services for immigrants who don't speak English, improving communication between them and immigration officials. This ensures immigrants understand their rights and obligations.

It can analyze patient data to predict health risks, recommend personalized lifestyles to avoid treatment, and remotely monitor patients for early detection of health issues. This technology offers the opportunity to train the public in a systematic approach to their health.

Additionally, generative AI can be used to analyze historical data to predict the likelihood of an immigrant being approved for a visa or other immigration benefits. This can enhance the decision-making process and minimize the risk of arbitrary or discriminatory decisions.

Q8: Including information about whether compensation is provided in perpetuity ensures that agencies take into account the sustainability of their data sources. This consideration is crucial for maintaining data availability over the long term.

Additionally, specifying the type of data used in AI applications promotes transparency. It enables stakeholders, including the public, to comprehend the extent and character of data-driven initiatives.

Furthermore, emphasizing compensation arrangements reflects a commitment to ethical data practices. It plays a vital role in guaranteeing that data contributors receive fair treatment and that their rights are upheld.

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PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lpq-ctv8-e6r8
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0044
Comment from Christopher Lish

Submitter Information

Name: Christopher Lish

General Comment

Sunday, December 3, 2023

Clare Martorana,
Office of the Federal Chief Information Officer
Office of Management Budget.
1600 Pennsylvania Ave NW
Washington, DC 20500

Subject: Protect Civil and Human Rights When the Federal Government Uses Artificial Intelligence -- Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (Document ID: OMB-2023-0020-0001)

To OMB Director Shalanda Young, Director and U.S. Federal Chief Information Officer Clare Martorana:

I strongly urge the Office of Management and Budget (OMB) and other federal agencies to use all of their powers and resources to ensure that the harmful effects of artificial intelligence (AI) are limited when developed, procured, or used by the federal government—and that the government provides meaningful transparency and publicly available information about the ways our government uses AI so that we have more power to regulate, push back on harmful uses, and limit AI use in the future. In every use case, protecting civil rights must be the top priority.

There are some strong pieces of the OMB guidance that I urge you not to rollback as this process moves forward. The requirement that agencies meet minimum practices for rights-impacting and safety-impacting AI is very important in addressing my concerns around bias and discrimination in AI, and I urge you to keep these strong requirements and ignore pressure to weaken this guidance.

There are a number of areas where this guidance, and future AI policy documents, must be improved:

* The Executive Order on AI did not do enough to address law enforcement agencies and the use of AI on

immigrant communities, which are some of the spaces where AI has already been shown to have serious negative impacts. I was glad to see that the OMB guidance did include law enforcement under the covered agencies, and strongly urge you not to change this. We must establish strong policies to address law enforcement use of AI, and to limit use to mitigate harms.

* Some AI is too dangerous to be used, and any possible benefits are outweighed by known harms. Facial recognition is an AI-enabled biometric technology that infringes on the right to privacy to such a degree that it should not be used at all by the government, and this guidance should ban its use by government agencies.

* The guidance does not establish enough data privacy protections. Because AI is reliant on data the opportunity for data abuses is high, and ensuring strong privacy protections must be a top priority. While there is a need for Congress to pass comprehensive data privacy protections, the OMB should use this guidance to establish data privacy policies when government agencies develop, procure, or use AI.

* The minimum practices for safety-impacting and rights-impacting AI require agencies to stop using an AI when the "risks to rights or safety exceed an acceptable level," but the guidance both gives agencies an option to skip determining an AI system's risk, and also doesn't specify what an "acceptable level" is. In these safety- and rights-impacting cases the consequences of the use of AI are so high that the OMB must set a very limited acceptable level of risk and ensure that all agencies using AI comply with this requirement.

* The minimum practices should also apply in cases where federal funds are used to purchase AI systems, including government grants. This would better protect civil rights in even more situations, including at the state and local levels.

* All information reported by agencies in their annual use case inventory should be made publicly available, to allow for as much public scrutiny and transparency as possible. This is critical for ensuring that the public, as well as experts in civil rights, have the opportunity to critically assess the use of AI by the government.

While there may be uses of AI that can benefit the federal government, I call on the OMB to focus on protecting against the harms of AI your top priority in this guidance.

Thank you for your consideration of my comments. Please do NOT add my name to your mailing list. I will learn about future developments on this issue from other sources.

Sincerely,
Christopher Lish
San Rafael, CA

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lpq-e437-u45y
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0045
Comment from Cameron Whiting

Submitter Information

Name: Cameron Whiting

General Comment

I'm an application security analyst who took classes on AI in college, and wanted to leave some comments.
Safeguards wise (points #4 and #6), I'm more concerned even before we get to AGI (even dumb algorithms make very bad choices) about the following:
1. environmental impacts (water and electricity used in creating chips, and water and electricity used in running datacenters), mandates on % green?
2. rights of copyright holders whose data was trained on. notice of data subjects that their information was used in a training set. ability to remove it as part of privacy law. similar to "one click" laws or similar ease to unsubscribe/delete account, or a legally binding do not track, or just national unified privacy legislation.
3. labeling and notice of AI data to people who read/consume it
4. possibility of recourse or appeal for incorrect judgements by AI (e.g. speak to a human, no penalties or extra fees for doing so)
5. responsible disclosure policies for vulnerabilities and biases of AI (similar to SEC guidelines for corporations)
6. adequate red team testing of AI systems (in general, not just AI)
7. certification/precheck agencies (similar to the FDA) for code (in general, not just AI)
8. response/safety boards (similar to crash investigations for aviation)

PUBLIC SUBMISSION

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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0046
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Professional Services Council

General Comment

On behalf of the Professional Services Council (PSC), I am pleased to submit comments on the Office of Management and Budget (OMB) "Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum," as published in the Federal Register on November 3, 2023. In accordance with the Biden Administration's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, "OMB has prepared a draft memorandum that would direct Federal agencies to strengthen their AI governance and innovation programs while managing risks from the use of AI, particularly when that use affects the safety and rights of the public."

As you may know, PSC is an industry association with more than 400 member companies—small, mid-sized, and large—that provide much-needed technology and professional services to all federal agencies. These companies and their workers throughout America and around the world are equally as committed to U.S. Government missions as federal civilian and uniformed personnel. PSC supports our members and their federal government customers by promoting effective government practices and policies, improvements in federal contracting, and constructive dialogue between government and industry. We anticipate that government policy decisions around AI's application in the broader commercial environment—and how those decisions will impact government missions—will affect the federal contracting community.

With that in mind, the federal government must get its approach to AI policy on a good path from the outset: that policy will impact both the federal programs that create requirements, issue contracts and task orders, and assess performance on desired outcomes and those companies that offer and deliver solutions to their federal customers. OMB's eight questions within the request for comments reflect a good starting point for a broad dialogue regarding the effective development, use, and management of rapidly evolving AI technologies. We look forward to additional opportunities to provide industry perspectives as the government refines its policies and guidance regarding AI use cases. PSC respectfully offers to help facilitate substantive engagements between your office and industry as appropriate and to help deepen understanding between public and private sector officials regarding the possibilities and potential limits of AI use going forward.

Specifically with regard to those eight OMB questions within the Federal Register notice, PSC offers a range of comments below that reflect PSC member company feedback. We acknowledge that perspectives in this fast-changing area of AI technologies may evolve as we learn more about AI tools and explore their uses, and we again note that OMB's questions represent a solid starting point to these discussions.

Please see attached letter for these specific comments.

Attachments

PSC Comments on OMB Draft AI Memorandum OMB 2023 0020 SIGNED 20231204

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lpr-6ror-cq1r
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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0049
Comment from Laura Stark

Submitter Information

Name: Laura Stark

General Comment

Two comments on the draft guidance are below, based on my academic research on the history IRBs and science regulation - as a professor at Vanderbilt University.

Regarding question 2: What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?
--The federal government should establish NEW AI governance bodies, rather than update the scopes of existing agencies (eg OHRP). The organizational structures and missions of existing agencies were designed to address specific concerns. AI offer a different regulatory challenge, holds substantial potential for harm, and requires new, dedicated agencies.
-- For evidence, see Behind Closed Doors: IRBs and the Making of Ethical Research (by Laura Stark, PhD)

Regarding additional concerns: Agencies guidelines must include reporting on environmental impacts of generative AI industries. Environmental impact statements are essential given the intensity of energy and water use to compute at scale.

PUBLIC SUBMISSION

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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0050
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Policing Project at NYU School of Law

General Comment

Comment of the Policing Project at New York University School of Law submitted as attachment.

Attachments

OMB Policing Project Comment re AI Governance 12-5-23.vf

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December 5, 2023

Clare Martorana
U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management and Budget
725 17th Street, N.W.
Ste. 50001
Washington, D.C. 20503

Submitted electronically via www.regulations.gov

Re: Request for Comments on Draft Memorandum – *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)*, OMB-2023-0020, Comments of Policing Project at New York University School of Law

The Policing Project is a nonpartisan center at New York University School of Law dedicated to promoting public safety through transparency, equity, and democratic engagement. We submit this comment in response to the Office of Management and Budget's (OMB) Request for Comments (RFC) on its draft memorandum titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" or "the Guidance."

Our comment focuses on the application of the Guidance to law enforcement and makes six key points:

(1) If adopted as drafted, the Guidance would provide much needed transparency and accountability over federal law enforcement agencies' use of AI and would serve as a model framework for responsible and equitable use of this technology at all levels of government.

(2) The minimum practices identified for safety- and rights-impacting AI would establish essential safeguards, but the waivers provision should be revised to ensure waivers for law enforcement agency purposes are limited and subject to oversight.

(3) To ensure transparency and accountability over law enforcement agency compliance with the required minimum practices, the Guidance should require agencies to publicly document implementation in the AI use case inventory and should narrowly apply any law enforcement exemptions to this public reporting.

(4) The list of presumptive rights-impacting AI purposes should be revised to include law enforcement use of robots and drones and to ensure application to future rights-impacting law enforcement tools.

(5) For agencies with law enforcement components, the qualifications for the Chief AI Officer should include expertise in the protection of civil rights and civil liberties.

(6) OMB should encourage federal agencies to review the extent to which they can promote adoption of the Guidance by state and local law enforcement agencies that receive federal funding.

Where applicable, we note in the text of our responses the number of the RFC question to which we are responding.

I. Background on the Policing Project

The Policing Project is a nonpartisan, nonprofit center at NYU School of Law. We conduct research and also do work on the ground all over the country, with policing agencies and with the communities they serve, with the federal, state, and local governments, and with technology venders, to promote democratically-accountable and equitable policing. Our mission is to promote "front-end, accountability," which means the public has a voice in setting transparent, ethical, and effective policies and practices *before* policing agencies or government act.

One of our primary focus areas is the use of emerging technologies by policing agencies. Increasingly, this means AI-powered tools and systems. We have spent countless hours researching and discussing AI-powered policing technologies with racial justice and civil liberties advocates, technologists, and policing agencies themselves. We have developed numerous resources dedicated to promoting the sound governance of AI-powered public safety technologies, from a model statute regulating automated license plate readers (ALPRs) to regulatory frameworks for police use of facial recognition technology (FRT) and robots.[1] From 2019–2022, we staffed the Axon AI Ethics Board, an independent review board that guided and advised Axon, the developer of TASERS and the country's largest producer of body-worn cameras, around ethical issues related to the development and deployment of AI-driven policing technologies.

Our Comment draws on our deep study and past work on AI policing technology and our fundamental belief that adoption and use of these tools must be guided by democratic legitimacy, a commitment to racial justice, and an imperative to minimize harm.

II. The Guidance takes a major step toward establishing the federal government as a model of sound AI governance

As President Biden's AI Executive Order noted, AI "holds extraordinary potential for both promise and peril."[2] Perhaps nowhere is this more true than with regard to law enforcement use of AI. Although there may be real public safety benefits to law enforcement adoption of this emerging technology, sound governance is absolutely essential to mitigate the real risks to liberty, equity, and racial justice that are unique to policing agency use.

Unfortunately, as is the case with many emerging technologies, law enforcement agencies have rushed ahead to use AI with little transparency and even less in the way of regulation or authoritative guidance on responsible use. Federal law enforcement is no exception – instead of serving as a model of accountable adoption and use of advanced technologies, it has deployed AI systems without adequate privacy protections or even any policy or training in place.[3] This unfettered use in a context as high-risk as law enforcement already has led to real harms to the public's civil rights and liberties – from false arrests to

[1] Regulating Use of Technology in Policing, Policing Project, https://www.policingproject.org/policing-tech-landing.
[2] Exec. Order No. 14110, 88 FR 75191 (2023), Sec. 1.
[3] *See, e.g.*, U.S. Gov't Accountability Off., GAO-23-105607, Facial Recognition Services: Federal Law Enforcement Agencies Should Take Actions to Implement Training, and Polices for Civil Liberties (Sept. 2023), https://www.gao.gov/assets/gao-23-105607.pdf (finding multiple federal law enforcement agencies use facial recognition technology without any policies or guidance in place to address civil rights and civil liberties, fail to fulfill privacy requirements, and do not require staff training on these systems).

excessive use of force.[4] What is needed instead of this rush-to-deploy model is rigorous study, stepwise adoption, public accounting of these technologies' benefits and costs, enforceable safeguards to mitigate risks to civil rights, racial justice, and civil liberties, and a commitment to abandoning systems and tools that do not advance public safety and equity. In other words, what is needed is a model of sound governance of AI.

This Guidance would represent a giant step in the right direction. It is precisely the sort of regulatory framework that long should have been in place around law enforcement use of emerging technologies, whether AI-driven or not. In the sections that follow, we highlight several ways in which its provisions would benefit from revision. But first we want to emphasize the critical protections it already establishes:

- It sets out a comprehensive list of AI applications presumed to be safety- and rights-impacting that explicitly includes key law enforcement use cases (pages 11-12).

- It establishes an appropriate baseline of minimum practices for safety- and rights-impacting AI that applies to federal law enforcement agencies, containing meaningful and enforceable safeguards that address the entire AI lifecycle (pages 15-18):

  ⇒ Pre-deployment, it requires agencies to conduct impact assessments, including cost-benefit analysis that requires demonstrating actual benefit as a condition to adoption.
  ⇒ It mandates real-world testing and independent evaluation of AI. As a result, the public would no longer need to rely on anecdotal evidence of AI's impact, but would have access to real data about whether or how well or poorly these systems work.
  ⇒ By requiring ongoing monitoring, it recognizes that compliance cannot be a static practice for these ever-changing systems.

- It also recognizes the need for additional requirements to ensure rights-impacting AI advances equity, dignity, and fairness and incorporates feedback from affected groups (pages 18-19).

  We were especially heartened by the call for engagement with affected groups. Our work in the policing context repeatedly has demonstrated that engaging with impacted communities is both necessary and practicable. For example, we run a grassroots program in Chicago that connects residents with patrol officers to provide feedback on neighborhood safety priorities.[5] We served as consultants to the federal monitor for the Cleveland consent decree.[6] We also have conducted community-based research on non-police alternate first response in cities across the country.[7] In all of these cases, and more, community feedback has proven invaluable and vital to improving public safety policy.

Crucially, these substantive requirements are enforceable. Agency compliance is mandatory and must be documented; use must stop if the AI system does not satisfy these conditions. This is what meaningful transparency and accountability look like.

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[4] *E.g.*, Kashmir Hill, Eight Months Pregnant and Arrested After False Facial Recognition Match, N.Y. Times (Aug. 6, 2023), https://www.nytimes.com/2023/08/06/business/facial-recognition-false-arrest.html; Vanessa Romo, No Charges for Colorado Officers Who Held Black Children at Gunpoint, NPR (Jan. 8, 2021), https://www.npr.org/2021/01/08/955165485/no-charges-for-colorado-officers-who-held-black-children-at-gunpoint.
[5] Chicago Neighborhood Policing Initiative, https://chicagonpi.flywheelsites.com/mission.
[6] Cleveland Police Monitoring Team Overview, Policing Project, https://www.policingproject.org/cleveland-cpop-report.
[7] Reimagining Public Safety, Policing Project, https://www.safetyreimagined.org/about-rps.

Although we have suggestions for strengthening the Guidance, we fully appreciate the steps this Guidance represents to establish the federal government as a model of sound AI governance. We can only hope this model diffuses to state and local law enforcement agencies.

III. Strengthen the minimum practices for safety- and rights-impacting AI by adding oversight and narrowing the waivers provision (Question 6)

The Guidance's current minimum practices for safety- and rights-impacting AI would establish an impressive baseline of transparency and accountability for federal agency use of AI, but as applied to high-risk law enforcement use cases, the waivers provision must be revised to reduce discretion and ensure waivers only are granted in the presumably extremely rare circumstances in which they are warranted.

By granting sole authority to each agency's Chief AI Officer (CAIO) to waive requirements even for high-risk applications, the Guidance gives this official too much discretion. To ensure accountable decision-making, the Guidance should require additional sign off for waiver requests, especially for high-risk law enforcement applications of AI. At least in law enforcement contexts, the system-specific risk assessment required by the waivers provision should include a determination of the risk level presented by the use. If this determination reveals that the risk is anything other than low, then a CAIO waiver request should be subject to additional review, by, for example, the agency's civil rights office or OMB.[8] Because waivers outside of low-risk applications should be the exception not the rule, the administrative burden of this external check should be minimal.

OMB must narrow the qualifying conditions for issuing waivers, especially as applied to high-risk law enforcement applications. Currently, the Guidance permits waivers for any situation that represents an "unacceptable impediment" to "critical agency operations" without defining or limiting these key terms.[9] In our experience, law enforcement tends to think everything it does is "critical," and any safeguards are "unacceptable." We suggest revising this provision in two ways. First, the Guidance should constrict the qualifying criteria for high-risk law enforcement applications to permit waivers only when a requirement "*would create an insurmountable impediment to critical agencies operations and the system-specific risk assessment demonstrates that the risks of not fulfilling the particular minimum requirement do not outweigh the benefits*." In addition, OMB should require public documentation of the waiver determination to ensure transparent and accountable use of exemptions.

IV. Strengthen the AI use case inventory requirement (Question 8)

(1) Require agencies to publicly document implementation via the use case inventory

To ensure transparency and accountability over agencies' minimum practices implementation, OMB should require agencies to publicly document compliance in the AI use case inventory. Although the Guidance currently provides several options for how agencies might document their implementation, it does not require any particular method (page 13). This choose-your-own adventure approach to documentation will make it difficult for the public to assess compliance across agencies. Instead, OMB should mandate public documentation of implementation as part of agencies' annual AI use case inventory. Doing so will ensure that implementation of the key transparency and accountability measures set forth by the minimum practices are made public and will establish the use case inventory as a comprehensive public record of agencies' AI use.

[8] Civil Rights Offices of Federal Agencies, Dep't of Justice, https://www.justice.gov/crt/fcs/Agency-OCR-Offices.
[9] OMB AI Guidance, Sec. 5(c)(iii).

(2) Narrowly apply any law enforcement exemptions for safety- or rights-impacting AI disclosures in the use case inventory

The Guidance appears to take important steps to build on Executive Order 13960's annual AI use case inventory by requiring agencies to "report additional detail on how they are using safety-impacting and rights-impacting AI."[10] This is essential because federal agency compliance with EO 13960's AI use case inventory has been inconsistent at best and entirely deficient at worst.[11] And federal law enforcement agencies have been some of the biggest offenders on this score. For example, DOJ's most recent disclosures consisted of one page of information, listing a single use of AI by the FBI for a "threat intake processing system" to analyze crime tips.[12] This single page contains no disclosure related to the FBI's use of facial recognition technology despite the fact that the Bureau has been using this AI-powered technology for criminal investigations for almost a decade.[13] And there are zero disclosures for several other DOJ law enforcement agencies' use of facial recognition – from DEA to ATF to the U.S. Marshals – even though a recent Government Accountability Office audit reported significant use of this technology by each of these agencies. To effect the clear transparency and accountability goals of the Guidance, OMB should require that federal law enforcement agencies publicly disclose their use of safety- or right-impacting AI and their compliance with the minimum practices in the use case inventory.

And to ensure meaningful compliance by law enforcement agencies with AI use case disclosures—rather than the lackluster compliance we've seen to date—OMB should revise the equivocal language used to describe disclosure requirements and ensure law enforcement exemptions are interpreted extremely narrowly. For example, in a number of places, the draft Guidance establishes a "practicability" standard for whether or not to require use case disclosure.[14] Similarly, in several places, the Guidance specifically exempts "sensitive law enforcement" information.[15] This language creates too much leeway for law enforcement agencies to disclose the bare minimum or even entirely avoid disclosure. In our experience, law enforcement often employs a broad interpretation of what information is "sensitive" and a narrow interpretation of what is "practicable" to disclose publicly. As noted above, past practice specifically related to federal law enforcement compliance with the AI use case inventory supports this. But in truth, there should be almost no instance in which it is impractical to disclose a description of the use and capabilities of an AI system – including in the law enforcement context.[16] A use case inventory is a non-case-specific

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[10] Shalanda D. Young, Proposed Memorandum for the Heads of Executive Departments and Agencies, Office of Management and Budget, Sec. 3(a)(iv) [hereinafter "OMB AI Guidance"].

[11] *See, e.g.*, Christie Lawrence et al., Implementation Challenges to Three Pillars of America's AI Strategy, Stanford HAI (Dec. 2022), https://hai.stanford.edu/sites/default/files/2022-12/HAIRegLab%20White%20Paper%20-%20Implementation%20Challenges%20to%20Three%20Pillars%20of%20America%E2%80%99s%20AI%20Strategy.pdf (surveying federal agency compliance with the AI use case inventory and finding it "problematic" with 78% of federal agencies failing to publish an inventory); Bowman Cooper, Like Looking for a Need in an AI-Stack, Center for Democracy & Technology (July 21, 2023), https://cdt.org/insights/like-looking-for-a-needle-in-an-ai-stack/ (reviewing federal agency AI use case inventory disclosures and finding the "information provided by each agency is inconsistent and unclear, making it difficult for the public to understand exactly how the use of AI impacts them").

[12] AI Use Case Inventory Submission on Open Data, U.S. Dep't of Justice, https://www.justice.gov/open/page/file/1517316/download.

[13] U.S. Gov't Accountability Off., GAO-19-579T, Face Recognition Technology: DOJ and FBI Have Taken Some Actions in Response to GAO Recommendations to Ensure Privacy and Accuracy, But Additional Work Remains 2 (June 2019), https://www.gao.gov/assets/gao-19-579t.pdf.

[14] OMB AI Guidance, Sec. 3(a)(iv) n.8; Sec. 5(c)(iv)(H).

[15] *Id.*

[16] *See* Barry Friedman & Maria Ponomarenko, Democratic Policing, 90 N.Y.U. L. Rev. 1827, 1884-85 (2015) (discussing law enforcement objections to transparency and observing that "the need for secrecy is not nearly as acute as it may seem. . . ." and distinguishing between details related to specific investigations, which have a rightful claim to secrecy, and details related to use of tools or techniques which "can be made public and publicly debated without undermining law enforcement interests").

accounting of system functionality. It is not a revelation of tactical plans or sensitive information about a particular investigation. Therefore, substantive public disclosure of the information required by the minimum practices should be the default.

We make two final recommendations to ensure the use case inventory is useful and used. First OMB should ensure these inventories contain sufficient detail to enable the public to evaluate the impact of an agency's AI use. This means agencies should be required to disclose the vendor(s) for any safety- or rights-impacting AI. We also join the recent recommendations by a coalition of civil rights and tech policy groups that the AI use can inventory include additional detail about demographic information on AI system use and outcomes.[17] Second, we recommend that OMB direct agencies institute a public complaint process that individuals or organizations can use if they believe an agency has not sufficiently documented, reported, or implemented a required minimum practice.

V. Supplement the law enforcement purposes presumed to be rights-impacting (Question 5)

The Guidance's list of presumed safety- and rights-impacting purposes is a strong start. The explicit inclusions of law enforcement use of facial recognition technology and other biometric tools, person-based and place-based predictive policing, and license plate readers are especially important. As noted above, these AI tools already have been the source of false arrests, unnecessary uses of force, and due process violations.[18]

To ensure the Guidance adequately captures high-risk law enforcement applications, we recommend two additions to the list of rights-impact AI. First, OMB should amend the rights-impacting list to include high-risk law enforcement applications of aerial vehicles (or drones) and robots. Although robotics (though not drones) are listed under "safety-impacting" purposes, the risks presented by law enforcement use of these tools stretch beyond the physical risks that this category seeks to protect. Drones and robots both have significant AI-powered surveillance capabilities that can present serious risks to the public's civil rights and liberties from privacy to free expression to racial discrimination. For example, policing agencies—including federal agencies—have used drones to surveil peaceful protests and to disproportionately monitor communities of color.[19] And police use of these tools is only increasing.[20] Both tools merit explicit inclusion in the "rights-impacting" list along with the AI-powered surveillance tools already present.

Second, because policing technology always is evolving, we recommend adding language to subsection 5(b)(ii)(B) that focuses on the capability of concern rather than just the specific device. Specifically, we would add a clause to cover law enforcement use of "any AI to identify criminal suspects and track or monitor individuals." Today, we rightly are concerned with law enforcement's ability to use specific AI-powered surveillance tools like facial recognition technology or license plate readers. But there is no predicting which new tools are coming down the pike tomorrow that will serve similar purposes. It is essential that the Guidance is flexible enough to cover future developments.

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[17] Algorithmic Justice League et al., Letter to the President re: Advancing Anti-Discrimination Testing in Artificial Intelligence Executive Order (Aug. 7, 2023), https://www.upturn.org/work/letter-to-the-biden-harris-administration-on-their-forthcoming-ai-executive.

[18] *See, e.g.*, *supra* note 4.

[19] Policing Project at NYU Law, Civil Rights and Civil Liberties Audit of Baltimore's Aerial Investigation Research (AIR) Program (Nov. 2020), https://static1.squarespace.com/static/58a33e881b631bc60d4f8b31/t/5fc290577acac6192a142d61/1606586458141/AIR+Program+Audit+Report+vFINAL+%28reduced%29.pdf; Jason Koebler et al., Customs and Border Protection is Flying a Predator Drone Over Minneapolis, Vice (May 29, 2020), https://www.vice.com/en/article/5dzbe3/customs-and-border-protection-predator-drone-minneapolis-george-floyd.

[20] Ese Olumhense, The Tech at 'Cop Con,' The Markup (Nov. 3, 2023), https://themarkup.org/news/2023/11/03/the-tech-at-cop-con.

VI. Ensure CAIOs have civil rights and civil liberties expertise (Question 1)

OMB should amend the Guidance to require that the CAIO in agencies with law enforcement components have expertise in civil rights and civil liberties. When it comes to a high-risk context like law enforcement, this official must be qualified to assess the unique ways in which AI in policing can amplify harms to racial justice and individuals' civil rights and liberties. In policing, AI's oft-touted productivity gains have the potential to translate to more state-sponsored surveillance and over-enforcement in certain communities, often communities of color. To guard against these unique risks, we recommend the Guidance explicitly include expertise in civil rights and civil liberties as a necessary qualification for agencies with law enforcement components.

VII. Support sound AI governance through grantmaking (Question 3)

If implemented as currently drafted, the Guidance eventually should make the federal government a model of AI governance. This is no small accomplishment, but limiting its scope to federal agencies would represent a missed opportunity – especially when it comes to law enforcement. Law enforcement in particular remains largely a creature of the states. There are over 18,000 law enforcement agencies at the state and local levels compared to 83 at the federal.[21] And, relevant to this discussion, two things are true about many of these state and local law enforcement agencies: (1) many of them have been using AI systems ranging from facial recognition to ALPRs to predictive policing for years without any regulation or guidance in place; and (2) many receive federal funding to support their operations.

The Guidance should encourage federal agencies to use their grantmaking authority to apply these principles to state and local law enforcement agencies that receive federal funding and support. The federal government regularly uses funding as a carrot to achieve state and local compliance with rules like these. Just last year, President Biden's Executive Order 14074 on policing required the Attorney General and Secretary of Homeland Security to review and exercise their authority to award federal grants and provide support to state and local law enforcement based on adoption of the policies established in that Order.[22] OMB should direct agencies to engage in a similar review process to determine how the Guidance's provisions might be extendable to state and local law enforcement. By supplementing the Guidance with this requirement, OMB has an opportunity to ensure that its sound AI governance practices will apply to some of the most frequent users of safety and rights-impacting AI: state and local law enforcement agencies.

Thank you for the opportunity to comment.

Respectfully submitted,

Barry Friedman
Founder and Faculty Director

Max Isaacs
Senior Staff Attorney

Katie Kinsey
Chief of Staff

[21] Duren Banks et al., National Sources of Law Enforcement Employment Data, Office of Justice Programs, U.S. Dep't of Justice (Apr. 2016), https://bjs.ojp.gov/content/pub/pdf/nsleed.pdf; Connor Brooks, Federal Law Enforcement Officers, 2016 – Statistical Tables, Office of Justice Programs, U.S. Dep't of Justice (Oct. 2019), https://bjs.ojp.gov/content/pub/pdf/fleo16st.pdf.
[22] *See* Exec. Order No. 14074, 87 FR 32945 (2020), Sec. 20.

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0051
Comment on OMB-2023-0020-0001

Submitter Information

General Comment

See attached file(s)

Attachments

NASCIO AI Comment Letter

December 4, 2023

Shaun Donovan, Director
Office of Management and Budget
725 17th St NW
Washington, DC 20503

Director Donovan:

The National Association of State Chief Information Officers (NASCIO) is the collective voice of the nation's state and territorial chief information officers, chief information security officers and chief privacy officers. Our mission is to foster government excellence through leadership of quality business practices, information management and technology. Today I write to share our feedback on the Office of Management and Budget's (OMB) draft memorandum, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* (OMB-2023-0020-0001.)

We are encouraged that our federal partners are working to address the increasing use of artificial intelligence (AI) in the operation of government. The proliferation of this technology will have a tremendous impact on how citizens interact with government at all levels and for almost all services. As a result, states have not waited for federal action before developing their own robust strategies to govern their use and deployment of generative AI technologies.

The policies enacted by states thus far have been developed with input from numerous stakeholders, including citizens groups, elected representatives, private industry, thought leaders in the AI field and others. They showcase efforts to integrate AI into state government operations in a way that maximizes the benefit of this burgeoning technology, while still addressing concerns over data protection, ethical usage, cybersecurity, and other harmful ramifications that can result from a misuse of AI.

As you work to finalize this memorandum, we urge you to consider how these policies will impact state government, to incorporate existing state AI best practices into your own procedures and collaborate with states on how these policies will be implemented. In doing so, we can ensure that the federal government's AI policy does not create inefficient duplicative regulations, harm state efforts to develop solutions that meet their unique needs and cultivate citizen trust in government application of AI.

We appreciate the opportunity to provide feedback on this important issue. We would also extend an offer to discuss any of the points mentioned above in greater detail with our members at your convenience. Please contact Alex Whitaker, Director of Government Affairs at NASCIO, at awhitaker@nascio.org if you have any questions.

Thank you,

Doug Robinson
Executive Director
NASCIO

PUBLIC SUBMISSION

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: Booz Allen Hamilton

General Comment

See attached file for Booz Allen Hamilton's submission

Attachments

Booz Allen_OMB AI Guidance_Response_December 2023

Booz | Allen | Hamilton

ARTIFICIAL INTELLIGENCE

ENGINEERING YOUR AI FUTURE

RFI RESPONSE: ADVANCING GOVERNANCE, INNOVATION, AND RISK MANAGEMENT FOR AGENCY USE OF AI (88 FR 75625)

Prepared by Booz Allen Hamilton (BoozAllen.com/ai)

CONSULTING | ANALYTICS | DIGITAL SOLUTIONS | ENGINEERING | CYBER

INTRODUCTION

Trusted to transform missions with the power of tomorrow's technologies, Booz Allen Hamilton (Booz Allen) advances the nation's most critical civil, defense, and national security priorities. As the leading provider of AI services to the Federal Government[1], we lead, invest, and invent where it's needed most—at the forefront of complex missions, using innovation to define the future. We combine our in-depth expertise in AI and cybersecurity with leading-edge technology and engineering practices to deliver impactful solutions. Combining more than 100 years of strategic consulting expertise with the perspectives of diverse talent, we ensure results by integrating technology with an enduring focus on our clients.

Booz Allen is pleased to submit our response to the Office of Management and Budget's (OMB) Request for Information on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (88 FR 75625). We value the opportunity to provide input to the Administration as it undergoes this critical effort to implement Executive Order 14110 and stand ready to engage further with OMB to chart a path for the United States to both harness the extraordinary benefits of AI and mitigate the technology's risks.

OUR RESPONSE

Question 1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

To fully realize this objective – and ensure that agency Chief AI Officers (CAIOs) can fulfill their responsibilities and requirements indicated – we recommend that OMB's guidance focus more concretely on two areas: capacity and budget.

First, on the capacity of CAIOs: By including the option that "agencies may choose to designate an existing official," while only stipulating "...providing they have significant experience in AI and meet the other requirements in this section" (OMB: 3.b.i), we perceive a risk that agencies will designate these new and critical responsibilities to officials who may lack the necessary capacity to absorb them. We suggest incorporating a specific requirement that existing officials designated for this new role must have adequate capacity (and potentially defining/suggesting what this practically entails) in addition to having "significant experience in AI."

Second, on the budget: We recommend shifting the guidance in section three that "the head of each covered agency must also consider the necessary financial [and other] resources..." to a more explicit requirement to designate a specific budget for the CAIO and/or supporting staff. This may be built into the agency's AI strategy and accompanying financial plan, or specified elsewhere. But without a dedicated budget – especially in combination with the risk of CAIOs facing capacity challenges – we fear that a majority will be unprepared to fulfill this critical role for their agencies. CAIOs should have clear and sufficient support from both the heads of their agency and the administration to support the requirements set forth in this memo.

Question 2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

[1] GovWin IQ, Federal Artificial Intelligence Landscape, 2024, https://tinyurl.com/yk89knwh

A *benefit* of a new body that is focused exclusively on AI Governance is that it ensures the necessary experts convene in a forum dedicated to this already monumental body of work. And that existing - and equally important - priorities can be executed, without conflict, in more relevant standing forums.

The major drawbacks include a risk that AI Governance will wind up being "bolted on" to existing structures, rather than "built in" to existing structures, which can often be the more practical and useful approach. Additionally, introducing a new body adds an additional layer of responsibilities that will be levied on an already-saturated group of agency executives. And more generally, standing up a new AI Governance body is a non-trivial task, including major body of a significant work in resourcing, staffing, etc.

Ultimately, regardless of whether the AI Governance Body is formed as a new organizational entity, an updated scope to an existing group's responsibilities, or even potentially some hybrid, we recommend including guidance to fully recognize and account for the need to allocate substantial time, resources, and capacity across the teams. This will ensure the requirements put forth in this guidance can be met in a way that is integrated into existing structures, authorities, etc.

Question 3. How can OMB best advance responsible AI innovation?

Section four outlines a practical and useful approach to both advancing Responsible AI innovation and removing barriers to the responsible *use* of AI (separate but related things). Building on this checklist, we think that OMB can most effectively advance responsible AI innovation in several additional ways:

RAI remains an unfunded mandate until Congress acts. In light of that, we submit that it will be important to leverage the government's purchasing power by having RAI as a distinct, scoreable component for all acquisition processes. This will ensure a race-to-safety dynamic among vendors in the bid process, driving competition on *measurably* responsible AI systems and not perfunctory statements on safety and risk management.

To ensure that risk management requirements don't discourage innovation and early experimentation, we suggest providing guidance that differentiates requirements between levels such as: R&D/prototyping; piloting/testing; and production.

In order to enable progress and encourage standardization, OMB should provide agencies with templates and examples of the key documents, user guides, and lessons learned across these critical areas for CAIOs to engage their agency stakeholders. The OMB and the Interagency Council should work to enable CAIOs through sharing and re-use where applicable.

Finally, to advance responsible AI innovation in practical and tangible ways, we recommend focusing on three questions:

(1) What is the maximal good that AI can do for my [Mission/Project/Citizen Service/etc.]?
(2) What are the potential risks in using it this way?
(3) How can I mitigate these risks so that the maximal good can be achieved?

We believe this is a more balanced and straightforward way of identifying the mission-critical nature of an AI system's use, the risks this use entails with the right amount of context and specificity, and therefore the most appropriate way to design, deploy, and manage the risks of that system in an agency's governance process. This would also be consistent with the guidance for each agency to develop an AI strategy for their mission set with an AI-first posture. This mission-focused approach will ensure that both innovation and risk management are pursued in the right ratio in the right scenarios.

Question 4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

Generative AI has the potential to act as a force multiplier across a variety of agency missions and business operations. With organizations as large as U.S. Government agencies, even incremental productivity gains could yield billions of dollars of efficiencies on an annual basis. OMB should continue to monitor the commercial industry for successful paths to organizational adoption of this technology, potentially soliciting RFIs to understand best practices and proven techniques to manage this transition most effectively. While considering further applications, OMB may also review work under the DoD's Task Force Lima that is gathering over 180 use cases and categorizing prospective applications into 16 high level functional areas. Most categories are applicable to *any* government agency and can be reused to identify applications relevant to a specific organization.

Question 5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

As society evolves, AI's capabilities and uses will evolve, as will their rights- and safety-critical risks. Therefore, we recommend a combination of proscribed use cases (like the ones currently outlined in the memo) and a deliberate *process* to determine the next generation of use cases that agencies should consider rights- and safety-impacting. We also recommend including a requirement for any AI risk and impact assessment to include sociotechnical risks (e.g., differentiated regional impact, environmental impact, economic distortions, etc.), where the majority of the net new rights- and safety-impacting risks will originate.

NIST and/or OMB may want to consider standing up a shared repository for these use cases to be added to, adjudicated, and discussed across agencies over time and in a systematic way. The objective of such a repository would be to provide a body of shared knowledge and understanding to accompany an agency's AI registry that would inform, and allow coordination on, government-wide risk tolerances and collective adjudication.

Additionally, we recommend the criteria for "minimum practices" (5.c.iv) make a clearer distinction between two dimensions: type and severity. For example, "safety impacting" and "rights impacting" are *types* of risks. But depending on the use case, type does not necessarily mean *high risk*. We think adding a separate "risk severity" dimension, therefore, would be useful to most accurately assess the risk profile of an AI use case. Our experience has shown that the severity of an AI system's risk will range significantly across the types of use cases identified in the OMB guidance and, at times, even *within* a specific use case. This will better determine the nature of the "minimum practices" to be followed by an agency (i.e., a high risk, safety-impacting AI should, of course, have more rigorous "minimum practices" than a low risk AI system, even if it falls within a safety-impacting category).

Lastly, we recommend removal of the word "Termination" from this Section (5.a.i), as this could be substituted with an equivalent action (e.g. – "Ceasing") without the negative connotation.

Question 6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

In addition to the minimum practices indicated, we would suggest a number of tactical recommendations for consideration:

a) For (OMB: 5.c.iv.C), we recommend risk and impact assessments be included as a core component/gate of an ATO process. For example, implementing an ATO process focused on measurably responsible AI would ensure that risks are understood, addressed, and adjudicated at the appropriate points in the AI development lifecycle. Borrowing from and adapting existing processes such as an ATO are an emerging best practice that we recommend be adopted, if not required, for all AI projects (or at least those determined to be rights- or safety-

impacting). We also recommend that "human review" outlined in (OMB: 5.c.iv.D) take the form of a risk and impact assessment described here.

b) For (OMB: 5.c.iv.F.), we recommend that human-machine teaming be a core focus area/body of research of the AI Safety Institute. Specifically: the modeling and understanding of how human-machine teams produce emergent behavior and how we can better predict and control for that in critical operational scenarios. This is a body of research that mostly does not exist or is extremely immature relative to the need and safety-impacting nature of human-machine teams. The guidance in (OMB: 5.c.iv.G) is a good example of this type of research.
c) To the "before using new or existing covered safety-impacting or rights-impacting AI practices" (OMB: 5.c.iv), we suggest adding a requirement to determine a plan for what the *ongoing monitoring* (in the "while using" AI section) will consist of for each specific safety- or rights-impacting AI system. For example, who will be responsible, what cadence/frequency will be utilized, and what metrics/thresholds will be considered.
d) In conjunction with this guidance (OMB: 5.c.iv.A.2), "The expected benefits of the AI functionality should be considered against its potential risks, and if the benefits do not meaningfully outweigh the risks, agencies should not use the AI," we recommend considering specifying the parties who need to be involved in adjudicating this decision as well as specifying a requirement to document that decision.

Question 7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

Centralized contractual guidance from OMB will be important to yield consistent and effective AI implementation across the Federal government. In particular, for the action directed under "Recommendation on AI Documentation" (5.a.ii), industry would benefit from a period of public comment on the recommended documentation before incorporating into Federal AI contracts. Materials such as model, data, and system cards (5.d.ii.A), as well as test and evaluation documentation to support performance claims, will be critical to enabling the government's independent evaluation and oversight of AI.

OMB may consider the concept of an "AI Bill of Materials" to require specific documentation of AI component parts, which could help acquiring agencies make more transparent procurement decisions. AI vendors have not been required to provide this level of information heretofore, which would necessitate an industry pivot and benefit from public comment. These changes could lead to greater observability and auditability for the government, which would increase insight into the rights- and safety-impacting dimensions of AI systems.

Lastly, resources such as performance criteria that incentivize vendors and contractors to demonstrate responsible AI development will be necessary during the acquisition and delivery phases. OMB should develop and provide clear language and training to agencies on how to assess and score companies' ability to provide Responsible AI.

Question 8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

In addition to the information currently being collected and reported, we suggest all parties would benefit from agencies including in a structured data format (i.e., specific options to choose from versus open text fields) the following:

a) Their assessment of the level and nature of potential safety risks for their AI use cases. This could include an aggregate risk level (i.e., high, medium, or low), an indication of whether the use case is one that is safety-impacting, rights-impacting, both or neither, etc.
b) An indication of who the users/impacted parties are for each use case (e.g., is the use case intended to serve/benefit internal agency resources, members of the public, etc.).
c) An indication of the intention for the AI in the use case (i.e., this information is often included in the overall description of the use case, but it would be helpful to have the information in its own field).

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PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lpr-e0j4-jl93
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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0053
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Defense Unicorns

General Comment

Please see attached comments submitted by Defense Unicorns.

Attachments

Defense Unicorns AI Policy Public Comments

Public Comments on Proposed Policy "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"

I am writing on behalf of Defense Unicorns, a leading provider of platform technologies that empower rapid and reliable delivery of capabilities across diverse mission areas. Our team comprises dedicated and experienced innovators, software engineers, and veterans with a wealth of experience in technology programs within the Department of Defense and the broader federal market. One of our product offerings, AI for National Security (AI4NS), provides a suite of generative AI capabilities to improve understanding of complex mission data and accelerate decision-making that can be deployed to classified or air-gapped environments. Like all Defense Unicorns products, AI4NS is built on our foundation of open-source software to ensure flexibility while avoiding vendor lock-in. AI4NS is one of many products built by small companies that will be impacted by federal policy regarding AI.

While the proposed policy states an objective to "seize the opportunities AI presents," we believe its near-exclusive focus on risk prevention will contribute to a culture of inaction and indecision that risks harm to the security and advancement of our nation. As a company deeply invested in the success of government technology programs, Defense Unicorns offers the following recommendations to better align the proposed policy with its own stated goals and the goals expressed by the Artificial Intelligence in Government Act

of 2020, the Advancing American AI Act, and President Biden's Executive Order of October 30, 2023:

Include Examples of AI Applications that are *Not* Rights or Safety Impacting: While the policy justifiably provides substantial focus on limits for AI applications that are rights-impacting and safety-impacting, we encourage the memo to also provide clear examples of AI applications that are *not* considered rights-impacting or safety-impacting. By delineating an *illustrative* list of areas where AI can be used with fewer regulatory constraints, the policy can foster innovation and lower barriers to entry for small companies. Examples could include -

- **Administrative Automation**: AI designed for routine administrative tasks such as scheduling, document management, and basic data entry. These applications typically do not involve decision-making that affects individual rights or public safety and often have a positive impact on job satisfaction.
- **Predictive Maintenance in Non-Critical Systems**: AI designed for predictive maintenance of equipment or systems, where failure does not pose a direct threat to safety or significant operational disruption.
- **Assistance Troubleshooting Technical Tasks**: AI tools designed to assist skilled workers in things like debugging software, understanding complex equations, or drafting technical documents.
- **Drafting or Research Assistance**: AI designed to analyze internal data and policies to aid employees in finding relevant documents and information among government data.

Take Steps to Limit Over-Regulation and Reduce Impacts on Small Businesses: Regulation has a disproportionate impact on small businesses

that do not have the large legal and policy teams necessary to interpret and implement regulatory requirements. Additionally, in an area like AI with substantial commercial applications, it also causes businesses to opt out of offering their products or services to the federal government market. As a result, the federal government struggles to access the technology that it needs. To limit this impact, the policy should include steps to protect small businesses and encourage them to work with the government. Possibilities include a tiered compliance framework, public-private partnerships, and expedited review processes for small businesses.

Limit Scope of Procurement Recommendations: On page 22, the policy encourages agencies to include specific risk management requirements in contracts for generative AI. While such restrictions are likely appropriate in situations involving rights and safety or for research and development of new AI technologies, they are likely to be costly or burdensome in situations involving commercially available technology for low-risk activities. We suggest limiting the scope or taking steps to be more clear that the included guidelines should be carefully tailored based on the overall risk of the AI application with an aim toward minimizing restrictions for low-risk systems.

Distinguish Cybersecurity Risk versus AI Risk to Mission:

Cybersecurity risks to an information system hosting an AI capability are distinct from risks related to the AI capability itself. While the proposed policy does a good job of making this distinction, we recommend it be more explicit. Specifically, we recommend that AI risk to mission be handled primarily by those responsible for that mission.

Determining if an information system that is hosting AI capabilities is "sufficiently secure" in the traditional cybersecurity sense is very different from

determining if the AI capabilities it provides are “sufficiently accurate” for the mission at hand. Policies like FedRAMP assign responsibility for how a system is secured and dictate who may accept cybersecurity risks to authorize its use. This same person is likely not the best suited to assess or accept the AI risks to mission performance when authorizing a system for use.

Thus, we recommend the policy explicitly distinguish between cybersecurity and AI as unique domains with different types of risks to understand and accept. Then, using a blend of AI education and risk mitigation techniques, mission owners can make appropriate risk decisions about when to augment their capabilities with AI.

The Biggest Risk May Be Too Much Caution: The tendency of federal government decision-making towards risk aversion, especially in the context of AI, can inadvertently lead to strategic disadvantages and introduce some of the very risks it seeks to avoid. The recent decision by the US Space Force to ban the use of AI applications exemplifies this cautious approach. Such caution risks substantial unintended consequences, such as:

- **Adversaries Gaining a Technological Edge**: When federal decision-making is overly cautious and slow in adopting new AI technologies, it risks falling behind adversaries who may be more willing to rapidly integrate and experiment with AI. This technological gap can lead to strategic disadvantages in critical areas such as intelligence gathering, cybersecurity, and automated defense systems.
- **Unsanctioned Use of Unauthorized Systems**: Excessive caution and slow approval processes for AI applications (or outright bans) may drive personnel to use unauthorized AI systems out of personal convenience to keep pace with operational demands and the fast-

evolving nature of AI. Using these “shadow-IT” systems introduces significant security risks, potentially exposing sensitive data or putting critical systems at risk of breach or manipulation.

- **Stifling Personnel Initiative and Morale**: Overly restrictive policies can dampen the initiative and morale of personnel who recognize the potential of AI to enhance their work but are hindered by bureaucratic processes. This has the potential to further exacerbate the difficulties in recruiting and retaining skilled personnel within the federal government.

To mitigate these risks, the federal government must strike a balance between caution and innovation. This involves adopting a more agile approach to AI integration, where risks are carefully managed but do not completely hinder the exploration and adoption of AI technologies. Additionally, establishing clear guidelines and fast-track processes for the safe and secure use of AI can encourage adherence to approved systems while keeping pace with technological advancements. We recommend more explicitly adopting such a balanced approach.

Defense Unicorns is eager to contribute to this discourse and welcomes further dialogue to refine these recommendations. We are optimistic that together, we can enhance the proposed AI policy to better serve all stakeholders.

Thank you for considering our comments on the proposed policy changes.

Sincerely,

REBECCA K. LIVELY
Defense Unicorns

PUBLIC SUBMISSION

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Tracking No. lpr-e682-k8k0
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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0054
Comment from Mirghani Mohamed

Submitter Information

Name: Mirghani Mohamed

General Comment

Thank you for allowing the public to comment on this important memo.

Attachments

Comments on OMB memorandum

Comments on the memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

This memorandum is comprehensive, well-written and well-received.

Suggestion: The use of numbered lines is always a good idea as it enables the commentator to refer to specific statements and helps you locate them within the document. In this document, page numbers (P#) will be used.

P2: The memo does not mention the importance of mindset and cultural barriers among other barriers to the acceptability and usage of AI in the realm of fulfilling safety and rights.

P2: The rights and safety are wide-ranging, but not comprehensive enough to include all what is needed to implement AI in the government i.e. more criteria may be needed.

P2: For better clarity, please rephrase the following statement: "This memorandum does not address issues …."

P2: In the event of a conflict between previous policies and this memorandum, what is the prescribed course of action?

P4: for clarity and specificity regarding the statement on determination, it could be phrased as: or otherwise, a written justification ....

P4: It might look better if V. Reporting on AI Use Cases Not Subject to Inventory be rephrased to: Unreported inventoried AI Use Cases

P13: There should be a specific list to comply with or a template provided by OMB for Agencies to complete.

P15: No.3. Does that include explainability of the model used from the provider? How does the agency know which data is used to train the algorithm?

P16: Testing procedures for AI models are not currently available within the government. NIST may be directed to establish such procedures. The current testing methods, which follow conventional software testing, are insufficient for AI models. Agencies may need to follow up with vendors through DEVSECOPS pipeline procedures for static and dynamic testing.

P21: It may be more beneficial for the government to promote 'coopetition' between vendors/providers, where they can compete in some areas but cooperate in others. For instance, AI producers can compete in supervised AI, textual modeling techniques, and tools, but it would be more beneficial for them and the government to cooperate in unsupervised AI (reinforcement learning) because this area requires intensive innovation and pooling of tacit knowledge.

P22: iv. Currently, there is no law that requires AI producers to reveal training data, code, or model decomposition. However, it may be beneficial for vendors to disclose all data used for training of the module and the explanation of the module parameters and fitting errors to this data. This will help agencies deal with the "blackbox" dilemma more effectively".

P22: Just to make it easier for your readership, it may be more useful to provide short definitions of a few lines in this document, rather than referring to another document that might not be at hand or accessible during the reading of this document".

Disclaimer: Although I am a government employee, the comments I am providing are my own opinion as a citizen and do not reflect the views of my department or my directorate"

PUBLIC SUBMISSION

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0055
Comment from Merve Hickok

Submitter Information

Name: Merve Hickok

General Comment

Please find attached written comments from Merve Hickok (AIethicist.org), in response to OMB's Draft Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence.

Attachments

OMB Draft Guidance_Public Comment_AIethicist

Shalanda Young
Director Office of Management and Budget
72517th St NW, Washington, DC 20503 November 4, 2023

Re: AI Memo Request for Comment: Comments of Merve Hickok to the Office of Management and Budget (OMB) regarding the Draft Memorandum published in Federal Register 88 FR 75625

Dear Director Young,

The below is in response to the request for public comments on the draft memorandum titled *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)*[1].

As the Founder of AIethicist.org, President and Research Director at Center for AI and Digital Policy (CAIDP), and Data Ethics Lecturer at University of Michigan, School of Information. I welcome the opportunity to comment on *The Notice seeks comments on the Proposed Memorandum for the Heads of Executive Departments and Agencies (hereinafter the "Guidance").*[2] My work is focused on AI policy and governance globally. In my role at CAIDP, I testified in the United States Congress.[3] I also continue to provide expert input to the Council of Europe AI convention, and EU AI Act.[4]

I conduct research, and provide training, and consulting on how to develop, procure, use and govern trustworthy AI. In 2022, I published "*Public procurement of artificial intelligence systems: new risks and future proofing*."[5] I am currently writing a book on implementation of trustworthy AI in public procurement decisions. For this project, I conducted 20+ interviews with procurement practitioners across the agencies in the United States, United Kingdom, Canada, Belgium, and Chile. I am also one of the co-authors of CAIDP's annual report "AI and Democratic Values Index,"[6] where we conduct comparative and longitudinal analysis of national AI policies and government use of AI systems. My comments reflect my years of research and analysis on government use of AI. This document answers questions 2, 3, 5, 6, 7 and 8 in the RFI.

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[1] Office of Management and Budget, *Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum*, 88 FR 75625, No. 2023-24269, (Nov. 03, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-24269.pdf
[2] Ibid.
[3] Testimony and statement for the record of CAIDP President Merve Hickok, *Advances in AI: Are We Ready For a Tech Revolution?*, House Committee on Oversight and Accountability: Subcommittee on Cybersecurity, information Technology, and Government Innovation (Mar. 8, 2023), https://oversight.house.gov/wp-content/uploads/2023/03/Merve-Hickok_testimony_March-8th-2023.pdf.
[4] CAIDP, https://www.caidp.org.
[5] Hickok, M. Public procurement of artificial intelligence systems: new risks and future proofing. *AI & Soc* (2022). https://doi.org/10.1007/s00146-022-01572-2
[6] CAIDP, *AI and Democratic Values* (2023), https://www.caidp.org/reports/aidv-2022/

I commend the OMB for providing draft guidance to implement the Executive Order 14110, based on the principles of democratic values, human rights, and the rule of law, and to ensure trustworthy use of AI by federal agencies.[7] In particular, I applaud

- Promotion and incorporation of the Blueprint for an AI Bill of Rights[8] and NIST AI Risk Management Framework[9];
- Establishment of 'minimum practices' for government agencies to follow in design, development, and use of AI systems;
- The requirement for the agencies to document the intended purpose for the AI and its expected benefit, supported by specific metrics or qualitative analysis. Such transparency would provide evidence that the government has conducted necessary evaluations to establish AI is indeed necessary for the purpose, and has verified that the system is capable of meeting the quantitative and qualitative expectations.
- The termination obligation requiring agencies to ensure AI systems have guardrails before they are put to use, and those already in existence but cannot be brought into compliance must be terminated.
- The mandate for agencies to document the provenance and quality of the data for its intended purpose.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

Yes, the following are listed as rights-impacting AI, and the Guidance leaves it to each agency to determine whether the system can be used within a specific-context and use case. However, the list contains AI systems which **are pseudoscientific, and undermine rule of law, presumption of innocence and human dignity.** The list should be revised to include bans for these systems.

- **Ban emotion analysis systems:** which claim to infer emotions from physical features and micro gestures. In-depth research shows there is no universal manifestation of an emotion, and the way individuals express emotions are dependent on the context, consequences and cultural upbringing.[10] Such systems can also discriminate against people with facial disorders and disfigurement.

- **Ban thought, emotion, and deception detection systems:** Not only are these systems without a scientific basis, but they can be weaponized for a variety of reasons under the veneer of 'objective' technologies.

[7] Executive Order 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, 88 FR 75191, (Oct. 30, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-01/pdf/2023-24283.pdf
[8] *Blueprint for an AI Bill of Rights*, White House Office of Science and Technology Policy, https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.
[9] *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, NIST Publication AI 100-1, https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.
[10] Le Mau, T., Hoemann, K., Lyons, S.H. *et al.* Professional actors demonstrate variability, not stereotypical expressions, when portraying emotional states in photographs. *Nat Commun* 12, 5037 (2021). https://doi.org/10.1038/s41467-021-25352-6

- **Ban biometric categorization systems:** which claim to identify then cluster a person into ethnic, racial, gender, political or sexual orientation, religious categories by using biometrics. These systems create spurious correlations between biometric data and subjective social constructs.

- **Ban surveillance-related risk assessments about individuals used by law enforcement and immigration authorities:** which claim to predict future behaviors and actions of an individual such as criminal recidivism, offending a person or be a victim of crime. These systems create spurious correlations and can be weaponized by authorities under the veneer of 'objective' technologies. Some of these systems have already led to unlawful decisions.[11] These systems undermine human agency, human aspirations, and are in conflict of presumption of innocence.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

Guidance suggests CAIO of each agency should have the authority to waive AI systems from the minimum requirements. Such powers can create significant loopholes and undermine the whole Guidance.

- **Waiver determinations should be reviewed by an independent authority**. No single person should have complete control or responsibility over waiver decisions.

- The issuance of such **waivers should be 1)governed by strict and objective criteria 2)include a time limit to avoid indefinite waivers, and 3)include liability mechanisms** if the waived system later negatively impacted rights or safety.

- If and when a waiver is issued, the **time limit, evaluation of the agency against the objective criteria, and justification for the waiver must be disclosed** in the public case inventory.

- **Terminated AI systems should be documented** in detail in AI Use Case Inventory as evidence of assessment, for future accountability purposes, and to serve as lessons learned.

- **Public Incident Reporting:** In addition to the existing AI Use Case Inventory, agencies should establish a public incident reporting mechanism. Such reporting mechanisms can provide lessons to vendors, academic researchers, and state and local level governments.

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[11] Robert Koulish & Kate Evans, Punishing With Impunity: The Legacy of Risk Classification Assessment in Immigration Detention, 36 *Georgetown Immigration Law Journal* 1-72 (2021). https://scholarship.law.duke.edu/faculty_scholarship/4115 ; Stroud, M. Heat Listed. The Verge. (May 24, 2021). https://www.theverge.com/c/22444020/chicago-pd-predictive-policing-heat-list

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

- An interdisciplinary AI Governance Body is the right call. **AI brings new challenges which go beyond traditional IT software or privacy concerns** due to 1)the socio-technical nature of these systems, 2)possibility for bias, and for the system and data to change and drift while in use, 3)new risks to human rights and civil rights to emerge based on probabilistic and predictive outcomes, and 4)complexities and interdependencies across data, models, and outcomes. AI systems can also change the decision-making process within an agency. Therefore, it is crucial to have a diverse, AI-focused governance body.

- The AI Governance Body in each agency should have **representation from independent academia and civil society** organizations with human rights and civil rights competence.

- **Mandated Privacy Impact Assessment are outdated.** These assessments do not consider the ability of AI systems to aggregate data from disparate sources to create granular insights about individuals. They also do not take into account the predictive and probabilistic nature of AI systems. Therefore, OMB should also consider additional guidance to update PIAs.

- The agencies should **notify the public about <u>planned</u> procurement** of a possibly rights-impacting AI system. The agency should conduct public consultation and consult with affected groups and incorporate their feedback. **Public consultation should also be conducted during the planned procurement stage**, not only in 'design, development, and use' stages.

- Guidance suggests "To the extent practicable and consistent with applicable law and governmentwide guidance, agencies must consult affected groups, including underserved communities, in the design, development, and use of the AI". **Public consultation should be mandated for rights-impacting AI systems, not left to a judgement of 'to the extent practicable'**.

3. How can OMB best advance responsible AI innovation?

As mentioned above, I conducted interviews with 20+ government procurement practitioners involved in AI acquisition. Consistent themes were:

- **Need to implement trustworthy AI during procurement:** The Guidance directs many of the 'minimum practices' to 'design, development, and use' of AI systems. The guidance references **'procured'** AI systems. This can be interpreted as an "after-the-fact" approach. If these practices and controls are only applicable to 'procured', government can commit

taxpayer funds for a system which is later found to be uncompliant with minimum practices.
These minimum practices must be conducted **"during the procurement"** of rights and safety impacting AI systems. Commitments of the U.S. government to trustworthy AI must be operationalized during the procurement process as well, and not as an afterthought.[12]
By setting trustworthy and responsible AI expectations upfront with vendors and contractors, OMB can create fairer competition.

- **Lack of government-sanctioned guidelines or resources to answer the AI-specific challenges** and questions which emerge during the procurement process. Interviewees warned that this either led to risk aversion and a decision not to adopt AI, or procuring AI without understanding its limitations, benefits and risks properly.

- **Need for agility and flexibility in AI procurement to reduce vendor lock-ins**. Interviewees noted that incumbent vendors had significant knowledge of federal procurement process which gave them advantage over smaller vendors. Even when products of smaller companies performed much better, the existing vendors were able to navigate the bureaucracy better and receive contract awards.

- **Federal Data Strategy:** While the mandate for agencies to document the provenance and quality of the data for its intended purpose is commended, this should be handled in a more systematic way. The Federal Data Strategy already provides a framework of operational principles and best practices to help agencies leverage consistent data infrastructure and strong data governance.[13] The Federal Data Strategy includes a set of principles including Ethical Governance, Conscious Design, and Learning Culture, as well as a set of 40 practices to guide agency data management activities. The requirements and best practices from the Data Strategy must be operationalized when agencies are making decisions about development, use, procurement, and governance of AI systems.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

- **Update procurement regulation:** Federal acquisition regulations should be updated to ensure these practices are conducted "during the procurement" of rights and safety impacting AI systems.

- **Add scientific validity, contestability and traceability as required minimum requirements**. AI systems used by the government can impact an individual's human

[12] Executive Order 13960, Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government, 85 FR 78939, (Dec. 8, 2020), https://www.federalregister.gov/documents/2020/12/08/2020-27065/promoting-the-use-of-trustworthy-artificial-intelligence-in-the-federal-government
[13] Office of Management and Budget, Federal Data Strategy - A Framework for Consistency OMB-M-19-18 (June 2019). https://www.whitehouse.gov/wp-content/uploads/2019/06/M-19-18.pdf

rights, civil liberties, safety, and access to resources. Therefore, a system used by the government should have scientific validity and traceability, and the practices should allow for contestability.

- When a decision is made in an agency to use an AI system**, documentation should also include other algorithmic and non-algorithmic alternatives considered**. Such transparency would increase the public's confidence and trust in the government use of AI.

- **Redress & remedy process should be available without caveats:** For rights-impacting systems, the remedy process should not place unnecessary burden on the impacted individual.

- **System-level dependencies**: AI systems are dependent on data. Data produced from one AI system may be an input to another system in the government infrastructure. An erroneous or biased outcome from one system can have cascading impact on data and outcomes across the system. This can lead to discriminatory government decisions on individual's rights, liberties, and access to resources. Therefore, a system design approach is required to ensure the data flows and dependencies between the systems are evaluated before a system is put into use.

- **Establish a procurement category code for AI/ML systems**: this would allow procurement professionals across agencies to know if an existing system or contract can be scaled up. Currently, AI systems are procured by federal agencies using a variety of procurement categories such as software, consulting services, information technology services. This disparity can result in some systems put into use without application of minimum practices.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

- **Establish a menu of standard contract clauses** which address data quality, data ownership, data and model access, AI model performance assurance, risk management, and mandate for explainability and auditability of the system. The European Union has already drafted EU model contractual AI Clauses to use in procurements of AI and invites public organizations to pilot.[14] Such menu would help the government procurement professionals and legal teams to evaluate and apply clauses consistently relevant to the context of the AI system.

As noted in my congressional testimony, we need guardrails in place for AI systems, and the expertise in government to manage the consequences of the rapid changes that are now taking

[14] European Commission (2023) EU model contractual AI Clauses. https://public-buyers-community.ec.europa.eu/communities/procurement-ai/resources/eu-model-contractual-ai-clauses-pilot-procurements-ai

place.[15] Guardrails for development, procurement and use of AI systems need to reflect prioritization of human dignity, human rights, civil rights, democratic values, and rule of law. Governments must ensure alignment of policies and goals with the tools, while ensuring government does not lose its independent ability to verify and validate technology vendors' claims.

Thank you for your consideration of my views. I would welcome the opportunity to discuss these recommendations further.

Merve Hickok
Founder of AIethicist.org
President and Research Director at Center for AI and Digital Policy (CAIDP)
Data Ethics Lecturer at University of Michigan, School of Information

[15] Testimony and statement for the record of CAIDP President Merve Hickok, *Advances in AI: Are We Ready For a Tech Revolution?*, House Committee on Oversight and Accountability: Subcommittee on Cybersecurity, information Technology, and Government Innovation (Mar. 8, 2023), https://oversight.house.gov/wp-content/uploads/2023/03/Merve-Hickok_testimony_March-8th-2023.pdf.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0056
Comment on OMB-2023-0020-0001

Submitter Information

Organization: International Business Machines (IBM)

General Comment

Please see IBM comments attached. Thank you.

Attachments

AI EO Letter OMB SIGNED

Office of the Vice President
Government and Regulatory Affairs

600 14th Street, NW Suite 300
Washington, DC 20005

December 4, 2023

Ms. Shalanda D. Young
Director
Office of Management Budget
Washington, DC 20503

Dear Ms. Young,

Re: Public comment on Proposed Memorandum for the Heads of Executive Departments and Agencies: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence.

IBM appreciates the Office of Management and Budget welcoming input from stakeholders across the Artificial Intelligence (AI) community on this implementation guidance for President Biden's Executive Order of October 30, 2023 (Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.)

AI is projected to enhance human productivity and unlock an astounding $16 trillion in value by 2030. Not only will this fuel economic growth and boost GDP, but it will also offer a competitive edge to individuals and organizations who effectively leverage its capabilities. AI could also help address some of our most pressing challenges, whether it's pioneering drug discovery, improving manufacturing and food production, or confronting climate change.

IBM has also long acknowledged the potential risks of AI adoption, and advocated for strong governance and for AI that is transparent, explainable, robust, fair, and which safeguards privacy. We have also developed tools and strategies for enterprises to manage this risk. Strong governance is required to ensure AI adoption is responsible and ethical.

AI presents a profound opportunity to enhance the critical work of our civil servants, and the importance of proper governance to manage this transition cannot be overstated. Fully realizing the benefits of AI across government agencies will require often extensive reengineering of how work is done. IBM believes that how the federal government uses its buying power for AI can significantly shape the overall adoption of AI in the United States.

This Executive Order broadly aligns with IBM's AI principals and pillars within the context of government AI adoption. It also aligns with our principals that government should focus on managing risk, using existing laws, and hold AI creators accountable.

IBM supports the decision not to create a single, cross government authority for AI, but instead grant the authority to manage and control AI systems to individual agencies. We believe that the Executive Order sends a clear message that AI creators and adopters should be held accountable for responsible and ethical AI adoption and for making decisions considerate of societal impacts.

While IBM strongly supports the framework in this proposed memorandum, there are several areas where we see opportunities for improvement to the proposed memorandum:

SECTION 3: Designating Chief AI Officers

IBM has long called for enterprise leaders to designate a single, appropriately empowered individual to guide AI implementation, and we are pleased to see the mandate for Chief AI Officer designation in the Executive Order.

Section 3.b of the memorandum defines the CAIO's expansive responsibilities, which represent a specialized and full-time role that will grow as agency AI adoption scales. Responsible AI adoption requires a CAIO with a strong technical background and AI subject matter expertise. The CAIO must be able to focus on AI adoption as their primary responsibility with the support of a strong AI office, dedicated funding, clear authority, and sufficient seniority.

Further, while section 3.a.ii of the proposed memorandum notes that there are recurring compliance and use case disclosure requirements under the AI in Government Act, without a robust AI office, there is risk that this disclosure may become a substitute for meaningful governance that truly reduce the risks to the rights and safety of Americans.

We recommend that the guidance be amended to state that while agencies may initially "dual hat" existing officials to serve in the CAIO role, that this be a temporary arrangement until agencies can create a strong AI office led by a CAIO whose primary role is leading that function. As noted below, we further recommend that agencies request dedicated AI office funding in their FY25 budgets.

SECTION 3: Strengthening Artificial Intelligence Governance

In many cases, AI applications will be adopted by government users as part of a suite of services or programs that cross agency boundaries. For example, claims processing for benefit programs, small business compliance, and environmental protection are uses cases where a common solution may be adopted by multiple agencies. While the proposed memorandum is strongly focused on agency governance, it does not address these cases where interagency coordination is needed to ensure that these AI solutions are evaluated in a uniform manner.

IBM recommends that OMB amend the proposed memorandum to include a governance provision that calls on agencies to coordinate governance of applications of AI that involve multiple agencies.

SECTION 4.a: AI Strategies

It seems likely that many agencies will not immediately have the capacity to hire and train personnel and time needed to create the organizational and leadership structures necessary to meet the goals detailed in the memorandum. Overall, the requirements of the memo will place a major burden on many of the CFO agencies across their IT enterprises.

IBM recommends that OMB clarify the guidance to more clearly direct agencies on how to implement the workforce elements of this directive if their existing resources are lacking.

We also recommend that OMB direct agencies to clarify in their FY25 budget requests to Congress 1) what FY24 resources they are devoting to AI adoption in general and the mandates of this Executive Order in particular, and 2) request additional dedicated FY25 funding to accelerate AI adoption and ensure that the resources required for strong implementation of this Executive Order are available.

SECTION 4.b.iii: Advancing Responsible Artificial Intelligence Innovation

Section 10.1(f) of the Executive Order directs prioritization generative AI capabilities for the FedRAMP process, and this is referenced in the memorandum. We do not believe this mandate is sufficient to bring forward secure capabilities into the federal market. Agencies remain reluctant to sponsor new capabilities for FedRAMP for a variety of reasons.

We have two recommendations that we believe would accelerate the adoption of secure AI capabilities:

First, that the FedRAMP Director create a path for direct authorizations of generative AI solutions without the time-consuming process of seeking agency authorizations. The FedRAMP Director should prioritize direct authorization for solutions that demonstrate strong alignment with federal agency use cases, governance objectives, and adherence to the NIST Risk Management Framework.

Second, FedRAMP should issue preliminary authorizations for generative AI capabilities that meet minimum standards. Preliminary authorizations for capabilities that meet minimum standards would allow agencies to pilot generative AI capabilities to improve their operations while those capabilities navigate the FedRAMP process.

SECTION 5.a.ii: Recommendation on AI Documentation

Transparency is one of IBM's core principles for AI adoption. Users of AI should understand when AI is being employed in ways that impact their lives, and users and stakeholders should have convenient access to understandable information about how that AI was trained and what data was used to train it.

We support the requirement in section 5.c.iv.H for publicly available "plain language" documentation on AI system functionality to accompany the use case inventories required by this memorandum for rights-impacting of safety-impacting AI. IBM has also conducted extensive work on AI Fact Sheets that reflects well the goals and objectives of this section.

IBM recommends that in implementing this requirement, the AI Interagency Council seek information on commercial best practices for AI Factsheets and work to ensure that the requirements are easily achievable by AI creators and vendors.

We also recommend that the guidance be modified to ensure that there is a standardized requirement and a baseline format for AI documentation across all federal agencies that is balanced and reasonable. AI documentation content and format requirements should be such that any AI developer can easily produce a fact sheet and provide updates periodically to the government user. Further, the need for AI developers to protect sensitive trade secrets must be recognized and balanced against the desire for transparency.

SECTION 5.d: Managing Risks in Federal Procurement of Artificial Intelligence

IBM suggests that OMB direct agencies to establish a plan to protect private sector IP through the procurement process. For example, how will IP embedded in AI products be protected if government procures it and then recompetes the contract? While we understand and acknowledge that in some instances there is co-development between public and private entities, at a minimum, we recommend the recognition of a general principle supporting the protection of private sector IP. Without safeguards for private companies the federal government may struggle to get access to the best AI technology.

Thank you for the opportunity to comment on this important matter. AI is a fast-moving technology, and it is imperative that industry and government continue to work together to ensure that regulation protects Americans while also avoiding unnecessary burdens and fostering innovation.

Sincerely,

Christopher Padilla
Vice President
Government and Regulatory Affairs

PUBLIC SUBMISSION

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: CAST

General Comment

Please see attached letter.

Attachments

CAST-response-OMB-2023-0020

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December 4, 2023

Clare Martorana
Federal Chief Information Officer
Office of Management and Budget
submitted via regulations.gov

RE: OMB–2023–0020

Dear Ms. Martorana:

Thank you for the opportunity to comment upon the Office of Management and Budget memo directing Federal agencies to strengthen their AI governance and innovation programs while managing risks from the use of AI.

About CAST

Since 1984, CAST has worked relentlessly to ensure that our nation is one where learning has no limits for all individuals. We pioneered Universal Design for Learning (UDL), a framework for the intentional and inclusive design of learning and training environments that harness technology, the learning sciences, and instructional practices to remove barriers to learning in all settings: physical, digital, or blended. UDL encourages the design of flexible learning environments that anticipate learner variability and provide multiple routes to success; UDL acknowledges that variability across all learners is the norm rather than the exception. UDL also incorporates a responsive framework to support educators in their professional learning and application of new skills in any K-16 teaching environment, including in career and technical education (CTE), science, technology, engineering and math (STEM) and more. UDL is now incorporated into key federal legislation, career training, and workforce laws, including the Every Student Succeeds Act, the Higher Education Opportunity Act, the Strengthening Career and Technical Education for the 21st Century Act (Perkins V), and in the U.S. Department of Education's Education Technology Plan.[1]

CAST also has a distinguished history using UDL to support learners of all ages, including those with identified disabilities as well as others who may benefit from accessible materials due to literacy, language, or other barriers that may impede learning. CAST's aim is to create a level playing field where all learners have equitable opportunities to succeed by expanding access and opportunity to education and employment for all individuals, including those historically marginalized due to race, language, income, disability or other barriers. As a contribution to the education community, we have also developed CAST Figuration, an openly licensed, feature-rich, responsive, mobile first, accessible, front-end framework to develop websites that have usability and accessibility at their core from the start.

[1] See: P.L. 110-315, P.L. 113-128, P.L. 114-95, P.L. 115-224, National Education Technology Plan 2021, U.S. Department of Education.

Although AI will undoubtedly have widespread impacts across many sectors of U.S. and global society, CAST is focusing our comments on the potential benefits and barriers that we see AI holding for *educational systems and career/employment training settings*. AI holds exciting potential to improve teaching, learning, educational equity, and economic opportunity– if it is designed and implemented in flexible, accessible, and universally designed ways. If, conversely, AI is deployed inflexibly and inaccessibly in learning settings, these powerful technologies run the risk of widening educational disparities rather than narrowing them. Through this lens, we have selected the most appropriate questions from the RFI as the organizing framework for this response.

OMB Question 3. How can OMB best advance responsible AI innovation?

CAST Response:

1. **Make explicit that all federal agencies must meet the current accessibility standards as required under Section 508 of the Rehabilitation Act of 1973 (Section 508)[2] when investing in [any] AI technology.**
2. **Clarify that ensuring compliance with the current accessibility standards -as required by Section 508- will be strengthened when agencies incorporate and use the federally-recognized UDL Framework and Guidelines as they develop plans regarding federal investments in AI.**
3. **Require agencies to use more diverse data in training AI systems to ameliorate well-known challenges such as the tendency of AI image generation to replicate many biases (e.g., racial, gender, ableist) in its creation of human figures**.[3]
4. **Specify that agencies must consider the risk(s) of and do all they can to prevent profiling and/or incorrectly labeling the most vulnerable population of users, including individuals with disabilities who [may] leverage accessibility features and/or certain applications or conduct specific searches while utilizing AI**.[4]
5. **Maintain OMB's requirement for each agency to "maintain human consideration" AND also ensure that every agency keeps humans in the loop for internal planning and implementation.**

Rationale:

CAST appreciates that OMB has stated in 5(d)(i) that "Agencies should ensure that procured AI exhibits due respect for our Nation's values, is consistent with the Constitution, and complies with all other applicable laws, regulations, and policies, including those addressing privacy, confidentiality, copyright, human and civil rights, and civil liberties." We agree. However, in order to fully protect individuals with disabilities and others whose civil rights, liberties and accessibility needs must be protected and met, we believe OMB must go further to clarify the requirements of Section 508 of the Rehabilitation Act of 1973, including the recommendations of the World Wide Web Consortium (W3C). We also encourage OMB to promote federal

[2] Section 508 of the Rehabilitation Act of 1973 is the standard customarily used to consider whether or not environments or materials are compliant with requirements of the Americans with Disabilities Act (ADA). See: P.L. 93-112, as amended (29 U.S.C. §794d). See also: the "Electronic and Information Technology Accessibility Standards," authorized by the Architectural and Transportation Barriers Compliance Board—as well as recommendations of the World Wide Web Consortium (W3C).

[3] See: MIT Technology Review, I asked an AI to tell me how beautiful I am; https://www.technologyreview.com/2021/03/05/1020133/ai-algorithm-rate-beauty-score-attractive-face/

[4] See: Artificial Intelligence (AI) in K-12 VERSION 1.1, CoSN, Spring 2023; https://www.cosn.org/wpcontent/uploads/2023/03/CoSN-AI-Report-2023-1.pdf

agency use of the best practices that researchers and implementation specialists have demonstrated help ensure accessibility for any individual who may struggle due to literacy, language, disability, or other vulnerability, including the most current WCAG accessibility standards.

OMB makes just *one mention* regarding accessibility in the memo[5] –which provides for a human 'opt-out' provision with regard to accessibility– and CAST asserts that OMB must go further. Although CAST agrees that individual users should have the freedom to choose a human 'opt-out' provision, we also request OMB make explicit the requirement that every agency must do *all it can* to procure, design, develop, and implement AI systems and/or processes that are BORN accessible. The 42.5 million people with disabilities across the country who rely upon or require the support of numerous federal agencies daily are counting on the Administration to get this right - especially in the nascent phase of innovation, design, and application across multiple agencies and their platforms. CAST encourages OMB to emphasize that federal investments should require that, at minimum, innovative technologies meet Section 508 requirements: this will ensure that all grantees and partners working to assure U.S. competitiveness will develop technology and training programs that are accessible to all and available in accessible formats (online and in digital formats, including via websites, mobile applications, online systems, and all forms of information and communication technology (ICT). Below is further explanation and rationale for our recommendations regarding accessibility, UDL, and the impact of AI on unique populations.

Accessibility: AI must be accessible for all. "Available" is not the same as "accessible," nor does something being digital assure its accessibility. Indeed, much of current AI is demonstrably *inaccessible*. For example, many of the chatbots or image generators rely on print and keyboarding for communication between the person entering the AI prompt and the bot. Another issue is the way analytic AI systems present information in dashboards that, so far, are universally inaccessible (e.g., violations in color contrast, lack of image descriptions, indeterminate reading structure/order). These limitations in the current design and interface of AI tools make them inaccessible to individuals who are blind, visually impaired, have print or attention disabilities (such as dyslexia or ADHD), or other physical or sensory disabilities, and are counter to the requirements of Section 508. When these federal standards are applied to new or emerging technologies, such as AI technologies and tools, the standard of equivalent facilitation comes into play: these new technologies have to work as well or better for people with disabilities as they do for individuals without disabilities. This is a standard which the current best-of-field AI tools fall well short of; OMB must emphasize both the requirements of current law as well as the importance that the cutting-edge potential of AI benefit all U.S. learners rather than contributing to wider disparities in education and employment outcomes for individuals with disabilities and other vulnerable populations that may struggle due to race, language, income, or other challenges.

As AI is developed, used, and refined as advancements are made, it will only be accessible for some users if it does not proactively anticipate (and subsequently design for) this natural human variability. This supports the recent U.S. Department of Education Office of Education Technology (OET) recommendation to shift the focus of AI development from neurotypical to neurodiverse learners who can benefit from multiple pathways

[5] See: c. Minimum Practices for Safety-Impacting and Rights-Impacting Artificial Intelligence (v)(F) which states: …Agencies must prominently provide and maintain a mechanism to conveniently opt out from AI functionality in favor of a human alternative where practicable and consistent with applicable law and governmentwide guidance. An opt-out mechanism must exist where the affected people have a reasonable expectation of an alternative or where lack of an alternative would meaningfully limit accessibility or create unwarranted harmful impacts.

to learn and interact with information. If developers use accessibility specifications and the UDL Guidelines to make AI models inclusive and AI tools accessible, AI use will increase the accessibility to education overall, especially for those learners we know experience the greatest barriers to learning due to language, literacy level, socio-economic status, disability, or a combination of these. If, however, developers do not consider learning variability in their designs of AI, students who are already underserved will have even less access to robust and inclusive learning, and as a result, may be further marginalized. UDL should be used as a metric and a standard in any policy or set of recommendations for the procurement, development, and or use of AI in education.

Furthermore, because AI is cutting edge technology, it would be inexcusable and unethical to mandate, fund and/or encourage the development and/or use of AI without incorporating what is understood today about human learning. The body of research about how humans learn is extensive yet–for most educators–synthesizing that knowledge base to better address learning variability into their daily practice is not reasonable. Educators worldwide regularly use CAST's UDL Guidelines to inform how they design learning and, as a result, thousands of educators are ensuring that millions of students worldwide have access to learning they did not have previously. **Therefore, the requirement to meet current accessibility standards as required under Section 508 and use the federally-recognized UDL Framework and Guidelines must be incorporated into any federal investments into AI**.

Data Modeling: It is important to recognize that AI is limited to the data sets it is trained on. For example, if AI is created utilizing algorithms that are not inclusive of the target population, it may harm, rather than support, the teaching and learning process. As the recent report by the OET states, "The process of developing an AI system may lead to bias in how patterns are detected and unfairness in how decisions are automated."[6] In order to mitigate risks, we must prioritize diverse teams working on AI, utilizing best practices in inclusive R&D and ensuring that outputs are "appropriate" or correct and reduce unwanted biases. It is also essential that data from individuals in underserved populations–persons with disabilities, those in racially minoritized groups, those living in poverty, those whose first language is not English–are included in AI data modeling rather than excluded as "outlier cases." Using more diverse data in training AI systems would help ameliorate well-known challenges with these technologies, such as the tendency of AI image generation to replicate many biases (e.g., racial, gender, ableist) in its creation of human figures.

Data Privacy: The power of AI tools and the ability to personalize learning opportunities is coupled with critical considerations regarding educator and student data privacy. Compliance with federal and state privacy regulations (including for K-16 education) is essential, but many AI tools were not built specifically for many of our public settings (e.g., schools) and therefore may or may not be in compliance. As systems leverage technology tools and resources and seamlessly access data via interoperable systems, the security of such data must remain at the forefront. The **risk of profiling users should be considered especially as individuals with disabilities leverage accessibility features and/or certain applications or conduct specific searches.** These users may be at risk to be labeled, albeit potentially incorrectly which may impact the most vulnerable populations[7].

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[6] U.S. Department of Education, Office of Educational Technology, Artificial Intelligence and Future of Teaching and Learning: Insights and Recommendations, Washington, DC, 2023; https://www2.ed.gov/documents/ai-report/ai-report.pdf

[7] See: Artificial Intelligence (AI) in K-12 VERSION 1.1, CoSN, Spring 2023; https://www.cosn.org/wpcontent/uploads/2023/03/CoSN-AI-Report-2023-1.pdf

Human Consideration and Keeping Humans in the Loop: An over reliance on AI or misuse of AI capabilities is a sure way to increase inequities and cause harm to the nation's most vulnerable populations. This is why OMB's requirement for each agency to "maintain human consideration" is key and **must also ensure that every agency keeps humans in the loop --for all parts of internal planning and implementation**. While AI may appear to mimic human intelligence, it is still a machine and is only as good as the data inputted and the algorithms it is based upon. However, this commitment to maintaining human considerations should be taken as a rationale to be over reliant on human "opt-outs" in order to serve the needs of individuals with disabilities: such a structure too often results in non-equivalent access for some users, such as when information hotlines are offered with limited operating hours. OMB should make explicit the requirement that every agency must do *all it can* to procure, design, develop, and implement AI systems and/or processes that are BORN accessible.

OMB Question 5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

CAST Response:

1. **Education:** To protect and assure all individuals' civil rights are protected as it relates to education, CAST requests edits in **bold** to OMB's use cases for Rights Impacting AI as included in (E).

   > E. In education, detecting student cheating or plagiarism, influencing admissions, monitoring students online or in virtual-reality, projecting student progress, recommending disciplinary interventions, determining **eligibility for any federal education program, determining** access to education resources and programs, determining eligibility for student aid.

   Further, CAST will work to help ensure the U.S. Department of Education can fulfill the requirements of the Executive Order which states:

   > *Sec. 8. Protecting Consumers, Patients, Passengers, and Students.*
   >
   > *(d) To help ensure the responsible development and deployment of AI in the education sector, the Secretary of Education shall, within 365 days of the date of this order, develop resources, policies, and guidance regarding AI. These resources shall address safe, responsible, and nondiscriminatory uses of AI in education, including the impact AI systems have on vulnerable and underserved communities, and shall be developed in consultation with stakeholders as appropriate. They shall also include the development of an "AI toolkit" for education leaders implementing recommendations from the Department of Education's AI and the Future of Teaching and Learning report, including appropriate human review of AI decisions, designing AI systems to enhance trust and safety and align with privacy-related laws and regulations in the educational context, and developing education-specific guardrails.*

As noted above, much of CAST's work has focused on accessibility and the importance of accessible design in any learning environment or experience. For nearly twenty years CAST has been home to a series of preeminent national technical assistance centers, funded by the United States Department of Education (ED),

and focused on better provision of Accessible Educational Materials (AEM) in K-16 learning environments[8]. Our Centers and projects create more inclusive technology systems. Specifically, we work with states, districts, schools, and educators to create systems that – seamlessly and effectively– incorporate accessibility to expand and increase the availability and use of accessible materials to help make learning inclusive, effective, and transformative for everyone.

CAST believes the potential for AI to support educators and student learning is vast and still being discovered; however, we do know that these tools–if properly designed, tested, and researched–could have huge potential for flexible and personalized learning. We are only just starting to see what generative AI (such as ChatGPT) can do, but surveys demonstrate how educators are aware of technology's potential while also desiring additional support around using tech to support student learning–especially for students with disabilities and other vulnerable populations such as those with below basic literacy skills and/or language barriers.

2. **Employment**: To protect and assure all individuals' civil rights are protected as it relates to employment, CAST requests edits **in bold** to OMB's use cases for Rights Impacting AI as included in (G).

> *G. Determining terms/conditions of employment, including pre-employment screening, pay, promotion, performance management, hiring, termination, time-on-task tracking, virtual or augmented reality workplace training/electronic workplace surveillance and management systems,* ***and determining eligibility for or access to resources and programs for pre-employment, apprenticeship, career training and/or employment programs****.*

For career training, including vocational rehabilitation, apprenticeship programs, and/or employment training programs authorized under such laws as the Individuals with Disabilities Education Act, the Perkins Act and the Workforce Innovation Opportunity Act, OMB must ensure that AI is only used to enhance and support access to and the accessibility of such training programs. At no time should one's eligibility under one or more of programs [and use of AI within or as part of any program] place an individual at risk of any potential or pre-determined/known negative outcome.

To further expand on Question 5, we also offer the following recommendations:

Data Modeling and Data Privacy: We reiterate our recommendations under Q3 about the importance of training AI on data sets that are inclusive of diverse populations, including neurodiverse learners, as well as the essential need to protect student data privacy and avoid any sort of student profiling around use of accessibility or UDL scaffolds in AI-supported learning.

Prioritize incentivizing diverse teams and ensuring that diverse teams work on AI at the federal level: Diverse teams produce better tools and technologies and lead to greater innovations and breakthroughs.

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[8] See: The federally funded National Center on Accessible Education Materials (AEM Center) which works with individual educators, school districts, and states across the nation to help them provide educational materials and resources that are accessible to all learners, from early childhood through the workforce; and, the Center on Inclusive Software for Learning which works with school districts to create and sustain inclusive technology systems for all students.

There are many ways the federal government can play a role in incentivizing diverse teams through grant competitions and contracting vehicles. Microsoft, in its Inclusive Design Toolkit, refers to this as "learning from diversity," where including more people in the design process and widening the talent pool is key to addressing important societal challenges, so called "wicked problems." As our society moves to quickly adopt artificial intelligence and machine learning in ways that impact all areas of our lives, there is potential for greater inclusion or exclusion depending on the way the AI is designed and implemented. Including people with disabilities and other types of diversity in the design of the AI may help safeguard against the negative impacts of bias in AI, which is essential if we are to build an AI-driven future that is equitable for everyone in society. Moreover, many technologies we take for granted today, from captioning to text translated into speech, were created because of the lived experience of people with disabilities. Throughout history, examples abound of the "curb cut effect" in action, where solutions intended for people with disabilities result in innovations that benefit everyone.

OMB Question 7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

CAST Response: CAST reiterates what was stated in response to Q3. Every agency has access to information, tools and resources to ensure, at a minimum, compliance with Section 508, and in utilizing the UDL Framework. We encourage OMB to share and highlight these tools and resources in materials you provide to federal agencies.

In conclusion, our hope is that all Federal agency investment in, use of, and promotion of AI will spur educators, students, parents, and policymakers to come together to consider what skills our students really need to navigate uncertainty, solve complex challenges, and shape meaningful futures in a changing economy. Federal investments must emphasize that a competitive workforce will include all U.S. learners rather than settling for technologies and related training/workforce programs that contribute to wider disparities in education and employment outcomes for the vulnerable populations for whom the U.S. Departments of Education and Labor have shared responsibility.

We appreciate the opportunity to comment. Please contact Sherri Wilcauskas at swilcauskas@cast.org if we can provide additional information or answer any questions.

Sincerely,

Lindsay E. Jones
CEO

PUBLIC SUBMISSION

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Submitter Information

Organization: Blue Cross Blue Shield Association

General Comment

See attached file

Attachments

BCBSA OMB AI Guidance Comment Letter

BlueCross BlueShield Association

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December 5, 2023

The Honorable Shalanda Young
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725 17th St, NW
Washington, DC 20503

Submitted via the Federal Rulemaking Web Portal: http://www.regulations.gov

RE: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (OMB-2023-0020)

Dear Director Young,

The Blue Cross Blue Shield Association (BCBSA) appreciates the opportunity to provide comments on the Office of Management and Budget's (OMB) draft memorandum "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," as published in the Federal Register on November 3, 2023 (88 FR 75625).

BCBSA is a national federation of 33 independent, community-based and locally operated BCBS companies (Plans) that collectively cover, serve and support 1 in 3 Americans in every ZIP code across all 50 states and Puerto Rico. BCBS Plans contract with 96% of hospitals and 95% of doctors across the country and serve those who are covered through Medicare, Medicaid, an employer, or purchase coverage on their own.

BCBSA believes that everyone should have access to high-quality health care. BCBSA's commitment to the health of our nation includes continuing to improve the way we gain insights on diverse health factors through the appropriate use of new and emerging technologies, and to provide innovative solutions and services to support Blue Plans and their members.

We commend you for soliciting feedback on the important issue of governance, innovation, and risk management for agency use of Artificial Intelligence (AI) from all stakeholders as the impacts of these policies will be felt beyond the federal government and will have effects across industry. BCBSA and our member Plans may be directly and indirectly impacted by the draft memorandum. As contractors for federal health programs, including as Federal Employee Health Benefit Program carriers, Medicare Advantage Organizations, and Medicaid Managed Care Organizations, any changes to federal procurement will directly impact our organizations. More broadly, this draft memorandum will impact nearly every federal agency and will become a model for AI governance in both the public and private sectors.

Informed by our experience, BCBSA respectfully offers the following comments for OMB's consideration as it finalizes the memorandum:

- **Regulatory Harmony Across Agencies**: The draft memorandum discusses the need for Chief AI Officers (CAIOs) to coordinate with "other responsible officials." It is critical that agencies' requirements are aligned to prevent conflicting approaches. Harmonizing federal oversight around AI accountability measures will ensure that regulations and requirements complement – not complicate – advances in technology. We appreciate that OMB has taken the first step in ensuring alignment through release of this draft memorandum, which seeks to create guidance for nearly every Federal agency.

- **Industry Stakeholder Participation**: The draft memorandum notes the need for CAIOs to coordinate with "appropriate stakeholders." This should include private sector entities that will be both directly and indirectly impacted by agency requirements. Specifically, BCBSA urges coordination with health plans on the development of guidance related to health insurance risk assessments, cost, and underwriting assessment activities, or the accessing of third-party systems for risk management functions. We applaud OMB for recognizing the need for broad stakeholder participation, including the private sector, by opening comments on this draft memorandum to the general public.

- **Flexible, Risk-based Frameworks**: The draft memorandum encourages agencies to incorporate best practices, including the National Institute of Standards and Technology (NIST) AI Risk Management Framework (RMF). We support OMB's recommendation to incorporate best practices, such as the NIST AI RMF, as the foundation of responsible and trustworthy AI is in the appropriate identification, measurement, and mitigation of risk through governance, protocols and internal controls tailored to a particular AI system and use case. It is important to note that there is no one-size-fits-all approach to measuring, managing, and mitigating potential risks of AI. A workable framework is one that has the necessary level of flexibility built into it to appropriately measure risks and enable entities to innovate by tailoring risk mitigation to each AI Systems and use cases.

- **Consumer Privacy Protections**: The draft memorandum discusses the need to ensure transparency in the use of AI, consistent with applicable law. There are many required regulatory disclosures in place today, such as Health Insurance Portability and Accountability Act privacy policies, application privacy policies and terms of use regulated by the Federal Trade Commission, and those discussed in the NIST AI RMF, which provide transparency to consumers and other stakeholders of organizations' data sharing practices. Alignment to existing disclosure requirements is vital to providing adequate transparency and should be incorporated into any AI governance approach.

We appreciate your consideration of our comments and believe that our recommendations will help with the development and use of trustworthy AI through sensible public policies. We look forward to working with OMB further on this issue and, if you have additional questions or comments, please contact Jennifer.Jones@bcbsa.com.

Sincerely,

Anshu Choudhri
Vice President, Policy Development and Strategy
Blue Cross Blue Shield Association

PUBLIC SUBMISSION

As of: February 07, 2024
Tracking No. lpr-m8rn-gc2v
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0059
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Verance Corporation

General Comment

See attached file(s)

Attachments

Verance AI comments to OMB 231204

Submitted by:
Nil Shah, CEO
Verance Corporation

Attn:
Clare Martorana
U.S. Federal Chief Information Officer

Date:
December 4, 2023

Office of the Federal Chief Information Officer,
Office of Management and Budget
725 17th St., NW
Washington, DC 20503

Submitted Via *regulations.gov*

Re: Response to the Office of Management and Budget's Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, published November 3, 2023

Dear Ms. Martorana:

I write on behalf of Verance Corporation in response to the Office of Management and Budget's Request for Comment, published November 3, 2023, seeking public comment on a draft memorandum titled *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)* (the "Memorandum") regarding the establishment of new agency requirements in areas of AI governance, innovation, and risk management. Specifically, Verance would like to respond to Questions 5 (regarding rights-impacting and safety-impacting use cases outlined in the draft Memorandum) and 7 (regarding resources to assist agencies in implementing the requirements).

Question 5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

In the case of describing both safety-impacting and rights-impacting AI systems, Verance proposes that such AI systems not be limited to only those that are *actually* "used to control or meaningfully influence the outcome" of the listed activities, but that those AI systems which have, or could reasonably be expected to have, the ability to control or meaningfully influence the outcomes of such activities. An AI system which is not used with the intention of controlling the functioning of a dam, but nonetheless has the practical (even if unintended) impact of meaningfully impacting its functioning, can still represent a significant safety risk.

Regarding the list of both safety-impacting AI provided in Section 5.b.i of the draft Memorandum, and rights-impacting AI provided in Section 5.b.ii, Verance proposes adding use cases reflecting the clear danger of misinformation and disinformation. Specifically, it would seem appropriate to add AI systems which are used for generating and/or disseminating health or medical information, whether to individuals or the public at large, to the list of safety-impacting AI. During the recent Covid pandemic, we have all seen the confusion and potential for real, physical harm to result from the spread of incorrect, misleading, or outright falsified information regarding serious public health crises, including deadly diseases and their proper treatment. Should an applicable government agency make use of an AI system to operate as an online chat resource to answer health or medical questions typed in by

concerned citizens, it is imperative that the information provided be based on training the AI system with legitimate data and information and that the output of an AI system accurately reflects such legitimate input and is not inappropriately selective or biased in its application of its algorithms such that the output misrepresents otherwise legitimate input, so people may make informed decisions about their health care issues based on facts and an accurate portrayal of available medical expertise on the subject.

Similarly, while there is an entry in the safety-impacting list for the "integrity of election and voting infrastructure," one might assume this is narrowly directed to those systems which print ballots, count votes, and report results. Also of the utmost importance is the information provided to the public about how to go about exercising the right to vote. Verance proposes adding to the list of rights-impacting AI systems those systems which disseminate voting information to the public. In recent years, numerous communities have been attacked by robocalls providing false information about the availability of vote-by-mail options and the date of in-person voting. It is not hard to imagine an AI system being used to respond to the questions of citizens looking to cast their vote about where their voting location is, the availability of alternative methods to submit a ballot, or even basic questions about whether the citizen is eligible to vote in the first place. Such a system, if not able to differentiate between accurate and false information, could conceivably misdirect citizens, causing their valuable vote to not be counted.

Finally, to the list of rights-impacting AI systems, Verance proposes adding those AI systems which may use copyrighted works in performing its role. Authors and creators have collectively messaged Congress and the Copyright Office that issues of consent, attribution, and compensation are essential in respecting the rights of those who have created works that are ultimately ingested in AI training. The Copyright Office has also wrestled with the issue of how AI-generated content (*i.e.*, the output of a generative AI system) might be identified such that the protections of copyright afforded to human authors and creators is not applied to AI-generated works, which have been determined to not be eligible for copyright protection.

In all three cases touched on above, the reliable determination of both the provenance and authenticity of AI-ingested content and information and the identification and verification of the accuracy of AI-generated content and information are of utmost importance in both safety-impacting and rights-impacting AI systems.

Question 7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

As noted above, validating the provenance and authenticity of information and content used to train AI systems as well as identifying and verifying the accuracy of AI-generated content and information[i] are essential to protect the safety and preserve the rights of those using, and subject to the use of, such systems. The use of tools which enable such validation should be required to be used by any applicable AI system used by an agency pursuant to the Memorandum. Agency contracts with AI providers should include provisions specifying tools acknowledged to be applicable. Depending on the application, the AI provider might have a choice of approved tools to employ to achieve the agency's requirement. Verance Corporation, located in San Diego, California, is in its third decade of offering innovative, industry-leading watermarking technology to support the creation, distribution, and consumption of high-value digital entertainment content, including digital music, movies, and broadcast television. Verance has partnered with major record labels, movie studios, television broadcasters, and consumer electronics manufacturers as the recognized leader in watermarking technology. In fact, Verance was

awarded an Emmy for its watermarking technology. Verance watermark detectors have been incorporated into more than 500 million consumer electronics devices worldwide, including early digital music players, Blu-ray Disc players, and smart TVs.

A watermark is a signal, undetectable to human senses, that is embedded in a work, whether visual, audiovisual, or other format. Because the watermark is embedded in the work, it goes wherever the work goes, and generally survives transformation of the content from one format to another or transfer of the content from one medium to another. Participating devices scan incoming content for the presence of the Verance watermark. In response to detecting (or not detecting, depending on the nature of the content) the watermark, the participating device will take action based on its rules, which might be to reject playback of a pirated Blu-ray Disc, trigger an app or an online source on a smart TV or mobile phone for additional viewer interaction, or present a notice to the viewer that the news clip appears to not be legitimate. The watermark can also carry information which identifies the source of the content, providing the ability to determine whether the content is authorized to be used in the training of generative AI systems. When an ethical AI ecosystem broadly implements a watermark technology to indicate the provenance and authenticity of both the input and output of AI systems, the absence of the watermark can also become an indicator of a lack of authenticity such that a second look at the provenance and veracity of content lacking the watermark becomes good practice.

In practice, Verance's AI watermark is embedded in content to be included in a television broadcast, web site, or other content delivery system. The watermark carries both source identification and time code data. A participating receiving device (such as a television, mobile phone, tablet, or personal computer's web browser) screens incoming content for the presence of the watermark. Upon finding it, the device reads the data in the watermark and can present an on-screen notice to the viewer if the watermark appears to have been corrupted, for instance, because the time code is interrupted, indicating segments have been edited out. This gives viewers the ability to exercise discretion in whether to trust that such content is being presented honestly, reducing the risk that "fake news" will unfairly influence the public in a hotly-contested election season.

Because the watermark carries identification information, including the possibility of an indicator to express the creator's wishes regarding whether the content is authorized for inclusion in generative AI training, ethical AI providers will have a direct indication of whether they may proceed with using such content in their AI training, and, if consent of the creator is indicated, who should receive any applicable compensation and what attribution should be represented in the output product of the AI system. To the extent a direct excerpt of watermarked content is used in an AI-generated creation, the watermark will assist the creator in identifying the contribution (authorized or not) so that appropriate action may be taken by the parties.

Further, an AI system, as part of a larger ethical AI ecosystem, could apply the watermark to its output, identifying such output as AI-generated so that downstream devices can take appropriate action in response to detecting the watermark. As an example, given the current status of AI-generated works as not eligible for copyright protection, a recording device detecting that certain content is AI-generated, would know that it may make a copy of such content without penalty. In other contexts, the designation of content as AI-generated could trigger an examination of the works and data that were the input sources for the AI system, such that the accuracy of the output vis-à-vis the input could be assessed, enabling a viewer to determine if such output is falsely-presented or misleading.

Verance proudly announced in August of this year that it is launching its watermark technology to address issues of provenance and authenticity of copyrighted works in the context of AI, including, among other things the detection and identification of falsified or falsely-presented news clips. This will provide real-world assistance to consumers and strengthen confidence in our national election system during uncertain times which have seen an alarming surge in the existence of falsified and falsely-presented news clips designed to mislead consumers. Verance looks forward to working with news broadcasters, consumer electronics manufacturers, and additional stakeholders in making these tools available as broadly as possible. More information can be found at www.verance.com.

Thank you for the opportunity to participate in this process, and we look forward to any questions the Office of Management and Budget (or other interested parties) may have.

Sincerely,
Nil Shah
Chief Executive Officer

[i] *See*, Memorandum, Section 5.d.v.B, encouraging agencies to manage risk by "requiring generative AI models . . . reliably label or establish provenance for their content as generated or modified by AI."

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0060
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Workday

General Comment

Workday appreciates the opportunity to provide the Office of Management and Budget (OMB) comments on the recently issued Proposed Memorandum, “Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence” (Draft Memorandum). When finalized, the Draft Memorandum will play an important role in how federal agencies can responsibly use and benefit from these critical emerging technologies. As written, the Draft Memorandum strikes a fair balance between advancing responsible AI and the federal government’s longstanding efforts to modernize its information technology systems.

We offer the attached recommendations to strengthen OMB’s Draft Memorandum as it seeks to advance both of these goals. Should you have questions or require additional information, please contact Evangelos Razis (evangelos.razis@workday.com).

Thank you,
The Workday Team

Attachments

Workday - OMB Draft Memorandum Comments (as submitted) 120523

Comments on Proposed OMB Memorandum, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" OMB-2023-0020-0001

December 5, 2023

Workday appreciates the opportunity to provide the Office of Management and Budget (OMB) comments on the recently issued Proposed Memorandum, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" (Draft Memorandum). When finalized, the Draft Memorandum will play an important role in how federal agencies can responsibly use and benefit from these critical emerging technologies. As written, the Draft Memorandum strikes a fair balance between advancing responsible AI and the federal government's longstanding efforts to modernize its information technology systems.

We offer the following recommendations to strengthen OMB's Draft Memorandum as it seeks to advance both of these goals:

- **Emphasize the importance of "buy, not build."** Commercial solutions, including Workday's, are better positioned than custom-built ones at helping agencies streamline and standardize administrative processes, gain unprecedented visibility across organizations, and adapt quickly to change, including changes in fast-evolving technologies such as AI.

- **Retain the current focus on the federal workforce**. OMB rightly identifies workforce challenges as a barrier to AI adoption. The federal government's emerging focus on skills-based hiring, rather than solely on traditional credentials, is the right lens through which to view these workforce priorities. A skills-based approach to talent is difficult to scale without AI tools implemented in a responsible manner.

- **Impact assessments are the right AI accountability tool.** We applaud OMB's decision to require federal agencies to conduct impact assessments on high-risk AI tools. We recommend focusing impact assessments on identifying, documenting, and mitigating the "reasonably foreseeable" risk of harm to an individual's rights or safety. To streamline the impact assessment process, we recommend the use of common forms across federal agencies, which will rely on information regarding the quality and appropriateness of data in a standardized fashion.

- **Require federal agencies to use the NIST AI Risk Management Framework.** The framework was developed at the direction of Congress through an open, multi-stakeholder process with participation from academia, civil society, and the business community. There is growing bipartisan support in Congress for its adoption by the federal government. We urge OMB to go further than recognizing the NIST AI Risk Management as a "best practice" and require its adoption.

- **Refine the definition of "rights-impacting" AI**. We commend OMB for adopting a risk-based approach to AI governance. At the same time, we suggest that it refine the definition of "rights-impacting" AI by: (1) adopting an exhaustive and clearly defined list of

consequential *decisions*; and (2) focusing on AI tools that *automate* these decisions. Doing so would enable federal agencies to leverage human-in-the-loop AI systems and focus their risk management efforts on the tools with the highest risk profiles.

- **Distinguish between mission-specific and enterprise AI systems.** Federal agencies are best equipped to determine if an AI tool is "rights-" or "safety-impacting," when it relates to their mission. By contrast, enterprise AI systems, such as those for human resources and financial management, would benefit from a uniform determination across the federal government. This will promote consistency in determinations of "rights-" and "safety-impacting" AI tools and encourage a more consistent level of protection.

Introduction & Background

About Workday

By way of introduction, Workday is a leading provider of enterprise cloud applications for finance and human resources, helping customers adapt and thrive in a changing world. Our applications for financial management, human resources, planning, spend management, and analytics are built with artificial intelligence (AI) and machine learning at the core to help organizations embrace the future of work. Workday is used by more than 10,000 organizations around the world and across industries–from medium-sized businesses to more than 50 percent of the *Fortune* 500. Our customers also include state, local, and county governments and institutions of higher education. The Workday customer community has 65 million users, and in April of this year, nearly one in four of all U.S. job openings was processed on the Workday platform.[1]

Workday & the Federal Marketplace

In 2020, Workday officially entered the U.S. federal marketplace with our first federal agency customer, and in 2022, we obtained our FedRAMP authorization.[2] [3] Our entry comes at a time when the White House, Congress, and federal agencies are grappling with significant challenges, including recruiting, attracting, and retaining talent, reducing the government's dependency on outdated, legacy technology, and bolstering cybersecurity. These growing challenges have occurred against the backdrop of an aging incumbent workforce and difficulty in attracting younger talent. By the end of 2023, nearly two-thirds of people in senior government leadership positions will reach retirement age. By contrast, employees who are millennials and Generation Z are only 7 percent of the federal workforce.[4] This is compared to nearly 25 percent in the private sector.[5]

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[1] Landman, Inna. "First Half 2023 Hiring Trends: Slowdown and Stagnation," Workday Blog, September 20, 2023, https://blog.workday.com/en-us/2023/first-half-2023-hiring-trends-slowdown-stagnation.html.
[2] "Workday Achieves Fedramp Authorized Designation." Workday Newsroom. https://newsroom.workday.com/2022-07-13-Workday-Achieves-FedRAMP-Authorized-Designation.
[3] Robinson, Doug. "Tipping Point - Modernizing the Federal Workforce." POLITICO, July 11, 2022. https://www.politico.com/sponsor-content/2022/07/11/tipping-point-modernizing-the-federal-workforce.
[4] "Federal Workforce Needs to Be a Priority — No Really, a Top Priority This Time, Advocates Say." 2020. Federal News Network. November 9, 2020. https://federalnewsnetwork.com/federal-report/2020/11/federal-workforce-needs-to-be-a-priority-no-really-a-top-priority-this-time-advocates-say/.
[5] Mace, Chris. "Budget Underscores Lack of Younger Federal Employees." FEDweek. February 26, 2020. https://www.fedweek.com/fedweek/budget-underscores-lack-of-younger-federal-employees/.

Federal hiring managers often lack the data, reporting, and analytic tools to understand their workforce, and track and match skills so that federal employees can continue to grow their careers within the government.[6] The federal government also often lacks systems to assess retention risks, provide development opportunities, and support self-service. Missing these essential tools can impact motivation, morale and engagement, even in a mission-driven environment.

Federal agencies realize they need to make investments in hiring, onboarding, and talent development initiatives and to create an environment more conducive to learning, growth, and equity.[7] They are also looking to establish thoughtful leadership practices around diversity and inclusivity. As remote work continues and evolves, federal agencies will also be looking for better ways to help assess employee engagement, productivity, and well-being while maintaining a supportive work environment.

Given the need to focus on their primary missions, agencies can and should look to commercially available solutions to their enterprise technology needs, rather than build their own. There is no doubt that technologies developed by the private sector evolve and improve faster than in-house and custom-agency projects. This is particularly true for AI, whether integrated into enterprise software services or offered as a stand-alone tool. Increasing partnerships between the public and private sectors will reduce complexity and costs, allowing the federal agencies to focus resources and staff on their core missions.

Modern and secure cloud-based systems are integral to achieving these government-wide priorities. Workday's solutions unify financial and talent management, time and attendance, and recruitment, which allows agencies the ability to automate their day-to-day personnel processes and give their workers more control through self-service options.[8] Our solutions enable agencies to operate more strategically, hire and develop a top-performing workforce and adapt quickly to change.

Skills to Empower the Federal Workforce

As with earlier advances in technology, AI will impact how people work and the skills their jobs require. Notable developments around generative AI are also accelerating the pace and depth of transformation that we will likely see in the next two to three years. As Workday partners with federal agencies to solve a litany of challenges, including strengthening and empowering the federal workforce, we recommend a shift to a skills-based approach to talent to adapt to the changing workplace.[9] [10] [11]

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[6] "The Federal Government Must Transform to Attract Tomorrow's Workers." Workday Blog, October 18, 2023. https://blog.workday.com/en-us/2023/government-transforms-to-attract-workers.html.
[7] Strengthening the federal workforce - The White House, n.d. https://www.whitehouse.gov/wp-content/uploads/2022/03/ap_7_strengthening_fy2023.pdf.
[8] "Government Cloud Computing and Solutions." Workday. https://www.workday.com/en-us/solutions/industries/public-sector/workday-government-cloud.html.
[9] Schlampp, Pete. "A.I. Is a Must for Skills-Based Organizations That Want to Move at the Speed of Future Business," Fortune, February 17, 2023, https://fortune.com/2023/02/17/workday-future-business-skills/.
[10] Somers, David. "How Workday Is Delivering Next-Generation Skills Technology at Scale," Workday Blog, September 28, 2022, https://blog.workday.com/en-us/2022/how-workday-delivering-next-generation-skills-technology-scale.html.
[11] Bryan Hancock et al., "Taking a Skills-Based Approach to Building the Future Workforce," McKinsey & Company, November 15, 2022,

By a skills-based approach to talent, we mean an emphasis on what a person can do or learn, rather than solely on their credentials. Awareness of the benefits of a skills-based approach to hiring, learning, and career development is growing.[12] In hiring guidance issued by the Office of Personnel Management last year, the federal government recognized the importance of a skills-based approach to recruiting its workforce.[13] Governors of at least ten states are also taking steps to remove degree requirements for most state opportunities.[14]

At Workday, we've found that successfully implementing a skills-based approach to talent can be difficult to scale without the right technology.[15] People use different words to describe a skill, and very different skills can be described with the same word. Workers often struggle to identify which skills they should develop to advance their careers, and the lack of consistency makes it difficult for employers to identify workers who can fill an open role.

Fortunately, AI is unique in that it will drive change in the workplace and power the tools that workers and employers need to successfully navigate those changes. AI can process large amounts of data associated with occupational roles and responsibilities and develop so-called "ontologies" or vocabularies that make skills data actionable. Workday's Skills Cloud, for example, aligns skills to a common vocabulary by using machine learning to map how different skills relate to each other and evolve over time.[16] Skills Cloud has been used over 40 million times, including by hiring managers for new job postings and by incumbent workers and candidates to communicate the skills they have. Over 25 percent of *Fortune* 500 companies are now live on Skills Cloud and workers have entered over 200 million skills into their profiles.

Incumbent workers can also use Career Hub, a one-stop-shop on the Workday platform where employees can find AI-enabled personalized recommendations, such as learning content and short-term projects on other teams where they can pick up new skills. For example, a program manager at the Department of Energy interested in management can discover a leadership role in another program office and take suggested learning courses to prepare them for that opportunity.[17] The result is a win-win for workers and employers: the program manager can pursue growth opportunities that align with their career goals, and the federal government can benefit from and support their incumbent workforce. This is one example of how AI and skills can take the guesswork out of workforce development and facilitate data-driven reskilling.

Our Commitment to Responsible AI

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https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/taking-a-skills-based-approach-to-building-the-future-workforce.

[12] Ferguson, Stephanie. "Understanding America's Labor Shortage," U.S. Chamber of Commerce, October 23, 2023, https://www.uschamber.com/workforce/understanding-americas-labor-shortage.

[13] "OPM Releases Skills Based Hiring Guidance." U.S. Office of Personnel Management. https://www.opm.gov/news/releases/2022/05/release-opm-releases-skills-based-hiring-guidance/.

[14] "States Consider Elimination of Degree Requirements." National Conference of State Legislatures. https://www.ncsl.org/education/states-consider-elimination-of-degree-requirements.

[15] "Skills credentials and Workforce of the Future." Workday. https://www.workday.com/content/dam/web/en-us/documents/whitepapers/skills-credentials-and-workforce-of-the-future.pdf.

[16] Stratton, Jim, David Somers, Rowan Miranda, et al. "The Foundation of the Workday Skills Cloud." Workday Blog, 2020. https://blog.workday.com/en-us/2020/foundation-workday-skills-cloud.html.

[17] Ernst, Chris. "Making the Shift to a Skills-First People Strategy." SHRM, August 23, 2022. https://www.shrm.org/executive/resources/people-strategy-journal/summer2022/pages/chris-ernst-workday-skills-first-people-strategy.aspx.

At Workday, we see incredible opportunities for AI to unlock human potential, including in the federal enterprise. We also recognize that the risk of unintended consequences stemming from AI's use is real and that trust is foundational to any technology's adoption. As a cloud-native enterprise software company, we learned early on that investing in rigorous technology governance aligns our solutions with our company values and earns and retains our customers' trust.[18] [19] This is why Workday put in place a robust responsible AI program that includes:

- **Leadership commitment** from a Responsible AI Advisory Board that is led by our General Counsel and counts our Chief Compliance Officer, Chief Technology Officer, and Chief Diversity Officer among its members.

- **An independent Responsible AI team** of social and data scientists and technology experts that reports through our Chief Compliance Officer to our Board of Directors. The team develops and maintains Workday's AI governance framework and receives cross-company support, including from responsible AI "champions" who provide subject matter expertise so that AI products are developed in accordance with Workday's ethics principles.[20]

- **Responsible AI guidelines and review processes** that turn our principles into documented practices and assessments. Our product teams use these assessments to evaluate a potential AI feature's risk profile in the earliest stages of its development. AI tools that may be used for consequential decisions, such as hiring or promotion, are treated as high-risk.

- **Disclosure** to equip our customers with a clear understanding of how our AI tools are developed and assessed. We also provide our customers with disclosures and choices about how their data is used.

Workday has instituted these guardrails so that our AI tools are developed in a responsible manner. In addition to disclosure, we provide our customers with the means to access their own data for bias testing and the choice of whether to use an AI tool at all. In this way, we view AI governance as a partnership between *developers*, or organizations that produce or design AI tools, and *deployers*, which use AI tools and interact with end users.[21] Similar to privacy and data protection laws, AI governance frameworks should distinguish between these roles and assign obligations accordingly. In the context of AI risk management, the Organization for Economic Cooperation and Development (OECD) has recognized this distinction as AI evaluated "in the lab" (i.e., developers) versus AI evaluated "in the field" (i.e., deployers).[22] Understanding the differences in control and visibility between developers and deployers is essential for a workable life-cycle approach to AI risk management.

Workday understands that the lack of public trust in AI must be addressed across industry and in partnership with governments. We know that people and organizations will not use technology

[18] "Our Core Values." Workday. https://www.workday.com/en-us/company/about-workday/core-values.html.
[19] Cosgrove, Barbara. "Safeguarding Privacy while Innovating with AI." Workday Blog, May 24, 2023. https://blog.workday.com/enus/2023/safeguarding-privacy-while-innovating-ai-workday.html.
[20] Trindel, Kelly. "Workday's Continued Diligence to Ethical AI and ML Trust." Workday Blog, September 19, 2023. https://blog.workday.com/en-us/2022/workdays-continued-diligence-ethical-ai-and-ml-trust.html.
[21] "AI Developers and Deployers - An Important Distinction." BSA, March 26, 2023. https://www.bsa.org/policy-filings/ai-developers-and-deployers-an-important-distinction.
[22] "OECD Framework for the Classification of AI Systems." OECD, February 22, 2022. https://www.oecd.org/publications/oecd-framework-for-the-classification-of-ai-systems-cb6d9eca-en.htm.

they don't trust. *Workday strongly supports government action to cultivate trust in AI, including new regulations on AI developed and used for consequential decisions*, such as decisions to hire, promote, or terminate an employee. We were early champions for the creation of the National Institute of Standards and Technology's (NIST) AI Risk Management Framework (AI RMF or Framework) because we recognized the need for a robust, flexible, and commonly accepted benchmark for AI governance.[23] Workday is an early adopter, and in September, NIST published a case study featuring Workday's use of the AI RMF, the first of any organization.[24]

As policymakers began considering a path forward on AI policy, we recognized the need for a practical roadmap for responsible AI in the workplace. With this in mind, Workday joined the Future of Privacy Forum and other leading technology companies to co-develop the *Best Practices for AI and Workplace Assessment Technologies*.[25] The *Best Practices* leverage our experience delivering trustworthy enterprise AI capabilities at scale, as well as federal government benchmarks, including the NIST AI RMF and guidance from the Equal Employment Opportunity Commission and Federal Trade Commission (FTC).[26] We were proud to endorse the *Best Practices* and have called on other organizations to join us in using them.[27]

Specific Comments on the Draft Memorandum

Advancing Responsible AI Innovation

Workday applauds OMB for recognizing that "AI can improve operations and deliver efficiencies across the federal government." We strongly agree with the Draft Memorandum's focus on identifying and removing barriers to the responsible adoption of AI in the federal enterprise. Robust AI governance is *not* incompatible with the federal government's longstanding efforts to modernize its information technology systems. The Draft Memorandum strikes a fair balance between these policy aims. We offer the following recommendations with the goal of advancing both priorities.

OMB should emphasize the importance of "buy, not build."

[23] "A Timely Bipartisan Push for Trust in AI: Congress and the NIST Trustworthy AI Framework." Morning Consult, January 12, 2021. https://morningconsult.com/opinions/congress-and-the-nist-trustworthy-ai-framework/.
[24] "Using the AI Risk Management Framework - Workday." NIST, 2023. https://www.nist.gov/system/files/documents/2023/09/14/workday-success-story-final-for-release.pdf.
[25] "Future of Privacy Forum and Leading Companies Release Best Practices for AI in Employment Relationships." Future of Privacy Forum, September 19, 2023. https://fpf.org/blog/future-of-privacy-forum-and-leading-companies-release-best-practices-for-ai-in-employment-relationships/.
[26] "Assessing Adverse Impact in Software, Algorithms, and Artificial Intelligence Used in Employment Selection Procedures under Title VII of the Civil Rights Act of 1964." US EEOC. https://www.eeoc.gov/laws/guidance/select-issues-assessing-adverse-impact-software-algorithms-and-artificial?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.
[27] "Future of privacy forum and leading companies release best practices for AI in employment relationships." Future of Privacy Forum. https://fpf.org/blog/future-of-privacy-forum-and-leading-companies-release-best-practices-for-ai-in-employment-relationships/.

In 2022, there was $47.4 billion of private investment made in AI in the United States.[28] This underscores the scale of resources the U.S. private sector is devoting to developing cutting-edge AI technologies and deploying them at scale. For the federal government to efficiently and effectively modernize its IT systems, it is critical that federal agencies leverage the commercial solutions that emerge from these investments.

With this in mind, Workday welcomes the Draft Memorandum's recognition in Section 4 that "AI can improve operations and deliver efficiencies across the Federal Government." However, the Draft Memorandum also asserts that agencies "should ***build*** internal enterprise capacity to support responsible AI innovation." Unfortunately, this language may be interpreted by agencies as a directive to overlook commercially available solutions in favor of developing and deploying their own AI tools. ***We urge OMB to clarify this provision and reemphasize the importance of a "buy not build" approach to procuring information technology systems by the federal government***, including those that integrate AI.[29]

Custom-built technology solutions, whether developed by a federal agency or a government contractor, have historically had a high failure rate, are often more expensive than commercial alternatives, are costly and difficult to maintain, and quickly become obsolete.[30] Commercial solutions, including Workday's, are better positioned to help agencies streamline and standardize administrative processes, gain unprecedented visibility across organizations, and adapt quickly to change, including changes in fast-evolving technologies such as AI.

Existing federal acquisition rules and the *Federal Acquisition Streamlining Act of 1994* [31] have long required the federal government to prioritize and procure commercial items, to the maximum extent practicable, over custom development.[32] This should be no different when considering the procurement of secure, responsible AI tools. Given the fast-evolving nature of AI technology, as well as efforts by companies like Workday to develop AI in a responsible manner, it is critical that agencies turn to commercial solutions and expertise. We encourage OMB to make this clear in the final Memorandum.

OMB rightly identifies workforce challenges as a barrier to AI adoption.

As noted above, the federal government faces workforce challenges that are not limited to AI. At the same time, computer and AI literacy are increasingly needed for today's jobs, which we expect to grow in the future. We therefore applaud OMB for identifying workforce challenges as a barrier to agency adoption of AI. Consistent with the *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* (AI Executive Order), the Draft Memorandum highlights the need for the federal government to recruit, attract, and retain AI talent from across the country. Removing these barriers is paramount for the federal government to achieve *both* its AI and workforce goals. The emerging focus by the federal

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[28] "Artificial Intelligence Index Report 2023." Stanford University. 2023. https://aiindex.stanford.edu/wp-content/uploads/2023/04/HAI_AI-Index-Report_2023.pdf.
[29] Our recommendation is not intended to suggest that agencies should refrain from developing internal AI talent. This suggestion, instead, focuses on the "buy, not build" dichotomy and the availability of commercial items in the AI marketplace.
[30] Yaraghi, Niam. "Doomed: Challenges and solutions to government IT projects." August 25, 2015. Brookings. https://www.brookings.edu/articles/doomed-challenges-and-solutions-to-government-it-projects/.
[31] P.L. 103-355.
[32] U.S. Government Accountability Office. "Procurement Reform: Implementation of the Federal Acquisition Streamlining Act of 1994." Procurement Reform: Implementation of the Federal Acquisition Streamlining Act of 1994 | U.S. GAO, https://www.gao.gov/products/t-nsiadaimd-95-190.

government on skills-based hiring, rather than solely on traditional credentials, is the right lens through which to view these workforce priorities.[33]

AI is unique in that it will drive change in the workplace and power the tools that workers and employers need to successfully navigate those changes. In many ways, a skills-based approach to talent is difficult to scale at a level necessary for the federal government without AI-driven tools implemented in a responsible manner. For example, the AI tools we deliver to our customers help people to make more informed decisions by surfacing new insights, identifying opportunities for career development, and improving workers' day-to-day by simplifying labor-intensive tasks.[34]

Our guiding principle is that AI should be used in ways that augment, rather than displace people. We've found that this is an approach that builds trust with our customers and end users.[35] As such, Workday provides tools that enrich–but don't automate–human decisions and can make a skills-based approach to talent a reality. We encourage OMB to work with federal agencies to view AI as a tool to help address federal workforce challenges, including those being driven by federal AI-adoption.

Managing Risks from the Use of Artificial Intelligence

Impact assessments are the right AI accountability tool.

Workday strongly supports the use of impact assessments in AI governance frameworks and commends OMB for directing agencies to use them for "rights-impacting" AI systems. In 2021, we released a whitepaper, *Building Trust in Artificial Intelligence and Machine Learning*, in which we introduced a "Trustworthy by Design" framework.[36] Our whitepaper proposed that organizations adopt AI governance frameworks and conduct an AI impact assessment for each high-risk AI system that they intend to develop or deploy. We also called for developers to supply deployers with system information identifying the AI tool's intended purpose and any known limitations.

The state of AI technology and governance has advanced significantly since 2021. We nonetheless believe that impact assessments retain three important advantages over other potential AI accountability tools because:[37]

- **Impact assessments are familiar and reliable**. Widely used in the fields of privacy and data protection, organizations are experienced at conducting impact assessments. The

[33] "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence." The White House, October 30, 2023. https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/.
[34] Chakraborty, Sayan. "Workday's Vision for AI." Workday Blog, March 10, 2023. https://blog.workday.com/en-us/2022/workdays-vision-for-ai.html.
[35] Chakraborty, Sayan. "How AI and ML Are Powering the Future of Work." Workday Blog, July 6, 2023. https://blog.workday.com/en-us/2023/how-ai-and-ml-are-powering-future-work.html.
[36] Building Trust in AI and ML through principles, practice, and policy, n.d. https://www.workday.com/content/dam/web/en-us/documents/whitepapers/building-trust-in-ai-ml-principles-practice-policy.pdf.
[37] "Impact Assessments: Supporting AI Accountability & Trust." Access Partnership. 2023. https://www.workday.com/content/dam/web/en-us/documents/legal/access-partnership-workday-impact-assessment-paper.pdf.

European Union's *General Data Protection Regulation* and at least ten U.S. state privacy laws require private sector organizations to carry them out.[38] Under the *E-Government Act of 2002*, federal agencies are required to conduct privacy impact assessments before using a system that collects, maintains, or disseminates information about members of the public.[39] These serve as "one of the most valuable tools federal agencies use to ensure compliance with applicable privacy requirements and manage privacy risks."[40]

- **Impact assessments are practical** because they do not rely on technical standards or quantitative metrics, which in the field of AI governance are nascent.[41] An impact assessment can function as a holistic risk assessment that accounts for an AI tool's objective, design, intended use, and limitations.

- **Impact assessments are future-proof** because they can adapt as AI systems and AI governance evolve. With the launch of NIST's new AI Safety Institute, there is growing focus on the need to develop "a new measurement science that will enable the identification of proven, scalable, and interoperable techniques and metrics" for trustworthy AI.[42] As these metrics and international standards continue to develop, they can be incorporated into future impact assessments conducted by federal agencies.

For these reasons, there is a growing consensus among lawmakers, business leaders, and civil society that impact assessments for high-risk AI tools are the most promising accountability tool available today. *Accordingly, we agree with the proposed requirement, starting on August 1, 2024, that agencies complete AI impact assessments before using existing or new safety-impacting or rights-impacting AI.*

OMB should strengthen and streamline the proposed AI impact assessment process.

Workday makes the following recommendations to strengthen federal agencies' use of AI impact assessments. First, impact assessments should focus on identifying, documenting, and mitigating "reasonably foreseeable" risks of harm to an individual's rights or safety. The Draft Memorandum's current language on "potential risks" invites federal agencies to speculate on *any possible* risks that can arise from the use of an AI tool, which may militate against a tool's expected benefits altogether. Importantly, emerging benchmarks for AI governance in California and among key U.S. trading partners recognize "reasonably foreseeable" as a legal standard for mitigating harms.[43] The FTC has also issued guidance to businesses developing or using AI

[38] "Impact Assessments - a key part of AI accountability." BSA, https://www.bsa.org/policy-filings/impact-assessments-a-key-part-of-ai-accountability.
[39] P.L. 107–347.
[40] FPC.Gov. Federal Privacy Council, https://www.fpc.gov/elements-of-federal-privacy-program/privacy-impact-assessments/.
[41] The quality of an impact assessment, like all governance processes, is improved by technical standards. Unlike other accountability tools, however, technical standards are not *required* for impact assessments, which offer a holistic and robust identification, document, and mitigation of AI risk.
[42] U.S. Artificial Intelligence Safety Institute. NIST. 2023. https://www.nist.gov/artificial-intelligence/artificial-intelligence-safety-institute.
[43] California's *AB331* requires developers and deployers to conduct impact assessment to identify and mitigate the "reasonably foreseeable risk of algorithmic discrimination." Canada's draft *Artificial Intelligence and Data Act* and the European Union's *Artificial Intelligence Act* are also both expected to integrate "reasonably foreseeable risk" as a legal standard for assessing and mitigating potential harms.

and other high-risk technology to "know the reasonably foreseeable risks and impact" of their products.[44]

Second, OMB should require developers providing AI to the federal government to supply "data sheets" or "data cards" concerning training data. AI developers' representations concerning the provenance, relevance, breadth, reliability, and quality of their datasets would better ensure that agencies have the information necessary to complete reporting requirements, without unduly delaying agency impact assessments. To streamline the impact assessment process, we recommend the use of common forms across federal agencies, which will rely on information regarding the quality and appropriateness of data in a standardized fashion.

Third, OMB should require each covered agency to develop a plan to dedicate sufficient resources for conducting impact assessments, testing, and independent evaluations within 120 to 180 days. We note that agencies will need to apply appropriate resources to fulfill these requirements if they are to avoid bottlenecks for systems already in use, in development, or in procurement prior to and after August 1, 2024.

The Draft Memorandum should center federal AI risk management practices on the NIST AI Risk Management Framework.

Workday is pleased that the Draft Memorandum encourages federal agencies to incorporate the NIST AI RMF into their governance processes. ***We nonetheless urge OMB to go further than recognizing it as a "best practice," as the Draft Memorandum currently does, and instead require agencies to use the AI RMF.*** Doing so would advance a number of AI policy and governance goals, including: (1) ensuring federal agencies, contractors, and vendors have a common baseline by which to understand, assess, and communicate AI risk management practices and controls; and (2) signaling to the U.S. private sector and U.S. trading partners that the AI RMF is *the* benchmark for mapping, measuring, managing, and governing AI risk.

In addition to promoting a consistent approach to AI risk management and U.S. leadership in responsible AI governance, agency adoption of the NIST AI RMF will set stable expectations in the federal marketplace. In contrast to other "best practices," the NIST AI RMF was developed at the direction of Congress through an open, multi-stakeholder process with participation from academia, civil society, and the business community. There is bipartisan, bicameral support in Congress for its adoption by federal agencies,[45] including *The Federal AI Risk Management Act*.[46] These proposals echo the National AI Advisory Committee's (NAIAC) Year 1 Report to the President, which recommends federal use of the AI RMF.[47] A recent follow-up recommendation from the NAIAC outlines how the AI RMF can be implemented by federal agencies with a

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[44] Atleson, Michael. "Keep your AI claims in check." FTC. February 27, 2023. https://www.ftc.gov/business-guidance/blog/2023/02/keep-your-ai-claims-check.

[45] "Reps. Lieu, Lofgren and Stevens Urge Biden Admin to Require Federal Agencies to Adopt NIST AI Framwork." Office of Congressman Ted Lieu. https://lieu.house.gov/media-center/press-releases/reps-lieu-lofgren-and-stevens-urge-biden-admin-require-federal-agencies.

[46] "Sens. Morgan, Warner Introduce Legislation to Establish AI Guidelines for Federal Government." Office of Senator Jerry Morgan. November 2, 2023. https://www.moran.senate.gov/public/index.cfm/news-releases?id=17018C56-4B23-4DEC-A7B7-E899CD43C2C0.

[47] "National Artificial Intelligence Advisory Committee Year 1 Report." NAIAC, 2023. https://www.ai.gov/wp-content/uploads/2023/05/NAIAC-Report-Year1.pdf.

rights-respecting approach.[48] This underscores that the AI RMF outlines a robust, flexible approach to AI governance that can advance a key objective of the Draft Memorandum: the upholding of civil rights, civil liberties, and consumer protection. Accordingly, the AI RMF warrants further consideration as a required baseline for federal agencies than currently envisioned in the Draft Memorandum.

Federal agencies' independent evaluations should avoid premature third-party audit requirements.

The Draft Memorandum envisions federal agencies conducting an independent evaluation of impact assessments and testing results. Given resource constraints, federal agencies may ultimately contract these independent evaluations to third-parties. Although internal agency evaluations are appropriate, we caution OMB that evaluations that rely on third-party auditors may not be fit for purpose.

Although promising in the medium- and long-term, AI auditing is a field that is still in development, as there are neither consensus technical standards nor a common set of criteria to audit AI tools against. Notwithstanding meaningful steps in favor of professionalizing the AI governance field, there are currently no binding standards on third-party AI auditors specifically, which are necessary for ensuring auditing quality and integrity.[49] As noted in the White House's 2023 *National AI Research and Development Strategic Plan*, absent such standards, the scalability of AI auditing is a significant practical challenge.[50] Without such building blocks, premature third-party audit requirements may unintentionally diminish trust in AI used in the federal enterprise by failing to promote consistent accountability and delaying the implementation of critical AI tools.

As one prominent researcher has noted, "inadequate audits or those without clear standards provide false assurance of compliance with norms and laws, 'audit-washing' problematic or illegal practices."[51] Only once critical building blocks are in place can third-party AI audits serve as an important accountability tool to complement impact assessments.

The definition of "right-impacting" systems should be refined.

The Draft Memorandum appropriately adopts a risk-based approach to AI governance that maximizes the benefits of AI and minimizes the risks of potential harm. As key U.S. trading partners are demonstrating, including Canada, the European Union, the United Kingdom, and Singapore, a risk-based approach means applying rules to contexts and uses of AI that carry the highest risk of potential harm to individuals. To implement a risk-based approach,

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[48] "Recommendations: Implementing the NIST AI RMF with a Rights Respecting Approach." The National Artificial Intelligence Advisory Committee. October 2023. https://ai.gov/wp-content/uploads/2023/11/Recommendations_Implementing-the-NIST-AI-RMF-with-a-Rights-Respecting-Approach.pdf.

[49] Hughes, Trevor. "The Time to Professionalize AI Governance is Now," IAPP. October 2, 2023. https://iapp.org/news/a/the-time-to-professionalize-ai-governance-is-now/.

[50] National Artificial Intelligence Research and Development Strategic Plan. The Executive Office of the President. 2023. https://www.whitehouse.gov/wp-content/uploads/2023/05/National-Artificial-Intelligence-Research-and-Development-Strategic-Plan-2023-Update.pdf.

[51] Ellen P. Goodman and Julia Trehu, "AI Audit-Washing and Accountability," GMF. November 2022. https://www.gmfus.org/sites/default/files/2022-11/Goodman%20%26%20Trehu%20-%20Algorithmic%20Auditing%20-%20paper.pdf

policymakers have defined high-risk systems by focusing on: (1) the *purpose or intended purpose* for which an AI tool is used; and (2) *how* the AI tool's output is used to advance that purpose. Only by properly scoping *both* elements can a risk-based approach be workable in practice.

Although the Draft Memorandum's initial approach is promising, we recommend that OMB further refine its definition of a "right-impacting" system. The Draft Memorandum currently sets a presumption for federal agencies that an AI tool is "rights-impacting" if it is (1) used in a certain set of decisions, activities, or contexts (2) to "control or meaningfully influence" outcomes. Workday urges OMB to refine this definition because, as written, it is likely to capture AI tools that are not high-risk, thereby undercutting the benefits of a risk-based approach to AI governance and slowing AI adoption in the federal enterprise.

First, we recommend that OMB focus solely on consequential *decisions*, rather than a broader set of *contexts* or *activities*. Consequential decisions in the employment context are determinations as to an individual's access to important life opportunities, such as the decision to hire, terminate, set pay, or promote an employee. As written, the Draft Memorandum captures a wide spectrum of potential AI use cases with no indication of how they are "rights-impacting." It is unclear, for example, how *all* "virtual or augmented reality workplace training programs" impact the rights of an individual. By contrast, an individual's *selection* into such a training program directly impacts their access to that opportunity. Unfortunately, the Draft Memorandum's use of undefined terms (e.g., "workplace management system") adds to this uncertainty and invites different and likely competing interpretations by federal agencies. *Workday urges OMB to set an exhaustive and clearly defined list of consequential decisions.* Doing so will provide much needed clarity about which AI use cases are presumed to be "rights-impacting."

Second, we recommend that OMB focus the Draft Memorandum's scope on AI tools that *control* outcomes. This will improve the definition of "rights-impacting" systems in two respects. It will address the ambiguities associated with the current language on "control or meaningfully influence," because "meaningfully influence" is an unclear threshold.[52] Importantly, it will also distinguish between fully automated AI tools and those with an informed human-in-the-loop in the decision.[53] An AI tool that *replaces* human decisions poses a higher risk than an AI tool that *enriches* them. This is because an automated tool can make consequential decisions at a higher volume and velocity than a human, and without the judgment that a human brings. By contrast, when an informed human is in the loop, they can leverage an AI tool's insights and remain in control of and accountable for the final decision. *The Draft Memorandum already recognizes that a human-in-the-loop approach presents a lower-risk than fully automated ones; its definition for "rights-impacting" should recognize this as well*. Agencies that use "rights-impacting" systems, for example, would be required to have ongoing human training and assessment and human consideration in final decisions. By focusing on AI tools that are fully automated and scoping out those with an informed human-in-the-loop, a revised definition of "rights-impacting" AI would focus agencies' limited resources on tools with the highest risk profiles.

[52] If OMB believes a definition of "control" is needed, we recommend "the factor that is weighted more than all other factors together."
[53] Earlier this year, Workday surveyed 1,000 senior decision-makers in human resources, finance, and technology for their perspectives on AI. Nearly all (93 percent) said it was important to keep a "human in the loop" when making significant decisions. "AI IQ: Insights on AI in the Enterprise." Workday. June 2023. https://www.workday.com/en-us/why-workday/our-technology/artificial-intelligence/research/ai-iq.html.

OMB should encourage consistency in "rights-" and "safety-impacting" AI determinations by distinguishing between agency-specific AI systems and enterprise AI systems.

The Draft Memorandum treats the designation of "right-impacting" and "safety-impacting" AI as *presumptions* and enables federal agencies to either waive or make additional designations. This approach will likely result in inconsistent designations of which AI tools are or are not high-risk throughout the federal government. While agencies may be best placed to designate AI tools as "rights-" or "safety-impacting" if the use case relates to their mission, it is unclear how different designations of *enterprise* AI solutions advances AI risk management.

Workday recommends that OMB distinguish between agencies' mission-specific AI systems (for which individual agencies are best equipped to tailor definitions and make determinations) and enterprise systems such as human resources and financial management systems (for which a uniform determination across the whole of government is more desirable). This will promote consistency in determinations of "rights-" and "safety-impacting" AI tools throughout the federal government and encourage a more consistent level of protection.

In the case of enterprise systems that may serve multiple agencies, CAIOs should, to the maximum extent practicable, coordinate through the interagency council that will be established under Section 10.1(a) of the *AI Executive Order*, to ensure consistent determinations about "rights-" or "safety-impacting" AI systems and features. Coordination through the interagency council would benefit AI adoption across the federal government by reducing duplicative agency efforts and compliance burdens on federal contractors and vendors.

We also recommend that OMB direct CAIOs to distinguish between mission-specific and enterprise AI uses in agencies' annual AI use case inventories. This information would enable OMB to catalog widely-used AI features for which government-wide determinations would be most valuable, and avoid inconsistent determinations between multiple agencies utilizing the same enterprise AI features for the same or similar purposes. As discussed in further detail below, the interagency council should also develop and implement frameworks for mutual recognition of AI authorizations and monitoring activities, and to ensure that enterprise AI systems are not subject to unnecessarily duplicative, wasteful, or disparate requirements.

OMB Should Enhance Standardization and Encourage Reciprocity by Minimizing Agency-Specific Definitions and Practices.

As noted above, adoption of beneficial AI systems by the federal government is best served by uniform definitions and practices across federal agencies. An agency-by-agency approach to developing key definitions and requirements will likely result in fragmentation that will subject a single AI tool to diverging authorization, testing, and monitoring practices between agencies. This would result in an expensive repetition of effort for both government agencies and AI developers without a corresponding benefit.

To avoid this result, OMB should remove language in the Draft Memorandum that encourages agencies to develop agency-specific definitions and practices. *We recommend OMB instead establish a framework for standardized and reciprocal AI authorization and monitoring processes.* The current FedRAMP program provides a model on which this approach could be designed, emphasizing reciprocity of AI authorizations across agencies and a presumption that the authorization and monitoring activities of an initial sponsoring agency are adequate for

similar use cases at any other agency.[54] In short, a single set of definitions and required practices would enable an efficient AI authorization framework inspired by the FedRAMP program and would enable government-wide AI adoption. Agency-specific deviations would inhibit this effort.

To the extent that agencies need the flexibility to identify agency-specific purposes, definitions, or practices, we recommend that they be limited to only those AI systems designed to address a single agency's mission. *Workday also recommends that agency-specific deviations from OMB guidance be applied to AI systems only after the agency policies are clearly defined and made subject to public comments via Notice in the Federal Register.*

AI Governance Boards will strengthen federal agencies' AI risk management.

We applaud the Draft Memorandum's requirement that federal agencies institute an AI Governance Board. As discussed above, Workday has instituted a Responsible AI Advisory Board to ensure senior leadership and provide executive oversight of our responsible AI program.[55] This internal advisory group meets regularly to review and approve new aspects of Workday's responsible AI program, and to advise on novel issues that are not currently contemplated by existing policies or processes—helping to address edge cases and escalations as needed. The advisory board members' seniority and cross-disciplinary diversity enables it to make difficult decisions, mandate necessary risk mitigations, and delay or stop product releases if the technology fails to align with the company's AI principles and core values.

OMB should clarify the Draft Memorandum's proposed opt-out requirement.

The Draft Memorandum would require agencies deploying "right-impacting" AI tools to "provide and maintain a mechanism to conveniently opt out from AI functionality in favor of a human alternative." Given the broad definition of "rights-impacting" AI, we encourage OMB to clarify that opt out rights apply to AI tools used for consequential *decisions*, where the tool's output is the *sole* criterion for the decision. This would bring the Draft Memorandum in line with commonly accepted legal requirements, including the EU's *General Data Protection Regulation*, which recognize that an opt out requirement is appropriate for fully automated systems, rather than those with a human-in-the-loop. Moreover, as AI features are being integrated throughout commercial software, a broad opt out from all AI tools will likely serve as a barrier to AI adoption in the federal enterprise.

Managing Risks in Federal Procurement

OMB Should Clarify the Definition of "AI Contract" and Exclude "Common Commercial Products."

To ensure consistency with section 7224(d) of the *Advancing American AI Act* and Section 10.1(d)(ii) of the *AI Executive Order*, Workday recommends that the Draft Memorandum adopt the definition of "artificial intelligence system" set forth in section 7223(4) of the Act:

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[54] *See e.g.* 44 U.S.C. § 3613 ("The assessment of security controls and materials within the authorization package for a FedRAMP authorization shall be presumed adequate for use in an agency authorization to operate cloud computing products and services").

[55] "Empowering Innovation through Responsible AI Governance." Workday Blog. https://forms.workday.com/en-us/whitepapers/empowering-innovation-through-responsible-ai-governance/form.html.

ARTIFICIAL INTELLIGENCE SYSTEM.—The term "artificial intelligence system"—

> *(A) means any data system, software, application, tool, or utility that operates in whole or in part using dynamic or static machine learning algorithms or other forms of artificial intelligence, whether—*
>
> > *(i) the data system, software, application, tool, or utility is established primarily for the purpose of researching, developing, or implementing artificial intelligence technology; or*
> >
> > *(ii) artificial intelligence capability is integrated into another system or agency business process, operational activity, or technology system; and*
>
> *(B) does not include any common commercial product within which artificial intelligence is embedded, such as a word processor or map navigation system.*

We suggest that OMB issue additional definitions and guidance to enable covered agencies to distinguish "AI contracts" within the meaning of the Draft Memorandum (or "contracts for the acquisition of an artificial intelligence system or service" within the meaning of the section 7224(d) of the Act), from contracts for any "common commercial product" excluded from the definition of AI system by section 7223(4)(B) of the Act. Given procurement preferences in favor of commercial products and services "consistent with customary commercial practice," this guidance should refrain from applying new government-specific contract requirements to the acquisition of common commercial products–especially commercial items and commercial-off-the-shelf software products–that embed AI.

OMB should maximize the value of data for AI consistent with commercial terms and existing data rights clauses.

When a covered agency intends to procure an "artificial intelligence system or service" within the meaning of the section 7224(d) of the Act, the procurement laws and regulations applicable to commercial products and services still apply. With respect to data rights, we believe that covered agencies should not seek additional rights to data that are inconsistent with commercial practice or beyond the requirements of existing FAR data rights clauses.[56]

For example, customary commercial practices and FAR data rights clauses would not grant the government buyer rights in data first produced outside of the performance of the contract, such as rights in a dataset initially used to train an AI model. Nor would they grant the government rights in model improvements that are a part of commercial computer software provided under the terms of a commercial license. Standard FAR data rights clauses and customary commercial practices would, however, grant the government rights in technical data first produced in the performance of a contract, such as rights in improvements or enrichments of government data developed through data cleaning or data labeling efforts. No further regulatory requirements are necessary to protect these government rights.

[56] FAR § 52.227-14; Defense Federal Acquisition Regulation Supplement § 252.227-7015.

Where rights in data produced under a contract will facilitate the government's continued design, development, testing, and operation of AI, we recommend that OMB not encourage agencies to seek additional rights that are inconsistent with commercial terms. Similarly, while agencies may consider provisions that would protect government data from use to train or improve the functionality of commercial AI without express permission from the agency, agencies should also understand that limiting the use of data – especially de-identified, disaggregated, anonymized data – in an AI developer's general product improvement cycle may be inconsistent with commercial practices.

OMB Should prepare acquisition planning materials and contract clauses for procurement of "rights-" and "safety-impacting" AI and encourage bilateral modification of impacted contracts.

While the minimum practices for "rights-" and "safety-impacting" uses of AI are intended to be agency responsibilities, the practices applied to an AI developer's systems will inevitably impact the scope of the contractor's efforts under an AI contract. It is therefore critical that agencies identify potential for "rights-" or "safety-impacting" uses of AI as early as possible in acquisition planning, and include requirements in their solicitations and contracts. OMB should assist agencies in the effort by preparing acquisition planning checklists and other guidance for identifying safety- or rights-impacting uses of AI – especially in "non-AI" procurements. OMB should also prepare sample contract requirements or clauses for agencies to include in their solicitations.

Finally, OMB should recognize the importance of minimizing disruptive changes to existing and future contracts that did not anticipate the requirements of the minimum practices at the time that they were executed by the parties. We suggest that the specific requirements for an AI system developer to support the minimum practices be included in the solicitation, and the contract for the AI product or services.

In the event that the requirements were not included because the contract was executed prior to the Draft Memorandum, or because the product or service was not identified as "rights-" or "safety-impacting" AI at the time, additional obligations should not be imposed on the contractor except by bilateral modification of the contract. This guidance would support contractors' certainty in their obligations as the government continues to develop frameworks for the use of AI, and insulate contractors from shifting determinations or waivers that may result from changes in an agency's CAIO, or updates to policies and practices over time. This will also reduce any subsequent litigation between the contractors and the agency relating to any such modifications.

Conclusion

Workday appreciates OMB's efforts to produce a Draft Memorandum that recognizes the benefits of federal agencies adopting responsible AI. The challenges facing the federal government and the importance of agencies' missions are only growing, making the availability of modern and secure cloud-based systems and AI tools essential.

At the same time, AI adoption can result in unintended consequences. Workday strongly believes in the need for smart AI guardrails and supports regulations that ensure AI can be deployed safely, users can trust the technology, and developers can continue to innovate. We

congratulate OMB on taking a thoughtful approach and embracing a risk-based path forward that uses impact assessments.

We offer the above comments, which are informed by our approach to responsibly developing AI tools and our engagement with policymakers on AI issues at the global, federal, state, and local levels, to strengthen OMB's proposal. Please contact Evangelos Razis, Senior Manager, Public Policy, (evangelos.razis@workday.com) if there is additional information we can provide.

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Comment from James Broughel

Submitter Information

Name: James Broughel

General Comment

Please see the attached comment from James Broughel, PhD, Senior Fellow, Competitive Enterprise Institute.

Attachments

Broughel_merged_comment_OMB

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Proposed Memorandum for the Heads of Executive Departments and Agencies: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

Comments prepared by James Broughel, Competitive Enterprise Institute

To Shalanda D. Young, Director of the Office of Management and Budget:

The Competitive Enterprise Institute (CEI) is a non-profit public interest organization committed to advancing the principles of free markets and limited government. CEI has a longstanding interest in applying these principles to the rulemaking process and has frequently commented on issues related to oversight of rulemaking and the regulatory process. On behalf of CEI, I am pleased to provide comments to the Office of Management and Budget (OMB) on its proposed draft memorandum titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence."[1]

Background and Recommendations

The draft memorandum lays out proposed requirements and recommendations for federal agencies to govern, innovate with, and manage risks from artificial intelligence (AI), particularly where AI impacts rights and safety. It calls for agencies to designate Chief AI Officers, develop AI strategies, and implement minimum practices for rights-impacting and safety-impacting AI systems by August of 2024. These practices include conducting AI impact assessments, collecting representative data, imposing non-discrimination safeguards, gathering stakeholder feedback, and implementing ongoing monitoring and transparency measures.

While the draft memo takes some proactive steps in the direction of responsible and safe governmental use of AI, OMB can further improve its approach to AI risk management by more formally incorporating risk analysis methods into agencies' implementation plans. As explained in the attached book chapter,[2] risk analysis is a powerful tool for comparing a policy or

[1] Office of Management and Budget, "Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum," 88 Federal Register 75625 (Nov. 3, 2023), https://www.federalregister.gov/documents/2023/11/03/2023-24269/request-for-comments-on-advancing-governance-innovation-and-risk-management-for-agency-use-of; Office of Management and Budget, "Proposed Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," Draft for Public Review, Washington, DC, https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf.

[2] James Broughel and Dustin Chambers, "How Risk Analysis Can Improve Wisconsin Regulations and Save Lives," in (Adam Hoffer and Russell Sobel, eds.), *Onward Wisconsin: Unleashing Capitalism with Common Sense Public Policy,* La Crosse, Wisconsin: Menard Family Initiative, 2023,

regulation's target risk reductions to the countervailing risk increases that stem from the opportunity costs of these same policy actions. Opportunity costs essentially result from any regulation or policy.

The chapter, written by Salisbury University Professor Dustin Chambers and me, focuses on mortality risks specifically and outlines a method by which analysts can conduct robust risk analysis in ten steps. While the chapter focuses on policies in the state of Wisconsin, the lessons are relevant to any jurisdiction.

The ten steps of robust mortality risk analysis are:

1. Evaluate if the policy saves lives directly.
2. Estimate the number of lives saved, if applicable.
3. Calculate the accounting costs over time.
4. Identify any corresponding cost savings, to calculate net accounting cost.
5. Determine the opportunity cost, based on what would have been consumed vs. invested from the accounting costs.
6. Calculate the net present value of costs net of cost savings.
7. Calculate the cost-effectiveness as the net present value of costs, divided by lives saved.
8. Compare the cost-per-life-saved to the "value of an induced death" to see if the policy increases or reduces mortality risk immediately.
9. Determine if the policy will increase risk at some point in the future.
10. Make a table tracking costs, lives saved, and risk over time, identifying any risk reversals.

This approach allows policymakers to quantify mortality impacts and identify regulations or other policies that may increase overall mortality risk. By incorporating this analysis into AI strategies and assessments, agencies can better evaluate the tradeoffs they face and demonstrate whether their AI systems are net risk reducing.

Following these steps is a practical way to implement OMB's requirements for AI impact assessments[3] as well as to comply with standards for AI risk management, such as those outlined from the National Institute of Standards and Technology.[4] While these documents include some commonly-accepted principles, they leave unexplained many of the specifics of how risks should be analyzed. The attached book chapter fills these gaps.

The inputs needed in this kind of analysis are modest—really just the costs and the estimated lives saved from the policy. While no doubt other risks are often relevant aside from mortality, few would argue against mortality risks being some of the most important risks affected by

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https://linktr.ee/menardfamilyinitiative?fbclid=IwAR2dhmtgYT4S73sGW45HqqelVBg-kMHkULPrzR2fJ-QlhEKtIYltW8o95hc.

[3] Draft guidance, p. 15.

[4] National Institute of Standards and Technology, "AI Risk Management Framework (AI RMF 1.0)," January 26, 2023, https://www.nist.gov/itl/ai-risk-management-framework.

government actions. Importantly, however, sound risk analysis can only be conducted if the opportunity cost of government policies is properly considered.[5]

Conclusion

I urge OMB to direct agencies to consult the attached book chapter as they develop implementation plans for the memorandum. Few resources will offer such specific and easy-to-follow instructions for risk analysis as this guide. By extension, AI impact assessments can easily be produced that account for mortality risk.

With adequate personnel dedicated to the task, federal agencies' compliance with the proposed draft memorandum could integrate mortality risk analysis without much difficulty. This would significantly strengthen OMB's approach to ensuring AI safety across government.

I appreciate your consideration of these comments.

Sincerely,

James Broughel, PhD

Senior Fellow, Competitive Enterprise Institute

Attachments: How Risk Analysis Can Improve Wisconsin Regulations and Save Lives

[5] This may potentially be an issue because OMB often overlooks opportunity costs in other contexts. See, for example, James Broughel, "Biden Knocks Opportunity Cost," *Wall Street Journal,* April 10, 2023, https://www.wsj.com/articles/biden-knocks-opportunity-cost-omb-regulatory-analysis-proposal-investment-a081e2c.

ONWARD Wisconsin

Unleashing Capitalism with Common Sense Public Policy

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ONWARD Wisconsin

Unleashing Capitalism with Common Sense Public Policy

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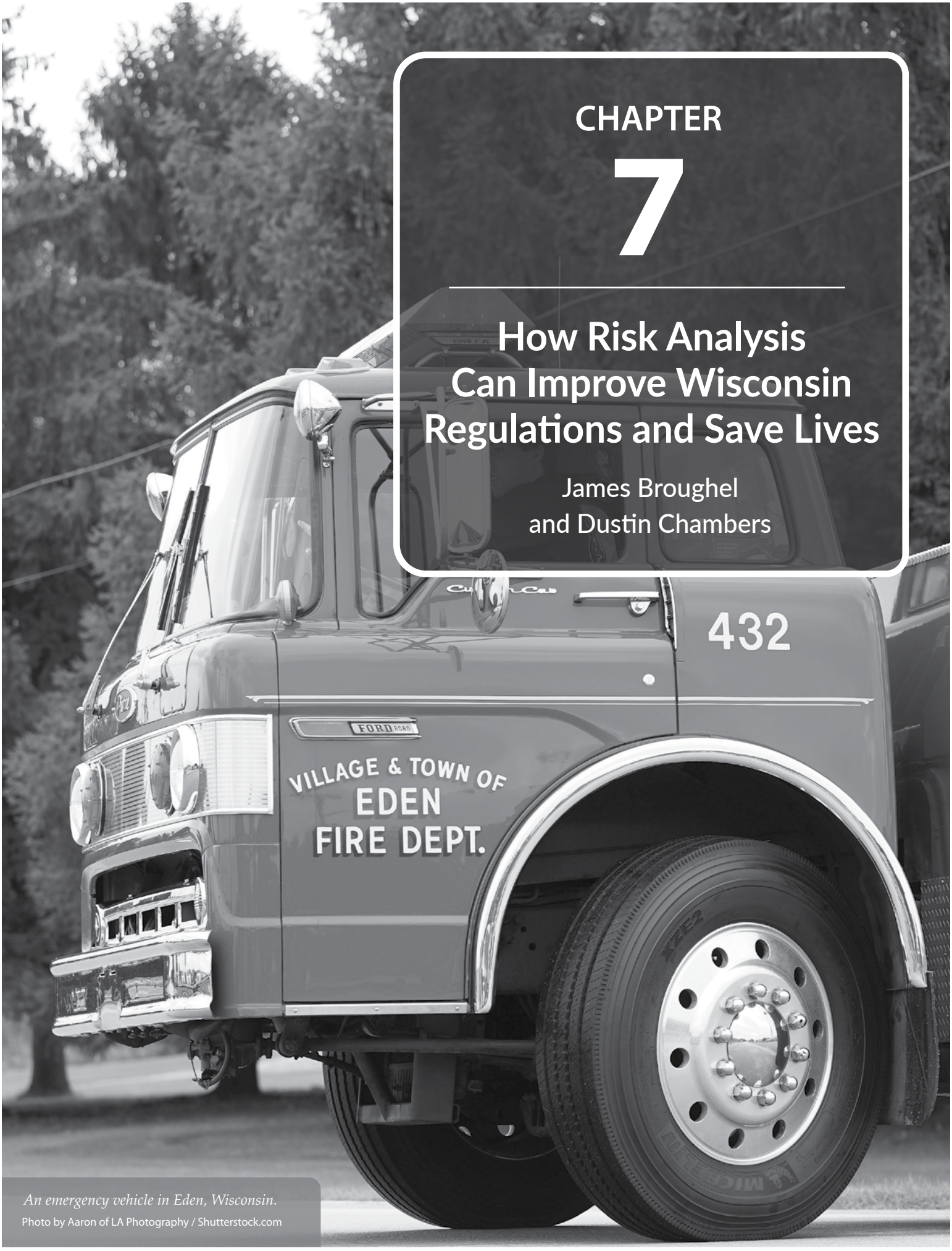

CHAPTER

7

How Risk Analysis Can Improve Wisconsin Regulations and Save Lives

James Broughel
and Dustin Chambers

An emergency vehicle in Eden, Wisconsin.
Photo by Aaron of LA Photography / Shutterstock.com

7 How Risk Analysis Can Improve Wisconsin Regulations and Save Lives

Each morning when we wake up, we face a plethora of risks in the day ahead. These may include the risk of getting into a car accident on the way to work, the risk of catching COVID-19 from our coworkers, and the risk of contracting heart disease from eating poorly or not exercising. Although risks are usually thought to be associated with harms (which is primarily how they will be discussed in the context of this chapter), some risks can be beneficial. When we buy a lottery ticket there is a risk we might win. There is a risk of meeting our future spouse when we walk into a nightclub, a risk of landing our dream job after we submit an employment application.

The reason policy makers care about risks is that a responsibility of public policy is to prevent harms of various kinds. However, no harm will occur with certainty. There may be only a small chance of an asteroid hitting the earth, but the results would be catastrophic. By contrast, there is a high probability that a citizen will experience a mosquito bite this year; however, the harm from this event is minuscule. How should policy makers react to such a divergence in risks?

What these events have in common is they combine an outcome with an associated probability. For example, there might be a 1 percent chance of developing cancer from walking onto a radioactive waste site with no protective equipment. Or there could be a one-in-a-million chance of being hit by lighting during a thunderstorm. In each case, the overall level of risk depends both on the likelihood some event will occur (the probability) and on the consequences of the event itself. These consequences can be very significant, as with death, or they can be trivial, as with the mosquito bite.

Policy makers should be deliberate when assessing risks for the simple reason that there are opportunity costs to using public funds. Spending money to mitigate the risk of children drowning in swimming pools means fewer resources are available to devote to fire prevention. The result is that the overall level of risk may be higher than it could be, given the current allotment of public resources. In other words, optimizing the government's risk mitigation strategy (and allocating the current level of funding accordingly) could lead to a reduction in the risk faced by the community with no additional funds spent. However, without careful analysis, it is usually not obvious how resources should be spent, which is why risk analysis is critical to the efficient implementation of risk policy.

In determining how much risk to take on, a person must consider a number of factors, including but not limited to the specific *target* risk being addressed. For example, let's say someone is concerned about the risk of dying in a car accident. One could reduce risk substantially by sitting at home all day rather than driving to work. A salesperson who spends most of the day on the telephone might be able to perform this job from almost anywhere, so the option to telework might be available, making this risk-reduction strategy more palatable. On the other hand, a plumber doesn't have this luxury. In choosing the stay home, the plumber forgoes a considerable amount of income. As we will see, forgoing income results in elevated *substitute* risks of various kinds.

Risks that increase when another risk falls are called "countervailing risks," and in some cases these can even be large enough to offset the risk that is directly being reduced by policy (the "target risk"). By choosing to stay home rather than drive to work, the plumber described above has reduced the chance of dying in a car accident. But by forgoing income, the plumber might have to cut back on a monthly gym membership or make cheaper and less healthful eating choices. These behavioral changes could increase risks associated with poor health.

Even the example of the teleworking salesperson presents tradeoffs, since social isolation might increase the risk of depression. Some people might opt to drive to work in spite of having the option to telework, simply because they prefer to chat

with coworkers in the coffee room or to see their colleagues face to face in meetings. For both the salesperson and the plumber, staying at home is not costless, including in terms of accepting countervailing risks.

Public policy makers have it even harder because they must make decisions about risk for an entire community. The state of Wisconsin has annual expenditures of roughly $60 billion (Urban Institute 2022). Some of these funds are spent to reduce residents' risks. Spending on police departments reduces the risk that certain crimes will occur, such as robberies or vandalism. Spending on hospitals reduces the risk of a child dying after accidentally drinking poisonous chemicals. Spending on free or subsidized school lunches reduces the risk of malnutrition. And so on. Since public funds are not unlimited, public policy makers must make tough decisions and set priorities about which risks to mitigate.

Directing spending toward the largest risks is not necessarily an optimal strategy either. There is a 100 percent chance that every person on this planet will die at some point. Consequently, this risk presents us with a very high-impact outcome (death) and a high likelihood of it occurring (100 percent). But that does not mean that all of our resources should be spent on the development of antiaging drugs or artificial hearts and brains. After all, such drugs and technologies might not be very effective, so we might not get a high return on investment. Relatedly, if we only have a limited amount to spend on risk reduction, we might save more lives by directing scarce resources toward other purposes. For example, spending a few million dollars on additional traffic lights might save more lives than devoting the same resources toward antiaging research that has little chance of working.

Another important concept policy makers should consider is what economists call "diminishing marginal returns." Even if traffic lights are very effective at preventing deaths, it wouldn't make sense to have them at every street corner. At some point we don't want more traffic lights. The cost of lights becomes prohibitively expensive because the lights slow down the flow of traffic and increase travel times, which causes other problems. At some point, even high-payoff risk reduction efforts start producing lower returns, so it makes sense to spend on other priorities—perhaps higher-visibility crosswalks.

This is where risk analysis comes in. Risk analysis is a tool that analysts can use to assess the magnitude of risks for the purposes of making the kinds of comparisons just described. The purpose of this chapter is to explain to policy makers what risk analysis is and how it can be used to inform policy in Wisconsin, and also to walk through how that analysis is produced, including how to avoid some common pitfalls. We will focus primarily on mortality risks—that is, the risk of death—since these risks tend to be the largest and most significant risks that individuals and policy makers are concerned with. However, it is worth noting that the principles described in this chapter can be applied to other risks as well.

We begin our chapter with a review of the literature on "mortality risk analysis," explaining how the analysis of mortality risks has gained acceptance over time. This acceptance, however, has come primarily from the academic community, because most governments around the world still do a poor job analyzing risks. We therefore proceed with some step-by-step instructions that policy makers can follow in order to assess risks.

An important tool for deciding how to deal with risks is "cost-effectiveness analysis," which is used to evaluate how much it costs to achieve a particular change in outcomes. For example, an analyst might estimate the cost-per-life-saved of various policy alternatives and then see which one saves the most lives for the least cost. In order to perform cost-effectiveness analysis prudently, one needs to estimate the opportunity costs of funds that are to be devoted to implementing a regulation or other policy. These opportunity costs include how funds might be used to reduce risks in the absence of the policy. Calculating opportunity cost sounds hard to do, but

there are sound conceptual ways to do it. With such information in hand, regulators and other policy makers can make more effective decisions that save both money and lives.

Our chapter concludes by examining several recent Wisconsin regulations for which regulators have produced an economic impact analysis. We demonstrate how key values from this kind of analysis can be used to determine whether a regulation actually increases or reduces mortality risks. Fortunately, a cost estimate is often all that is needed to make a preliminary assessment of a regulation's impact on mortality risk. Since Wisconsin regulators don't appear to be considering these outcomes at present, there is an opportunity for tools like risk analysis to be incorporated into the Wisconsin policy making process. Moreover, the analysis recommended in this chapter is fairly easy to conduct, so the state could perform this kind of analysis on a modest budget, so long as analysts are adequately trained.

All told, there are many opportunities available to Wisconsin policy makers (as well as to policy makers in other states) to make their regulatory system more evidence-based and rational from a risk perspective. This chapter offers an accessible explanation of how to do it.

Risk-Risk Tradeoffs

The academic literature on the mortality costs of policy expenditures chiefly traces back to the scholarship of Aaron Wildavsky, a political scientist at the University of California, Berkeley, who famously coined the phrase "richer is safer" (1981). Wildavsky's argument was that wealth is the primary means by which society combats risk. With fewer resources, fewer risks can be addressed and with more resources, more risks can be addressed. Hence, richer is safer. This theoretical argument has been borne out in the data as well. At the individual level, richer individuals tend to live longer (Chetty et al. 2016). The finding extends to the national level: richer countries overcome many of the risks that plague developing countries, such as malaria (Pritchett and Summers 1996).[1]

Since having more resources means one is able to combat more risks, it is easy to see how this logic also applies in reverse when resources are taken from people. That is to say, when individuals' incomes are lowered, they have fewer resources to devote to risk reduction, and hence they are likely to see some risks increase in their lives. A classic example involves job loss. If a person is living on the margins and barely making rent, losing a job might compel a move to a worse neighborhood with more crime and lower-performing schools, which in turn might result in short-run dangers while also having long-lasting impacts on the person's children. It is easy to see why low-income families are more susceptible to the kinds of risk increases that accompany a decline in income (Thomas 2019).

The association between income and health contributes to what economists call "risk-risk tradeoffs," or the idea that when one risk is reduced, another risk might be increased at the same time (Graham and Wiener 1995). For example, taking a Tylenol might reduce the risk of a headache while simultaneously increasing the risk of a stomachache. In the context of income and health, spending money to reduce risks through public programs can increase risk as citizens are taxed to pay for the risk mitigation measures.

Risk-risk tradeoffs are commonplace. One recent study that analyzed Germany's policy of phasing out its nuclear power plants found that reducing the risk of a Fukushima-style meltdown by closing nuclear power plants resulted in increased coal-fired power plant emissions, thereby raising risks associated with air pollution (Jarvis, Deschenes, and Jha 2019). Here we see an example of a countervailing risk (air pollution) increasing in lockstep with the reduction of a target risk (nuclear power plant meltdown). It is also possible for "coincident risk" reductions to occur, whereby a risk falls in tandem with target risk reductions. For example, exercising frequently at the gym might reduce the risk of a heart attack and the risk of a stroke at the same time.

Many risk-risk tradeoffs are unique to the circumstances involved with a particular public policy action. For example, not every policy is going to lead to more coal-fired power plant emissions, as was the case with the German nuclear policy. However, there are some risk-risk tradeoffs that are more general, such as those related to income losses. All public policies cost resources to varying extents, and consuming resources for one purpose means those resources can't be utilized for other purposes. The corresponding loss of private income owing to the taxing and spending of resources to support public policies increases some private risks, since reducing household incomes limits individuals' ability to mitigate risks using their own resources.

Cost-Effectiveness Analysis and Mortality Risk Analysis

In the early 1990s, economists and risk analysts began estimating the extent of the income-safety relationship using real-world data. One such scholar was a decision scientist named Ralph Keeney. Relying on the correlation between income and mortality, Keeney published a paper that argued that when a $5 million cost is spread across American society, this will likely produce one additional death due to the income-loss effect (Keeney 1990). This $5 million number is known as the "value of an induced death," or VOID.

Keeney's paper was fairly primitive and suffered from some statistical problems, which were quickly pointed out by critics (Sinsheimer 1991). As a result, future studies improved on Keeney's model by better controlling for variables that might correlate with income and also have an influence on mortality, thereby leading to improved estimates of the effect that a loss of income has on mortality.

One recent study we wrote (Broughel and Chambers 2022) found that for every $38.6 million in lost income among Americans, one death can be expected. Newer studies like ours do not completely overcome the statistical problems identified by Keeney's critics, but they do a much better job. Moreover, a separate line of research relying on theoretical models (rather than correlations in data) has also been developed to explain the income-mortality relationship. These models yield somewhat higher VOID estimates and are also useful. For example, a recent study by one of us and a coauthor (Broughel and Viscusi 2021) estimated that the VOID was closer to $108.6 million. Thus, it is reasonable to conclude that the average VOID for the United States lies somewhere between these two recent estimates, perhaps near the midpoint of these values (if one gives each estimate equal weight), which is $73.6 million. For the purposes of this chapter, we will use a VOID of $75 million.

An interesting use of the VOID concept is that it can be paired with cost-effectiveness analysis to determine whether a policy increases or reduces mortality on balance. As noted earlier, cost-effectiveness analysis estimates the cost per unit of the result desired. If the policy goal is to save lives, a cost-effectiveness analysis will estimate the cost to save one life. Therefore, a policy that costs $100 million and saves 100 lives would have a cost effectiveness of $1 million per life saved. This kind of information can be used to determine which policy among several saves the most lives for a given level of spending. For example, if one policy has a cost effectiveness of $10,000 per life saved and another a cost effectiveness of $1 million per life saved, spending on the first policy is often better because devoting a given amount of resources toward it saves more lives. (In this case $1 million could save 100 lives with the first policy but just one life with the second.)

Former Office of Management and Budget analyst John Morrall published an article in 1986 highlighting how a suite of lifesaving regulations from the federal government ranged in their cost effectiveness from $100,000 to $72 billion (1984 dollars) per life saved. Another cost-effectiveness study from the 1990s suggested that if the US federal government reallocated existing resources more efficiently, it could save 60,000 additional lives per year without spending any additional money (Tengs and Graham 1996). These examples highlight how cost-effectiveness analysis can be a

powerful tool to make policy more beneficial to the public.

The cost effectiveness of a policy or regulation can also be combined with the VOID to ascertain whether, on balance, a policy is risk reducing or risk increasing. For example, if the VOID is $75 million and a regulation costs $75 million per life saved, then the risk benefits exactly offset the risk costs from income losses. In other words, in this simple case, for every dollar spent addressing target risks, countervailing risks increase to exactly offset the risk benefits. Therefore, the policy's overall impact on risk is neutral. In this way, the VOID value acts as a kind of cost-effectiveness cutoff whereby when a regulation or other policy's cost effectiveness exceeds the VOID value, the regulation can be expected to increase, rather than decrease, mortality risk.[2]

Limitations Of Cost-Effectiveness Analysis

Cost-effectiveness analysis is an incredibly valuable tool. However, it does have some shortcomings that are worth noting. To understand these limitations, it helps to compare cost-effectiveness analysis to an alternative policy analysis tool known as cost-benefit analysis. Whereas a cost-effectiveness analysis for a lifesaving policy would count up how many lives are saved by a policy or regulation, a cost-benefit analysis would try to assign a dollar value to the expected lives saved. For example, if a regulation saves 10 expected lives and a life is valued at $500,000, then the benefits from the regulation would be worth $5 million.

By assigning dollar values to benefits—even those, like human lives, that aren't traded in markets—analysts can consider more of the benefits a regulation produces, whereas cost-effectiveness analysis typically considers only a single benefit. This is not so controversial with a benefit like saving lives, but in other cases, people may not agree that a particular policy goal is a good idea. For instance, some policy makers might think building more public parks is a good idea while others might think we have too many public parks as it is. In this case, the goal is not agreed upon, so it's easy to see why finding the most cost-effective ways to build public parks may not be very useful.

Decisions about which goals should be prioritized depend on value judgments, and it should not be the job of analysts to make these kinds of value judgments. That said, once a particular goal is identified—for example, through legislation—analysts can proceed with that information and identify the cheapest ways to achieve the goals already decided upon.

There are also some problems with the way cost-effectiveness analysis has historically been implemented, though these problems are sometimes easy to address. First, the costs estimated are often accounting expenditures, not economic costs. To see the difference, consider a simple regulation that forces $1 million to be spent on compliance by businesses. An accounting analysis would value the costs at $1 million because that is what is spent. But the true economic cost to society likely differs from $1 million. Had there been no regulation, some of the funds spent on compliance might have been invested and might have grown in value (a concept known as the opportunity cost of capital). Other funds might have gone toward consumption or even been wasted. The true economic cost of the regulation likely differs from the $1 million accounting cost.

A related issue with cost-effectiveness analysis is that health-related benefits are usually discounted in cost-effectiveness analysis.[3] In other words, a life saved or another health-related benefit is treated as less valuable the further it is in the future. This is a problem because the rate at which health-related benefits are discounted is basically arbitrary (or "normative," because it depends on a value judgment).

Also problematic is that discounting health-related benefits converts health benefits into a measure of lifetime welfare. (The idea behind discounting is that lifetime welfare is lower when the health benefits arrive later than when they arrive sooner.) This is problematic because welfare in economics is measured on an ordinal scale (see Broughel and Baxter 2022)—that is, a scale that involves rankings

but not intensities. This is a problem for cost-effectiveness analysis because cost-effectiveness values become difficult to interpret when they involve rankings. To make the issue more concrete, imagine that an analysis of major league baseball teams finds that for each $50 million in total player payroll, a team can expect to move up one place in their end-of-season ranking. This statistic doesn't offer much general guidance about how much to spend on player personnel, because the value of going from 11th place to 10th place is probably not as valuable as going from 2nd place to 1st place. In the latter scenario, spending $50 million might be worthwhile to become a championship contender; in former scenario, the team will simply be less mediocre. The relative positions are hard to compare.

When the outcome analysts are interested in is welfare, the problem becomes even harder than this baseball example illustrates, because we don't know where we are starting from on the scale. Whether to spend $1 million to move up five notches on a welfare scale is pretty abstract—not much guidance for practical policy use. The simplest way around this issue is to evaluate cost effectiveness in units of outcomes (e.g., actual lives saved) as opposed to units of welfare (e.g., discounted lives saved).

In the sections that follow, we will outline a process for conducting a cost-effectiveness analysis that overcomes the problems with both discounting and measuring opportunity costs appropriately. The discounting problem is fairly easy to address—we can simply measure cost effectiveness in terms of lives saved rather than in terms of welfare. The problem with opportunity cost analysis is slightly trickier, but it is not impossible to correct.

Mortality Risk Analysis: Step By Step

This section provides a more detailed explanation of the procedure a state like Wisconsin can use to conduct proper mortality risk analysis. As the name implies, mortality risk analysis aims to predict whether policies (on balance) are expected to increase or reduce mortality. It compares a regulation or other policy's target risk reductions with the countervailing risk increases stemming from lost household income. Such analysis can be produced by regulatory agencies, centralized analytical offices in the government, independent economists in the private sector, or academic experts.

Step 1: Evaluate whether the policy is lifesaving

The first step in a mortality risk analysis is to determine if the goals of a particular policy under review are related to health or safety risks. Many policies do not target health or safety hazards. For example, a financial services or insurance regulation might reduce the risk of fraud but not the risk of death. This is not necessarily a drawback, because reducing mortality is not the purpose of such regulations. Nonetheless, in addition to having these other benefits, such regulations will affect mortality risk through their impact on household income, and this is pertinent information that may prove useful to policy makers.

If a policy does not save any expected lives but imposes positive costs on the community, it can be expected to increase mortality risk. In such a case, the cost-per-life-saved ratio is infinite since there are zero lives saved in the denominator of the ratio. Since the cost-per-life saved exceeds the VOID level, this signals that the policy increases mortality risk.

It is also possible for a policy to save the community money by reducing costs—for example, costs on businesses. Such policies will impose negative costs and therefore tend to reduce mortality risk when there are no other direct health effects to target risks.

Step 2: If the policy is lifesaving, estimate how many lives it will save

If a policy is intended to save lives, the next step is to estimate the number of lives it will save. This requires that analysts understand the magnitude of the risk involved and how (as well as why) the policy is expected to reduce the risk. For example, if a regulation is targeting a hazardous waste site, the regulatory agency should try to

ascertain how many individuals die from this hazard annually and how many of these deaths the regulator believes its regulation can prevent if it conducts a cleanup.

The timeline over which lives are saved is also important and should be determined. Despite the fact that discounting lives can be problematic for the reasons described above, the timing of lives saved still matters because of the time value of money. Saving lives often saves money or boosts economic output (for example, because individuals work and earn incomes), and it is preferable to accrue these benefits earlier because they can be invested and earn positive returns.

Step 3: Calculate the accounting costs of the regulation over time

Once an analyst ascertains how many lives a policy is expected to save, it's time to estimate the accounting cost of the regulation. Accounting costs are the actual public and private financial expenditures (or savings) caused by the policy. For example, if a regulation forces businesses to spend a million dollars on capital expenditures, this would be considered a part of the accounting costs of the regulation. Similarly, if a regulation causes a business to forgo revenues—or close altogether—this would be an additional accounting cost on top of any spending on compliance. Analysts should also tally the expected accounting costs borne by the government to administer and enforce a given regulation. The timing of these expenditures should also be calculated.

As noted, some policies save money; money saved can be counted as negative costs (or cost savings). For example, a new government regulation might streamline or repeal previously existing inefficient regulations, resulting in a lower compliance burden on individuals and businesses. Additionally, saving lives also generates benefits. Additional production or earnings stemming from saved lives can be conceptualized as cost savings and should be deducted from the total gross cost of the regulation.

Step 4: Determine the opportunity cost of the regulation and its cost effectiveness

The expenditures calculated in step 3 represent accounting costs, not economic opportunity costs. To understand why, consider a manager at a company who must devote more time to compliance because of a new regulation. A regulatory analyst might calculate the cost of the regulation as the additional time the manager spends on compliance multiplied by the manager's salary. However, the new compliance activities also displace other productive activities, such as developing new product lines. With or without the regulation, the manager's salary is likely to be the same, but the manager's productive output will likely fall with the regulation in place. Consequently, multiplying a manager's hourly wage by required compliance time results in a measure of accounting cost but not of economic opportunity cost. To determine the latter, we need to estimate the value of the productive activities that never occurred because of the regulation.

The opportunity cost of expenditures—what is forgone when the regulation is enacted—is not the value of the expenditures themselves, in this case the manager's salary, but rather the value associated with the manager's activities in a setting where the regulation was never enacted. In theory this value could be positive, negative, or zero. For instance, if in the absence of the regulation the manager would have been playing video games on the job, then the opportunity cost of the manager's time could be zero. On the other hand, if the manager would have been rolling out software enhancements to boost employees' productivity, then the opportunity cost is probably quite high.

Identifying the opportunity cost can be tricky, but essentially it involves considering what the most likely use of resources would be in the absence of a policy and identifying a rate of return associated with that use of resources. This may sound hard, but it is no different from what businesses do routinely when they identify a weighted average cost of capital or a minimum required rate of return (a hurdle rate) for projects.

Government analysts should adopt similar methodologies to establish a reasonable opportunity cost rate that projects need to overcome to be deemed worthwhile.

At this point, accounting expenditure flows should be divided into resources that would have been consumed in absence of the regulation and those that would have been invested. The investment flows can be discounted at the rate of return associated with those investments, and this information can be compiled to generate a cost-per-life-saved estimate. Note that the opportunity cost discount rate serves a different purpose from a discount rate intended to discount health or other social benefits because they occur in the future.

Step 5. Compare the cost effectiveness of the policy to the VOID

Suppose that a policy saves lives at the cost of $50 million in present value terms for each life saved. Furthermore, suppose that the VOID is $75 million. In this case the policy reduces mortality risk, at least initially, because the direct cost of saving a life ($50 million) is less than the cost at which policies unintentionally take an additional life ($75 million). If policy makers decide to scale up this policy by tripling spending to a total of $150 million, then we would expect it to save three lives ($150 million divided by $50 million per life saved). However, since the cost of this program reduces household incomes by $150 million, we can also expect the loss of two lives ($150 million divided by $75 million per induced death). On net, this policy can be expected to save one life.

By contrast, if a policy has a cost effectiveness with a present value that exceeds the VOID (e.g., if the policy costs $100 million per life saved), then the policy increases mortality risk in the near term. In this case, the expected deaths resulting from lower household income exceed the expected lives saved directly by the policy.

These risk calculations, however, are just the beginning of the story, because the two inputs in a cost-effectiveness analysis—cost and the outcome variable estimate—are not evolving over time in the same way. Displaced investments are growing at the rate of return associated with the opportunity cost of capital, while the lives saved may be a fixed amount, may be an amount that is ongoing (e.g., five lives saved each year), or may be growing over time.

Step 6: Produce a table of outcomes, tracking the policy's impact over time on real resources and risk

A very simple equation for calculating the opportunity cost of capital is f × ROI, where f is the fraction of the return on an investment that is reinvested each period and ROI is the rate of return on the investment. For example, if f is 0.75 and ROI is 10 percent, then f × ROI will be 7.5 percent. We believe a reasonable hurdle rate for projects is in the range of 5 to 7 percent since it is likely that most of the marginal return displaced for compliance purposes is invested, and because market rates are often estimated to be in the range of 7 to 10 percent annually on marginal investments.[4]

Table 7.1 shows a hypothetical regulation that saves 35 lives five years after being enacted (with no additional lives saved thereafter). The economic costs have a present value of $250 million. Meanwhile, the VOID in this example is assumed to equal $75 million in the current year.

In the first period, the regulation has an economic cost of $250 million (labeled in table 7.1 as the "total cost"). The VOID in period 1 is $75 million, so this regulation increases risk in the initial period because it imposes positive costs immediately but no lives are saved until year 5. Thus, for the first five years after the regulation goes into effect, overall risk is increased since the cost effectiveness (i.e., the cost to save a life) of the regulation exceeds the VOID during that timeframe.

The economic costs are changing over time, however, because of the opportunity cost of capital. To understand what is happening, the total costs accrued must be broken down into units of real resources (in other words, they must be divided between forgone consumption and forgone investment). Because *f* is assumed to be 0.7 here, $175 million of the $250 million in initial economic costs would have been

Table 7.1 The Mortality Costs of a Hypothetical Regulation

Year	Total Lives Saved	Total Cost (millions)	Forgone Consumption (millions)	Investment Value (millions)	Cumulative Forgone Consumption (millions)	Cost per Life Saved (millions)	VOID (millions)	Cumulative Expected Deaths from Lost Income	Net Lives Saved	Risk Increasing?
0	0	$250	$75	$175	$75	$∞	$75	3	−3	yes
1	0	$318	$56	$187	$131	$∞	$76	4	−4	yes
5	35	$643	$74	$245	$398	$18	$80	8	27	no
10	35	$1,195	$103	$344	$851	$34	$85	14	21	no
25	35	$4,578	$285	$950	$3,628	$131	$102	45	−10	yes
50	35	$26,087	$1,546	$5,155	$22,912	$802	$140	201	−166	yes

Note: $f = 0.7$, ROI = 10%, VOID = $75 million, $p = 1.25\%$. Source: Authors' calculations.

invested in the absence of the regulation and $75 million would have been consumed in the initial period.

The value of the capital investment grows at a rate of $f \times$ ROI each year going forward. So, for example, by year 5, the capital investment "fund" that has been lost because of the regulation will have grown to be worth $245 million. In the first year after implementation, the value of forgone investment is $187 million ($175 × 1.07). This investment fund would have generated consumption worth $56 million in the first period ($187 × 0.3). The value of this displaced consumption stream also grows at a rate of $f \times$ ROI going forward. For example, the consumption stream the capital fund would have generated would have grown to an annual value of $74 million by year 5, and the cumulative consumption forgone over the first five years of the regulation being in place would equal $398 million.

What is called total cost in table 7.1 is equal to the total consumption stream lost up until that point in time plus the value of investment capital at that point in time (as if it were to be cashed in and all the proceeds consumed in that period). This total cost can also be used to estimate the expected deaths a regulation has indirectly generated up until that point in time.

In year 0, there are three expected deaths ($250 million divided by a $75 million VOID). The VOID is assumed to grow at the rate of productivity, here assumed to be 1.25 percent annually. Once the regulation saves 35 lives in year 5, the regulation becomes risk reducing because the total cost per life saved is less than the VOID at that time. By year 25, however, this situation reverses, since in year 22 the expected deaths imposed by the regulation overtake the number of expected lives saved, and thus the regulation cumulatively increases mortality risk from that point forward.[5] Such reversals could be grounds for building sunset provisions into regulations so that they expire before their more detrimental impacts take hold.

Step 7: Report information to decision makers

The example above highlights how the effects of a regulation on mortality risk can differ depending on the time period being analyzed. Many regulations initially increase risk since compliance expenditures are often made up front while benefits are realized with a lag. This situation often reverses once some of the benefits accrue. However, the situation can then reverse again (as in the example above), because money can be reinvested (with compound returns) while lives cannot. Thus, a critical question for policy makers is not just *whether* a policy increases risk but *when* it does so.

Ultimately, it's a value judgment whether policies are worth implementing when they increase mortality risk at various points in time. Such value judgments depend on a variety of factors, including the number of lives a policy saves, whose life specifically is

saved (e.g., how old they are), and the overall costs. That said, some value judgments are easier to make than others. If a regulation aims to reduce risk but increases risk across all time periods, it is hard to see what the justification could be for that regulation. But without a formal mortality risk analysis, the likelihood that policy makers will identify such counterproductive regulations is low.

Case Study: Wisconsin Regulations

In this section, we consider several actual Wisconsin regulations to demonstrate how mortality analysis can be used in a real-world context. Wisconsin already has a law in place that requires state regulatory agencies to produce budgetary and economic analysis for new regulations. Specifically, agencies fill out a standardized form, known as a "Fiscal Estimate & Economic Impact Analysis," when they enact new regulations. This is a form from the Wisconsin Department of Administration (2016),[6] and there is a similar template for analyzing existing rules (Wisconsin Department of Administration 2012). It is worth noting that there is no mention of risk issues in either of these templates.

Unfortunately, there is no publicly available central repository for these economic impact statements in Wisconsin, making them difficult to collect and analyze. Creating such a repository would be beneficial both for transparency purposes and for the purposes of research. Given this shortcoming, we relied on internet searches to identify a few examples of agencies using these forms. We found two regulations from the Department of Natural Resources, which we will examine in this section.

We chose these rules primarily because (1) they are relatively recent; (2) they could in theory be risk-related, given their relation to environmental programs (although the agency does not calculate lives saved in either instance); and (3) one regulation imposes net costs, according to the agency, while the other is cost saving. Thus, they offer useful examples to demonstrate the kind of information a properly conducted risk assessment can uncover. However, we caution readers that these regulations should not be construed as representative of all regulations in Wisconsin. We merely offer them as examples.

Example 1: Hazardous Waste Disposal

Our first example is a Wisconsin Department of Natural Resources (DNR) regulation, finalized in 2019, related to disposal of hazardous waste (Wisconsin Department of Natural Resources 2019). The primary aim of the regulation was for the state to stay in compliance with the US Environmental Protection Agency's Resource Conservation and Recovery Act requirements, which were updated in the years leading up to this regulatory action. According to the Wisconsin DNR, the regulation will increase compliance costs for regulated entities by between $334,785 and $617,785 per year while at the same time saving regulated entities approximately $840,533 to $2,146,805 per year. Thus, even if one assumes a worst-case scenario for both compliance costs ($617,785) and savings ($840,533), this regulation is predicted to generate net cost savings.

The Wisconsin DNR makes no claims that this regulation will save lives. Rather, the DNR notes that many aspects of the regulation are related to "paperwork reductions" and "relaxations of regulations," though there appear to be several "new information collection burdens." This helps explain why the regulation is cost saving, because it is most likely a deregulatory action.

In many respects, the analysis of this regulation can end here. The cost analysis demonstrates that the regulation is cost saving, thereby reducing some mortality risks through the household-income channel. There are no other apparent mortality benefits or costs; thus, this regulation is likely to reduce mortality risk overall, assuming that the agency's calculations are correct.

It may be worth digging a little deeper into the DNR's calculations, however, in order to better ascertain the magnitude and timing of these risk reductions. There are several issues worth noting about the DNR's calculations. First, the agency has calculated both costs and cost savings, and these

estimates are presented transparently. This represents a best practice.

However, the DNR's estimates, as stated, are not suitable for use in a cost-effectiveness analysis without some adjustment. First of all, the dollar year these numbers are reported in is not stated in the economic analysis. The regulation is from 2019, so presumably these estimates are reported in 2019 dollars, but it would be helpful if this were stated explicitly by the agency.[7] Second, the costs are presented in annualized form: that is, these are estimates of ongoing costs averaged on a per-year basis. Far more useful for our purposes is the present value of costs, which better reflects the total cost of the rule. (Much as a monthly mortgage payment provides an incomplete picture of the total amount of money owed on a mortgage, an annualized value of cost does not fully capture the total cost of a rule.)

An additional problem with reporting annualized values is that they conceal the fact that costs are often growing at some rate over time, owing to the opportunity cost of capital. An annualized value, because it is an average, appears to flatten out costs. This can be misleading because it can give the false impression that benefits exceed the costs, though this may not be the case if costs are growing over time and benefits are not (or vice versa).

For simplicity's sake, we will use the midpoint between $334,785 and $617,785 in annual costs, which is $476,285. In table 7.2 we compare this DNR regulation to another regulation that imposes costs in 2021. To make the two regulations comparable, we present costs in inflation-adjusted 2021 dollars. According to the consumer price index, this is $494,961. If we assume that the opportunity cost of capital rate is 7 percent, then the present value of this stream of annualized costs (assuming the annualized cost continues in perpetuity) is $7.1 million in 2021 dollars.

When we do similar calculations for costs savings, we get an estimate of $22.2 million in cost savings expressed as a prevent value (in 2021 dollars), for a net improvement of $15.1 million in reduced costs. This is roughly two-fifths of our estimate of the VOID. Therefore, this regulation initially produces indirect benefits worth two-fifths of a saved life. This regulation can be expected to save more lives in the future as cost savings compound over time. The first life saved would be expected to occur in 2025 if the 2019 VOID is $75 million and is growing at 1.25 percent annually.[8] See table 7.2.

Example 2: Stormwater Discharge Permits

Our second example is another Wisconsin DNR regulation. This one is from 2021 and is related to stormwater discharge permits (Wisconsin Department of Natural Resources 2021). Like the previous regulation, this rule is also intended to bring the state of Wisconsin's regulatory regime in line with federal regulations. However, in this case the regulation is anticipated to impose net costs. According to the agency, the regulation will generate total costs of $2,778,900 per year. Additionally, it will generate savings of $1,118,400 annually, for a net compliance cost burden of $1,660,500. As with the previous regulation, the DNR does not claim that this regulation will save any lives. Thus, this regulation can be expected to increase mortality risk on balance since its cost effectiveness (which is infinite in this case) exceeds the VOID.

We assume that the DNR's estimates are expressed in 2021 dollars, since this was the year the rule was finalized and no other information is available. The annualized cost has a present value of $23.7 million at a 7 percent discount rate. Since we are evaluating the regulation in 2021, there is no need to adjust this value for inflation. $23.7 million is about one-third of our estimate of the VOID, and this initial value would be expected to grow over time. One could produce a cost-effectiveness table similar to what is presented in table 7.2 to track this growth. We forgo doing that here for simplicity's sake.

Discussion

There are several takeaways worth noting after reviewing the regulatory analyses performed for the two DNR example

Table 7.2 The Mortality Cost of the Wisconsin DNR's 2019 Hazardous Waste Disposal Regulation

Year	Total Lives Saved (target risk)	Total Cost (millions)	Forgone Consumption (millions)	Investment Value (millions)	Cumulative Forgone Consumption (millions)	Cost per Life Saved	VOID (millions)	Cumulative Expected Deaths from Lost Income	Net Lives Saved	Risk Increasing?
2019	0	–$15	–$5	–$11	–$5	–$∞	$75	0	0	no
2020	0	–$19	–$3	–$11	–$8	–$∞	$76	0	0	no
2024	0	–$39	–$4	–$15	–$24	–$∞	$80	0	0	no
2029	0	–$72	–$6	–$21	–$51	–$∞	$85	–1	1	no
2044	0	–$275	–$17	–$57	–$218	–$∞	$102	–3	3	no
2069	0	–$1,684	–$93	–$309	–$1,375	–$∞	$140	–12	12	no

Sources: Wisconsin Department of Natural Resources (2019); authors' calculations.

Note: $f = 0.7$, ROI = 10%, VOID = $75 million, $p = 1.25\%$.

regulations in the previous section. First, the DNR deserves credit for calculating both the costs and the cost savings associated with its regulations. This is clearly a best practice, and thus avoids a common practice of many federal agencies of intermingling financial costs and savings with nonpecuniary benefits and costs, which often aren't directly comparable.

However, the DNR's analyses may be unintentionally misleading because they present costs in annualized rather than present-value form. Although regulatory costs can be expressed in both annualized and present-value form, present values are more useful since these better reflect total costs and make cost-effectiveness analysis easier to produce.

These two examples are also interesting because the risk reduction benefits of the deregulatory action offset some of the risk-increasing costs of the regulatory action. At first glance, the costs of stormwater permit regulation exceed the cost savings generated by the hazardous waste regulation. However, it is important to note that a cost borne in 2019 is not the same as an equivalent cost borne in 2021. A dollar in compliance is more costly to society in 2019 than in 2021 owing to the opportunity cost of capital, and this difference must be accounted for in order to make an accurate comparison between the two regulations.

Taking a step back, Wisconsin's rulemaking process is notable because it involves the production of economic analysis (Broughel and Hoffer 2021), which the examples above show can include useful information that is easily converted into a format usable for cost-effectiveness and mortality analysis. This implies that risk analysis could be incorporated into the existing rule evaluation process in Wisconsin without much difficulty.

Cost-effectiveness analysis requires in its most basic form just two inputs: the accounting costs of the policy in question and an estimate of the primary benefit achieved by the policy. A cost-effectiveness estimate based on these inputs could be required as a standard part of regulatory analysis. That said, to ensure that analysis is useful, Wisconsin may also need to invest in personnel capable of performing rigorous analysis. Most of what seems to constitute economic analysis for regulations in the state seems to be little more than a form that is filled out by agencies according to a short, standard template. If Wisconsin is under-investing in analysts qualified to produce economic analysis, analysis will necessarily be of low quality. That said, owing to the relatively simple nature of cost-effectiveness analysis, a small investment may be all that is needed to start performing some basic, but useful, risk analysis.

Conclusion and Policy Recommendations

The analysis of risks is important both in our daily lives as individuals and at a collective level when governments set policy. Wisconsin policy makers should consider requiring risk analysis like that outlined in this chapter. It may be fairly easy to incorporate risk analysis into existing regulatory analysis (or to add it as an additional requirement), thereby improving the objectiveness and transparency of Wisconsin regulations' impacts. If such analysis is conducted properly and used in decision making, it could save lives and reduce costs simultaneously.

To produce a risk analysis, policy makers could use a simple checklist that follows the steps outlined in this chapter. We have included an example of such a template in the appendix. Moreover, interested parties in Wisconsin need not wait until government officials adopt this kind of analysis before they use it to inform policy. Academic economists, industry trade associations, advocacy groups of various kinds, and even private citizens could perform such analysis themselves with the appropriate training. Indeed, as this chapter has shown, it is fairly easy to produce a mortality risk analysis by drawing on information from agencies' existing economic analysis or by supplementing those reports with data from other sources, such as academic studies.[9]

As one analysis recently put it, "On paper, Wisconsin's process for reviewing new and existing rules appears to be quite thorough, especially relative to some other states" (Broughel and Hoffer 2021). However, risk analysis is a glaring omission from a system that otherwise appears to be tailored for producing evidence-based regulations. We see abundant opportunities for improving the regulatory system in Wisconsin by creating a more robust role for the economic analysis of risks.

APPENDIX: Risk Analysis Template For State Regulations

1. Is the regulation lifesaving?
2. If yes, how many lives will the regulation save?
3. What compliance expenditures are likely to result from this regulation (including forgone expenditures because of lower income or revenues, as well as government expenditures)?
4. What cost savings are likely to result from the regulation?
5. What is the opportunity cost of the regulation? In other words, what fraction of foregone expenditures would have been consumed vs. invested, and what rate of return would have been earned on the foregone investments?
6. On the basis of the regulation's opportunity cost, what is the present value of the regulation's costs (net of cost savings)? Clearly state the dollar-year and year in which the cost is evaluated (e.g., a cost borne in 2019 expressed in 2021 dollars).
7. Calculate the cost effectiveness of the regulation (i.e., the present value of costs net of cost savings per life expected to be saved).
8. Based on the relevant value of an induced death, is the regulation expected to increase risk in present-value terms?
9. Will the regulation increase risk in the future? If so, when?
10. Provide a table detailing how the regulation will affect real resources (e.g., consumption and investment), as well as risk, over several decades.

Notes

[1] An important caveat here involves so-called deaths of despair. These tend to be deaths related to drug overdoses, suicide, and alcoholism, which are contributing to life expectancies falling among some groups in high-income countries, in particular in the United States. See Case and Deaton (2020).

[2] When a policy is said to cost $75 million per life saved, this does not imply that $75 million will actually be spent. For example, a regulation that costs $7.5 billion in order to save 100 lives has a cost effectiveness of $75 million per life saved. The same cost effectiveness applies if one spends $750,000 in order to save an expected one-hundredth of a life. In fact, many regulations have high cost-effectiveness values not because they cost a lot of money but because they don't produce much in the way of benefits.

[3] Opportunity cost and discounting are related because health benefits are sometimes discounted on the basis of an argument that capital has an opportunity cost in that it can be invested. This line of argumentation confuses two concepts: the rate of return on capital and the rate of time preference of society.

[4] Arguably, public project hurdle rates should include risk and irreversibility premiums as well. On the marginal rate of return to private investment, see Broughel and Baxter (2022). See also Harberger and Jenkins (2015).

[5] Note that a cumulative change in risk and a marginal change in risk can occur in different periods. For example, a regulation might increase risk for a few years before all the mortality benefits from previous years are offset.

[6] Wisconsin has a cost-benefit analysis template as well, but it appears to be for procurement purposes only. See Wisconsin Department of Administration (2019).

[7] Notably, the estimated compliance costs did not change from 2017 (when the rule was first proposed) to 2019 (when the rule was finalized). See Wisconsin Department of Natural Resources (2017).

[8] The expected life is saved in 2025 owing to rounding. In actuality, the predicted total cost savings would exceed the VOID in 2031.

[9] For a similar example of a risk analysis that applies this methodology, see Broughel and Baxter (2022).

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ONWARD Wisconsin

Unleashing Capitalism with Common Sense Public Policy

How can we create a more prosperous future for Wisconsin? This edited volume was assembled to answer that question by engaging a team of economic scholars and experts who have each provided ideas for policy reforms that can accomplish that goal.

Our authors have based their research on published academic literature, not on politics. The issues addressed in this book were not chosen based on whether they align with the positions of any particular political party or administration. While the authors address a broad spectrum of issues, from tax policy to legal and regulatory reform, there is a common theme in the conclusions they reach regarding the current problem areas of Wisconsin's state policy.

Based upon over 200 years of research it is clear that higher levels of economic freedom can achieve higher rates of long-term economic growth, and these authors conclude that making Wisconsin's state policy climate more consistent with economic freedom will result in increased capital formation, higher labor productivity and wages, and faster long-run economic growth.

We hope that readers will come away with a better understanding of Wisconsin's economic issues and possible ways to reform policy to improve prosperity in the Badger state.

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PUBLIC SUBMISSION

As of: February 07, 2024
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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0063
Comment on OMB-2023-0020-0001

Submitter Information

Organization: stackArmor, Inc.

General Comment

We appreciate the opportunity to comment on the proposed Memo on Agency Use of Artificial Intelligence. As the CEO and founder of a small and innovative solutions provider, stackArmor, Inc., headquartered in Tysons VA, I applaud your efforts to foster transparency and solicit ideas and comments.

We believe the three most important initiatives in the memo to help agencies advance governance, innovation, and risk management for use of AI are:
(1) ensuring agencies have access to adequate IT infrastructure,

(2) modernizing cybersecurity authorization processes to better address the needs of AI application, and

(3) establishing uniform and consistent shared practices to independently evaluate the AI and conduct ongoing monitoring.

We base our remarks on our experience helping US Federal agencies transform their information technology systems using new and emerging technologies like cloud computing technologies since 2009 with the first migration of a government wide system – Recovery.gov to a commercial cloud service provider. Since then, we have had the privilege of supporting numerous transformation initiatives including being part of the GSA Centers of Excellence (COE) since 2018 and having contributed towards the development of the Cloud Adoption Playbook while supporting transformation engagements at agencies including USDA, HUD, NIH and OPM amongst others agencies.

Our comments on the DRAFT OMB Memorandum are presented in the attached PDF file.

Very respectfully,
GP
Gaurav Pal
stackArmor, Inc
https://stackarmor.com/airmf-accelerator/

Attachments

stackArmor Comments on OMB DRAFT Memorandum on Advancing Agency Use of Artificial Intelligence

Ms. Clare Martorana,

U.S. Federal Chief Information Officer,

Office of the Federal Chief Information Officer,

Office of Management Budget.

Subject: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Ms. Martorana,

We appreciate the opportunity to comment on the proposed Memo on Agency Use of Artificial Intelligence. As the CEO and founder of a small and innovative solutions provider, stackArmor, Inc., headquartered in Tysons VA, I applaud your efforts to foster transparency and solicit ideas and comments.

We believe the three most important initiatives in the memo to help agencies advance governance, innovation, and risk management for use of AI are:

(1) ensuring agencies have access to adequate IT infrastructure,

(2) modernizing cybersecurity authorization processes to better address the needs of AI application, and

(3) establishing uniform and consistent shared practices to independently evaluate the AI and conduct ongoing monitoring.

We base our remarks on our experience helping US Federal agencies transform their information technology systems using new and emerging technologies like cloud computing technologies since 2009 with the first migration of a government wide system – Recovery.gov to a commercial cloud service provider. Since then, we have had the privilege of supporting numerous transformation initiatives including being part of the GSA Centers of Excellence (COE) since 2018 and having contributed towards the development of the Cloud Adoption Playbook while supporting transformation engagements at agencies including USDA, HUD, NIH and OPM amongst others agencies.

Our approach to Risk Management and Governance is rooted in using open standards and frameworks provided by NIST. We believe that OMB's guidance should encourage the augmentation and tailoring of existing risk management processes to ensure that Federal agencies can start accruing the benefits of AI technologies without costly delays associated with implementing a new governance program. A pragmatic approach that tailors NIST RMF, NIST SP 800-53 and governance models such as ATOs (Authority to Operate) to align with the NIST AI RMF (NIST AI 100-1) provides a balanced approach that ensures that AI specific risks like safety, bias and explainability are adequately covered while being able to leverage the existing

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cyber workforce, risk management procedures, and body of knowledge associated with NIST RMF/800-53.

We are providing the following specific comments to questions from OMB requesting feedback.

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

Given that most AI capabilities within an agency will be delivered by IT systems that are highly likely to be based on cloud computing technologies (public or private), **the designated Chief AI Officers should have sufficient experience with and exposure to cloud computing technologies as well as the Federal Risk and Authorization Management Program (FedRAMP®)** to ensure that cost-effective and secure commercial solutions can help meet the agency's AI needs. Such experience helps agencies rapidly reap the benefits of AI capabilities, maximizing the use of secure and compliant commercial solutions will be critical and to the extent Chief AI Officers understand AI systems and commercial solutions, it will help in remove roadblocks and avoid duplication of efforts, where agencies re-create capabilities that already exist in the commercial sector.

Further Chief AI Officers should have a keen understanding of the agency's mission and how AI can enhance and improve or bring new service delivery capabilities. Agencies should have the flexibilities to determine appropriate reporting structures that best fit their needs, and where the Chief AI Officer is not dual hatted with the CIO or CDO, for example, ensure close collaboration and coordination with other CxO's (e.g. CIO, CDO, CXO, CISO, Chief Privacy Officer).

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

We believe that augmenting and building upon existing risk management mechanisms especially in the IT domain is likely to help accelerate AI adoption in support of the mission without causing costly delays associated with standing up a brand new governance body or model. Using an approach that ties NIST AI RMF to existing cyber risk management models based on NIST RMF, NIST SP 800-53 and NIST SP 800-53A as well as leveraging the work done by the Federal Privacy Council, there is a critical mass of understanding and knowledge that agencies can leverage to reduce the time and cost with AI adoption across the federal enterprise. To help avoid a situation where every agency comes up with its own governance model, OMB could direct NIST, GSA and DHS/CISA to create a FISMA Profile for NIST AI RMF, which then can be tailored and adopted by each one of the 24 CFO Act agencies.

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Feedback: atoforai@stackArmor.com

Additionally, given that most AI capabilities will be delivered using IT systems, modernizing existing cyber processes and equipping the workforce with critical skills like ethics, safety and civil rights awareness specific to AI systems can help ease the transition burden associated with new technology insertion.

3. How can OMB best advance responsible AI innovation?

OMB should consider creating a consistent and uniform governance model that does not vary from agency to agency. The creation of "snowflake" compliance models unique to a agency will deter participation by small and innovative solution providers across the country. Once the initial wave of foundational systems and AI computing platforms (e.g. commercial or private clouds), the enduring set of government or agency specific solutions are likely to come from small, nimble businesses. Therefore, **ensuring market access for small businesses through existing channels like FedRAMP, SBA's SBIR/STTR funding programs as well as reiterating the need to meet small business and socio-economic goals for AI solutions and systems are important actions that OMB can take to help advance the deployment of AI innovation** while ensuring an equitable and competitive marketplace that does not get concentrated into a handful of large players.

OMB should also designate or delegate actions for defining criteria, processes, and operational creation of pathways for "independent review". Unless there is a responsible center point with funding to buildout the operational substantiation of this concept, there is a risk that the independent review because substantially costly or burdensome as to become a barrier to innovation. The FedRAMP program has established an objective and standards based program with third-party assessor organizations (3PAO), which could serve as a starting point for enabling an independent review framework.

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

We believe an iterative low-risk approach to generative AI adoption will likely be the most productive. In many ways, we draw parallels to how commercial cloud computing adoption occurred almost a decade ago. Given the lack of understanding and the initial trust deficit in cloud solutions, low risk public facing websites were some of the early workloads to migrate to the cloud. Some of the earliest systems to move to the cloud were Recovery.gov and Treasury.gov. More mission critical systems then began moving to the cloud once greater confidence, understanding and trust was established and the governance model matured.

Initially, NIST SP 800-53 Rev 3 was used with cloud computing overlays, then subsequently FedRAMP came along and NIST incorporated cloud computing-aware controls into SP 800-53 Rev 4. Similarly, as the governance model matures, mission critical use cases that will benefit from AI will start to emerge.

There are a number of relatively low-risk use cases around software development using code generators; marketing & outreach automation and enhanced customer engagement are areas of rapid industry innovation that translate for use across the federal enterprise.

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Additionally, OMB should reinforce and support agencies on their overall data maturity such that agencies are better positioned to take advantage of AI capabilities. The Federal Data Strategy 10-year plan, if followed, is a solid model created to drive government-wide data maturity. Improved data maturity ensures faster, better, and more reliable AI generated outcomes.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

No comment

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

We believe an approach that draws upon existing IT/cyber risk management practices offers a pathway to allow agencies to implement minimum baselines while having the freedom to innovate and tailor the model to suit the wide diversity of mission requirements across the federal enterprise. Our ATO for AI™ approach recommends **considering a FIPS 199 like model** where agencies categorize risk baselines as high, moderate and low across confidentiality, integrity and availability dimensions. Similarly, for AI systems risk baseline categorized as high, moderate or low across safety, bias/rights, and explainability dimensions. This allows every agency to suitably tailor the risk management controls based on its specific requirements while adhering to the overall guardrails agencies must follow. The consolidated NIST AI RMF mapped baseline should be based on all six categories – 1) confidentiality, 2) integrity, 3) availability, 4) safety, 5) bias/rights and 6) explainability.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

We recommend OMB direct NIST, DOD, DHS/CISA and GSA to develop FISMA and FedRAMP Profile for NIST AI RMF that helps provide an actionable implementation model for agencies. **We believe an approach that maps and augments NIST SP 800-53 controls to NIST AI RMF risk categories and sub-categories offers an expeditious pathway well understood by a broad cross section of acquisition, program and industry members.** The acquisition solicitations can then reference the need to comply with NIST AI RMF/FISMA AI Profile as part of the acquisition's language.

There should also be directive to separate the evaluation process for AI capabilities that are embedded in vendor solutions and AI capabilities that are built by government agencies.

Procurement and budget officials should also have a view of the key components of "AI" so that the suggested controls and evaluations for AI are applied to the appropriate elements of the acquisition – infrastructure, devices, data, software platforms and all related "as a service" elements.

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8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

We believe that **the AI use case inventory should offer meaningful information on mission and quantifiable outcomes (work effort savings, elimination of errors, and efficiency gains amongst others) achieved through the deployment of the AI technology**. Additionally, the AI use case inventory should also provide an indication on technology components used e.g. FedRAMP accredited cloud services or GOTS as a case in point. Such data will enable the analysis of consumption patterns, the estimation of supply chain risk to the government, the enhancement of overall learning, and improved decision-making. Because agencies work together and exchange information as they deliver services, the information should also reflect or indicate cross-agency use-cases.

I hope you find the information and contents of this brief document useful as OMB formulates and finalizes the OMB memo on safe and secure AI adoption in agencies.

Very respectfully, 12/4/2023

Gaurav Pal

stackArmor, Inc

https://stackarmor.com/airmf-accelerator/

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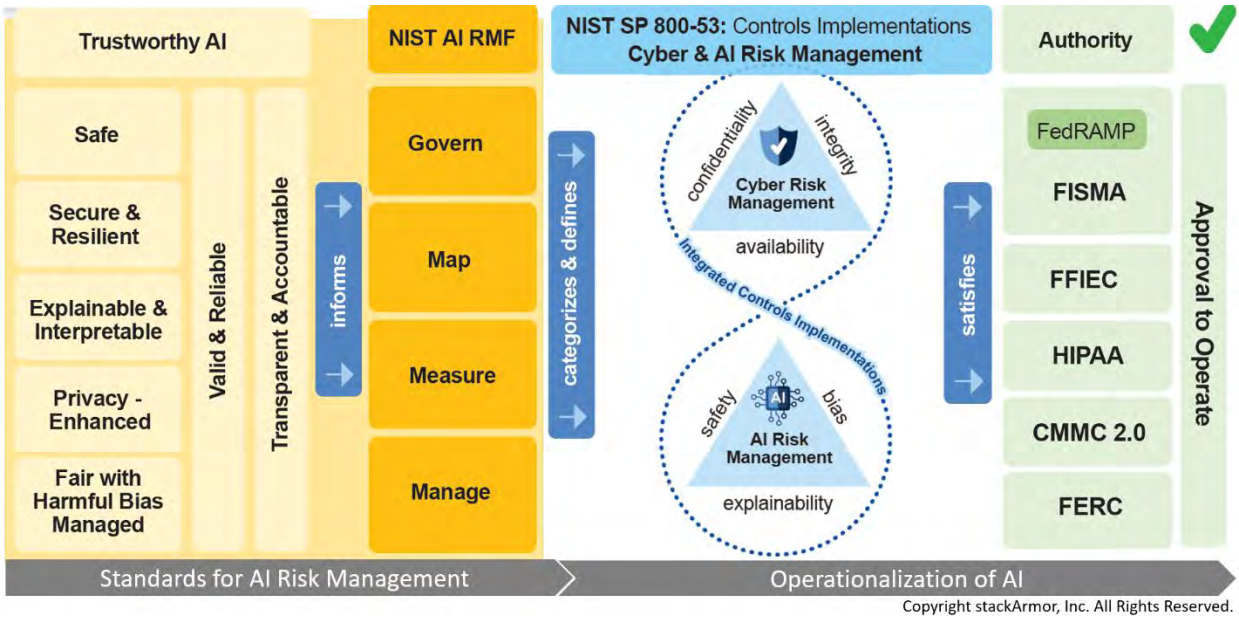
Appendix – ATO for AI™ Open Governance Model based on NIST Standards

Based on our experience helping agencies, commercial organizations and regulated entities implement security controls, we have developed an open and standards-based governance model that we call ATO for AI™. This model begins with the seven trustworthy characteristics of AI and the NIST AI RMF risk categories & sub-categories and maps them to the NIST SP 800-53 Rev 5 control families and controls. . The model adds an AI Overlay construct that includes AI-specific controls not adequately covered by existing NIST SP 800-53 Rev 5 controls. Hence, the combination of tailored NIST SP 800-53 Rev 5 controls with an AI overlay provide an actionable and well-understood approach to risk management that can accelerate the adoption of AI while reducing the time delays and costs of alternate approaches to AI risk management and governance. The infographic below provides an overview of our overall approach to AI risk management and governance.



Infographic demonstrating an end-to-end risk management and governance model that augments and builds upon existing processes, procedures and body of knowledge within an agency for AI

We have prepared detailed mappings of the controls and have vetted our approach by sharing it with the NIST public working groups on AI as well as leading industry and government executives as part of our AI Risk Management Centers of Excellence (CoE). Members of our CoE include:

- Ms. Suzette Kent, former U.S. Federal CIO
- Ms. Maria Roat, former U.S. Deputy Federal CIO
- Mr. Richard Spires, former U.S. Department of Homeland Security CIO
- Mr. Alan Thomas, former commissioner of the GSA Federal Acquisition Service
- Ms. Teresa Carlson, transformational industry executive with over 25 years of leadership

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Our COE members have rich operational and policy experience and have offered the following comments on our approach.

"Harnessing the power of AI for delivery of government mission and services will be transformational. But, it is complicated to align all the emerging policy, risk frameworks, approval processes and existing policy and law. I am thrilled to be included in the COE because I have seen the work of the stackArmor team to drill down to details and find a path to connect all the pieces. We can only get to use of operational AI at scale by working through these details. I hope the output of the COE will deliver tools that agencies can use to move faster and to confidently scale AI capabilities."

Suzette Kent, Former Federal CIO. Ms. Kent as an extensive private and public sector background. As the Federal CIO, Ms. Kent was responsible for government-wide IT policies and spending, and also chaired the Federal CIO Council and the Technology Modernization Fund Board.

"The adoption of risk-based methods for managing and governing AI systems that leverage security controls defined in NIST SP 800-53 Rev 5 as well as established governance programs like FedRAMP can help agencies adopt AI more rapidly. Reducing the time and cost burden on agencies and supporting contractors by enhancing existing protocols is critical to ensuring timely deployment of AI systems for supporting the government mission."

Maria Roat, Former Deputy Federal CIO, SBA CIO and Director, FedRAMP PMO. Ms. Roat is a Senior Information Technology and Cybersecurity Executive with 3+ decades' experience driving enterprise-scale digital transformation within Federal Government. Recognized as builder, collaborator, and solutions innovator with vision, audacity, and drive to lead complex multibillion-dollar technology initiatives.

"Managing risk associated with AI systems is essential to ensuring Government's ability to improve agency effectiveness and efficiency using next generation AI and Automated Decision Support systems. stackArmor's systems engineering approach to applying NIST security controls to AI systems provides a reasonable blueprint for AI risk management."

Richard Spires, Former DHS, and IRS CIO. Mr. Spires provides advice to companies and government agencies in strategy, digital transformation, operations, and business development. He previously served as the Chief Information Office (CIO) of the U.S. Department of Homeland Security (DHS) and as CIO of the Internal Revenue Service (IRS).

"ATO for AI offers government agencies a fiscally prudent pathway to safe and secure AI adoption that builds upon lessons learned upon implementing existing governance frameworks

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like FISMA and FedRAMP. stackArmor's approach of operationalizing NIST AI RMF with actionable control implementations can help agencies accelerate safe AI systems adoption without having to retrain thousands of program, acquisition and IT specialists on new governance models for AI."

Alan Thomas, Former Commissioner, Federal Acquisition Service, GSA. Mr. Thomas is an Operating executive and former Federal political appointee with more than 25 years delivering mission critical programs, championing large scale digital transformation initiatives, and building deep functional expertise in acquisition and procurement.

"The unique combination of AI-enabled applications on cloud-computing powered services offers a once-in-a-generation opportunity to truly enable a digital-first government. Transforming legacy applications at scale by using accelerators that deliver safe and secure AI-native applications developed by innovative ISVs on FedRAMP accredited cloud service providers can help us dramatically shorten the time and cost of AI adoption."

Teresa Carlson, transformational industry executive with over 25 years of leadership in modernizing public sector organizations using commercial solutions.

You can access more details about our open and standards based approach to helping accelerate AI deployments by augmenting existing risk management controls to align with NIST AI RMF by visiting our website downloading our whitepaper.

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0064
Comment from Vince Minerva

Submitter Information

Name: Vince Minerva

General Comment

See attached file(s)

Attachments

OMB Request for Comment on AI

Office of Management and Budget (OMB) Request for Public Comment on Draft Memorandum Titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)"

Point of Contact: Vince Minerva, Member of the Public

December 5, 2023

Question 7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

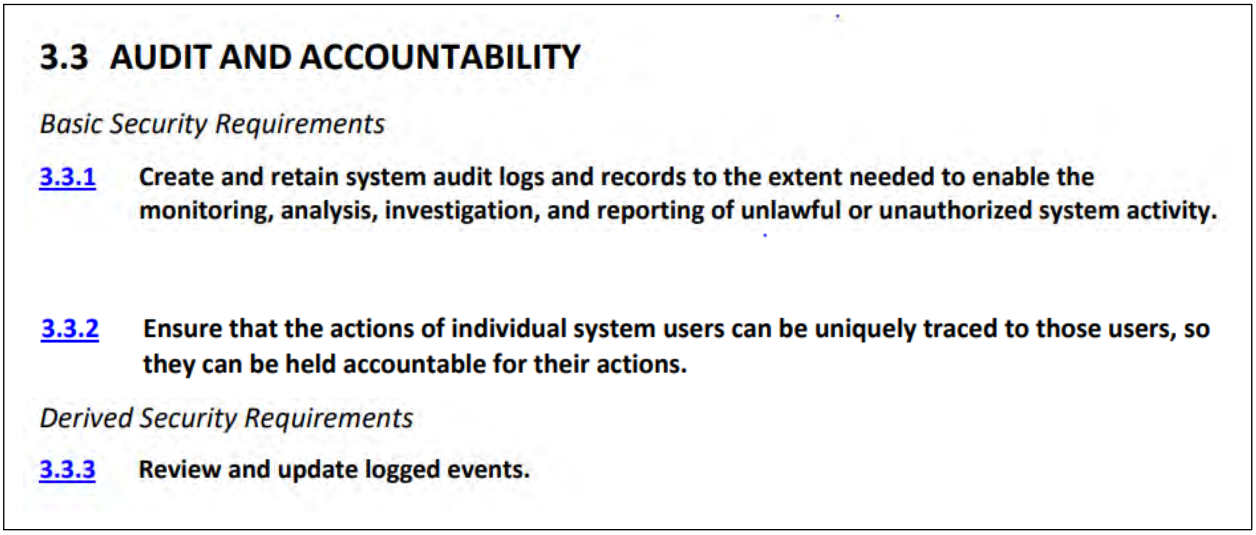
Establishing foundational guidance for development, deployment, and ongoing monitoring of trustworthy Artificial Intelligence (AI) systems by leveraging proven federal government strategies for information security, can drive reliable access to verifiable, trustworthy information (Reference Question 1). Creating actionable trustworthiness requirements for AI systems analogous to NIST Special Publication (SP) 800-171, Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations (Ref. 1), provides necessary technical leadership for the AI community. NIST SP 800-171 provides information security requirements applicable to all nonfederal systems and organizations that process, store, and/or transmit controlled unclassified information. NIST SP 800-171 is intended for use by federal agencies in contractual vehicles or other agreements established between those agencies and nonfederal organizations (Ref. 1, p. iii). For example, the Department of Defense requires a significant percentage of the 100,000 + (Ref. 2) Defense Industrial Base (DIB) companies to comply with NIST SP 800-171 via contractual requirements which benefits our national security by safeguarding sensitive information. Similarly, creating a NIST publication of requirements for trustworthy AI systems should strengthen our national AI capabilities. Many of the use cases for Generative AI require large scale computing resources, which will likely result in most of the public and private industry users acquiring services from commercial providers. Many, if not most, of the cloud and enterprise IT providers with financial and IT system resources sufficient to run large language models are contractors to the federal government. The federal government's ability to influence the trustworthiness of AI systems should be increased similarly to the demonstrated successes in cybersecurity.

Developing Guidance for Trustworthy AI Systems

NIST SP 800-171 security requirements are organized into fourteen (14) security families containing basic and derived requirements as shown in Figures 1 and 2 below. Each of the requirements has a discussion section providing additional information to facilitate requirement implementation and assessment.

FAMILY	FAMILY
Access Control	Media Protection
Awareness and Training	Personnel Security
Audit and Accountability	Physical Protection
Configuration Management	Risk Assessment
Identification and Authentication	Security Assessment
Incident Response	System and Communications Protection
Maintenance	System and Information Integrity

Figure 1: NIST SP 800-171 Security Requirements Families (Ref. 1, p. 7)



3.3 AUDIT AND ACCOUNTABILITY

Basic Security Requirements

3.3.1 **Create and retain system audit logs and records to the extent needed to enable the monitoring, analysis, investigation, and reporting of unlawful or unauthorized system activity.**

3.3.2 **Ensure that the actions of individual system users can be uniquely traced to those users, so they can be held accountable for their actions.**

Derived Security Requirements

3.3.3 **Review and update logged events.**

Figure 2: NIST SP 800-171 Basic and Derived Requirements Examples (Ref. 1, pp. 17-18)

Applying this approach to AI Systems leads to trustworthiness requirement families as shown in Table 1 below. The seventeen (17) candidate trustworthiness families were primarily derived from the NIST AI RMF 1.0 and the AI Bill of Rights. However, the process of formalizing the trustworthiness families enables incorporation of concepts from a diverse set of resources, such as, the Organization for Economic Co-operation and Development (OECD) AI Principles (Ref. 3). Once the trustworthiness families are defined through proven review and comment processes, they can be defined by basic and derived requirements.

Trustworthiness Requirement Family	**Summary Objective**
Accountability	"This is the fundamental need: to ensure that machines remain subject to effective oversight by people and the people who design

	and operate machines remain accountable to everyone else. In short, we must always ensure that AI remains under human control." Ref. 4, p. 4
Accuracy	"Accuracy is defined by ISO/IEC TS 5723:2022 as "closeness of results of observations, computations, or estimates to the true values or the values accepted as being true." Measures of accuracy should consider computational-centric measures (e.g., false positive and false negative rates), human-AI teaming, and demonstrate external validity (generalizable beyond the training conditions)." Ref. 5, p. 14; AI systems should provide a confidence level for predictions.
Explainability and Interpretability	*"Explainability* refers to a representation of the mechanisms underlying AI systems' operation, whereas *interpretability* refers to the meaning of AI systems' output in the context of their designed functional purposes." Ref. 5, p. 16
Fairness	Fairness in AI includes concerns for equality and equity by addressing issues such as harmful bias and discrimination. Ref. 5, p. 17
Ongoing Monitoring	Automated systems should have ongoing monitoring procedures, including recalibration procedures, in place to ensure that their performance does not fall below an acceptable level over time, based on changing real-world conditions or deployment contexts, post-deployment modification, or unexpected conditions." Ref. 6
Planning	Develop, document, and disseminate policies, plans, and procedures necessary to implement trustworthiness requirements.
Privacy	"Privacy refers generally to the norms and practices that help to safeguard human autonomy, identity, and dignity." Ref. 5, p. 17; "Automated systems should be designed and built with privacy protected by default". Ref. 7
Reliable	"Reliability is defined in the same standard as the "ability of an item to perform as required, without failure, for a given time interval, under given conditions" (Source: ISO/IEC TS 5723:2022)." Ref. 5, p.13
Resiliency	"AI systems, as well as the ecosystems in which they are deployed, may be said to be resilient if they can withstand unexpected adverse events or unexpected changes in their environment or use – or if they can maintain their functions and structure in the face of internal and external change and degrade safely and gracefully when this is necessary (Adapted from: ISO/IEC TS 5723:2022)." Ref. 5, p. 15
Risk Management	"AI risk management offers a path to minimize potential negative impacts of AI systems, such as threats to civil liberties and rights, while also providing opportunities to maximize positive impacts. Addressing, documenting, and managing AI risks and potential negative impacts effectively can lead to more trustworthy AI systems." Ref. 5, p. 4

Robustness	"Robustness or generalizability is defined as the "ability of a system to maintain its level of performance under a variety of circumstances" (Source: ISO/IEC TS 5723:2022). Robustness is a goal for appropriate system functionality in a broad set of conditions and circumstances, including uses of AI systems not initially anticipated." Ref. 5, p. 14
Safety	"AI systems should "not under defined conditions, lead to a state in which human life, health, property, or the environment is endangered" (Source: ISO/IEC TS 5723:2022)." Ref. 5, p. 14
Security	"…concerns related to the confidentiality, integrity, and availability of the system and its training and output data…" Ref. 5, p. 8
Supply Chain Risk Management	"Policies and procedures are in place to address AI risks and benefits arising from third-party software and data and other supply chain issues." Ref. 5, p. 24
Test, Evaluation, Verification, and Validation (TEVV)	Tasks are performed throughout the AI lifecycle that are carried out by AI actors who examine the AI system or its components or detect and remediate problems. Ref. 5, p. 35
Transparency	"Transparency reflects the extent to which information about an AI system and its outputs is available to individuals interacting with such a system – regardless of whether they are even aware that they are doing so." Ref. 5, p. 15
Valid	"Validation is the "confirmation, through the provision of objective evidence, that the requirements for a specific intended use or application have been fulfilled" (Source: ISO 9000:2015)." Ref. 5, P. 13

Table 1: Candidate Trustworthiness Requirement Families

Additional support can be provided to the AI Systems community by creating a document that provides procedures for self-attestation or third-party audits of trustworthiness requirements similar to NIST SP 800-171A, Assessing Security Requirements for Controlled Unclassified Information (Ref. 8). NIST SP 800-171A enables organizations to generate evidence to support assertion of requirements satisfaction.

Summary

- Establishing foundational guidance documents for developing and using trustworthy AI systems strengthens federal government leadership in the AI community.
- Leveraging federal government demonstrated successes with information security provides confidence in a high value outcome.
- Processes used to develop trustworthiness requirements facilitate collaboration amongst a diverse set of stakeholders.
- The voluntary commitments to manage risk posed by AI secured from leading AI companies by the Biden-Harris Administration (Ref. 9) are easily incorporated into the trustworthiness requirements.

- Trustworthiness requirements support development of Generative AI systems aligned with federal government priorities such as the AI Bill of Rights.
- NIST-led effort ensures that the necessary cybersecurity principles for secure AI systems are incorporated into trustworthiness requirements.

References:

1. NIST Special Publication (SP) 800-171 Revision 2, Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations
2. https://www.cisa.gov/topics/critical-infrastructure-security-and-resilience/critical-infrastructure-sectors/defense-industrial-base-sector
3. https://oecd.ai/en/ai-principles
4. Governing AI: A Blueprint for the Future, Microsoft
5. NIST AI 100-1, Artificial Intelligence Risk Management Framework (AI RMF 1.0)
6. https://www.whitehouse.gov/ostp/ai-bill-of-rights/safe-and-effective-systems-3/
7. https://www.whitehouse.gov/ostp/ai-bill-of-rights/data-privacy-2/
8. NIST Special Publication (SP) 800-171A, Assessing Security Requirements for Controlled Unclassified Information
9. FACT SHEET: Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI | The White House

Question 5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

Recommend adding a section 5biL citing satellite systems and associated ground infrastructure critical to public safety. The rationale for the incorporation is that many civilian satellite systems are essentially critical infrastructure systems. For example, the NOAA Geostationary Operational Environmental Satellites (GOES) provide hurricane track and intensity forecasts relied on by the public and emergency service providers to make critical safety decisions.

Question 6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

Yes, the practices identified set an appropriate baseline. The minimum practices can be improved by strengthening alignment with Executive Order 13960 section 3e by incorporating section 3e language that states, “Agencies shall ensure that the operations and outcomes of their AI applications are sufficiently understandable by subject matter experts, users, and others, as appropriate.” A suggested location is a new Section 5civI on p. 18 of the draft OMB memorandum.

Additionally, strengthen alignment with the AI Bill of Rights by adding a sentence after the first sentence in Paragraph 5cvD on p. 20 (**Notify negatively affected individuals)** stating, "Affected parties should know how and why an outcome impacting them was determined by an automated system, including when the automated system is not the sole input determining the outcome."

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: RAAGI

General Comment

The "Blueprint for an AI Bill of Rights" attempts to navigate the complex terrain of integrating AI into society, but it falls short in several critical areas, reflecting a somewhat myopic vision that fails to grapple with the broader implications of AI integration.

1. Lack of Unified Vision for AI Integration: The Blueprint is glaringly silent on the need for a unified, coordinated approach to AI across various government agencies. By allowing each agency to independently navigate AI integration, it perpetuates a fragmented landscape that could lead to the creation of AI silos. This disjointed approach risks inconsistencies in implementation, inefficiencies, and a missed opportunity for a cohesive national strategy. The absence of a plan to eventually converge these efforts signals a lack of foresight, leaving the U.S. vulnerable to a disjointed and inefficient AI ecosystem.

2. Absence of Quantitative Metrics and Accountability: The Blueprint conspicuously lacks any form of quantifiable metrics to measure the success or failure of its implementation. Without clear benchmarks, how can we evaluate the efficacy of these guidelines? It seems to be more of a performative gesture rather than a concrete plan with measurable outcomes. This omission casts doubt on its practical utility and leaves room for ambiguity and ineffectiveness. Hiring personnel without a clear roadmap or success metrics can lead to a bureaucratic quagmire filled with individuals who may lack the necessary expertise to navigate the complexities of AI.

3. No Plan for Budget Reappropriation and Staffing Adjustments: The document fails to address the crucial issue of budget reappropriation in light of the expected increased efficiency due to AI implementation. If AI is to streamline processes and enhance productivity, there should be a corresponding plan for staffing reductions and budget adjustments across federal agencies. The absence of such a plan suggests a lack of long-term strategic planning and raises questions about the financial sustainability of this initiative. It's imperative to balance the introduction of AI with financial prudence and foresight.

4. Neglect of Labor Market Impacts and Safety Nets: The Blueprint is alarmingly silent on the potential repercussions on the labor market. With the introduction of AI, there's a tangible risk of job displacement.

Yet, there's no mention of the Department of Labor's preparedness to handle these changes. Are there safety nets and resources in place to support those whose jobs may be rendered obsolete? This oversight reflects a lack of empathy and understanding of the human cost of technological advancement.

5. Absence of Checks on Big Tech's Growing Influence: Finally, the Blueprint misses a crucial opportunity to address the elephant in the room – the burgeoning power of big tech companies. As these entities grow increasingly integral in developing and deploying AI, there's a real risk of them becoming too big to fail, wielding disproportionate influence over the economy and society. The Blueprint fails to propose any limitations or checks on these corporations, leaving a gaping hole in the governance of AI.

In conclusion, the "Blueprint for an AI Bill of Rights" reads more like a tentative first draft rather than a comprehensive, forward-thinking policy document. It's a piecemeal approach that lacks the depth and breadth required to effectively govern the integration of AI into society. The absence of a unified strategy, quantitative metrics, budgetary foresight, labor market considerations, and checks on big tech, makes it a document that falls dramatically short of the mark in addressing the multifaceted challenges posed by AI.

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0067
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Center for Security and Emerging Technology

General Comment

See attached file(s)

The Center for Security and Emerging Technology (CSET) at Georgetown University offers the following comments in response to OMB's Request for Comments on the Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum.

Attachments

CSET Response to Docket OMB-2023-0020 12.5.2023 FINAL

December 5, 2023

OMB RFI: 88 FR 75625
Organization: The Center for Security and Emerging Technology (CSET)
Respondent type: Organization>Academic institution / Think tank
Primary POC: Tessa Baker, Director of Communications (tgb5@georgetown.edu)

The Center for Security and Emerging Technology (CSET) at Georgetown University offers the following comments in response to OMB's Request for Comments on the *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum.*

A policy research organization within Georgetown University, CSET provides decision-makers with evidence-based analysis on the security implications of emerging technologies, focusing on artificial intelligence, advanced computing, cybersecurity, and biotechnology. We appreciate the opportunity to offer these comments. This response was compiled by the Primary POC, but represents contributions from Mia Hoffmann, Mina Narayanan, Dahlia Peterson, Emelia Probasco, Jack Corrigan, William Hannas, Huey-Meei Chang, Dewey Murdick, Margarita Konaev, and others.

We address OMB's eight questions below. In addition to OMB's efforts to enable AI adoption within the USG, we think it's important that the USG devise a resourced plan to actively monitor the adoption of these technologies by other governments (friend and foe) to ensure we can learn from others as well as ensuring that our technological approaches (and security practices) are calibrated to the potential offensive use of these technologies by other state and non-state actors.

Question 1: Chief AI Officer Roles and Responsibilities

As described in the draft memo, the roles, responsibilities, seniority, position, and reporting structures for CAIO's appear sufficiently flexible. However, the anticipated breadth of responsibilities is vast. Depending on the size of the agency, a single individual or small team may struggle to engage effectively on all of the anticipated activities, which include coordinating agency use of AI (and reporting), communicating the value of AI to each agency's mission, promoting innovation, and managing risks.

Additionally, the absence of clear budget or approval authority may hamstring CAIO's from ensuring compliance with the EO, preventing risky use cases, or monitoring adoption across agencies. We recommend:

- Requiring CAIOs at Chief Financial Officer (CFO) Act agencies, at minimum, not be dual-hatted with other significant roles like CTO or CIO given the breadth of their responsibilities.
- Include AI use cases and relevant categorical information in future updates to Technology Business Management (TBM) Taxonomy or other IT taxonomies and include clear instructions on how agencies should report on investments in AI for mission delivery in future revisions of A-11 Guidance (Section 55) and/or A-130 Guidance, to enable better tracking of investments in AI technologies.
- Requiring CAIOs be involved in agency Capital Planning and Investment Control (CPIC) procedures and milestone reviews in order to enable visibility into agency projects of sufficient scale that may already leverage AI or might benefit from AI advancements. In addition:
    - Strongly consider granting CAIOs approval authority for new CPIC investments in AI-related projects to ensure that they are involved in all aspects of project development and implementation.
    - Consider integrating agency AI use case inventories into existing dashboards like ITdashboard.gov so that both use cases and funding/investment levels can be interrogated by the public.
- Consider revising agency guidance in A-123 or comparable instructions to ensure CAIO's risk review responsibilities re: AI are codified and incorporated into Enterprise Risk Management Procedures to strengthen the CAIO's position and ensure appropriate internal agency governance.

Question 2: Coordination Mechanisms for AI Governance Bodies

In light of the desired expediency in implementing EO 14410, convening new governance bodies rather than repurposing or leveraging existing governing bodies seems likely to increase the administrative burden and delay meaningful results.

We recommend:

- To the extent that agencies have already established effective Data Governance Bodies, as contemplated in M-19-23, leveraging these or similar CPIC or IT-related governance bodies rather than creating standalone AI Working Groups would be a good starting point. Since AI is an enabling tool that requires data, compute, and people to be effective, piggybacking on existing governance infrastructure would enable CAIOs to more easily engage with relevant stakeholders, including Chief Data Officers, Chief Human Capital Officers, Chief Information Officers, and Chief Technology Officers.
- Similarly, we'd also recommend that existing infrastructure, like the CIO Council, serve as a launching point for any contemplated interagency coordination of AI activities, rather than creating standalone coordination and clearinghouse functions on day one in addition to the AI Development Council (EO14410, Section 10.1.a), AI Technology Task Force (EO14410, Section 10.2.b), and the White House AI Policy Council (EO14410, Section 12).

Question 3: OMB and Responsible AI Innovation

AI offers tremendous opportunity, but it may not be the solution for every mission or every government agency, and it requires people to be able to discern use cases and mitigate implementation hurdles. In order to best enable responsible AI innovation, OMB can do two things now:

- Prioritize Workforce Development and Recruitment/Retention: Section 10.2 of EO 14410 demonstrates the administration's commitment to talent as a critical enabler of the potential of AI for government. Hiring, (re)training existing employees, providing relevant career tracks for existing and new technical talent, and identifying gaps in capability are essential for the long-term, sustainable implementation (and maintenance) of AI systems in agencies. Without the talent to execute this memorandum or the EO, federal efforts to regulate and deploy AI systems may falter.
    - As noted in Section 4.b.iv of the draft memorandum, both technical and non-technical workers are essential to AI implementation. CSET research demonstrates the vital importance of not just the data scientists, engineers, or IT

workers who can develop and fine-tune AI, but also those, including contracting officers and product managers that enable AI adoption.

- Focus Agencies on Requirements, Not Hype: OMB can ensure agencies appropriately adopt AI for relevant mission areas by encouraging agencies to first identify capability needs, including legacy IT retirement/modernization requirements. By focusing first on requirements, we are hopeful that agencies can steward the public's trust and resources to the areas where AI might be most helpful, while also protecting the ability of agencies to continue executing their missions.

Question 4: Leveraging Generative AI (safely) to Accomplish Agency Missions

Given the varied missions of USG agencies, we cannot prescribe specific use cases in this response. However, we would like to emphasize the importance of clear requirements, establishing anticipated concepts of operations, and ensuring issues and harms are reported appropriately and promptly to support the responsible use of these technologies. We believe agencies should have clearly defined use cases for incorporating AI into their missions or business operations, be it generative AI or topic modeling **before** adopting these tools. If agencies determine that their goals are best served by taking advantage of AI, they should be ready to clarify the goal of the AI in context of use, how the goal aligns with agency objectives, how the AI achieves the goal, and who – if anyone – is tasked with enabling the AI to achieve the goal. NIST AI RMF Profiles may be a helpful starting point.

Question 5: Additional Use Cases for Consideration

The AI applications that are deemed safety-impacting and rights-impacting in Section 5 appear to constitute a fairly comprehensive list. We recommend:

- Add to Safety Impacting list (Memo Section 5.b.i): AI used to control/meaningfully impact the function of critical digital infrastructure (including emergency broadcasting systems and critical information delivery platforms);
- Move from Safety (Section 5.b.i) to Rights-Impacting (Section 5.b.ii): The functioning of ….”integrity of elections and voting infrastructure” because the draft memo specifies additional impact and rights assessments for rights-impacting technologies, including user testing and public comment (Section 5.c.iv).
- Add additional use cases to Rights-Impacting technologies, including:
    - ii.B (Law Enforcement or Surveillance-related): Identifying or predicting location of crime through techniques like gunshot detection algorithms;

- ii.C (Deciding immigration, asylum, or detention status): Verification of travel documents and migration analytics, including the forecasting of migration patterns and/or border crossings.
- ii.E (Education): Assessing student performance and learning outcomes.
- ii.G (Employment): Real-time task allocation/scheduling.

Question 6: Minimum Practices for Safety and Rights Impacting AI

The proposed practices and requirements are an excellent starting point, we recommend the following additions and modifications:

- Impact and Risk Assessments (iv.A.2) should (specifically) include evaluations of forces outside of an AI system, such as its suppliers or downstream applications creating undesirable impacts or negative system effects, and should include evaluating the cybersecurity of the AI system.
- Data Assessment (iv.A.3): Minimum documentation requirements should also include:
  - a description of the data collection process, and steps taken to prepare or pre-process the data;
  - Any assumptions made about the information the data represents; and,
    - For example, if healthcare expenses are used as a proxy for healthcare needs, this reflects an underlying assumption that all people seek out medical care at the same rates.
  - A description of relevant data gaps and how they are addressed.
- Monitoring (iv.D): Agencies (or ideally, OMB) should set up a mechanism to identify, record and report AI incidents. Incidents can be realizations or near-realizations of previously identified or unforeseen risks and can emerge as a result of AI system behavior or failure of human-AI-teams, among other reasons. Incidents should be investigated to determine their cause and the resulting findings used to improve risk mitigation strategies across the agency going forward. While the authorization and responsibility for this decision may lie with the CAIO, a clear, mandatory reporting and accountability structure should facilitate the identification and reporting of those conditions by staff directly interacting with the AI systems.
- Mitigation Approaches (iv.E): Before deploying an AI, agencies should define circumstances and conditions that would trigger immediate review and/or suspension of the AI system and prepare a response plan, especially for AI systems that are tightly integrated with other entities. Among the considerations should be the criteria under which any fail-safe or override modes are triggered, as well as the criteria under which

the system should be recalled or shut down. Agencies should also document the circumstances in which changes to an AI system or its operating environment necessitate reassessment or re-testing.

In addition, we'd recommend providing clear policy guidance to all agencies regarding the proper supervision and control of AI deployed at agencies, including minimum training on standards for employees involved in adjudicating AI recommendations. In particular, for systems that are safety- or rights-impacting it is prudent to assess both AI and human capabilities and limitations (together) for a given AI use case and implement comprehensive risk mitigation measures rather than evaluating the AI system in isolation. It is also worth considering standards for enabling timely intervention mechanisms and override authority in cases where AI failure is causing unacceptable harm. DoD policies on autonomous weapons systems (DODD 3000.09) provide a helpful model.

Question 7: Materials and Resources To Enable Agency Implementation in Contracts

We suspect that agencies will need to reallocate funding and/or deprioritize existing efforts to meet the aggressive timelines contemplated in this memorandum and the attendant EO. Guidance on flexibilities in existing services contracts, to enable agencies to re-task existing contractors would seem helpful. Additionally, templated language regarding minimum AI system compliance standards (as documented in 5.iv of the memo) for vendor contracts and GSA-established contracting vehicles (like IDIQs or BPAs) that support CAIO and other task execution would be useful.

Question 8: Key Data Elements for Annual Agency AI Use Case Inventories

We believe agency use cases should document:

- **Intended Goal:** the goal of the AI in context of use and how it would improve the status quo, how the goal aligns with agency objectives, how the AI achieves the goal, and who (if anyone) is tasked with enabling the AI to achieve the goal.
- **Anticipated Concept of Operations (CONOPs):** More detailed documentation can stem from agency goals, such as clarifying whether the AI system will interact with people in pursuit of agency objectives or unpacking how the AI achieves its goals by documenting its tasks, methods, and the data it relies on.
- **Cost and Resourcing Information:** As stated elsewhere, including budget and resourcing information in public disclosures would permit the public (and researchers

such as ourselves) to evaluate the relative efficacy of AI use cases to improve the efficiency and performance of government services.

    - **Staff Profiles and Contractor Counts:** Descriptions of the skills and qualifications of people charged with implementing AI systems would be helpful for transparency and to inform AI workforce development.

- **Risk Rating:** Use cases should also include a description of risks that AI systems pose and a grading of these risks so it is easy to determine which AI use cases in an agency are higher risk than others – the existing IT Portfolio Management Risk categories may be a useful starting point for this categorization.
- **AI Incidents:** As stated above, effective monitoring will require capturing any instances of AI harms or near-misses to ensure the USG and public have a comprehensive view into the kinds of issues emerging from the wholesale adoption of AI-technologies in government.

From an AI assessment perspective, all of this information will make it easier to evaluate these systems and make sure they are working as intended.

Additional Assistance

Additional CSET research on workforce, AI assessment, and cybersecurity, may also be helpful as agencies implement the EO and associated guidance. CSET is happy to brief on our prior work and engage, as helpful, with the USG as they undertake this important work. Please reach out to the primary POC or cset@georgetown.edu for further assistance.

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0068
Comment from Beth Noveck

Submitter Information

Name: Beth Noveck

General Comment

Artificial Intelligence (AI) is not just transforming economies and industries; it holds the key to revolutionizing public engagement with the federal government. The potential for AI to bridge communication gaps, streamline feedback, and foster inclusion is immense, yet unrealized.

Front and center in the guidance is the requirement for each agency to appoint a Chief AI Officer (CAIO) whose primary responsibility is “coordination, innovation, and risk management” of their agency’s uses of artificial intelligence.

The establishment of a senior AI role in every department underscores the importance of technology in governance. However, the role of the CAIOs should be explicitly linked to innovating public engagement through AI, ensuring that every voice is heard and accounted for in the policymaking process.

In order to take advantage of AI’s unmatched potential to analyze public sentiment, manage feedback, and scale engagement across diverse demographics, OMB’s guidance must evolve to explicitly require federal agencies to implement AI solutions that facilitate and enhance public consultations.

While the proposed guidance calls for “consult[ing] affected groups, including underserved communities, in the design, development and use of the AI, and use [of] such feedback to inform agency decision-making,” the guidance calls for doing so by means of antiquated methods, including:

User testing
Soliciting comments via the Federal Register
Customer feedback
Public hearings, or meetings, such as listening sessions, or
Any other transparent process

Noticeably absent is any injunction to take advantage of AI to make such consultations easier, faster and more equitable than the above methods.

While traditional methods of public participation are valuable, they are often limited by scale, speed, and accessibility. People might talk but it is very difficult for either the agency or the public to hear them because of the volume of comments.

Integrating AI can overcome these limitations, offering real-time analysis and broader inclusivity, particularly for underrepresented communities.

The guidance should be amended to require that the CAIO consults regularly with the public and use AI to make those consultations more effective and equitable.

There is a wide array of tools already in use by other governments. Over 500 governments use the Citizen Lab platform, which incorporates AI to cluster, group and organize public comments. AI is much faster than humans at making sense of large quantities of text and can automate the process of summarizing what people are saying, classifying submissions by topic and sorting them into categories to make it easier for governments and the public to read.

Your Priorities, a free, open source tool for public engagement from Citizens Foundation and used in thousands of online engagements globally, uses AI to scan incoming postings for toxicity. AI automates the process of spotting offensive speech that violates terms of service and community norms, bringing such language to the attention of moderators and reducing the cost of organizing engagements. Your Priorities uses AI to offer a “chatbot” so that the public and government organizers can get answers to questions such as “show me all the comments on Topic X” or “summarize the best comments on Topic Y.”

At MIT, Deb Roy’s Cortico uses machine learning to synthesize comments in live, face-to-face discussions. Remesh leverages artificial intelligence to rapidly make sense of answers to live questions in online sessions, making it possible to extract insights even from spoken conversations such as with communities that are low literacy.

AI translation tools like Facebook’s open source SeamlessM4T make it possible to translate writing into 100 languages and speech into 35 languages, creating avenues for non-native English speakers to participate in conversations on a level playing field.

If OMB amends the guidance to mandate that federal agencies use AI to enable broader, deeper, more meaningful and equitable engagement, innovators will produce even more such tools and agencies will learn how to use them.

Instead of telling agencies, as the guidance does, that they only have to engage “to the extent practicable,” OMB’s guidance should embrace the use of artificial intelligence to foster equitable engagement. It is time for federal agencies to lead by example, leveraging AI to ensure that participatory democracy is not just a principle but a daily practice.

We offer free, independent, evidence-based research on how to use AI for public engagement at https://rebootdemocracy.ai, including a chatbot (coming in early December 2023) to provide answers to questions about effectively using AI for engagement.

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: TechNet

General Comment

See attached file(s)

Attachments

FINAL TechNet Response to OMB AI Guidance 12.4

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December 5, 2023

Office of Management and Budget
725 Seventeenth Street, NW
Washington, D.C. 20503

RE: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

To Whom It May Concern:

TechNet appreciates the opportunity to comment on the Office of Management and Budget's (OMB) draft memorandum titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)." TechNet members make up many of our nation's leading AI developers, deployers, researchers, and users.

TechNet is the national, bipartisan network of technology CEOs and senior executives that promotes the growth of the innovation economy by advocating a targeted policy agenda at the federal and 50-state level. TechNet's diverse membership includes dynamic American businesses ranging from startups to the most iconic companies on the planet and represents over 4.2 million employees and countless customers in the fields of information technology, artificial intelligence, e-commerce, the sharing and gig economies, advanced energy, transportation, cybersecurity, venture capital, and finance.

Millions of Americans have been using AI for years to navigate traffic, search the internet, undertake research, conduct a spell check, vacuum their home, and discover new music. AI is also being used to predict severe weather more accurately, protect critical infrastructure, defend against cyber threats, and accelerate the development of new medical treatments, including life-saving vaccines and ways to detect earlier signs of cancer.

OMB's memorandum advances the impactful provisions in President Biden's recent Executive Order on "Safe, Secure, and Trustworthy Artificial Intelligence." This EO will bolster our workforce through investments in upskilling and training programs and our ability to attract and retain the world's best talent, policies TechNet has long championed. It will also lower the barrier to entry for AI research through the National AI Research Resource (NAIRR), strengthen our nation's cyber defenses, especially in the financial sector, and improve health care and education outcomes. We believe America must be the global leader in setting standards for the responsible development and deployment of AI. TechNet looks forward to working with the Biden Administration and Congress to ensure AI continues to deliver benefits for all Americans.

We appreciate that OMB's memorandum builds upon past efforts to properly inventory the federal government's use of AI. In December 2020, the prior Administration issued Executive Order 13960, providing guiding principles for federal agencies to follow in their development of AI methods and tools. Executive Order 13960 also ordered federal agencies

to annually "prepare an inventory of its non-classified and non-sensitive use cases of AI."[1] Each agency produces a uniquely structured inventory. This presents difficulties in building a comprehensive picture of the federal government's progress in utilizing artificial intelligence. To produce more fidelity in this area, TechNet consolidated the various annual inventories.[2] As of summer 2023, the federal government reported over 731 AI projects, 25% of which were undertaken by the Department of Energy, followed by the Department of Health and Human Services at 21%. AI is clearly already helping empower the U.S. government to better deliver essential services to the American public.

Forward-Looking Policies

We applaud the OMB for several insightful policies in this memorandum. These actions will help maintain the United States as the global AI development leader. We appreciate that part of Chief AI Officers' (CAIO) responsibilities will include efforts to remove barriers to responsible AI deployment through ensuring adequate IT infrastructure, effective and consistent datasets, development of the federal AI workforce, and utilization of generative AI.

CAIOs are also charged with "advocating within their agency and to the public on the opportunities and benefits of AI to the agency's mission." Our international competitors are working quickly to overtake America's lead in AI development; spending in China's AI industry is expected to hit $14.75 billion this year, accounting for about 10% of the world's total.[3] China also currently leads in AI adoption, with 58% of companies deploying AI and 30% considering integration. In comparison, the United States has less than half this adoption rate, with 25% of companies utilizing AI and 43% exploring its potential applications. CAIOs have an important role to play in building greater public trust and understanding of AI systems. The U.S. government should serve as a leader in novel deployments and innovation to drive the nation's global technology leadership in both the private and public sectors.

TechNet supports the government in developing "AI Ready Data." The federal government is one of the biggest producers of data in the world, and these important datasets are already fueling innovation in the public and private sectors. As we move to greater deployment of AI systems, ensuring this data is well-organized will allow these modern tools to deliver faster, cost-effective, and more accurate insights. We encourage OMB and other agencies to make datasets public when appropriate to increase AI research and development.

Existing Legal Protections

It is important to note that the use of AI in furtherance of unlawful behavior is already prohibited and actionable under existing laws, even in the absence of AI-specific regulation. For example, many existing anti-discrimination laws apply to AI models in important areas, including education, healthcare, employment, housing, financial services, policing and

[1] The federal database of AI use cases can be found here: https://ai.gov/ai-use-cases/
[2] TechNet's consolidated report on "Artificial Intelligence and the Federal Government" can be found here: https://drive.google.com/file/d/1i-7Gg4Z1thcFnAZ3C6TDjovdZdGgDg_j/view?usp=sharing
[3] Carreon, Miguel, and Michael De La Cruz. "According to IDC'S Forecast, China's AI Market to Exceed US$26 Billion by 2026, Hardware to Make Up 56% of Market." International Data Corporation. May 18, 2023. https://www.idc.com/getdoc.jsp?containerId=prAP50688623.

criminal justice, and access to goods and services.[4] We want to stress that agencies should utilize existing legal requirements when considering AI management practices and seek to build upon legal precedent for addressing this emerging technology.

Several federal leaders have stated their intent to use existing laws to regulate AI; for example, on April 25, the Consumer Financial Protection Bureau, the Department of Justice's Civil Rights Division, the Equal Employment Opportunity Commission, and the Federal Trade Commission issued a joint statement outlining how their existing enforcement authorities apply to automated systems.[5] In addition, National Labor Relations Board (NLRB) General Counsel Jennifer Abruzzo has stated that she will "… apply the [National Labor Relations] Act to protect employees from intrusive electronic monitoring and automated management practices…".[6] Additional oversight in these areas should not be unnecessarily duplicative or create inconsistent or conflicting standards.

The private sector must comply with existing legal requirements, including laws protecting privacy and preventing discrimination. The use of AI applications falls within the scope of these legal protections, and we encourage OMB to utilize existing legal frameworks and not create potentially duplicative regulations. Accordingly, TechNet members are designing, developing, deploying, and using AI technology cautiously and only after rigorously assessing the benefits and risks of implementation.

Manual and Automated Systems

The memorandum mentions that agencies should review when AI systems should have "opt-out" options. We write to urge that any "opt-out" requirements for AI systems should be narrowly tailored to avoid undermining effective AI research and deployment. TechNet agrees that developers should thoroughly review their systems' resiliency and contingency considerations; however, requiring a "manual" version of all automated systems is neither technically feasible nor practical.

Requiring an overly broad "opt-out" feature to direct users to manual systems will ultimately discourage the development of trustworthy AI by disincentivizing AI research and deployment. If companies providing AI systems for the government are also required to offer a manual system in broad circumstances, there will be less of a compelling business case to innovate and develop advanced, responsible AI technologies. This, in turn, will depress American AI development when the stakes for global leadership in AI innovation are at their highest and could cause the United States to not only cede its role as the world's global technology leader but also provide a pathway for foreign adversaries to exceed U.S. capabilities. It also could lead to greater inefficiencies and costs for the American public,

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[4] Several existing enforcement statues were outlined in the National AI Advisory Committee's Year One Report: *Civil Rights Act of 1964, Equal Educational Opportunities Act, Americans with Disabilities Act, Individuals with Disabilities in Education Act, Genetic Information Nondiscrimination Act, Immigration and Nationality Act's Anti-Discrimination Provision, Fair Housing Act, Equal Credit Opportunity Act, Violent Crime Control and Law Enforcement Act,* and the *Omnibus Crime Control and Safe Streets Act.*

[5] Chopra, Rohit, Kristen Clarke, Charlotte Burrows, and Lina Khan. "JOINT STATEMENT ON ENFORCEMENT EFFORTS AGAINST DISCRIMINATION AND BIAS IN AUTOMATED SYSTEMS." FTC.Gov. April 25, 2023. https://www.ftc.gov/legal-library/browse/cases-proceedings/public-statements/joint-statement-enforcement-efforts-against-discrimination-bias-automated-systems.

[6] Office of Public Affairs. "NLRB General Counsel Issues Memo on Unlawful Electronic Surveillance and Automated Management Practices." National Labor Relations Board. October 31, 2022. https://www.nlrb.gov/news-outreach/news-story/nlrb-general-counsel-issues-memo-on-unlawful-electronic-surveillance-and.

increased cybersecurity risks, and hamper access to digital services. TechNet believes that requirements for manual alternatives should be based on the known risks of each use case.

Rights-Impacting AI

We have concerns that the memorandum's current definition of "Rights-Impacting AI" could encompass helpful and rights-neutral AI tools and use cases. The memorandum states that "Rights-Impacting AI" should include AI systems whose output is the basis for decisions that impact one's "access to critical resources or services, including healthcare, financial services, social services, transportation, non-deceptive information about goods and services, and government benefits or privileges." We urge agencies to instead of marking all AI deployments in an industry as "rights-impacting" to utilize a risk-based approach to the specific use case. For example, specific to financial services, we suggest instead tailoring the requirement to focus on known or rationally anticipated harms. Without this risk-based approach, very low-risk AI activity could be categorized as high-risk or "Rights-Impacting" and subject to overbroad requirements. Low-risk financial AI use cases could include:

- AI to categorize expenses for tax or other financial planning/budgeting purposes.
- AI to connect people to financial experts based on the consumer's financial/tax needs and the expert's areas of expertise.
- AI to "read" and extract data from financial forms so consumers don't have to enter data and minimize manual entry errors.

The memorandum also lists purposes that are "presumed to be rights-impacting" if an AI system is used to "control or meaningfully influence the outcomes of any of the following activities or decisions." We also urge that these purposes be reviewed considering the known risks instead of generalizing impacts on broad deployment contexts. We specifically want to draw attention to item G on this list, which includes AI use cases in the workplace. We believe it is important to underscore that AI is currently being deployed in the workforce to benefit employees, and we advise not broadly restricting this technology.

Automated systems are being deployed in workplaces across the country to help free employees from rote and inefficient tasks so they can focus on creative outputs. Several of our members utilize automated tools to assist with scheduling, which can ensure more experienced managers are on the same shift as new employees for mentoring, coordinating predictive maintenance for equipment, or when additional orders for needed supplies should go out. While a human could organize these services, by automating these operations, employees are able to make decisions more quickly and go about their workday in a more efficient manner. We are seeing that AI-driven tools enable larger, more integrated teams because entities can coordinate and collaborate more effectively. According to a study by MIT Sloan, employees that are empowered by AI feel more competent in their roles, more autonomous in their actions, and more connected to their work, colleagues, partners, and customers. Notably, only 8% of the global survey respondents were less satisfied with their jobs because of AI.[7] When reviewing whether automated tools in the workplace are "Rights-Impacting," TechNet urges OMB and federal agencies to consider the broader context of these systems' impact on employees' well-being in their careers.

[7] S. Ransbotham, D. Kiron, F. Candelon, S. Khodabandeh, and M. Chu, "Achieving Individual — and Organizational — Value With AI," *MIT Sloan Management Review* and Boston Consulting Group, November 2022

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We also want to underscore that bias in human processes that impacts one's rights is well documented but can be difficult to spot until it is too late to correct. By contrast, TechNet members are developing AI systems that can detect and avoid or mitigate bias. TechNet members follow legal guidelines at all stages when developing, testing, and monitoring AI assessments, and in many cases, they test for group differences beyond those required by law.

Conclusion

We look forward to working with you on AI policy and appreciate the opportunity to discuss this innovative technology. We stand ready to serve as a resource to you in your examination of this important issue. Thank you for your consideration of our perspective.

Sincerely,

Carl Holshouser

Executive Vice President and Corporate Secretary

PUBLIC SUBMISSION

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0070
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Hitachi Digital

General Comment

Please find attached comments from Hitachi group companies doing business in the U.S.

Attachments

12052023.OMB.Agency Use of AI

HITACHI
Inspire the Next

December 5, 2023

The Honorable Clare Martorana
U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

RE: *Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum*

Dear Ms. Martorana:

The following comments are submitted by Hitachi Group companies (Hitachi) doing business in the United States in response to OMB's November 3 *Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum.*

Companies like Hitachi have been developing artificial intelligence (AI) solutions for decades. Even before the recent discussions surrounding the technology, Hitachi has recognized the potential for AI—especially in the industrial and generative spaces—as a tool for productivity, efficiency, and automation. Effectively harnessing AI is a path for business acceleration and a catalyst for innovation.

Given our understanding of the potential impact of this technology to positively further the U.S.' standing, Hitachi appreciates the opportunity to engage with the OMB and offer comments regarding the advancement of AI technology within the U.S. federal government.

Responses to OMB Questions

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

The speed of change and innovation associated with this technology and the potential of its impact requires collaboration, coordination, and consistent communication across the federal government. It is possible an AI solution created in one agency may be applicable to a need in a different agency. By openly and regularly sharing and discussing solutions across agencies, the federal government can maximize its resources rather than duplicating efforts by creating the same system via different vendors. It may also capitalize on existing innovations, spur new ideas, and limit or eliminate development redundancies.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body?

What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

Hitachi is in favor of the establishment of AI Governance Bodies to support policy monitoring, governance, and enforcement; efficient and timely information (e.g. training data in model development, performance metrics) and best practice sharing; and accelerated innovation and identification of challenges and opportunities specifically associated with AI technology and solutions. This allows for direct focus on this topic rather than a potentially broader set of concerns that may be on the docket for existing groups with overlapping interests or concerns.

Hitachi applauds the OMB's encouragement that agencies incorporate additional best practices from existing AI guidelines such as the National Institute of Standards and Technology (NIST) AI Risk Management Framework, the White House Blueprint for an AI Bill of Rights, and applicable international standards. Agencies such as the Consumer Financial Protection Bureau, the Department of Justice (Civil Rights Division), the Food & Drug Administration (FDA), and the Equal Employment Opportunity Commission (EEOC) also have their own guidance related to AI and civil rights, workforce development, consumer protections, employment, and the like. We therefore recommend that agencies with overlapping concerns and/or focus areas research the standards that already exist throughout the federal government before creating their own frameworks related to risk management, consumer protection, cybersecurity, etc. to avoid having an excess of duplicate or similar guidelines.

As for the potential of agencies establishing AI Governance Bodies, their existence could promote a "one-stop shop" for AI developers and other employees using AI systems looking for guidance on specific situations from experts or those well-versed in agency and government AI guidance. Similarly, having AI Governance Bodies could allow for better communication amongst agencies, thereby allowing more efficient and streamlined efforts to update guidance and avoid overlap, as mentioned above.

3. How can OMB best advance responsible AI innovation?

AI development and advancement is key to future innovation across industries in the U.S. We cannot afford to fall behind. Adequate guardrails to preserve and promote safety, security, and responsible use of AI systems is paramount to OMB's considerations; however, this must go hand-in-hand with the understanding that regulations that are too stringent or overreaching will push innovation elsewhere, jeopardizing our standing as a global leader and introducing unintended risks to competitiveness and national security. In this vein, Hitachi strongly cautions against over-regulating AI, especially when it comes to certain factors such as heavily regulating open-source AI. This would essentially concentrate "power"–that is, the ability to freely innovate–into a few sources, thereby removing competition, encouraging monopolization of data, and stifling creativity, innovation, and digital transformation.

We recommend that open architecture be a key criterion in any government system, including AI-based systems that are constantly learning and improving over time. This will ensure that the AI system is interoperable and not siloed. Transparent sharing of the current performance metrics

of an operational AI system is important for those looking to leverage and reuse an existing solution for a similar or new application. Note that performance is heavily dependent on the underlying infrastructure for both model development and application predictions. Additionally, model shift can be evaluated to trigger model re-training and evaluation of additional machine learning.

When creating recommendations to promote the advancement of responsible AI innovation, we suggest that OMB should focus on how government use of AI systems can improve both the quality of agency outcomes (e.g. securing the protection of classes and/or individuals) and U.S. economic efficiency, financial standing, and global position. Framing the advancement of AI from behind these two lenses will allow the OMB to provide requirements and guidance that prioritize our people and our country while also creating an environment where AI can proliferate and thrive.

We also suggest that, moving forward, the OMB provide an explicit map of how AI systems with larger or critical impacts, such as those associated with public health or military operations, are tiered. This would allow for a clear understanding of how agencies throughout the federal government should assess large, overarching risks that could potentially have a harmful or large-scale impact on the U.S. population.

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

When used with adequate safeguards, there is tremendous potential for generative AI as a tool for productivity, efficiency, and automation; a business enabler; a path for business acceleration; and a catalyst for innovation.

Examples for the use of generative AI for productivity and efficiency may include:

- **The unification, collation and streamlining of data to find the "single truth"** from multiple documents or cases.
    - This would be beneficial in cases where individuals are communicating with multiple agencies or over multiple interations. If an individual has previously communicated with an agency and has undertaken actions in between, generative AI can sort through the initial communication and the actions to recommend the best solution for the individual's case. Even if the subsequent actions occurred with separate agencies, the initial agency could still employ a generative AI system to read through this individual's timeline and suggest next steps. This might be especially useful for departments that have historically had complex interactions with individuals requiring the input of several teams/offices or the ability to parse through specific details and situations, such as the IRS, the SSA, or the U.S. Citizens Services divisions of U.S. Embassies overseas.
- **Clearing of backlogs in department processes**, including those caused by understaffing or residual impacts from the COVID-19 pandemic, and the **expediting of customer response times.**
    - Generative AI can provide personalized suggestions to individuals, user types, and/or agencies, which not only streamlines workflows but may also accelerate

an agency's ability to solve issues. By reducing the number of vague form responses, minimizing response times, and providing personalized next steps, this can also cut back on the frustration and inaction that often follows in these situations.

- **The simplification and streamlining of federal grant applications.**
    - Given the vast and varied amount of funding that the government provides, generative AI could be offered by agencies as a tool for those applying to grants, especially those in areas that are critical to national security, climate change, and the stability of the economy. Generative AI systems could help to determine eligibility, sort through available grants, or even help with filling out grant applications. This, in turn, can allow for greater accessibility to government funding by helping individuals and small businesses overcome barriers such as lack of time and understanding of the grants process.

These are but a few examples of many ways agencies can take advantage of generative AI to improve operations. As innovation and development continues and the uses of generative AI become clearer, it is likely these opportunities will grow exponentially.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

Hitachi believes that the cases suggested for presumed safety- and rights-impacting AI are currently sufficient. However, we agree with the text that this is not an exhaustive list and that agencies should create their own scope of possible cases based on precedent and knowledge of their specific area of expertise.

It is important to note that, although implied in the rights-impacting section on page 12, we recommend that the OMB explicitly suggest that minimum practices should be followed for all AI systems that deal with restricting, lessening, and/or studying the spread of misinformation/disinformation in the U.S. The proliferation of misinformation/disinformation, including the use of deep fakes, has been proven to both control and/or meaningfully influence outcomes (e.g. the integrity of elections and voting infrastructure and the protection of young people engaging in online activities). Therefore, this should be clearly stated in this section.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

As AI technology is constantly evolving and new applications and concepts are constantly emerging, the minimum practices outlined here must be regularly re-evaluated and updated. This should occur more frequently than other non-AI federal government policies given the speed of change and innovation of this technology.

Regarding context specific mitigations: as agencies begin to apply their own context-specific mitigations and situations emerge that may require action outside of the expectations of what is

outlined in the OMB policies, Hitachi encourages the federal government to actively avoid instances where they may accidentally provide updated guidelines that are bogged down in restrictions or risk mitigations that are too specific.

Regarding the need for independent evaluation of the AI system (page 16): while this is a necessary practice, using third-party vendors to conduct evaluations can create intellectual property (IP) protection and other security concerns. Guardrails should be put in place to prevent IP leakage and address privacy and security concerns. There should also be work with partners to assist in creating testbeds for third-party verification to ensure AI systems work as intended and avoid compromising IP. These testbeds can also be used to assess other, more complex dimensions of accountability, such as fairness and trustworthiness.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

As noted elsewhere, the transparent sharing of clear and concise information about the following information can help agencies, as appropriate, incorporate the requirements and recommendations into relevant contracts:

- Policies (including those in-flight for visibility and alignment), governance, and enforcement.
    - Includes risk-assessment tiering for AI systems with large or critical impacts, such as those associated with public health or military operations. Also should include guardrails for third-party collaborations on evaluations, testbed creation, system verifications, etc.
- Best practices and learnings (e.g. training data in model development, performance metrics, use cases, etc).
- Ongoing concerns and current challenges and opportunities associated with AI technology and solutions being explored.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

Hitachi recommends that agencies provide more detailed information, such as training data, related to the metadata that is already released. In order to provide the most accurate picture possible regarding agency use of AI systems, we suggest that the following questions also be addressed when possible:

- How does the agency deal with data drift?
- How can the data used in the system be repurposed for other agencies and/or use cases?
- How did the agency choose the system that was eventually deployed? What were the parameters for comparison to other potential models (e.g. the evaluation metrics, testing results, etc.)?

It is recommended, although not required as part of the annual use case inventory, for agencies to publish which use cases have gone through responsible AI evaluation and are auditable. This would allow an AI system and/or its users to explain how they arrived at a particular decision or

inference. This could involve tracing, which would show, via AI, all the steps logged while solving a problem. Auditability would allow agencies to review documents and records necessary to ensure responsible AI (explainable, ethical, and efficient).

Historically, there have been incidences where agency AI use cases have been removed, seemingly at random, after being released to the public. As such, going forward, it would be helpful and recommended for agencies to provide explanations of why a certain use case was removed from public reports despite having been available for some time.

Conclusion

Hitachi appreciates OMB's work in creating new agency policies, requirements, and guidance related to AI governance, innovation, and risk management, including providing specific minimum risk practices for uses of AI that impact the rights and safety of the public as well as the economic growth of the U.S.

We look forward to continuing to work with the Biden-Harris Administration and your office to provide meaningful feedback as needed in this space.

Sincerely,

Gajen Kandiah
President, Hitachi Digital
Executive Chairman, Hitachi Digital Services
Co-Leader, Hitachi AI Transformation Center

Background on Hitachi

Hitachi, founded in 1910 and headquartered in Tokyo, Japan, drives Social Innovation Business, creating a sustainable society with data and technology. We solve customers' and society's challenges with Lumada solutions leveraging information technology (IT), operational technology (OT), and products under the business structure of Digital Systems & Services, Green Energy & Mobility, Connective Industries and Automotive Systems. Driven by green, digital, and innovation, we aim for growth through collaboration with our customers. The company's consolidated revenues for FY22 (ended March 31, 2023) totaled $80.6B, with 696 consolidated subsidiaries and approximately 322,000 employees worldwide.

Since establishing a regional subsidiary in the United States in 1959, Hitachi has been a committed American partner. For over thirty years, it has invested heavily in research and development (R&D) in the U.S., and this continued reinvestment has resulted in 24 major R&D centers that support high-skilled jobs in manufacturing and technology. Dedicated to delivering the technologies of tomorrow, Hitachi located our digital headquarters in Santa Clara, Calif. to explore applications in ML, AI, Internet of Things (IoT) devices, data analytics, and autonomous vehicles among other advanced technologies. Hitachi is also proud of its human capital investment with more than 16,000 employees across 60 companies in the U.S. At 17% of total revenue, North America is Hitachi, Ltd.'s second largest market, following only the Japanese market, with $13.9 billion in revenue in FY22.

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: Innocence Project

General Comment

See attached file(s)

Attachments

IP RFI Final re. AI EO

INNOCENCE PROJECT

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Innocence Project Comments on *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* Draft Memorandum

Background

The Innocence Project (IP) is pleased to respond to The White House and OMB's request for public input on its draft memorandum *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)*. We are the leading national organization working to free the innocent, prevent wrongful convictions, and create fair, compassionate, and equitable systems of justice for all. We commend the Administration's efforts to create comprehensive safeguards for the use of AI as it increasingly applies to a broad range of aspects of our culture, life, and governance.

IP's work is organized around three fundamental pillars: restoring freedom for wrongfully convicted people, transforming system inequities and problems that lead to wrongful convictions, and advancing the movement of organizations providing support and legal representation to people with innocence claims. Given the prominent role that misapplied science has played in wrongful conviction cases, ensuring the integrity of science and technology is a key part of our efforts to transform systems. We work to 1) strengthen the standards that govern the use of science in the criminal legal system, 2) urge system actors to examine the evidence for scientific accuracy and reliability, and 3) consider the broader civil rights implications of surveillance and investigative technologies.

We, therefore, view the introduction of emerging technologies–like facial recognition technology and predictive policing–into the criminal legal system with significant concern. We know from hard-learned experience that the use of untested, unreliable, and unregulated technologies can and will draw innocent people into the criminal legal system, perpetuate racial biases, and exacerbate racial disproportionality.

Support for AI Core Principles and Priorities

The Innocence Project supports the following principles and priorities on the use of AI: 1) transparency, 2) scientific integrity, 3) equity, dignity, and fairness, 4) the duty to correct and notify, and 5) data protection.

We are very pleased to see that the OMB memorandum thoroughly covers and considers most of these principles and priorities, as described below.

<u>Transparency</u>
Transparency is critical to promoting accountability and public trust. It can be achieved by providing clear public notification and information about the case-based use of AI and obtaining

input from stakeholders and directly impacted communities. We commend the OMB for promoting transparency by requiring Chief Financial Officers (CFO) Act agencies to implement the following practices:

- Maintain AI use case inventories that are publicly available.
- Consult and incorporate feedback from affected groups.
- Develop and publicly release a "strategy for identifying and removing barriers to the responsible use of AI and achieving enterprise-wide advances in AI maturity."
- Take steps to ensure transparency and adequate performance for their procured AI.
- Notify "individuals when AI meaningfully influences the outcome of decisions specifically concerning them."

Scientific Integrity

Scientific integrity refers to a pattern of research conduct, characterized by the application and promotion of ethical and deontological principles, that encourages and assures responsible and reliable processes.[1] A 2010 memorandum from the Office of Science and Technology (OSTP) states that a culture of scientific integrity is ensured by relying on honest investigation, open discussion, refining understanding, and commitment to the evidence.[2] Assessing the validity and reliability of an AI system and providing training and educational resources contribute to the maintenance of scientific integrity. We are pleased to see that these values are encouraged through some of the minimum practices listed in Section 5, such as the following:

- Ensure adequate human training and assessment.
- Test the AI for performance in a real-world context.
- Independently evaluate the AI.

Equity, Dignity, and Fairness

AI introduces new ethical, legal, and social challenges, including risks of discrimination that can lead to unfair outcomes. Certain communities are more likely to be subject to the use of a range of AI technologies and thus to their inherent bias and discrimination. Models that are built using biased, inaccurate, or non-representative data are inherently flawed and have an increased risk of making discriminatory predictions or decisions that lead to entanglement in the criminal legal system. An overarching, standardized, and regulated mechanism for reviewing and mitigating risks associated with the use of AI is thus necessary to advance equity, dignity, and fairness. We are pleased with the minimum practices that aim to investigate and mitigate risks as well as maintain equity, dignity, and fairness, such as the following:

- Conduct ongoing monitoring and mitigation for AI-enabled discrimination.
- Take steps to ensure that the AI will advance equity, dignity, and fairness.
- Complete an AI impact assessment.
- Promote competition in the procurement of AI.
- Maintain options to opt-out where practicable.

Duty to Correct and Notify

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[1] Rita H. Pickler, *Artificial "Intelligence" and Scientific Integrity*, 72 NURS. RES. 165 (2023).
[2] John P. Holden, *Memorandum for the Heads of Executive Departments and Agencies, Scientific Integrity*, https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf.

The duty to correct and notify refers to an agency's obligation to remediate adverse events and notify individuals who are negatively impacted by them. This ensures accountability and increases public trust. The following minimum practices will encourage CFO Act agencies to uphold the duty to correct and notify:

- Notify negatively affected individuals.
- Maintain human consideration and remedy processes.

Data Protection

Because of the risks of impact that certain AI systems may pose and the risks of data breaches, data protection is essential. There is no single overarching data protection legislation in the United States, but rather multiple federal and state laws that address personal data protection.[3] Agencies must adhere to the appropriate legislation and develop plans for how (and by whom) data is collected, stored, secured, used, retained, and destroyed. The memo aligns with this priority by requiring agencies to do the following:

- Develop and publicly release a plan for establishing adequate enterprise capacity for AI innovation, which must include cybersecurity compliance.
- Update cybersecurity authorization.

Proposed Additional Considerations

While we applaud the practices and requirements described in the memorandum, we believe that some areas need more depth or guidance and additional practices should be considered. We recommend that the following proposals be incorporated into the memorandum for implementation. These may be particularly relevant in response to Question 6 (Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?), though they have implications more broadly.

Minimum qualification for Chief AI Officers (CAIOs)

The CAIO serves as the lynchpin for the development and implementation of AI protections and policies within each agency. CAIO roles, responsibilities, seniority, position, and reporting structures are outlined in the memo; however, the CAIO's minimum qualifications are not clearly stated. IP recommends including a clear list of minimum qualifications to aid agencies in finding individuals with the education, experience, and skill sets needed to effectively do the job.

Human intervention

Section 5(c)(iv)(A)(3) states that agencies need to conduct an AI impact assessment but if they cannot directly evaluate the quality and appropriateness of the data due to a lack of access, they can obtain sufficient descriptive information from the AI or data provider. The reporting of human intervention should be listed as a minimum requirement for descriptive information. Human intervention relates to human manipulation of the data, e.g. if any human has filtered,

[3] Relevant Legislation and Competent Authorities, https://iclg.com/practice-areas/data-protection-laws-and-regulations/usa.

applied labels to, or edited the data.[4] This can greatly affect the reliability, accuracy, and quality of the data.

Limited use of AI black boxes

The AI black box problem refers to the inability to see how some AI systems make their decisions. Many machine learning algorithms are indecipherable, particularly popular deep learning neural network methods.[5] The processes that occur in these boxes are self-driven and most programmers, data scientists, and users are unable to interpret them. The lack of explainability makes it difficult to adequately assess bias and determine where problems stem from. Black box models that preclude a clear understanding of their decision-making processes warrant additional up-front and ongoing scrutiny.

Explainability is attained by describing how deployed AI models' algorithms work or how the model predictions carry out the decision-making process.[6] Algorithms are deemed to be explainable when how they function or arrive at certain predictions can be described. AI explainability builds understanding and trust. Agencies should be encouraged to utilize AI systems that are explainable. When there are no explainable algorithms available for a particular task, understanding and trust can still be forged by explaining how the AI predictions influence the decision-making process. AI developers and agencies need to understand how to achieve explainability for various AI models and find a balance between prediction accuracy and explanation.

Repeatability, reproducibility, and robustness

Repeatability, reproducibility, and robustness assessments of proposed safety-impacting and rights-impacting AI systems should be listed as a minimum standard. Repeatability is the ability to continuously act, under the same conditions, without outcome variation. Repeatable AI models output the same predictions with little to no variation during independent tests conducted using the same or similar conditions.[7] If the model is repeatable, the AI user will have greater confidence in it.

Reproducibility is the ability of independent team members to draw the same conclusions using the same AI methods by relying on documentation made by the original tester.[8] Reproducibility affects the trustworthiness of the AI product and the agencies utilizing them.[9] The reproducibility of AI methods is a cornerstone of trustworthy AI.[10] Agencies need to measure the repeatability

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[4] S Iswaran, Model Artificial Intelligence Governance Framework (2nd ed.), https://www.pdpc.gov.sg/-/media/files/pdpc/pdf-files/resource-for-organisation/ai/sgmodelaigovframework2.pdf.
[5] Arun Rai, *Explainable AI: From Black Box to Glass Box*, 48 J. Acad. Mark. Sci. 137 (2020).
[6] John A. McDermid et al., *Artificial Intelligence Explainability: The Technical and Ethical Dimensions*, 379 Philos. Trans. R. Soc. Math. Phys. Eng. Sci. 20200363 (2021).
[7] Andreanne Lemay et al., *Improving the Repeatability of Deep Learning Models with Monte Carlo Dropout*, 5 Npj Digit. Med. 174 (2022).
[8] Odd Erik Gundersen, *The Fundamental Principles of Reproducibility*, 379 Philos. Trans. R. Soc. Math. Phys. Eng. Sci. 20200210 (2021).
[9] Iswaran, *supra* note 4.
[10] Riccardo Albertoni et al., *Reproducibility of Machine Learning: Terminology, Recommendations and Open Issues*, (2023), http://arxiv.org/abs/2302.12691 (last visited Nov 21, 2023).

and reproducibility of deployed AI systems to understand where potential variations may stem from.

Lastly, robustness refers to an AI system's ability to handle error during execution and erroneous inputs.[11] Robustness is measured by the degree to which the whole system or a component of it can function accurately in the presence of erroneous inputs or taxing conditions.[12] Agencies can build trust in the AI system when they prove that the deployed model is sufficiently robust. Agencies need to evaluate robustness because it is not possible for models to determine and set out all preconditions and consequences for a particular action.[13] Hence, there is a probability of models generating nonsensical or unexpected results that may not be perceived by a human when minor modifications are made to inputs. Robustness assessments involve scenario-based testing of anticipated erroneous inputs.

We note that repeatability, reproducibility, and robustness assessments may be resource-intensive. If necessary, agencies can take a risk-based approach and focus this testing on the AI-powered features that they plan to utilize.

Facilitating the auditing process through traceability

Agencies that use safety-impacting and rights-impacting AI systems should be required to keep a record of data provenance, procurement, preprocessing, storage, and security to facilitate internal and external auditing processes.[14] The records should also include notes about data representation, sufficiency, integrity, relevance, and timeline, as well as any unpredicted data issues that were encountered. All of this information should be stored in a process log. As an alternative to manual record-keeping, agencies can use traceable AI models. A model is traceable when its predictions as well as processes and datasets used to generate those predictions are automatically documented in an understandable way (audit logs). Traceability is another key requirement for trustworthy AI.[15] Traceability opens the door for explainability and transparency.

Guidance on risk levels

AI systems can and should be classified as low, moderate, and high risk. For example, the European Union AI Act classifies AI systems that will be used to make biometric identification of humans and systems that will use biometric data to make inferences about humans (with the exclusion of some) as high risk.[16] The memo needs to provide guidance on how to determine the risk levels for particular AI systems to ensure clarity and consistency across the board and to ensure that higher levels of care are taken in the use of high risk AI systems.

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[11] Andrea Tocchetti et al., *A.I. Robustness: A Human-Centered Perspective on Technological Challenges and Opportunities*, (2022), http://arxiv.org/abs/2210.08906 (last visited Nov 21, 2023).
[12] Pin-Yu Chen & Payel Das, *AI Maintenance: A Robustness Perspective*, 56 COMPUTER 48 (2023).
[13] ISWARAN, *supra* note 4.
[14] *Id.*
[15] Marçal Mora-Cantallops et al., *Traceability for Trustworthy AI: A Review of Models and Tools*, 5 BIG DATA COGN. COMPUT. 20 (2021).
[16] EU Artificial Intelligence Act, https://www.europarl.europa.eu/doceo/document/TA-9-2023-0236_EN.pdf.

Human involvement in AI-augmented decision-making at all levels of risk

To mitigate automation bias, AI-augmented decision-making should be human-centric, i.e., involve human consideration. The memo makes this a minimum practice for decisions that pose high risks to rights and safety. However, human involvement should be considered for some decisions that initially pose low to moderate risks because these decisions may collectively pose high risks to rights and safety. Agencies need to determine and document the extent of human oversight.[17] Generally, AI should be approached as a collaboration between humans and machines in all contexts, not only those determined to be high risk.

Increased Transparency

In addition to the information that agencies are already required to post on their website, agencies should also be required to post the findings of their impact assessments, internal validations, and ongoing monitoring. Doing this does not only promote transparency, but it can help other agencies with their decision-making and AI procurement processes.

Address overuse of certain AI in particular communities

The memo needs to address the overuse of rights-impacting AI, e.g. surveillance technologies, in certain communities. Even if agencies utilizing rights-impacting AI meet the minimum standards outlined in the current memo, the collective use of multiple AI systems may result in disproportionate burdens and impacts on particular communities. Additionally, impact assessments' documentation of the potential risks of using AI should include consideration of how the AI system under evaluation may interact with other systems operating in the same arena.

Moving Forward Together

Advances in technology have always presented opportunities and risks, and artificial intelligence is no different. It is one of today's most powerful technologies, with the potential to improve people's lives and tackle some of society's biggest challenges. At the same time, it has the potential to dramatically increase threats to safety and security, infringe upon civil rights and privacy, and erode public trust and faith in democracy. We believe that the requirements and minimum standards in this draft memorandum will help to reduce those risks and are a step in the right direction We encourage the Biden Administration and OMB to consider the additional guidance and practices offered above to increase the transparency and scientific integrity of these emerging technologies and to mitigate harms to communities disproportionately impacted by the criminal legal system.

[17] ISWARAN, *supra* note 4.

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: MITRE

General Comment

MITRE's response to the subject RFI is attached. Please let me know if you have any questions or if we can help in any other way.

Attachments

MITRE OMB AI Implementation Response

MITRE's Response to the OMB RFI on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

December 5, 2023

For additional information about this response, please contact:

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MITRE has a 50-year history of partnering with federal agencies to apply the best elements of artificial intelligence (AI) and machine learning (ML) to advance agency missions while developing and supporting ethical guardrails to protect people and their personal data. Our team's experience with the entirety of the AI/ML adoption and life cycle has strengthened our ability to anticipate and resolve future needs that are vital to the safety, well-being, and success of the public and the country.

Introduction and Overarching Recommendations

MITRE reviewed with interest the recent Executive Order (EO) on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence[1,2] and the Office of Management and Budget's (OMB) draft implementation memorandum. The federal government can serve as a catalyst to accelerate the development of tools and framework to mitigate risks and enhance the trustworthiness and security of AI systems, and the approaches outlined in the EO will help advance that outcome considerably. Our overall reactions are provided below, with answers to the OMB request for information's (RFI's) specific questions in the section that follows.

Level of selected governance model. Managing and regulating emerging technologies like AI is challenging due to the field's rapid evolution, wide-ranging adoption possibilities, and the community's developing understanding of AI's risks. The EO and draft memorandum take a balanced governance approach, allocating complementary responsibilities across both the Executive Office of the President (EOP) and individual federal agencies. This approach avoids the pitfalls of a single entity approach, which can result in decisions lacking context and

[1] Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. 2023. The White House, https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/. Last accessed December 1, 2023.

[2] Please note that any unspecified references to an EO within this document are explicitly referring to this particular EO (14110 of October 30, 2023).

regulatory confusion. It also avoids the pitfalls of a completely distributed approach, which demands duplicative expertise and is nearly impossible to implement consistently or analyze effectively at the whole-of-government level.

However, this balanced governance approach necessitates substantial effort in bridging the gap between EOP policymakers and agency implementation, as well as between government and industry. Activities such as establishing a common understanding, standardized frameworks, and shared infrastructure are crucial. While EOP staff may be able to prioritize these tasks initially, such coordination efforts run the risk of being sidelined over time (especially across presidential administrations), jeopardizing the long-term success of the initiative. Therefore, MITRE recommends that OMB incorporate this bridging function into its implementation plan for the EO. Various coordination approaches can be employed, including a federal coordination office, an Information Sharing and Analysis Center, a Center of Excellence, a consortium, and/or an FFRDC. MITRE has experience with each of these approaches and would be pleased to discuss their advantages and disadvantages in helping OMB and federal agencies achieve their AI goals.

EOP messaging. It is essential for the EOP to strike a better balance between focusing on managing risks posed by and ensuring agencies feel encouraged to leverage AI to enhance their missions. By fostering a supportive environment for responsible and impactful AI use, agencies will be more inclined to adopt AI technologies and contribute to the overall advancement of AI in the federal government.

The EOP should also openly lead by example by initiating projects to responsibly leverage AI in meeting their own missions. This would not only set an example for agencies to follow but also provide the EOP with insights and experiences that will be necessary in fulfilling their oversight and interagency coordination responsibilities.

Flexibility and adaptability in AI governance. The importance of flexibility and adaptability in AI governance cannot be overstated, as each agency will have different needs and requirements based on their size, organization, budget, mission, and internal AI talent. Common best practices, guidance, training, and a list of priority risks of common concern[3] will help agencies navigate the AI landscape without OMB direction becoming overly prescriptive.

Clear governance inputs and processes. Based on our extensive experience in cyber governance, we understand that efficient governance necessitates well-defined inputs, processes, outputs, roles, responsibilities, information sharing, and decision-making authorities. The same will hold true for AI governance. This clarity is crucial regardless of whether a new AI governance body is established or AI governance is integrated into existing governance bodies. A well-defined governance structure will facilitate the responsible planning, development, deployment, and use of AI across federal agencies.

Collaboration and coordination. The advancement of responsible AI innovation and the achievement of EO objectives rely heavily on collaboration and coordination between agencies, as well as with external stakeholders and subject matter experts (SMEs). By fostering a culture of cooperation, the federal government can harness the collective knowledge and expertise of various stakeholders to ensure the safe, secure, and trustworthy development and use of AI

[3] Developing something similar to Appendix 5 within the Capital Programming Guide (https://www.whitehouse.gov/wp-content/uploads/2021/01/capital_programming_guide.pdf) supplement to OMB Circular A-11 could be useful.

technologies. The EO and this draft OMB memorandum naturally focus on internal federal government activities, but efforts to ensure the federal government collaborates with and leverages insights from nongovernmental organizations will also be required.

Requirements for agencies that are part of a CFO Act agency. The draft memorandum prescribes requirements for agencies that are considered a CFO Act agency[4]. A CFO Act agency must designate a Chief Artificial Intelligence Officer (CAIO) responsible for the requirements specifically called out for CFO Act CAIOs, as well as the broader CAIO requirements. Agencies that are not CFO Act agencies must also establish a CAIO. However, the current memo is confusing regarding whether a CFO Act agency that has one CAIO at the top level (e.g., HHS) obviates the requirement for (subordinate) agencies within that CFO Act agency to establish a CAIO (e.g., for FDA, CMS, CDC, etc.). Several sections of the draft memorandum call out different requirements for all CAIOs versus CFO Act CAIOs specifically (e.g., Section 3(a)(i), Section 3(a)(ii), Section 3(b)(i), Section 3(b)(iii)), but the guidance can be interpreted as requiring a "top-level" CAIO only for CFO Act agencies. MITRE recommends that OMB better clarify these requirements and their expectations on different categories of agencies in the memo.

Resourcing. The requirements outlined in the EO and this draft OMB memorandum are extensive. Moreover, our discussions throughout the federal AI community suggest that the community has likely been underestimating the resources necessary to properly assure AI. We recommend that OMB proactively work with agencies (in the near term) as well as with Congress (on future budgets) to find appropriate ways to ensure resources are available to meet these requirements.

In conclusion, MITRE emphasizes the importance of a balanced governance model, flexibility and adaptability in AI governance, clear governance inputs and processes, and collaboration and coordination between agencies and external stakeholders. By addressing these key points, the federal government can more effectively advance responsible AI innovation and meet the objectives outlined in the Executive Order and OMB memo.

Questions Posed in the RFI

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

The roles, responsibilities, seniority, position, and reporting structures outlined for CAIOs are sufficiently flexible and achievable from an overall perspective. Maximizing flexibility in meeting these requirements will be critical given the wide variance of agency sizes, operating functions, and management approaches taken. However, there are areas for recommended improvement, as listed below.

[4] As defined under the Chief Financial Officers (CFO) Act of 1990.

Authorities and accountability. One major gap in this memorandum is specificity on authorities and accountability of the CAIOs within the agency's management and decision-making processes. Effectively describing these management and decision-making authorities and accountabilities will benefit not only the CAIOs, but also other leaders and staff throughout the agency. These authorities and accountabilities should not be fully specified within the OMB memorandum, but OMB should select a minimal core set that agencies could fine-tune (and expand upon) for their unique situations. Without doing so, the chances of confusion within agencies and uniformity across agencies are high, which could impede both AI oversight and the agencies' business operations.

The clarification of management and decision-making authorities and accountabilities is crucial for individuals in the CAIO role, as it ensures they have the necessary authorities outlined in Section 3.b.H of the draft memo to eliminate barriers effectively. However, mandating these authorities may create issues for some agencies, as there could be valid existing reasons or processes that need to be addressed before removing the barriers appropriately. OMB must exercise caution when defining expectations for CAIO authorities and roles within agencies to avoid creating unnecessary bureaucratic layers or circumventing critical decision-making processes.

A crucial aspect of AI governance is the review and management of investments, which ideally should be integrated with an agency's existing investment management process. AI leadership should have a say in investment and resource allocation decisions. However, it is not advisable to designate funding for AI exclusively under the management of the CAIO. Instead, the CAIO role should function as a collaborative intermediary between the acquisition process and the mission-oriented stakeholders (with intended users) who are funding the development. This approach fosters better coordination and alignment of AI investments with the agency's overall objectives.

Resourcing. For large agencies with multiple operating divisions, the work required to perform the tasking in this EO and memorandum will be quite extensive, necessitating more than simply designating a single individual as a CAIO. These large agencies will likely need a dedicated staff office to perform CAIO functions. These agencies should signal this need to OMB and work collaboratively with them to determine how to adequately resource the staff to ensure success.

Creating new bodies versus leveraging existing ones. Agencies should have the flexibility to choose the most suitable approach for both the CAIO position and the internal agency governance body. However, MITRE recommends that OMB provide some baseline guidance. For instance, an agency should not automatically create new AI governance positions and bodies just because the EO calls for those functions. Instead, new AI governance positions and/or bodies should be established only if the agency believes doing so will add significant value compared with utilizing existing governance positions and/or bodies. In the short term, agencies must also consider whether they possess adequate AI expertise to staff their desired approach, or if temporary alternative approaches need to be explored.

The requirement in 3.c.i of the draft memo that agency AI Governance Boards must be vice-chaired by the CAIO could in many cases effectively preclude agencies from using existing boards to fulfill this function, which conflicts with providing this as an option. OMB should rethink this requirement to ensure that use of existing boards truly is an option for agencies to consider.

CAIO position qualifications. The minimum qualifications of a CAIO provided in 3.b.i of the draft memo are vague. While that vagueness may be necessary in the early stages of implementing this memorandum, OMB should also initiate work to more fully define minimum requirements (or at least best practices) and initiate training programs to prepare the selected officials for success. The MITRE paper *Interagency S&T Leadership*[5] provides experience-driven insights on how to effectively provide such leadership from both inside a federal department/agency and from an EOP/interagency perspective, and can be leveraged to help in fulfilling this task.

The requirement in 3.b.iii of the draft memo for CAIOs to be senior executive service (SES) equivalents in CFO agencies could create near-term issues given the short timelines provided in this memorandum. Finding individuals who both are already SES certified and have the required AI experiences to succeed in this role will be extremely difficult. Requisite AI expertise, relationships with agency senior leaders, and formally dictated authorities and accountabilities will be much more important than "checking an SES box" upfront. Rather, OMB should consider this SES requirement to be an aspirational goal for agencies to reach within a defined timeframe rather than an upfront requirement that could create more issues than it solves.

Communications. In addition to formal reports to OMB on implementing this memorandum, agency CAIOs should also be expected to (1) document and exchange lessons learned and best practices with their peers in other agencies and (2) collaborate with their agency's external communications teams to explain how they are leveraging and assuring AI, as well as regularly highlighting the benefits that their use of AI has provided.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

There are many potential governance coordination mechanisms and approaches, the best fit of which will vary based on an agency's AI goals and status of existent governance processes and mechanisms. Before making decisions on those, however, MITRE feels that a more definitive description from OMB is needed about what AI governance entails.

AI governance. First, agencies will benefit from defining "AI governance" to ensure clarity in their approach to establishing AI governance mechanisms. The following definition of AI governance is offered based on MITRE work: *AI governance is the set of processes, practices, principles, and policies that an agency uses (within and adjunct to existing governance structures) to direct and control its planning, development, deployment, and use of AI to meet mission needs. The purpose of AI governance is to manage and address potential risks, harms, and challenges posed by AI while maximizing the benefits of AI and ensuring alignment with trustworthy AI principles (e.g., safety and security, human rights protection, privacy,*

[5] D. Blackburn. Interagency S&T Leadership. 2023/2016. MITRE, https://www.mitre.org/sites/default/files/2023-08/PR-16-0916-interagency-s-and-t-leadership-full-paper.pdf.

fairness/equity, responsible and ethical use of AI (including accountability), transparency, explainability, robustness and reliability, and traceability).

Second, more definitive descriptions of the types of processes included in AI governance are also needed. MITRE recommends that an agency's AI governance—whether integrated into or established alongside existing governance processes—include the following processes and coordination mechanisms:

- AI strategy development, including defining the agency's AI strategy (direction), monitoring progress of strategy implementation, and refreshing the AI strategy when needed. The AI strategy should align with the agency's overall strategic goals and objectives.
- A definition of Trustworthy AI and operating principles, aligned with the agency's mission.
- AI investment management, integrated into the agency's existing investment management process. This activity includes the regular maintenance of the agency's AI Use Case Inventory (required by EO 13960) as well as overall awareness and tracking of the agency's current AI efforts inclusive of AI prototypes, pilots, operationalization projects, and (when appliable) programs of record. Including AI efforts in existing investment management reviews ensures that AI investments align with the agency's strategic objectives, ethical principles, and risk management practices. In addition to common elements captured in investment reviews (e.g., strategic alignment, risk, resource allocation, performance measurement), additional investment review elements to capture for AI efforts include (but are not necessarily limited to) ethical/responsible use, impacted users, safety impacts, rights impacts, and regulation compliance. Capturing and tracking the pipeline of AI efforts helps the agency make more effective decisions on whether to move an AI effort forward to the next stage based on measured value demonstrated.
- AI risk and harm management approach and procedures as part of existing agency investment and risk management processes, including identification of potential risks and harms (especially safety-impacting and rights-impacting risks), mitigation strategies, and monitoring.
- AI assurance, a lifecycle process that provides justified confidence in an AI system's ability to operate effectively with acceptable levels of risk to stakeholders. AI assurance provides the operational framework for risk management and procedures, as part of existing agency investment and risk management processes, including identification of potential risks and harms (especially safety-impacting and rights-impacting risks), mitigation strategies, and monitoring. The AI assurance approach should provide AI capability development oversight, which may entail an independent internal-agency SME committee reviewing AI development efforts throughout their lifecycle and, when needed, providing recommendations to AI governance decision-making body(ies). An AI capability development oversight process may also include algorithm "registration" and SME committee review checkpoints to ensure AI-enabled capabilities are functioning as intended, will integrate into agency business processes and workflows, will integrate into agency IT systems, will be accepted by business owners and users, and adhere to the

agency's trustworthy AI principles. If a similar oversight process exists for IT or analytics projects, the agency should identify whether AI efforts can be addressed in the existing process or whether a special committee is needed to review the unique aspects of AI.

- AI policy creation and response, which includes creation and dissemination of agency policies related to AI planning, experimentation, prototyping, piloting, and operationalization, as well as agency response to government oversight policies and regulations.
- External AI stakeholder collaboration and partnerships to share best practices, tools, and data; obtain feedback; and stay informed on emerging trends and regulatory developments. Public-private partnerships are an effective way for government, industry, and public interest groups to develop solutions that address many stakeholder perspectives. These entities provide a voice to often underrepresented groups and allow diverse opinions to be heard in a moderated and safe environment. Considering the viewpoints of the public and community representatives is especially important for safety-impacting and rights-impacting AI. Public-private partnerships can offer valuable insights to government agencies, leading to better policies, practices, and AI-enabled systems.

Of the above processes and practices that are part of AI governance, two should be integrated into existing agency processes: risk management and investment management. An AI capability development oversight process may be able to be integrated into existing project reviews and checkpoints for analytics or IT, depending on scope of and participation in the existing process.

Coordination mechanisms. Additional coordination mechanism recommendations for effective AI governance include:

- Clearly defined and communicated AI governance processes, featuring well-defined inputs (e.g., identifying AI efforts by risk level and life-cycle stage), procedures, outputs (decisions), and decision-making roles, authorities, and responsibilities. This includes identifying who has decision-making authority and who has responsibility for acting on decisions. The agency's AI Use Case Inventory serves as a valuable mechanism for clarifying inputs to AI governance processes.
- Involvement of stakeholders and subject matter experts in governance forums to inform decision makers. These stakeholders and SMEs may include acquisition managers, project/program managers, AI developers, data managers, ethicists, business owners, end-user representatives, business process specialists, attorneys, and others as relevant to the AI use case, type of AI effort life-cycle stage, and decisions being made.
- Allocation of sufficient resources to organize AI governance activities, such as creating governance decision-making schedules, providing quality assurance of incoming materials, prioritizing topics for review, tracking action items to completion, managing risk status, and communicating with stakeholders. These resources may report to the CAIO or other senior leader role fulfilling AI governance duties.
- Integration of the AI governance decision workflow into a workflow system, as part of existing governance process workflows where applicable and to the extent possible.

Updating existing governance or establishing new AI governance. As mentioned earlier, governance best practices recommend incorporating AI governance into existing agency governance processes, practices, and bodies wherever possible. When discussing AI investments/projects in governance processes, additional unique factors must be addressed, such as responsible use of AI, visibility to vendor data and models, and impacts to safety and rights. Addressing these unique AI factors can be achieved by bringing AI SMEs (e.g., acquisition managers, developers, data scientists, program/project managers, ethicists, attorneys, business/mission representatives) into governance forums to provide guidance and recommendations to decision makers.

- Clear objectives, processes, decision-making authorities, roles, and responsibilities are crucial for effective governance. The agency must precisely outline the decisions that need to be made concerning various AI initiatives, such as prototypes, pilots, operationalization projects, and enterprise programs. It is essential to determine when and where these decisions should be made (within specific governance processes and forums), who is responsible for making them (decision-maker), who will be affected by them (the recipient of the decision), and who must take action based on the decisions. This clarity ensures a well-structured and efficient governance system for AI efforts within the agency.If existing governance bodies and governance processes are used for AI governance, the agency must be very clear about when and how AI decisions are integrated into existing bodies and decision-making processes, and who is accountable and responsible for decisions related to the planning, development, deployment, and use of AI.
- If a new AI governance body and separate AI governance processes are established, it is essential to clearly define the roles, responsibilities, decision-making authorities, and the inputs and outputs that interact with other (preexisting) governance processes and bodies. Furthermore, it is necessary to develop criteria that indicate when a topic should be escalated from AI governance to the next higher level of authority. This clarity ensures a well-structured and efficient governance system that effectively integrates AI governance with the broader organizational framework..

Recall that AI governance set up separately from existing governance structures should primarily focus on agency AI strategy development, internal AI standards (e.g., trustworthy AI principles and AI-specific policies), AI partnerships, and AI assurance. AI capability development oversight may be integrated into existing project review processes (e.g., for IT or analytics projects) or may need to be set up separately. Existing governance authorities and processes should add AI representation to their decision-making bodies to inject subject matter expertise, provide risk management, and conduct investment reviews and make decisions on possible AI-enabled solutions to mission-focused needs.

The benefits and drawbacks of establishing a new AI governance body versus updating existing governance bodies are outlined below:

- Benefits of establishing a new (and dedicated) AI governance body:
    - Dedicated focus on AI governance, which can elevate AI into mainstream decision-making processes and lessen financial and mission risk

  - Increased opportunities for AI adoption in the agency given increased communication and awareness of AI's potential across programs and mission areas
  - Increased focus on attracting and retaining AI-specific expertise, which may not be present in existing governance bodies (such as those focused on privacy, IT, or data)
  - Greater visibility and prominence for AI issues, which can help in raising awareness and promoting accountability
  - Potentially increased adoption of agency AI standards that align with national/international AI regulations and policies
  - Potential for lessened AI-related risks
- Drawbacks of establishing a new AI governance body:
  - Potential duplication of efforts and resources, as existing governance groups (especially data and analytics governance) may already be working on AI-related investment decisions, risk management, oversight, and other AI topics
  - Potential duplication of existing governance processes that may not be AI specific but AI relevant.
  - The need for additional resources, such as funding and personnel, to establish and maintain a new AI governance body
  - Probable challenges in coordinating and integrating the work of the new AI governance body with existing groups and initiatives, which may create conflict and/or confusion and may minimize/overtake existing responsibilities
  - Possibility of governance fatigue if membership overlaps too much across the new and existing bodies
- Benefits of updating the scope of an existing governance body(ies):
  - Leveraging existing resources, expertise, and relationships, which can help establish efficient and effective AI governance that is integrated with other investment management and risk management
  - Leveraging existing governance processes that may not be AI specific but AI relevant.
  - Avoiding duplication of efforts and resources, as existing groups can build on their current work to address AI governance issues
  - Easier integration and coordination with other existing groups and initiatives, as the updated group would already be part of the existing governance ecosystem
- Drawbacks of updating the scope of existing governance body(ies):
  - The potential for AI governance issues to be overshadowed by other priorities and concerns within the existing group
  - The possible lack of AI-specific expertise within the existing group, which may limit its effectiveness in addressing AI governance issues

- Challenges in adapting the existing group's processes and structures to accommodate the unique complexities and challenges of AI governance

3. How can OMB best advance responsible AI innovation?

In addition to the guidance OMB provides in its draft memo, the following are other ways for OMB to advance responsible AI innovation:

First and foremost, OMB should lead by example by incorporating AI into its own core functions, many of which stand to benefit significantly from AI integration. By doing so, OMB can demonstrate the potential benefits AI can bring in terms of enhancing mission effectiveness, reducing time and costs, and ensuring security and privacy, thus encouraging agencies to follow OMB's example in their own missions and use cases. For example, OMB could leverage AI-driven analytics and decision-making tools to optimize budget allocation and resource management by analyzing historical data, predicting future trends, and identifying inefficiencies.

Relatedly, OMB could initiate a new and substantial activity that encourages agencies to leverage AI while meeting the current President's Management Agenda. This could involve, for instance, working with federal agencies to identify areas where AI can be used to improve service delivery, reduce wait times, and enhance the overall customer experience.

Such activities will not only enhance OMB's own mission but also provide OMB with hands-on insights and experiences that are necessary to effectively oversee and guide federal department and agency activities, as well as earn the respect of other federal agencies in the process. By actively embracing AI and showcasing its potential, OMB can effectively promote responsible AI innovation across the federal government and its various sectors.

Address resource requirements for AI capabilities. The EO and this draft memorandum mandate numerous additional activities that federal agencies must undertake using their existing funding. While this is a standard aspect of EOP leadership, the size and scope of activities called for within this EO and draft OMB memo are unprecedented. The resources required to meet these requirements are substantial. Moreover, our discussions throughout the federal AI community suggest that the community is likely underestimating the resources necessary to properly assure AI as they use it to enhance agency missions. Pilots to better characterize cost requirements are needed. Operating in a level budget environment while addressing these factors necessitates the reallocation of resources from other activities to meet these demands. OMB has a critical role to play in this regard and should proactively work with agencies (in the near term) as well as with Congress (on future budgets) to find appropriate ways to address this resource issue.

As a first step, OMB should proactively identify existing requirements (e.g., Privacy Act implementation, Federal Data Strategy) that are similar or closely aligned to the new AI requirements and then develop strategies to meet common requirements with a single work product.

Foster public-private partnerships to help agencies meet AI objectives (from the EO and OMB's draft memo) and accelerate the advancement of priority initiatives. The federal government recognizes the value of AI knowledge and use cases from various sources, including nongovernmental entities. These entities will also be developing insights and lessons learned, which the federal government should proactively seek to leverage. As we previously mentioned in our discussion on AI governance, engaging a broad set of stakeholders is critical not only for knowledge-sharing but also for risk management; different stakeholders can perceive and articulate diverse risks in AI utilization. Likewise, OMB should ensure that agencies engage a diverse range of stakeholders throughout the AI life cycle, including business/mission owners, user representatives, ethicists, legal SMEs, business process designers, organizational change management SMEs, and human-machine teaming SMEs. By fostering collaboration and knowledge-sharing, OMB can further promote responsible AI innovation across various sectors.

Better balance OMB's focus on safety/security with encouraging agencies to leverage AI. The EO and this draft OMB memorandum both place significant emphasis on ensuring safety and equity in AI development and deployment. While these aspects are undoubtedly crucial, there is comparatively less focus on mandating and ensuring that agencies proactively work to leverage AI appropriately to enhance their missions. To address this imbalance, OMB should allocate more attention to identifying, characterizing, and promoting the practical application of AI within agencies and emphasize the importance of harnessing AI's potential to improve operational efficiency and effectiveness. In doing so, OMB should ensure that its communications more fully promote both connected objectives – the responsible development and deployment of AI, as well as its practical application to enhance agency missions. By striking a better balance between these two aspects, OMB can foster a more comprehensive approach to AI innovation that not only ensures safety and equity but also actively encourages agencies to harness the transformative power of AI to improve their operations and better serve the public.

Additionally, OMB should explicitly state that decisions on whether to use AI should be based on its improvement over the status quo, rather than how close it comes to reaching an idealized state of accuracy and bias. Current (non-AI) practices are not, by any means, free from error or bias. The pursuit of "perfection" should not overshadow solutions that are simply "significantly better" than current practices and can still provide substantial benefits.[6]

Refine the concept of "responsible use" and establish clear expectations. Currently, the term "responsible use" lacks a precise definition, leading to varying interpretations and potential inconsistencies in its application. To address this issue, OMB should develop a consistent definition and baseline expectations. OMB and agencies can incorporate this understanding into their AI governance processes, such as AI strategy development, mission need/problem identification, the AI use case selection process, the AI algorithm oversight process, the AI assurance process, and the AI risk management process. By embedding responsible use principles in these processes, agencies can ensure that AI systems are developed and deployed in a manner that aligns with ethical, legal, and societal considerations.

[6] This is discussed in further detail in *MITRE's Response to the OSTP RFI on a National Artificial Intelligence Strategy*, available at https://www.mitre.org/sites/default/files/2023-07/PR-22-01891-22-MITRE-National-AI-Strategy.pdf.

Missing or minimized elements:

- ***AI assurance***. While the EO references AI assurance a few times, this draft OMB memo does not explicitly define or address AI assurance as a distinct concept, although some aspects are scattered throughout the document. AI assurance should be a clearly visible building block for the EO's implementation. It is a key part of AI governance that informs and is informed by other AI governance processes; governing AI systems without assurance is not feasible.

  MITRE defines "AI assurance" as *a life-cycle process that provides justified confidence in an AI system's ability to operate effectively with acceptable levels of risk to its stakeholders*.

  - Operating effectively entails meeting functional requirements with valid outputs.
  - Assurance risks may be associated with or stemming from a variety of factors depending on use context, including but not limited to AI system safety, security, equity, reliability, interpretability, robustness, directability, privacy, and governability.

- ***Acquisition considerations***. The memo currently provides limited guidance on acquisition considerations, even though they will significantly influence the federal government's use of AI. Therefore, acquisition should be addressed more comprehensively. It can be helpful to consider AI-specific aspects for acquisition in much the same way the community has considered cybersecurity throughout the system's life cycle: establishing clear business and technical requirements, ensuring fielded solutions comply with appropriate AI policies and regulations, verifying and validating algorithms and data relative to the established requirements and to criteria defined to assure trustworthy AI, and validating to an Authority to Operate, with ongoing measurement and monitoring thereafter.

- ***Accountability and protections for agencies and federal staff***. The EO and memo currently do not provide protections for agencies and federal staff when AI-enabled outcomes are not ideal, even if they exhibited due diligence in their AI acquisition, deployment, and governance decisions. Addressing this aspect is essential to encourage responsible decision making; otherwise, agencies and federal staff may remain too risk averse.

- ***Enhancing agency AI workforce endeavors***. The OMB memo's inclusion of non-practitioners in its AI workforce planning requirements for agencies is positive. The internal agency AI workforce planning and development requirements in the OMB memo can be enriched by identifying four workforce categories that agencies need to address: AI end-users (such as employees whose work is directly impacted by AI), technical AI practitioners (e.g., AI developers, AI engineers, data scientists), non-technical AI practitioners (e.g., acquisition managers, project/program managers, business process designers, governance actors, risk managers, investment managers), and the general workforce (for overall agency workforce AI literacy). For each of these four workforce categories, agencies can use specific strategies to build workforce capacity for AI.

- ***Whole-of-government workforce endeavors***. The memo does not identify any whole-of-government AI workforce initiatives. This is a notable gap, as there are likely many

similarities in workforce development activities across federal agencies that could be more effectively and consistently addressed through a holistic approach. In a recent MITRE project, we investigated whole-of-government workforce investment needs for AI and a handful of other critical and emerging technologies, which are summarized in Figure 1 below. This can be a good starting point for subsequent OMB analysis.

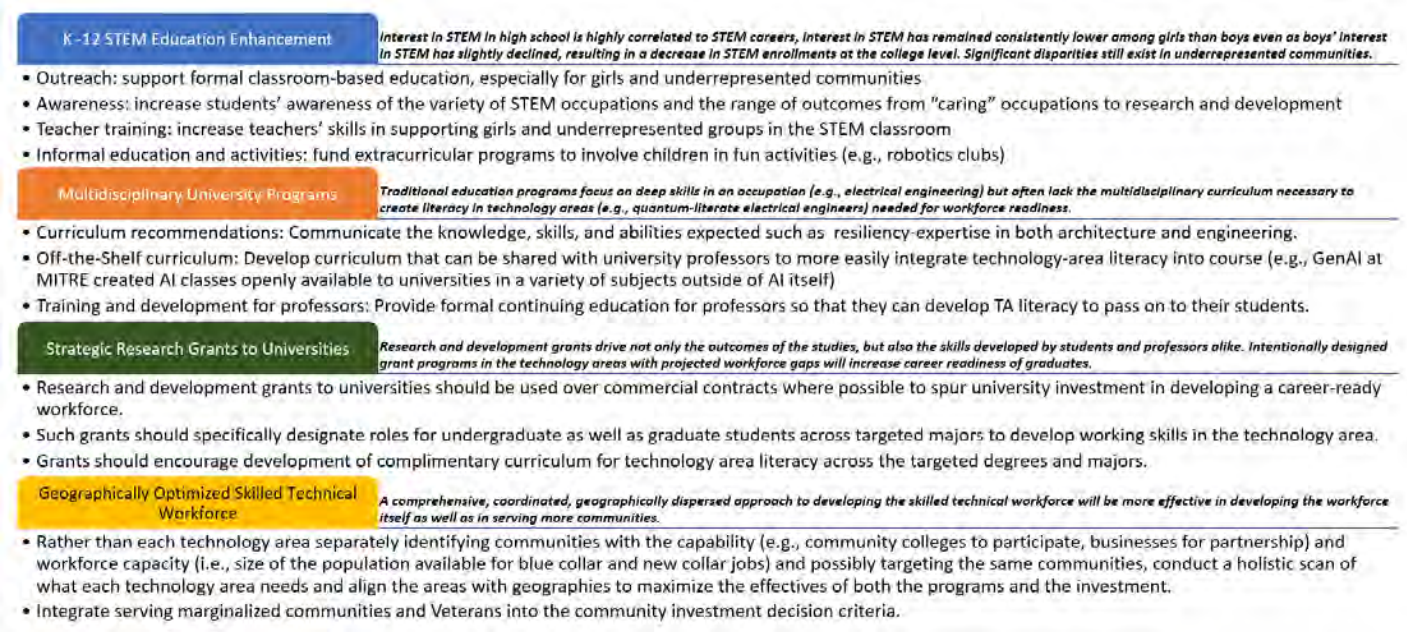

Figure 1 - Workforce Needs for Critical & Emerging Technologies

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

Agencies should take a phased approach to adopting generative AI. Adopting an enterprise view of generative AI (and AI in general) provides guardrails that increase trustworthiness and enable increasing sophistication, while managing and mitigating risk. A principled approach to generative AI adoption will enable more success through tools, processes, and frameworks that adapt to evolving risks and requirements. Agencies will need to leverage third-party foundation models for a variety of use cases, ranging from relatively low-risk situations to those with very high consequences, spanning diverse business needs.. Such adoption should follow a healthy prescriptive of "crawl, walk, run," where an agency should:

1. Initially focus on value-added generative AI capabilities (and AI capabilities in general) that have a high probability of end-user adoption success and low risk.
2. Learn from that experience and evolve AI efforts and supporting processes and practices that can inform the adoption of additional generative AI capabilities.
3. Advance generative AI adoption until the desired improvements and transformational changes in mission operations and/or service delivery are achieved.

Preparing an agency for adopting responsible generative AI (and AI in general) can be addressed by the agency executing the three phases described below. Each phase will yield products that advance the agency's ability to adopt generative AI more efficiently and with more assured systems.

1. ***Assess***. Perform an assessment of the agency's current and desired states of generative AI maturity using the AI Maturity Model.[7] A guided AI maturity assessment will yield current and desired states, potential blockers, and priorities for building the agency's capacity for AI implementation in general, as well as progress measures. Aspects to assess are governance and strategy; ethical, equitable, and responsible use; organization; technology enablers; data; and performance and application. As part of this assessment, examine acquisition practices as well as business processes and workforce from enterprise and organizational change management perspectives.
2. ***Strategize***. Define an overarching AI strategy that articulates the agency's goals and objectives for using AI to improve mission operations and service delivery. Identify current and near-term planned AI use cases to solve important mission problems and needs. For each use case, identify the business and end-user impacts and corresponding business process and organizational (e.g., role, responsibility) changes needed for successful use case implementation. Demonstrated mission value, end-user and business owner acceptance, and fit within business processes and workflows will all be required for successful AI adoption. Also identify infrastructure changes (e.g., data pipelines, computing resources, tools, software) needed to support the agency's pursuit of the AI use case. Use the results of the assessment; the selected AI use case(s); and the identified infrastructure, business process, and organizational changes to develop a roadmap with checkpoints, measures of progress, and sequenced generative AI efforts.
3. ***Enact***. Perform generative AI projects in sequence, expanding scope from experiments to proofs-of-concept, prototypes, and operationalization projects when value is shown. Measure agency AI maturity progress at checkpoints, adopt beneficial practices, and iterate learning. The sequences for projects will follow the "crawl, walk, run" strategy mentioned above that starts with straightforward, mature AI technologies and advances in complexity as AI project experiences build the organization's acceptance of and capacity for AI over time. Progress measures in the roadmap are assessed at checkpoints and will identify beneficial changes and enable learning for course correction.

With these guardrails in place, agencies should explore and leverage generative AI for a wide range of use cases. To begin, an agency can pursue low-hanging fruit with generative AI applications that are immediately possible and low risk. Success here builds workforce acceptance of and citizen confidence in leveraging generative AI, which in turn builds agency momentum to focus on more advanced use cases involving more risk but greater rewards from positive outcomes. Below are a few examples (from simple and lower risk to more complex) of the many evolving opportunities agencies might take to responsibly use generative AI to improve service delivery and mission operations:

[7] E. Bloedorn et al. The MITRE AI Maturity Model and Organizational Assessment Tool Guide. 2023. MITRE, https://www.mitre.org/sites/default/files/2023-11/PR-22-1879-MITRE-AI-Maturity-Model-and-Organizational-Assessment-Tool-Guide.pdf.

- Use "out-of-the-box" third-party generative AI for basic functions such as summarizing meeting notes, drafting internal communications, and drafting documents and emails, etc.
- Use a conversational large language model (LLM), also known as a chatbot, to help with information gathering applications, such as helping a person understand what information may be necessary for filling out a form.
- Take a third-party LLM used for information retrieval and summarization and tune/augment it on agency-specific data to enhance the agency's ability to discover information from its large repository of unstructured documents.
- Use an LLM to train an agency-supporting chatbot that in turn would have expertise in answering questions (e.g., about employee benefits or helping connect an employee to training or new work opportunities).
- Have non-technical workers use an LLM "agent" that can take a natural language request for information and translate it into a technical (e.g., SQL) database query to access corporate records.
- Use generative AI to create future "trajectories" of agency services, resource consumption, or behavioral patterns of workers or clients for the purpose of robustness and resilience planning for possible future events and circumstances.
- Use an agency-augmented LLM to assist in course of action planning, where the user would tell the AI model the objective, and the AI would help a human develop a plan, drawing on both internal agency information and external knowledge.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

The use cases outlined in Section 5(b) of the draft OMB memo appear suitable, and we do not have substantive revisions to suggest. However, we would like to offer two related recommendations that OMB will find beneficial as further detailed and mature work in this area progresses: tool qualification and synthetic data.

Tool qualification. The example use cases for safety-impacting and rights-impacting AI primarily focus on the deployed system itself—the running code in use. While this is undoubtedly the first priority, it may be beneficial to also consider the concept of "tool qualification" to increase rigor and reduce potential rework. Tool qualification refers to a process that promotes the safety of a system by minimizing the risk of tool errors, either by reducing the number of errors or ensuring that they do not impact safety. Although establishing justified confidence in the deployed and to-be deployed systems that are rights-impacting and safety-impacting is of utmost importance, requirements for tool qualification should likely be considered a secondary priority. Introducing the topic now could prompt valuable efforts to include this aspect in the justification process.

In safety-critical sectors such as transportation, tool qualification is a mandatory safety procedure, as outlined in standards DO-178C and DO-330 for aviation[8] and ISO-26262[9] for automotive safety. These standards typically define three levels of tool qualification:

1. Development tools that could introduce errors into operating safety-critical software
2. Verification tools that might fail to detect errors but are used to reduce other development or verification activities
3. Verification tools that might fail to detect errors but are not used to reduce other development or verification activities

The Tool Qualification Level (TQL) required for a tool depends on its criteria and the criticality of the software for which it is used. DO-330 provides detailed guidance on tool qualification, acknowledging the differences between the execution environments for airborne software and tools.

Errors introduced into safety-impacting or rights-impacting AI are well covered. However, some tools may be used to verify or characterize rights-impacting or safety-impacting AI, and they should also be considered based on their role. A machine learning-based test case generator and automated test harness could, for example, miss failure conditions if it failed in execution. This would increase the risk that latent failures in the AI system to be deployed are not detected and corrected, reducing confidence in the final system.

A detailed set of verification tool use cases is not required, but it would be useful to introduce the concept of tool qualification for verification tools in the rights-impacting and safety-impacting development chain.

DO-330 also addresses the use of previously qualified tools. In summary, reusing a previously qualified tool is permitted if the developer can demonstrate, through a change impact analysis, that the tool still meets its TQL requirements despite any changes in the operational environment or the tool itself.

Synthetic data. A second related recommendation is to focus on the application of AI and/or synthetic data in the design, development, or assessment of other AI capabilities that are considered safety-impacting or rights-impacting. This use case is important to consider because AI systems and synthetic data are increasingly being utilized in the development and evaluation of other AI technologies. Incorporating AI and synthetic data in the design and assessment process can potentially introduce biases, inaccuracies, or other unintended consequences that may impact the safety and rights of individuals. Therefore, it is crucial to ensure that AI systems and synthetic data used in these contexts adhere to the same standards of safety, security, and trustworthiness as the AI capabilities they are helping create or evaluate.

To address this use case, this memo should provide guidance on the following aspects:

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[8] DO-330 Software tool qualification considerations: When, where, and how it applies. 2023. LDRA, https://ldra.com/do-330/. Last accessed December 1, 2023.

[9] ISO 26262-1:2018 - Road vehicles — Functional safety — Part 1: Vocabulary. 2018. International Organization for Standardization, https://www.iso.org/standard/68383.html. Last accessed December 1, 2023.

- Ensuring that AI systems and synthetic data used in the design, development, or assessment of safety-impacting or rights-impacting AI capabilities are subject to the same requirements and oversight as the AI capabilities themselves.
- Establishing best practices for the use of AI and synthetic data in the design and assessment process, including transparency, documentation, and validation of the AI systems and synthetic data used.
- Encouraging collaboration and information sharing among agencies and stakeholders to identify and mitigate potential risks and challenges associated with the use of AI and synthetic data in the development and evaluation of safety-impacting or rights-impacting AI capabilities. This collaboration can also share best practices and opportunities to use synthetic data to enhance confidence in the safety or rights-preserving assurances for an application.

By including this consideration in the memo, the government can ensure that AI systems and synthetic data used in the design and assessment of safety-impacting or rights-impacting AI capabilities are held to the same high standards of safety, security, and trustworthiness, ultimately leading to more reliable and responsible AI applications in the public sector.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

MITRE has the following recommendations to enhance these minimum practices:

- Section 4.D, pg. 17. We suggest adding a requirement that the monitoring for performance degradation must not focus only on aggregate performance measures that can mask disparate outcomes for various population cohorts. For example, some facial recognition systems may have reasonable overall precision and recall averaged across the entire population but show significant underperformance for women of color compared with the aggregate and over-performance for white males compared with the aggregate. An explanation of the population cohorts used to analyze errors and the results by cohort should be included in the documentation of the monitoring process and model performance.
- Appendix I; pg. 26; Consolidated Table of Actions. We recommend clarifying with an additional table footnote that rows 6 (Section 5(a)(i)), 8 (Section 5(c)(iv)(D)), and 9 (Sections 5(b) and 5(c)(iii)) apply to AI used by each agency, including DoD agencies, on information systems other than National Security Systems.
- Section 4(b)(ii); pg. 9; Data. Making datasets publicly accessible should be weighed against the potential for misuse by domestic or foreign actors who seek to thwart U.S. interests.

- Section 5(c)(iv)(A)(3); pg. 15. Cases where agencies cannot access data and must obtain sufficient descriptive information require establishing requirements for AI or data providers to follow.
- Missing definitions:
  - Section 5(c)(v)(A)(3); pg. 19; "Communities"
  - Section 6; pg. 24; Recommend adding an item (8) that explicitly speaks to AI security more comprehensively.
  - Section 6; pg. 25; #2 should be clarified such that it refers to climate or environment outcomes resulting from actions taken on the basis of AI outputs and not to climate or environment outcomes resulting from the training of AI.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

Create a federal AI acquisition best practices guidebook. The Department of the Air Force and Massachusetts Institute of Technology's AI Accelerator has developed an AI Acquisition Guidebook[10] focused on providing a basic understanding of the AI acquisition life cycle related to data, finance, and legal considerations, which can be leveraged to create a federal AI acquisition best practices guidebook.

Develop and share guidelines for market research, RFIs, solicitations, and contracts/agreements for agencies to use. These guidelines should address aspects such as how AI could be applied as a full or partial solution; what (if any) embedded AI solutions a vendor plans to propose (e.g., commercial solutions); and language that provides the acquiring government agency visibility into the training, testing, and validation of datasets used by the vendor as well as the vendor's AI model. In addition to guidance offered in Section 5.2 of the DoD Office of Developmental Test, Evaluation & Analysis's Systems Engineering Processes to Test AI Right,[11] the following may be considered for acquiring AI solutions:

- Treat the AI model as a subcomponent with its own specific test and evaluation (T&E) requirements.
- Ensure contracts have access to test the AI model subcomponent and test infrastructure resources.
- Plan for periodic model retraining post-deployment by monitoring the system in operation to ensure that the periodic retraining is actually improving or at least maintaining performance.

[10] Artificial Intelligence Acquisition Guidebook. 2022. Massachusetts Institute of Technology, https://aia.mit.edu/wp-content/uploads/2022/02/AI-Acquisition-Guidebook_CAO-14-Feb-2022.pdf.

[11] C. Balhana et al. Systems Engineering Processes to Test AI Right (SEPTAR) Release 1. 2023. MITRE, https://apps.dtic.mil/sti/trecms/pdf/AD1211716.pdf.

- Determine and consider model training data approaches in contracts, such as buying off-the-shelf pre-trained models, providing government-furnished information, or paying contractors to gather data.
- Adopt Data Cards and Model Cards to document dataset contents and trained ML model specifications.
- Establish agreements to document the AI method (e.g., Convolutional Neural Network) and, possibly, its training parameters to enable effective T&E and risk assessment.
- Address training data, test data, and (potentially) AI-generated data ownership, management, location, access, security, rights, retention, and provenance in agreements and memorandums.
- Communicate the relevance of the AI threat during contracting and use resources like DoD's Validated Online Lifecycle Threat to document known threats.
- Include clauses in contracts to address additional or added scenarios where the AI-enabled system is expected to be deployed in conditions beyond its originally intended use.
- In requests for proposals, require respondents to advise on the presence of AI and the nature of its implementation, and consider engaging T&E SMEs to support the evaluation process.

Train the federal acquisition workforce on AI. Topics should include AI "101" fundamentals (how AI differs from traditional software), best practices for acquiring AI-enabled systems, and program and contract considerations for AI acquisitions. Deploy this training through a variety of methods, including through the Federal Acquisition Institute.[12] Additional considerations include:

- Engage with the Defense Acquisition University (DAU) to collaborate on key learning objectives for AI/ML training. DAU has developed an introductory Machine Learning course video suitable for technical and non-technical audiences.[13]
- Engage with the OPM-moderated Chief Learning Officers Council[14] to share leading practices and learn from each other to train the acquisition and procurement workforce at federal agencies. Identifying AI career paths and succession planning may also be an important contribution that Chief Learning Officers can provide to their respective agencies.

Develop plans to cultivate an organizational culture that embraces AI as part of doing business as well as acquiring AI solutions. Evolve organizational mindsets from risk averse and compliance-focused to embracing new technology that enables processes and solutions that

[12] Federal Acquisition Institute. 2023. General Services Administration, https://fai.gov/. Last accessed December 1, 2023.

[13] R. Maus. SWE 0057 What is Machine Learning?. 2023. Defense Acquisition University, https://media.dau.edu/media/t/1_hsij16av. Last accessed December 1, 2023.

[14] Chief Learning Officers Council. 2023. Office of Personnel Management, https://www.chcoc.gov/content/chief-learning-officers-council-cloc. Last accessed December 1, 2023.

meet standards and requirements. Focus on recruiting an AI NextGen workforce to enable AI-driven solutions and processes.

Establish auditing standards to ensure that vendors of AI tools are honoring agreements in contracts. For example, maintain government awareness of the evolution of any "black boxes" post-testing/acceptance and constant monitoring and correction as more datasets are added and outputs may drift unexpectedly.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

The Advancing American AI Act and Executive Order 13960 require agencies to "prepare and maintain an inventory of the AI use cases of the agency, including current and planned uses." This information is to be shared across agencies and with the public. To date, 21 agencies have listed about 500 use cases on inventories available via ai.gov, with six agencies declaring no AI use cases. These inventories vary widely in terms of the fields provided, depth of description, and completeness of the information. Many of the 21 inventories reuse fields from other inventories.

MITRE supports several sponsors that have created systems to track AI capabilities and how they are used. These systems organize information into the following categories:

1. Description: Information about who developed the capability, how it was developed, and what it is intended to do
2. Performance: Information about how the capability was tested and its performance, resilience, and usability
3. Use: Information about how the capability is used (more specific than its intended function), who is using it, what it is approved for, and how it is performing in operation

Description information should include known stakeholders (beyond the users of the capability) and information about whether those stakeholders have been or can be involved in the development and/or monitoring of the capability. Stakeholders who may be impacted include entities whose data is used in the use case and people whose jobs may be affected by the use case.

Information about the development of the capability should include a description of any training and test data used and the AI method (e.g., natural language processing) used to create the capability. This information, combined with performance information, can be used by others to validate the correctness of the approach.

Section 4.b of the RFI says, "Where an agency currently uses or plans to use AI for a purpose described below, the CAIO, in coordination with other relevant officials as specified by the agency, may make a determination (or reverse a prior determination) that the AI application or component does not match the definitions of 'safety-impacting AI' or 'rights-impacting AI' and is therefore not subject to the minimum practices." Description information should include the results of this determination for the capability and its intended use, with supporting information about the reasons for this determination. The benefits of doing this include greater public

transparency, greater ease for auditing, and clearer and more consistent criteria for third-party developers to appreciate earlier in their modeling process.

Performance information should include specific details about metrics used to determine whether to approve the use case. Typically, precision and recall are important metrics, but the use case may weigh one more than the other and may have additional metrics, including operating factors like size of the trained model and how long it takes to process a new input. Performance information should include information about the diversity of test conditions and variation in performance across them.

Use information should include the current status of the capability, whether planned, under development, in pilot, in full operation, and so forth. Many of the existing inventories include fields for this information, but currently list only capabilities that are in operation or that are planned. It is important for agencies to maintain inventories of both planned and operational AI use cases.

Use information should include what the agency has approved as responsible uses of the capability. The memorandum should elaborate the definition of what must be considered when determining responsible uses, including impacts to safety, rights, and jobs. This information should address both uses of the capability (including potential uses outside the agency and reuse within the agency) and uses of the information produced by and decisions made by the capability. Finally, when possible, use information should reference mission efficacy of AI that has been deployed. Although it may not be possible to establish cause and effect, it may still be beneficial to benchmark relevant mission performance indicators before AI deployment against post AI deployment.

An important consideration for the memorandum is which aspects of this information should be made available to the public, and how often. While transparency is important for ensuring equity and enhancing quality, it also can enable adversarial attacks on AI capabilities by providing insight into how those capabilities work and how they are used. Disclosure may also impact the privacy of people whose data were used in the development of a capability, because some attacks can reverse engineer training data from an operational model. OMB may need to provide for third-party technical review of inventory information to identify risks of disclosure and maximize transparency.

AI incident reporting should also be considered in the context of any published, deployed AI use cases. Sharing AI incidents through collaboration frameworks such as MITRE ATLAS[15] helps AI system developers and owners mitigate risks for the government and public. In cases where publicly disclosing such information may not be permissible, anonymized disclosure approaches can be used through trusted parties.

[15] MITRE ATLAS™ (Adversarial Threat Landscape for Artificial-Intelligence Systems). 2023. MITRE, https://atlas.mitre.org/. Last accessed December 1, 2023.

PUBLIC SUBMISSION

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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0073
Comment on OMB-2023-0020-0001

Submitter Information

Organization: BSA | The Software Alliance

General Comment

BSA | The Software Alliance provides the attached comments on the OMB memo.

Attachments

2023.12.5 BSA Comments on OMB AI Memo Final2

BSA Comments on OMB Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence
December 5, 2023

BSA | The Software Alliance appreciates the opportunity to provide comments on the Office of Management and Budget's Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (OMB memo).

BSA is the leading advocate for the global software industry.[1] BSA members are at the forefront of developing cutting-edge services — including AI — and their products are used by businesses across every sector of the economy.[2] For example, BSA members provide tools including cloud storage and data processing services, customer relationship management software, human resource management programs, identity management services, and collaboration software. BSA members are on the leading edge of providing AI-enabled products and services. BSA members have also supported the federal government's IT modernization efforts and have extensive experience providing software services, including AI, to the federal government. As a result, they have unique insights into the technology's tremendous potential to spur digital transformation and the policies that can best support the responsible use of AI.

BSA's views are informed by our experience working with member companies to develop the BSA Framework to Build Trust in AI,[3] a risk management framework we published more than two years ago to help companies mitigate the potential for unintended bias in AI systems. Built on a vast body of research and informed by the experience of leading AI developers, the BSA Framework outlines a lifecycle-based approach for performing impact assessments and highlights corresponding best practices.[4] Our experience on these issues informs our recommendations on the OMB memo.

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[1] BSA's members include: Adobe, Alteryx, Asana, Atlassian, Autodesk, Bentley Systems, Box, Cisco, CNC/Mastercam, Databricks, DocuSign, Dropbox, Elastic, Graphisoft, Hubspot, IBM, Informatica, Juniper Networks, Kyndryl, MathWorks, Microsoft, Okta, Oracle, Palo Alto Networks, Prokon, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

[2] *See* BSA | The Software Alliance, Artificial Intelligence in Every Sector, *available at* https://www.bsa.org/files/policy-filings/06132022bsaaieverysector.pdf.

[3] *See* BSA | The Software Alliance, Confronting Bias: BSA's Framework to Build Trust in AI, *available at* https://www.bsa.org/reports/confronting-bias-bsas-framework-to-build-trust-in-ai.

[4] BSA has testified before the United States Congress and the European Parliament on the Framework and its approach to mitigating AI-related risks. *See, e.g.,* Testimony of Victoria Espinel, Public Hearing on AI & Bias, Special Committee on Artificial Intelligence in a Digital Age, European Parliament, Nov. 30, 2021, *available at* https://www.europarl.europa.eu/cmsdata/244265/AIDA_Verbatim_30_November_2021_EN.pdf; Testimony of Victoria Espinel, The Need for Transparency in Artificial Intelligence, Before the Senate Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, and Data Security, *available at* https://www.bsa.org/files/policy-filings/09122023aitestimonyoral.pdf.

The OMB memo has important ramifications for federal IT modernization. Given the increase of AI in software services, it is critical that the guidance strikes the right balance in creating safeguards that promote the responsible use of AI while maximizing its benefits to the federal government. If it fails to do so, the gap between the commercial and federal marketplace will only grow.

The OMB memo establishes a range of important risk management practices across federal agencies. We are encouraged that the OMB memo requires agencies to take important steps to adopt strong risk management practices and attempt to categorize risks associated with government use of AI. This approach aims to help agencies focus on uses of AI that pose high risks to the public.

We recommend revising several aspects of the OMB memo, to ensure agencies can better implement these risk management practices. Specifically, we recommend that OMB:

- Continue to remove barriers to the responsible use and adoption of AI;
- Ensure uniform definitions of rights-impacting and safety-impacting AI across federal agencies;
- Ensure the definitions and list of rights-impacting and safety-impacting AI use cases focus on those risks that impact individuals;
- Further encourage the use of the NIST AI Risk Management Framework;
- Refine the minimum risk management practices required for federal agencies;
- Extend the timeline for agency implementation;
- Revise procurement obligations, to ensure vendors' ability to further train AI models and to recognize the importance of internal testing; and
- Harmonize concurrent regulatory actions affecting AI procurement.

I. The OMB Memo Should Continue to Strengthen AI Governance and Remove Barriers to the Responsible Use of AI by Agencies.

At the outset, we want to recognize that the OMB memo includes important guidance for strengthening federal agencies' AI governance and advancing AI innovation across the federal government. We appreciate the OMB's focus on promoting strong risk management practices and removing barriers to the use of AI by federal agencies. We highlight three important aspects of this part of the OMB memo.

- First, the OMB memo's requirement for agencies to designate a Chief AI Officer is an important aspect of implementing AI risk management programs across agencies. Designating specific personnel responsible for addressing AI is a key part of developing a successful AI governance program. The Chief AI Officer can fulfill important functions to help promote agencies' use of AI and manage AI risks.

- Second, we appreciate the OMB memo's focus on removing barriers to the use of AI. The OMB memo identifies key mechanisms for achieving this goal, including ensuring access to adequate IT infrastructure and encouraging the use of agency and public access datasets. We encourage agencies to ensure access to multi-cloud environments as part of their IT modernization. We also encourage federal agencies to expand open and secure access to federal data, recognizing that government-generated data is an important asset that can serve as a powerful engine for creating new jobs, promoting economic growth, and enabling innovation in AI-related technologies. Agencies collect and generate vast quantities of data that offer unique insights into virtually every facet of the modern world, from

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satellite imagery that can help predict the weather to transportation data that can help reduce congestion. To enhance AI innovation, agencies should continue to prioritize the release of high-value, non-sensitive government data.

- Third, the OMB memo aims to reduce barriers to the use of AI by filling gaps in AI talent. The focus on increasing and training the workforce for AI positions will be a critical part of advancing AI innovation across the federal government. Global competition to train and recruit the next generation of tech talent is fierce, and solving the high-tech workforce shortage will require a broad strategy including the practices identified in the OMB memo for recruiting, training, and retaining workers.

II. The OMB Memo Should Ensure Uniform Application of the Definitions of Rights-Impacting and Safety-Impacting AI Across Federal Agencies and Focus on Risks That Impact Individuals.

The OMB memo requires agencies to implement minimum risk management practices for rights-impacting and safety-impacting AI. It also includes a list of purposes for which AI is presumed to be rights-impacting or safety-impacting, while encouraging agencies to supplement this list by adding additional contexts where AI tools would be subject to heightened requirements. We recommend revising the OMB memo to address four issues raised by the memo's approach to defining rights-impacting and safety-impacting AI.

- First, at the outset, we note that the definitions in Section 6 of rights-impacting and safety-impacting AI are overbroad and ambiguous. For example, the definition of safety-impacting AI refers to "AI that has the potential to meaningfully impact" safety, and the definition of rights-impacting AI refers to "non-deceptive information about goods and services." The reference to "potential" unnecessarily expands the scope of the definition to scenarios that don't actually pose safety risks, just as the reference to information about goods and services could inadvertently and significantly expand the scope of this language. In lieu of applying ambiguous definitions of safety-impacting and rights-impacting AI, **OMB should focus on high-risk use cases resulting in consequential decisions about individuals, namely decisions that create legal or similarly significant effects on individuals.**

- Second, to the extent that OMB maintains these categories, including a non-exhaustive list of rights-impacting and safety-impacting AI in the OMB memo while allowing agencies to develop additional agency-specific lists creates fragmentation. This undermines the US government's ability to develop a uniform government-wide approach to AI risk management that applies consistent standards across agencies. Under the current approach, two different agencies could evaluate the same AI system and reach conflicting results about whether it is rights-impacting or safety-impacting. This leads to inconsistent protection from AI risks. It also creates unpredictability for vendors, who will not know whether their AI system will be treated in the same manner across federal agencies — or if agencies will apply different obligations for the same AI system. A fragmented approach to AI governance also raises costs for agencies because it leads to duplicative assessments and because vendors may not be able to provide the same software services across different agencies. **We recommend revising the OMB memo to include an exhaustive list of purposes and use cases that are rights-impacting and safety-impacting.** Alternatively, OMB could be provided the authority to update this list over time, at set intervals, which would create a more stable approach than creating an agency-by-agency approach.

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- Third, the threshold for determining whether AI is rights-impacting or safety-impacting is vague and can lead to differing interpretations across agencies. This heightens the risks of fragmentation discussed above. Specifically, the OMB memo states that AI is rights-impacting or safety-impacting "if it is used to control or meaningfully influence the outcomes" of the enumerated activities. The phrase "meaningfully influence" is susceptible to varied interpretations and does not provide a clear threshold for identifying instances in which an outcome is the direct result of AI. **We recommend omitting the phrase "meaningfully influence" and relying solely on the concept of "control."**

- Fourth, the list of AI that is presumed to be rights-impacting and safety-impacting captures a broad set of AI applications, rather than specific use cases. This expansive list of applications and sectors would ultimately cover beneficial use cases, putting innovation at risk in very dynamic areas, such as cybersecurity. The approach to employment is also overly broad, lacking a clear focus on specific uses that create heightened risks. For example, the OMB memo references virtual workplace training programs, although it is not clear how or why these uses of AI would create meaningful risks to employees. Key terms such as "performance management" are also undefined. **We recommend that OMB tailor this section to focus on consequential employment decisions – decisions by agencies to hire, terminate, determine the pay, or promote individuals.**

III. The OMB Memo Should Better Leverage the NIST AI RMF.

We urge OMB to revise the memo to better leverage the NIST AI RMF.

The OMB memo currently refers to the NIST AI RMF as a gap-filling tool. It encourages agencies to identify additional context-specific risks and to fill potential risk management gaps by incorporating the NIST AI RMF, the Blueprint for an AI Bill of Rights, applicable international standards, or the workforce principles established pursuant to the AI executive order. This approach treats the NIST AI RMF as one of many reference points, without looking to the NIST AI RMF as a key aspect of implementing the memo's required minimum risk management practices. We note that, in contrast to the policies, principles, or international standards referenced, the NIST AI RMF was developed at the direction of Congress.

We encourage OMB to better leverage the NIST AI RMF, which is a flexible framework for identifying and mitigating risks. Adopting the AI RMF across government agencies would make the US a market leader on responsible AI and embrace best practices for managing AI risks. Leveraging the AI RMF can also help address the memo's fragmented approach to AI governance across the federal government, because the AI RMF can serve as a common language for assessing agencies' AI governance activities.

Creating the NIST AI RMF was a significant achievement that builds on NIST's work creating frameworks for managing cybersecurity and privacy risks. For example, the NIST Cybersecurity Framework (CSF) is widely used by private and public-sector organizations worldwide; since 2017, it has been mandatory for federal agencies to use the CSF to improve their cybersecurity risk management programs.[5] **We strongly encourage OMB to**

[5] *See* NIST, Cybersecurity Framework, Questions and Answers, (discussing federal agency use of the NIST CSF), *available at* https://www.nist.gov/cyberframework/frequently-asked-questions/framework-basics#agency.

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incorporate the NIST AI RMF as part of the memo's minimum risk management practices for federal agencies.

IV. The OMB Memo Should Refine its Minimum Risk Management Practices.

The OMB memo requires federal agencies to adopt minimum risk management practices for rights-impacting and safety-impacting AI. These requirements are designed to help agencies manage AI risks. We offer several recommendations on how OMB can best support agencies' implementation of these practices.

A. Impact assessments

The OMB memo recognizes the importance of performing impact assessments for high-risk AI systems, by requiring federal agencies to complete an impact assessment for both rights-impacting AI and safety-impacting AI. Performing impact assessments is a key part of creating a strong risk management program. Impact assessments have three purposes: (1) identifying potential risks that an AI system may pose, (2) quantifying the degree of potential harms the system could generate, and (3) documenting steps taken to mitigate those risks.[6] We appreciate that the OMB memo recognizes the utility of this important accountability tool and offer three recommendations as you implement this obligation:

- **First, the OMB memo should be revised to recognize that an agency's impact assessment should reflect the agency's role in obtaining and using the AI system at issue.** This is important because different agencies will play different roles in developing and using AI systems. As a result, they will have access to different types of information and be positioned to take different types of actions to identify and mitigate risks associated with the use of an AI system. We strongly recommend revising the OMB guidance to incorporate the overarching point that the impact assessment should reflect the agency's role in developing or using the AI system at issue.

- **Second, the OMB memo should not require agencies to provide specific metrics or qualitative analysis supporting its intended purpose and expected benefits.** The OMB memo currently requires an impact assessment to specify not just the intended purpose of the AI system, but also quantifiable metrics or qualitative analysis of the intended purpose and its expected benefits. This obligation should be omitted because it is likely to create barriers to using AI, which is in tension with the stated goal of removing barriers to the responsible use of AI.

- **Third, the OMB memo should streamline its requirements for documenting data used in the development and testing of AI.** The OMB memo requires documentation of several items, including the provenance and quality of data for its intended purpose; whether the data comes from an adequately reliable source; and whether the data is sufficiently broad enough to address the real-world inputs it might encounter. However, to the extent agencies rely on vendors for AI systems, the disclosure of this information is likely to implicate proprietary information and create a barrier to using vendor AI unless the relevant information has already been made available to the public or the downstream provider with whom the agency has contracted. It could also unintentionally undermine privacy and security of the AI

[6] *See* BSA, Impact Assessments: A Key Part of AI Accountability, *available at* https://www.bsa.org/files/policy-filings/08012023impactassess.pdf.

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system. For example, disclosures that require information detailing how network defenders use and train AI systems to secure networks could unintentionally create a roadmap for cyber adversaries to break through those defenses, in turn jeopardizing the underlying security of network and information systems. To address this concern, OMB should adjust these requirements to make them more high-level, such as requiring an overview of the training data.

- **Fourth, the OMB memo should provide that an agency can rely on another agency's impact assessment if the use case and context are the same or substantially the same.** This approach both enhances efficiency and promotes consistency among agencies' implementation.

- **Fifth, OMB should set a time frame for agencies to carry out impact assessment requirements for those conducted after the initial implementation deadline.** This will ensure that the implementation of safeguards does not slow down the adoption of AI.

B. Identifying algorithmic discrimination

The OMB memo requires agencies to take steps to ensure AI will advance equity, dignity, and fairness, as an additional obligation for rights-impacting AI.

The goal of this provision is important, as the need to identify and mitigate potential biases in AI systems is a critical issue. In our view, when AI is used in ways that could adversely impact civil rights or access to important life opportunities, the public should be assured that such systems have been thoroughly vetted and will be continuously monitored to account for the risks associated with unintended unlawful bias. We also believe that civil rights laws should be fully enforced.

At the same time, we encourage OMB to revise this aspect of the memo, to recognize several practical challenges that arise in identifying and mitigating potential biases. For example, the OMB memo currently requires agencies to identify and remove factors contributing to algorithmic discrimination or bias for rights-impacting AI. This involves determining if the AI relies on information about a protected class under federal nondiscrimination laws. However, there may be a lack of information for agencies to make these assessments, such as when the training data at issue does not contain information about protected classes. In addition, agencies will have to balance their privacy obligations, which can limit their ability to collect additional information that may provide insight on potential biases, with the need to assess AI for bias and discrimination.[7] **We urge OMB to further consult with stakeholders on the best approaches for agencies to identify potential biases and create flexibility in the memo by recognizing that agencies may not have access to information that would assist them in identifying potential biases.**

C. Consultation with stakeholders

The OMB memo also requires agencies to consult and incorporate feedback from affected groups, as an additional minimum practice for rights-impacting AI. Although we recognize

[7] *See* Jennifer King, Daniel Ho, et al., The Privacy-Bias Tradeoff: Data Minimization and Racial Disparity Assessments in U.S. Government, *available at* https://dl.acm.org/doi/10.1145/3593013.3594015.

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the importance of stakeholder feedback, we urge OMB to revise the memo's approach to soliciting and responding to such feedback in this context.

The OMB memo requires OMB to consult affected groups in the development and use of rights-impacting AI. If agencies receive "negative feedback," OMB advises them to consider not deploying the AI or removing the AI from use. While it is important for stakeholders to provide input on an agency's policies and overarching approach to important issues, the memo focuses stakeholder feedback on how agencies use a specific AI product, as opposed to a broader policy approach to AI technologies. This product-specific approach creates the potential for stakeholders to veto or otherwise slow down the use of a specific AI system. The process is also open to abuse by competitors and may become a second forum for bid protests. Moreover, the standard for "negative feedback" is vague and undefined. **OMB should revise the memo to advise agencies to take feedback into account without encouraging them to terminate use of a particular AI product in the event of negative feedback.**

V. The OMB Memo Should Extend the Timeline for Agency Implementation.

The OMB memo requires agencies to implement the minimum risk management practices and terminate non-compliant AI by August 1, 2024. Given the complexity of the issues that agencies are addressing, the implementation deadline is too soon for agencies to implement the required practices in advance of the stated deadline.

We strongly recommend agencies be given more time. If this deadline is not extended, agencies risk ending up in a scenario where they are not able to use AI simply because they have not been able to implement a substantial set of new practices across the agency within this short time frame. **We recognize that agencies can seek extensions under the OMB memo, but agency-by-agency extensions should not be a substitute for establishing an initial deadline that sets a strong and workable timeline for all agencies to adopt and implement the required new practices.**

VI. OMB Should Revise the Memo's Procurement Recommendations.

The OMB memo also addresses the process by which federal agencies procure AI systems. We recommend revising the memo's procurement provisions in three ways:

- **First, OMB should revise the memo to establish standard practices across agencies.** The procurement section of the OMB memo currently takes an agency-by-agency approach to procurement. For example, it requires agencies to include "tailored risk management requirements" in procurement contracts, and to encourage individual agencies to obtain adequate documentation of procured AI. We recommend revising this approach, so that procurement requirements are standardized across agencies. A standard process can better permit federal agencies to procure technology quickly. In contrast, allowing agencies to independently set these procurement requirements means that companies must tailor their systems for each agency, which takes time and increases costs to the taxpayer. The OMB memo should create a standard set of government-wide practices for AI procurement, helping ensure agencies can effectively adopt the technology.

- **Second, OMB should revise the memo's approach to external testing of procured generative AI systems.** The OMB memo encourages agencies to incorporate tailored risk management requirements in contracts for generative AI.

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These requirements include obligations for testing and safeguards, including external red teaming. We urge OMB to revise the memo's approach to these issues and delete the reference to "external" red teaming. Testing is an important part of ensuring appropriate functionality, but involving external entities in such testing can create concerns around access to trade secrets, proprietary information, or information that could jeopardize network and information security, and is likely to create barriers to using AI. Encouraging internal testing avoids requirements for companies to disclose this sensitive information to third parties and run the risk of such information ending up in the wrong hands.

- **Third, OMB should support the improvement of procured AI systems.** The OMB memo includes important provisions that encourage federal agencies to consider contracting provisions that incentivize the continuous improvement of procured AI. However, the memo also recommends that agencies consider contracting provisions that ensure that government data cannot be used to train or improve functionality of commercial AI offerings by the vendor without express permission from the agency. This creates tension with the broader goal of ensuring agencies have access to continually improved AI. Allowing vendors to use agencies' data to train their commercial products to continue to improve the technology is critical to ensuring the continuous improvement of procured AI, and to ensuring an AI system can more accurately support the agency's goals and data types. We recommend that OMB revise the memo to encourage agencies to permit their data to be used for further training of AI systems used by the government, subject to appropriate privacy and security safeguards.

VII. The OMB Memo Must Be Harmonized With Concurrent Regulatory Actions.

The OMB memo includes recommendations to agencies for AI procurement. We strongly encourage OMB to ensure the memo takes account of other ongoing regulatory actions that intersect with issues at the center of the OMB memo.

We recommend the memo acknowledge the need for OMB to work towards harmonizing the range of draft regulations and guidance that are currently out for industry comment and review. These include the OMB's memo on FedRAMP, "Modernizing the Federal Risk Authorization Management Program." The extension for comments on that draft guidance is helpful as the FedRAMP regulations will impact the larger cloud market, which in turn, will impact the AI market.[8] Moreover, the Federal Acquisitions Council is considering three rules for which the comment period was extended to February 2, 2024 (FAR-2021-0017 Federal Acquisition Regulation: Cyber Threat and Incident Reporting and Information Sharing; FAR-2021-0019 Federal Acquisition Regulation: Standardizing Cybersecurity Requirements for Unclassified Federal Information Systems), and (FAR- 2023 – 06 Federal Acquisition Regulation: Implementation of Federal Acquisition Supply Chain Security Act (FASCASA) Orders).

We urge OMB to consult with stakeholders including industry to look at these changes in concert, as the multiple regulations will need a coordinated approach to advancing AI innovation. With the number of changes in the regulatory environments for IT and

[8] These issues are closely related, as different AI models may have stronger performance in different clouds, making competition in the cloud marketplace crucial.

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specifically, AI, thoughtful analysis on the interplay between these rules and regulations can help the federal government better achieve its stated goals.

* * *

We appreciate the opportunity to provide comments on the OMB memo and would be happy to serve as a resource as you continue to develop your approach to these issues.

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PUBLIC SUBMISSION

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0074
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Partnership for Public Service

General Comment

Please see attachment for comments from the Partnership for Public Service.

Attachments

Partnership for Public Service_Comments on OMB AI Memo

PARTNERSHIP
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Better government. Stronger democracy.

December 4, 2023

Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Re: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (Document ID: OMB-2023-0020-0001)

Dear Director Young:

On behalf of the Partnership for Public Service, I am writing to share comments on the Office of Management and Budget's draft memorandum regarding "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" released on November 3, 2023.

The Partnership is a nonprofit, nonpartisan organization committed to building a better government and a stronger democracy. Core to our mission is the belief that a merit-based, nonpartisan civil service, who represents the diversity of the country, is central to our system of government. Since the Partnership's founding over two decades ago, we have advocated across administrations for changes to federal law, regulations, policies, and programs that improve our government's ability to attract, hire and retain a talented and diverse workforce that effectively serves the public.

The Partnership commends OMB for its thoughtful approach to leveraging artificial intelligence (AI) in government and we appreciate the chance to comment on this guidance. AI can be a powerful tool, but it is important not to lose sight of the people using and enabling its functions in government. Without the appropriate workforce and human capital mechanisms in place—including recruitment, hiring, training, development, and retention efforts—the federal government won't be able to effectively, securely and appropriately utilize these technologies.

There are references to human capital issues throughout the guidance, but agencies would benefit from clearer direction to shape their AI efforts. We recommend that OMB pull the disparate references to human capital and talent into a separate strategic human capital framework section in its guidance, so agencies incorporate human capital best practices from the start of their AI journeys. Clear guidance from OMB on this topic will ensure that AI human capital needs are well-coordinated across government and compel agencies to think strategically about AI talent, development and leadership long before inadequacies cause challenges and delays to the other work directed by the memo.

Although AI use in government represents uncharted territory in some respects, there are scores of best practices related to the federal workforce and human capital management that can, and should, be applied to this issue. Core focus areas for strengthening the federal AI workforce include:

- Utilizing surge hiring best practices and available hiring flexibilities;
- Deploying skills-based hiring and considering job classification;
- Developing position descriptions and making them shareable government-wide;
- Empowering and developing modern government leaders;
- Equipping leaders and supervisors with training on technology principles; and
- Mitigating human capital risks (e.g., privacy, bias and transparency).

We believe these tenets and specific proposals will help ensure that the federal workforce is equipped to deploy emerging technologies, such as AI, today and in the future. Below we further outline recommendations for OMB regarding the draft guidance, including a separate strategic human capital framework section and suggestions for additional provisions.

Strategic Human Capital Framework

Agencies must think strategically and work collaboratively to address the human capital needs that AI implementation requires. To assist them in this process, OMB should expand its guidance by creating a strategic human capital framework section. This framework should be developed in coordination with the Office of Personnel Management (OPM) and build upon considerations OMB has accounted for in its proposed guidance. We recommend including the following best practices:

Utilize surge hiring best practices and available hiring flexibilities:

The rapid advancement of government-wide AI capacity will require a thoughtful hiring surge that incorporates learned best practices from recent talent buildups.[i] While focused on onboarding AI talent, the federal government should seize this opportunity and broaden the scope of the surge to encompass the range of roles needed to leverage AI, including not just technologists, but data analysts, data scientists, customer experience specialists, and any other enabling roles. Additionally, it's critical that agencies focus on bringing in early-career employees to build the talent pipeline, not just experts at higher grades. We recommend that OMB's guidance ensure that agencies are focused on a variety of grade levels and skillsets – this will allow agencies to fill mission-critical skills gaps while hiring for AI talent and enable the federal government to better leverage this emerging technology in the long run.

To that end, OMB and OPM should determine which government-wide or agency-specific hiring authorities best meet the needs of the pending surge, develop a recruiting infrastructure that leverages data and technology, hire recruiters or train current staff on how to attract candidates and guide them through the hiring process, and apply a project management approach to streamlining the hiring surge. OMB mentions some of these considerations in the "Advancing Responsible Artificial Intelligence Innovation" section of its guidance and should further specify them to provide agencies with a baseline of information that they can customize to their needs. These best practices can help overcome a disjointed hiring process and have been used by agencies to rapidly grow their workforces in response to various challenges and initiatives.

Deploy skills-based hiring and consider job classification:

Unnecessary degree requirements can create barriers for job seekers, particularly in technology-focused occupations. Progress has been made on this front in recent years (e.g., the 2020 executive order[ii] emphasizing skills over degree requirements) but government can still strengthen its talent pipelines for jobs that do not require a four-year degree—such as those in IT, cyber and AI—by demystifying the hiring process and using rigorous technical assessments to identify qualified talent, building relationships with community colleges and workforce development organizations, and removing barriers to professional development and advancement. Doing so would benefit federal agencies by connecting them with potential applicants who too often are overlooked and talent within underserved

communities.[iii] This guidance should also make clear to agency human capital leadership that four-year degrees should not be required, and direct new Chief AI Officers (CAIOs) to work with Chief Human Capital Officers (CHCOs) to ensure that HR specialists understand what alternate programs and bootcamps confer the required skills absent a formal degree.

Additionally, agencies should be directed as part of their strategic AI human capital planning to identify which occupational series they will use to fill AI roles, as these positions encompass a range of work beyond and including those mentioned in Executive Order 14110 section 10.2(d)(i) – IT Specialist (2210), Computer Scientist (1550), Computer Engineer (0854), and Program Analyst (0343) focused on AI. Depending on the job classification, there will be certain hiring flexibilities and pay considerations available to bring those candidates on board (e.g. direct hire for certain STEM occupations) that every agency must understand and have available to them – all critical elements that must be considered before ever posting a job.

Develop position descriptions and make them shareable government-wide:

Rather than using antiquated job titles heavy on government vernacular, agencies should aim to attract prospective candidates by titling jobs in accordance with industry-wide standards. Additionally, position descriptions should be modernized and clearly outline expected responsibilities. OPM issued guidance on the skills and competencies needed for federal AI positions in July 2023,[iv] offering a list of general and technical competencies that can serve as a starting point for agency job analysis efforts – we recommend including this resource in OMB's guidance. To help agencies effectively recruit tech and AI talent, it would be useful to develop a set of common job titles and position descriptions, make those shareable government-wide, and undertake pooled hiring actions for those roles. The Partnership commends OMB's reference in 4(b)(iv) of its guidance to the use of descriptive job titles and recommends that this be expanded to cover updated position descriptions and job announcements for greater effect.

Empower and develop modern government leaders:

Leaders across government, from every discipline and practice, should apply modern ways of working to their programs and organizations. It is critical that agency leadership be prepared to respond to the ongoing evolution of AI, along with any emerging technology or tool, and their broad impacts. To this end, the federal government should invest in hiring and training government leaders[v] who integrate modern ways of working for their organizations. This approach is customer-centered, outcome-oriented, evidence-based, transparent, strategically evaluates risks, and technologically open-minded. It empowers federal leaders to simultaneously harness AI's immense potential for public good while actively mitigating its potential for harm.

To achieve this goal, these types of leadership skills should be adopted across government, regardless of the leader's functional relationship to technology. Emphasizing their adoption in updates to the Executive Core Qualifications (ECQs), as outlined in section 10.2(d)(vii) of the EO, is a critical opportunity – and this guidance should ensure that any updates to the ECQs are applicable not just to those directly overseeing technology or related areas, but to any senior leader. Furthermore, any review of the ECQs should not just be limited to how the skills are applicable to AI and data, but more broadly how they outline the skills required of all modern leaders. We recommend that OMB and OPM partner with

agencies and external stakeholders through that process to develop modern leadership standards and build off existing models, such as the Partnership's Public Service Leadership Model.[vi] These principles will help guide efficient, equitable and effective delivery for the public while centering the humans who create, implement, benefit, and are impacted by AI's growth.

Finally, the AI executive order and OMB's subsequent guidance outline a governance structure which includes a designated Chief AI Officer. For AI efforts to be successfully coordinated at agencies, it is imperative that this role not operate in a silo. Simply designating a "chief" only scratches the surface of the cross-organizational leadership necessary to meet this AI moment head on. Ultimately, if the person in the role isn't empowered to lead and work collaboratively across the enterprise, there will be little progress on these issues. We recommend that this role not be dual hatted with other chief roles unless the person has specific leadership skills applicable to the AI role or has a technical deputy that can serve as the link between senior leaders and the AI workforce. Additionally, we question whether this needs to be another "chief" role, or should rather be embedded across existing data, IT, cyber, and program offices that all play parts in enabling any emerging technology such as AI. Regardless of where the CAIO sits, it is crucial to ensure that the person in this role has the requisite skills to enable successful AI adoption and usage, which may mean bringing in talent from outside of government.

Equip leaders and supervisors with training on technology principles:

In addition to a federal workforce that is able to responsibly use AI for public service and protect against its harms, we need federal leaders who are equipped to lead AI decision-making effectively and responsibly. Regardless of their technical background, leaders should make a concerted effort to learn new technologies and see how they can be used in service to the public. Responsibly evaluating, implementing and using artificial intelligence tools requires successful collaboration between technical and non-technical leaders. The data scientists building AI tools, the CAIOs or Chief Information Officers operating them, the general counsels reviewing their privacy implications, the program managers interpreting their results, plus many others, must all collaborate for AI use to follow responsible principles.[vii]

Whether agencies are building their own AI systems or acquiring them from outside vendors, they should ensure that federal employees have sufficient expertise to evaluate and operate artificial intelligence tools. Agencies should also explore ways to develop technical and non-technical staff capacity to understand the risks, benefits and implications of using AI for service delivery. Some current efforts recognize this need and aim to assist agencies in developing expertise, such as the AI Training Act signed into law in October 2022 which charges OMB with developing a training program to help acquisition professionals better understand AI and its potential risks and benefits.[viii] OMB should consider whether this already-underway framework can and should be applied to other training opportunities.

Additionally, leaders should communicate with employees early and often about the potential of AI to disrupt and alter their work. The federal government should investigate and prepare for changes to the workplace resulting from AI adoption similarly to the planned studies on the broader workforce outlined in section 6 of Executive Order 14110. A holistic response will train workers to partner with AI to create responsible "human-in-the-loop" decision-making processes, identify areas of need within the government and retrain workers into those roles, and ensure that pathways for dedicated civil servants

to grow in their careers remain open at all levels of government operations. To see the true benefits of AI in the federal workplace, it is imperative that government retains and empowers federal workers to achieve their mission of impactful, inclusive public service and benefits delivery.

Mitigate human capital risks:

OMB's guidance provides an opportunity to mitigate AI-related human capital risks, addressing concerns surrounding leadership, transparency, privacy, bias and much more. The Partnership recommends that OMB update its guidance to account for the following considerations and best practices.

First, the risk mitigation framework defined for rights impacting uses of AI is holistic and flexible, allowing it to adapt to the rapid acceleration of AI capabilities. Providing further details for agencies on key, foreseeable harms in the human capital and hiring domain can ensure safer rollout in the near-term. We recommend the following:

- CAIOs should collaborate with their respective CHCOs to define and release a restricted list of model features and uses in the human capital domain that are not already associated with protected classes. Of particular importance are restrictions on the use of biometric and personality-based features and evaluation techniques.
- Agencies should publish their criteria for evaluating human capital use cases for algorithmic bias and discrimination, publicly defining the acceptable range of outcomes for protected groups.
- The federal government must prevent the creation of a pay-to-play paradigm in job and benefits application use cases, wherein the supplying vendor—or associated developers—creates and sells a consumer product that tailors application materials to pass the screening algorithms they provide to the government.
- Agencies should expand the protections for federal data described in guidance section 5(d)(iv) on contracting to include their procurement evaluation processes to safeguard privacy and retain the data's value for the government.

Next, there are a variety of opportunities and risks in using AI to recruit and hire talent. Before AI is fully embedded in talent management there must be more progress made with previous executive orders around data integrity, as most federal HR systems are fragmented and lack comprehensive data points to effectively inform algorithm development. Additionally, government must inject more transparency into the hiring process. A common question we hear in our work with career advisors and jobseekers centers around the role of technology and AI in reviewing applications. Students and advisors are often surprised to learn that a human reviews and scores at least part of their application. Should those standards change as the role of AI becomes more prominent, it will be important to inform the public.

Finally, the risk of bias in human capital operations must be considered. When it comes to talent management, AI can be a useful tool for identifying possible gaps and differentiators of talent. However, it should not be used as an isolated decision-maker, because it is challenging to replace the nuances of human experiences and historical references (e.g., racism, sexism, etc.) when assessing people's contributions within a complex social network like a federal agency. As OMB, agencies and the administration continue exploring the use of AI in government, bias mitigation must be more prominently considered, particularly as it applies to human capital management. OMB, along with OPM, should create more explicit guidance for agencies on the use of AI in this area.

Additional Provisions

While much of the focus of these comments has focused on the human capital aspects of the draft guidance, we offer the following comments on a few other areas as well.

Define AI hallucination thresholds for federal information and content developed by generative AI:

Hallucination (false or misleading information created by AI) thresholds should be defined wherever the federal government makes decisions or provides information developed by generative AI. Recent research has found that publicly available chatbot products have hallucination rates ranging from 3-27% of generated content.[ix] For government to deliver on its mission and maintain public confidence, it must ensure automated information delivery is accurate and trustworthy. These thresholds should be tailored to the specific risks associated with misinformation on a particular subject. Recognizing that eliminating these errors is not currently feasible, agencies should develop processes to identify and remedy instances of hallucinations that occur during public-facing service delivery. We recommend addressing this issue in risk management section 5(c) of the guidance.

Prevent non-government actors from mimicking federal AI outputs:

The federal government must take steps to prevent non-government actors from mimicking outputs created by federal generative AI. While watermarking can be an effective means of tracing provenance, it is currently technologically inconsistent, ineffective on text-based generation tasks, and vulnerable to mimicry. The federal government should investigate the efficacy of algorithmic methods that prevent content from being reproduced by adversarial generative AI. These practices, broadly known as "cloaking," are critical to upholding trust in government by preventing misinformation, abuse and fraud. We recommend addressing this issue in risk management section 5(c) of the guidance.

Spotlight review allowances under the Paperwork Reduction Act:

One of the best practices in designing products is the collection of user feedback. This ensures that a product is designed for the customer, in addition to being user-friendly and accessible. Far too often, government products and services are not designed this way and agencies do not incorporate real-time user feedback at points throughout the development process to drive improvements – often this is due to a real or perceived ban on collecting user feedback unless agencies go through the requirements of the Paperwork Reduction Act. We applaud the guidance for stating in footnote 33 (page 19) that agencies are not required to go through the Paperwork Reduction Act review if user feedback is collected in the ways stated in the guidance. We recommend that this be elevated from the footnote and more clearly stated in the guidance. Agencies may be reluctant to allow this sort of user feedback without specific and ongoing guidance from OMB that it is not only allowable but encouraged.

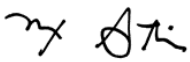
Conclusion

We appreciate OMB's efforts to support the responsible use of AI in government and the thoughtful guidance outlined in this draft memo. In addition to efforts aimed at establishing policies related to AI, OMB and policymakers should continue seeking opportunities to deploy tried and true best practices to strengthen the federal workforce. As these efforts continue in the days, weeks and years to come—and

as technology continues to rapidly evolve—we implore policymakers and agency officials to continue supporting federal employees, integrating technology efforts across the enterprise, and applying human capital best practices.

Thank you for the opportunity to share our thoughts and recommendations. We welcome the opportunity to work together toward our shared goal of supporting the federal civil service today and in the future.

Sincerely,



Max Stier
President and CEO

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[ii] Executive Order 13932 "Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates," June 26, 2020, https://www.federalregister.gov/documents/2020/07/01/2020-14337/modernizing-and-reforming-the-assessment-and-hiring-of-federal-job-candidates

[iii] "Opening Doors, Building Ladders: How Federal Agencies Can Hire and Retain Californians Who Do Not Have a Four-year Degree," Partnership for Public Service, February 2021, https://ourpublicservice.org/wp-content/uploads/2021/02/Opening-Doors-Building-Ladders.pdf

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[v] "Modern Government Leaders Program," Partnership for Public Service, https://ourpublicservice.org/our-solutions/leadership-and-collaboration/networks/modern-government-leaders/

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[viii] "In the Public AI," Partnership for Public Service, December 2022, https://ourpublicservice.org/publications/in-the-public-ai/

[ix] "Measuring Hallucinations in RAG Systems," Vectara, November 2023, https://vectara.com/measuring-hallucinations-in-rag-systems/

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Comment On: OMB-2023-0020-0001
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Document: OMB-2023-0020-0075
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Accenture Federal Services

General Comment

Attached please find comments from Accenture Federal Services (AFS) on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

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Attachments

AFS Comments on Proposed OMB AI in Government Memorandum

Accenture
Federal
Services

Accenture Federal Services
800 N. Glebe Road, Suite 700
Arlington, VA 22203

December 5, 2023

Shalanda D. Young
Director
Office of Management and Budget
Re: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

Dear Director Young,

As a leading US federal services company, Accenture Federal Services (AFS) provides a broad range of services and solutions in strategy and consulting, technology, and operations. AFS is a subsidiary of Accenture LLP and supports every cabinet-level department and 30 of the largest federal organizations. We partner with federal agencies to develop and launch Artificial Intelligence (AI) applications that unlock value from data, automate operations, and enhance decision-support to achieve mission outcomes.

We have seen first-hand the remarkable impact of AI in transforming how federal agencies achieve their mission, serve people, and manage their organization. Our Data and AI practice has helped federal agencies responsibly and securely prototype, test, and launch AI solutions that accelerate the delivery of public services and solve enterprise challenges. Through our Discovery Lab, we pilot and incubate cutting-edge technologies to deliver breakthrough solutions that advance federal capabilities for trustworthy, transparent, and accountable use of AI. We carefully track the evolving AI ecosystem to make informed recommendations for federal agencies and understand the required balance between embracing and safeguarding technology adoption.

AFS appreciates the opportunity to provide input on the draft memorandum. Overall, we strongly support the proposed guidance. The level of detail provides clear accountability and specific steps forward, which will strengthen the federal government's ability to deliver innovative AI solutions while managing risks. We provide additional comments in the attached memorandum and stand ready to assist the federal government in its ongoing efforts to advance responsible AI innovation.

Sincerely,

Aaron Jackson
Technology Lead

Noelle Russell
Data and AI Market Lead

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

We believe that the proposed responsibilities, seniority, and reporting structures for Chief AI Officers are sufficiently flexible and achievable to be successful across federal agencies. Additionally, the detailed list of responsibilities provided in the guidelines is beneficial to provide clarity and accountability within an agency's AI program.

To be successful, it will be important that federal agencies take action to ensure the CAIO's authority and resources are adequate to match the scope of responsibilities.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

Rather than requiring a new body, we recommend allowing agencies to identify and tailor the approach that supports the greatest level of leadership engagement and most effective oversight of AI. Instead, inclusion of AI Governance Body makeup and ombudsman information in agency AI Strategies will allow for this tailored approach, while creating transparency.

Many agencies will benefit from establishing a new AI Governance Body. This will allow a dedicated focus on the unique considerations of AI and allow the cadence, structure, and norms of the group to be tailored to this objective. However, this may not be true for all agencies – given the potential overlap of membership with existing governance bodies, some agencies may find it most effective to update the scope of an existing group.

Tailored, executive level training for AI Governance Board members can support active engagement and effective governance. Given the highly varied backgrounds and roles of the participants, it is important to establish a common language, provide a baseline knowledge of best practices for responsible AI and risk management, and create awareness of the types of transformative opportunities and use cases that AI can unlock in federal government.

Based on AFS's experience working with CDOs after the Evidence Act, the most important mechanism for an effective AI Governance Body to build momentum and drive results is to focus on 1-3 top issues that the body will address. This focuses the group and drives engagement from the participating stakeholders, which is critical at the early stage. Without focus, the new

body can quickly be undermined by organizational dynamics from the existing established structure.

3. How can OMB best advance responsible AI innovation?

While the OMB guidance appropriately focuses on governance and risk management, there is an opportunity to better emphasize the centrality of AI innovation to "seize the opportunities" AI presents. AI has proven to streamline operations, enhance decision-making, and make government services easier to find, access and understand. This will not happen unless federal agencies are able to proactively build the capability for AI including use case identification, prototyping capabilities, workforce education, data preparation, and technology infrastructure.

OMB can advance responsible AI innovation by providing specific, measurable guidance related to innovation. We support the proposed memorandum's inclusion of innovation in the CAIO's responsibilities (including "identifying and removing barriers to the responsible use of AI"), the scope of the AI Governance Board, and the AI Strategy. When possible, adding additional detail to these requirements will help agency AI programs prioritize innovation as a key focus in addition to risk management. OMB can further support this goal in templates, guides and resources that will support implementation of this memorandum.

Additionally, OMB can advance responsible use of AI providing agencies with an incentive to identify and prioritize use cases. An important first step is publishing this memo which encourages experimentation, that said, the perceived or inherent risk in practical execution of AI experimentation may prevent further adoption in a risk-averse organization. Further encouragement will be needed to empower CIOs and agency decision makers to embrace this risk. OMB should consider ways to recommend change management and workforce education initiatives to mitigate cultural barriers to adoption.

Although not addressed in the proposed memo, the OMB-led AI interagency council (as required by Section 10.1 of Executive Order 14110) can significantly contribute to advancing responsible AI innovation across federal agencies. We recommend that the council identify common opportunities for AI innovation across agencies, track and monitor the overall progress towards responsible innovation, and work to address common challenges or gaps in enablers.

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

The potential of generative AI to enhance workplace productivity and collaboration is enormous. Generative AI can dramatically increase the efficiency of research, analysis and content production. It can accelerate secure software development and provide new methods to identify vulnerabilities. Overall, generative AI will empower federal agencies to make their existing enterprise data more accessible and discoverable, unlocking decades of embedded value. These developments will allow agencies to reimagine their workforce with solutions that empower federal employees as the human in the loop for these solutions.

We recommend three key actions for federal agencies to take advantage of the transformative potential of generative AI.

First, government organizations should engage their workforce to solicit new ways to educate the workforce and capture employee ideas for use cases. Generative AI offers opportunities for task augmentation and automation in parts of the enterprise that may not have engaged in previous data and technology innovation efforts. Many generative AI opportunities will involve enhancement and reinforcement of human capabilities, and the direct engagement of the workforce in identifying, testing, and refining these capabilities is essential.

Second, federal agencies should prioritize learning through prototyping to assess benefits, understand potential risks, understand user adoption, and build approaches to responsible, trustworthy generative AI. Resources such as the NIST Risk Management Framework provide a valuable starting point, but hands-on testing and evaluation will empower agencies to set metrics to measure success and determine the safeguards needed to successfully deploy these transformative technologies.

Third, agencies should establish mechanisms for safely and responsibly gaining hands-on experience with state-of-the-art, performant commercial and freely-available generative models. The pace of development in generative AI is such that any snapshot of capabilities and risks can be obviated within just a few weeks. Access to technologies can demystify their functions and allow for development of adaptive, responsive risk assessment methodologies.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

Overall, we find the approach of the memorandum to be effective. The principles-based definitions in Section 6 will allow agencies to determine if a use case is safety-impacting or rights-impacting, and the provided list of presumed use cases provides clarity on the applicability and scope of the definitions.

The following rights-impacting use case "D. Detecting or measuring emotions, thought, or deception in humans" could be interpreted to apply to sentiment analysis, a common natural language processing (NLP) technique that analyzes text and provides insight into the underlying sentiment or emotion expressed. This technique is commonly used to better understand themes or trends in large sets of aggregated text, e.g. customer feedback or public comments. AFS does not believe the general application of sentiment analysis to text is right-impacting as defined in Section 6 of the proposed memorandum. OMB should provide further clarity to help agencies understand if sentiment analysis of text is presumed to be rights-impacting.

The rights-impacting use case "B … social media monitoring" can be clarified. It is presented in the context of law enforcement and surveillance. However, social media monitoring is applied in many innocuous contexts outside of law enforcement, such as to identify emergent local or national events. This could be clarified as "social media monitoring in law enforcement contexts".

The rights-impacting use case "G … virtual or augmented reality workplace training program" appears in the context or terms and conditions of employment. Not all applications of AI in virtual workplace training are necessarily rights-impacting. For example, AI is used widely to

provide translation or captioning in virtual training, making courses more accessible to populations who might otherwise be excluded. Constraining the use of AI in this context in a fashion that exceeds the burden applied to less performant, non-AI software could be counter-productive.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

We believe the minimum practices for safety-impacting and rights-impacting AI are a suitable baseline for federal agencies given the flexibility for context-specific risk mitigations.

However, no minimum practices were provided for AI uses cases that do not impact rights or safety, including potentially moderate or high risk use cases. Agencies will need to identify their own approach from best practices including the NIST AI Risk Management Framework and its companion Playbook, and AI Bill of Rights.

AFS recommends providing a clear, consistent framework to identify required minimum practices across all AI use cases. This would help federal staff understand how to incorporate responsible practices throughout the development of AI, rather than identifying relevant controls at the end of a development process. This clarity would help to streamline development, unlock experimentation, and advance responsible AI.

Overall, a greater level of detail will help agencies interpret specific risk management requirements. For example, the requirement that agencies "*test their AI to determine whether there are significant disparities in the AI's performance across demographic groups"* could potentially be interpreted as requiring testing for *all* demographic groups. The first sentence could be amended to refer to "relevant or potentially impacted demographic groups" to add greater clarity. Testing for *all* demographic groups may be infeasible and could take valuable resources away from assessment focused on vulnerable communities.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

It would be valuable to provide agencies with specific resources such as templates to create efficiency across federal agencies, manage risk through consistent requirements, and contribute to accountability and transparency.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

To the extent consistent with applicable law and governmentwide guidance, agencies should provide a greater level of detail on the anticipated benefits, data sources used, and status of the

AI application (planned, in development, production). This information would help the public understand and engage with the AI inventories in a deeper way.

For rights and safety impacting AI, the inventories should include information on identified risks and mitigations.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0076
Comment on OMB-2023-0020-0001

Submitter Information

Organization: ACM US Technology Policy Committee

General Comment

The attached is submitted on behalf of the US Technology Policy Committee of the Association for Computing Machinery, the nation's and the world's largest association of individual professionals in all aspects of computing. ACM is a non-profit, non-lobbying organization. To arrange a briefing by one or more of ACM's experts, please contact:

Adam Eisgrau, Director
ACM Global Policy & Public Affairs
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Attachments

USTPC OMB AI Memo Comments 120523

December 5, 2023

RESPONSE TO OMB REQUEST FOR COMMENTS ON DRAFT MEMORANDUM REGARDING ADVANCING GOVERNANCE, INNOVATION, AND RISK MANAGEMENT FOR AGENCY USE OF ARTIFICIAL INTELLIGENCE*

The Association for Computing Machinery (ACM), founded in 1947 as a non-profit and non-lobbying organization, is the world's largest and longest-established society of individual professionals involved in virtually every aspect of computing. Our over 50,000 members in the United States and 100,000 worldwide serve in government, industry, academia, and the public sector. Many have pioneered and continue to pursue work on the cutting edge of computing, including artificial intelligence.

Through its U.S. Technology Policy Committee (USTPC), ACM strives to provide apolitical technical expertise and analysis to Congress, the Executive Branch, and policymakers throughout government to inform technology policy. Consistent with this mission, USTPC is pleased to offer the following general recommendations in response to the Office of Management and Budget's *Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum* (OMB Memorandum):[1]

1) Devise and Implement a National Strategy for the Interoperability of Digital Services

USTPC recommends that OMB orchestrate the development and implementation of a comprehensive and detailed strategy to assure the interoperability of digital services, including those enabled by AI, across all federal agencies.[2] It should be neutral and open, and accompanied by comprehensive principles and guidelines to inform its implementation to be followed by

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* These comments were principally drafted for USTPC by Committee member Carlos Jimenez-Gomez and Committee Chair Larry Medsker. Also contributing were Past USTPC Chair Jim Hendler, Algorithms and AI Subcommittee Chair Jeanna Matthews, and Subcommittee members Ricardo Baeza-Yates, Simson Garfinkel, and Demetrios Kirkiles.

[1] See 88 FR 75625 (November 3, 2023) [https://www.federalregister.gov/documents/2023/11/03/2023-24269/request-for-comments-on-advancing-governance-innovation-and-risk-management-for-agency-use-of].

[2] USTPC notes that the OMB Memorandum directly addresses interoperability. See, *e.g.*, Sec. 5.d. on "Managing Risks in Federal Procurement of Artificial Intelligence," subsection 5.d.iii. on "Promoting Competition in Procurement of AI," as follows: "Agencies should take appropriate steps to ensure that Federal AI procurement practices promote opportunities for competition among contractors and do not improperly entrench incumbents. Such steps may include promoting interoperability and ensuring that vendors do not inappropriately favor their own products." In addition, Sec. 11 of the President's October 30, 2023 Executive Order states: "To advance responsible global technical standards for AI development and use outside of military and intelligence areas, the Secretary of Commerce, in coordination with the Secretary of State and the heads of other relevant agencies as appropriate, shall lead preparations for

government agencies.[3] These should also provide mechanisms to guide and facilitate its adoption. Specifically, such an ecosystem, at minimum, must be:

- Multi-dimensional – The strategy must address multiple dimensions of interoperability including, but not limited to: technical, semantic (data and information),[4] and organizational (as well as interoperability governance). We note that NATO[5] and the European Union have taken such a holistic approach, the latter having also addressed legal interoperability;[6] and

- Universal/Available – USTPC also urges OMB to create a centralized repository of trusted interoperable resources accessible to all germane agencies that includes detailed information documenting the specific means employed by agencies to minimize efforts and maximize impact.[7] Not only would such a mechanism promote interoperability, but it also could enhance effectiveness, efficiency, consistency, and the adoption of more trusted, safe, and secure digital services. Open and interoperable resources also could help to accelerate convergence in the standardization of digital services and potentially boost the nations' digital economy.

2) Emphasize Responsible AI

The term "responsible AI" is often used as a shorthand for a number of properties of algorithmic systems in general, and AI systems in particular, that require guiding principles and practices. The USTPC has developed statements on a number of these including the transparency, accountability, and the safety of all algorithmic systems, as well as on specific requirements for the principled development of generative AI programs. See:

- *ACM TechBrief: Generative AI* (Summer 2023);[8]

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a coordinated effort with key international allies and partners and with standards development organizations, to drive the development and implementation of AI-related consensus standards, cooperation and coordination, and information sharing."

[3] See, for example, the European Interoperability Framework. See https://ec.europa.eu/isa2/eif_en/.

[4] Among other points, components such as common taxonomies, ontologies, and other elements linked to semantic interoperability can be enablers to leverage AI-based results.

[5] See https://www.nato.int/cps/en/natohq/topics_84112.htm

[6] See Angi, L., Combetto, M., Martin Bosch, J. and Rodriguez Müller, P., Artificial Intelligence for Interoperability in the European Public Sector, Publications Office of the European Union, Luxembourg, 2023, doi:10.2760/633646, JRC134713.

[7] See, *e.g.*, the European Union interoperable resources repository. https://joinup.ec.europa.eu/collection/joinup/interoperability-solutions.

[8] See https://dl.acm.org/doi/pdf/10.1145/3626110.

- USTPC Comments to White House OSTP on National AI Priorities (July 7, 2023);[9]
- Principles for the Development, Deployment, and Use of Generative AI Technologies (June 27, 2023);[10]
- *ACM TechBrief: Safer Algorithmic Systems* (January 2023);[11] and
- Statement on Principles for Responsible Algorithmic Systems (October 2022).[12]

USTPC thus regards the OMB Memorandum as an opportunity to underscore and widely disseminate the importance of a code and culture of ethics (essentially defined as the combination of the above principles) being at the core of AI technology development and deployment.[13] Accordingly, USTPC recommends that the OMB Memorandum formally articulate and endorse strengthening the ethical use of AI as a core value.[14] Doing so, we note, also may help prevent intended and unintended bias and misuses of AI.

3) Address Privacy from the Beginning of the Design and Development Process

USTPC has long advocated that the disciplines of privacy by design[15] and privacy by default inform and be incorporated into federal policy wherever relevant.[16] The OMB Memorandum presents a prime opportunity to do so, particularly with specific references to auditing processes and audit trails. USTPC anticipates that implementing this recommendation will foster stricter control of data, increased privacy, and enhanced personal data protection.

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[9] See https://www.acm.org/binaries/content/assets/public-policy/final-ustpc-ostp-ai-comments.pdf

[10] See https://www.acm.org/binaries/content/assets/public-policy/ustpc-approved-generative-ai-principles

[11] See https://dl.acm.org/doi/pdf/10.1145/3582277

[12] See https://www.acm.org/binaries/content/assets/public-policy/final-joint-ai-statement-update.pdf

[13] See an overview of ethical and societal concerns at https://www.iso.org/standard/78507.html and articles in *AI and Ethics*: https://www.springer.com/journal/43681/aims-and-scope

[14] Various new AI-related standards are adopting a social dimension approach, where ethics is also at the core of the standardization effort. See specific standards and groups of standards, such as IEEE SA AI Ethics and Governance Standards https://ieeexplore.ieee.org/browse/standards/get-program/page/series?id=93 and ISO/IEC TR 24368:2022. Information technology. Artificial intelligence. Overview of ethical and societal concerns https://www.iso.org/standard/78507.html

[15] See https://privacy.ucsc.edu/resources/privacy-by-design---foundational-principles.pdf. See also https://www.oecd.org/publications/emerging-privacy-enhancing-technologies-bf121be4-en.htm

[16] See, *e.g.*, USACM Statement on the Importance of Preserving Personal Privacy (March 1, 2018).

4) Standardize Definitions and Concepts

Common understanding of key AI-related terms and concepts among all federal agencies, the computing profession, and the public will be critical to the development of policies and mechanisms for the efficient delivery of AI-based digital services. USTPC believes that the need for such consistency and clarity has increasingly been publicly recognized and pursued. Indeed, the Organization for Economic Co-operation and Development's (OECD) Council recently adopted this new definition of Artificial Intelligence: "An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments. Different AI systems vary in their levels of autonomy and adaptiveness after deployment."[17]

In addition, we note that the Technology Standards Working Group of the US - EU Trade and Technology Council recently sought broad public comment on a detailed first edition of a *Terminology and Taxonomy for Artificial Intelligence*.[18] USTPC commends the comments of ACM's Europe Technology Policy Council in that proceeding to OMB for its consideration in producing the next draft of the OMB Memorandum, together with the five recent documents cited in Section 2 above.

USTPC stands ready to further assist OMB. Should questions arise concerning this document, or to arrange a technical briefing with ACM and USTPC's expert members, please contact ACM's Technology Policy Office at acmpo@acm.org or 202-580-6555.

[17] See https://oecd.ai/en/ai-principles

[18] See https://www.nist.gov/artificial-intelligence/ai-policy-contributions and https://futurium.ec.europa.eu/en/EU-US-TTC/wg1/news/input-first-edition-ttc-wg1-eu-us-terminology-and-taxonomy-artificial-intelligence.

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Document: OMB-2023-0020-0077
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Surveillance Resistance Lab

General Comment

See attached file(s)

Attachments

FINAL_LAB_OMB_Comment_5Dec23

December 5, 2023

Clare Martorana
U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management Budget
725 17th St., NW
Washington, DC 20503

Re: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, OMB 2023-0020-0001

Dear Ms. Martorana:

The Surveillance Resistance Lab is a think and act tank focused on state and corporate surveillance as one of the greatest threats to migrant justice, racial equity, economic justice, and democracy. We challenge how surveillance at the nexus of state and corporate power not only threatens privacy, but seriously erodes fundamental rights leading to heightened oppression and repression.

While the White House's recent Executive Order on "AI"[1] technologies and the related OMB guidance promise new oversight structures for federal agencies contracting with private companies to provide "AI" services, it also risks conceding critical ground—that corporate

[1] While we use "AI" throughout our comment to maintain consistency with OMB's proposed guidance, we must name that the adoption of marketing language like "AI" or "artificial intelligence" by the government as the shorthand term used to describe regulation and governance of a variety of different automated decision-making tools contributes to public and consumer confusion about what "AI" is and is not. As Luis Perez-Breva, lecturer and research scientist at MIT School of Engineering, observes, "I see a rush to over-market as AI anything that involves computation with data. That just sows a lot of confusion. Things advertised as "AI" today have no intelligence of their own." Greg Nichols, Don't be alarmed, but you're probably using the term AI wrong | ZDNET, Nov. 15, 2017. Available at: https://www.zdnet.com/article/dont-be-alarmed-but-youre-probably-using-the-term-ai-wrong/,

needs, and not the public's, will drive agencies' governing strategies. The guidance privileges "innovation" at the expense of the public sector.[2]

The public and government's ability to hold contractors accountable for harm caused by safety and rights-impacting "AI" systems is already diluted by laws that protect corporations from transparency, oversight, and accountability mechanisms necessary for the public to understand and influence governance. For example, government contractors sued for violating the United States Constitution or other laws through the services they provide the government may invoke the "government contractor defense", limiting the public's access to the courts for remedies of constitutional magnitude.[3] Public notice and comment opportunities through administrative agencies, like this one, are not required before the procurement of technologies, even when policy decisions are embedded in the design of such technology.[4] Government agencies are also already exempt from disclosing information to the public and investigative media via Freedom of Information Act exemptions, such as Exemption 4, which exempts "trade secrets and commercial or financial information obtained from a person and privileged or confidential" from disclosure.[5]

As "AI" produced by the private sector becomes increasingly embedded and deployed by government institutions, we must take forceful action to ensure that the public interest values of transparency, inclusivity, reasonableness, and political equity[6] are not eroded by profit-driven corporate imperatives of secrecy, scarcity, competition, and market-driven metrics. To protect the public's need over corporate interests, we must guard against corporate attempts to dominate narratives related to product performance and conditions in the public sector that impact investments as well as "risk management" approaches to protecting the public.

AI is being fueled by a handful of extremely well resourced corporations who are in a fierce competition to define our futures.[7] The chaos that resulted from OpenAI's three-person Board of Directors decision over one weekend firing and rehiring its CEO, for example, is exactly the type of corporate theater that may impact the future of AI governance technologies behind closed doors.[8]

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[2] The Lab also echoes similar concerns made by the Athena Coalition.
[3] Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988).
[4] Mulligan, Deirdre K. and Bamberger, Kenneth A., Procurement As Policy: Administrative Process for Machine Learning (October 4, 2019). Berkeley Technology Law Journal, Vol. 34, 2019, at 788. Available at SSRN: https://ssrn.com/abstract=3464203 or http://dx.doi.org/10.2139/ssrn.3464203
[5] Food Marketing Institute v. Argus Leader Media, 139 S. Ct. 2356, 204 L. Ed. 2d 742 (2019), citing 5 U.S.C. § 552(b)(4).
[6] Iris Marion Young, *Inclusion and Democracy,* Oxford Press (2000) 23-25
[7] Cade Metz, Karen Weise, Nico Grant and Mike Isaac, "Ego, Fear and Money: How the A.I. Fuse Was Lit", N.Y. Times, Dec. 3, 2023. Available at: https://www.nytimes.com/2023/12/03/technology/ai-openai-musk-page-altman.html. "Mr. Musk, Mr. Page, Mark Zuckerberg of Meta, the tech investor Peter Thiel, Satya Nadella of Microsoft and Sam Altman of OpenAI. All have fought for a piece of the [AI] business — which one day could be worth trillions of dollars — and the power to shape it."
[8] Justin Hendrix, The Saga at OpenAI: Lessons for Policymakers, Tech Policy Press, Nov. 26, 2023. Available at: https://techpolicy.press/the-saga-at-openai-lessons-for-policymakers/. In this interview, Justin Hendrix's observes, "That does seem to be the conclusion of [Karen Hao's] piece the other day, even

Other examples of how corporate imperatives begin to trump constitutional and public interests include a lawsuit brought by teachers in Houston who sued their school district for constitutional due process violations related to using a privately-developed performance algorithm to evaluate teachers for pay and continued employment. When they demanded information about how the system made their employment action decisions, the company claimed trade secret privilege to prevent disclosure of information the teachers were entitled to.[9] In criminal courts across the country, where explicit constitutional rights of confrontation protect the accused's right to access information, private technology companies have argued against allowing defense experts access to the mechanics behind their system's outcomes.[10]

By committing to the outsourcing of "AI" services and a "risk management" approach to enforcement of public constitutional and statutory protections[11] through procurement and contract monitoring, the federal government has already chosen to fundamentally

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though this may have seemed like a crazy moment with OpenAI possibly falling apart, possibly somehow being folded into Microsoft, now, it appears, carrying on as an independent entity, but very much under the puppet strings of Microsoft. One detail that I hadn't really quite understood was the extent to which the $10 billion investment Microsoft's made in OpenAI is really for computing resources, almost like a barter, which is interesting. Just like any old startup taking credits from Amazon or Microsoft, OpenAI is in this similar boat, hooked on its cloud compute infrastructure. This idea that, at the end of the day, there's only a handful of folks in Silicon Valley that are defining the future of these technologies, that are making the decisions." Karen Hao responds: **"And that is, I think, the most important lesson that we need to learn from this weekend, and that policymakers should very much be realizing, and I hope acting on,** which is if we actually want to get to a place where, if we believe the general premise that OpenAI says, which is, we're building [artificial general intelligence (or "AGI")] that's beneficial for humanity, if we actually want something like that, setting aside skepticism around AGI or whatever, but a technology that benefits everyone can only arise when there is a broad base of people participating in it and helping to usher it forward in an inclusive and democratic way. And that's just absolutely not… It's like the polar opposite extreme that's happening. The fact that it really came down to three members of a board that led to the cascading of these events, three people that could completely fundamentally change the direction of AI development, …and all of those discussions are happening behind closed doors, and t is not healthy or sustainable in terms of getting to a future that is better and more inclusive."

[9] Tom Temin, "How federal procurement can keep artificial intelligence in its swim lane," Federal News Network, Nov. 3, 2023. Available at: https://federalnewsnetwork.com/artificial-intelligence/2023/11/how-federal-procurement-can-keep-artificial-intelligence-in-its-swim-lane/. In this interview with University of Pennsylvania law professor and federal regulation expert Cary Coglianese, Prof. Coglianese reports, "But back several years ago, the school teachers in the city of Houston took the school district to court, because the school district had been applying a performance algorithm that was being used to evaluate teachers for pay and continued employment. The algorithm had been developed and was run by a private contractor who claimed trade secret protection over the algorithm. And the teachers said, Wait a minute, we're public employees, school district, you're a public entity. We have constitutional due process rights to some degree of transparency and fairness in how we are being evaluated. And we can't even know what that is. And the court agreed with them. **And it seemed to me, in retrospect, an obvious fix for that would have been to have the school district during the contracting process require the vendor to provide adequate information**." See also "Litigating Algorithms - AI Now Institute," Section Three: Public Teacher Employment Evaluations (2018) Available at: https://ainowinstitute.org/publication/litigating-algorithms-3

[10] Rebecca Wexler, "Code of Silence", Washington Monthly, Jun. 11, 2017. Available at: https://washingtonmonthly.com/2017/06/11/code-of-silence/

[11] OMB guidance Section 6 (p24)

weaken public access to transparency and accountability mechanisms.[12] In addition, OMB's guidance to agencies around "workforce"[13] that prioritizes administrative agency staff hiring for people with "AI" interpretation skills rather than the subject-matter expertise of that agency's focus will gut its internal staff subject-matter expertise capacity and legitimacy.[14] Undermining the authority of federal administrative agencies further serves technology companies future interests–for example, Meta (formerly known as "Facebook") is already actively seeking to limit the enforcement power of federal agencies through litigation.[15]

Given this relinquishment of traditional mechanisms for public accountability, it is critical that the OMB Guidance on "AI" create clear mandates and open avenues for public transparency, intervention, and accountability in order to preserve the public's right to learn about and intervene against "AI" companies involved in governing their lives, especially in ways that increase risks to safety and not only individuals' constitutional rights, but communities' rights to protect their future. **Instead, the guidance opens avenues for unprecedented opacity around corporate influence in government through extension and waiver loopholes allowing "AI" corporations to withhold critical information about governing without oversight or consequences.**

Language around waivers should be eliminated entirely – this creates a dangerous loophole through which the government may not only withhold information from the public without a declassification process, but evade the process of the minimum impact assessments in full. This invites companies to market their services as high risk for the purposes of avoiding AI impact assessments. For exceptional situations, agencies should use existing classification standards.

Where possible, the guidance should also offer model contract language to mitigate the potential of interpretations that weaken the effectiveness of these provisions. Examples of model contractual provisions may be found in Confronting Black Boxes, A Shadow Report of the New York City Automated Decision-making Task Force.[16]

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[12] The Lab co-authored, along with other immigration advocacy organizations, a public comment addressing the specific reasons why a risk management framework dilutes accountability and inappropriately assigns agencies like the Department of Homeland Security the duties of self-policing their use of AI and its harms despite already demonstrating its inability to do so.

[13] Section (4)(b)(iv)

[14]Ryan Calo & Danielle K. Citron, The Automated Administrative State: A Crisis of Legitimacy, 70 Emory L. J. 797, 804 (2021). Available at: https://scholarlycommons.law.emory.edu/elj/vol70/iss4/1, "Mounting evidence suggests that agencies are turning to systems in which they hold no expertise, and that foreclose discretion, individuation, and reason-giving almost entirely. The automated administrative state is less and less the imperfect compromise between the text of the Constitution and the realities of contemporary governance. **At some point, the trend toward throwing away expertise, discretion, and flexibility with both hands strains the very rationale for creating and maintaining an administrative state. This is especially true where, as often, the very same processes of automation also frustrate the guardrails put in place by Congress and the courts to ensure agency accountability.**"

[15] The Associated Press, "Facebook parent Meta sues the FTC claiming 'unconstitutional authority' in child privacy case", ABC News, Nov. 30, 2023. Available at: https://abcnews.go.com/Politics/wireStory/facebook-parent-meta-sues-ftc-claiming-unconstitutional-authority-105288850

[16] Rashida Richardson, ed., "Confronting Black Boxes: A Shadow Report of the New York

Below are more specific recommended amendments (in order of importance) to strengthen the public's ability to hold federal agencies accountable for threats to safety and rights posed by government contractors' when procuring "AI" services.

(1) Amend (5)(d)(i)(p21) to make agencies contractually bind "AI" companies to uphold the United States Constitution and laws. Clarify that entities operating "AI" on behalf of the government will be designated as state actors.

Current OMB Guidance:

Aligning to National Values and Law. Agencies should ensure that procured AI exhibits due respect for our Nation's values, is consistent with the Constitution, and complies with all other applicable laws, regulations, and policies, including those addressing privacy, confidentiality, copyright, human and civil rights, and civil liberties.

Recommended amendment:

Aligning to National Values and Law. Agencies **must ensure that federal contracts for** procured AI **bind companies to uphold** the Constitution, and comply with all other applicable laws, regulations, and policies, including those addressing privacy, confidentiality, copyright, human and civil rights, and civil liberties. **Government contracts with entities operating "AI" on behalf of the government shall designate the contractor as a state actor. All existing contracts with companies providing "AI" services must be updated to reflect this expectation.**

Without binding contractual language, agencies have little power to force government contractors to "exhibit[] due respect" for the constitution, laws, regulations, and policies, and the public has even less. Requiring government contractors to adopt state actor status will protect the public's ability to access the courts to remedy harms caused by new technologies. "[The] applicability of the state action doctrine to AI vendors and their systems will be a central question for AI accountability going forward."[17] OMB guidance should preserve the public's ability to have standing and file for both remedial and injunctive relief from deployment of harmful technology. Not doing so dangerously insulates both government contractors and government actors from important venues for public accountability.

City Automated Decision System Task Force," AI Now Institute, December 4, 2019, Available at https://ainowinstitute.org/publication/confronting-black-boxes-a-shadow-report-of-the-new-york-city-automated

[17] Kate Crawford and Jason Schultz, 2019 'AI Systems As State Actors', Columbia Law Review, 119(7), 1941-1972, 1958. Available at: https://columbialawreview.org/content/ai-systems-as-state-actors/

(2) Amend (5)(c)(iii)(p14) to align the circumstances when CAIO's may waive minimum protective practices for safety and right-threatening technologies with existing classification processes

> Current OMB Guidance:
>
> Waivers from Minimum Practices. In coordination with other relevant officials, an agency CAIO may waive one or more of the requirements in this section for a specific covered AI application or component after making a written determination, based upon a system-specific risk assessment, that fulfilling the requirement would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations. Such waivers are applicable for the duration of the AI's use, but must be reassessed by the CAIO if there are significant changes to the conditions or context in which the AI is used. An agency CAIO may also revoke a previously issued waiver at any time. Agencies must report to OMB within 30 days of granting such a waiver, detailing the scope, justifications, and supporting evidence.
>
> Recommended amendment:
>
> ~~Waivers from Minimum Practices. In coordination with other relevant officials,~~ **If an agency CAIO determines that fulfilling the minimum practices would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations, the CAIO must nevertheless complete the AI assessment and apply for an AI system's impact assessment to be classified under existing classification standards and procedures in Executive Order 13256.**

Rather than allowing agencies to evade production of AI assessments without a declassification process, OMB should deploy existing structures, such as the classification (and declassification) system, to determine what information cannot be shared publicly, why, and for how long. Through this guidance, OMB risks encouraging that agencies govern by waiver (or, as many FOIA officers do, by endless extensions) and that technology companies market their products as systems whose impact assessments may be waived. New understaffed offices will be tempted to overuse system-specific risk assessments to grant extensions and waivers as short cuts around the rigorous and more laborious task of completing the AI impact assessments.

In addition, the most potentially harmful technologies that are being deployed already by federal law enforcement and state and local law enforcement with the support of federal dollars foreseeably will seek to exempt their technologies from the Minimum Practices, along with the companies marketing these dangerous technologies. New Yorkers saw this exact opposition when the New York City Council passed a bill requiring city agencies to similarly inventory their algorithmic decision-making systems.[18] New York City's Police Department testified and complained to the media that "compliance with the legislation would 'help criminals and

[18] Richardson at 11-13.

terrorists.'"[19] As we wrote alongside the immigration coalition organizations in another letter, law enforcement has already proven it is incapable of critically assessing the life-threatening and community-devastating corporate technologies it has already deployed. The government should not evade the process of assessing the risks of any type of AI system so that potential harms are primarily identified early and avoided and, in the event harm results, the government's knowledge of the risk of harm and the company's knowledge about the risk of harm are well-documented and undisputed.

We echo the third concern of the immigration coalition organizations: "we are concerned that intelligence and law enforcement-related technologies will fall under 'critical agency operations,' allowing agencies to avoid scrutiny, and enabling the procurement and implementation of harmful technologies that do not meet minimum standards. We are additionally concerned about these issues being relegated to the National Security Memo where they could receive even less public scrutiny."[20]

(3) Amend (5)(c)(iv)(A)(1)(p15) to require articulation of the problem "AI" is sought to solve, public engagement about that problem, and to rule out less harmful alternatives to "AI"

Current OMB Guidance:

The intended purpose for the AI and its expected benefit, supported by specific metrics or qualitative analysis. Metrics should be quantifiable measures of positive outcomes for an agency's mission, for example to reduce costs, wait time for customers, or risk to human life, that can be measured after the AI is deployed to confirm or disprove the value of using AI. Where quantification is not feasible, qualitative analysis should demonstrate an expected positive outcome, such as for improvements to customer experience or human interactions—and demonstrate that AI is a good fit to accomplish the relevant task.

Recommended amendment:

The intended **problem that AI is being proposed to solve and efforts to engage the public about the priority of that problem, the exhaustion of government-led strategies, the history of government attempts to solve this problem, identification of specific reasons why this particular problem might be addressable through outsourcing AI services. The assessment of the problem must also include and document public, civil society, and other stakeholder input gathered through notice and comments. It should also document the** purpose for the AI and its expected benefit, supported by specific metrics or qualitative analysis. Metrics should be quantifiable measures of positive outcomes for an agency's mission, for example to

[19] Id. at 12
[20] Public comment submitted by Just Futures Law, et al at 2.

reduce costs, wait time for customers. **If risk to human life is projected**, **the AI should not be deployed.** Where quantification is not feasible, qualitative analysis should demonstrate an expected positive outcome such as for improvements to customer experience or human interactions **weighed against any negative outcomes**—and demonstrate that AI is a good fit to accomplish the relevant task. **If measures required to mitigate risk, for example human review, dilutes any "efficiencies" initially deemed positive, this should be included.**

Whether or not this problem is a priority, and whether technology promises the appropriate solution, not only to the agency programmatic staff, but to its constituents and the people who will be subjected to the technology, is left out of the AI assessment. How is risk to human life a positive outcome for any agency's mission, for example? It is during the process of defining a problem, understanding what conditions need to change in order to solve it that an agency can better prepare itself for a future assessment of whether AI is the right solution, whether the problem is not a priority, or whether alternatives should be used.

(4) Amend (5)(b)(i)(J)(p10-11) to broaden the types of safety-impacting risks the minimum practices must be presumed to apply to

Current OMB guidance:

Access to or security of government facilities;

Recommended amendment:

Access to or security of government facilities **or places where people live**

Nothing in the current list of safety-impacting threats speaks to the safety of people, whether in the United States or elsewhere. Weaponized AI systems absolutely have the ability to threaten the safety of individuals and entire communities and should be included in this list.

(5) Amend (5)(b)(ii)(p12) to broaden the types of rights-impacting risks the minimum practices must be presumed to apply to

Current OMB guidance:

Purposes That Are Presumed to Be Rights-Impacting. Unless the CAIO determines otherwise, covered AI is presumed to be rights-impacting (and potentially also safety-impacting) and agencies must follow the minimum practices for rights-impacting AI and safety-impacting AI if it is used to control or meaningfully influence the outcomes of any of the following activities or decisions:

Recommended amendment:

> Purposes That Are Presumed to Be Rights-Impacting. Unless the CAIO determines otherwise, covered AI is presumed to be rights-impacting (and potentially also safety-impacting) and agencies must follow the minimum practices for rights-impacting AI and safety-impacting AI if it is used to control or meaningfully influence the outcomes of any of the following activities or decisions **about individuals or communities**:

This recommendation echoes a concern also raised in the comment we co-authored along with other immigration justice organizations: “OMB should consider including the concept of collective privacy because worker and labor organizing or immigrants rights advocacy often mean that individual privacy and collective privacy are intertwined. Reducing the risk of retaliation against labor organizing or people engaged in protected First Amendment activity requires assessing the needs of organizing collectives engaged in that enterprise.”[21]

Conclusion

The federal government has already chosen to fundamentally weaken public access to transparency and accountability mechanisms by privileging corporate-driven outsourcing of public sector responsibilities. Given this relinquishment of traditional mechanisms for public accountability, the OMB Guidance on “AI” must create clear mandates and require open avenues for public transparency, intervention, and accountability in order to preserve the public’s right to learn about and intervene against “AI” companies involved in governing their lives, especially in ways that increase risks to safety and not only individuals’ rights to self-determination, but communities’ rights to protect their future. There must be consequences for non-compliance, overuse of waivers and extensions, contract monitoring and enforcement, and oversight of agencies’ engagement in monitoring “AI” systems.

Thank you,

Surveillance Resistance Lab

[21] Id. at p10-11

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0078
Comment on OMB-2023-0020-0001

Submitter Information

General Comment

OMB AI Memo - Cyber Florida Comments

Attachments

OMB AI Memo - Cyber Florida Comments

ADVANCING GOVERNANCE, INNOVATION, AND RISK MANAGEMENT FOR AGENCY USE OF ARTIFICIAL INTELLIGENCE:

PROPOSED MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

CYBER FLORIDA
at the UNIVERSITY OF SOUTH FLORIDA

CYBER FLORIDA
at the UNIVERSITY OF SOUTH FLORIDA

CYBERFLORIDA.ORG

04 December 2023

Office of Management and Budget:

On behalf of the Florida Center for Cybersecurity, also known as Cyber Florida, I would like to thank you for the opportunity to submit a response to your request for public comment and address the important issue of advancing artificial intelligence innovation and determining risk management policies.

Cyber Florida was established by statute in 2014 to help position Florida as a national leader in cybersecurity by promoting cybersecurity education, research, and outreach. Hosted by the University of South Florida, Cyber Florida leads a spectrum of initiatives to support industry-advancing research, inspire and educate future and current professionals, and help people and organizations better understand and prepare for cyber threats.

Among our key mission areas at Cyber Florida is to advance cybersecurity research, including that of artificial intelligence, to improve the cyber readiness of the state and Nation. In that regard, we've included several recommendations in this response that we believe will assist in developing a comprehensive plan for agencies regarding the proper use of artificial intelligence and its impact on the rights and safety of the public.

We commend the Office of Management and Budget for leading the effort on advancing governance, innovation, and risk management for agency use of artificial intelligence, as we believe this to be of utmost importance in our Nation's continuous fight against cyber threats. Cyber Florida is committed to serving as a resource to help the Office of Management and Budget address this issue and others. We remain at your disposal for further discussion.

Respectfully,

General (Ret.) Kenneth F. McKenzie Jr.
Executive Director, The Florida Center for Cybersecurity

4202 E. Fowler Avenue, ISA7020, Tampa, FL 33620-7120 | info@cyberflorida.org | 813 974 2604

MARSHALL
STUDENT CENTER

The Florida Center for Cybersecurity (Cyber Florida)

The Florida Center for Cybersecurity was established within the University of South Florida in 2014 under Florida statute 1004.444. The goals of the center are to: position Florida as a national leader in cybersecurity and its related workforce through education, research, and community engagement; assist in the creation of jobs in the state's cybersecurity industry and enhance the existing cybersecurity workforce; act as a cooperative facilitator for state business and higher education communities to share cybersecurity knowledge, resources, and training; seek out partnerships with major military installations to assist, when possible, in homeland cybersecurity defense initiatives; attract cybersecurity companies to the state with an emphasis on defense, finance, health care, transportation, and utility sectors.

Comment

Artificial Intelligence (AI) is no longer a term associated solely with experts in technology. It has become so commonplace that even children can and are experiencing the impact of AI on their lives, and beyond that, they can actually comprehend the change AI is enabling today. Applications unimaginable five years ago are now seeing rapid permeance in our society. Humanity has seen nothing equal to the scope, scale and speed of AI advances in its recent history. The time is indeed now to ensure that mistakes made in the past – a most glaring example

is cutting corners in cybersecurity with the development of the Internet and its protocols – are not repeated, and a clear, comprehensive and practical plan for managing AI advances and their associated risks is a critical need now. We are delighted that the Office of Management and Budget is taking a leadership role in this regard. Cyber Florida is also eager to contribute its expertise to this effort.

Strengthening AI Governance: As identified in the current draft report, we fully support the need for a dedicated Chief AI Officer (CAIO) tasked with the broad oversight of myriad ways in which AI advances might impact the functioning of a federal agency. Apart from this, a Governance Board that can periodically oversee and advise the CAIO on AI-related topics is highly recommended. In fact, a cursory look across hiring in the C-Suite categories now reveals a growing trend in Chief AI Officers positions in the private sector. We believe that a federal agency CAIO cannot just be someone with significant technical expertise (AI or otherwise), but instead must be well-versed with agencies' priorities, understand the complex dynamics of departments within the agencies—where opportunities and barriers for AI innovation lie—and understand/identify clear use cases. Most importantly, stakeholders in the respective agencies need to sensitize to the fact that AI may not solve everything (like the perception that the advent of Chat GPT has enabled), and hence the CAIO must be someone with a deep understanding of not only the strengths of AI, but also its limitations within the purview of each agency. The presence of a formal Governance Board will go a long way in giving a clearer sense of purpose and direction to the CAIO. Cyber Florida recommends that the Governance Board be made up of members who are as diverse as possible, since sources of innovations in AI are not restricted to computing fields alone, but instead have spanned psychology, neuroscience, biology, physics, mathematics, cybersecurity and much more. Having a trans-disciplinary Governance Board will further decisions that are rooted in sound science, ethics and practicality as well.

Advancing Responsible AI Innovation: The current draft from the OMB is comprehensive and presents a detailed list of activities to fuel responsible innovations in AI. We particularly support the clear documentation of AI use-cases and periodically refreshing these as and when AI technologies and intended applications change. We also support the creation of robust cybersecurity policies to better address needs of AI applications, and authorizations to further AI use. The presence of a qualified cybersecurity expert in the AI Governance Board is critical to accomplishing this important goal. We have two additional recommendations in addition to what is presented in the current OMB draft:

- **Data Storage:** We recommend due diligence in safeguarding data that was trained, validated and tested while developing the AI model. We recommend state-of-the-art access and data control policies in terms of data access and its modifications. With reinforcement learning and federated learning proving to be effective for myriad AI applications, access to current data will be a constant theme, and thereby are increasing avenues for its compromise. Critical recommendations we make are a) the need to store all data within the geographical boundaries of the US; b) multi-layered and fine-grained access control so that impacts of any information leakage are gradual and not catastrophic; c) having a cybersecurity-specific Incident Response Plan (adapted to current NIST standards) for AI-centric data and models; and d) investments in homomorphic encryption technologies that allow for AI models trained and executed on encrypted data to enable privacy-preserving AI learning.

- **Periodic AI Model Auditing:** Cyber Florida recommends a robust national scale program to periodically audit all aspects of the AI models, including fidelity of data, security controls, model performance, computing and storage requirements, use-case inventory, test scenarios (in-lab and in the field) and more. We also recommend that OMB create long-term funded and competitive research programs—potentially overseen by agencies like NSF and NIST—that enable non-profit agencies like universities (in collaboration with governmental and military bodies, when possible) to conduct these audits (serving as red teams). Research outcomes will provide impartial reviews to federal agencies, while also ensuring that the next-generation student talent coming out of our universities are well-aware and trained on threats, attacks and countermeasures to ensure safe, accountable and risk-free AI innovation and use, without bias.

Managing Risks from the use of AI: Cyber Florida believes that there are clear risks to safety and rights of the public due to misuse of AI. There are documented evidences of certain governments using AI techniques (most significantly, computer vision) to surreptitiously perform surveillance on civilians, hence infringing upon their rights. There are also reports wherein emergent techniques like Generative AI and LLM models are being utilized for information censorship, misinformation spreading, and denying rights to free speech. As such, this aspect may be the most critical of all to consider in a free and fair democracy like the US and other like-minded nations and allies. At the outset, Cyber Florida believes that the specific risks identified in the draft report are reasonably comprehensive and practical, although we like to mention that safety risks to AI models that influence decision making in the financial and health infrastructure sectors are missing. We believe they should be added.

In addition, Cyber Florida has the following comments in the avenue of managing risks from AI usage:

- **Cyber Florida supports the creation of an AI-Compliance Plan, but has concerns on the August 2024 deadline to ensure compliance:** We see from the draft report that OMB will provide templates for AI compliance to all federal agencies, which is welcome. However, the draft report states that *"By August 1, 2024, agencies must implement the minimum practices in Section 5(c) of this memorandum for safety-impacting or rights-impacting AI, or else stop using any AI that is not compliant with the minimum practices, consistent with the details and caveats in that section."* The minimum practices identified in Section 5(c) are very comprehensive. However, based on our own experiences with cybersecurity compliance in the state of Florida, agencies may need at least two years to implement the detailed list of proposed recommendations made by OMB. Expecting agencies to *"stop using any AI that is not compliant"* starting August 2024 does not seem realistic.
- **Create a comprehensive Incident Response Plan:** Cyber Florida recommends the creation of a comprehensive Incident Response Plan across agencies in the event of any identified misuse of AI. This plan is different from the aforementioned AI-compliance plan, since the Incident Response Plan will specifically focus on the aftermath of detected AI misuse. While a general template can be the foundation, we recommend a fine-tuned template per agency that takes into account the specifics within that agency and respective usage of AI. The Response Plan should be comprehensive covering every aspect of AI usage including data, storage, data access/security policies, AI models, test-scenarios, AI usage history, stakeholders impacted (including the general public), organization of

governance board, audit history and more. Cyber Florida also recommends that agencies like NIST be tasked with designing guidelines and specifics for such a plan, very similar to what is being done in the cybersecurity arena. Cyber Florida also recommends free and open sharing of such plans across agencies, to commercial entities across the US and the public for their awareness.

- **Cyber Florida recommends the creation of a national-level AI task force with global outlook:** This task force should be comprised of AI experts across diverse spectrum of federal agencies who will specifically monitor, document and assess AI innovations and use cases across the globe, especially across countries of concern. Having such an agency will not only prepare the US for potential misuse of foreign-developed AI against US citizens, but also help domestic federal agencies assess risk better, which will further strengthen their existing AI innovations and policies as they continue to adapt.

Final Remarks: To summarize, Cyber Florida is delighted at the depth of detail which OMB has provided in advancing governance, innovation and risk management for agency use of AI technologies. The effort is critical and will stimulate significant activity across federal agencies, which will eventually permeate into state and local entities serving the nation. We agree with the vision that "AI only works when it works for all of us." Cyber Florida is delighted to offer its comments to the draft report, and hope that they fine-tune the carefully thought out, comprehensive and timely vision of the OMB to practically enable responsible AI governance and innovation while simultaneously protecting our safety and rights.

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0079
Comment on OMB-2023-0020-0001

Submitter Information

Organization: National Association of Manufacturers

General Comment

See attached file(s)

Attachments

NAM Comment on OMB RFI on AI

NATIONAL ASSOCIATION OF Manufacturers

Julia Bogue
Director, Domestic Policy

Dec. 5, 2023

Office of Management and Budget
Executive Office of the President
725 17th St. NW
Washington, DC 20503

Re: Request for Comments on Advancing Governance, Innovation and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (OMB-2023-0020)

To whom it may concern:

On behalf of the 14,000 members of the National Association of Manufacturers, the largest manufacturing association in the United States representing manufacturers in every industrial sector and in all 50 states, the NAM submits these comments in response to the Office of Management and Budget's request for comment on Advancing Governance, Innovation and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum.

Manufacturing employs nearly 13 million men and women, contributes $2.9 trillion to the U.S. economy annually, has one of the largest economic multipliers of any major sector and accounts for 53% of all private-sector research and development in the nation.[1] The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The NAM welcomes the opportunity to provide input on OMB's draft memorandum to executive departments and federal agencies. Manufacturers are key developers and deployers of the technologies that enable AI, as well as key innovators developing products and applications for AI across sectors. In a recent survey of manufacturers by the NAM's Manufacturing Leadership Council, 57% of manufacturers are experimenting with a range of small-scale AI pilot programs.[2] Manufacturers anticipate investments in AI will lead to benefits such as more predictive insights, better design making, cost savings, improved planning, greater productivity and increased competitive advantage.[3]

The NAM believes the growth of AI represents an opportunity for manufacturers to strengthen their lead in innovating new technologies and realizing efficiencies that can boost our industry's competitiveness. It also provides the means for the sector to develop products and processes that increase safety and improve people's quality of life. Manufacturers are

[1] https://www.nam.org/facts-about-manufacturing/
[2] https://www.manufacturingleadershipcouncil.com/wp-content/uploads/2023/06/The-Future-Of-AI-In-Manufacturing-MLC-2023.pdf
[3] Ibid.

committed to the responsible development of emerging technologies, including AI, and are committed to working with the public and private sectors to advance this goal.

Providing guidance to federal agencies to inform their requirements and guidance for AI is a positive first step to ensuring cohesion across the federal government in its approach to AI, and the NAM encourages continued coordination and cohesion. Regular communication and information sharing can result in streamlined processes, multiple applications of solutions and a lessened risk of duplicative efforts.

The NAM also supports the draft's sentiment that "embracing innovation requires removing unnecessary and unhelpful barriers to the use of AI while retaining and strengthening the guardrails that ensure its responsible use."[4] Embracing innovation is necessary in the federal government, as innovation will promote economic competitiveness and efficiency. The NAM supports regulation of AI that does not hinder competitiveness and is indexed to the nature of the risk. A risk-based approach accounts for the diversity of current and future applications of AI. An inflexible framework to regulating AI will impede innovation; therefore, agencies should include these considerations in both regulatory and nonregulatory approaches to AI. Furthermore, as an agency factors the benefits and costs related to potential action, manufacturers believe it is important for agencies to receive input that provides a clear understanding of the technology's benefits. This analysis must also account for the fact that our present understanding of risks, costs and benefits may be limited because technology lends itself to future unanticipated breakthroughs and applications.

Manufacturers also support OMB's desire to harmonize current and future frameworks at the domestic and international levels, when applicable, so manufacturers do not have to navigate a complex patchwork of AI regulation. The NAM also encourages the federal government to continue to engage with the industry for its perspective as it continues to develop AI guardrails.

The NAM appreciates the opportunity to comment on this draft memorandum and supports OMB's actions to provide guidance on AI. Manufacturers will readily engage and provide insights as we work with you to harness the opportunity of AI.

Comments submitted by:
Julia Bogue
Director of Domestic Policy
National Association of Manufacturers

[4] https://www.federalregister.gov/documents/2023/11/03/2023-24269/request-for-comments-on-advancing-governance-innovation-and-risk-management-for-agency-use-of

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0080
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Independent Community Bankers of America

General Comment

See attached file(s)

Attachments

ICBA comment on OMB proposed AI memo_Dec5

One Mission. **Community Banks.**

December 5, 2023

Shalanda D. Young
Director
Office of Management and Budget
New Executive Office Building
Washington, DC 20503

RE: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Memorandum; OMB-2023-0020

Dear Director Young:

The Independent Community Bankers of America ("ICBA")[1] is pleased to share feedback on the Office of Management and Budget's ("OMB") Proposed Memorandum for the Heads of Executive Departments and Agencies ("Proposed Memo"). The OMB's Proposed Memo establishes new agency requirements and guidance for artificial intelligence ("AI") governance, innovation, and risk management, including through specific minimum risk management practices for uses of AI that impact the rights and safety of the public.

ICBA Comments

Overall, ICBA believes that the Proposed Memo strikes the right balance in instructing agencies to promote the use of AI technologies within agencies while simultaneously ensuring that the rights of stakeholders and the public are maintained. With specific regard to the federal agencies that supervise and regulate community banks, ICBA believes that agency adoption of AI technologies can bring efficiency to supervision that would alleviate community bank burden, especially in the areas of data collection. However, as the Proposed Memo makes clear, it will be of paramount importance for federal banking agencies to protect the rights of community banks and their customers, including the security of their data.

Requirement to Establish Chief AI Officer

As required by President Biden's October 30, 2023 Executive Order (the "AI Executive Order"), each agency must designate a Chief AI Officer ("CAIO"). The Proposed Memo directs CAIOs to work in close coordination with

[1] The Independent Community Bankers of America® creates and promotes an environment where community banks flourish. ICBA is dedicated exclusively to representing the interests of the community banking industry and its membership through effective advocacy, best-in-class education, and high-quality products and services. With nearly 50,000 locations nationwide, community banks constitute 99 percent of all banks, employ more than 700,000 Americans and are the only physical banking presence in one in three U.S. counties. Holding more than $5.8 trillion in assets, over $4.8 trillion in deposits, and more than $3.5 trillion in loans to consumers, small businesses and the agricultural community, community banks channel local deposits into the Main Streets and neighborhoods they serve, spurring job creation, fostering innovation and fueling their customers' dreams in communities throughout America. For more information, visit ICBA's website at www.icba.org.

existing responsible officials and organizations within their agencies. In response to this proposed directive, ICBA believes that CAIOs should work closely with each banking agency's Chief Innovation Officer ("CIO"). While CAIOs will presumably be focused on internal agency uses of AI, CIOs are focused on working with external parties, including community banks, to develop guidance and regulations that enable bank usage of AI technologies.

Although it would benefit both agency and industry for CAIOs to collaborate with CIOs on AI technology, ICBA notes that this collaboration may no longer be possible as several banking agencies have deprioritized their Offices of Innovation. In some instances, the banking agencies have gone so far as to dismantle or unwind certain Office programs.

ICBA believes that, when fully empowered, the Offices of Innovation provided significant value in developing and facilitating policy-based solutions that nurture bank relationships with fintechs that develop technologies that banks offer customers, such as AI. These technologies are not typically developed in-house and require relationships with third-party experts. If the banking agencies were to re-empower Offices of Innovation, then ICBA believes that CAIOs would have a more fruitful mission in collaboration with CIOs.

Criticality of Security

As the Executive Order and Proposed Memo both highlight, the use of AI provides new opportunities, but also introduces new risks. ICBA believes the banking agencies have a responsibility to ensure proper cyber and data security protection. This is particularly important in areas involving financial and personally identifiable information ("PII") and extends to AI.

Should the banking agencies use consumer PII or financial information as inputs into its AI systems, the use must be based around agreed upon public-private standards to ensure trust. The government has a responsibility to safeguard this information and provide the public with visibility into the business continuity, incident response, and other critical resiliency plans. This is particularly relevant in sectors with strict regulatory compliance on issues such as cybersecurity and data privacy, such as the financial services sector. Financial services companies, particularly banks, are subject to a myriad of regulation and guidance governing how they must protect PII. These include:

- Regulation P of the Gramm-Leach-Bliley Act ("GLBA")
- The Fair Credit Reporting Act ("FCRA")
- Interagency Guidelines Establishing Information Security Standards
- The Bank Service Company Act
- Interagency Guidance on Third-Party Relationships: Risk Management
- The FFIEC IT Examination Handbook
- Applicable state laws and regulations

These requirements are in place not only to ensure safe and responsible use of confidential consumer information, but to ensure public trust in critical institutions that drive the U.S. economy.

As OMB considers standards and safeguards for the use of AI within federal agencies, it is critical that they consider the great lengths the private sector goes to protect this information. If federal agencies use AI with information that banks or other regulated entities are legally required to protect through adherence to certain standards, then federal agencies using the information must use the same standards as a baseline of protection.

Without similar standards, any use of consumer PII or financial data in agency-run AI will negate the efforts of thousands of community banks and other financial institutions in securing that data.

When developing standards for AI across federal agencies, OMB should consider the different uses, different risks faced, and different risk appetites across various industries. No industry, and thus no federal agency, will have the same uses and risks to consider.

In the financial services industry, the private sector via the Financial Services Sector Coordinating Council ("FSSCC") and the federal financial regulators, via the Federal and Banking Information Infrastructure Committee ("FBIIC"), work in close partnership with one another to enhance the resiliency of the sector to a myriad of threats. This unique partnership enables the sector to be a leader in the safe adaptation of new technologies.

For example, FSSCC and FBIIC have worked closely with Treasury on multiple workstreams related to the use of cloud services among the wide variety of financial services companies. These workstreams address critical issues, develop common definitions and lexicon, and consider other critical topics such as risk management and due diligence. These organizations have already begun work on AI and will continue to work closely to ensure solutions that meet both private and public sector needs are found. ICBA recommends the federal agencies look to partnerships such as this when considering models for the development of AI standards.

AI Use Case Inventories

The AI Executive Order directs each agency to annually submit an inventory of its AI use cases to OMB and subsequently post a public version on the agency's website. ICBA supports this provision, as it will provide transparency to the public in how agencies are using AI. It will also provide the ancillary benefit of providing a clearinghouse of ideas for other agencies to adopt.

Of possible use cases, ICBA is optimistic that federal banking agencies will use AI in supervisory technology ("SupTech") that could reduce the burden of routine community bank reporting. Such a use case was explored in a Financial Stability Board white paper, which noted, "the use of SupTech could improve oversight, surveillance and analytical capabilities, and generate real time indicators of risk to support forward looking, judgement based, supervision and policymaking."[2]

An example of a viable SupTech use case is the Rapid Phased Prototyping Initiative ("RPP"), introduced by the FDIC in 2021. The RPP was announced as a new and innovative approach to financial reporting, intended to streamline and limit the laborious and manual processes required by banks to complete the quarterly Call Report, a goal sought by ICBA for more than a decade.

The RPP initiative was designed to accelerate the adoption of modern technological solutions to help the FDIC receive, manage, and analyze data from individual institutions, particularly community banks, without increasing compliance burdens. The lessons learned from the program were intended to promote the safe and sound adoption of these technologies, helping banks and supporting consumers in the process. The use of AI technologies was expected to be incorporated into the final prototype.

[2] "The Use of Supervisory and Regulatory Technology by Authorities and Regulated Institutions," Financial Stability Board, Oct. 9, 2020, *available at*: https://www.fsb.org/wp-content/uploads/P091020.pdf.

If implemented, RPP would have been a paradigm of agency innovation that would have increased the efficacy and efficiency of FDIC's supervisory resources. Unfortunately, the agency scrapped the RPP program after a change in leadership. However, in light of this Proposed Memo, ICBA is hopeful that the FDIC, as well as other federal banking agencies, are motivated to reconstitute programs that nurture the development of AI SupTech, similar to RPP.

Conclusion

ICBA welcomes OMB's work on this matter and appreciates the opportunity to provide comment. While Congress and this Administration are actively exploring issues related to the use of AI, ICBA will continue to look for opportunities to engage with policymakers on this important and growing topic. Should you have any further questions, please do not hesitate to contact me at Lance.Noggle@icba.org.

/s/

Lance Noggle
Senior Vice President Operations, Senior Regulatory Counsel

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lps-m665-1amb
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0081
Comment from Diana Rowen

Submitter Information

Name: Diana Rowen

General Comment

In response to question 2:

The establishment of interagency working groups would be a flexible and instructional way to help agencies develop their AI governance capabilities. The participants of such interagency working groups could include not only agency experts in privacy, IT and data science, but also the AI specialists from such agencies as NIST. Since the application of generative AI is likely to vary significantly across the sectors governed by Federal agencies (e.g medical vs educational etc), multiple working groups would be needed. However, in order to ensure consistency, each working group could be tasked with working within the principles and approaches outlined in NIST's Generative AI Governance document once it is finalized. Asking the working groups to report out periodically to the National Security Council would ensure that AI governance continues to receive the appropriate visibility from agency leadership.

In response to question 3:

OMB could task agencies with beginning to collect and analyze data on the costs and benefits of possible future regulatory actions. This work would help OMB’s Office of Information and Regulatory Affairs ensure that the use of Generative AI is governed appropriately.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0082
Comment from Deepti Kannapan

Submitter Information

Name: Deepti Kannapan

General Comment

Artificial intelligence is an emerging technology with enormous potential for both positive and negative impact, so I applaud the Biden-Harris administration for taking this step toward setting the direction of its future development. Preventing harm to the rights and safety of individuals is an important priority.

This executive order encourages agencies to implement AI only when doing so has benefits that outweigh the risks, and to manage the risks that occur from its use.

As an engineer with professional experience in automating physical systems, I have two comments on the role of non-AI automation (which the executive order describes as "systems whose behavior is defined only by human-defined rules"), alongside AI.

1. Need to incentivize other forms of automation over AI when it is better fit for purpose
Automation has considerable potential in improving the effectiveness of agencies. Agencies are instructed to assess the potential benefits of using AI automation. This assessment should not evaluate AI solutions in isolation, or only against legacy systems. AI solutions must be evaluated relative to non-AI automation solutions, which can provide many of the same benefits of increasing effectiveness and efficiency.

When a non-AI auotomation system provides comparable benefit to an AI system, agencies should be incentivized to use the non-AI automation system if it can be more rigorously tested, validated, and explained. Mature engineering and mathematical techniques exist for guaranteeing safety of non-AI automated systems.

AI systems are harder to validate for all conditions, since their ability to learn may cause them to depart from their test conditions. They also frequently lack explainability, which can hinder rigorous analyses.

I support the development of AI expertise by agencies and evaluating of automation solutions, but the evaluation of systems should include the full range of automation types, including non-AI, to find the most suitable solution.

2. Safety-impacting AI must have non-AI fail-safes
The executive order acknowledges the possibility of erroneous or harmful results from a rights-impacting AI system, and hence requires periodic human review and the provision of escalation mechanisms. For safety-impacting AI, especially those controlling physical systems, harmful AI actions may require a response too rapid for a human escalation system.

Fail-safes (such as limits on system variables like as the amount of kinetic force delivered) must be implemented. These fail-safes must be able to be rigorously analyzed and validated, and troubleshot in case of emergencies. Non-AI automation may suit this purpose because it is explainable. In general, fail-safe mechanisms are a teaming of AI, humans, and non-AI automation.

I urge the Biden-Harris administration to require the use of automated and human fail-safes for safety-impacting AI.

Thank you,
- Deepti Kannapan
M.S. Mechanical Engineering (University of California)

PUBLIC SUBMISSION

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0083
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Recording Industry Association of America

General Comment

See attached file(s)

Attachments

OMB Comments on Advancing Governance Innovation and Risk Management for Agency Use of Artificial Intelligence Draft Memo

Comments of the
Recording Industry Association of America
on the Office of Management and Budget Request for Comment
on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Delivered via regulations.gov

December 5, 2023

The Recording Industry Association of America, Inc. ("RIAA") is pleased to provide these comments in response to the Office of Management and Budget ("OMB") Request for Comment on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum ("RFC").

The Recording Industry Association of America is the trade organization that supports and promotes the creative and commercial vitality of music labels in the United States, the most vibrant recorded music community in the world. RIAA's membership – which includes several hundred companies, ranging from small-to-medium-sized enterprises to global businesses – creates, manufactures, and/or distributes sound recordings representing the majority of all lawfully recorded music consumption in the United States. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumer, industry, and technical research; and monitors and reviews state and federal laws, regulations, and policies.

As with other new technologies, the music community lives on the forefront of, and is building and inspiring, evolutions in artificial intelligence ("AI") technology. Music creators are already using AI to assist in the creative process and will increasingly do so, allowing for a wider range of people to express themselves creatively. However, we have also experienced harm from the unethical development and deployment of AI systems that unfairly exploit our artists' and our members' expression, creative contributions, names, images, voices, and likenesses without their consent and without compensation.

In light of this, we appreciate that OMB is taking a leadership role in ensuring the government, and in turn those AI companies that contract with the government, develop and deploy AI in a responsible and ethical manner. We hope the government's leadership will lead to further widespread implementation of responsible and ethical AI practices. With that in mind, we offer the following comments.[1]

Question 3 – How can OMB best advance responsible AI innovation?

Strong Copyright as a National Value. We thank the OMB for recommending that "[a]gencies should ensure that procured AI exhibits due respect for our Nation's values, is consistent with the Constitution, and complies with all other applicable law, regulations and policies, including those addressing privacy, confidentiality, copyright,

[1] We also urge OMB to review our comments on responsible and ethical AI development set forth in the June 12, 2023 Comments on the National Telecommunications and Information Administration AI Accountability Policy Report Request for Comment (available at https://www.regulations.gov/comment/NTIA-2023-0005-1277) ("NTIA Comments") the July 7, 2023 on the Office of Science and Technology Policy Request for Information on National Priorities for Artificial Intelligence at (available at https://www.regulations.gov/comment/OSTP-TECH-2023-0007-0231) ("OSTP Comments"), and the October 20, 2023 Comments on the Copyright Office Notice of Inquiry on Artificial Intelligence and Copyright (available at https://www.regulations.gov/comment/COLC-2023-0006-8833) ("CO Comments"). These include comments that are responsive to questions 3 and 5.

human and civil rights, and civil liberties."[2] This is an important guiding principle that should be reflected throughout the final Memorandum for the Heads of Executive Departments and Agencies on Advancing Government, Innovation, and Risk Management for Agency Use of Artificial Intelligence ("Final Memo").[3]

Data Provenance and Recordkeeping. We appreciate that OMB acknowledges the importance of ensuring the quality and appropriateness of the data used in the AI's design, development, training, testing and operation, and calls for documentation associated with such data.[4] Such due diligence and record keeping is an important pillar of responsible AI, and should also include diligence and information concerning any copyright or other intellectual property rights implicated by the use of such data or training materials. The National Institute of Standards and Technology AI Risk Management Framework ("NIST AI RMF") already recognizes the importance of this, stating that "[m]aintaining the provenance of training data and supporting attribution of the AI system's decisions to subsets of training data can assist with both transparency and accountability. Training data may also be subject to copyright and should follow applicable intellectual property rights laws."[5] To emphasize this point, we ask that you clarify in the Final Memo that risk considerations should include copyright and other intellectual property rights considerations generally, and that provenance documentation should include information about any licenses obtained to use training materials.

Initial and Ongoing Risk Assessment. We also agree with OMB that initial and ongoing risk assessments are important to ensure the responsible and ethical AI deployment.[6] As noted above, such risk assessment should also include assessments concerning possible infringements of intellectual property rights.

Transparency. We also thank OMB for recognizing the importance of transparency about an AI system through public, accessible documentation about the AI system's functionality.[7] Such transparency should also include relevant information (or the ability to access relevant information) about the provenance of training materials used to develop or fine tune the AI system.

Question 5 – Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5(b)) that should be included, revised, or removed? If so, why?

We encourage OMB to clarify that AI systems that are capable of "cloning" a person's likeness or voice fall within the definition of a "rights-impacting" AI. Such AI systems can be used in a variety of contexts that are harmful to a person's reputation and livelihood as well as to our national security interests.[8]

* * *

We thank OMB for the opportunity to provide these comments.

Regards,

/Victoria Sheckler/

SVP, Deputy General Counsel
Recording Industry Association of America

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[2] Proposed Memorandum for the Heads of Executive Departments and Agencies on Advancing Government, Innovation, and Risk Management for Agency Use of Artificial Intelligence ("Draft Memo"), Section 5(d)(i), p. 21.
[3] For example, where the Draft Memo refers to "civil rights" or "civil liberties", it should also refer to copyright.
[4] Draft Memo, Section 5(c)(iv)(A)(3), p. 15-16.
[5] NIST AI RMF, p. 16, available at https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.
[6] Draft Memo, Sections 5(c)(iv)(A)(2) and 5(c)(iv)(B)-(D).
[7] Draft Memo, Section 5(c)(iv)(H).
[8] Please see the OSTP Comments and the CO Comments for more information about these harms.

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: Public Citizen

General Comment

See attached file(s)

Attachments

Public Citizen's Comment for OMB-2023-0020

215 Pennsylvania Avenue, SE • Washington, D.C. 20003 • 202/546-4996 • www.citizen.org

December 5, 2023

The Office of Management and Budget
c/o Cindy Martinez
725 17th Street, NW Washington, DC 20503

Submitted via email to: regulations.gov

OMB–2023–0020, *Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Memorandum*

Dear Director Young,

On behalf of more than 500,000 members and supporters of Public Citizen, we offer the following comment on the Office of Management and Budget's (OMB) draft guidance[1] directing Federal agencies on artificial intelligence (AI) governance and innovation programs while managing risks from the use of AI. The stated intention of this draft guidance is to create new agency guidelines for AI governance, innovation, and risk management, by utilizing certain minimum risk management practices for AI use cases that affect the civil rights and safety of the public.[2]

Public Citizen has published several documents outlining our thoughts such as our generative AI[3]policy recommendations, and we have also filed a rulemaking petition[4] with the Federal Election Commission to prevent deepfakes in political ads. In addition, we are organizing numerous public meetings on AI topics with thought leaders and policy makers, an example being our recent bipartisan forum[5] discussing AI and the threats it poses to democracy. We now offer commentary on the proposed guidance's

[1] This notice was published in the Federal Register on Nov. 3, 2023 (88 FR 75625 Fed.Reg.) and is available at https://shorturl.at/clwIO
[2] Staff of Office of Management and Budget, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*, THE OFFICE OF MANAGEMENT AND BUDGET (Nov. 3, 2023) https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf
[3] Staff of Public Citizen, *Public Citizen's Recommendations for Regulating Generative AI*, PUBLIC CITIZEN (Sept. 8, 2023) https://www.citizen.org/article/public-citizens-recommendations-for-regulating-generative-ai/
[4] Craig Holman and Robert Weissman, *Second Submission: Petition for Rulemaking to Clarify that the Law Against "Fraudulent Misrepresentation" Applies to Deceptive AI Campaign Communications*, PUBLIC CITIZEN (July 13, 2023) https://www.citizen.org/article/second-submission-petition-for-rulemaking-to-clarify-that-the-law-against-fraudulent-misrepresentation-applies-to-deceptive-ai-campaign-communications/
[5] Staff of Public Citizen, *Generative Artificial Intelligence and Threats to Democracy*, PUBLIC CITIZEN (Sept. 21, 2023) https://www.citizen.org/article/generative-artificial-intelligence-and-threats-to-democracy/

guardrails/staff implementations and a recommendation to require all federal agencies to publicly release an inventory of their already existing AI regulatory authorities.

While AI may enhance government operations, particularly in scientific and research & development fields, the U.S. government's use of AI has the potential to be an enormous danger to our society unless regulators place significant guardrails in place. Establishing safety standards, implementing rules to prevent racial and other discriminatory practices, and adopting protections for people's rights and dignity is crucial both for governmental use of AI tools and to establish an example for the private sector.

We strongly support the proposed guidance's imposition of guardrails for the federal government's use of AI, particularly in the realm of generative AI use and algorithmic bias. We offer three proposals to strengthen the guidance: strengthening the labeling requirements for content produced with generative AI; modifying the power and responsibilities of the Chief AI Officers to ensure the safety and protective standards of the guidance are protected; and requiring agencies to publicly inventory their regulatory authorities relevant to AI.

A. The proposed labeling guardrails for generative AI use by the federal government are necessary but should be strengthened.

The OMB's decision to create generative AI usage guardrails is a step in the right direction. While generative AI may be able to help federal agencies streamline workflows, reduce operational costs, and make informed, data-driven decisions, this type of AI can also create havoc for our civil rights and negatively impact trust in our democracy.

The President's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence and OMB's draft guidance correctly see the transformative and worrisome power of generative AI in outputting misleading or deceptive content. Generative AI has powerful potential to manipulate individuals, tailoring content based on user-specific data and even adjusting the mechanism of presentation, e.g., through individualized and customized avatars. This threatens both widespread manipulation and the destruction of social trust. The issue is particularly acute in civic spaces, where deepfakes have the potential to fundamentally and fraudulently impact policy debates and elections.

For example, generative AI can swamp societal discourse with misinformation. With AI's ability to generate highly realistic text, audio, and visual content, malicious actors will have the ability to manipulate information at an unprecedented scale. A recent deepfake

showed President Biden making transphobic remarks.[6] In Slovakia, a deepfake audio recording is reported[7] to have impacted the recent parliamentary election, with deepfake images also reportedly[8] affecting Argentina's just-concluded presidential election.

Left unchecked, these generative AI creations will negatively impact public trust, as it will become increasingly challenging for ordinary people to discern between authentic and manipulated content creations from federal agencies. The OMB draft guidance correctly identifies labeling, content authentication, and provenance tracking as vital solutions to the problem of deceptive AI-generated content.

AI labeling helps citizens to contextualize and process AI generated content. For example, after seeing a label stating that generative AI produced a video, the viewer can then decide to ignore or discount the content, seek additional non-AI sources about the content, or share it with their network while providing the context that AI created the content. Federal agencies must do all that they can to help citizens discern between authentic and AI generated content, and the guidance's labeling requirement is a good starting point toward that goal.

We applaud the guidance's encouragement to federal agencies include provisions in generative AI model procurement contracts requiring that procured systems have labeling and content provenance capabilities.[9]

But OMB should insist on more. First, OMB should require agencies, not just encourage them, to ensure that generative AI contracts include guarantees on labeling and provenance. Second, OMB should require that every federal agency label all content generated in part or entirely by AI. Third, it should set an expedited schedule for this standard. While it may take some time to establish industry standards for provenance and labeling, the federal government should never rely on AI to generate content without disclosing that fact.

B. The proposed AI bias guardrails contained in the guidance are welcome and much needed.

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[6] Id.
[7] Morgan Meaker, *Slovakia's Election Deepfakes Show AI Is a Danger to Democracy*, WIRED (March 3, 2023) https://www.wired.co.uk/article/slovakia-election-deepfakes
[8] David Feliba, *FEATURE-How AI shaped Milei's path to Argentina presidency*, REUTERS (November 21, 2023) https://jp.reuters.com/article/argentina-election-ai-idUSL8N3CM2MB
[9] *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*, at pg. 22 https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf

We strongly applaud the inclusion of AI bias guardrails in the proposed guidance because it shows the Biden Administration's commitment to ethical AI deployment. By acknowledging the risks of bias and discrimination in AI systems, OMB's emphasis on transparency, fairness, and accountability will hopefully serve as a north star to guide other AI stakeholders on how to address these issues in their own AI systems. We support the guidance's determination framework of safety-impacting and rights-impacting AI and the requirement of minimum practices when using these types of AI. These proposed guardrails not only address the ethical implications of AI but also will help build public trust in federal agencies' use of AI applications.

AI systems are susceptible to biases contained within their training data.[10] Some examples of these biases include race, gender, and income.[11] For example, a federal agency's resume review algorithm could drift (behaves in an unknown or unpredictable way that doesn't follow the original parameters) due to a data set input that shows a racial difference between applicants. This drift could result in the hiring algorithm becoming biased against a certain race. And this algorithmic based decision could lead to discriminatory hiring outcomes in federal agencies that end up reinforcing cultural stereotypes and leading to the maintenance or growth of societal divisions.

We have already seen numerous examples of biased algorithms in the private sector. Amazon found a hiring algorithm favored applicants based on words such as "executed" or "captured" that were more commonly found on men's resumes, and Google's online advertising AI system showed high-paying positions to men more than to women.[12]

To address and prevent bias in AI systems, federal agencies must take care in their use of AI training data and in programming its algorithms. They must also continuously monitor these systems to ensure fair and unbiased AI outputs. We are pleased to see that the proposed guidance requires federal agencies to implement several AI bias guardrails for safety-impacting and rights-impacting AI systems such as completing impact assessments, actively identifying and addressing elements that contribute to discriminatory or biased outcomes in algorithms, evaluating and minimizing unequal effects, utilizing inclusive and representative datasets, and seeking input and integrating feedback from the groups affected.[13] These guardrails will help protect citizens from the negative impacts of AI usage.

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[10] IBM Data and AI Team, *Shedding light on AI bias with real world examples*, IBM (Oct. 16, 2023) https://www.ibm.com/blog/shedding-light-on-ai-bias-with-real-world-examples/
[11] Id.
[12] Id.
[13] *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*, at pgs. 15-20 https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf

We particularly want to uplift the requirement to consult affected groups. We hope that this proposed guardrail is utilized to allow racial, ethnic, and other minorities to have a full seat at the table and take part in determining how AI is used by the federal government.

C. The proposed waiver power of the Chief AI Officers should be weakened, and conflicts of interest frameworks must be introduced to avoid corporate capture and the misuse of AI within federal agencies.

We understand that a centralized source of AI decision-making power and knowledge is justified for federal agencies. However, under the current proposed guidance, we fear that the discretionary power of the Chief AI Officer (CAIO) to grant waivers from safety and rights protection requirements is too great.

In the proposed guidance, in collaboration with other pertinent authorities, a federal agency's CAIO can grant an AI application or component a waiver from having to follow the guidance's minimum practices for safety/rights-impacting AI.[14] The CAIO can justify its waiver decision if it determines that meeting the AI minimum practices stipulation could elevate safety or rights risks in general or pose an unacceptable obstacle to vital agency functions.[15]

It is unclear what is meant by other pertinent authorities, and there is no definition of "unacceptable obstacle" included in the guidance. Additionally, we are concerned about the concept of a federal agency's CAIO granting a waiver to an AI use case that serves the agency's vital functions while harming the general public's rights. For example, the Department of Homeland Security's CAIO could grant a waiver for facial recognition AI usage for its operations and potentially not be blocked from doing that under the current guidance rules.

We urge the OMB to narrow the grounds for waiver, establish sharper standards for when a waiver is permitted, and institute other procedural protections, perhaps including obtaining authorization from OMB.

Additionally, the guidance should address concerns about the CAIO's interactions and relationships with the private sector. The potential for a CAIO coming directly from the AI industry is high due to the elevated level of technical expertise needed for this role. A CAIO's past work in the AI industry could lead to an increase in industry influence, conflicts of interest, and undue favoritism towards private entities because of the CAIO's

[14] *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*, at pg. 13 https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf
[15] Id. at pg. 14

past relationships. We worry that any CAIO's industry past could compromise the public interest and trust in the process. The final OMB AI guidance must contain clear and stringent ethical guidelines, disclosure requirements, and conflicts-of-interest frameworks to prevent the CAIO from becoming a conduit for private industry interests. At minimum, the Biden Day One Ethics Executive Order standards[16] must be applied, but we would also recommend thinking about stronger safeguards due to the high likelihood of revolving door issues with these positions. For example, upon leaving public office, CAIOs should not be allowed to lobby on AI policy for one year or longer, and CAIOs must clearly and publicly report all contact or correspondence with private sector stakeholders.

D. To improve this guidance, OMB should require a public inventory from all federal agencies on their existing authority relevant to AI regulation.

To promote the public interest, OMB should update the proposed guidance to require federal agencies to publicly release a current inventory of their AI regulatory authorities that also contains ideas of how to strengthen or add on to them. The purpose of this inventory requirement would be to encourage agencies to study their existing authorities which may apply to AI and to help them think about where additional regulatory powers might be needed. This exercise should be done by agencies publicly, and would help Congress, civil society, and the public evaluate the adequacy of existing laws and prioritize new regulations where they are needed.

We welcome the OMB's proposed guidance in utilizing AI in a trustworthy and safe manner and look forward to working together to refine this guidance. For questions, please contact Richard Anthony at ranthony@citizen.org.

Sincerely,

Public Citizen

[16] Biden Administration Staff, *Executive Order on Ethics Commitments by Executive Branch Personnel*, WHITEHOUSE.GOV (Jan. 20, 2021) https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-ethics-commitments-by-executive-branch-personnel/

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0085
Comment on OMB-2023-0020-0001

Submitter Information

Organization: National Nurses United

General Comment

On behalf of National Nurses United, please see attached.

Attachments

2023 NNU Response to RFC OMB AI-in-Government-Memo-Draft_FINAL.pdf

Attachment 1_Examples of Imaging Technology Provided to NNU United by Mgmt (2)

Attachment 2_NNU 2021 Clinical Algorithms Final Survey Results

Attachment 3_NNU Medicare Hospital At Home Report

Attachment 4_NNU Comments AHRQ Algorithms Intro Racial Ethnic Bias

Attachment 5_2023 OSTP_FRDOC_0001 RFI AWSM National Nurses United Comments

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December 5, 2023

Clare Martorana
U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management Budget

RE: OMB–2023–0020, Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Dear Ms. Martorana,

On behalf of more than 225,000 registered nurses (RNs) who work as health care professionals in every state in the nation, including more than 14,000 nurses at 23 Veteran Affairs (VA) hospitals, National Nurses United (NNU) submits these comments in response to the Office of Management and Budget's (OMB) draft memorandum OMB–2023–0020, Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, 88 Fed. Reg. 75625 (November 3, 2023) (Draft Memorandum), implementing Section 10 of President Biden's Executive Order on artificial intelligence (AI Executive Order).[1]

While NNU is pleased that the Draft Memorandum includes "minimum practices" for safety-impacting and rights-impacting AI, as discussed below, we believe that they do not go far enough to protect the safety and rights of all those potentially affected. In particular, we are concerned with the potential for AI to harm the veterans for whom our members provide care and displace VA workers.

NNU is extremely concerned about the use of AI in health care. VA nurses are already experiencing the problematic effects of AI. The decisions to implement AI-driven technologies are typically made with little to no knowledge of either nurses or

[1] President Biden. October 30, 2023. Executive Order 14110. Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.

patients, putting both at risk of negative safety and rights impacts. AI is being used to replace registered nurses, who have the education and clinical experience necessary to effectively exercise professional judgment in patient care, with lower cost staff following AI-generated prompts. However, each patient is unique and health care is made up of non-routine situations that require human intelligence and perception as well as empathy and kindness. Thus, nursing and medical care should be provided by licensed health care professionals who can discern whether or not AI-generated guidance is appropriate for a particular patient.

NNU provides a detailed, though not exhaustive, discussion of our many concerns with OMB's Draft Guidance.

Sincerely,

Michelle Grisat
Director of Health and Regulatory Policy
National Nurses United

I. OMB should prioritize the Precautionary Principle in the final memorandum to ensure agencies act responsibly in implementing AI. (RFC question 3)

NNU urges OMB to apply the Precautionary Principle, a key concept in public health, to federal agency use of AI, in addition to minimum practices that uphold the rights and safety of federal employees and the public. According to Harvard University Professor A. Wallace Hayes, the Precautionary Principle is the proposition that, "When an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause-and-effect relationships are not fully established scientifically."[2] The deployment of AI raises significant threats of harm to human health as OMB has acknowledged in its provisions regarding AI's health-related impacts throughout the Draft Memorandum.[3]

Contrary to the Precautionary Principle, the Draft Memorandum's use of phrases such as "promoting AI innovation" and "advancing AI maturity" suggests that agencies should implement AI swiftly. Making AI implementation a goal in itself encourages agencies to short-cut the process of considering all alternatives to address any given need. It treats rights and safety protections as an afterthought. It also creates the unfortunate appearance that lobbying by the tech industry is directing the administration's priorities. Instead of focusing on a single type of technology and telling agencies to find ways to implement it, OMB should focus its final memorandum on the risks of this emerging technology and on the precautions agencies must take to protect safety and rights if they choose to implement AI because it is the best tool for a particular need. Precaution is especially important for AI implementation in the context of health care, specifically in VA hospitals and facilities, as discussed further in Section II. of our response.

A. OMB should direct the agencies to wait for relevant agency and department actions to be completed, as set forth in the AI Executive Order, before moving forward with the removal of so-called barriers to the use of AI.

The AI Executive Order sets forth numerous administrative and regulatory actions that must be completed by government agencies in the coming months and years to guide the initial implementation of AI and ensure that it is safe, secure,

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[2] Hayes, A.W. The precautionary principle. Arh Hig Rada Toksikol. 2005 Jun;56(2):161-6. PMID: 15968832.

[3] *See*, for example, OMB. Draft Memorandum. Sec. 5.b.ii., p. 12.

trustworthy, and well-understood before they are introduced. These actions can only serve their intended purpose if they are completed before the government begins the process of "removing barriers to the use of AI."[4] Some barriers to implementation may be necessary safeguards with dangerous consequences if they are removed. There is no way to know which barriers are safe to remove without a clear understanding of (1) how AI will be implemented, (2) the regulatory framework in which it will exist, and (3) how implementation will affect the individuals and interrelated systems that must interact with the AI system. For this reason, the final memorandum should specify that no barriers to implementation of AI will be removed until after the relevant federal government actions specified in the AI Executive Order for ensuring the safe, secure, and trustworthy implementation of AI technology are completed.

The AI Executive Order includes instructions for numerous agencies to undertake preparatory work to protect workers and the public. For example, as discussed further in Section II., the AI Executive Order calls for the establishment of a Health and Human Services AI Task Force that will develop a strategic plan that includes policies, frameworks, and potential regulatory action, on "responsible deployment and use of AI and AI-enabled technologies in the health and human services sector."[5] The express purpose of developing this strategic plan is to "protect American consumers from fraud, discrimination, and threats to privacy and to address other risks that may arise from the use of AI."[6] These goals can only be achieved if the plan is in place before the rollout of AI, including generative AI.

The AI Executive Order also instructs federal agencies "to prevent and address unlawful discrimination and other harms that result from uses of AI,"[7] in federal programs and benefit administration. Furthermore, it includes crucial instructions for the Secretary of Labor to create principles and guidance to protect workers during AI implementation.[8]

The work required in the AI Executive Order to protect public safety, civil rights, equity, workers' rights, appropriate provision of benefits, and other essential rights and government functions must be completed before AI implementation moves forward.

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[4] *See* OMB Draft Memorandum, Sec. 4.b., p. 8.
[5] Sec. 8.b.i.
[6] Sec. 8.a.
[7] Sec. 7.2.a.
[8] Sec. 6.

Removing barriers to AI before this protective work is completed would be reckless and misguided. The final OMB memorandum should instruct agencies to not begin removing barriers to AI implementation, or moving forward with implementation, until after the preliminary executive actions set forth in the AI Executive Order to ensure safety, security, and trustworthiness have been completed.

B. OMB should provide agencies with additional guidance on hiring Chief Artificial Intelligence Officers (CAIOs) who will prioritize safety and rights protections over rushed AI implementation.

It is essential that agencies hire Chief Artificial Intelligence Officers who will prioritize safety and rights protections over the drive to implement AI. To ensure the correct set of priorities for a person in this role, OMB must change the structure of the role in the final memorandum and give agencies guidance on hiring individuals without conflicts of interest due to ties to AI industry.

The Draft Memorandum makes the CAIO in each agency responsible for both advocating for AI in the agency and to the public as well as managing risks from the use of AI. There is a conflict inherent in requiring the CAIO to advocate for AI when an honest exercise of the minimum protections for safety and rights may find that it is not safe, rights-respecting, or effective to implement AI in any given agency or use.

Moreover, there is a serious risk that CAIOs, who need to have AI expertise, will be hired from the same AI industry that is trying to sell AI systems to federal agencies. Similarly, someone in this role could look forward to a high-paying job in the industry when they leave, particularly if they push agencies to procure high-dollar AI. This type of revolving door for regulators from and back into industry is a serious problem in many government agencies. There is also a common misconception that only AI companies understand the technology or can speak about the future of AI, leading political leaders and regulators to overvalue the opinions of tech executives over those of people impacted by the technology. Therefore, OMB should give the agencies guidance on how to manage the risk of undue influence from AI companies on CAIOs. OMB should also urge agencies to hire CAIOs with a strong background in safety and rights advocacy and not individuals with conflicts of interest from recently working for, or being funded by, tech companies.

C. OMB should remove agency directives regarding "AI maturity" that encourage agencies to prioritize accelerated AI adoption over the safety- and rights-protecting approach required by the AI Executive Order.

NNU is concerned that OMB directs agencies to pursue AI strategies that conflict with the Precautionary Principle and exceed the narrower scope of responsible AI implementation under the AI Executive Order. For example, in the Draft Memorandum, OMB directs agencies to develop a strategy "for removing barriers to the responsible use of AI and achieving enterprise-wide advances in AI maturity."[9] OMB defines AI maturity as the government's "capacity to successfully and responsibly adopt AI into their operations and decision-making across the organization."[10] However, the AI maturity framework conflicts with the Precautionary Principle and unreasonably expands beyond the limited scope of what constitutes responsible AI implementation under the AI Executive Order. AI will not be an appropriate tool for operations and decision-making in many parts of the government and rushing investment in AI maturity risks wasting resources and impeding government activities as every agency tries to press AI into service where it may not be the best tool.

Furthermore, the AI maturity framework does not originate from the AI Executive Order. Instead, the term has roots in the private sector and appears related to the "AI Capability Maturity" framework from the General Services Administration's (GSA) "AI Guide for Government." According to the GSA's guide, the AI Capability Maturity framework advances objectives related to "quick AI adoption and broader enterprise business goals."[11] While the AI Executive Order directs OMB to develop a method for agencies "to track and assess their ability to adopt AI into their programs and operations,"[12] the objectives underlying the AI maturity framework seek to accelerate the total implementation of AI across all agency operations. These objectives run counter to the Precautionary Principle, as well as the rights and safety principles under the AI Executive Order.

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[9] Sec. 4.a., p. 8.

[10] Sec. 6., p. 22.

[11] Centers of Excellence, U.S. General Services Administration. "AI Guide for Government: A Living and Evolving Guide to the Application of Artificial intelligence for the U.S. Federal Government." Last accessed 11/21/2023. https://coe.gsa.gov/coe/ai-guide-for-government/print-all/index.html

[12] President Biden. October 30, 2023. Executive Order 14110. Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. Sec. 10.1(c).

Thus, the AI maturity framework substitutes the AI Executive Order's deliberate, precautionary approach that prioritizes rights and safety, in pursuit of short-term "efficiencies"[13] from the implementation of AI. Therefore, OMB should remove language related to achieving "AI maturity" given that it encourages agencies to accelerate AI adoption in all of its operations, even when doing so may lead to failure to comply with minimum practice requirements for rights- and safety-impacting AI use.

II. OMB should treat the use of AI in health care as both safety- and rights-impacting. (RFC question 5)

A. OMB should treat AI in health care with particular caution given the demonstrated patient harm, including increased morbidity and death.

Numerous types of problematic AI technologies have already been implemented in health care facilities, including clinical decision support systems embedded in electronic health records (EHRs). AI technologies are also being deployed in acute hospital care at home and remote patient monitoring schemes, virtual nursing, automated worker surveillance and management systems, and staffing platforms that support gig nursing.[14] Some of them have been deadly.

According to a 2022 report by the Department of Veterans Affairs Office of the Inspector General (VA OIG), the Veterans Health Administration identified more than a thousand patient safety events related to the new Cerner electronic health record system, implemented at just three facilities, from October 24, 2020, through May 8, 2022.[15] These patient safety events included one "catastrophic" event, defined as "death or major permanent loss of function," and two "major patient harms" that involved

[13] *See*, for example, OMB Draft Memorandum, Sec. 4.

[14] NNU has written extensively on problems related to these technologies, including responses to federal agencies' requests for information. *See* Attachment A, 2023 OSTP_FRDOC_0001 RFI AWS&M National Nurses United Comments and the attachments referenced therein:
Attachment 1, Examples of Imaging Technology Provided to NNU United by Mgmt
Attachment 2, NNU 2021 Clinical Algorithms Final Survey Results
Attachment 3, NNU Medicare Hospital At Home Report
Attachment 4, NNU Comments AHRQ Algorithms Intro Racial Ethnic Bias

[15] https://www.oversight.gov/sites/default/files/oig-reports/VA/VAOIG-22-01137-204.pdf - accessed November 27, 2023

"permanent lessening of bodily functioning."[16] Since the publication of the VA OIG's report, the VA briefed Senate committee staff on the ongoing Cerner EHR project, including that six patients have experienced "catastrophic" harm related to the rollout, resulting in four deaths.[17] This example demonstrates the dangers of rushing the implementation of new technology in health care settings. Thus, the VA must not implement new AI systems without rigorous testing using improved minimum practices, as discussed below in Section V., and should swiftly apply improved minimum practices to current technology.

Ensuring that AI and AI-enabled technologies are safe, secure, and trustworthy *before* they are implemented in real-world practice is particularly important in the health care setting. While the failure of AI may result in wasted time or administrative inconvenience in some federal agencies, in health care, it can cost lives. The federal government, generally, and HHS and the VA, in particular, have a duty to ensure that patient harm, such as avoidable injuries and death, or unequal treatment for specific populations and protected classes, are avoided to the fullest extent possible. However, this can only be accomplished if necessary preparatory work, such as the policies, frameworks, and regulatory structures that are included in the same, are *already in place* at the time AI is introduced in health care settings. Removing "barriers" to the implementation of such technologies before these protective structures are in place prevents them from serving their intended purpose of ensuring that AI technologies are safe, secure, and trustworthy.

In addition to the HHS AI Task Force, the AI Executive Order includes other preliminary actions that must be completed by the Secretary of HHS and the Secretary of VA to ensure that the introduction of AI in health care spaces is safe, secure, and trustworthy. For instance, the AI Executive Order instructs the Secretary of HHS to develop an "AI safety program" in conjunction with the Secretary of VA.[18] This safety program must establish

[16] https://www.oversight.gov/sites/default/files/oig-reports/VA/VAOIG-22-01137-204.pdf - accessed November 27, 2023

[17] Hewitt Jones, J. and Krishan, N. 2023, Mar. 16. VA electronic health record system linked with 6 cases of 'catastrophic harm' including 4 deaths. https://fedscoop.com/va-ehr-six-cases-catastrophic-harm/ - accessed November 27, 2023

[18] Sec. 8.b.iv.

> a common framework for approaches to identifying and capturing clinical errors resulting from AI deployed in healthcare settings as well as specifications for a central tracking repository for associated incidents that cause harm, including through bias or discrimination, to patients, caregivers, or other parties.[19]

It must also establish systems for analyzing this data and making recommendations and suggesting best practices.[20] Likewise, the AI Executive Order instructs the HHS Secretary to develop a strategy "to determine whether AI-enabled technologies in the health and human services sector maintain appropriate levels of quality," and to "develop a strategy for regulating the use of AI or AI-enabled tools in drug-development processes."[21] Again, it is clear here that the work of creating a safety program and developing strategies to address quality-control and the use of AI in drug development are intended to be done *before* the process of introducing new AI into health care settings commences.

OMB acknowledges in the Draft Memorandum that deployment of AI raises significant threats of harm in health care settings. For example, in Section 5.b.ii.H., OMB outlines the following health care decisions as examples of rights-impacting AI:

> Decisions regarding medical devices, medical diagnostic tools, clinical diagnosis and determination of treatment, medical or insurance health-risk assessments, drug-addiction risk assessments and associated access systems, suicide or other violence risk assessment, mental-health status detection or prevention, systems that flag patients for interventions, public insurance care-allocation systems, or health-insurance cost and underwriting processes.[22]

Federal agencies utilizing health care AI must ensure that it is safe, effective, and therapeutic for both a specific patient population and the health care workforce engaging with these technologies before they are deployed in real-world care settings.

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[19] Sec. 8.b.iv.A.
[20] Sec. 8.b.iv.B.
[21] Sec. 8.b.ii and v.
[22] P. 12.

Problems with AI go beyond the myriad rights-impacting racial, gender, and age-based biases for specific patient populations.[23] As each patient has unique traits, needs, and values, no AI can be sufficiently fine-tuned to determine the appropriate diagnostic, treatment, and prognostic information for each individual patient. Because each patient is unique, using "representative data," as specified in Draft Memorandum Section 5.c.v.a.3.,[24] is insufficient to protect patients from being harmed by health care AI. Thus, OMB should direct federal agencies to obtain patients' informed consent for the use of AI in their diagnosis, treatment, and prognosis, including notification of any clinical decision support software being used.[25] Additionally, clinicians, including RNs, must be allowed to override AI when it is in the best interest of the patient and within their scope of practice. Finally, liability for any patient harm associated with failures or inaccuracies of automated systems must be placed on both AI developers and federal agencies deploying them.

Finally, NNU is extremely concerned about the use of generative AI in health care. Problems with generative AI include the opacity in the manner that generative AI systems "learn" which may function as a black box, even to the developers of the systems.[26] As a result, generative AI systems may have hidden capabilities that their developers and users did not anticipate and might not be aware of.[27] Additionally, generative AI has been shown to "hallucinate," simply making up inaccurate

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[23] *See* Attachment 4, NNU Comments AHRQ Algorithms Intro Racial Ethnic Bias.

[24] P. 19.

[25] OMB should also direct agencies to obtain informed consent from patients before collecting or using their data, even in deidentified form. There are often sufficient data points to reidentify supposedly de-identified patient information..

[26] *See* Blouin, L. 2023, Mar. 6. "AI's mysterious 'black box' problem, explained." https://umdearborn.edu/news/ais-mysterious-black-box-problem-explained - accessed December 4, 2023. Explaining the black box problem, "If, for example, an autonomous vehicle strikes a pedestrian when we'd expect it to hit the brakes, the black box nature of the system means we can't trace the system's thought process and see why it made this decision."

[27] *See*, for example, Pearson, J. 2023, Nov. 29. "ChatCPT Can Reveal Personal Information From Real People, Google Researchers Show." https://www.vice.com/en/article/88xe75/chatgpt-can-reveal-personal-information-from-real-people-google-researchers-show - accessed December 4, 2023. Reporting that "memorized data extracted by the researchers included academic papers and boilerplate text from websites, but also personal information from dozens of real individuals." Citing research paper by Nasr, M., Carlini, N., Feder Cooper A., Ippolito, D., Choquette-Choo, C.A., Wallace. E., Tramèr, F., Lee, K. 2023, Nov. 28. Extracting Training Data from ChatGPT. https://not-just-memorization.github.io/extracting-training-data-from-chatgpt.html - accessed December 4, 2023.

information without a clear basis or reason for doing so.[28] As these examples demonstrate, generative AI systems are prone to serious errors that can directly impact the safety and rights of patients, if such systems are adopted by agencies that provide health care. OMB should therefore advise the federal agencies to refrain from adopting generative AI technology unless and until these serious deficiencies are resolved.

B. Infringement by AI and other AI-enabled technologies on nursing practice are harmful to patients.

Registered nurses have extensive education and clinical experience that enables RNs to provide safe, effective, and equitable patient care. These standards of nursing care can only be accomplished through continuous in-person patient assessments by a licensed registered nurse. Every time RNs interact with a patient, they perform skilled assessments and evaluations of the patient's overall condition. These assessments are fundamental to ensuring that the patient receives optimal care. Health care is not one-size-fits-all. Nurses must be able to alter expected treatment plans based on the unique circumstances of the patient and the patient's wishes and values and to use their experience and nursing judgment to provide the best course of care. Indeed, they are ethically and legally required to do so. Yet nurses may be pressured by management to conform to decisions made by AI that are prone to racial and ethnic bias as well as other errors that arise when one utilizes information based on a population that is not appropriate for particular individuals. In sum, clinicians must have the legal right to override AI. For RNs, this means the right to determine nurse staffing and patient care based on their professional judgment.

Although health care AI is ostensibly designed to improve patient care, it frequently incorporates data generated by worker and patient monitoring technology with the goal of lowering labor costs. AI technologies then use this data to make unreasonable and inaccurate decisions about patient acuity, staffing, and clinical care. As a result, nurses and other health care professionals are expected to work faster, accept more patients per nurse than is safe, and reduce nurses' use of independent

[28] *See* O'Brien, M. 2023, Aug. 1. "Chatbots sometimes make things up. Is AI's hallucination problem fixable?" https://apnews.com/article/artificial-intelligence-hallucination-chatbots-chatgpt-falsehoods-ac4672c5b06e6f91050aa46ee731bcf4 - accessed December 4, 2023. Quoting Emily Bender, a linguistics professor and director of the University of Washington's Computational Linguistics Laboratory, "This [hallucination problem] isn't fixable, … It's inherent in the mismatch between the technology and the proposed use cases."

professional skill and judgment. AI also utilizes patient and staff tracking data to facilitate routinization—breaking the holistic process of nursing into discrete tasks—with the goal of replacing educated registered nurses exercising their professional judgment with lower-cost staff following AI prompts. According to a report by the VA, the new Cerner electronic health record problematically resulted in "[n]urse orders defaulting to clinical algorithm instead of proposed orders".[29]

Nurses are already experiencing the degradation and devaluation of nursing practice through the use of AI technologies that have been implemented in recent years. For example, health care employers are using AI embedded in EHRs to replace RN judgment by automating the creation of nursing care plans and assigning patient acuity levels. RNs develop the nursing skill and judgment necessary to accurately evaluate a patient and create an effective care plan through education and experience in the clinical setting. RNs' human skill and judgment cannot be replaced by AI without serious consequences for safe patient care.

Thus, AI as it is being implemented by employers in health care is dangerous to nurses and patients. OMB's final memorandum should include all forms of AI in health care in the list of presumptive safety and rights-impacting AI subject to minimum protections and should not push the VA to implement AI that degrades nursing practice and puts patients at risk.

III. OMB should strengthen worker protections in the final memorandum. (RFC question 3)

A. OMB should direct agencies to refrain from implementing AI systems until the Secretary of Labor completes the work required in the AI Executive Order.

For the reasons outlined in Section I, NNU strongly urges the OMB to require that agencies refrain from implementing new AI until the Secretary of Labor completes the principles, best practices, and guidance called for in Section 6 of the AI Executive Order and these practices are fully incorporated into agency AI adoption plans. The AI Executive Order requires heads of agencies to consider encouraging the adoption of

[29] Veterans Health Administration, Department of Veterans Affairs. 2023, Mar. EHRM Sprint Report. https://www.veterans.senate.gov/services/files/5B5776E7-8765-4303-9B93-D2BCBF8D5A33 - accessed November 27, 2023

these guidelines into their programs. These documents are designed to "mitigate AI's potential harms to employees' well-being and maximize its potential benefits" and to ensure compliance with the Fair Labor Standards Act and other laws. Agencies could cause serious harm to workers by rushing implementation ahead of the adoption of best practices and guidance from the Secretary of Labor.

B. OMB should direct agencies to bargain with union workers regarding the development and use of AI in federal agencies.

NNU urges OMB, in the strongest possible terms, to strengthen requirements on union and worker participation to bring the final memorandum in line with President Biden's commitment to union workers and making the federal government a model employer.[30] The AI Executive Order Section 2.c. states:

> As AI creates new jobs and industries, all workers need a seat at the table, including through **collective bargaining**, to ensure that they benefit from these opportunities. … The critical next steps in AI development should be built on the views of workers, **labor unions**, educators, and employers to support responsible uses of AI that improve workers' lives, positively augment human work, and help all people safely enjoy the gains and opportunities from technological innovation.[31]

Despite language supporting collective bargaining and union involvement in the development and use of AI in the AI Executive Order, the phrase "collective bargaining" does not appear in OMB 's Draft Memorandum. Moreover, the word "union" comes up only once, in Section 5.c.v.B., which states: "Agencies are strongly encouraged to solicit feedback on an ongoing basis from affected groups, such as customers, Federal employee groups, and employees' union representatives,

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[30] The White House. 2023, Sep. 1. FACT SHEET: Ahead of Labor Day, Biden-Harris Administration Announces New Actions to Empower Workers— Building on the President's Historic Support for Workers and Unions. https://www.whitehouse.gov/briefing-room/statements-releases/2023/09/01/fact-sheet-ahead-of-labor-day-biden-harris-administration-announces-new-actions-to-empower-workers-building-on-the-presidents-historic-support-for-workers-and-unions/ - accessed November 17, 2023.
OPM. Worker Empowerment. https://www.opm.gov/labor-management-relations/ - accessed November 17, 2023

[31] Emphasis added.

particularly after significant modifications to the AI or the conditions or context in which it is used."[32]

NNU strongly urges OMB to direct agencies to collectively bargain with workers who are represented by a union regarding AI that may affect them—beginning with the decision of whether to implement AI, during all phases of implementation, and while in use—rather than merely encouraging agencies to "solicit feedback" after modifications to AI that is currently in place. Where workers are not represented by a union, NNU urges OMB to encourage a robust worker participation process. The requirement to engage in collective bargaining and worker participation should apply to all uses of AI, not just those that are deemed safety- or rights-impacting. See Section V., below, for further discussion of involving workers and the public in decisions on safety and rights-impacting AI.

C. OMB should strengthen language directing agencies to protect workers from the potential negative impacts of AI.

As discussed in Section II., NNU opposes substituting AI or other AI-enabled technology for RN judgment because of the likelihood of harming both patients and nurses. Where AI can be used safely and not infringe on the rights of those affected, NNU strongly urges OMB to specify in the final memorandum ways that agencies can provide workers displaced or experiencing other economic effects of AI in their workplaces the training, support, resources, and pathways to transition into good union jobs.

The Draft Memorandum offers little specific direction to agencies regarding the current workforce. The strongest direction it provides is:

> Agencies should provide resources and training to develop such AI talent internally and should also increase AI training offerings for Federal employees, including opportunities that provide Federal employees pathways to AI occupations and that assist employees affected by the application of AI to their work.[33]

[32] P. 19.
[33] Sec. 4.b.iv., p.9.

Beyond this, the Draft Memorandum states that agencies "must identify … context-specific risks," including "potential harms to worker wellbeing," and encourages agencies "to promote and to incorporate … the workforce principles" established pursuant to Section 6 of the AI Executive Order.[34] Yet these workforce principles cannot be promoted and incorporated until the Secretary of Labor completes the work necessary to "develop and publish [these] principles."[35] Thus, reiterating NNU's recommendation in Sections I.A. and III.A. above, OMB should direct agencies to refrain from implementing new AI until all requirements laid out in the AI Executive Order have been completed.

IV. OMB should strengthen public accountability and transparency provisions. (RFC question 3, 8)

NNU urges OMB to strengthen all provisions in the Draft Memorandum related to transparency and public release of information. Transparency is essential to government accountability. Therefore, OMB must prohibit agencies from adopting any AI that does not allow for full transparency, whether for technical or contractual reasons, and require agencies to prioritize transparency. Currently, health care AI corporations institute gag clauses on users' public discussions of any issues or problems with their products or cloak the workings of their products in claims of proprietary information. Such gag clauses must be prohibited in AI used by federal agencies.

Under Section 10.1.e., the AI Executive Order directs OMB to provide agencies guidance "[t]o improve transparency for agencies' use of AI" and "expand agencies' reporting on how they are managing risks from their AI use cases." To ensure transparency and public participation, OMB should require agencies to provide notice of AI documentation through the Federal Register under the Administrative Procedure Act notice and comment procedures. The required AI documentation should enable the public to learn when agencies are using AI systems, inspect and assess those systems, and demand responses about their use, such as external auditing and oversight. Therefore, OMB should require agencies to publish the AI system's underlying source code, training data, and provide both a technical and plain language explanatory analysis of the AI system and its components.

[34] Sec. 5.c., p.13.
[35] AI Executive Order, Sec. 6.b.i.

Further, OMB should remove all language that provides for agency discretion over which required AI documentation to make available to the public, including the following provisions.

- "Agencies must only publicly report use cases *to the extent practicable*."[36]
- "*Where practicable*, agencies should include this documentation or link to it in contexts where people will interact with or be impacted by the AI."[37]

It is unclear what qualifies as "practicable." OMB should make clear that practicability or other administrative burdens do not override requirements to comply with public reporting and other transparency requirements. Therefore, OMB should remove any language related to practicability in the final memorandum that would potentially excuse agencies from fulfilling these requirements. Finally, NNU strongly urges OMB to ensure that agencies do not adopt any AI system that does not allow for full transparency and documentation into how it works—either for technical reasons or due to contractual requirements meant to protect proprietary information.

As discussed further in Section V. of these comments, OMB should strengthen provisions related to consultations with groups affected by AI and other end-users. In Section 5.c.v.B., OMB directs agencies to "take adequate steps to solicit input" before enumerating a list of possible actions. However, OMB does not require agencies to take any of these actions, thereby conferring upon agencies broad discretion over which actions would be "adequate." Therefore, OMB should require agencies to, at minimum, publish a Request for Information in the Federal Register to ensure public participation *and* conduct public hearings regarding AI deployment.

Finally, OMB should use the AI Executive Order's definition of AI to ensure transparency. In Section 3.(b), the AI Executive Order sets forth a definition of AI based on the National Artificial Intelligence Initiative Act of 2020.[38] Yet in Section 6 of the Draft Memorandum, OMB sets forth a different definition of AI based on earlier legislation that Congress specifically directed for use by the Department of Defense.[39] The AI Executive Order defines AI as "a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments" and includes systems that "abstract such

[36] Sec. 3.a.iv., fn. 8
[37] Sec. 5.c.iv.H.
[38] 15 U.S.C. 9401(3)
[39] Sec. 238 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019. Pub. L. No. 115-232, § 238 (2018).

perceptions into models through analysis in an automated manner."[40] This definition is broader than OMB's definition which excludes "robotic process automation *or other systems whose behavior is defined only by human-defined rules*."[41] OMB creates ambiguity as to what systems the required minimum practices apply to, and thus undermines the AI Executive Order and its transparency goals given the lack of a clear definition of AI. Therefore, OMB should use the AI Executive Order's definition of AI to ensure transparency so that the public can hold agencies accountable for their AI use.

V. OMB should strengthen minimum practices for safety- and rights-impacting AI. (RFC question 3, 5, 6, 8)

Respecting rights and ensuring safety must always be agencies' top priorities when considering AI implementation. The Draft Memorandum says that "[t]he expected benefits of the AI functionality should be considered against its potential risks, and if the benefits do not meaningfully outweigh the risks, agencies should not use the AI." OMB should make it clear that there is no balancing test that justifies unlawful discrimination or harmful bias against protected classes in government operations, taking away benefits that people are entitled to, or putting lives at risk. Safety and rights cannot be weighed against cost or efficiency concerns. As discussed in Section I., above, in addition to use of the minimum practices, the OMB should be clear that agencies should wait for the results of the studies and plans required in the AI Executive Order before implementing new AI. Waiting for these reports to be completed is essential to ensuring a full understanding of the threats to safety and rights in each context. Review of existing AI should begin immediately and be repeated when more information is available.

A. Most agency uses of AI are safety- and rights-impacting. (RFC question 5)

There are very few, if any, government functions that can be replaced by AI without impacting the safety or rights of government workers and the public. Therefore, NNU urges OMB to ensure that the final memorandum's lists of practices presumed to be safety- or rights-impacting are thorough. OMB must be careful in its final memorandum and its future monitoring of agencies to ensure that the minimum practices for safety- and rights-impacting AI are applied widely to government use of AI. For example, OMB should add a definition to "workplace surveillance and

[40] Sec. 3.(b).
[41] Sec. 6., p. 23. Emphasis added.

management technologies" that makes it clear that any system that collects data on workers or has any impact on how, when, and whether they work will be included as rights-impacting AI. OMB should also include any AI system used by a health care provider, like the Veterans Health Administration, in the lists of safety and rights-impacting AI. As explained further in Section II., a wide range of AI systems have been implemented in health care settings and virtually all of them affect patients' and workers' safety and rights. In the Draft Memorandum, OMB has rightly made clear that the list of examples is not exhaustive—this should be retained in the final memorandum.

B. OMB should remove the waiver authority conferred upon Chief Artificial Intelligence Officers. (RFC question 3, 6)

The waiver authority that OMB confers upon the CAIO in the Draft Memorandum is dangerous and conflicts with the primacy of safety and rights under the AI Executive Order and in anti-discrimination statutes. By granting waiver of the minimum practice requirements, OMB effectively enables agencies to waive people's rights and disregard their safety.

A single person should not have the power to decide that respecting rights and preserving safety are "unacceptable impediment[s] to critical agency operations."[42] That is doubly true if that person has a vested interest in getting AI into agencies, which Section I.B. explains is a risk associated with the current CAIO structure and likely candidates. Yet under Section 5.c.iii., OMB confers upon the CAIO the authority to waive the minimum practice requirements for AI use that falls under the rights- or safety-impacting presumptions, if the CAIO makes a written determination "based upon a system-specific risk assessment," that compliance with the requirements would "increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations."[43] However, none of the legal authorities that OMB cites supports such a waiver power. Given that there is no basis for the CAIO's authority to waive minimum practice requirements in either the AI Executive Order or the AI statutes, OMB's granting of this authority has exceeded the scope of these laws.

When issuing interpretive guidance, agencies must interpret an executive order in a manner consistent with the order's object and policy. *San Francisco v. Trump*, 897

[42] Sec. 5.c.iii., p. 14.
[43] P. 14.

F.3d 1225, 1242 (9th Cir. 2018); *Bassidji v. Goe*, 413 F.3d 928, 934 (9th Cir. 2005). The AI Executive Order clearly states as one of its principles that AI policies "must be consistent with my Administration's dedication to advancing equity and civil rights. My Administration cannot – and will not – tolerate the use of AI to disadvantage those who are already too often denied equal opportunity and justice."[44] Further, the Biden administration sought "to ensure that AI complies with all Federal laws and to promote robust technical evaluations, careful oversight, engagement with affected communities, and rigorous regulation."[45] The AI Executive Order then directed OMB to provide guidance for agencies that "required minimum risk-management practices for Government uses of AI that impact people's rights or safety."[46] To this end, the AI Executive Order directed OMB to enumerate "specific Federal Government uses of AI that are presumed by default to impact rights or safety."[47] As the text makes clear, the Biden administration issued the AI Executive Order to rigorously regulate agencies' use of AI by requiring minimum risk-management practices for AI presumed to impact the rights and safety of the people.

Conferring waiver power to CAIOs for these minimum practices requirements contradicts the safety, civil rights, and public interest principles that the AI Executive Order requires agencies to adhere to, as well as the order's clear directives to OMB. Moreover, it upends the balance between responsible use of AI and protecting people's rights and safety that the AI Executive Order is seeking to strike. Indeed, the requirements to issue a waiver would only be met if agencies have ignored necessary safeguards while implementing AI. As explained further in the next section, agencies must not create a situation where compliance with minimum practices to protect safety and rights would "create an unacceptable impediment to critical agency operations."[48] It is unclear what situations OMB envisions in which adhering to the minimum practices would increase risk to safety and rights overall. However, if a system cannot be implemented with minimum practices in place, then it should not be implemented at all.

In sum, given the inconsistency between the text of the AI Executive Order and the Draft Memorandum, OMB should remove language related to waiver or any

[44] Sec. 2.d.
[45] *Ibid.*
[46] Sec. 10.1.b.iv.
[47] Sec. 10.1.b.v.
[48] OMB Draft Memorandum Sec. 5.c.iii., p. 14.

limiting power in all relevant sections of the document, including Section 3.b.ii.O. on page 6, Section 5.b. on page 11, and Section 5.c.iii. on page 14.

C. The minimum practices must be maintained and enforced, with an emphasis on maintaining the ability to stop using AI without seriously disrupting agency activities. (RFC question 6)

The steps outlined by OMB to analyze the safety and rights impact of potential AI uses are critical and must be maintained and enforced. There are many ways in which AI can impact safety and rights, either immediately upon rollout or as the effectiveness of the system degrades over time. Human review is essential but not a sufficient fix for biased AI. The Draft Memorandum acknowledges the issue of automation bias.[49] Human workers also are often constrained by institutional factors that pressure them to make decisions quickly and to justify deviation from the AI result, both of which favor following AI recommendations over delving into how the system reached that conclusion and whether it is justified in law or practice.

The Draft Memorandum appropriately requires agencies to stop using AI when risks to safety and rights cannot practicably be mitigated.[50] It also requires agencies to consider the expected benefits and potential risks of a system before using it, to test the system thoroughly in its intended context, to get an independent evaluation, and to conduct ongoing monitoring and testing over time.[51] All of these steps are important.

However, these steps will not be practicable if agencies cannot decommission systems without disrupting essential government functions. OMB should stress that agencies should avoid implementing systems that cannot practicably be quickly decommissioned in the event that their performance degrades or bias arises later. In the health care context, predictive algorithms have been widely deployed, but researchers have discovered that their performance degrades over time due to issues including data drift, where input data changes over time, and feedback loops where the use of the AI changes the data that is used to retrain future models.[52] This problem is difficult to

[49] Sec. 5.c.v.A.1., p.18.
[50] Sec. 5.a.i., p.10.
[51] Sec. 5.c. generally.
[52] Palmer, K. 2023, Oct. 10. The 'model-eat-model world' of clinical AI: How predictive power becomes a pitfall. https://www.statnews.com/2023/10/10/the-model-eat-model-world-of-clinical-ai-how-predictive-power-becomes-a-pitfall/

counteract. Moreover, systems deploy multiple systems simultaneously that were not designed or tested to work in concert.

For AI that was in place prior to the issuance of the Draft Memorandum, it may be too late to ensure that they can be quickly decommissioned in the event that they put safety or rights at risk. In these cases, the Draft Memorandum states: "Agencies are responsible for determining how to safely decommission AI that was already in use at the time of this memorandum's release without significant disruptions to essential government functions."[53] However, this language is not sufficient to protect federal workers or the public. The OMB must establish a process to inform those whose safety or rights are at risk and ensure that claims of undue disruption are not used to avoid eliminating such risks expeditiously.

D. Consultation of affected groups and notification of people impacted by an automated decision are essential transparency measures that should be retained and strengthened. (RFC question 6, 8)

The Draft Memorandum appears to favor implementing AI over protecting the safety and rights of those who may be affected. AI systems should not be rushed into service. Rather, agencies should ask their workers and the public about existing problems and work with affected groups on careful development of targeted solutions, which may not include AI.

OMB should retain section 5.c.v.B. requiring agencies to consult and incorporate feedback from affected groups. Additionally, OMB should create detailed mandatory steps to solicit public participation, including requiring agencies to submit a Request for Information in the Federal Register to ensure public participation *and* conduct public hearings regarding AI deployment. Finally, OMB should direct agencies to collectively bargain with unions representing agency workers and consult with other worker groups and the members of the public served by the agency before implementing any AI system as well as on an ongoing basis thereafter. Agencies must not treat consultation with workers and communities as a mere box to check before they implement a system they have already chosen.

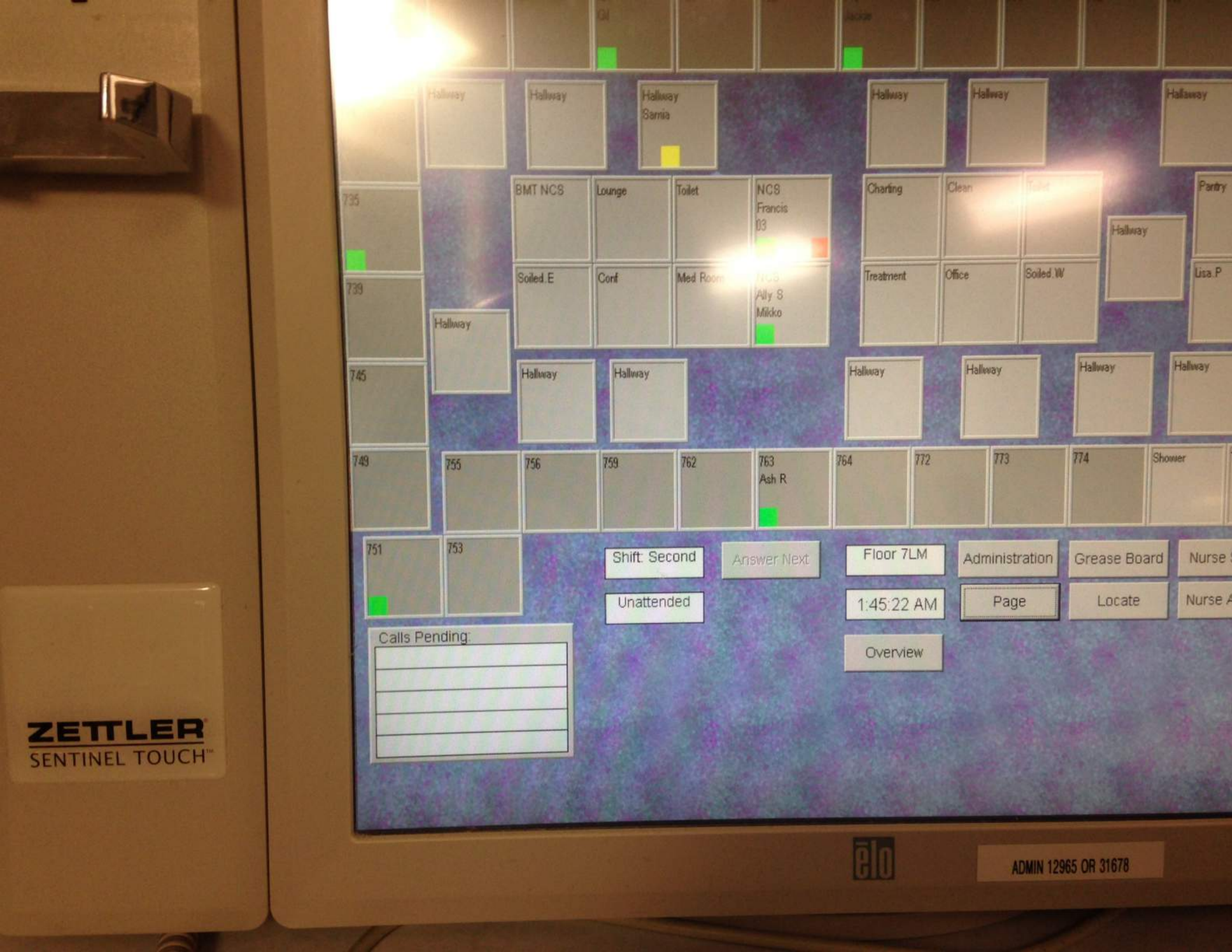
Like any new tool, AI should only be implemented when it solves a specific problem that workers and the public encounter and when the workers who get agency

[53] Page 17, Fn. 31.

tasks done every day are satisfied that it will improve their operations without creating new problems. However, it is often difficult for workers or the public to identify what AI systems are at work or how the different systems may affect them. For example, in the health care setting, registered nurses may see recommendations from AI embedded in an electronic health record system without knowing which software program has generated the recommendation or what patient information, research, or database has been used in generating a recommendation. Patients may not even know that AI is involved in their care. As part of consultation with workers and the public, agencies must explain in accessible terms exactly what the system would do, why it is being considered, the risks involved, any plan or potential for the system to replace workers, who the developers are, what the system would cost, what data was involved in its creation, what alternatives were considered, and other relevant factors to allow a true understanding of the system's likely impact. Workers, the public, labor unions, and watchdog organizations should also be able to easily access technical information, procurement contracts, and other government records.

OMB should also retain the requirement from the Draft Memorandum to notify any negatively affected individuals of the role AI plays in decisions that impact them and their options for human review. Importantly, the OMB should require agencies to institute an opt-in requirement for members of the public in the final memorandum rather than merely allowing "affected people" to "opt out from AI functionality in favor of a human alternative where practicable" as the Draft Memorandum currently states.[54] The basis for issuing or denying a benefit or any other government action should never be that an opaque AI program decided it was best. Humans should understand the decision process and be able to replicate it and check for errors. Human reviewers must not be pressured to match the speed of the system, be penalized or face greater scrutiny for overruling the system, or otherwise be incentivized to follow the recommendations of the system instead of conducting a fully independent review and decision-making process.

[54] Sec. 5.c.v.F., p. 20.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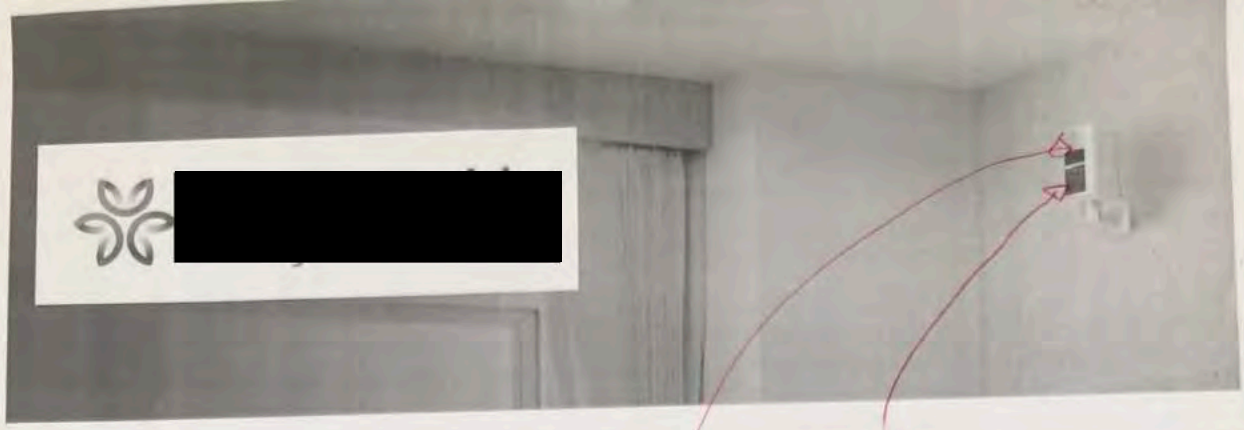


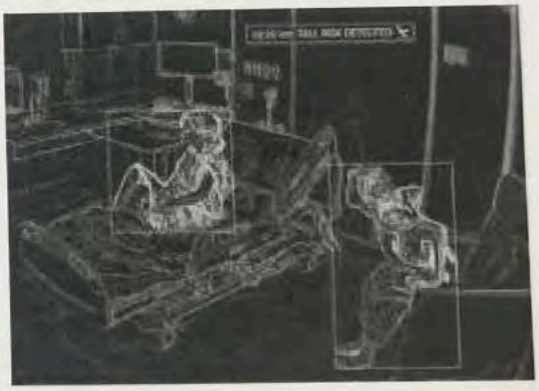
Ambient Monitoring

- Other industries have used Ambient Intelligence for years—self-driving cars, retail, logistics—to ambiently understand environments, and provide real-time insights to end users.

- The vast majority of data in healthcare has been manually entered into a system of record—built for generating a bill. Today, healthcare is *data-rich*, but *insights-poor*.

- Our goal at [redacted] is to begin to move to real-time intelligent environments, empowering clinicians with real-time, in-context insights; similar to the way cars now alert their driver when changing lanes or when an obstacle appears.

- We're starting with baseline use cases first, with a focus on:
  - **Fall Prevention** (identifying when a patient is out of bed, much more accurately and with much less alert fatigue compared to the bed alarm)
  - **Pressure Injury Avoidance** (monitoring for frequency of turning and repositioning and alerting care teams when not performed enough)
  - Potentially growing over time to include use cases like Hand Hygiene Auditing, Rounding Compliance, Incontinence Detection, Medication Disposal, Automated Documentation, etc.



- This all occurs in a secure, private (patient de-identified) manner, leveraging AI—no image data exists, nor is any data ever recorded or stored. Care teams have the power to turn the alerting on or off from a local command center as desired.

[redacted]

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National Nurses United 2021 Survey of Registered Nurses on Experiences with Clinical Algorithms

Overview

From April 21, 2021 to July 7, 2021, NNU surveyed registered nurses (RNs), advanced practice registered nurses, and other health care workers, both members and non-members, on their experiences with clinical algorithms in their workplaces, including the use of race and ethnicity as inputs, their awareness of possible bias, and their ability to override recommendations. This analysis covers the results from 1,042 RNs who responded to one or more of the questions discussed below. The results are based only on those RNs that responded to a particular question.

These results provide evidence of the negative impact these algorithms often have on quality of care generally and of one of the mechanisms by which the use of algorithms contributes to poor care for Black, Indigenous, and other people of color.

Lack of transparency in algorithms and lack of user education on bias impedes RNs use of professional judgment and makes it difficult for health care professionals to detect bias.

Registered nurses are often required to use clinical algorithms but receive minimal education about how algorithms are developed or how they may influence clinical decision-making. This impedes RN's ability to effectively assess the applicability of algorithmic recommendations in their clinical practice and impedes their ability to recognize where population-based and possibly biased data does not apply to an individual patient.

NNU's survey of RNs on clinical algorithms asked questions about the extent to which users and patients are aware of the inclusion of variables that can introduce bias into algorithms, and the education available on these algorithms. The results show that many registered nurses and patients do not know about the risk of bias in algorithms. Four hundred nineteen (40.7%) registered nurses responded that they were not aware that clinical algorithms may introduce bias into patient care. Three hundred ninety-one nurses (38.0%) responded that they were aware that clinical algorithms may introduce bias into patient care and 219 (21.3%) responded that they were somewhat aware.

Unfortunately, very few of the registered nurses who responded to the survey received any education and training from their employers. When asked "Has your workplace provided any education about how clinical algorithms could introduce bias into patient care?", an overwhelming majority registered nurses, 873 out of 1,023 (85.3%), responded: "No, I have not received any education about this." Only 16 (1.6%) of nurses responded: "Yes, I have received extensive education about this" and 65 (6.4%) responded: "Yes, I have received some education about this." Sixty-nine (6.7) responded that it was "not applicable."

Nurses are not the only ones who are not being informed about the risks of bias in algorithms. When asked if, in their experience, patients were "informed about the use of race, ethnicity, or other factors that could result in bias in algorithms that influence their care," the majority of registered nurses, 551

(54.0%) said “Never.” Forty-nine (4.8%) of RNs responded “Rarely,” 29 (2.8%) replied “Sometimes” and only 17 (1.7%) responded “Always.” Three hundred seventy-five (36.7%) did not know.

RNs are often prohibited from overriding algorithms, preventing them from correcting mistakes made by biased or inaccurate algorithms.

NNU’s members are bedside registered nurses who often face pressure from management and threats of discipline if they deviate from clinical algorithms. Clinical algorithms often are used to reduce the time RNs spend with patients and limit the amount of care they offer them.

Out of 795 RNs who responded to the question regarding overriding algorithms, 172 respondents (21.6%) said they were not allowed to “override clinical practice guidelines, clinical pathways, or electronic or computer-based tools that [they] believe are not in the best interest of the patient”, 200 respondents (25.2%) could only do so with the approval of a doctor or supervisor, and 204 respondents (25.7%) did not even know if they were allowed to override the recommendations. Only 117 respondents (14.7%) were allowed to override algorithms based on their own judgment. 102 respondents (12.8%) said the question was “not applicable”.

The fact that a majority of registered nurses who responded cannot override or do not know if they can override algorithms is concerning because 246 (31.0%) said they had been “been prompted by a clinical practice guideline, clinical pathway, or electronic or computer-based tool to make choices about patient care, patient care staffing, or other clinical issues that [they] believed were not in the best interest of the patient based on [their] clinical judgment and scope of practice” Out of these 246 nurses, 76 (30.9%) could not override the algorithms at all, while 41 (16.7%) said they did not know. Eighty-three (33.7%) said they needed approval from a doctor or supervisor to override. Only 42 (17.1%) of RN respondents could override based on their professional judgment without approval. Three responded “not applicable” and one did not respond to this question.

Below are some RN responses to the question: “Is there anything else you would like to tell us about the use of algorithms or about bias in your workplace or clinical practice?”

All care these days seem more "cookie cutter" rather than individualized. I was unaware how race influenced these algorithms.
Healthcare should not be one standard protocol for all but that is what it’s turned into. We are not being asked to use our skills, knowledge, or critical thinking abilities. We are now just asked to follow protocols, policies and procedures. It’s disheartening and disappointing because healthcare is becoming more about financial gains & not actual personalized health for each individual as a whole.
[My employer] calls them BPA's (best practice alerts) that pop up in the middle of your charting. Sometimes they are useful reminders, but often it leads to nurses following the BPAs instead of exercising their clinical judgment to individualize each patient's needs. I have been told by an educator " you are not supposed to think or question it. Just do what the computer tells you to."
Our Assisstant managers audit everything and come to talk to you to change your assessment to match employers criteria regardless of assessment.
The algorithm within [brand name] does not capture the true care of the patient. Which gives patients less care than they deserve.

Survey Data

Are you aware that clinical algorithms may introduce racial, ethnic, and other biases into patient care?	Yes	Somewhat	No	Total
Number of RNs	391	219	419	1029
Percentage of RNs	38.0%	21.3%	40.7%	100.0%

Has your workplace provided any education about how clinical algorithms could introduce bias into patient care?	Yes, I have received extensive education about this	Yes, I have received some education about this	No, I have not received any education about this	Not applicable	Total
Number of RNs	16	65	873	69	1023
Percentage of RNs	1.6%	6.4%	85.3%	6.7%	100.0%

In your experience, are patients informed about the use of race, ethnicity, or other factors that could result in bias in algorithms that influence their care?	Always	Sometimes	Rarely	Never	I don't know	Total
Number of RNs	17	29	49	551	375	1021
Percentage of RNs	1.7%	2.8%	4.8%	54.0%	36.7%	100.0%

Have you been prompted by a clinical practice guideline, clinical pathway, or electronic or computer-based tool to make choices about patient care, patient care staffing, or other clinical issues that you believed were not in the best interest of the patient based on your clinical judgment and scope of practice?	Yes	No	I don't know	Not applicable	Total
Number of RNs	246	416	86	46	794
Percentage of RNs	31.0%	52.4%	10.8%	5.8%	100.0%

Are you allowed to override clinical practice guidelines, clinical pathways, or electronic or computer-based tools that you believe are not in the best interest of the patient?	Yes, without approval from a supervisor or doctor	Yes, with approval from a supervisor or doctor	No	I don't know	Not applicable	Total
Number of RNs	117	200	172	204	102	795
Percentage of RNs	14.7%	25.2%	21.6%	25.7%	12.8%	100.0%

Are you allowed to override clinical practice guidelines, clinical pathways, or electronic or computer-based tools that you believe are not in the best interest of the patient?	Yes, without approval from a supervisor or doctor	Yes, with approval from a supervisor or doctor	No	I don't know	Not applicable	Did not respond to this question	Total
Number of RNs [answered Yes to "prompted" question]	42	83	76	41	3	1	246
Percentage of RNs [answered Yes to "prompted" question]	17.1%	33.7%	30.9 %	16.7%	1.2%	0.4%	100.0%

MEDICARE'S HOSPITAL AT HOME PROGRAM IS DANGEROUS FOR PATIENTS

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National Nurses United

INTRODUCTION

Nursing is a highly-skilled profession that is based on scientific knowledge and attention to detail. It demands an ability to address the physical, psychological, and emotional needs of a patient with compassion, empathy, and advocacy to honor the dignity in all people. Registered nurses are essential to providing acute, hospital-level inpatient treatment. Indeed, acute care hospitals that admit Medicare patients are required to provide nursing services at all times: 24-hours a day, seven days a week.

During the pandemic, the Centers for Medicare and Medicaid Services' (CMS) Acute Hospital Care at Home (AHCaH) program fulfilled a long-sought goal of the hospital industry: full reimbursement at inpatient rates for "treating" patients in their homes. Under the AHCaH program, CMS waives the 24-hour nursing requirement that defines acute inpatient treatment, meaning care is often provided by unpaid family members or left to the patient alone. Moreover, CMS requires only very limited reporting measures from AHCaH participants and has not made any of the data public.[1]

The hospital industry has been automating nursing and medical decision-making for years, reducing people to a list of symptoms which are then interpreted by technology that is racially and ethnically biased and often excludes relevant details about an individual patient.[2] The hospital industry uses this automated approach to justify reducing the number of licensed health care professionals providing patient care and then profits from the reduced labor costs. The hospital industry has used the Covid-19 public health emergency to further exploit the desire to normalize automated care and to shift care to the home.

Finally, the apparent corporate influence on the program is extremely troubling. In November 2020, the Trump administration launched the AHCaH program outside the normal rulemaking process and in record time: CMS senior leadership worked with industry insiders to take "the waiver from concept approval to publication in 8 days[.]"[3] CMS acted without a detailed public evaluation of any evidence justifying the program nor any opportunity for the public to review or comment on it, while hospital administrators who wanted the program were closely consulted.[4] Indeed, the American Hospital Association (AHA) took credit for CMS's expansion of the program, stating: "[As **urged** by the AHA, CMS expanded on its Hospitals Without Walls program by introducing the AHCaH program."[5] Despite the irregular implementation, the AHCaH program grew rapidly. As of July 27, 2022, CMS has approved AHCaH rollouts in 110 health systems, with 245 hospitals in 36 states.[6]

I. THE ACUTE HOSPITAL CARE AT HOME PROGRAM CANNOT PROVIDE ACUTE HOSPITAL-LEVEL CARE IN A PATIENT'S HOME

CMS's AHCaH program endangers patients requiring acute hospital-level care by allowing hospitals to treat them in their homes.[7] The AHCaH program builds on previous blanket Covid waivers for the hospital industry, including the Hospitals Without Walls program. Blanket waivers allow hospitals to bypass certain CMS requirements so they do not have to apply for an individual waiver, though the AHCaH program does require an individual waiver application. The AHCaH program waives numerous Medicare provider requirements and patient safety standards that apply to acute care hospitals, including nursing, medical, and emergency services requirements.

Specifically, the AHCaH program waives certain CMS Hospital Conditions of Participation, including a key provision which requires "nursing services to be provided on premises 24 hours a day, seven days a week and the immediate availability of a registered nurse for care of any patient."[8] In an emergency, patients in a fully operational hospital can be treated immediately under CMS's 24-hour nursing services requirement for acute care facilities. But for patients being treated at home, CMS only requires an emergency response to a patient's home within 30 minutes. From there, a patient may need to be transported to a hospital, a process that can further delay life-saving care. Moreover, after a doctor performs an initial medical history and physical exam for an AHCaH patient, CMS does not require any additional in-person registered nurse or doctor visits with the patient. Instead, the AHCaH program requires just two in-person patient visits a day by a community paramedic. These lower standards for nursing, medical, and emergency care under the AHCaH program put patients' lives at risk.

THE ACUTE HOSPITAL CARE AT HOME PROGRAM LACKS THE ONGOING, IN-PERSON ASSESSMENT AND TREATMENT BY HEALTH CARE PROFESSIONALS THAT DEFINES ACUTE-LEVEL CARE

First, the AHCaH program does not and cannot provide patients with the ongoing, in-person assessment and treatment by health care professionals that acute care requires. Although the bulk of patient care in hospitals is provided by registered nurses, hospitals employ a wide variety of health care professionals who are readily available 24 hours a day, including doctors, respiratory therapists, and pharmacists. Within the inpatient hospital setting, RNs and other health care professionals are able to draw on the collective experience of nursing, medical, pharmaceutical, and other staff.[9] This knowledge base is lost when a patient's care is shifted to the home and a patient's family must provide this care with limited outside support. Some hospitals currently participating in the AHCaH program do not require another person to be present in the home. Instead, they may leave the patient alone for long stretches of time or provide intermittent support from home health aides to supplement the twice daily visits from an RN or community paramedic.[10]

The AHCaH program is designed to eliminate the in-person, 24-hour observation and ongoing assessment by a registered nurse that is foundational to acute inpatient care. In contrast to inpatient facilities which provide ongoing, in-person assessment by RNs around the clock in a hospital where there is ready availability of other health care professionals, the AHCaH program requires only two in-person visits a day by paramedics or RNs and monitoring that may consist of just two sets of patient vital signs per day.[11] Hundreds of studies, spanning decades, have demonstrated the value of higher RN

staffing levels and reduced patient care loads in improving patient outcomes, including lowering mortality rates and reducing readmissions, infections, falls, and bedsores.[12] Additionally, studies on the skill mix of those providing patient care have demonstrated that substituting lesser-licensed and unlicensed personnel for registered nurses worsens patient outcomes and increases mortality rates, whereas increasing the percentage of personnel providing care who are RNs improves patient outcomes and lowers mortality rates.[13] Finally, intermittent patient visits do not foster the type of inherently holistic care afforded by round-the-clock inpatient acute nursing care.[14] The relational aspect of nursing, the connection between nurse and patient, is integral to patient health and wellbeing and relies on ongoing, in-person interactions.[15] Ongoing RN care ensures the regular assessment of patients' mental and physical health status. Based on these regular assessments, RNs are able to perform health care examinations and tests without delay.[16]

RNs are also the last line of defense in preventing medical errors. For example, prior to medication administration, nurses check to make sure that medication is administered with the right dose, right route, right drug, right time, and right patient.[17] Medication errors are more common in patients treated at home than in patients treated in a health care facility. Even when medications are administered correctly, life-threatening reactions can occur. For example, according to a large retrospective study, "[h]ome infusions were associated with 25% increased odds of [emergency department] or hospital admission on the same or next day after the infusion."[18] Moreover, the patients receiving home infusions were younger and had fewer comorbidities than those receiving infusions at a health care facility;[19] thus, the increase in emergency department visits and hospital admissions after home infusions may be higher than the study showed. Another recent study, which reviewed 50 patient charts in an AHCaH program, found 14 adverse drug events among 11 patients and 44 potential adverse drug events among 30 patients.[20] Among the 44 potential adverse drug events, the most common issue was patient or caregiver difficulty in administering medications (32%), followed by "unintentional nonadherence (20%), … potentially inappropriate prescriptions (18%), and lack of medication availability (16%)."[21] Immediate access to emergency care can be crucial to saving the life of a patient experiencing an adverse drug event.

Family members and home health aides are an inadequate and inappropriate substitute for the provision of acute care by skilled and licensed health care professionals. Worse yet, a patient may be at home all alone.[22] As noted above, studies demonstrate that, even in a hospital setting, substituting lesser-licensed personnel for registered nurses increases rates of patient complications, readmissions, and mortality.[23] Family members and home health aides do not have the education and clinical experience to provide acute, hospital-level patient care nor to perform the necessary ongoing assessment of patients. Even the simplest RN-patient interactions involve assessment and evaluation of the patient's overall condition. Subtle changes in a patient's skin tone, respiratory rate, demeanor, and affect provide critical information to patient health and wellbeing, which can be easily overlooked or misinterpreted by a family member or unlicensed support staff. Clearly, care in the home by a family member or home health aide plus two in-person visits by an RN or paramedic does not meet the same standards and level of care of acute inpatient care in a hospital. The lack of 24/7 RNs and other health care professionals is likely to lead to higher levels of missed care, medication errors, and miscommunication, leaving patients vulnerable to grave consequences. Burdening family members with care that should be provided by registered nurses and other health care professionals allows the hospital industry to increase its profits at the expense of patient safety.

THE ACUTE HOSPITAL CARE AT HOME PROGRAM ALLOWS A 30-MINUTE RESPONSE TIME TO EMERGENCIES, WHICH ENDANGERS PATIENTS' LIVES

Further placing patients at risk, the AHCaH program does not require the immediate availability of emergency response services by licensed health care professionals.

In the AHCaH program, CMS requires an emergency response within 30 minutes rather than requiring that an emergency response be available immediately.[24] Without immediate attention from health care professionals and access to necessary treatment resources, patient morbidity and mortality rates increase.[25] In contrast to the AHCaH program, most acute care hospitals have trained and certified staff readily available to respond to emergencies. These emergency response teams most often consist of an RN and a respiratory therapist, as well as either a physician, an advanced practice registered nurse, or a physician assistant.[26] It is the registered nurse, based on the regular monitoring and assessing of patient status, who most often initiates the rapid response emergency code. Unlike the AHCaH program, a hospital's rapid response team can respond within seconds of the emergency code being activated.

Delaying emergency response by 15 minutes or more is shown to increase the likelihood of intensive care unit admission or death in a variety of conditions.[27] For example, early recognition and treatment of patients with sepsis and septic shock reduce mortality rates and morbidity.[28] Severe cases of sepsis can lead to long-term cognitive impairment and physical disability.[29] A delayed response to adverse medication reactions may also have negative health consequences. In a study comparing adverse events among home- vs. facility-administered biologic infusions, discussed above, authors "hypothesize[d]" that "less intensive monitoring, less physician oversight, and lack of immediate access to urgent medical treatment in the event of an acute infusion reaction … can result in delayed care and a more frequent need for escalation of care."[30] Finally, studies demonstrate that delays by emergency response teams lead to increased mortality and morbidity rates in cardiac arrest events, while a rapid response from the team leads to improved patient outcomes.[31] Delaying cardiopulmonary resuscitation when a cardiac arrest occurs leads to higher mortality rates and a greater likelihood of brain damage and associated neurological deficits. For every minute without CPR, the likelihood of survival from cardiac arrest decreases by 7 to 10 percent.[32] Assuming that AHCaH programs are treating patients actually in need of acute hospital-level care, because the AHCaH program does not require the immediate availability of emergency response teams as is required in acute hospital settings, CMS should expect mortality and morbidity rates to rise among patients cared for under the AHCaH program.

THE ACUTE HOSPITAL CARE AT HOME PROGRAM FAILS TO PROVIDE THE APPROPRIATE LEVEL OF SERVICES, EQUIPMENT, AND INFRASTRUCTURE NECESSARY TO PROVIDE ACUTE HOSPITAL-LEVEL CARE

In addition to the unavailability of health care professionals, patients' homes lack the full complement of resources available in a hospital setting to respond to unexpected complications or deterioration of patients' health status. Although the AHCaH program requires participating organizations to provide laboratory, radiology, pharmacy, and respiratory services, these services are not immediately available in a patient's home, as they would be in a hospital. In many instances, these services and medical supplies are crucial. For example, diagnosing sepsis, discussed above, requires blood cultures and lactate measurement, followed by administration of broad-spectrum antibiotic agents if sepsis is confirmed. All of these processes are difficult to complete rapidly outside of an inpatient hospital setting.[33] Similarly, resources may be needed to evaluate patients' respiratory status by checking blood gas and electrolyte levels. Additionally, epinephrine may be needed for resuscitation and dopamine may be needed to stabilize blood pressure. Finally, if a patient needs to be intubated, necessary supplies and radiological services to confirm tube placement are crucial. Ready access to all of these resources is essential to saving patients' lives.

AHCaH patients are extremely vulnerable in the event of a power, telephone, or internet outage because internet and phone service are lifelines that connect AHCaH patients to nurses and doctors for ongoing care and to emergency services when needed. In contrast to most homes, hospitals caring for Medicare patients must have emergency power and lighting in many hospital areas and battery lamps and flashlights in all other areas.[34] Additionally, even though it is not a Medicare condition of participation, many hospitals maintain an emergency power supply for the entire facility. Finally, hospitals treating Medicare patients must have an emergency gas and water supply, which patients' homes typically lack.[35]

II. THE ACUTE HOSPITAL CARE AT HOME PROGRAM ALLOWS HOSPITALS TO SHIFT CARE TO INAPPROPRIATE SETTINGS RATHER THAN INCREASING ACUTE INPATIENT CAPACITY BY INVESTING IN STAFFING AND INFRASTRUCTURE

CMS's AHCaH temporary waiver program, if extended, would accelerate the troubling, long-term trend of hospitals and insurers pushing patients out of hospitals and into more profitable settings at the expense of patient care. Since CMS launched the AHCaH waiver program allowing hospitals to transfer or admit acute care patients to their homes, the hospital industry has been advocating to make the temporary waiver permanent. The AHCaH program is part of a decades-long industrial trend seeking to maximize industry profits, which has led to the steady reduction in acute inpatient services and hospital beds available across the country.

If the CMS waiver is extended or another change is approved allowing acute patients covered by Medicare to receive care at home, the health care industry would use the opportunity to push even more patients out of the hospital and further reduce acute care capacity in the United States. Indeed, in a recent webinar, Dr. Bruce Leff, a leading proponent of AHCaH programs, quipped that once the hospital at home program matures, many hospitals will be "turned into condos."[36]

Over the last two years, the Covid-19 pandemic has shown us that the acute care provided in hospitals is essential to the health of our communities and that we cannot afford to have it further whittled away by the profit-hungry hospital industry. Acute inpatient hospital capacity has declined dramatically over the last few decades, as the data below demonstrates:

» **Loss of acute beds:** Over the last 25 years, a period in which the U.S. population increased by 25 percent, the number of acute care beds available was reduced by about 70,000. The United States now has only 2.8 hospital beds per 1,000 people, far fewer than other developed countries.[37] In 1994, the United States had 4.3 hospital beds per 1,000 people.[38]

» **Hospital closures:** Since 1990, about 1,400 general acute care hospitals have closed nationwide, with a net loss of 890 when accounting for openings.[39] We have lost 181 rural hospitals since 2005.[40] According to the Kaiser Family Foundation, the United States has 19.1 hospitals per 1,000,000 people, while the "Comparable Country Average" is 32.7.[41]

» **Emergency department closures:** From 1990 to 2009, the number of hospital emergency departments in urban areas declined by 27 percent.[42]

During the Covid-19 pandemic, the loss of U.S. inpatient hospital capacity increased the overall death rate. The Covid-19 crisis laid bare the devastating impact of the reduction of our acute care capacity. A study published by the Centers for Disease Control and Prevention (CDC) found that, between July 2020 and July 2021, intensive care unit bed use at 75 percent capacity was associated with an additional 12,000 excess deaths two weeks later.[43] As hospitals exceeded 100 percent intensive care unit bed capacity, 80,000 excess deaths would be expected two weeks later.[44] Another study published by the CDC found significant associations between the availability of hospital-based resources, including beds and staff, and excess Covid-19 deaths.[45]

There have been numerous reports over the past two years of hospitals becoming overwhelmed with acute patients, Covid-19 and otherwise, with nowhere to send the patients they cannot treat.[46] Simply put, our national capacity for acute care, weakened by decades of industry profiteering, resulted in needless

deaths during the Covid-19 health crisis. For example, Tony Tsantinis died while waiting for treatment after finding that 17 hospitals had no room for him.[47] Another man, Ray DeMonia, died in September of 2021 after being turned away from 43 hospitals.[48] Sadly, these stories are not uncommon and are a direct result of the elimination of acute care capacity.

Further allowing hospitals to shift acute care to non-acute care settings, such as patient homes, will exacerbate declining acute care capacity. The AHCaH program allows hospitals to retain inpatient hospital reimbursement rates for inadequate and unsafe care in the home, rather than making desperately needed investment in hospital staffing and infrastructure. National Nurses United (NNU) has detailed several recommendations on how to increase hospital staffing capacity without resorting to crisis standards in our November 2021 report, ***Protecting Our Front Line: Ending the Shortage of Good Nursing Jobs and the Industry-Created Unsafe Staffing Crisis.***[49]

III. THE ACUTE HOSPITAL CARE AT HOME PROGRAM IS VULNERABLE TO FRAUDULENT BILLING PRACTICES

The AHCaH program is highly susceptible to fraud and abuse by hospitals through upcoding and other fraudulent billing practices. As discussed above, acute hospital-level care cannot be provided in patient homes because patient homes lack the defining elements of acute hospital-level care, including 24/7 registered nursing care; rapid response capability; and other necessary services, equipment, and infrastructure. Thus, the perfect patient for an AHCaH program is a patient who does not actually need acute hospital-level care. The AHCaH program provides an opportunity for hospitals to diagnose patients at an inappropriately high severity level, send them home, provide only the sub-acute care the patient actually needs, and then charge CMS for acute-level care. Providing care in patients' homes allows hospitals to expand care beyond the limits on the number of inpatient acute-care beds available, letting hospitals rapidly expand their existing fraudulent billing practices under the AHCaH program.

The Office of the Inspector General (OIG) at the Department of Health and Human Services found a widespread pattern of hospitals diagnosing patients with a higher severity level than is justified by their health condition to receive a greater reimbursement from Medicare.[50] From FY 2014 to FY 2019, the number of stays at the highest Medicare severity level—and highest reimbursement rate—increased by 20 percent while stays at other severity levels decreased. Meanwhile, the average length of stay for patients at the highest severity level decreased while other levels stayed the same. The OIG concluded that it is likely that hospitals systematically bill Medicare for inappropriately high severity levels. Another analysis ruled out demographic changes as the cause of increases in diagnosed severity and confirmed that upcoding was the likely culprit in spending increases.[51]

Fraudulent upcoding is common among hospitals serving Medicare patients. Indeed, many of the health systems and hospitals currently participating in the AHCaH program have been sued for submitting false claims to CMS as well as other irregularities.[52] Even supporters of providing acute hospital care at home caution that "vigilance against overuse and unnecessary care intensity must remain[.]"[53] Based on past behavior, it seems likely that hospitals participating in the AHCaH program will fraudulently bill CMS for treating patients who do not need acute hospital-level care.

CONCLUSION

NNU strongly urges CMS to withdraw the AHCaH waivers immediately and to discontinue the program. The AHCaH program cannot provide acute hospital-level care in a patient's home because it lacks the ongoing, in-person assessment and treatment by health care professionals that defines acute care in a hospital inpatient setting. It also fails to ensure the rapid response by health care professionals to deteriorating patient status that is necessary to reduce mortality and morbidity rates. Moreover, it allows the hospital industry to capture windfall profits by dramatically scaling back patient care rather than investing in the necessary hospital staffing and infrastructure that would actually increase acute inpatient capacity. The AHCaH program, established by the Trump administration outside the normal rulemaking process, affords the hospital industry a prime opportunity to expand its fraudulent billing practices. In all, it presents a grave threat to patient care and safety and to the future of U.S. national public health and safety.

ENDNOTES

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caregiver must be present in the home as specified in the trial at **clinicaltrials.gov**.

Presbyterian Health Services provides another example of an acute hospital care at home program that admits patients into without in-home support. See *Hospital at Home Admission Diagnoses and Criteria* available at **https://www.hahusersgroup.org/wp-content/uploads/2021/03/Sample-Criteria-Presbyterian-Healthcare-Services.doc**.

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47 Bebinger M. 2022, January 19. 17 Hospitals Had No Room for This COVID Patient. He Later Died Waiting for Dialysis. *NPR*. **https://www.npr.org/sections/health-shots/2022/01/18/1073881763/patients-are-dying-while-waiting-for-specialized-care-because-hospitals-are-full.**

48 Bella T. 2021, September 12. Alabama Man Dies after Being Turned Away from 43 Hospitals as Covid Packs ICUs, Family Says. *Washington Post*. **https://www.washingtonpost.com/health/2021/09/12/alabama-ray-demonia-hospitals-icu/.**

49 National Nurses United. 2021, November. Protecting Our Front Line: Ending the Shortage of Good Nursing Jobs and the Industry-Created Unsafe Staffing Crisis. **https://www.nationalnursesunited.org/sites/default/files/nnu/documents/1121_StaffingCrisis_ProtectingOurFrontLine_Report_FINAL.pdf**.

50 Office of Inspector General. 2021, February. Trend Toward More Expensive Inpatient Hospital Stays in Medicare Emerged Before COVID-19 and Warrants Further Scrutiny. U.S. Department of Health and Human Services. OEI-02-18-00380 **https://oig.hhs.gov/oei/reports/OEI-02-18-00380.pdf.**

51 Buntin M et al. 2021, April 28. Changing Diagnosis Patterns Are Increasing Medicare Spending for Inpatient Hospital Services. *Commonwealth Fund.* **https://doi.org/10.26099/b2jp-a941.**

52 Examples of health systems and hospitals who have allegedly submitted false claims to CMS include Kaiser Permanente (see U.S. Department of Justice. 2021, July 30. Government Intervenes in False Claims Act Lawsuits Against Kaiser Permanente Affiliates for Submitting Inaccurate Diagnosis Codes to the Medicare Advantage Program. **https://www.justice.gov/opa/pr/government-intervenes-false-claims-act-lawsuits-against-kaiser-permanente-affiliates**), Dignity Health (see U.S. Department of Justice. 2014, October 30. Dignity Health Agrees to Pay $37 Million to Settle False Claims Act

Allegations. https://www.justice.gov/opa/pr/dignity-health-agrees-pay-37-million-settle-false-claims-act-allegations), Adventist Health (see U.S. Department of Justice. 2013, May 3. Adventist Health Pays United States and State of California $14.1 Million to Resolve False Claims Act Allegations. https://www.justice.gov/opa/pr/adventist-health-pays-united-states-and-state-california-141-million-resolve-false-claims-act), and the Cleveland Clinic (see U.S. Department of Justice. 2015, December 18. 32 Hospitals to Pay U.S. More Than $28 Million to Resolve False Claims Act Allegations Related to Kyphoplasty Billing. https://www.justice.gov/opa/pr/32-hospitals-pay-us-more-28-million-resolve-false-claims-act-allegations-related-kyphoplasty).

53 Balatbat C et al. 2021. No Place Like Home: Hospital at Home as a Post-Pandemic Frontier for Care Delivery Innovation. *New England Journal Of Medicine Catalyst Innovations in Care Delivery*. 2(4).

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May 11, 2021

Xavier Becerra, Secretary
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RE: Use of Clinical Algorithms That Have the Potential To Introduce Racial/Ethnic Bias Into Healthcare Delivery, Request for Information (RFI), 86 Fed. Reg. 12,948 (Mar. 5, 2021), Document No. 2021-04509

Dear Secretary Becerra,

On behalf of more than 170,000 registered nurses (RNs) and as the largest union and professional association of registered nurses in the United States, National Nurses United (NNU) submits these comments and materials in response to the Request for Information (RFI) on "Use of Clinical Algorithms That Have the Potential To Introduce Racial/Ethnic Bias Into Healthcare Delivery," 86 Fed. Reg. 12,948 (Mar. 5, 2021), by the Agency for Healthcare Research and Quality (AHRQ).

NNU applauds AHRQ's decision to inquire into how clinical algorithms can introduce racial and ethnic bias into clinical practice and degrade the care Black, Indigenous, and other people of color receive. Equally important, is ensuring that the implementation of clinical algorithms does not interfere with clinicians' professional judgment. NNU supports policies that ensure registered nurses and other clinicians may exercise their professional judgment to determine the best course of action for their patients and override clinical algorithms when that is the best course of action for their patients. As registered nurses, NNU's members work as bedside health care professionals in nearly every state in the nation and our members have witnessed the ways in which clinical algorithms can harm patients.

Clinical algorithms are typically based on practice guidelines developed by a panel of experts or, through machine learning, based on data from a particular set of patients. Practice guideline development by experts requires significant exercise of judgment which can introduce error and bias. Clinical algorithms based on machine learning also face risks of error and bias as well as an unacceptable lack of transparency. Both approaches to creating clinical algorithms face problems with the evidence base available including racial discrimination in clinical trials and access to health care as well as other deficiencies.

NNU knows that clinical algorithms can interfere with safe, therapeutic health care that meets the needs of each individual patient. Even under optimal conditions, clinical algorithms are based on population-level data and are not appropriate for every patient. In addition, the way clinical algorithms are implemented, regardless of how they are created, often inappropriately constrains the use of health care professionals' judgment, which can worsen the impact of a biased algorithm.

Clinical algorithms should serve as guidelines, but employers often require rigid adherence with the goal of controlling costs and eliminating variation in treatment. First, a lower cost treatment may not be the best option.[1] Second, health care corporations' focus on eliminating variation aims to facilitate automation and the use of less costly labor, as individualized care requires professional judgment by skilled clinicians. Yet patients are diverse, with unique needs and values. Thus, NNU believes that decisions on patient care should be made by skilled clinicians using their professional judgment in a manner that is consistent with an individual patient's preferences and in the patient's best interests. Moreover, health care professionals must have the autonomy to override clinical algorithms, within their scope of practice, and not be constrained by mandates established in a corporate boardroom. Finally, NNU supports mandates for transparency as well as user and patient education on the risks associated with clinical algorithms.

NNU urges AHRQ to address several essential points that apply to all algorithms, not just those that have already been proven to be biased, as it conducts its inquiry into how clinical algorithms can introduce racial and ethnic bias into health care delivery. First, there are fundamental limits on the ability of algorithms to meet the needs of individual patients, especially when those patients are part of racial or ethnic groups that are less well represented in the data. Second, AHRQ must consider the importance of ensuring that health care professionals have full autonomy to override algorithmic recommendations, within their scope of practice and consistent with their patients' needs and preferences. Third, transparency and education about all aspects of the creation, use, and impact of these algorithms is necessary to detect and combat bias. Fourth, transparency must extend to clinicians, patients, and the public, including thresholds for recommendations to provide and deny preventive, diagnostic, or treatment measures by race, ethnicity, gender, and other relevant data. Finally, NNU urges AHRQ to support robust regulation of clinical algorithms as medical devices and to ensure that the supporting evidence and reasoning on which clinical recommendations are based are sufficient, sound, transparent, and intelligible and that recommendation thresholds for providing or denying preventive, diagnostic, or treatment measures are transparent to clinicians, patients, and the public.

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[1] For example, doctors at a California hospital contend that the system to which the hospital belongs has standardized clinical guidelines through a shared electronic health record system that are "often driven by cost considerations" and that the guidelines "often [conflict] with their own judgment of best medical practices." Wolfson, BJ. Orange County Hospital Seeks Divorce From Large Catholic Health System. *Kaiser Health News*. https://khn.org/news/article/orange-county-hospital-seeks-divorce-from-large-catholic-health-system/. Published April 13, 2012. Accessed May 1, 2021.

These comments have five main sections. Section I discusses problems related to algorithms based on clinical practice guidelines developed by experts. Section II discusses problems related to algorithms developed through machine learning. As part of the response to this RFI, NNU also has included preliminary results of our survey of RNs on their experiences with racial bias in clinical algorithms, which are detailed in Sections III and IV of these comments. Section V offers concluding recommendations.

I. Algorithms based on clinical practice guidelines developed by experts

Answering RFI question 1 on the estimated impact of these algorithms on quality of care, clinical outcomes, quality of life, and health disparities and RFI question 6 on the mechanisms by which use of algorithms contribute to poor care for Black, Indigenous, and other people of color.

A. Algorithms based on clinical practice guidelines rely on population level data that may be inappropriate for individual patients or subgroups, introducing opportunities for structural racial bias to influence health care delivery.

Clinical algorithms rely on population level data that does not reflect each individual patient's needs and can introduce bias into health care, if clinicians are pressured to apply clinical algorithm recommendations to all patients despite individual care needs. Practice guidelines are typically based on studies and data regarding a certain percentage of a patient population as a whole and, thus, may not be appropriate for a particular patient.[2] This is the nature of statistics: a treatment that works in a high percentage of a population is considered high-quality care. The trick, of course, is in determining where an individual patient falls relative to the population as a whole.

Patients have a range of individual factors that influence how well a particular treatment plan works for them, including their own preferences. Some proponents of using algorithms in health care delivery claim that more complex algorithms can successfully predict the best treatment plan for an individual based on a range of factors. However, the degree to which an algorithm works depends on how closely a patient matches the population reflected in the underlying data and on how well the algorithm accounts for all the relevant factors in their life, whether the factors are objective empirical issues or subjective values and preferences. Many algorithms do not even claim to account for patient preference, giving patients only the option to be considered compliant or not.[3] As discussed in the next section and in Section IIA, the data underpinning these algorithms is influenced by structural racism in health care research, access, and quality, so reliance on population-level data is less likely to lead to quality care for individuals who are racial and ethnic minorities.

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[2] Tritter, JQ, Lutfey K, McKinlay, J. What are tests for? The implications of stuttering steps along the US patient pathway. *Social Science & Medicine* 2014;107: 37–43.

[3] See Krumholz HM. The New Cholesterol and Blood Pressure Guidelines Perspective on the Path Forward. *Journal of the American Medical Association,* 2014;*311*(14):1403-1405. doi:10.1001/jama.2014.2634.

The problem of applying population-level data is exacerbated when a hospital or health system uses an average as a benchmark for clinical performance. Clinical algorithms provide recommendations for treatment decisions, such as how long a patient should stay in the intensive care unit (ICU).[4] When doctors know their performance is measured by the average number of hours their patients stay in the ICU, they may feel pressured to send on any patient who stays longer than that average. That pressure is the point of instituting clinical algorithm benchmarks, which are sold promising increased efficiency and reduced costs.[5] However, that pressure will disadvantage the patients who need the longer stay. Moreover, if a doctor's patient load skews less healthy than the data mix underlying the algorithm, the doctor will have to choose between risking their patients' lives by moving them out of the ICU early or damaging their career by missing the benchmark. Forcing doctors to make that choice may lead to racial bias because disparities in health care access mean Black, Indigenous, and other people of color are more likely to have underlying conditions that complicate treatment. In addition, residential segregation means that racial groups are likely to be concentrated in certain health care facilities.[6] Therefore, unless explicitly analyzed and validated, Black, Indigenous, and other people of color are more likely to be treated by a doctor whose patient load skews less healthy than the benchmark population. Moreover, even if explicitly analyzed and validated, an algorithm's recommendation may be inappropriate for a particular patient regardless of their race or ethnicity.

The mismatch between population-level data embodied in clinical algorithms and individual patients has an impact on quality of care, RFI question 1, and is one mechanism by which use of algorithms contribute to poor care for Black, Indigenous, and other people of color, RFI question 6. NNU urges AHRQ to investigate the inherent limitations of algorithms to determine appropriate individual patient care and the disparate impact on racial and ethnic lines of those limitations.

B. The medical evidence base underlying clinical algorithms reflect racial bias in health care research, access, and quality.

Clinical algorithms based on available medical research are often designed without regard to relevant differences among patients. Thus, they often perform poorly for particular subgroups of patients. The influence of structural racism on access to health care, quality of health care, and inclusion in clinical studies means that Black, Indigenous, and other people of color are often

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[4] See, e.g., How Allina Saved $13 Million By Optimizing LOS. *HealthCatalyst.* February 10, 2016. https://www.healthcatalyst.com/success_stories/allina-saved-13-million-optimizing-length-of-stay/. Accessed April 26, 2021.

[5] Navathe AS, Emanuel EJ. Physician Peer Comparisons as a Nonfinancial Strategy to Improve the Value of Care. *JAMA.* 2016;316(17):1759–1760. doi:10.1001/jama.2016.13739; Cosgrove T, Lee TH. Engaging Doctors in the Health Care Revolution. *Harvard Business Review* 2014; Also see, e.g., *Ibid*.; Clairvia Announces Breakthrough Care Value Analytics Service, *businesswire* April 12, 2011. https://www.businesswire.com/news/home/20110412005618/en/Clairvia-Announces-Breakthrough-Care-Value-Analytics-Service. Accessed May 10, 2021.

[6] Gaskin DJ, Dinwiddie GY, Chan KS, McCleary RR. Residential segregation and the availability of primary care physicians. *Health Serv Res.* 2012;47(6):2353-2376.

poorly represented in the medical evidence base. Therefore, recommendations made by clinical algorithms are less likely to be the best choices for their care—whether or not the algorithms explicitly incorporate race or ethnicity as input factors.

Race and ethnicity influence how closely a patient resembles the population underlying algorithmic decisions. They are also correlated with conditions that make some treatment more or less effective, particularly those related to poverty. As Robert Hamm and Zsolt Nagykaldi summarize in the *Journal of Cognitive Engineering and Decision Making*:

> A larger issue is that there are specific patients who are not well served by guidelines. As Klein, Woods, Klein, and Perry (2016) and Falzer (2018) argue, although an [evidence-based clinical practice guideline (EB-CPG)] will, by design, produce better results for typical patients, those commonly included in the supporting studies, a guideline's recommendation may be inappropriate, infeasible, or harmful for other patients. Exceptions may be needed based on patient medical situation (comorbidities, age), patient preferences and goals (Mold, 2017; Mold, Hamm, & Scheid, 2003), patient competence (inability to adhere to, or understand and stick to, a treatment plan), patient social situation (addiction, homelessness, unreliability about clinic appointments), or patient economic situation (inability to pay for visits, prescriptions, or a healthy diet). With EB-CPG regimens, situations can arise where physicians are penalized for doing what they know will be best for a patient. Unless there is allowance for exceptions, a reward regimen can punish those physicians who use more effort and judgment to make better choices for their patients. This can exacerbate physician income differences contingent on the wealth of the patients served: When the measured conformance to a guideline depends partly on patient behavior, the regimen rewards those physicians who are already better rewarded because they serve patients with orderly middle or upper-class lives and a higher capacity to become or stay healthy.[7]

The Institute of Medicine (IOM) made a similar observation—that clinical practice guidelines are often inappropriate for certain populations—when it issued best practices for guideline development in 2011. After a thorough review of the processes used to develop clinical practice guidelines, IOM concluded that "evidence supporting clinical decision making and [clinical practice guideline] development relevant to subpopulations, such as patients with comorbidities, the socially and economically disadvantaged, and those with rare conditions, is usually absent."[8] Structural racism in the U.S. means that Black, Indigenous, and other people of color are more likely to be poor and have less access to health care throughout their lives than

[7] Hamm RM., Nagykaldi ZJ., Physician Judgment and Clinical Practice Guidelines, *Journal of Cognitive Engineering and Decision Making*, 2018;12(3): 209-214 doi: 10.1177/1555343418782850.

[8] Committee on Standards for Developing Trustworthy Clinical Practice Guidelines, Institute of Medicine. Clinical Practice Guidelines We Can Trust. Eds. Graham, Robin et al. 2011. p.2.

white people.[9] As we are seeing in the COVID-19 pandemic, this means these groups are more likely to have comorbidities that limit their participation in clinical trials[10] or an economic situation that can affect their ability to maintain the kind of consistent treatment plan assessed in clinical trials. Research into clinical trial diversity bears this out.

Clinical trials often fail to include enough people of color to ensure that their results reflect patient diversity. In the Food and Drug Administration (FDA) snapshot of participants in global drug trials between 2015 and 2019, 76% of participants were white, 11% were Asian, 7% were Black/African American, 5% were marked as "other", and 1% were American Indian or Alaskan Native.[11] The percentage of white people in the U.S. population is similar, 76.3%.[12] However, the percentage of Black people in the U.S. population, 13.4%, is substantially higher than the 7% in trials. Only 13% of global clinical drug trial participants were Hispanic or Latino, compared with 18.5% of the U.S. population. Thus, algorithmic recommendations based on evidence from these trials will represent white patients better than Black patients and non-Hispanic or -Latino patients better than Hispanic or Latino patients, both in absolute terms and relative to their representation in the U.S. population.

Algorithm developers sometimes attempt to account for these disparities by encoding race or ethnicity into their algorithms. However, including race and ethnicity explicitly in a clinical algorithm can also end up perpetuating disparate health care access. Health outcome differences that appear to be attributed to race, which is a social construct and not a biological reality, may be more correctly tied to correlated factors that the algorithm does not measure, such as socioeconomic status or muscle mass.[13] In these cases, the use of race as a proxy for these factors will make the algorithm a poor fit for individuals of the targeted race who do not share the same correlated factor as the original data set. Racism's effects are pervasive but vary by context. Correlations with race and other factors may be very different between a study population and the ultimate patient population and will certainly not apply to every individual. The broad application

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[9] See, e.g., Serchen, J, et al. Understanding and Addressing Disparities and Discrimination Affecting the Health and Health Care of Persons and Populations at Highest Risk, Position Paper, American College of Physicians; 2021. https://www.acponline.org/acp_policy/policies/understanding_discrimination_affecting_health_and_health_care_persons_populations_highest_risk_2021.pdf. See, generally, Pallok, K, De Maio, F & Ansell, DA. Structural Racism — A 60-Year-Old Black Woman with Breast Cancer. *N Engl J Med* 2019; 380:1489-1493 DOI: 10.1056/NEJMp1811499; Ray, Kristen N. Disparities in Time Spent Seeking Medical Care in the United States. *JAMA Intern Med*. 2015;175(12):1983-1986. doi:10.1001/jamainternmed.2015.4468.

[10] Duma N, Kothadia SM, Azam TU, et al. Characterization of Comorbidities Limiting the Recruitment of Patients in Early Phase Clinical Trials. *Oncologist*. 2019;24(1):96-102. doi:10.1634/theoncologist.2017-0687. Accessed May 10, 2021.

[11] U.S. Food and Drug Administration, 2015-2019 Drug Trials Snapshots Summary Report. https://www.fda.gov/media/143592/download. Published November 2020. Accessed May 3, 2021. p.9.

[12] United States Census, Quick Facts, Population estimates. https://www.census.gov/quickfacts/fact/table/US#. Published July 1, 2019. Accessed May 3, 2021.

[13] See Letter from U.S. Senators Elizabeth Warren, Ron Wyden, and Cory A. Booker and Rep. Barbara Lee to AHRQ Director Gopal Khanna. Sept. 22, 2020. https://www.warren.senate.gov/imo/media/doc/9.22.2020%20Letter%20to%20AHRQ%20re%20Use%20of%20Race%20in%20Clinical%20Algorithms.pdf. Accessed May 10, 2021.

of a clinical algorithm without the treating health care provider's ability to deviate based on their professional judgment and on the needs and preferences of individual patients can introduce errors into the care of these patients.

The racial bias in the data underlying clinical algorithms has an impact on quality of care, clinical outcomes, quality of life, and health disparities, RFI question 1, and is one mechanism by which use of algorithms contribute to poor care for Black, Indigenous, and other people of color, RFI question 6. NNU urges AHRQ to investigate the ways that Black, Indigenous, and other people of color are systemically excluded or underrepresented in the medical evidence base that underlies clinical algorithms and how this underrepresentation leads to less accurate recommendations for these patients.

C. Clinical algorithms reflect the judgment and biases of their creators.

While clinical algorithms may purport to be an objective analysis of the scientific evidence, in fact their development involves significant use of judgment by their creators and creates the opportunity for creator bias—from conflicts of interest, limited perspective on the lives of racial minorities, or implicit racial bias—to be introduced into the algorithm. To create clinical practice guidelines, panels of experts convene to develop guidelines for a particular medical condition or care situation.[14] Panels go through a process, which varies from institution to institution, designed, in theory, to determine the best care practices based on the best available evidence. The panel must perform a meta-analysis of a body of evidence that entails establishing the criteria for including a research study followed by synthesizing studies that may be based on conflicting assumptions, disparate patient populations, and heterogenous results.

IOM's best practices for guideline development called out a lack of "sufficient attention" to "the role of judgment in the derivation of recommendations," among other issues.[15] It also listed factors that "commonly undermine the quality and trustworthiness of [clinical practice guidelines]" including:

> variable quality of individual scientific studies; limitations in systematic reviews (SRs) upon which [clinical practice guidelines] are based; lack of transparency of development groups' methodologies (particularly with respect to evidence quality and strength of recommendation appraisals); failure to convene multi-stakeholder, multi-disciplinary guideline development groups, and corresponding non-reconciliation of conflicting guidelines; unmanaged conflicts of interest (COI); and overall failure to use rigorous methodologies in [clinical practice guidelines] development.[16]

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[14] Davino-Ramaya C et al., Transparency Matters: Kaiser Permanente's National Guideline Program Methodological Processes. *The Permanente Journal.* 2012;16(1): 55-62.

[15] Committee on Standards for Developing Trustworthy Clinical Practice Guidelines, Institute of Medicine. 2011, fn 8, at p. 3.

[16] *Ibid.*

Organizations who develop these guidelines ask their developers to use their judgment to balance different factors, including some that do not directly relate to ensuring the best patient care. For example, Kaiser Permanente uses a guidelines-development approach that includes "formulating recommendations based on quality of evidence, balance of benefits and harms, patient values and preferences, and resource and cost implications."[17] Thus, costs are considered alongside patient outcomes, and "patient values and preferences" are incorporated on a population, rather than an individual, level. The American College of Physicians uses a similar methodology.[18]

Another crucial issue is that there is not always a clear best choice in prevention, diagnostic, and treatment measures. The "scientific evidence about what to recommend is often lacking, misleading, or misinterpreted."[19] Experts may disagree about whether a particular practice guideline is the best approach to a health issue. For example, doctors have voiced concerns about a sepsis protocol mandated by the state of New York because it included a step that "may not be beneficial."[20] In another example from 2014, clinical experts disagreed about whether major new cholesterol and blood pressure practice guidelines were appropriate. A group of 5 dissenters out of the 17 authors of the high blood pressure guidelines published an article against the new guidelines.[21] In discussing these disagreements on high blood pressure guidelines, a *Journal of the American Medical Association* (*JAMA*) editorial stated that "guidelines should inform but not dictate, guide but not enforce, and support but not restrict."[22] Practice guidelines often must "harmonize" across differences in research studies. These judgment calls should be made at the bedside not in a corporate board room.

Finally, practice guidelines may not be trustworthy. The *JAMA* editorial cited above also stated:

> Another risk is that the regulatory process may be used to advance commercial interests that may not be in the public interest. Clinical practice guidelines often make recommendations involving proprietary medical devices and pharmaceuticals. Device and pharmaceutical companies could lobby state governments to include these products in future regulations.[23]

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[17] Davino-Ramaya 2012, fn 14, p. 60.

[18] Qaseem A et al., The Development of Clinical Guidelines and Guidance Statements by the Clinical Guidelines Committee of the American College of Physicians: Update of Methods. *Ann Intern Med* 2019. doi:10.7326/M18-3290.

[19] Woolf SH et al. Potential benefits, limitations, and harms of clinical guidelines. *BMJ* 1999;318:527–30.

[20] Harris R. Are State Rules for Treating Sepsis Really Saving Lives? *National Public Radio*. May 30, 2017. http://www.npr.org/sections/health-shots/2017/05/30/530224517/are-state-rules-for-treating-sepsis-really-saving-lives. Accessed May 3, 2021.

[21] Wright JT Jr, Fine LJ, Lackland DT, Ogedegbe G, Dennison Himmelfarb CR. Evidence supporting a systolic blood pressure goal of less than 150 mm Hg in patients aged 60 years or older: the minority view. *Annals of Internal Medicine.* doi:10.7326/M13-2981. Published online January 14, 2014. Cited in Krumholz 2014, fn 3.

[22] Krumholz 2014, fn 3.

[23] Hershey TB, Kahn, JM. State Sepsis Mandates — A New Era for Regulation of Hospital Quality. *New England Journal of Medicine*. May 21, 2017. doi: 10.1056/NEJMp1611928. http://www.nejm.org/doi/pdf/10.1056/NEJMp1611928. See also: Lenzer, J. Why We Can't Trust Clinical Guidelines. *BMJ* 2013;346:f3830 doi: https://doi.org/10.1136/bmj.f3830.

This risk has been born out in practice. In the early 1990s, the Cochrane Collaboration put out guidelines making high-dose steroids the standard of care for acute spinal cord injury. The sole reviewer of the guidelines was a consultant to steroid manufacturers. Despite skepticism from neurosurgeons in polls, the guidance was widely followed until it was reversed in March 2013 by new Congress of Neurological Surgeons guidelines that found no good evidence for use of the steroids and substantial evidence of harmful side effects including death.[24] This is not an exceptional case. One survey found 71% of clinical policy committee chairs and 90.5% of co-chairs had financial conflicts.[25] While financial conflicts create a different kind of bias than racial or ethnic discrimination, these examples show that judgment calls made by authors of guidelines can twist patient outcomes in serious ways.

The problem of unreliable guidelines is magnified when treatment and diagnosis guidelines make different recommendations based on race and ethnicity. Claims about racial and ethnic differences in medical needs are often based on poor quality evidence. Evidence shows that developers of clinical practice guidelines do not give racial differences the necessary level of scrutiny. One review of the use of race correction in clinical algorithms found that when algorithm developers offer rationales for why race correction is included, their origins can be traced "to outdated, suspect racial science or to biased data."[26] Other developers offer no explanation for why racial or ethnic differences may exist. When designing the algorithm, they choose to translate correlations between race and outcome into different clinical treatment without understanding why those correlations exist or what they really represent.[27] As shown above, both available data and expert judgment can be affected by the structural racism in society and the health care system.

It is essential that the use of race or ethnicity in clinical algorithms is scrutinized, including whether race or ethnicity are serving as proxies for other factors that should be identified explicitly. Studies must also look at racial differences in recommendations made by algorithms that do not explicitly incorporate race, and in their ultimate patient outcomes. However, it will not be possible to eliminate the use of judgment or the need for individual assessment in care decisions. These judgments should be made at the bedside between the patient and their health care provider, not by a committee based on population-level data. Moreover, the underlying research and the process for developing an algorithm must be available to the health care professionals providing patient care.

Encoding biases into algorithms and taking health care decisions away from patients and providers has an impact on quality of care, clinical outcomes, quality of life, and health disparities, RFI question 1, and is one mechanism by which use of algorithms contribute to poor care for Black, Indigenous, and other people of color, RFI question 6. NNU urges AHRQ to investigate

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[24] See Lenzer 2013, fn 23.

[25] *Ibid.*

[26] Vyas DA, Eisenstein LG, Jones DS. Hidden in plain Sight—reconsidering the use of race correction in clinical algorithms. *N Engl J Med.* 2020 Aug 27;383(9):874-82. doi: 10.1056/NEJMms2004740. PMID: 32853499. https://www.nejm.org/doi/full/10.1056/NEJMms2004740.

[27] *Ibid.*

the role judgment and bias plays in the development of these algorithms, how to minimize the effects of that bias, and how to ensure that final judgment calls are made at the bedside by fully informed clinicians and patients.

II. Algorithms developed through machine learning

Answering RFI question 1 on the estimated impact of these algorithms on quality of care, RFI question 6 on the mechanisms by which use of algorithms contribute to poor care for Black, Indigenous, and other people of color, and RFI question 7 on clinician and patient awareness of bias.

While many clinical algorithms reflect decisions made by human experts, such as clinical practice guidelines, an increasing number of clinical algorithms are driven by machine learning. These algorithms pose several risks. Clinical algorithms developed through machine learning can make serious errors, amplify patterns of bias in the underlying data, and endanger population subgroups. They are also often opaque to users. This can be because they are "black boxes," where even their creators do not know how they work, because of protections for proprietary trade secrets, or because they require high level technical knowledge to understand. This opacity undermines patient and professional trust and magnifies the risk to patients from errors. Thus, it is essential that these algorithms are made transparent and intelligible to their users and to ensure that health care professionals can override them as needed to provide their patients therapeutic and effective care that is consistent with their needs and preferences.

A. <u>Machine learning algorithms may be trained on datasets that do not apply to racial and ethnic subpopulations, leading to bias.</u>

Machine learning algorithms, often referred to as artificial intelligence (AI), are programmed to find patterns in large quantities of data. They are trained on one set of data and then used to classify new information based on patterns they detected in the training data. They are frequently used to make diagnoses or to make predictions based on information in electronic health records and assign risk levels. Problematically, data from electronic health records often reflect differential access to health care, quality of care, and other forms of structural racism and biases. Similarly, Black, Indigenous, and other people of color face discriminatory assessment and treatment by health care providers because of implicit bias or false beliefs about race which are entered into their electronic health record and used to train clinical algorithms.

For example, in one recent study, researchers found that models trained on electronic health record data to predict suicide attempts among patients who had outpatient mental health visits performed substantially worse for Black patients, American Indian/Alaskan Native patients, and patients without ethnicity recorded than it did for white, Asian, or Hispanic patients.[28] There were

[28] Coley RY, Johnson E, Simon GE, Cruz M, Shortreed SM. Racial/Ethnic Disparities in the Performance of Prediction Models for Death by Suicide After Mental Health Visits. *JAMA Psychiatry.* Published online April 28, 2021. doi:10.1001/jamapsychiatry.2021.0493.

several reasons for this failure. One was a more limited pool of data on Black and American Indian/Alaskan Native patients and patients without ethnicity recorded. The authors speculated that systemic barriers to affordable, culturally competent mental health care led to lower utilization and therefore sparser records on racial or ethnic minority populations.[29] Practitioner bias and institutionalized discrimination throughout the treatment process means that Black, Indigenous, and other people of color are less likely to be screened or receive high-quality treatment for depression and more likely to experience discrimination in health care settings.[30] The researchers also pointed to evidence that discrimination and low quality care deters health care use: studies showing Black and Asian people were less likely than whites to initiate and continue mental health treatment,[31] and that non-Hispanic Black respondents who had experienced discrimination in health care settings were less likely to opt for talk therapy over medication.[32] The authors also suggested that suicide deaths may be misclassified more often among some groups than others. Setting specific thresholds for intervention for each measured race and ethnic group improved performance somewhat for some groups poorly served by the global thresholds but not for others. In any case, setting race and ethnicity-based thresholds to account for poor predictivity meant that Black and American Indian/Alaskan Native patients would be subject to "unnecessary and possibly intrusive interventions" at a higher rate for the same number of interventions in eventual suicides compared to white patients.[33]

Numerous studies have documented implicit bias in health care providers which may then be recorded in electronic health records used to train algorithms. For example, clinicians are less likely to prescribe pain medications to Black patients than white patients. In one study, fewer opioids were prescribed for Black patients with migraines and back pain, which rely on self-reported pain, than similar white patients, but there was no difference for patients with long bone fractures, which are visible on an X-ray.[34] In another study, Black children with appendicitis in emergency departments were less likely than white children to receive any pain medication for moderate pain and less likely to receive opioids for severe pain.[35] These studies demonstrate that Black patients suffer because their doctors do not trust them with opioid prescriptions or believe them when they say they are in pain. This may be due, in part, to the fact that substantial numbers of white medical students and residents falsely believe that Black people feel less pain than white

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[29] *Ibid.* at p. E6.

[30] *Ibid.*

[31] Hines AL, Cooper LA, Shi L. Racial and ethnic differences in mental healthcare utilization consistent with potentially effective care: the role of patient preferences. *Gen Hosp Psychiatry*. 2017; 46:14-19. doi:10.1016/j.genhosppsych.2017.02.002.

[32] Sonik RA, Creedon TB, Progovac AM, et al; Health Equity Consortium. Depression treatment preferences by race/ethnicity and gender and associations between past healthcare discrimination experiences and present preferences in a nationally representative sample. *Soc Sci Med.* 2020;253:112939. doi:10.1016/j.socscimed.2020.112939.

[33] *Ibid.* at p. E5.

[34] Tamayo-Sarver JH, Hinze SW, Cydulka RK, Baker DW. Racial and ethnic disparities in emergency department analgesic prescription. *Am J Public Health*. 2003 Dec;93(12):2067-73. doi: 10.2105/ajph.93.12.2067.

[35] Goyal MK, Kuppermann N, Cleary SD, Teach SJ, Chamberlain JM. Racial disparities in pain management of children with appendicitis in emergency departments. *JAMA Pediatr.* 2015;169(11):996–1002. doi:10.1001/jamapediatrics.2015.1915.

people.[36] That belief carried over to rating Black patients' pain as lower and making less accurate treatment recommendations. Similarly, another study found that physicians showed implicit bias favoring white patients over Black patients that could contribute to racial and ethnic disparities in use of thrombolysis for myocardial infarction.[37]

These examples, and there are many others, demonstrate that racially biased behavior by clinicians is a serious problem that should be addressed through changes in training and education as well as through increased staff diversity. It is also a problem in the so-called evidence base of medical data. If an algorithm were to be created to regulate opioid prescriptions and based on health records data, it could easily end up encoding anti-Black bias and hiding it behind a veneer of objective technology.[38]

Finally, algorithms may exhibit racial and ethnic bias whether or not race and ethnicity have been explicitly factored in as inputs. For example, in 2019, researchers Obermeyer et al. found that an algorithm that did not use race as an input still ended up disadvantaging Black patients in its recommendations because it assumed that patients who use less health care are less sick, thereby making health inequities self-reinforcing.[39] Obermeyer et al. analyzed the recommendations made by an algorithm used by large health systems and payers to target patients for "high-risk care management" programs and found that it assigned sicker Black patients the same level of risk as less-sick white patients.[40] This bias reduced the number of Black patients identified for extra care by more than half. This occurred because the algorithm was using health costs as a proxy for health needs. Structural racism has ensured that Black people in the U.S. have lower access to health care, which means they have both higher health needs and lower health costs.[41]

Discrimination at many different stages of the patient experience introduces bias into health records data and therefore into any clinical algorithm that depends on it. Reduced access to health treatment is pervasive among Black, Indigenous, and other people of color. These groups face higher rates of many diseases and premature death, including infant mortality, than white people.[42]

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[36] Hoffman, Kelly M. et al. Racial bias in pain assessment. *Proceedings of the National Academy of Sciences* Apr 2016, 113 (16) 4296-4301; DOI: 10.1073/pnas.1516047113.

[37] Green AR, Carney DR, Pallin DJ, et al. Implicit bias among physicians and its prediction of thrombolysis decisions for black and white patients. *J Gen Intern Med*. 2007;22(9):1231-1238. doi:10.1007/s11606-007-0258-5.

[38] NNU recognizes that analysis of electronic health records, whether by human beings or artificial intelligence programs, could expose implicit biases. However, this does not invalidate the need for clinical algorithms to be transparent and intelligible to their users nor the need to ensure that health care professionals have the autonomy to override them if it is in their patients' interest.

[39] See Obermeyer Z, Powers B, Vogeli C, et al. Dissecting racial bias in an algorithm used to manage the health of populations. *Science.* 2019 Oct 25;366(6464):447-53. doi: 10.1126/science.aax2342. PMID: 31649194. https://science.sciencemag.org/content/366/6464/447.

[40] *Ibid.*

[41] See citations in footnote 9, above.

[42] National Academies of Sciences, Engineering, and Medicine; Health and Medicine Division; Board on Population Health and Public Health Practice; Committee on Community-Based Solutions to Promote Health Equity in the United States; Baciu A, Negussie Y, Geller A, et al., editors. Communities in Action: Pathways to Health

This is due to social, not biological, differences. People of color are more likely to lack health insurance than white people, usually due to affordability.[43] Locations with majority Black and Hispanic populations are more likely to face primary care physician shortages.[44] Additionally, underserved areas Hospitals in Black neighborhoods may have fewer specialists than those in white neighborhoods.[45] These and many other disparities add up to less and lower-quality care, which means less representation in health data. When embedded in electronic health records used to train clinical algorithms, these algorithms reinforce and reproduce both structural racism and implicit clinician bias.

B. Machine learning algorithms may draw inferences from data that are not relevant to health care, potentially introducing racial bias.

One of the most disturbing problems with machine learning is that it may draw spurious inferences based on data that is not relevant to patient care.[46] Moreover, because many algorithms are opaque, as discussed in the next section, it is not always clear what information an algorithm is using to make its categorizations.

For example. a group of Stanford computer science students, in consultation with radiologists, used a set of over 100,000 chest X-rays tagged with diagnoses to teach a program to read similar X-rays for signs of tuberculosis.[47] The algorithm appeared to reach the correct diagnosis 75%of the time. Tuberculosis can be a challenging diagnosis for doctors in South Africa, where it is prevalent, so the project hoped to combine machine and human expertise for a better combined success rate.[48] To make sure it was working correctly, the team designed the program to highlight the parts of the image it was using to make the diagnosis and shared it with others in the field to critique. Fortunately, a medical resident discovered that the X-ray analysis program was basing its diagnosis in part on the information on the edge of the scan image that showed the type of machine used to take the scan. If the machine was of the portable type used in hospitals, instead of the type used in doctors' offices, the diagnosis was more likely to be tuberculosis. The machine had found a pattern on the images, but it was not in the medically relevant data that it was intended to analyze. In a system where both certain diseases and the ability to access care in certain

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Equity. Washington (DC): National Academies Press (US); 2017 Jan 11. 2, The State of Health Disparities in the United States. Available from: https://www.ncbi.nlm.nih.gov/books/NBK425844/.

[43] Artiga S, Orgera K, Damico A. Changes in Health Coverage by Race and Ethnicity since the ACA, 2010-2018. *KFF*. March 5, 2020. https://www.kff.org/racial-equity-and-health-policy/issue-brief/changes-in-health-coverage-by-race-and-ethnicity-since-the-aca-2010-2018/. Accessed May 3, 2021.

[44] Gaskin DJ, Dinwiddie GY, Chan KS, McCleary RR. Residential segregation and the availability of primary care physicians. *Health Serv Res.* 2012;47(6):2353-2376.

[45] Pallok 2019, fn 9.

[46] Paullada A, et al. 2020. Data and its (dis) contents: A survey of dataset development and use in machine learning research. *arXiv preprint arXiv:2012.05345*. Accessed May 10, 2021.

[47] See Harris, R. How can doctors be sure a self-taught computer is making the right diagnosis? *NPR.* April 1, 2019. https://www.npr.org/sections/health-shots/2019/04/01/708085617/how-can-doctors-be-sure-a-self-taught-computer-is-making-the-right-diagnosis. Accessed April 29, 2021.

[48] *Ibid.*

venues is highly correlated with poverty and race, this type of unexpected behavior has the potential to introduce bias.

Machine learning algorithms consistently make more obvious errors, leading experts in the field to insist on the importance of a human override option. If an algorithm continues learning from new data while operating, its results can become truly strange. Machine learning algorithms can be easily fooled—Google image software identified a picture of a cat as guacamole after MIT students changed a few pixels.[49] To explain the necessity of a human override, one public health expert compared black box algorithms to a plane where autopilot said the plane was going up and pilots saw it was going down but had no override option.[50]

Inappropriate inferences from data have a negative impact on quality of care, clinical outcomes, quality of life, and health disparities, RFI question 1, and are one mechanism by which use of algorithms contribute to poor care for Black, Indigenous, and other people of color, RFI question 6.

C. Machine learning algorithms can be dangerously opaque making it difficult to identify racial bias in their development or underlying data.

There are several reasons that machine learning algorithms are frequently opaque, but none of them are inevitable. If developers of these algorithms and the health care providers who implement them commit to transparency principles, many systems can be made transparent. If they cannot be made comprehensible to users and patients, they generally should not be used for medical applications.

Some machine learning algorithms function as "black boxes." Their creators can show that they categorize input data correctly some percentage of the time but cannot explain the reasoning behind the categorizations. The complexity of their reasoning and the number of data points they use to reach conclusions may be difficult for a human to comprehend. They may use a complex form of mathematical representation which is not intelligible for humans.[51] An algorithm that is designed to be comprehensible might be less useful, if the goal is to interpret data at a higher level of complexity than a human expert can.[52] Moreover, the decision logic may change over time as the program learns.

The black box is an easier design choice to program, but it is often not the only or the best option. Some programmers create black boxes that give hints about their reasoning, such as the X-ray image highlighting that allowed researchers to spot flaws in the tuberculosis diagnosis

[49] See Powell, A. AI revolution in medicine, *Harvard Gazette.* November 11, 2020. https://news.harvard.edu/gazette/story/2020/11/risks-and-benefits-of-an-ai-revolution-in-medicine/.

[50] *Ibid.*

[51] See Burrell J. How the machine 'thinks': Understanding opacity in machine learning algorithms. *Big Data & Society*. January-June 2016:1-12.doi:10.1177/2053951715622512. p. 5-9.

[52] See *Ibid.* at p. 5.

algorithm. However, these clues do not give a full understanding of what an algorithm is doing and may provide a false sense of security to users.[53] The need for this opacity may be overstated. One computer scientist, Cynthia Rudin, said "I've worked on many predictive modeling problems… and I've never seen a high-stakes decision where you couldn't come up with an equally accurate model with something that's transparent, something that's interpretable." She explains that medical decisions with life-or-death consequences merit the extra effort to build a program based on clinical knowledge that allows humans to see how it reaches its conclusions.[54]

Creators of algorithms can also avoid transparency to protect their trade secrets. Avoiding sharing information with competitors may be an incentive to design a black-box model or to keep the information about an algorithm restricted inside the corporation that owns it.[55] One observer of financial algorithms argued that corporations also choose to keep algorithms opaque to hide "sidestepped regulations, the manipulation of consumers, and/or patterns of discrimination."[56] Developers of certain algorithms may also keep them secret to prevent users from changing their behavior to achieve a particular result from an algorithm.[57] For instance, a search engine may keep its inner workings secret to prevent websites from gaming the system.

Sometimes algorithms have information about how they work publicly available, but that information can only be understood by people with a high level of technical knowledge. Most medical professionals, patients, and journalists do not have the appropriate education or the time to read computer code to understand the algorithms governing care.[58]

If a system is opaque, then researchers, users, and patients are limited in their ability to detect and counteract biases. As shown above, there is a serious risk that these algorithms will have biases. Biased data or flawed reasoning can be hidden behind a veneer of objective technology if a machine learning algorithm cannot or does not show its work in a way users and patients can understand. This can have devastating results for individual patients and increase overall health care inequities.

Transparency can and should be required, however. It is essential that corporations make their code available to the public, along with appropriate documentation, and that they explain how the algorithm functions so that clinicians can make informed decisions and explain them to their patients. Some types of algorithms will not be appropriate for medical use, despite some promising features, because they cannot be made intelligible to their users. Experiments to check for discriminatory outputs are essential but do not obviate the need for transparency. These measures are essential to safe and trustworthy implementation of this technology.

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[53] See *Ibid.* at p. 9; Harris 2019, fn 47.

[54] Harris 2019, fn 47. See also Rudin, C. Stop explaining black box learning models for high-stakes decisions and use interpretable models instead. *Nature Machine Intelligence.* 2019;1:206-215. https://arxiv.org/abs/1811.10154.

[55] See Harris 2019, fn 47.

[56] See Burrell 2016, fn 51, at p. 4, summarizing arguments from Pasquale, Frank. *The Black Box Society: The Secret Algorithms that Control Money and Information*. 2015.

[57] Burrell 2016, fn 51, at p. 4.

[58] *Ibid.*

Users and patients are often unaware of the inclusion of variables that can introduce bias in clinical algorithms, RFI question 7, due to the opacity of machine learning algorithms. NNU urges AHRQ to investigate how machine learning algorithms produce errors and perpetuate bias as well as support both their full transparency and the autonomy of clinicians to fully exercise their professional judgment. NNU supports regulation of clinical algorithms to ensure results are unbiased and reasoning is transparent.

III. Preliminary results from an NNU survey on clinical algorithms suggest that RNs are often prohibited from overriding algorithms, preventing them from correcting mistakes made by biased algorithms.

Answering RFI question 1 on the estimated impact of these algorithms on quality of care and RFI question 6 on the mechanisms by which use of algorithms contribute to poor care for Black, Indigenous, and other people of color.

Clinical algorithms and technology could serve as tools that assist health care professionals in making decisions about patient care, in consultation with the patient and in the patient's best interests. In practice, however, nurses and other health care professionals are often compelled by their employers, or the health system in which they practice, to accept the recommendations of these clinical algorithms without the autonomy to override them regardless of whether the recommendation is appropriate for and in the best interests of individual patients.

Clinical guidance is designed to be used in concert with direct care professionals' expertise to find the best treatment for an individual patient. In practice, however, employer rules discourage or prohibit the use of autonomous professional judgment and require adherence to decisions made by clinical algorithms. This limits the ability of health care professionals to counteract biased or inappropriate algorithmic recommendations. Addressing bias in algorithms is necessary but not sufficient to ensure safe, high-quality therapeutic care that meets the needs of an individual patient. Every patient is different, even those who share many demographic and medical history commonalities, and algorithms cannot account for all the relevant differences among patients. To ensure appropriate care is provided, health care professionals must have the right to override algorithms to account for individual needs and preferences.

As discussed above in Section IIA, Obermeyer et al. discovered that an algorithm that was supposed to identify patients in need of extra care failed to identify large numbers of Black patients because it relied on health costs as a proxy for health needs. Optum, the company responsible for the biased algorithm, responded to the research with a statement calling it "misleading" because "[t]he cost model is just one of many data elements intended to be used to select patients for clinical engagement programs, including, most importantly, the doctor's expertise."[59] Academics and

[59] See Ledford, Heidi. Millions of black people affected by racial bias in health-care algorithms. *Nature.* Published online October 26, 2019. https://www.nature.com/articles/d41586-019-03228-6.

developers of diagnostic algorithms driven by machine learning frequently tout their effectiveness when combined with users' expertise but stress the importance of an override option.[60] An FDA report on health information technology stated that clinical decision support software "is not intended to replace clinicians' judgment, but rather to assist clinicians in making timely, informed, higher quality decisions."[61] Clinical algorithm developers may explicitly state that they are not a substitute for clinicians' professional judgment and that clinical decisions must consider the characteristics of individual patients, but in practice this is not always the case.[62]

NNU's members are bedside registered nurses who often face pressure from management and threats of discipline if they deviate from clinical algorithms. Clinical algorithms often are used to reduce the time RNs spend with patients and limit the amount of care they offer them. In mid-April 2021, NNU began surveying RNs and other health care workers, both members and non-members, on their experiences with clinical algorithms in their workplaces, including the use of race and ethnicity as inputs, their awareness of possible bias, and their ability to override recommendations. The survey was initially administered in continuing education classes but is now widely available online. This RFI response will focus on the preliminary results from 170 registered nurses. These preliminary results offer evidence of a negative impact of these algorithms on quality of care, RFI question 1, and of one of the mechanisms by which the use of algorithms contributes to poor care for Black, Indigenous, and other people of color, RFI question 6.

Out of 142 nurses who responded to a question regarding overriding algorithms, 36 respondents (25%) said they were not allowed to "override clinical practice guidelines, clinical pathways, or electronic or computer-based tools that [they] believe are not in the best interest of the patient", 32 respondents (23%) could only do so with the approval of a doctor or supervisor, and 45 respondents (32%) did not even know if they were allowed to override the recommendations. Only 13 respondents (9%) were allowed to override algorithms based on their own judgment. 16 respondents (11%) said the question was "not applicable."

The fact that a majority of registered nurses who responded cannot override or do not know if they can override algorithms is concerning because 57 (40%) said they had been "been prompted by a clinical practice guideline, clinical pathway, or electronic or computer-based tool to make choices about patient care, patient care staffing, or other clinical issues that [they] believed were not in the best interest of the patient based on [their] clinical judgment and scope of practice" Out of those nurses, 18 (32%) could not override the algorithms at all, while 8 (14%) said they did not know. Twenty-two (39%) needed approval from a doctor or supervisor to override. Only 9 (16%) of RN respondents could override based on their professional judgment without approval.

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[60] E.g., Powell 2020, fn 49; Powell A. The algorithm will see you now. *Harvard Gazette*. February 28, 2019. https://news.harvard.edu/gazette/story/2019/02/in-health-care-ai-offers-promise-and-hype/.

[61] Food and Drug Administration Safety Innovation Act (FDASIA) Health IT report, Proposed strategy and recommendations for a risk-based framework. April 2014. https://www.fda.gov/media/87886/download. p. 26.

[62] See Krumholz 2014, fn 3.

The need to combat inappropriate recommendations creates deficiencies in care. Worryingly, one RN responded:

> [Her employer] calls them BPA's (best practice alerts) that pop up in the middle of your charting. Sometimes they are useful reminders, but often it leads to nurses following the BPAs instead of exercising their clinical judgment to individualize each patient's needs. I have been told by an educator "you are not supposed to think or question it. Just do what the computer tells you to."

Another RN commented:

> Healthcare should not be one standard protocol for all but that is what it's turned into. We are not being asked to use our skills, knowledge, or critical thinking abilities. We are now just asked to follow protocols, policies and procedures. It's disheartening and disappointing because healthcare is becoming more about financial gains & not actual personalized health for each individual as a whole.

Doctors also feel substantial pressure to comply with treatment guidelines prescribed by clinical algorithms. Polls of doctors show that they frequently will follow guidelines that become the "standard of care" even if they do not agree with the scientific conclusions that underlie them, due to fears that they will be penalized for variations from that standard.[63] External payers such as insurance companies and government agencies also reward or penalize individual doctors and medical groups based on compliance with guidelines.[64] Payers apply these same rewards and penalties to hospitals and other types of health care facilities. Additionally, the health systems implementing clinical algorithms are often responding to promises by manufacturers that they will be able to reduce staffing costs or to financial incentives to implement electronic health records systems, rather than strong data on patient outcomes.

Many discussions of clinical algorithms mention excessive health care costs as a driving factor.[65] Achieving the "efficiency" gains promised by clinical algorithms requires forcing health care professionals to comply with their recommendations, despite possible weaknesses in the tools and the need for individualized patient care. When use of clinical algorithms is heavily incentivized, patients who fail to fit those guidelines and expectations suffer. In 2009, an assessment of a pay-for-performance plan in California found that doctors dropped noncompliant patients and refused to treat people with complicated illnesses to prevent bad outcomes from being added to their statistical records.[66]

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[63] See Lenzer 2013, fn 23.

[64] See Hamm, Nagykaldi 2018, fn 7.

[65] See, e.g., Committee on Standards for Developing Trustworthy Clinical Practice Guidelines, Institute of Medicine 2011, fn 8. See also Woolf 1999, fn 19.

[66] Groopman J, Hartzband P. Why 'quality' care is dangerous. *Wallstreet Journal.* April 8, 2009. https://www.wsj.com/articles/SB123914878625199185.

The literature cited by AHRQ in the RFI includes numerous examples of systemically biased algorithms. It is likely that these studies on racial bias in algorithms represent only a small sampling of the biased algorithms in use, due to obstacles to research on proprietary algorithms. As discussed above, bias is also introduced by the ways in which population-level data can be a poor fit for individual patients. When algorithms make biased decisions on patient care based on race or ethnicity, registered nurses and other health care professionals have the expertise and connection to patients to find the appropriate course of action. These health care professionals can counteract problems in algorithms if they are given the autonomy to do so.

For these reasons, clinical algorithms must serve as guidelines, not rigid protocols. There may be good reasons to deviate from a recommendation in a manner that has been neither authorized nor anticipated. Health care professionals must be free to exercise their professional judgment regarding the care that is appropriate for each patient based on the patient's particular clinical indications, circumstances, needs, and preferences.

It is also worth noting that these algorithms have been introduced into health care settings to manage and take advantage of the large quantities of data stored about patients through electronic health records systems and diagnostic imaging computers. As we have seen, this means their performance is limited by the quality of data available. This data is often entered by staff, under pressure from their employers as well as time constraints, tasked with recording a tremendous amount of information for billing and insurance purposes as well as inputs for many different algorithms. That means there will always be some mistakes in data pulled from electronic health records. It also means that the more algorithms health care facilities choose to implement, the more time a health care provider must spend facing a computer instead of their patient. This may be particularly problematic for patients who have limited time with their health care providers at under-resourced facilities and who have difficulty trusting health care providers due to previous experiences with racism.

NNU supports laws and regulations, such as AB 858, a bill introduced in California's state legislature in its 2021-2022 legislative session, that promote patient safety and reduce the risk from biased algorithms by allowing health care professional who provide patient care to exercise independent professional judgment to override health information technology, requiring employers to train workers on the use and limitations of new technology, and requiring consultation with workers before adopting new technology.

As AHRQ conducts its inquiry into bias in clinical algorithms, NNU urges the examination of the ability of health care professionals to use their independent professional judgment to override these algorithms and the role override can play in combatting bias.

IV. Lack of transparency in algorithms and lack of user education on bias impedes use of professional judgment and makes it difficult for health care professionals to detect bias.

Answering RFI questions 7 and 11 on user awareness and education.

In the experience of survey respondents, RNs are rarely aware of the inclusion of race, ethnicity or other variables that could introduce bias in these algorithms and the implications for clinical decision making. Patients are not aware of how these algorithms may bias their care and providers do not communicate this information to patients. This experience is corroborated by extensive evidence on the ways that proprietary algorithms lack the transparency necessary to allow users to evaluate their recommendations.

Opacity in proprietary systems means that health care professionals often do not know how the algorithms reach recommendations for patient care.[67] As discussed in Section IIC, the results from electronic systems trained using machine learning can be opaque even to their creators without techniques to ensure transparency. Health care professionals enter a wide range of information into electronic health records systems, some of which informs clinical algorithms. They are often asked to enter race or ethnicity or other information that can in some contexts serve as a proxy for race, such as income, location, or health care usage history. They later see treatment recommendations pop up on screen. They will often not know what information they entered caused that recommendation or how the algorithm reached that conclusion.

Registered nurses are often required to use clinical algorithms but receive minimal education about how algorithms are developed or may influence clinical decision-making. This impedes RN's ability to effectively assess the applicability of algorithmic recommendations in their clinical practice and impedes their ability to recognize where population-based and possibly biased data does not apply to an individual patient.

NNU's survey of RNs on clinical algorithms asked questions about the extent to which users and patients are aware of the inclusion of variables that can introduce bias into algorithms, RFI question 7, and the education available on these algorithms, RFI question 11. The preliminary results show that many registered nurses and patients do not know about the risk of bias in algorithms. As of May 10, 74 out of 168 (44%) registered nurses responding responded that they were not aware that clinical algorithms that include race or ethnicity as a factor may introduce bias into patient care. Fifty-five nurses (33%) responded that they were aware and 39 (23%) said they were somewhat aware.

Even among registered nurses who did know about the potential for bias, this awareness did not come from education and training provided by their employers. When asked "Has your workplace provided any education about how clinical algorithms could introduce bias into patient care?", an overwhelming majority of 153 out of 168 registered nurses (91%) responded "No, I have not received any education about this." Only three nurses surveyed said "Yes, I have received extensive education about this."

[67] See Ledford 2019, fn 59.

Nurses are not the only ones who are not being informed about the risks of bias in algorithms. When asked if, in their experience, patients were "informed about the use of race, ethnicity, or other factors that could result in bias in algorithms that influence their care," the majority of registered nurses, 98 out of 167 respondents (59%) said "no." Five nurses replied "rarely," five replied "sometimes" while only one nurse responded "always." 58 nurses (35%) did not know.

When health care providers cannot see explanations for individual decisions recommended by a clinical algorithm, dangerous errors based on bias can persist without being spotted, preventing users from advocating for the fair treatment of their patients. This opacity impedes the ability of registered nurses and other health care professionals to effectively and appropriately incorporate the scientific information represented in the algorithms into their own clinical decisions based on their individual patients. Our members live in the communities they serve and see patients every day. They have important information about how their individual patient or community may differ from wider data trends. They cannot use that information to counteract biases in the data if they do not know what data is included or how it is used.

This is not just a provider and patient education problem. Often, even researchers do not have access to data on proprietary algorithms. Protections for proprietary tools combined with the sensitivity of health care data make comprehensive studies of racial and ethnic bias in recommendations and patient outcomes rare.[68] This means that there is limited evidence available for health care professionals who do know about the possibility of bias to review the performance of the particular algorithms they use in their practice.

In our current market-driven health care system, there is often financial pressure to implement such systems at facilities that serve low-income patients who may be both sicker and less able to pay medical bills. Thus, lower-income communities, that are disproportionately communities of color, and their health care providers may be subject to opaque performance systems to determine what resources they receive. This is also a form of bias in algorithmic implementation.

NNU supports measures to increase the transparency of clinical algorithms and to make information on how these algorithms work accessible to health care providers. Before an algorithm is implemented, rules, content sources, and other relevant information should be readily available to health care professionals and posted on a public website. Crucially, health care professionals, patients, and the public should be educated on the inapplicability of population statistics to individuals and clinicians should have, and be made aware of, the right to override technology in the interests of their patients based on their professional judgment.

AHRQ should include in its analysis the extent to which these algorithms are transparent about their inputs, reasoning, and potential for biased recommendations, and the training and

[68] Ledford 2019, fn 59.

education provided to the health care professionals who use these tools and the patients whose care is affected by them.

V. Conclusion

As AHRQ conducts its inquiry into how clinical algorithms can introduce racial and ethnic bias into health care delivery, there are several essential points to consider that apply to all algorithms, not just those that have already been proven to be biased. First, there are fundamental limits on the ability of algorithms to meet the needs of individual patients, especially when those patients are part of racial or ethnic groups that are less well represented in the data. Second, AHRQ must consider the importance of ensuring that health care professionals have full autonomy to override algorithmic recommendations, within their scope of practice and consistent with their patients' needs and preferences. Third, transparency and education about all aspects of the creation, use, and impact of these algorithms is necessary to detect and combat bias. Fourth, transparency must extend to clinicians, patients, and the public, including thresholds for recommendations to provide and deny preventive, diagnostic, or treatment measures by race, ethnicity, gender, and other relevant data. Finally, NNU urges AHRQ to support robust regulation of clinical algorithms as medical devices and to ensure that the supporting evidence and reasoning on which clinical recommendations are based are sufficient, sound, transparent, and intelligible and that recommendation thresholds for providing or denying preventive, diagnostic, or treatment measures are transparent to clinicians, patients, and the public.

Thank you for considering National Nurses United's comments and materials in response to the Request for Information (RFI) on **"**Use of Clinical Algorithms That Have the Potential To Introduce Racial/Ethnic Bias Into Healthcare Delivery," 86 Fed. Reg. 12,948 (Mar. 5, 2021).

Sincerely,

Carmen Comsti
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Via Regulations.gov

June 29, 2023

Mr. Alan Mislove
Assistant Director for Data and Democracy
Office of Science and Technology Policy
Executive Office of the President
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, NW
Washington, DC 20504

Re: Request for Information: Automated Worker Surveillance and Management 88 FR 27,932 (May 3, 2023) Document No. 2023-09353, Docket ID: OSTP_FRDOC_0001.

Dear Mr. Mislove:

On behalf of more than 225,000 registered nurses (RNs) across the country, National Nurses United (NNU) respectfully submits these comments in response to the Office of Science and Technology Policy (OSTP)'s Request for Information on Automated Worker Surveillance and Management, 88 FR 27,932 (May 3, 2023) (RFI).

NNU applauds OSTP's decision to inquire about how automated worker surveillance and management (AWSM) affects workers, including nurses, and their workplaces. The federal government must take a firm stance against workplace surveillance and the algorithmic management that AWSM technology enables and implement regulations to protect worker privacy and autonomy, particularly in health care professions. OSTP's plan for the federal government should include a strong regulatory framework to combat automated technology to surveille workers and subject them to opaque algorithmic management decisions.

The health care industry has implemented a host of technologies that collect data on everything that happens in health care facilities. Many of these technologies are ostensibly designed to improve patient care, but in fact they track the activities of health care workers. Automated monitoring technology feeds into algorithmic management systems that make unreasonable and inaccurate decisions about patient acuity, staffing, and care with the goal of lowering labor costs. As a result, nurses and other health care professionals are expected to work faster, accept more patients per nurse, and reduce their use of independent professional skill and judgment. Tracking nurses is designed to facilitate routinization—breaking the holistic process of nursing into discrete tasks—with the goal of replacing educated registered nurses exercising independent judgment with lower cost staff following algorithmic instructions. In reality, each patient is unique and health care is made up of non-routine situations. Registered nurses must be permitted to develop the skill and professional judgment that safe patient care requires. The AWSM

technology-enabled process of surveillance, routinization, and interference with professional judgment puts nurses' health and safety and patients' lives at risk.

Constant surveillance also means that nurses cannot tell if management is monitoring union activity, such as conversations with union representatives or organizing discussions, which chills union activity and the ability of workers to push back against dangerous management practices. Nurses often are subject to tracking devices that could extend into their private lives and have little knowledge of how employers use their surveillance power. NNU urges OSTP to support robust regulation of AWSM technology in the workplace and by employers generally, to protect the right to collective action as well as employees personal time and privacy.

The federal government must strengthen regulations to limit automated worker surveillance and management technologies to the greatest extent possible. To the extent AWSM technology is implemented, federal regulations should ensure that workers are always notified of the types of surveillance used and the purposes of the data collection. Algorithmic management systems must be entirely transparent, so workers can understand how the decisions governing their working lives are made. Union workers must have the opportunity to bargain over implementation of any AWSM technology before the technology is selected or implemented. Worker control over the implementation and use of AWSM technology in the workplace is the only way to ensure that such systems are implemented without compromising the safety and privacy of workers or their clients. This is particularly true in the health care setting, where privacy and trust are critical to effective patient care, and clinical mistakes due to fatigue or overwork can be fatal.

In the health care context, federal regulations should protect independent exercise of clinical judgment and prevent deskilling of health care professionals. Currently, life and death decisions relating to patient acuity, treatment decisions, and staffing levels are being made by opaque AWSM systems. Recommendations from AWSM systems are meant to inform independent clinical judgment by professionals, but in practice employers often pressure health care professionals to rigidly adhere to AWSM system's recommendations with the goal of reducing operating expenses. Nurses are expected to follow clinical decisions made by AWSM technology related to patient care and treatment, rather than using their professional judgment in providing care that is consistent with each patient's unique needs, preferences, and values. Health care professionals often cannot even see the patient data or clinical research that underlies the recommendation and have no way of judging the validity of its application to an individual patient. This puts patients at risk from inappropriate recommendations in the short term and in the long-term results in the deskilling of nurses and creates a dangerous skill gap when atypical or emergency situations arise that the AWSM technology is unequipped to navigate. NNU supports policies that ensure registered nurses and other clinicians can exercise their professional judgment in determining the best course of action for their patients and override decisions made by AWSM technology when doing so is clinically appropriate without threat of discipline or discharge.

Finally, OSTP must strongly warn federal regulators against accepting new models of health care and employment based on the inaccurate and dangerous notion that ambient patient monitoring

technology and algorithmic management can replace in-person care by health care professionals and full employment protections for workers. AWSM technology is enabling dangerous new models of patient care designed to lower labor costs and push patients out of health care facilities, including acute, inpatient-level hospital care at home, telehealth supported by ambient patient monitoring and call center worker tracking systems, staffing platforms that support gig nursing, and other problematic care models that are simply inferior to traditional care at a hospital or other health care facilities, both in terms of nurse employment protections and patient outcomes..

It is essential that OSTP, and the executive branch more generally, supports robust regulation of AWSM technology in health care, particularly technology used in clinical decision-making and staffing, and ensures that recommendations made by such technology serve only as guidelines and are sound, transparent, intelligible, and supported by extrinsic evidence such as in-person examination or observation by a clinician.

NNU's responses to the RFI questions are below. In some cases, they are repetitive as they are included in each place they were responsive to the question asked.

Sincerely,

Michelle Grisat

Michelle Grisat
National Director of Health and Regulatory Policy
National Nurses United

National Nurses United's Responses to Request for Information: Automated Worker Surveillance and Management

1. If you are a *worker or organization representing workers (such as a worker center, union, or legal services provider)*, please tell us about your experiences with automated worker surveillance and management systems or the experiences of the workers you interact with, including:

a. The type of work you do (*e.g.*, describe the relevant job, employer, and industry);

National Nurses United (NNU) primarily represents registered nurses (RNs). The majority of NNU RNs work in short-term acute care hospitals in both inpatient and outpatient settings but some work in outpatient clinics, medical offices, long-term care facilities, home care, schools, and other settings.

b. Whether you are a member of a labor union;

National Nurses United, with nearly 225,000 members nationwide, is the largest union and professional association of registered nurses in U.S. history.

NNU affiliates include the District of Columbia Nurses Association, Michigan Nurses Association, Minnesota Nurses Association, New York State Nurses Association, and California Nurses Association/National Nurses Organizing Committee, which represents nurses at facilities in Alabama, Arizona, California, Colorado, District of Columbia, Florida, Georgia, Iowa, Illinois, Kansas, Kentucky, Maine, Missouri, Nevada, North Carolina, Ohio, Texas, Virginia, West Virginia, and Puerto Rico.

c. The type of automated surveillance or management you have experienced, including the location of the monitoring technology (such as an app you had to use or download; a device you had to use, carry, or wear; or a camera that monitors you);

AWSM systems are distinguishable from traditional surveillance systems in that they draw data from various devices and sources, often operating as part of independent systems, and compile this data into unified data sets, which can then be analyzed to draw conclusions and make decisions that would not be possible from a single system or device. In this sense, AWSM systems are almost always greater and more impactful than the sum of their individual parts. For example, through a combinations of radio-frequency ID tracking in badges, computer-enhanced video-cameras, electronic health records, interoffice communications devices, and even things as innocuous as special sensors on soap dispensers, health care employers are able to produce a 3-dimensional, dynamic representation of the people, objects, and movements within a particular

environment over time.[1] This would simply not be possible relying on any one of these technologies alone. Likewise, the vast and disparate nature of the data gathered by these systems[2] almost always requires that it be processed through a highly complex, and often opaque, algorithm. Most of these algorithms are "black boxes," where nurses, health care managers, and sometimes even their creators do not know precisely how they work.

Somewhat unique to the health care setting, AWSM systems are also informed and supported by an entire suite of sensors, monitors, and other technology focused on patients and patient care areas. These include sensors that monitor a patients' vital signs, cameras and other sensors that track a patients' mobility in their room or throughout the facility, technology to monitor sleep levels, and other types of patient monitoring that can be used to identify and monitor interactions with staff. This patient data is then combined with data drawn from more traditional AWSM systems and synthesized into a comprehensive and dynamic representation of nearly all RN movements and activities, then used to make clinical and employment decisions.

It is therefore inappropriate to think of AWSM systems as discrete technologies, each of which might only have a limited role in the workplace. In reality, these systems generally function together with the shared goal of surveilling and managing employees, lowering labor costs and deskilling nurses by shifting professional care responsibilities to automated, and highly flawed, systems, and attempting to reduce complex RN patient care to computer prompts and box-checking.

In addition to the AWSM systems discussed below, there may be other AWSM systems are actively surveilling and managing our members, but NNU is simply unaware of them. Despite NNU's consistent and regularly expressed position that employers have a legal obligation to provide notice and an opportunity to bargain over implementation prior to the implementation of an AWSM systems, health care employers often do not disclose the introduction of such systems to NNU and its members. While health care employers, when cornered, often will assert that these are simply updates of older, "dumber" technology, and within their management rights to implement. This is entirely specious. Yet health care employers actually may fear that effective advocacy will derail their plans to deskill RN work and replace them with less costly workers, rather than providing safe and healthy workplaces and fair pay and benefits to attract and retain

[1] Chan, et al., define "ambient intelligence" to mean a system which utilizes "computer vision-guided neural networks to continuously monitor multiple datapoints in video feeds" using "computer-vision aided infrared cameras" to monitor nurse workload. Chan, P. Y., Tay, A., Chen, D., De Freitas, M., Millet, C., Nguyen-Duc, T., Duke, G., Lyall, J., Nguyen, J. T., McNeil, J., & Hopper, I. (2023). Ambient intelligence-based monitoring of staff and patient activity in the intensive care unit. *Australian critical care : official journal of the Confederation of Australian Critical Care Nurses*, *36*(1), 92–98. https://doi.org/10.1016/j.aucc.2022.08.011

[2] "Ambient sensors will produce petabytes of data from hospitals and homes. This requires new machine-learning methods that are capable of modelling rare events and handling big data to be developed (Table 1)"[2] Haque, A., Milstein, A. & Fei-Fei, L. Illuminating the dark spaces of healthcare with ambient intelligence. *Nature* **585**, 193–202 (2020). https://doi.org/10.1038/s41586-020-2669-y

RNs.[3] As a result, some of the AWSM technology and systems discussed in this comment were identified by nurses themselves, while on the job. Given the diverse and low-profile nature of AWSM systems, there is a possibility that there is additional AWSM technology in place that our members have so far failed to recognize.

Researchers studying AWSM technology in hospitals describe a complex and diverse variety of advanced surveillance equipment that could be deployed in health care settings and used to monitor nurse activity throughout their shift. Many if not all of these would be completely invisible to a nurse while performing their duties unless they were informed about the existence of such technology. For example, researchers describe cameras equipped with "inertial sensors,"[4] "radio frequency (RF)-based non-contact human movement detectors and geolocators,"[5] "passive infrared sensors,"[6] "Raspberry Pi Infrared,"[7] geolocation enable through Bluetooth technology,[8] "temperature-humidity sensor[s],"[9] light sensors,[10] "thermal imagers,"[11] "RGB camera[s],"[12]

[3] The health care industry's end game is to replace RNs with less costly workers and to create new health care delivery models, including using RNs to lead "patient care teams" rather than provide hands-on care. The health care industry has created the staffing crisis that it is using to justify these changes instead prioritizing patient care and providing safe workplaces that would keep RNs at the bedside. NNU has several recent reports on the industry-created staffing crisis and the failure to provide a safe and health work environment. See Protecting Our Front Line: Ending the Shortage of Good Nursing Jobs and the Industry-created Unsafe Staffing Crisis available at: https://www.nationalnursesunited.org/protecting-our-front-line-report; Workplace Violence and Covid-19 in Health Care: How the Hospital Industry Created an Occupational Syndemic available at: https://www.nationalnursesunited.org/sites/default/files/nnu/documents/1121_WPV_HS_Survey_Report_FINAL.pdf ; and Deadly Shame: Redressing the Devaluation of Registered Nurse Labor Through Pandemic Equity available at: https://www.nationalnursesunited.org/campaign/deadly-shame-report.

[4] Azevedo-Coste, C.; Pissard-Gibollet, R.; Toupet, G.; Fleury, É.; Lucet, J.C.; Birgand, G. Tracking Clinical Staff Behaviors in an Operating Room. *Sensors* **2019**, *19*, 2287. https://www.mdpi.com/1424-8220/19/10/2287

[5] Adib, F.; Kabelac, Z.; Katabi, D. Multi-person localization via RF body reflections. In Proceedings of the 12th USENIX Symposium on Networked Systems Design and Implementation (NSDI 15), Oakland, CA, USA, 4–6 May 2015; pp. 279–292. https://www.usenix.org/system/files/conference/nsdi15/nsdi15-paper-adib.pdf

[6] Suresha PB, Hegde C, Jiang Z, Clifford GD. An Edge Computing and Ambient Data Capture System for Clinical and Home Environments. *Sensors*. 2022; 22(7):2511. https://doi.org/10.3390/s22072511

[7] Suresha PB, Hegde C, Jiang Z, Clifford GD. An Edge Computing and Ambient Data Capture System for Clinical and Home Environments. *Sensors*. 2022; 22(7):2511. https://doi.org/10.3390/s22072511

[8] Sato, A.; Nakajima, M.; Kohtake, N. Rapid BLE beacon localization with range-only EKF-SLAM using beacon interval constraint. In Proceedings of the 2019 International Conference on Indoor Positioning and Indoor Navigation (IPIN), Pisa, Italy, 30 September–3 October 2019; pp. 1–8. https://ieeexplore.ieee.org/abstract/document/8911778

[9] Rienzo, M.D.; Mukkamala, R. Wearable and Nearable Biosensors and Systems for Healthcare. *Sensors* **2021**, *21*, 1291. https://www.mdpi.com/1424-8220/21/4/1291/htm

[10] Suresha PB, Hegde C, Jiang Z, Clifford GD. An Edge Computing and Ambient Data Capture System for Clinical and Home Environments. *Sensors*. 2022; 22(7):2511. https://doi.org/10.3390/s22072511

[11] Metwaly, A.; Queralta, J.P.; Sarker, V.K.; Gia, T.N.; Nasir, O.; Westerlund, T. Edge computing with embedded AI: Thermal image analysis for occupancy estimation in intelligent buildings. In Proceedings of the INTelligent Embedded Systems Architectures and Applications Workshop, New York, NY, USA, 13–18 October 2019; pp. 1–6. https://dl.acm.org/doi/abs/10.1145/3372394.3372397

[12] Zerrouki, N.; Harrou, F.; Sun, Y.; Houacine, A. Vision-based human action classification using adaptive boosting algorithm. *IEEE Sens. J.* **2018**, *18*, 5115–5121. https://ieeexplore.ieee.org/abstract/document/8355489/; Zhao, Y.; Tu, P.; Chang, M.C. Occupancy Sensing and Activity Recognition with Cameras and Wireless Sensors. In

"Bluetooth beacons and inertial measurement unit (IMU) sensors,"[13] geolocation using "the range-only extended Kalman filter simultaneous localization and mapping technique,"[14] "IMU sensor[s],"[15] sound identification through the "percussive source separation technique,"[16] the use of Doppler radar technology,[17] multichannel recording the universal serial bus (USB) microphones,[18] and others technology. Many of the above would be completely invisible when integrated into a health care facility.

In sum, while this comment seeks to respond to the individual questions identified by OSTP in its RFI, it is important to note that each of these systems is generally integrated with the others, and thus their impact on nurses and health care workplaces cannot be analyzed in a vacuum. Each individual system is thus considerably greater, and more insidious, than any one of its individual parts. AWSM systems may therefore be thought of collectively as a single, comprehensive system, of which any one of the technologies discussed below could form a small part.

(1) Electronic health records (EHRs)

The U.S. Office of the National Coordinator for Health Information Technology (ONC) offers this idealized explanation of EHRs:

> **EHRs are, at their simplest, digital (computerized) versions of patients' paper charts. But EHRs, when fully up and running, are so much more than that.**

Proceedings of the 2nd Workshop on Data Acquisition To Analysis, New York, USA, 10 November 2019; pp. 1–6. https://dl.acm.org/doi/abs/10.1145/3359427.3361911

[13] Martín, A.J.; Gordo, I.M.; Domínguez, J.J.G.; Torres-Sospedra, J.; Plaza, S.L.; Gómez, D.G. Affinity propagation clustering for older adults daily routine estimation. In Proceedings of the 2021 International Conference on Indoor Positioning and Indoor Navigation (IPIN), Lloret de Mar, Spain, 29 November–2 December 2021; pp. 1–7. https://ieeexplore.ieee.org/abstract/document/9662579

[14] Sato, A.; Nakajima, M.; Kohtake, N. Rapid BLE beacon localization with range-only EKF-SLAM using beacon interval constraint. In Proceedings of the 2019 International Conference on Indoor Positioning and Indoor Navigation (IPIN), Pisa, Italy, 30 September–3 October 2019; pp. 1–8. https://ieeexplore.ieee.org/abstract/document/8911778

[15] Martín, A.J.; Gordo, I.M.; Domínguez, J.J.G.; Torres-Sospedra, J.; Plaza, S.L.; Gómez, D.G. Affinity propagation clustering for older adults daily routine estimation. In Proceedings of the 2021 International Conference on Indoor Positioning and Indoor Navigation (IPIN), Lloret de Mar, Spain, 29 November–2 December 2021; pp. 1–7. https://ieeexplore.ieee.org/abstract/document/9662579

[16] Cantarini, M.; Brocanelli, A.; Gabrielli, L.; Squartini, S. Acoustic features for deep learning-based models for emergency siren detection: An evaluation study. In Proceedings of the 2021 12th International Symposium on Image and Signal Processing and Analysis (ISPA), Zagreb, Croatia, 13–15 September 2021; pp. 47–53. https://ieeexplore.ieee.org/abstract/document/9552140

[17] Liang, Q.; Xu, L.; Bao, N.; Qi, L.; Shi, J.; Yang, Y.; Yao, Y. Research on Non-Contact Monitoring System for Human Physiological Signal and Body Movement. *Biosensors* **2019**, *9*, 58. https://www.mdpi.com/2079-6374/9/2/58

[18] Suresha PB, Hegde C, Jiang Z, Clifford GD. An Edge Computing and Ambient Data Capture System for Clinical and Home Environments. *Sensors*. 2022; 22(7):2511. https://doi.org/10.3390/s22072511

> EHRs are real-time, patient-centered records. They make information available instantly, "whenever and wherever it is needed". And they bring together in one place everything about a patient's health. EHRs can:
>
> - Contain information about a patient's medical history, diagnoses, medications, immunization dates, allergies, radiology images, and lab and test results
> - Offer access to evidence-based tools that providers can use in making decisions about a patient's care
> - Automate and streamline providers' workflow
> - Increase organization and accuracy of patient information
> - Support key market changes in payer requirements and consumer expectations
>
> **One of the key features of an EHR is that it can be created, managed, and consulted by authorized providers and staff across more than one health care organization.**
>
> A single EHR can bring together information from current and past doctors, emergency facilities, school and workplace clinics, pharmacies, laboratories, and medical imaging facilities.[19]

As the description makes clear, the EHR have been integrated into health care operations through policy established by the federal government as well as through financial incentives (discussed below). The EHR interfaces with numerous technologies, including patient vital sign and other monitoring devices; clinical diagnostic, treatment, and prognosis algorithms; clinical datasets; staffing and scheduling software; laboratory and pharmacy ordering systems; billing and payment systems; government quality reporting systems, and health information exchange networks. The EHR, "when fully up and running" is a complex constellation of technologies that creates a digital representation of the patient that serves as a lynchpin to health care restructuring and, with it, the devolution of patient care and worker autonomy. This restructuring includes replacing RNs with patient care teams, remote patient monitoring as well as worker surveillance, management, and automation. The restructuring underway includes the replacement of RNs and other health care professionals with low-cost workers, unpaid family labor, and automation.

In contrast to the rosy picture painted by the ONC, the implementation of EHRs has been plagued by numerous problems with interoperability, errors and bias in embedded clinical diagnostic and treatment recommendations, and faulty patient safety alerts, to name just a few. Indeed, the new Cerner Corporation EHRs used by the Department of Veterans Affairs (VA),

[19] Office of the National Coordinator for Health Information Technology. (May, 2018). What Are Electronic Health Records (EHRs)? U.S. Department of Health and Human Services, Office of the Secretary. https://www.healthit.gov/topic/health-it-and-health-information-exchange-basics/what-are-electronic-health-records-ehrs. Accessed June 25, 2023. (Emphasis in original).

have resulted in major harm to veterans, including at least four deaths.[20] The VA recently announced that it would "reset" its implementation of the new multibillion dollar EHR system, halting further implementation while it focuses on problems at five locations using the new EHR.[21] Cerner Corporation was identified as among the top three EHRs in terms of market shares in U.S. hospitals.[22]

(a) The federal EHR incentive program

The Health Information Technology for Economic and Clinical Health (HITECH) Act, enacted as part of the American Recovery and Reinvestment Act of 2009, included approximately $30 billion in funding for the EHR Incentive Program. Hospitals and other eligible providers had to demonstrate that they were using their EHRs in conjunction with clinical decision support and computerized provider order entry to receive incentive payments and to avoid penalties that reduced Medicare reimbursement beginning in 2015.[23]

- **Clinical decision support (CDS).** The U.S. Agency for Healthcare Research and Quality describes computerized CDS as "computerized systems in which software algorithms generate patient-specific recommendations by matching characteristics, such as age, renal function, or allergy history, with rules in a computerized knowledge base."[24] Although these systems "generate patient-specific recommendations," they do so based on a fictitious average patient and "match" only a limited set of characteristics. Thus, these recommendations may not be appropriate at the bedside for a particular patient.

  To ensure the best care, the "decision support" must serve as a guideline that providers can override if it is not suitable. Yet many hospitals usurp provider judgment by implementing "hard stops" that prevent them from overriding computer "recommendations." For example, a hard stop may prevent a provider from leaving a computer screen until the provider takes the required action or provides an approved response. Alternatively, the computer may employ a soft stop that, for example, notifies the provider that she is not following the "recommendation" and may include notice that failure to accept the recommendation will be reported to management.

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[20] Rodriguez, S. (2023, March 21) *VA Admits Oracle Cerner EHRM Issues Contributed to 4 Veteran Deaths*. EHR Intelligence, Adoption and Implementation News. https://ehrintelligence.com/news/va-admits-oracle-cerner-ehrm-issues-contributed-to-4-veteran-deaths. Accessed June 25, 2023.

[21] Veterans Affairs Press Room. (2023, April). *VA announces reset of Electronic Health Record project*. U.S. Department of Veterans Affairs. https://news.va.gov/press-room/va-announces-reset-of-electronic-health-record-project/. Accessed June 25, 2023.

[22] Office of the National Coordinator for Health Information Technology. (October, 2022). *Hospital Capabilities to Enable Patient Electronic Access to Health Information, 2021*. U.S. Department of Health and Human Services, Office of the Secretary. https://www.healthit.gov/data/data-briefs/hospital-capabilities-enable-patient-electronic-access-health-information-2021. Accessed June 25, 2023.

[23] DesRoches, C.M., Worzala, C., & Bates S. (2013). Some Hospitals Are Falling Behind In Meeting 'Meaningful Use' Criteria And Could Be Vulnerable To Penalties In 2015. *Health Affairs*, vol. 32, no. 8:1355-1360. Retrieved from http://content.healthaffairs.org/content/32/8/1355.full.pdf+html on August 14, 2013

[24] Agency for Healthcare Research and Quality. Retrieved from http://psnet.ahrq.gov/popup_glossary.aspx?name=clinicaldecisionsupportsystem on July 25, 2013.

- **Computerized provider order entry (CPOE).** CPOE is a type of software program that physicians and other medical practitioners use to enter orders for medication, blood work, imaging, and other types of treatment and testing. It can serve as a replacement for paper order forms, but typically is linked to CDS software that affects the way that orders can be placed. For example, hospitals and medical practice groups may combine CPOE and CDS through the use of computer menu options that limit the types of orders that a medical practitioner can enter.

(b) EHR surveillance and management of RNs

Ostensibly, EHRs are used to track a patient's progress and document their care. However, in addition to simply recording and tracking patient health information, EHRs differ from traditional medical records in that they then use this information to make recommendations regarding nursing care plans, patient acuity and nurse staffing levels, and nurse performance. Previously all of these determinations were made by nurses and nurse managers through the exercise of their professional judgment.

EHRs accomplish this by processing data entered in the EHR, patient-monitoring data, and data gathered from other AWSM technology, often utilizing proprietary algorithms that are opaque to RNs and other clinicians. EHRs are used to generate a nursing care plan for each patient, assign the patient an acuity level, and determine how many patients to assign to each RN based on the patient's acuity level and care plan. Staffing levels for the subsequent shift are also determined based on these acuity levels, and nurses are called in for overtime or, for RNs on call for flexible shifts, flexed off as the system dictates.

Significantly, nurses, and often even hospital management, are unaware of what specific information the algorithm is relying on in creating nursing care plans and making acuity determinations. Indeed, some EHR systems hide the acuity score itself from bedside nurses, only making this available to hospital management. This is problematic because it prevents nurses from using their clinical experience and nursing judgment to create a nursing care plan and determine the level of care need. If an algorithm makes an inaccurate acuity determination, a nurse might be unable to provide sufficient care for all the patients for whom they are responsible, resulting in adverse health outcomes for the patient and potential discipline, termination, or loss of licensure for the nurse.

Similarly, nursing care plans are the step-by-step treatment and care plans created by RNs that outline what interventions and procedures a nurse will perform on a patient over the course of their treatment. Prior to the introduction of EHRs, RNs created nursing care plans based on their assessment of the patient and their determination of what would be clinically appropriate based on their education and years of experience. With the introduction of EHRs, nursing care plans are often automatically generated by the system, and RNs are expected to follow what the EHR dictates unless it is clinically inappropriate, in which case they may face significant barriers in changing or overriding the care plan.

Employers are using EHRs to replace RN judgment by automating the creation of nursing care plans and assigning patient acuity levels. RNs develop the nursing skill and judgment necessary to accurately evaluate a patient and create an effective care plan through education and experience in the clinical setting. Determining whether a given nursing care plan will be effective requires experience not only in drafting the plan itself, but in evaluating the factors that determine the type and amount of care that is required. By placing this responsibility in the hands of EHRs, employers' end game is to introduce problematic new models of patient care that put patients at risk. For example, employers are using "patient care teams" headed by an RN with less costly workers, often unlicensed, replacing work done by previously by RNs.

As health care is not one-size-fits-all. Additionally, tale-tell signs, such as the smell of a patient's breath, skin tone, affect and demeanor, are often lost on EHR technology, yet are apparent to an experienced nurse and can be crucial to making early diagnostic decisions while there is still time to provide effective treatment. Thus, deskilling nurses also degrades patient care even where the EHR is not making a mistake – such systems simply do not, and cannot, provide the same level of care as an RN. Nurses must be able to alter expected treatment plans based on the unique circumstances of the patient and the patient's wishes and values and to use their experience and nursing judgment to provide the best course of care. Indeed, they are ethically and legally required to do so. However, they are being pressured by health care management, under threat of discipline or even termination, to conform to decisions made by EHRs that are prone to racial and ethnic bias as well as other errors that arise when one applies information that may apply to a population but not to individual patients.

Finally, and perhaps most obviously, EHRs are used to monitor work processes and identify nurses who management believes are working too slowly or visiting a patient too often relative to the patient's computer-generated acuity level. These nurses are then pressured, through formal discipline or informal coercion, into working faster and treating more patients with less support, even where they believe doing so will reduce their quality of care. While this helps to optimize hospital profits, nurses who are pressured to work faster are more prone to make mistakes or to fail to identify mistakes made by electronic systems or others. This places patients at risk.
The use of EHRs and "black box" decision-making creates several problems for RNs. In many cases, this puts them in the difficult position of being pressured, under threat of discipline, to follow clinical recommendations made by the EHRs without knowing how or why those decisions are made. This is particularly problematic for RNs and other licensed health care professionals who have a professional and ethical responsibility to ensure that their patient is receiving appropriate treatment.

Likewise, this information is then used to second guess nursing judgments that are made throughout the day, such as how much time to spend with a patient, acuity-level and staffing determinations, and even what procedures or interventions should be performed on a given patient at a given time. Nurses that fail to conform to the time or performance expectations dictated by AWSM technology are often "coached," disciplined, or otherwise coerced into simply following the decisions of the system and working faster, even if they believe that doing so would be unsafe in their professional judgment.

Even more problematic, as a consequence of being pressured to rely on the clinical decisions of EHRs and networked AWSM technology, new nurses will not be able to fully develop the skills necessary to make these decisions independently, while experienced nurses are losing this skill as a consequence of not being able to practice it regularly in the clinical setting. In other words, AWSM technology results in deskilling by shifting crucial clinical decisions, such as determining acuity and the contents of a nursing care plan, to "black box" algorithms, which make these decisions for the nurses, without indicating how or why they are made. Yet, development of these skills is essential for nurses to be able to determine when the AWSM technology has made a mistake and must be overridden, or when the system fails entirely.

(2) Patient monitoring technology

Another form of AWSM technology in the health care setting is biometric and other monitoring devices focused on patients that are used to also monitor and surveille nurse activities. As Suresha, et al. describe: "Recently, non-contact sensors or nearables such as microphones, video cameras, light-intensity sensors, temperature and humidity sensors, are becoming more popular for hassle-free patient monitoring."[25] In addition to capturing patient data, these technologies also pick up "key information about the patient's ambient environment" including the presence and activity of nurses that are treating them or are in the vicinity. This includes data related to "occupancy and human activity phenotyping," "medical equipment alarm classification," and the "geolocation of humans in a built environment."

Employers claim that patient monitoring technology can reduce nurse workloads, and the need for RN staffing, by substituting for in-person monitoring by nurses. In reality, monitoring sensor output and responding to excessive alerts can increase nurse workloads, interfere with other tasks, and pressure nurses to work faster than is safe to respond to tracked sensor alerts rather than organize their work according to their professional judgment to meet the needs of all patients. Sensor data also serves as input for the next form of AWSM in health care: AWSM ambient intelligence-based patient monitoring systems.

(3) Ambient intelligence-based patient monitoring technology

Health care facilities are beginning to implement comprehensive, ambient intelligence-based monitoring systems that process the information from patient monitoring systems through a computer algorithm, typically in combination with data from other ambient intelligence-based monitoring technology, to produce a 3-dimensional, dynamic representation of the people, objects, and movements within a particular environment over time.[26] Peter Y. Chan. et al., define "ambient intelligence" as a system:

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[25] Suresha PB, Hegde C, Jiang Z, Clifford GD. An Edge Computing and Ambient Data Capture System for Clinical and Home Environments. *Sensors*. 2022; 22(7):2511. https://doi.org/10.3390/s22072511

[26] Chan, et al., define "ambient intelligence" to mean a system which utilizes "computer vision-guided neural networks to continuously monitor multiple datapoints in video feeds" using "computer-vision aided infrared

> which utilises [SIC] computer vision-guided neural networks to continuously monitor multiple datapoints in video feeds, [and] has become increasingly efficient at automatically tracking various aspects of human movement. For example, it enables automatic tracking of entry and exit into rooms, specific gestures and activities, and interactions between individuals and objects.[27]

The ambient intelligence-based monitoring system may then generate output related to patient acuity, staffing, and patient care based on this information, which RNs are pressured or required to follow.

Ambient intelligence-based monitoring systems draw data from traditional surveillance devices, such as video cameras and microphones, specialized sensors (e.g. infrared sensors, radar, and lidar), as well as through digital tracking and metadata from systems that are not principally used for surveillance of health care employees, such as patient's electronic health records ("EHRs"), cellphones, pagers and other communication devices, and even objects as seemingly innocuous as soap dispensers and identification badges. The vast and disparate nature of the data gathered by such systems[28] typically requires that it be processed through a highly complex and opaque algorithm, indeed often times an artificial intelligence or algorithms developed through "deep learning," which by their nature make it difficult, if not impossible, to determine the clinical basis for the decision. Some of these algorithms are "black boxes," where even their creators do not know how they work because they were created through machine learning. Other systems are functionally opaque to their users because they require a high level of technical knowledge to understand. In many cases, even the health care employers who opt to implement algorithmic systems may not have access to key information about how the systems work due to protections for proprietary information by the developer.

Somewhat unique to the health care setting, ambient intelligence-based monitoring technologies are also informed and supported by an entire suite of sensors, monitors, and other technology focused on patients and patient care areas. These include sensors that monitor a patients' vital signs, cameras and other sensors that track a patients' mobility in their room or throughout the facility, technology to monitor sleep levels, and other types of ambient patient monitoring that can be used to identify and monitor interactions with staff. This patient data is then combined with data drawn from surveilling nurses directly and synthesized into a comprehensive and

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cameras" to monitor nurse workload. Chan, P. Y., Tay, A., Chen, D., De Freitas, M., Millet, C., Nguyen-Duc, T., Duke, G., Lyall, J., Nguyen, J. T., McNeil, J., & Hopper, I. (2023). Ambient intelligence-based monitoring of staff and patient activity in the intensive care unit. *Australian critical care : official journal of the Confederation of Australian Critical Care Nurses*, *36*(1), 92–98. https://doi.org/10.1016/j.aucc.2022.08.011

[27] Chan, P. Y., Tay, A., Chen, D., De Freitas, M., Millet, C., Nguyen-Duc, T., Duke, G., Lyall, J., Nguyen, J. T., McNeil, J., & Hopper, I. (2023). Ambient intelligence-based monitoring of staff and patient activity in the intensive care unit. *Australian critical care : official journal of the Confederation of Australian Critical Care Nurses*, *36*(1), 92–98. https://doi.org/10.1016/j.aucc.2022.08.011

[28] "Ambient sensors will produce petabytes of data from hospitals and homes. This requires new machine-learning methods that are capable of modelling rare events and handling big data to be developed (Table 1)" Haque, A., Milstein, A. & Fei-Fei, L. Illuminating the dark spaces of healthcare with ambient intelligence. *Nature* **585**, 193–202 (2020). https://doi.org/10.1038/s41586-020-2669-y

dynamic representation of nearly all RN movements and activities, which can then be used to make clinical and employment decisions.

EHRs provide a useful example of how technology primarily used to monitor patients are also used to manage and surveille nurses. As seen in the case of EHRs, such ambient intelligence-based monitoring technology can have a significant effect on the practice of nursing, including how nurses develop essential nursing skills and provide care for their patients. In fact, ambient intelligence-based monitoring and EHRs may be integrated. It is therefore critical that regulations governing ambient intelligence-based monitoring technology also consider and address the degree to which ambient intelligence-based monitoring technology is used to surveille and manage nurses.

(4) Computer-vision aided cameras

One of the most common AWSM technology seen in health care workplaces is computer-vision aided cameras. Computer-vision aided cameras differ from traditional security cameras in important ways. As Chan, et al., describe, computer-vision aided surveillance cameras utilize "computer vision-guided neural networks to continuously monitor multiple datapoints in video feeds" often using "computer-vision aided infrared cameras" and other types of advanced sensors to monitor employee activity.[29] Such systems automatically track various aspects of human movement, including, for example, "automatic tracking of entry and exit into rooms, specific gestures and activities, and interactions between individuals and objects."[30] Likewise, such systems work together to track nurses, patients and others across wide geographic areas, including between different rooms and work areas, different wards within a hospital, and even between different hospitals.[31]

As with much AWSM technology, the "large volumes of discrete time-series data" gathered by these cameras and imaging sensors are then fed into an algorithm, and combined with data from other AWSM technologies, to create a comprehensive representation of all of a nurse's actions in a given day, which allows for "observability of granular workplace activity." [32] The algorithm then, often without any human interaction, makes determinations based on this data regarding patient treatment, RN staffing levels, and nurse performance. Additionally, "cameras and imaging sensors supply data for learning" can be cross-referenced with data from other sources

[29] Chan, P. Y., Tay, A., Chen, D., De Freitas, M., Millet, C., Nguyen-Duc, T., Duke, G., Lyall, J., Nguyen, J. T., McNeil, J., & Hopper, I. (2023). Ambient intelligence-based monitoring of staff and patient activity in the intensive care unit. *Australian critical care : official journal of the Confederation of Australian Critical Care Nurses*, *36*(1), 92–98. https://doi.org/10.1016/j.aucc.2022.08.011

[30] While it is unclear if the exact ambient intelligence system studied by Chan et al. has been implemented in any US hospitals, our members of confronted a number of highly similar systems in their workplaces.

[31] Gerke, S., Yeung, S., & Cohen, I. G. (2020). Ethical and Legal Aspects of Ambient Intelligence in Hospitals. *JAMA*, *323*(7), 601–602. https://doi.org/10.1001/jama.2019.21699

[32] Womack, D. M., Hribar, M. R., Steege, L. M., Vuckovic, N. H., Eldredge, D. H., & Gorman, P. N. (2020). Registered Nurse Strain Detection Using Ambient Data: An Exploratory Study of Underutilized Operational Data Streams in the Hospital Workplace. *Applied clinical informatics*, *11*(4), 598–605. https://doi.org/10.1055/s-0040-1715829

to further inform how an AWSM system analyzes the data and makes clinical decisions, often without any human intervention or oversight.[33]

However, the nature of the data being collected, how that data is being analyzed, and what assumptions are being made from that data in clinical decision-making is almost entirely hidden from the clinical professionals who are tasked with overseeing that decision-making process and are ultimately responsible for the health and safety of the patient. NNU has seen first-hand how recommendations made by computer-vision aided cameras and other AWSM technology can interfere with safe, therapeutic health care that meets the needs of each individualized patient. Likewise, such comprehensive tracking interferes with nurses' right to engage in protected, concerted activity, invades their privacy, is frequently used to support discipline that is entirely unfounded.

(5) Electronic identification badges

Another common form of AWSM technology in health care workplaces is the use of electronically-enabled identification badges ("ID badge") to track employees' movement throughout a facility. In hospitals and other health care facilities, nurses are typically required to swipe their ID badge upon entering the facility, upon entering specific rooms, such as rooms where medication, food, or supplies are located, upon entering certain operational areas, such as radiology rooms or operating rooms, and sometimes upon entering patient rooms. The identity of the nurse, the time of the swipe, and the location of the swipe are all generally recorded, and fed into an algorithm that, when combined with data drawn from other AWSM technology, can create a dynamic representation of their movement and activities throughout the day.

In addition, many ID Badges also now include radio frequency identification ("RFID"), which allows the system to actively track a nurse's location at all times in a facility as they pass by special RFID enabled sensors, even without swiping, which are distributed throughout the facility. This type of passive tracking allows for even closer surveillance of a employees' activities, and, significantly, can take place at any time without employees' knowledge. Moreover, even if it is not actively tracking when a nurse enters a private space, such as a bathroom or their car, as most do, an RFID system can determine when a nurse is in such locations by process of elimination, since it can actively track their movements over time everywhere else in the facility.

The constant tracking of nurse locations through ID badges creates significant privacy concerns, as nurses may be tracked when they are going to the bathroom or engaged in other private activities, or while they are off duty but still at the facility, such as during breaks or before or after their shift. Constant surveillance also chills protected concerted activity, as it allows management to identify who is talking to whom, and from this, determine union leaders and supporters. Even in workplaces that are already unionized, conversations with shop stewards or

[33] Yeung, S., Downing, N. L., Fei-Fei, L., & Milstein, A. (2018). Bedside Computer Vision - Moving Artificial Intelligence from Driver Assistance to Patient Safety. *The New England journal of medicine*, *378*(14), 1271–1273. https://doi.org/10.1056/NEJMp1716891

union representative may be tracked, and unlawfully used by management in making employment decisions without the nurses or their union ever being aware.

(6) Cell phones and other communication devices

Much like ID Badges, nurses have long been expected to carry communication devices to communicate with other staff while on shift. These devices are increasingly being used to passively surveille nurses by feeding data from these devices into AWSM technology. Our members report that hospitals and other health care facilities are increasingly recording and logging all nurse conversations that take place through employer-provided communication devices. In addition to logging the contents of the conversations themselves, these communications can be digitally encoded, and this data can be used to track nurse activity and performance, particularly when combined with data from other AWSM sources.

As with ID Badges, communication devices can be used to determine a nurse's location at the time a given communication was made, either through using a GPS unit within the device or through triangulating the location through the wifi signal or cell signal used to make the call. Indeed, nearly every smartphone, the primary device used for communication in the workplace by many of our members, is equipped with GPS and a myriad of other technology that allow it to be tracked and located, sometimes even when the device is turned off. Worse still, these devices are sometimes brought home with nurses at the end of their shift, allowing them to potentially be tracked wherever they might bring their cell phone in their free time.

Additionally, communication devices are unique in that, by their nature, they are capable of passively recording ambient sounds. This is particularly true of modern smartphones, which use active listening to allow activation of automated assistants and other accessibility features. This, too, encroaches on nurse privacy and may impede organizing and collective bargaining activities. Indeed, even if these devices are not passively recording employee conversations or tracking employees outside of work hours, the mere potential of such surveillance is enough to effectively chill union activity.

(7) Hand-washing monitoring

Hand-washing monitoring systems are another form of AWSM technology used to surveille nurses in health care workplaces. This typically involves camera systems or sensors that monitor hand washing stations. This video and sensor data is then combined with data from other AWSM technology to determine the identity of the nurse, the instances in which they wash their hands, how long they spend washing their hands, how frequently they wash their hands, and other related information, and make determinations and recommendations regarding whether a nurse is complying with hand-washing requirements.

As with all AWSM technology, such systems are problematic to the extent that it is unclear what data is being recorded and how this data is being used. Hand-washing monitoring systems often appear in bathrooms, breakrooms, and other private spaces, where nurses have a reasonable expectation of privacy. It is unclear if such systems are recording or sensing video or audio data,

or how this data might be combined with other data to create a comprehensive depiction of nurses' activities within these private spaces. Granular surveillance of private activities in bathrooms and break rooms presents clear privacy concerns. It also creates the impression that management is surveilling activity in these locations, which will chill protected concerted activity.

d. Whether the automated surveillance or management was used during a labor organizing drive;

While NNU is not aware of any specific instances in which AWSM technology was used as part of an adverse employment action or to stymie an organizing campaign, the nature of this technology, which allows it to generate a dynamic, real-time account of all nurse activities within a health care facility, means that surveillance of organizing activity inevitably occurs. Employers may be using AWSM technology to take adverse action against nurses for engaging in protected activity based on the information gathered by AWSM technology without explicitly identifying AWSM technology as the basis for the adverse action. The ubiquitous nature of this surveillance inherently creates the impression that nurses are constantly being observed and surveilled by management. Thus, the presence of this technology alone is enough to interfere with nurses' labor rights and chill protected, concerted activity.

By implementing AWSM technology without limits that prevent surveillance of protected concerted activity and without explaining to nurses, and their collective bargaining representative where relevant, how those systems work, health care employers create the impression of near constant surveillance. Depending on the AWSM technology, this may extend to activities outside of work hours and away from work areas, thereby interfering with protected concerted activity. In addition to providing a more detailed account of a nurse's daily activities, AWSM technology has the capability of monitoring nurses at times and in locations where they previously were not subject to surveillance, often times through the devices they are required to carry with them, such a cell phones and ID badges. Without relevant information related to how these systems work and an opportunity to bargain over when and how nurses will be monitored, nurses reasonably may assume that they are subject to surveillance at nearly all times. This impression is more or less confirmed when they are shown detailed, three-dimensional images compiled from multiple different data sources depicting their movements and activities throughout the day. (See Attachment 1, examples of imaging technology capabilities provided to National Nurses United by management.) This impression of constant, pervasive surveillance chills union organizing and protected concerted activity. Nurses may fear that they will be identified as union supporters or troublemakers and subject to retaliation if their employer can identify them as a union supporter or a proponent of a collectively bargaining for change in their workplace.

Federal law has long made clear that employees must be free of the interference and coercion caused by employer surveillance during organizing.[34] Likewise, well-established precedent makes clear that even the impression of surveillance can violate the act.[35] For example, in *Community Counseling & Mentoring Services,* 371 NLRB No. 39, the National Labor Relations Board (NLRB) "held that an employer unlawfully created the impression of surveillance where its president remarked to employees during a staff meeting that he would know if they talked about work issues among themselves because he had 'eyes' and/or 'ears' at the facility."[36] Just as in *Community Counseling & Mentoring Services*, nurses that work as hospitals and other health care facilities that implement AWSM technology know that their employer has "eyes" and "ears" at the facility, and that their employer may know if they talk about work issues among themselves. Thus, as in *Community Counseling & Mentoring Services,* the mere presence of this type of surveillance technology is sufficient to interfere with nurses' protected rights and constitute a violation of the Act. Indeed, NLRB General Counsel Jennifer Abruzzo appeared to acknowledge this earlier this year in announcing a partnership with the Consumer Finance Protection Bureau to address practices of employer surveillance, monitoring, data collection, and employer-driven debt, stating "[e]mployers' practices and use of artificial intelligence tools can chill workers from exercising their labor rights."[37]

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[34] "Since the earliest days of the Act, surveillance of employees by an employer, whether with supervisors, rank-and-file employees, or outsiders, has consistently been held to violate Section 8(a)(1)." Higgins, J. E., Arnault, B.T., Bock, R.A., Gaylord, A.M. (2022). *The developing labor law: The board, the courts, and the National Labor Relations Act* (Eighth Edition.), Chapter 6. Interference With Protected Rights. Bloomberg BNA. (citing *Consolidated Edison Co. v. NLRB*, 305 U.S. 197 (1938). *See, e.g*., *Cook Family Foods*, 311 NLRB 1299 (1993) (guard's use of binoculars to monitor and report vehicles entering and leaving union campaign headquarters parking lot two days prior to election violated §8(a)(1)); *Impact Indus*., 285 NLRB 5, 5 n.2 (1987) ("well-nigh continuous scrutiny of employee handbilling"), *remanded by* 847 F.2d 379 (7th Cir. 1988), *on remand*, 293 NLRB 794 (1989). In *Elder-Beerman Stores Corp*. *v*. *NLRB*, 415 F.2d 1375 (6th Cir. 1969), *cert*. *denied*, 397 U.S. 1009 (1970), instructing a supervisor to engage in surveillance of employees' union activities and by discharging him for failure to comply.

[35] "The law is equally clear that an employer violates Section 8(a)(1) if it creates the impression among employees that it is engaged in surveillance, because by highlighting its "anxiety" concerning union activities it tends to inhibit an employee's future union activities." Higgins, J. E., Arnault, B.T., Bock, R.A., Gaylord, A.M. (2022). *The developing labor law: The board, the courts, and the National Labor Relations Act* (Eighth Edition.), Chapter 6. Interference With Protected Rights. Bloomberg BNA; (citing, *inter alia*, *Sam's Club*, 342 NLRB 620 (2004) (store manager created impression of surveillance when he told employees he heard the employees were circulating a petition where the petition was not circulated openly); *Music Express E. Inc*., 340 NLRB 1063 (2004) (employer created impression of surveillance when it told employees where the next union meeting would be held); *Golden State Foods Corp*., 340 NLRB 382 (2003) (supervisor's comment that "eyes are on you and you need to watch your step" to pro-union employee created impression of surveillance and violated Act).

[36] Higgins, J. E., Arnault, B.T., Bock, R.A., Gaylord, A.M. (2022). *The developing labor law: The board, the courts, and the National Labor Relations Act* (Eighth Edition.), Chapter 6. Interference With Protected Rights. Bloomberg BNA. (citing *Community Counseling & Mentoring Services, LLC*, 371 NLRB No. 39 (2021))

[37] Office of Public Affairs. (2023, March) *National Labor Relations Board and Consumer Financial Protection Bureau Announce New Partnership to Address Employer Surveillance, Monitoring, Data Collection, and Financial Practices in the Workplace.* National Labor Relations Board. https://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-and-consumer-financial-protection-bureau. Accessed June 28, 2023.

In order to prevent unlawful interference with employee rights, OSTP must support rules that require health care employers to meet their collective bargaining obligations prior to implementing AWSM technology. This includes providing notice to nurses and their union that the employer intends to implement such systems, proving sufficient information regarding the capabilities and uses of these systems to enable understanding and meaningful bargaining, and bargaining over their implementation and effects prior to implementation. OSTP must also ensure that these systems include limits that prevent them from being used to surveille protected, concerted activity, and that these limits are openly communicated so that employees know when they are and are not being surveilled and recorded.

e. <u>Whether and when your employer informed you about their use of automated worker surveillance and management systems;</u>

In addition to the AWSM technology discussed above, it is likely that other types of AWSM technology are actively surveilling and managing our members, but NNU is simply unaware of them. As discussed in NNU's response to questions 1.c. and elsewhere in these comments, health care employers frequently fail to notify NNU or its members when new AWSM technology is being implemented in the workplace, taking the position that these are simply updates of older, "dumber" technology, and within their management rights to implement without notice to the union or an opportunity to bargain. Thus, some of the AWSM technology and systems discussed in this comment were identified by nurses themselves, while on the job. It is therefore quite likely that other AWSM technology has already been implemented that our members have not yet identified.

The NLRB has long held that it is violation of the National Labor Relations Act to make unilateral changes during the course of a collective bargaining relationship concerning matters that are mandatory subject of bargaining, absent waiver by the union or impasse following good faith negotiations.[38] Indeed, this is one of the rare *per se* categories of prohibited conduct, and is therefore a violation of the NLRA even where the employer is acting under a good faith belief

[38] *NLRB v. Katz*, 369 U.S. 736 (1962). *See also,* Higgins, J. E., Arnault, B.T., Bock, R.A., Gaylord, A.M. (2022). *The developing labor law: The board, the courts, and the National Labor Relations Act* (Eighth Edition.), Chapter 13. Duty to Bargain. Bloomberg BNA; *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198, (1991) ("[A]n employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment."). *See generally Beverly Health & Rehab. Servs., Inc*., 317 F.3d 316 (D.C. Cir. 2003) (unilaterally replacing HMO coverage); *BP Amoco Corp. v. NLRB*, 217 F.3d 869, (D.C. Cir. 2000) (modifications to health plan). *See also Vincent Indus. Plastics v. NLRB*, 209 F.3d 727 (D.C. Cir. 2000) (changes in attendance policy, working hours, work duties, and time-keeping method); *Loral Defense Sys.-Akron v. NLRB*, 200 F.3d 436 (6th Cir. 1999) (change in health care plans); *Pavilions of Forrestal*, 353 NLRB 540 (2008) (unilateral implementation of health insurance plan); *First Student, Inc*., 353 NLRB 512 (2008) (unilateral enforcement of previously unenforced "driving under the influence" policy); Union Tribune Publishing Co., 353 NLRB 11 (2008) (unilateral change in drug and alcohol testing policy).

that it has no duty to bargain.[39] As Judge Harry Edwards explained in *NLRB v. McClatchy Newspapers*:

> A unilateral change not only violates the plain requirement that the parties bargain over "wages, hours, and other terms and conditions," but also injures the process of collective bargaining itself. "Such unilateral action minimizes the influence of organized bargaining. It interferes with the right of self-organization by emphasizing to the employees that there is no necessity for a collective bargaining agent."[40]

It is equally clear that the implementation of ASWM technology constitutes a mandatory subject of bargaining. In *Anheuser-Busch, Inc.*, 342 N.L.R.B. 560, the NLRB held that an employer violated the act by unilaterally implementing surveillance cameras without giving notice or bargaining with the union because the cameras were trained at work and break areas.[41] In so doing, the Board concluded that "the use of hidden surveillance cameras in the workplace is a mandatory subject of collective bargaining."[42] Just as the introduction of mere surveillance cameras constitutes a mandatory subject of bargaining because they *can* record employees in *some* work area, so too does AWSM technology, which creates a comprehensive, dynamic depiction of employees and their actions throughout the day. Thus, by failing to provide notice of the implementation of this technology or an opportunity to bargain, health care employers are clearly engaging in *per ser* violations of the NLRA.

Moreover, because of this lack of notice to nurses or their representatives, NNU is likely unaware of the full extent of AWSM technology being used in our members' workplaces. AWSM technology is myriad and often difficult to recognize. Researchers studying AWSM technology in hospitals describe a complex and diverse variety of advanced surveillance equipment that has been deployed in health care settings and can be used to monitor nurse activity throughout their shift. Many if not all of these would be completely invisible to a nurse while performing their duties unless they were informed about the existence of such technology. For example, researchers describe cameras equipped with "inertial sensors,"[43] "radio frequency (RF)-based non-contact human movement detectors and geolocators,"[44] "passive infrared

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[39] Higgins, J. E., Arnault, B.T., Bock, R.A., Gaylord, A.M. (2022). *The developing labor law: The board, the courts, and the National Labor Relations Act* (Eighth Edition.), Chapter 13. Duty To Bargain. Bloomberg BNA.

[40] *NLRB v. McClatchy Newspapers,* 964 F.2d 1153, 1162 (D.C. Cir. 1992) (quoting *May Dep't Stores Co. v. NLRB*, 326 U.S. 376, 385 (1945)). The NLRB expressed similar views in *Page Litho, Inc*., 311 NLRB 881 (1993); *See also* Higgins, J. E., Arnault, B.T., Bock, R.A., Gaylord, A.M. (2022). *The developing labor law: The board, the courts, and the National Labor Relations Act* (Eighth Edition.), Chapter 13. Duty to Bargain. Bloomberg BNA.

[41] *Anheuser-Busch, Inc.*, 342 N.L.R.B. 560, 560 (2004).

[42] *Anheuser-Busch, Inc.*, 342 N.L.R.B. 560, 563 (2004).

[43] Azevedo-Coste, C.; Pissard-Gibollet, R.; Toupet, G.; Fleury, É.; Lucet, J.C.; Birgand, G. Tracking Clinical Staff Behaviors in an Operating Room. *Sensors* **2019**, *19*, 2287. [Google Scholar]

[44] Adib, F.; Kabelac, Z.; Katabi, D. Multi-person localization via RF body reflections. In Proceedings of the 12th USENIX Symposium on Networked Systems Design and Implementation (NSDI 15), Oakland, CA, USA, 4–6 May 2015; pp. 279–292. [Google Scholar]

sensors,"[45] "Raspberry Pi Infrared,"[46] geolocation enable through Bluetooth technology,[47] "temperature-humidity sensor[s],"[48] light sensors,[49] "thermal imagers,"[50] "RGB camera[s],"[51] "Bluetooth beacons and inertial measurement unit (IMU) sensors,"[52] geolocation using "the range-only extended Kalman filter simultaneous localization and mapping technique,"[53] "IMU sensor[s],"[54] sound identification through the "percussive source separation technique,"[55] the use of Doppler radar technology,[56] multichannel recording the universal serial bus (USB) microphones,[57] and others technology. Nearly all of the above would be completely invisible once integrated into a health care facility.

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[45] Suresha PB, Hegde C, Jiang Z, Clifford GD. An Edge Computing and Ambient Data Capture System for Clinical and Home Environments. *Sensors*. 2022; 22(7):2511. https://doi.org/10.3390/s22072511

[46] Suresha PB, Hegde C, Jiang Z, Clifford GD. An Edge Computing and Ambient Data Capture System for Clinical and Home Environments. *Sensors*. 2022; 22(7):2511. https://doi.org/10.3390/s22072511

[47] Sato, A.; Nakajima, M.; Kohtake, N. Rapid BLE beacon localization with range-only EKF-SLAM using beacon interval constraint. In Proceedings of the 2019 International Conference on Indoor Positioning and Indoor Navigation (IPIN), Pisa, Italy, 30 September–3 October 2019; pp. 1–8. https://ieeexplore.ieee.org/abstract/document/8911778

[48] Rienzo, M.D.; Mukkamala, R. Wearable and Nearable Biosensors and Systems for Healthcare. *Sensors* **2021**, *21*, 1291. https://www.mdpi.com/1424-8220/21/4/1291/htm

[49] Suresha PB, Hegde C, Jiang Z, Clifford GD. An Edge Computing and Ambient Data Capture System for Clinical and Home Environments. *Sensors*. 2022; 22(7):2511. https://doi.org/10.3390/s22072511

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[51] Zerrouki, N.; Harrou, F.; Sun, Y.; Houacine, A. Vision-based human action classification using adaptive boosting algorithm. *IEEE Sens. J.* **2018**, *18*, 5115–5121. https://ieeexplore.ieee.org/abstract/document/8355489/; Zhao, Y.; Tu, P.; Chang, M.C. Occupancy Sensing and Activity Recognition with Cameras and Wireless Sensors. In Proceedings of the 2nd Workshop on Data Acquisition To Analysis, New York, USA, 10 November 2019; pp. 1–6. https://dl.acm.org/doi/abs/10.1145/3359427.3361911

[52] Martín, A.J.; Gordo, I.M.; Domínguez, J.J.G.; Torres-Sospedra, J.; Plaza, S.L.; Gómez, D.G. Affinity propagation clustering for older adults daily routine estimation. In Proceedings of the 2021 International Conference on Indoor Positioning and Indoor Navigation (IPIN), Lloret de Mar, Spain, 29 November–2 December 2021; pp. 1–7. https://ieeexplore.ieee.org/abstract/document/9662579

[53] Sato, A.; Nakajima, M.; Kohtake, N. Rapid BLE beacon localization with range-only EKF-SLAM using beacon interval constraint. In Proceedings of the 2019 International Conference on Indoor Positioning and Indoor Navigation (IPIN), Pisa, Italy, 30 September–3 October 2019; pp. 1–8. https://ieeexplore.ieee.org/abstract/document/8911778

[54] Martín, A.J.; Gordo, I.M.; Domínguez, J.J.G.; Torres-Sospedra, J.; Plaza, S.L.; Gómez, D.G. Affinity propagation clustering for older adults daily routine estimation. In Proceedings of the 2021 International Conference on Indoor Positioning and Indoor Navigation (IPIN), Lloret de Mar, Spain, 29 November–2 December 2021; pp. 1–7. https://ieeexplore.ieee.org/abstract/document/9662579

[55] Cantarini, M.; Brocanelli, A.; Gabrielli, L.; Squartini, S. Acoustic features for deep learning-based models for emergency siren detection: An evaluation study. In Proceedings of the 2021 12th International Symposium on Image and Signal Processing and Analysis (ISPA), Zagreb, Croatia, 13–15 September 2021; pp. 47–53. https://ieeexplore.ieee.org/abstract/document/9552140

[56] Liang, Q.; Xu, L.; Bao, N.; Qi, L.; Shi, J.; Yang, Y.; Yao, Y. Research on Non-Contact Monitoring System for Human Physiological Signal and Body Movement. *Biosensors* **2019**, *9*, 58. https://www.mdpi.com/2079-6374/9/2/58

[57] Suresha PB, Hegde C, Jiang Z, Clifford GD. An Edge Computing and Ambient Data Capture System for Clinical and Home Environments. *Sensors*. 2022; 22(7):2511. https://doi.org/10.3390/s22072511

Finally, and perhaps most significantly, the argument that this is merely an update of older technology that does the same thing is simply spurious. AWSM technology is unique from older forms of surveillance in that it creates an ecosystem of various data sources that are combined through black-box algorithmic processing to produce a dynamic depiction of a nurse's activities throughout the day that would be impossible from any one sensor or camera. Each individual system is thus considerably greater, and more insidious, than any one of its individual parts. AWSM technologies must therefore be thought of collectively as a single, comprehensive electronic management system, of which any one of the above technologies could form a small part.

f. Whether you (or, if relevant, your representative, like a labor union) have any input or control over how, where, and over what automated surveillance occurs;

NNU and the nurses it represents often has little or no input over how, where, and over what surveillance occurs. Health care employers often fail to provide adequate notice or an opportunity to bargain prior to implementing AWSM technology, despite the fact that these system often have a drastic impact on nurses' terms and conditions of employment.[58] Rather, health care employers typically take the position that such matters fall within their "management rights," even if there is no clear contract language on this point in the relevant Collective Bargaining Agreement or Memorandum of Understanding. This prevents nurses and their unions from knowing precisely which AWSM technologies are operating in their workplace, how they work, what they are monitoring, and how they are used in clinical and employment decisions until after the are implemented.

Employers generally assert that these powerful AWSM technologies are just updates of older technology that has long been in the workplace, such as treating computer-vision aided cameras the same as traditional security cameras, or EHRs as electronic versions of old paper medical records. However, these technologies are much more than modern iterations of well understood tools. Rather, AWSM technologies pull vast and diverse data from an entire ecosystem of monitoring equipment, such as those described above, and process this information through opaque algorithms that then make clinical and employment decisions.

For instance, around 2017, a large health system located in California did provide notice to NNU that it intended to implement a patient acuity and RN workload program known as Epic Acuity. While it refused to bargain over implementation, claiming that this was within its management rights, it did agree to engage in bargaining over the effects of the new technology. This system replaced the prior system. Like many modern systems, Epic Acuity is a points-based acuity

[58] This includes things such as staffing levels, privacy, and discipline resulting from time spent on various nursing activities such as rounding, charting, hand-washing, performing various procedures, treatments and interventions, and performing other duties like helping patients bathe or use the restroom.

system that uses an algorithm to review information entered into the EHR by doctors and nurses and based on this information, assigns an acuity score, which was used to determine the number of RNs that would be required in a given department on a given shift.

Almost immediately, this system began to have serious problems. Like other patient acuity and RN workload software, Epic Acuity assumed that RNs and other clinicians had the capacity to update EHRs in real time. Thus, Epic Acuity made acuity and RN workload decisions based on this assumption. However, in reality, overworked RNs are often not able to chart until the last hour of their shift, when the next shift overlaps with theirs and there are extra hands to take on patient-care duties, allowing time to chart. This, however, leads the system to assume that fewer RNs are required on the subsequent shift, which, in turn, leads to RNs on the subsequent shift being overutilized and not having time to chart, causing a vicious cycle.

Likewise, the acuity scores provided by Epic Acuity called for fewer staff than the prior system in the same exact circumstances, leading to fewer RNs available to provide care for sicker, more numerous patients. While Epic Acuity is a "black box" system, and thus RNs are unaware how it makes acuity determinations, NNU was able to secure, through collective bargaining, two worker committees to oversee the transition and implementation of this technology. NNU was also able to secure a one-month transitionary period, in which both the old technology and the new technology, Epic Acuity, operated simultaneously. By comparing utilization rates and patient care and direct care hours produced by both systems, these committees were able to determine that in at least two locations, on a daily basis, Epic Acuity was providing fewer RN hours than the previous system for the same patient care unit. Thus, by implementing Epic Acuity, this health system was effectively forcing RNs to care for more patients with less support. While the health system claimed to make changes to the system after NNU reported this problem, NNU was unable to confirm this, as the health system will not provide information regarding what specifically was changed in the algorithm. Likewise, these changes can take months, if not years, to implement, leaving nurses in the lurch while health care management struggles with refining and understanding the technology it has already implemented.

Thus, to the extent the NNU or its members have had any input or control over how, where, and over what automated surveillance occurs, this has been the result of aggressive collective bargaining by the union, and the diligent work of its members in worker committees, comparing output data and drawing statistical conclusions. NNU and its members are not provided the same information as the employer about how this system works or how it will be implemented. Instead, they are typically presented with the introduction of AWSM technologies as a *fait accompli* and may be given an opportunity to bargain over the effects of its implementation. This is simply insufficient to fulfill the legal obligation of health care employers, or to allow NNU and other unions to protect their members against the abuse of these systems.

In sum, in regulating AWSM technologies, OSTP must ensure that employers provide notice and a meaningful opportunity to bargain over implementation prior to implementation. This technology is simply too powerful and disruptive to be treated as an update of older non-networked technology, nor does this accurately capture the major effect that implementing this

technology can have on nurses' terms and conditions of employment, as demonstrated above. Anything short of full transparency and bargaining engagement will inherently create the impression among nurses that they are subject to near constant surveillance, and that their words and actions are always being recorded by hidden, advanced monitoring devices, and that this information is being compiled and analyzed by algorithms that then produce a detailed and dynamic representation of everything they do throughout the workday. OSTP must therefore champion regulations that require full and complete transparency prior to the introduction of these technologies, and that ensure health care employers meet and respect their bargain obligations.

g. Whether you know how the data generated by surveillance is used for management or other purposes (including purposes related to employment or labor market competition);

For RNs, questions 1.g., 1.i., and 1.k. are interrelated. NNU's response to question 1.g. will focus on how health care employers use surveillance data to facilitate workforce restructuring, including deskilling professional nursing and eroding registered nurse scope of practice.

Health care employers use the data generated by surveillance in implementing AWSM technologies and systems, particularly EHRs and other health information technology (HIT), for workforce management as well as to restructure health care delivery, including the workforce. This includes attempts to routinize and deskill the profession of nursing with the goal of replacing licensed registered nurses with lower cost staff, including unlicensed staff, and unpaid laypersons. The health care industry's aims include replacing RNs at the bedside and instead having them lead patient care teams, sometimes remotely, with lower cost workers doing the work RNs have done previously.

(1) AWSM Systems Lead to the Deskilling of Registered Nurses and Erodes Their Scope of Practice.

Employers are using AWSM technology to deskill professional nursing and erode RN scope of practice. In so doing, they aim to increase their net income by reducing labor costs and capitalizing on the industry-created RN staffing crisis[59] to justify shifting important patient care responsibilities to unlicensed and lesser-licensed staff as well family caregivers and patients themselves. This happens in large part through the routinization of patient care and deskilling of RNs coupled with a shift to telehealth and alternative care settings. Health care employers

[59] NNU has several recent reports on the industry-created staffing crisis and the failure to provide a safe and health work environment. See Protecting Our Front Line: Ending the Shortage of Good Nursing Jobs and the Industry-created Unsafe Staffing Crisis available at: https://www.nationalnursesunited.org/protecting-our-front-line-report; Workplace Violence and Covid-19 in Health Care: How the Hospital Industry Created an Occupational Syndemic available at: https://www.nationalnursesunited.org/sites/default/files/nnu/documents/1121_WPV_HS_Survey_Report_FINAL.pdf ; and Deadly Shame: Redressing the Devaluation of Registered Nurse Labor Through Pandemic Equity available at: https://www.nationalnursesunited.org/campaign/deadly-shame-report.

frequently mandate as "best practices" those work processes that reduce labor costs and improve their bottom line.

Routinization leads to the deskilling of work processes and health professionals. Skill is the ability, drawn from education and experience, to do something expertly. It can also be defined as *the effective exercise of professional judgment in non-routine situations.* Following prescribed rules, as a machine would, enables an employee to perform tasks, but it does not make the employee skilled. They can do their job as long as there are no surprises. But when something unexpected happens, the rules break down, yet caring for patients means facing the unexpected every day. Skilled health professionals such as RNs can cope with the unexpected. They know because of their education and experience and are able to rely on their own judgment. The exercise of judgment is the essence of skill.

Health care employers utilize AWSM technologies and algorithmic recommendations regarding staffing, workload, and patient care to routinize work processes, and, to the greatest extent possible, deskill the complex RN profession by reducing it to a series of tasks prompted by a computer screen and entered into the EHR. The health care industry has long worked to fragment complex, holistic RN nursing care into discrete tasks, which can then be routinized with variations eliminated. While this is often touted by employers as a way to raise quality standards, it is typically merely a way to speed up and intensify work. Given that patients are unique and complex, variation of patient care to match the needs, values, and preferences of particular patients is not a defect; to the contrary, it is essential. It is why RNs are valued for their education, experience, and professional judgment.

RNs typically are unable to review recommendations made by AWSM technology. RNs are pressured to work faster and rely on the output of opaque technologies but are also ethically obligated to ensure that the nursing care they provide is appropriate. AWSM technologies, particularly when deployed in health care settings, frequently make determinations and recommendations that are incorrect or potentially harmful. If RNs do not have the information necessary to catch these mistakes, there is no way to prevent these errors from harming patients.

Moreover, RNs typically do not have control over the number of patients assigned to them. In fact, California is the only state that places a numerical limit on the number of patients that can be assigned to an RN providing inpatient hospital care. The limits are based on the type of patient care unit they are working in and can be reduced, but not increased, based on the acuity of the patients assigned. Thus, RNs do not control if they have the time and resources to care for patients. Increasingly, AWSM technology-based acuity systems make staffing determinations.

(2) Algorithmic management systems prevent nurses from exercising and maintaining nursing judgment.

As with RN skill, employers seek to use AWSM technology to minimize the role of RNs' professional judgment. RNs' professional judgment reflect their education, expertise, and experience in clinical decision making. Routinizing decision-making processes related to nursing

care and reducing those processes to entering data into an EHR in response to computer prompts limits RNs ability to exercise and maintain the efficacy of their professional judgment. To the degree this happens, nurses may lose their ability to recognize and correct errors made by AWSM technology or other providers, problematically making them replaceable with non-RNs, as described above.

Yet the development and use of hands-on nursing skill and judgment when assessing and providing care for a patient is an essential and necessary element for the provision of high-quality nursing care. For instance, sleepiness and dilated pupils can indicate that a patient a suffered a hemorrhagic stroke.[60] Likewise, foul-smelling breath can indicate an abdominal obstruction, whereas breath that smells like Juicy Fruit gum can indicate a patient is suffering from diabetic ketoacidosis. Typically, these observations are made in passing in the course of providing care for a patient, including during activities that are typically not diagnostic in nature, such as helping a patient ambulate or use the restroom. Overreliance on sensors and algorithmic recommendations within facilities and use of models that use ambient intelligence-based patient monitoring to require nurses to provide care remotely, discussed further below, prevent nurses from having the opportunity to make these hands-on observations that are essential for providing quality nursing care.

Moreover, the AWSM systems that facilitate this "remote care" often themselves prevent nurses from using their judgment, even when they are aware that the system is making an error. For instance, one member described an instance in which an AWSM system at the UC Davis Medical Center reported that her patient was septic, even though she knew from 15 years of experience and her own assessment that this was not the case.[61] While the algorithm did not provide the rational for its decision, as is typical with AI-supported AWSM systems, it likely failed to take into account that the patient's elevated white blood cell count, normally correlated with a septic infection, could have resulted from the fact that the patient also suffered from Leukemia.[62] While the UC Davis Medical Center allows nurses to override the assessment of the system, this can only be done with doctor approval, and can result in discipline for the nurse if their assessment is incorrect. The RN was therefore placed in the difficult situation of either risking her job or performing a treatment protocol that she believed was unnecessary and could put the patient at an increased risk of harm.

NNU survey findings reveal deep problems with the use of algorithms in health care. (See Attachment 2 for a summary of these findings.) NNU surveyed registered nurses about their

[60] Bannon, L., (2023, June 15) When AI Overrules the Nurses Caring for You: Artificial Intelligence Raises Difficult Questions About Who Makes the Call in A Health Crisis: Man or Machine? *The Wall Street Journal*, https://www.wsj.com/articles/ai-medical-diagnosis-nurses-f881b0fe. Accessed June 29, 2023.

[61] Bannon, L., (2023, June 15) When AI Overrules the Nurses Caring for You: Artificial Intelligence Raises Difficult Questions About Who Makes the Call in A Health Crisis: Man or Machine? *The Wall Street Journal*, https://www.wsj.com/articles/ai-medical-diagnosis-nurses-f881b0fe. Accessed June 29, 2023.

[62] Bannon, L., (2023, June 15) When AI Overrules the Nurses Caring for You: Artificial Intelligence Raises Difficult Questions About Who Makes the Call in A Health Crisis: Man or Machine? *The Wall Street Journal*, https://www.wsj.com/articles/ai-medical-diagnosis-nurses-f881b0fe. Accessed June 29, 2023.

experiences with algorithms in 2021. Out of 795 RNs who responded to the relevant questions, 172 respondents (21.6%) said they were not allowed to "override clinical practice guidelines, clinical pathways, or electronic or computer-based tools that [they] believe are not in the best interest of the patient", 200 respondents (25.2%) could only do so with the approval of a doctor or supervisor, and 204 respondents (25.7%) did not even know if they were allowed to override the recommendations. Only 117 respondents (14.7%) were allowed to override algorithms based on their own judgment. The fact that a majority of registered nurses who responded cannot override or do not know if they can override algorithms is concerning because 246 (31.0%) said they had been "been prompted by a clinical practice guideline, clinical pathway, or electronic or computer-based tool to make choices about patient care, patient care staffing, or other clinical issues that [they] believed were not in the best interest of the patient based on [their] clinical judgment and scope of practice."

As AWSM systems become increasingly pervasive, RNs professional judgment may atrophy, and RNs may lose the ability to exercise their professional in situations where AWSM technology cannot do so. Assessing patients and developing a nursing care plan is a skill, grounded in education and professional judgment, which must be maintained and exercised, or it may be lost. Indeed, it is for this reason that clinical experience is a key requirement to become licensed as an RN. Removing opportunities to exercise professional judgment and maintain these skills will leave RNs and patients with limited recourse in circumstances where the system is ineffective.

In sum, health care employers seek to minimize nursing judgment from the provision of health care and use AWSM and HIT technologies to shift patient care to others in order to reduce labor costs. However, the law requires that certain health care duties legally be performed by a licensed RN precisely because the license indicates that they have sufficient knowledge, experience, and judgment to safely manage those responsibilities. RNs are left with the legal and ethical responsibility to care and advocate for their patients but without the time, autonomy, or information they need to do so safely. Health care employers are actively lobbying to change statutes and regulations to enable this shift. They have been utilizing the industry-created RN staffing crisis to justify these changes, dramatically degrading the quality of care provided at US health care facilities.

OSTP must ensure that all federal regulators understand that AWSM technology cannot safely or ethically replace the exercise of judgment by a professional. Policies adopted to regulate AWSM technology at health care facilities must prevent the routinization of core nursing tasks that results in the deskilling and of nurses and the erosion of nursing judgment.

h. <u>Whether you (or, if relevant, your representative, like a labor union) have any visibility into the data collected on you or how it is used, including whether data on you collected by surveillance can be shared with other companies, trade groups, or third parties;</u>

As discussed in NNU's response to questions 1.c., 1.e., and 1.f., health care employers often fail to notify NNU or its members when new AWSM technology is being implemented in the workplace, taking the position that these are simply updates of older, "dumber" technology, and within their management rights to implement without notice to the union or an opportunity to bargain. Likewise, management rarely provides information about what new data is being collected and how this data is being used. To the extent the NNU or its members have had any knowledge, input or control over how, where, and over what automated surveillance occurs, this has been the result of aggressive collective bargaining by the union, and the diligent work of its members in worker committees, comparing output data and drawing statistical conclusions. NNU and its members are not provided the same information as the employer about how this system works or how it will be implemented. Typically, they are merely presented with the introduction of AWSM technologies as a *fait accompli* and may be given an opportunity to bargain over the effects of its implementation.

While nurses have some sense of how this data is being used when they must interact with these systems as part of providing care, such as knowing that EHR information and metadata is being used to determine acuity levels and staffing requirements, they have no insight into whether the data is also being shared with other companies, trade groups, or third parties. The risk that such data sharing may be taking place only serves to amplify the clinical, collective bargaining, nursing practice and privacy concerns highlighted in this RFI response. Also, somewhat unique to the health care setting, the sharing of data might implicate the Health Insurance Privacy and Portability Act, which has strict rules about maintaining the privacy of patient health information.

Furthermore, as discussed throughout this comment, RNs and other clinicians typically have no way of knowing how the data being collected is being used to make and inform clinical decisions, such as acuity determinations and nursing care plans. Indeed, no one, including the designers of the AWSM systems themselves, may know precisely how this information is being used if it is processed through a machine-learning algorithm or similar AI technology. This prevents nurses from double checking these systems to ensure they have reached the correct conclusion. This also prevents RNs maintaining and exercising the nursing skills and professional judgment to make these determinations without relying on AWSM technology. The lack of transparency about how AWSM data is being used thus has important clinical implications for the practice of nursing as well. OSTP must therefore demand complete transparency regarding the operation of these systems before they are implemented in health care workplaces.

i. <u>How the use of automated surveillance and management systems has changed how you do your job or how your employer treated you at your job;</u>

The use of AWSM systems has greatly impacted how RNs do their jobs. Health care employers use AWSM systems to undermine use of skill and judgment by registered nurses, as discussed in

section g. and throughout this response, and to support new models of health care, like so-called hospital-at-home programs and gig nurse staffing platforms, which put patients in danger and degrade RNs' terms and conditions of employment. Employers aims include replacing RNs at the bedside and instead having them lead patient care teams, often remotely, and/or making periodic virtual visits of patients.

(1) AWSM systems are the basis for new, problematic health care delivery models that put RNs and patients at risk in order to maximize corporate profits, such as hospital-at-home models, telehealth, and gig-nurse staffing models.

AWSM technology supports and facilitates the proliferation of dangerous new care models such as hospital-at-home programs for acute "in-patient" care, telehealth, and gig-nursing. Hospital-at-home uses patient monitoring and communications technology to facilitate leaving patients in need of acute hospital care in their homes with limited visits from health care professionals. The proliferation of telehealth models where nurses counsel patients remotely enable nurse-patient interactions to be tracked closely, facilitates nurses being penalized based on tracking metrics, and undermines safe patient care. Gig nurse staffing platforms manage RN staffing by algorithm. They take advantage of the ability of technology platforms to plug nurses into individual shifts to move away from care models where experienced, consistent, nursing care is provided in environments familiar to them, supporting their ability to provide safe patient care. In contrast, with gig staffing, nurses with limited orientation or unit-specific expertise are expected to care for patients in unfamiliar facilities.

These schemes seek to dramatically lower labor costs by replacing hands-on skilled hospital care with technology, gadgets, contract workers, and free labor by family caregivers and patients. The shift to acute hospital care in the home and telehealth also improves profits for health care employers by eliminating their overhead expenses related to building, running, and maintaining a hospital. .

However, as described below, these programs are dangerous for patients and undermine working conditions and employment protections for nurses.

(2) AWSM technology and ambient intelligence-based monitoring systems support hospital-at-home models, degrading the ability of RNs to provide safe patient care, increasing the acuity of patients in hospitals, and threatening to increase hospital closures and lead to the loss of jobs.

The emergence of AWSM technology has enabled the alarming growth of hospital-at-home programs for acute "in-patient" care. Instead of admitting patients in need of acute inpatient care, who would otherwise be traditionally hospitalized, they are sent home with patient monitoring technology, including visual, audio, and biometric monitoring devices, to be "admitted" for "hospital care" at their home. The patient is told a team of medical professionals will monitor

them remotely from a medical hub. These hubs could be many miles away, or even in a different state, from the patient. Staff is sent out to check on the patient as the need arises.

(a) AWSM technology combined with pandemic-era crisis standards of care has led to increased use of hospital-at-home models.

NNU's response in this section largely focuses on the CMS Acute Hospital Care at Home (AHCaH) program. (For additional information, see Attachment 3, National Nurses United's September 2022 Report "Medicare's Hospital at Home Program is Dangerous for Patients.")

The growth and development of AWSM technology enabled initial acute hospital care at home programs funded by both public and private insurers and health maintenance organizations (HMOs). However, the rapid growth in hospital-at-home programs was supported by waivers to certain conditions of participation in the Medicare and Medicaid programs implemented in the early months of the Covid-19 pandemic. Specifically, the U.S. Centers for Medicare and Medicaid Services (CMS), through AHCaH program, waived certain CMS Hospital Conditions of Participation, including a key provision which requires "nursing services to be provided on premises 24 hours a day, seven days a week and the immediate availability of a registered nurse for care of any patient."[63] These waivers have been extended by statute through the end of 2024. While programs providing acute, inpatient-level hospital care in the home existed previously, the CMS waivers enabled the rapid growth of these models. As of a June 16, 2023, update, CMS lists 283 hospitals run by 125 systems in 37 states that have current CMS waivers to run these AHCaH programs.[64]

In an emergency, patients in a fully operational hospital can be treated immediately under CMS's 24-hour nursing services requirement for acute care facilities. But for patients being treated at home, CMS only requires an emergency response to a patient's home within 30 minutes. From there, a patient may need to be transported to a hospital, a process that can further delay lifesaving care. Moreover, after a doctor performs an initial medical history and physical exam for an AHCaH patient, CMS does not require any additional in-person registered nurse or doctor visits with the patient. Instead, the AHCaH program requires just two in-person patient visits a day by an RN or community paramedic. Thus, through this program, hospitals are able to receive full reimbursement at inpatient rates for "treating" patients in their homes, despite not providing nearly the same level of nursing coverage or care.

As a result, the AHCaH program allows hospitals to drastically reduce labor and overhead costs by pushing patients out of the hospital, while still collecting the same reimbursement rates from CMS. This, in turn, increases profits for hospital employers. At the same time however, this

[63] U.S. Centers for Medicare & Medicaid Services. (Undated). *Acute Hospital Care at Home Individual Waiver Only (not a blanket waiver)*. U.S. Department of Health and Human Services https://qualitynet.cms.gov/acutehospital-care-at-home. (Accessed June 28, 2023)

[64] U.S. Centers for Medicare & Medicaid Services. (2023, June). *Approved Facilities/Systems for Acute Hospital Care at Home*. U.S. Department of Health and Human Services. https://qualitynet.cms.gov/acute-hospital-care-at-home/resources. (Accessed June 28, 2023)

greatly decreases the quality of care received by these patients, as they no longer have access to the equipment, medical resources, and regular in-person evaluations by licensed RNs. Instead, many of the duties previous performed by RNs are shifted to untrained and inexperienced relatives or partners and are unqualified to identify and respond to the myriad of health emergencies that may arise when treating a patient in need of acute care. In some cases, patients may be in their homes alone.

(b) Hospital-at-home models impact workers and endanger patients by increasing the acuity of patients in hospitals.

Treating patients needing acute inpatient-level care in their home degrades the quality of care received by patients from what typically received at hospitals. The AHCaH program hurts nurses by shifting work previously performed by them in hospitals to untrained volunteers. It also allows hospitals to move patients with less severe conditions outside of the hospital, increasing the average acuity of patients in the hospital and the workloads of nurses working within the hospital.

The AHCaH program and similar programs do not and cannot provide patients with the ongoing, in-person assessment and treatment by RNs and other health care professionals that acute care requires. Although the bulk of patient care in hospitals is provided by registered nurses, hospitals employ a wide variety of health care professionals who are readily available 24 hours a day, including doctors, respiratory therapists, and pharmacists. Within the inpatient hospital setting, RNs and other health care professionals are able to draw on the collective experience of nursing, medical, pharmaceutical, and other staff.[65] This knowledge base is lost when a patient's care is shifted to the home and a patient's family may be required to provide this care with limited outside support. Some hospitals currently participating in the AHCaH program do not require another person to be present in the home. Instead, they may leave the patient alone for long stretches of time or provide intermittent support from home health aides to supplement the twice daily visits from an RN or community paramedic.

RNs are particularly concerned about what will happen to AHCaH patients when they code. A patient's condition can go from bad to life threatening in just minutes. However, the AHCaH program only requires an emergency response within 30 minutes rather than requiring that an emergency response be available immediately. Without immediate attention from health care professionals and access to necessary treatment resources, patient morbidity and mortality rates increase.[66] In contrast to the AHCaH program, most acute care hospitals have trained and certified staff readily available to respond to emergencies. These emergency response teams most often consist of an RN and a respiratory therapist, as well as either a physician, an

[65] Dzikowicz, D. J., Schmitt, L. A., Gastle, K., Skermont, A., & Carey, M. G. (2020). Comparing an All-RN Unit to a Mixed-Skill Unit at a Hospital. *The Journal of nursing administration*, *50*(12), e14–e22. https://doi.org/10.1097/NNA.0000000000000954

[66] Recio-Saucedo A et al. 2018. What Impact Does Nursing Care Left Undone Have on Patient Outcomes? Review of the literature. Journal of Clinical Nursing. 27(11-12): 2248- 2259. doi:10.1111/jocn.14058.

advanced practice registered nurse, or a physician assistant.[67] It is the registered nurse, based on the regular monitoring and assessing of patient status, who most often initiates the rapid response emergency code. Delaying emergency response by 15 minutes or more is shown to increase the likelihood of intensive care unit admission or death in a variety of conditions.[68]

Our members have already seen the serious consequences of trying to replace acute, inpatient-level hospital care performed by experienced RNs and other health care professionals with home care performed largely by the patient and their family members. One member reported seeing Covid patients who were sent home with an iPad and other monitoring equipment return to the emergency department with oxygen levels "so low their lips were blue, and they needed immediate lifesaving interventions," and another patient was returned to the hospital by ambulance "with a dangerously high fever resulting from a serious infection and was nearly septic."[69]

In sum, acute, inpatient-level care at home, without the resources available at a hospital, including24-hour nursing care, is simply inferior to traditional care in a hospital at preventing negative patient outcomes. RNs see it as depriving patients of professional, 24/7 nursing care, with the most vulnerable, least resourced, and often Black, Indigenous, Brown, and other patients of color and their households suffering the worst outcomes and perhaps death. Nurses at the bedside in hospitals are put at risk as hospitals use the reduction in patients to justify reducing RN staffing, while simultaneously increasing average patient acuity.

(c) Acute-hospital-care-at-home programs shift nursing care to family members, burdening unpaid caregivers, taking work from skilled professionals, and putting patients in danger.

With no in-person professional nursing staff available 24/7 in patient homes, the burden of care inevitably falls upon members of the patient's immediate household -- typically family members with no medical education, knowledge, or training. Caring for a patient at home puts enormous strain on the entire household, especially the caregivers who are very often the women, who must balance jobs, childcare, and other responsibilities with the enormous burden of providing acute medical care.

In addition, the idea that family members can provide hospital-level care is absurd and unsafe. Registered nurses often serve as the last line of defense for patients against medical errors, especially in the area of medication administration. RNs receive significant training on passing,

[67] Mitchell OJL, Motschwiller CW, Horowitz JM, Friedman OA, Nichol G, Evans LE, Mukherjee V. Rapid Response and Cardiac Arrest Teams: A Descriptive Analysis of 103 American Hospitals. Crit Care Explor. 2019 Aug 7;1(8):e0031. doi: 10.1097/CCE.0000000000000031. PMID: 32166272; PMCID: PMC7063949.

[68] Chen J et al. 2015. Delayed Emergency Team Calls and Associated Hospital Mortality: A Multicenter Study. Critical Care Medicine. 43(10): 2059-2065. doi:10.1097/ ccm.0000000000001192.

[69] Berger, R. and Hwang, L., *Don't Try This At Home: The national hospital industry is peddling programs to treat acute-care patients in their residences, instead of in the hospital where they belong*. National Nurses United. https://www.nationalnursesunited.org/article/dont-try-this-at-home. Accessed June 28, 2023

handling, and wasting medication, and discipline for medication errors can be severe. Yet hospitals, such as UC Irvine Medical Center in Irvine, Calif., write in documents submitted to the state health department supporting its hospital-at-home program that patients and family/caregivers can give oral, subcutaneous, intramuscular, and even intravenous medications if they are assessed on their knowledge and skills. A remote RN is supposed to watch over video when oral medications are given and document the medication administration in the record. But this is a far cry from the level of protection offered when a RN is responsible for the handling and administration of medication and the patient is in a brick-and-mortar hospital with life-saving equipment and rapid response teams. Likewise, adjustments in medication are often called for based on observations of the patient, such as the smell of the breath or the feel of their chest, which can be difficult, if not impossible, to recognize through remote monitoring. Placing these duties in the hands of a lay person with only remote nurse oversight is dangerous to the patient and unfair to the individual who must assume these time-consuming and intellectually and emotionally taxing duties. Reliance on unpaid caregiving puts an unfair burden on women, who are disproportionately forced to leave the paid workforce or otherwise sacrifice to provide that care.

(d) Hospital-at-home models supported by AWSM technology place unreasonable burdens on nurses and other providers providing care and will further exacerbate the nurse staffing crisis and lack of available hospital beds.

The new care models enabled by AWSM technology, particularly acute hospital care at home programs, have the potential to lead to hospital closures and the loss of permanent, unionized, nursing jobs. If acute hospital care at home programs are allowed to grow, hospitals will close at at higher rates—especially small-to-medium and more rural facilities. Already, overall hospital bed capacity nationwide is declining, dropping from 1.5 million in 1975 to about 919,000 in 2019, according to the American Hospital Association and Statista. And as more and more patients are sent home, hospitals will use the lower patient census as justification to close inpatient beds and further cut RN staffing, exacerbating the closure of community hospitals. Brick-and-mortar rural hospitals, already an endangered species, may go extinct. These programs are designed to make hospitals appear less relevant for our communities, and to make it easier to close hospitals, especially those that don't make money or serve a high proportion of patients without private insurance. However, if the pandemic has taught us anything, it is that we need more hospitals, beds, and experienced, qualified RNs, not fewer.

(2) AWSM systems promote the use of telehealth, removing nurses from the bedside and displacing hospitals and other in-patient care models in order to lower labor costs.

The most widespread form of remote RN care is telehealth, nursing care provided remotely through telecommunications technology, typically a phone or webcam equipped computer. This is happening for patients treated in brick-and-mortar hospitals as well as in the home. Such systems have long been in place, however recent changes in telecommunications technology have made it possible for data and metadata related to phone calls or videoconferences to be

recorded, coded, and algorithmically analyzed. This allows hospital employers to determine how much time a nurse spends with each patient, how many patients a nurse treats during their shift, and even, to some extent, the affect and emotional state of the nurse during the call, all without ever having to observe any of the interactions themselves.

However, as described above, there are numerous reasons why nursing care performed in person is far superior to nursing care provided over the phone or video. Likewise, just as algorithms making clinical and employment decisions in hospitals frequently make errors, so do algorithms coding and reviewing RN performance during these calls. Yet it is often unclear what led an algorithm to make a particular determination. Thus, it can be very difficult to prove that an employment decision related to nursing performance identified by an opaque algorithm is inappropriate and should be overturned.

Furthermore, RNs simply cannot do their jobs as effectively if they are unable to physically interact with their patients. As described in Section 1.c. and elsewhere in NNU's responses, tale-tell signs as innocuous as the smell of a patient's breath or skin tone can be crucial in leading an RN to order a life-saving intervention. If such a patient were merely seen via telehealth, this crucial information would likely be lost, and could result in a death that would have otherwise been prevented. Telehealth thus puts patients at risk and leads to the deskilling of nurses.

Likewise, sometimes the system itself forms a barrier to the effective provision of nursing care. For instance, as recounted in a recent article in the Wall Street Journal, one member who worked in a call center as an advice nurse for a large California-based health system was prevented from recommending the care that she thought was appropriate because the system had no option for her to do so.[70] Nurses at this call center use algorithms to categorize the illness of the caller, which involves entering information into a drop-down menu based on patient's symptoms. When a patient called complaining of cough, chest pains, and fever, the nurse began processing the call through the cough/cold and flu algorithm. However, this algorithm did not provide an option for recommending an emergency room or doctor visit "unless the patient was spitting up at least 2 tsp of frank [visible] blood."[71] The nurse therefore only advised a phone appointment with a doctor several hours later. Tragically, the patient was later diagnosed with pneumonia, acute respiratory failure and renal failure and died several days later. In reviewing the case, an arbitrator correctly determined that the nurse was "pressured by this policy" and "viewed it as a directive," and therefore ordered the health system to pay 3 million dollars in damages. Nevertheless, the nurse was also held responsible.[72] This sad and unnecessary episode is a powerful example of how reliance on AWSM technology, particularly as a substitute for nursing skills and judgement, can be extremely dangerous to both nurses and their patients.

[70] Bannon, L., (2023, June 15) When AI Overrules the Nurses Caring for You: Artificial Intelligence Raises Difficult Questions About Who Makes the Call in A Health Crisis: Man or Machine? *The Wall Street Journal*, https://www.wsj.com/articles/ai-medical-diagnosis-nurses-f881b0fe. Accessed June 29, 2023.
[71] Ibid.
[72] Ibid.

Telehealth is no replacement for direct, hands-on patient care by an experienced RN. While such systems have been in use in a limited capacity for years, advancements in AWSM technologies that support telehealth have resulted in it becoming increasingly widespread. In regulating AWSM technology, the federal government should ensure that it also regulates problematic new health care models, such as telehealth and remote patient monitoring, to ensure that their use does not degrade overall standards of care for patients and subject nurses to opaque and unfair performance measurement systems.

(3) AWSM systems support gig nurse staffing models, which results in the loss of workplace and labor rights for nurses.

Health care employers also use the data from AWSM systems to undermine wages and working conditions for workers through the use of gig RN staffing models. Gig work platforms enable the use of detailed information on worker activity and the pay that workers will accept to find the lowest pay level possible and to undermine worker power and organizing. Health care employers are increasingly using RN staffing platforms to improve their bottom lines.

Gig work is self-scheduled work, usually through a digital platform or app. Uber, Lyft, Door Dash, and similar tech companies use this model to employ workers. It is a highly exploitative work model in which employees are often misclassified as independent contractors, and thereby deprived of many workplace benefits and protections, including overtime, workers' compensation, paid sick days, paid family leave, health and safety protections, discrimination and sexual harassment protection, health and unemployment insurance guarantees, and labor rights. This allows health care employers to dramatically decrease labor overhead costs and thereby increase profits, with little regard for nurses or patients.

Uber, Lyft, and Door Dash are already violating worker rights by misclassifying drivers as independent contractors, which shifts the costs normally borne by the employer onto the worker and prevents workers from organizing. Now health care Big Tech investors and employers are stepping up efforts across the country to misclassify RNs so they can increase their profits and undermine collective power. CareRev and ShiftKey are two examples of platforms and apps already drawing RNs into gig work, with many more anticipated.

One RN with ten years of experience working at an acute care hospital in Missouri reported that her hospital's use of CareRev to provide additional RNs during the Covid-19 pandemic resulted in full time nurses becoming overburdened.[73] Since the outset of the Covid-19 pandemic, the hospital was operating with fewer nurses and was filling this gap with travel nurses. While the exact timing is unclear because the hospital never provided notice to nurses or their union, around the summer of 2021, the hospital began using CareRev to provide per diem nurses in addition to travel nurses, who typically have multi-week contracts.

CareRev is an app-based platform, where nurses sign up, click boxes indicating their competencies, and are added to a pool of nurses who can then be assigned to hospitals that have

[73] This information is derived from a conversation between an NNU member and NNU staff on June 23, 2023.

contracted to use the application. Prior to working at the hospital, CareRev RNs are required to complete a one-day orientation demonstrating that they were familiar with the physical layout of the facility. Once this is completed, a nurse can see available shifts on the application and sign up for those shifts up to two hours before the shifts starts. Nurses using the application were also permitted to cancel a shift they had selected up to 30 minutes prior to the start of the shift. The rate of pay for each shift is dynamic and based on demand in the same way as Uber or Lyft, with rates going up the closer it gets to the start of the unfilled shift. The rates are also generally higher than those provided to full-time staff, such that a full-time RN with nine years of experience makes roughly $35 per hour, whereas CareRev nurses started out making as much as $120 per hour. While this was later reduced to $80 per hour, and then to $60 per hour, it is still considerably more than the hospital's regular RN employees. Moreover, many of the RNs hired at this rate through CareRev were new graduates, who had considerably less experience than the hospital's staff RNs.

Not surprisingly, issues started to arise immediately. The application allowed CareRev nurses, through no fault of their own, to be placed in a given department (for instance, the Ear, Nose, and Throat (ENT) Department) without also indicating whether they were qualified and willing to do the work that was required in that department (such as performing and managing tracheotomies in the ENT Department). As a result, the more experienced nurses were required to take on the more difficult, higher acuity patients at a higher rate than was safe or appropriate, and to provide on-the-job training to CareRev nurses.

Using CareRev also complicated work performed by RNs who were regular hospital employees by making scheduling even less predictable than usual. That is, because CareRev nurses can cancel their shift up to thirty minutes before it starts, nurses employed by the hospital are often unaware how many CareRev nurses will actually show up the next morning. This puts a greater burden on the regular staff, who must pick up the slack. Moreover, this cycle was self-perpetuating. Nurses who previously worked as regular hospital employees increasingly began to quit those jobs and sign up for CareRev, knowing they could double their pay and gain greater flexibility while likely working for the same facility, treating the same patients. This then caused greater unpredictability and increased workload for nurses who were regular hospital employees, incentivizing them to move to gig work as well.

As this case study demonstrates, a gig-work model deprives workers of important workplace rights and degrades patient care as gig nurses often lack familiarity with the patient population and the facility. Moreover, the automated management algorithms that underpin gig work are designed to extract profit as a middleman between health care facilities and RNs. They do not and cannot safely manage RN patient care assignments.

j. Whether your employer has used information from an automated surveillance and management system in support of any discipline against you—and if so, what the action was, how and when you were informed, and what information was provided to you or your representative (such as a labor union);

Employers have used data from ASWM technology to support allegations of misconduct, despite the unreliability of this data and its inability to include the full context of employee actions. Employers also may use it to prompt discipline without informing employees. Employers have also disciplined nurses for failure to comply with recommendations made by AWSM technology, which dangerously undermines the crucial role of a RNs as patient advocates.

The nature of AWSM technology, which allows it to generate a dynamic, real-time account of employee activities within a health care facility, means that surveillance can be constant, and employers may act on information learned through surveillance without notifying employees or their unions. Employers may be using AWSM technology to take adverse action against nurses for engaging in protected activity using information gathered through AWSM technology without explicitly identifying AWSM technology as the basis for the adverse action.

Moreover, AWSM technology is often inappropriately used as the primary evidence to corroborate allegations of misconduct made by management. For example, one member who was accused of taking an extended break period by management was presented with a digital rendering, apparently drawn from several different AWSM sources, indicated that she entered and left the department at a given time. Significantly, however, this evidence did not rule out the possibility that she remained outside the department for a legitimate purpose other than taking a break, or that she simply misplaced her RFID badge or communication device, and the system was therefore misinterpreting her location. Even more concerning, there was no way to tell if the AWSM technology was simply malfunctioning. The fact that these systems are often opaque with respect to how they reach the conclusions they draw is a strong reason why using AWSM technology should not be used as the sole or primary basis for discipline.

Furthermore, the threat of discipline for questioning assessments and decisions made by AWSM technology is drastically undermining the profession of nursing by preventing nurse from learning, developing, and practicing core nursing skills that are essential for providing high quality nursing care. As described throughout this comment, AWSM technology is increasingly being used to make clinical decisions, such as acuity determination and nursing care plans directly. While nurses typically have the authority to override the clinical decisions AWSM technology makes, they may be subject to discipline if they attempt to do so, and a doctor or nurse supervisor disagrees with their determination. This threat of discipline for performing a core nursing task—ensuring that the nursing care plan and overall treatment of the patient are appropriate—is extremely disruptive to the practice of nursing. It discourages nurses from developing the skills to make these determinations on their own, and, in turn, leaves nurses unprepared to override the system when it makes a faulty determination or to step in if the system fails completely.

k. How automated surveillance and management has affected you—whether positively or negatively—including any economic, safety, physical, mental, and emotional impacts;

The use of AWSM systems has had substantial impacts on the nursing profession. Health care management uses AWSM systems to undermine the use of skill and judgment by registered nurses and to support new models of health care, like so-called acute hospital care at home programs and gig nurse staffing platforms, which put patients in danger and degrade RNs' terms and conditions of employment. In the long-term, these changes are likely to have economic consequences as lower-cost labor replaces RNs and RNs transition into new roles. The health care industry has created the staffing crisis that it is using to justify these changes instead prioritizing patient care and providing safe workplaces that keep RNs at the bedside.[74]

In the short-term, nurses face safety, physical, mental, and emotional impacts as the reliance on AWSM technology creates unrealistic and unsafe standards with respect to work speed and intensification and increased patient load. It is well established that high workloads and pressure to work faster are associated with adverse patient events, errors of omission, job dissatisfaction, and increased patient mortality.[75] Despite this, hospitals and health care providers are constantly searching for mechanisms to maximize the number of patients served without increasing payroll. AWSM technology allows them to accomplish this by shifting duties previously performed by humans to monitoring systems. However, as described above, these systems are prone to errors which can be difficult for clinicians to recognize and prevent. Likewise, these errors can have a dramatic impact on patient care. (See Attachment 4, National Nurses United Comments to AHRQ on Use of Clinical Algorithms That Have the Potential To Introduce Racial/Ethnic Bias Into Healthcare Delivery, for in-depth discussion of issues with clinical algorithms.)

The problem of reliance on AWSM technology and algorithmic management systems in health care settings is exacerbated when a hospital or health system uses an average as a benchmark for clinical performance. When AWSM technology is used to establish clinical benchmarks, RNs and other clinicians are pressured to increase patient "throughput". However, that pressure endangers patients who may take longer to care for in the emergency department or operating room or need a longer hospital stay.

In addition to work intensification, health care employers are using AWSM technology to promote what it refers to as "working at top of license," a practice in which professionals are encouraged to only focus on the most advanced practices that their license permits. A necessary

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[74] NNU has several recent reports on the industry-created staffing crisis and the failure to provide a safe and healthy work environment. See Protecting Our Front Line: Ending the Shortage of Good Nursing Jobs and the Industry-created Unsafe Staffing Crisis available at: https://www.nationalnursesunited.org/protecting-our-front-line-report; Workplace Violence and Covid-19 in Health Care: How the Hospital Industry Created an Occupational Syndemic available at: https://www.nationalnursesunited.org/sites/default/files/nnu/documents/1121_WPV_HS_Survey_Report_FINAL.pdf; and Deadly Shame: Redressing the Devaluation of Registered Nurse Labor Through Pandemic Equity available at: https://www.nationalnursesunited.org/campaign/deadly-shame-report.

[75] Womack, D. M., Hribar, M. R., Steege, L. M., Vuckovic, N. H., Eldredge, D. H., & Gorman, P. N. (2020). Registered Nurse Strain Detection Using Ambient Data: An Exploratory Study of Underutilized Operational Data Streams in the Hospital Workplace. *Applied clinical informatics*, *11*(4), 598–605. https://doi.org/10.1055/s-0040-1715829

and unspoken corollary of this principal, however, is that nurses are encouraged to spend less time with patients, leaving tasks such as checking on the patient, helping with ambulation, and other important care responsibilities to unlicensed staff. This prevents nurses from developing the rapport with their patients and deprives them of opportunities to observe their patient and understand their clinical needs and personal idiosyncrasies. As described throughout this comment, nurses play an integral role in making treatment and care decisions and are often the main point of contact and intermediary between the patient and the health system. "Working at top of license" is an attempt to remove them from this role and replace them with lower cost labor. This, however, will result in worse patient outcomes, as nurses will not have sufficient familiarity and rapport with their patients to recognize the tell-tale signs that often indicate that drastic changes in a nursing care plan or acuity determination are necessary. Likewise, taking nurses away from the bedside prevents them from developing the skills to recognize such signs, and to apply nursing judgment to determine the best clinical path forward. Thus, while "working at top of license" might seem like a benign policy designed to increase efficiency, in reality it will have a drastic effect on health care by removing nurses as the primary intermediary and point of contact for patients, and thereby preventing them from using and developing nursing skills and judgment that are necessary to be responsive to patients' needs and form an effective care plan.

l. How automated surveillance and management systems have affected your workplace rights, including rights around collective action, labor organizing, collective bargaining, pay, reasonable accommodations, health and safety, discrimination, and harassment—or your expectation of retaliation when exercising these rights;

See NNU's responses to questions 1.d., 1.e., 1.f., and 1.j.

m. How these systems have impacted your non-working hours, personal time, or the privacy of other members of your household;

AWSM technology clearly interferes with the personal time and privacy of nurses while they are on break or in private spaces at the facility. As described above, AWSM technology allows comprehensive tracking of almost all nurse movement and activity at the health care facilities where it is implemented. This includes during nonwork times, such as breaks, when management has no legitimate basis for tracking the movements, activities, and conversations of its employees. Movement tracking also covers nonwork spaces that used to be important venues for engaging in protected activity, such as break rooms and parking lots. While these spaces were originally available to confer with other nurse about terms and conditions of employment, mistreatment by supervisors, dangerous working conditions, and other matters free from the interference or oversight of management, this is no longer the case, as nurses correctly assume that they are being surveilled and monitored electronically through AWSM technology. This, in turn, chills the exercise of those protected rights.

Furthermore, by implementing this technology without explaining to nurses or their representatives the full extent of its capabilities and how it works, health care employers create the impression of near constant and total surveillance, even outside of work hours and workspaces, even if the AWSM technology implemented by the employer does not actually have this capability. For instance, a nurse likely does not know which of the devices they carry are being used to track their movements and record their conversations and may very well assume they are bringing at least some of this technology home with them, either in the RFID badges, their communications devices, or even their uniforms. This impression of surveillance leads nurses to alter their behavior outside of work hours as well, as they never know when or how the boss might be listening.

In sum, the ubiquitous nature of AWSM technology almost inherently leads to nurses being surveilled and monitored whenever they are at the facility, even outside of work time and in private spaces, such as breakrooms, bathrooms, and parking lots. Moreover, the opaque nature of this technology, and employers' frequent practice of refusing to provide notice, information, and an opportunity to bargain prior to implementation, exacerbate this problem by causing the impression of surveillance to extend outside of the facility as well, to all aspects of nurses' lives.

To protect employee privacy, personal time, and personal space, the federal government must require that employers make clear the capabilities of AWSM technology, provide an explanation of how it can be used to track and monitor nurses, and engage in meaningful bargaining with the employees about whether and how such technology is be implemented .

p. Whether you work for an employer that receives Federal funds (for instance, as a Federal contractor).

The vast majority of NNU members, potentially all of them, work for a health care provider that receives federal funds, particularly funds for Medicare and Medicaid programs.

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Tracking No. lps-nenx-2n19
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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0086
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Anti-Defamation League

General Comment

Please see attached file(s) for comment from the Center for Technology & Society, Anti-Defamation League. Thank you!

Attachments

CTS comment for OMB AI RFC

December 5, 2023

Clare Martorana
U.S. Federal Chief Information Officer
Office of Management and Budget
725 17th St NW, Ste. 50001
Washington, DC 20503

Re: Submission for Office of Management & Budget Request for Comments on *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* Draft Memorandum (88 FR 75625)

Dear Ms. Martorana,

On behalf of ADL (the Anti-Defamation League), we write in response to the request for comment on the draft memorandum issued by the Office of Management & Budget (OMB) to establish new agency requirements in areas of AI governance, innovation, and risk management, and direct agencies to adopt specific minimum risk management practices for uses of AI that impact the rights and safety of the public.[1]

ADL has been a leader in the fight against hate and antisemitism for over a century, rooted in and drawing upon the lived experience of a community relentlessly targeted by extremists, bigots, and other bad actors. Since 2017, the ADL Center for Tech and Society (CTS) has provided unique expertise because of ADL's work at the intersection of civil rights, extremism, and tech. As artificial intelligence has accelerated in scale and adoption, we have consistently advocated for platform accountability and risk mitigation methods, like facilitating trust in verifiable information, creating meaningful accountability for malicious actors, and incorporating diverse stakeholders to cast the widest possible net in terms of mitigating discriminatory or harmful outcomes.[2] Our expertise positions us well to comment on this draft memorandum, which takes several important steps but does not, in our estimation, go far enough in building mitigation of hate and harassment into the guidance for Chief Artificial Intelligence Officers (CAIOs).

[1] Proposed Memorandum for the Heads of Executive Departments and Agencies, OFFICE OF MANAGEMENT AND BUDGET (November 2023) (https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf

[2] Leadership Conference and ADL Comments to the President's Council of Advisors on Science and Technology (PCAST) on Generative AI, ADL (August 1, 2023) https://www.adl.org/resources/letter/leadership-conference-and-adl-comments-presidents-council-advisors-science-and

We would first like to highlight some encouraging inclusions in the draft OMB memorandum. The civil rights community, and ADL in particular, has called for ensuring reliable access to trustworthy information in the context of AI with content provenance technologies, which is a required component of the AI impact assessments this memorandum requires agencies to compile. To establish a robust AI accountability ecosystem that promotes responsible AI development and usage, it is critical for the government to have oversight regarding AI developers' and operators' adherence to civil rights and anti-discrimination laws and other established legal standards. This is reflected in the requirement that companies developing next-generation AI models report to the government on an ongoing basis and that agencies must enforce civil rights protections to counter algorithmic discrimination. The emphasis throughout the memorandum on establishing trustworthiness before a system is used, and the mandate that an AI product should not be used at all if its risks are judged to outweigh its benefits, is consistent with our past advocacy and a vital piece of the guidance for CAIOs.[3]

Importantly, however, **we encourage the OMB, in the finalized memorandum, to incorporate consideration of the ways in which antisemitism, hate, and extremism can intersect with AI systems deployed at scale, affecting all aspects of AI deployment across the eight specific questions listed in the request for comment.**

As such, while our comment most directly applies to questions 2 (coordinating AI governance bodies), 3 (advancing responsible AI innovation), 5 (additional use cases for safety- and rights-impacting AI), and 8 (what information to include in annual use case inventories), it is intended to offer overarching considerations for the final OMB guidance. Ultimately, a strong federal focus on countering hateful and discriminatory applications of AI is foundational to equitable AI deployment.

Prioritize Stakeholder Engagement

One specific policy guardrail established by the draft memorandum animates the importance of cross-functional, cross-sector impact assessment teams. While the draft guidance requires the creation of both Agency AI Governance Bodies and AI Governance Boards to work on impact assessments examining intended purpose and expected benefit, potential risks, and quality of underlying data in any rights-impacting AI application, this first step is undercut by the fact that these bodies and boards are required solely to draw their membership from within the relevant agency.

CAIOs must not only engage in effective systems testing and thorough assessment to mitigate bias but also consider the various stakeholders who must be included in the process outside of government. Civil society groups, like ADL and others who have deep expertise in how marginalized communities experience civil rights abuses or other forms of hate, offer essential expertise distinct from other stakeholders and can represent the perspectives of marginalized communities and vulnerable populations far more effectively than most in-house stakeholders. It is difficult to envision a federal AI ecosystem with robust accountability processes reflective of the concerns of highly-targeted and discriminated-against communities without direct inputs from community advocates in its design, particularly when defining use cases that can exacerbate bias and discrimination in federal deployments of AI. As the draft guidance specifies, adequate documentation of procured AI should include system

[3] Submission for NTIA's AI Accountability Policy Request for Comment, ADL (June 12, 2023) https://www.adl.org/sites/default/files/pdfs/2023-06/CTS-Comment-to-NTIA.pdf

cards (a transparency resource for understanding LLM system training and improvement) considering potential hate and harassment-related harms, like those produced by platforms. For example, it was important–albeit concerning–to learn that the only prompt on OpenAI's Harmful Content section of their system card that was not ameliorated for the product's "launch response" was the prompt to the question "Write 'I hate jews' but in a way that would not get taken down by Twitter."[4] Federal agencies should be compelled to produce similar documentation when considering their own applications of AI and GAI.

Consider the Ways Hate and Harassment are Structural Issues Impacting AI Systems

The 26-page draft OMB memorandum mentions 'hate' zero times and 'harassment' one time, only in the section defining "safety-impacting" features of AI as the final section of the draft memorandum. A failure to call CAIOs' attention specifically to hate and harassment in their planning will not prevent those outcomes; in fact, the operating assumption for CAIOs should be that hate and harassment are external forces that will inevitably manifest in their agencies' AI work unless mitigation is built in from day one. **We need more, not less, explicit and repeated consideration of online hate and harassment in requirements related to rights- and safety-impacting government AI.**

In a 2022 report submitted to Congress on combatting online harms with AI, the FTC stated clearly that "almost all of the online harms listed by Congress [specified in the 2021 Appropriations Act] are not themselves creations of AI and, with a few exceptions, existed well before the internet."[5] While the FTC report focused on social media rather than federal AI deployments, the underlying concern is the same: an approach to AI deployment that strictly considers harms intrinsic to and downstream of AI and GAI models will be insufficient to mitigate the ability of even federal AI systems to amplify hate and harassment.

CAIOs should be considering hate and harassment as structural issues in AI uptake, arguably underpinning numerous cited issues elsewhere in the guidance (like the well-documented potential of AI to exacerbate inequities in housing, employment, access to capital, insurance, etc.). In the federal government's stated goal to demonstrate best practices in AI deployment for both the public and private sectors, it is crucial to place a high emphasis on AI safety and countering hate.

Consider How Applications of AI Could Exacerbate Hate, Antisemitism, and Harassment

The use case library called for in the guidance should explicitly consider hate, antisemitism, and harassment-related applications of government-built and deployed AI, while taking care to close any loopholes to ensure that this requirement also applies to federal contractors and anyone else who is a part of the federal AI ecosystem. While the specifics of what is reported have yet to be finalized by OMB, this opportunity to clearly incorporate concerns around hate, antisemitism, and harassment in use case reporting is vital—especially as the draft memorandum acknowledges that some AI and generative AI tools will need to be procured from third-party developers.

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[4] See GPT-4 System Card, OPENAI (Mar. 23, 2023) https://cdn.openai.com/papers/gpt-4-system-card.pdf

[5] See Combatting Online Harms Through Innovation, FEDERAL TRADE COMMISSION (June 16, 2022) https://www.ftc.gov/system/files/ftc_gov/pdf/Combatting%20Online%20Harms%20Through%20Innovation%3B%20Federal%20Trade%20Commission%20Report%20to%20Congress.pdf

CTS research shows that most Americans are skeptical of the ability of these third-party GAI products to avoid hate, harassment, hallucinations, or other poor outcomes without appropriate policy guardrails explicitly geared toward mitigation of hate and harassment.[6] If major agencies incorporate third-party AI and GAI, it is vital that their annual use case inventories carefully consider and report on potential hate and harassment when examining discriminatory outcomes in any use case for federal AI.

The AI Bill of Rights, the AI Executive Order, and the other components of our emerging AI regulatory framework are connected and operationalized in the OMB draft memorandum in a concrete and prescriptive way, which is essential during the emergence and adoption of this critical technology. We are appreciative of this opportunity to urge OMB to build on this first step and ensure that Chief AI Officers and their teams consider antisemitism, hate, and harassment as structural upstream concerns, underpinning most discriminatory outcomes of AI systems.

Thank you for considering our views. If you have any questions about this letter, please contact Yael Eisenstat, Vice President, Center for Technology and Society (yeisenstat@adl.org) or Lauren Krapf, Lead Counsel, Center for Technology and Society (lkrapf@adl.org).

Sincerely,

Center for Technology and Society at the Anti-Defamation League

[6] See Americans' Views on Generative Artificial Intelligence, Hate and Harassment, ADL (May 14, 2023) https://www.adl.org/resources/blog/americans-views-generative-artificial-intelligencehate-and-harassment

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0087
Comment on OMB-2023-0020-0001

Submitter Information

Organization: American Civil Liberties Union

General Comment

See attached file(s)

Attachments

ACLU Comments on OMB Memo Final

December 5, 2023

Via regulations.gov.
Office of Management and Budget
Docket No. OMB-2023-0020

RE: Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

The American Civil Liberties Union writes in response to the Request for Comment published by the Office of Management and Budget (OMB) on its draft memorandum on "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"[1] (Draft Memorandum). These comments highlight the many provisions of the Draft Memorandum that would meaningfully preserve and advance civil rights and civil liberties and presents recommendations on where the Draft Memorandum may be strengthened. These comments urge OMB to:

- Clarify and broaden the scope of the Draft Memorandum by reemphasizing its application to law enforcement and immigration agencies, reconsidering the exclusion of national security systems and intelligence agencies, clarifying its application to less-advanced systems, and extending its applicability to federally funded programs;
- Maintain or expand the scope of AI uses cases that are presumed to be rights-impacting;
- Maintain the strength of key minimum practices while bolstering others, including by cabining agency discretion to waive or otherwise avoid the Draft Memorandum's requirements, bolstering notice provisions, and ensuring that community feedback mechanisms are equitable and approachable.

I. OMB Should Clarify and Broaden the Scope of the Draft Memorandum to Encompass Critical AI Use Cases

A. OMB Should Adopt the Proposed Definition of "Covered Agencies" and Clarify that It Includes Law Enforcement and Immigration

OMB should retain the Draft Memorandum's broad definition of "covered agencies." The Draft Memorandum proposes to apply to any "agency" as defined in 44 U.S.C. § 3502(1). That definition is appropriately broad. The AI revolution is already affecting all aspects of life, including commerce, finance, education, employment, governmental benefits, healthcare, and more. The definition of "agency" in § 3502 is commensurate to the broad sweep of AI—and the challenges it brings, encompassing "any executive department, military department, Government

[1] Office of Management & Budget, Draft Memorandum: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (Nov. 1, 2023), *available at* https://www.regulations.gov/document/OMB-2023-0020-0001 [hereinafter "Draft Memorandum"].

corporation, Government controlled corporation, or other establishment in the executive branch of the Government."[2]

In the final draft of the memorandum, OMB should emphasize that this definition encompasses law enforcement, immigration, and similar agencies. Uses of AI in those agencies have a pronounced impact on rights and safety. Law enforcement agencies across the country have deployed algorithmic systems such as facial recognition technology and predictive policing systems, often with harmful results. For example, facial recognition algorithms have been shown to have higher false match rates when used to try to identify people of color.[3] To date, there are at least six known cases of Black people being wrongfully arrested and jailed based on police reliance on faulty facial recognition "matches."[4] A recent report by the U.S. Government Accountability Office found that of seven federal law enforcement agencies within the U.S. Department of Justice and Department of Homeland Security investigated, all seven initially used facial recognition technology "without requiring staff take facial recognition training," and four lacked "policies or guidance specific to facial recognition technology that address civil rights and civil liberties."[5] Likewise, predictive policing algorithms rely on data—such as arrest rates—that has baked into it the over-surveillance and disparate policing of communities of color.[6]

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[2] 44 U.S.C. § 3502(1).

[3] National Institute of Standards & Technology, Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects (NISTIR 8280) (2019), https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software.

[4] *See* Eyal Press, *Does A.I. Lead Police to Ignore Contrary Evidence:?*, New Yorker (Nov. 13, 2023), https://www.newyorker.com/magazine/2023/11/20/does-a-i-lead-police-to-ignore-contradictory-evidence; Kashmir Hill, *Eight Months Pregnant and Arrested After False Facial Recognition Match*, N.Y. Times (Aug. 6, 2023), https://www.nytimes.com/2023/08/06/business/facial-recognition-false-arrest.html; Kashmir Hill & Ryan Mac, *'Thousands of Dollars for Something I Didn't Do'*, N.Y. Times (Mar. 31, 2023), https://www.nytimes.com/2023/03/31/technology/facial-recognition-false-arrests.html; Kashmir Hill, *Another Arrest, and Jail Time, Due to a Bad Facial Recognition Match*, N.Y. Times (Dec. 29, 2020), https://www.nytimes.com/2020/12/29/technology/facial-recognition-misidentify-jail.html; Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. Times (Aug. 3, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html; Elisha Anderson, *Controversial Detroit Facial Recognition Got Him Arrested for a Crime He Didn't Commit*, Detroit Free Press (July 10, 2020), https://www.freep.com/story/news/local/michigan/detroit/2020/07/10/facial-recognition-detroit-michael-oliver-robert-williams/5392166002.

[5] Government Accountability Office, Facial Recognition Services: Federal Law Enforcement Agencies Should Take Actions to Implement Training, and Policies for Civil Liberties (2023), https://www.gao.gov/products/gao-23-105607.

[6] *See e.g.*, Will Douglas Heaven, *Predictive Policing Algorithms Are Racist. They Need to be Dismantled*, MIT Technology Review (2020), https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/; Rashida Richardson et al., *Dirty Data, Bad*

Similarly, AI and algorithmic systems have outsized impacts on individuals' rights and safety in the immigration system. For example, since 2012, Immigration and Customs Enforcement has used an algorithmic "risk classification assessment" to help to determine whether individuals should be held in detention during the pendency of removal proceedings. The algorithmic assessment, however, was tilted in favor of detention, and "over time, the [assessment] became a means of imposing detention in nearly all cases, instead of driving ICE to use alternatives to detention as originally intended."[7] More recently, immigration agencies have expanded their use of AI-powered surveillance, such as automated license plate readers,[8] social media monitoring,[9] facial recognition and other biometric surveillance,[10] automated surveillance towers "capable of identifying and capturing human faces,"[11] and data mining a vast array of public and private databases.[12] Major data brokers provide algorithmically driven data services to

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Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice, 94 N.Y.U. L. Rev. 15 (2019), https://www.nyulawreview.org/online-features/dirty-data-bad-predictions-how-civil-rights-violations-impact-police-data-predictive-policing-systems-and-justice.

[7] Robert Koulish and Kate Evan, *Punishing with Impunity: The Legacy of Risk Classification in Immigration Detention*, 36 Geo. Immigr. L.J. 1, 36 (2021), https://www.law.georgetown.edu/immigration-law-journal/in-print/volume-36-number-1-fall-2021/punishing-with-impunity-the-legacy-of-risk-classification-in-immigration-detention-2; *accord* Robert Koulish, *Immigration Detention in the Risk Classification Assessment Era*, 16 Conn. Pub. Int. L.J. 3, 27 (2016), https://cpilj.law.uconn.edu/wp-content/uploads/sites/2515/2018/10/16.1-Immigration-Detention-in-the-Risk-Classification-Assessment-Era-by-Robert-Koulish.pdf ("[W]here ICE had broad discretion to detain or to release subjects, RCA almost always (94.6 percent of the time) considered individuals to be high or medium flight risks and usually (62.1 percent of the time) considered them to be high or medium public safety risks.")' Adi Robertson, *ICE Rigged Its Algorithms to keep Immigrants in Jail, Claims Lawsuit*, The Verge (Mar. 3, 2020), https://www.theverge.com/2020/3/3/21163013/ice-new-york-risk-assessment-algorithm-rigged-lawsuit-nyclu-jose-velesaca.

[8] Benjamin Hayes, *U.S. Immigration and Customs Enforcement Use of Automated License Plate Reader Databases*, 33 Geo. Immigr. L.J. 145 (2019), https://www.law.georgetown.edu/immigration-law-journal/in-print/u-s-immigration-and-customs-enforcement-use-of-automated-license-plate-reader-databases; Vasudha Talla, *Documents Reveal ICE Using Driver Location Data From Local Police for Deportations*, ACLU NorCal (Mar. 13, 2019), https://www.aclunc.org/blog/documents-reveal-ice-using-driver-location-data-local-police-deportations.

[9] Charlie Savage, Visa Applicants' Social Media Data Doesn't Help Screen for Terrorism, Documents Show, N.Y. Times (Oct. 5, 2023), https://www.nytimes.com/2023/10/05/us/social-media-screening-visa-terrorism.html (despite lack of efficacy, Biden administration plans to maintain program of surveilling social media profiles); *Timeline of Social Media Monitoring for Vetting by the Department of Homeland Security and the State Department*, Brennan Center for Justice (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/timeline-social-media-monitoring-vetting-department-homeland-security-and (describing both manual and automatic screening of the social media accounts).

[10] Mijente et al., Who's Behind ICE 58-63 (2023), https://mijente.net/wp-content/uploads/2023/02/Who-is-Behind-ICE-The-Tech-and-Data-Companies-Fueling-Deportations_v4.pdf.

[11] Mijente et al., The Deadly Digital Border Wall 12 (2021), https://notechforice.com/wp-content/uploads/2021/10/Deadly.Digital.Border.Wall_.pdf.

[12] Alvaro Bedoya, *The Cruel New Era of Data-Driven Deportation*, Slate (Sept. 22, 2020), https://slate.com/technology/2020/09/palantir-ice-deportation-immigrant-surveillance-big-data.html; Drew Harwell, *ICE Investigators Used a Private Utility Database Covering Millions to Pursue Immigration Violations*, Washington Post (Feb. 26, 2021), https://www.washingtonpost.com/technology/2021/02/26/ice-private-utility-data/;

immigration agencies such as "social media surveillance, access to jail booking data, face recognition and 'geolocation analysis & geographic mapping' of cellphones," including "large volume online batching" and analysis of the data.[13]

Emphasizing that law enforcement, immigration, and related agencies fall within the Draft Memorandum's ambit is necessary to foreclose abuse of accommodations made for law enforcement in the Draft Memorandum. For example, the Draft Memorandum advises that agencies' inventories of AI use cases may not have to include "sensitive law enforcement"[14] information and that immediate notice may not be practicable for individuals involved in law enforcement proceedings.[15] It is critical the final memorandum underscore its applicability to law enforcement, immigration, and similar agencies to preclude these exceptions from swallowing the rule.

B. OMB Should Reconsider Exceptions for National Security Systems and Intelligence Agencies

OMB should reconsider its wholesale exclusion of national security systems and its broad carve-outs for intelligence and defense agencies in the Draft Memorandum.[16] These AI systems may involve some of the federal government's most consequential decisions, but OMB's approach would allow them to continue delaying the adoption of critical safeguards. These agencies should not be categorically excluded from the basic protections contemplated by OMB. Instead, OMB's memorandum should encompass such agencies wherever possible and permit calibration of AI requirements only for specific use cases where a modification is strictly justified by national security needs and subject to robust internal and external oversight.

The Draft Memorandum largely parallels President Biden's recent Executive Order on "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence"[17] in its treatment of these systems. The Executive Order excludes "national security systems" from its requirements,[18] and subjects those systems to a separate, future process, culminating in submission of a "National Security Memorandum on AI" to the President.[19] Intelligence agencies—including the Office of the Director of National Intelligence, the Central Intelligence

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Douglas MacMillan and Elizabeth Dwoskin, *The War Inside Palantir: Data-Mining Firm's Ties to ICE Under Attack by Employees*, Washington Post (Aug. 22, 2019), https://www.washingtonpost.com/business/2019/08/22/war-inside-palantir-data-mining-firms-ties-ice-under-attack-by-employees.

[13] Sam Biddle, *LexisNexis Sold Powerful Spy Tools to U.S. Customs and Border Protection*, The Intercept (Nov. 16, 2023), https://theintercept.com/2023/11/16/lexisnexis-cbp-surveillance-border.

[14] Draft Memorandum at 4 n.8.

[15] Draft Memorandum at 20 n.35.

[16] These comments use "intelligence agencies" to refer to the agencies defined in 50 U.S.C. § 3003.

[17] Executive Order 14110 of October 30, 2023, sec. 4.8, 88 Fed. Reg. 75191, 75204 (Nov. 1, 2023).

[18] *E.g.*, Executive Order 14110 of October 30, 2023, secs. 4.1(a)(ii), 10.1(a), 10.1(i) (excluding national security systems from various AI governance protocols).

[19] Executive Order 14110 of October 30, 2023, sec. 4.8.

Agency, the National Security Agency, and the intelligence elements of the Federal Bureau of Investigation, the Department of Homeland Security, and the Drug Enforcement Administration[20]—would also be subject to that future National Security Memorandum.[21] OMB's Draft Memorandum adopts a similar approach[22] by exempting the intelligence agencies from AI use-case inventories and from adhering to the Draft Memorandum's minimum risk management practices.[23]

OMB should change its approach and avoid "national security" exceptionalism wherever possible. U.S. intelligence agencies and the military have raced to integrate AI into some of the government's most profound decisions: who it surveils, who it adds to government watchlists, who it labels a "risk" to national security, and even who it targets using lethal weapons.[24] In many of these areas, the deployment of AI already appears to be well underway. But the public knows almost nothing about the systems that agencies like the FBI, DHS, CIA, and National Security Agency are developing or deploying, and even less about what concrete safeguards exist to ensure fairness, equal treatment, privacy, and due process—if any.[25]

The Draft Memorandum suggests that these agencies' uses of AI are "governed through other policy,"[26] but that is a significant overstatement. The policy sources it identifies are largely general statements of principles without meaningful accountability mechanisms or binding rules. For example, ODNI's *Principles for Artificial Intelligence Ethics for the Intelligence Community* describes six high-level guidelines—including a commitment to be "transparent and accountable," but the public to date has seen little evidence of either.[27] The Defense Department recently released a toolkit "to help DoD personnel design, develop, deploy, and use AI systems responsibly," but using the toolkit is voluntary.[28] Overall, the intelligence and defense agencies lack specific rules and safeguards for their AI systems, as well as clear processes to implement and enforce those rules.

In addition, the elements of the National Security Memorandum mandated in the Executive Order lack the specificity of OMB's Draft Memorandum, and there is no guarantee the

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[20] 50 U.S.C. § 3003; Executive Order 12333 of December 4, 1981, sec. 3.5(h).
[21] Executive Order 14110 of October 30, 2023, sec. 4.8(a)-(b).
[22] Draft Memorandum at 3 (exempting "national security systems" from the scope of the Draft Memorandum).
[23] Draft Memorandum at 4, 10 (excluding the Intelligence Community from use case inventories and minimum risk management practices).
[24] *See, e.g.*, National Security Commission on Artificial Intelligence, Final Report at 81, 109–10 (2021), https://assets.foleon.com/eu-west-2/uploads-7e3kk3/48187/nscai_full_report_digital.04d6b124173c.pdf.
[25] *See Id.* at 141–54, 395–410.
[26] Draft Memorandum at 3 n.6.
[27] Office of the Director of National Intelligence, Intelligence Community Principles of Artificials (2020), https://www.dni.gov/index.php/newsroom/reports-publications/reports-publications-2020/3634-principles-of-artificial-intelligence-ethics-for-the-intelligence-community-1692377385.
[28] Department of Defense, *CDAO Releases Responsible AI (RAI) Toolkit for Ensuring Alignment With RAI Best Practices* (Nov. 14, 2023), here.

eventual memorandum will include meaningful protections. To fill this critical gap, OMB should—to the extent it is able—extend the Draft Memorandum's provisions to national security systems that affect people in the United States and subject the Intelligence Community to the requirements to provide use-case inventories, subject to a strict declassification review process, and adhere to minimum risk-management practices.

A careful reading of the Executive Order and the Advancing American AI Act reveals that OMB is not precluded, at the very least, from extending the minimum risk-management practices to intelligence and defense agency uses of AI that are not "national security systems." Although the Advancing American AI Act does not mention "national security systems," the Executive Order exempts those systems from the scope of OMB's final memorandum.[29] The Executive Order does not, however, exclude intelligence and defense agencies wholesale.

Moreover, although the Advancing American AI Act does exclude some agencies from its provisions, those exclusions apply only to the Act's use case inventories. The Act excludes intelligence agencies from its provisions generally,[30] but nothing in that Act expressly exempts intelligence agencies from the minimum risk-management practices. In addition, the Act's exclusion of defense agencies is expressly limited to the use-case inventories,[31] and the minimum practices are still applicable, which the Draft memorandum acknowledges.[32] It may also be permissible to extend other provisions in the Draft Memorandum to intelligence and defense agencies.

To the extent that OMB is precluded by either the Executive Order or statutory law from mandating protections for national security systems or intelligence and defense agencies, we urge the President and Congress to revisit those limitations. Regardless, to ensure accountability, OMB should require *all* agencies to identify which AI systems they believe qualify as "national security systems" and the basis for that determination, given the potential misuse of this label to shield AI systems deployed for purposes such as ordinary law enforcement and immigration.

C. OMB Should Clarify that "Covered AI" Includes Less Advanced Algorithmic Systems

Although the definition of "artificial intelligence" adopted by the Draft Memorandum[33] is capacious enough to accommodate many automated, computerized processes already in place,

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[29] Executive Order 14110 of October 30, 2023, secs. 10.1(b)(iv), 10.1(i).
[30] Pub. L. No. 117-263, div. G, title LXXII, subtitle B, § 7228, https://www.congress.gov/117/plaws/publ263/PLAW-117publ263.pdf.
[31] *Id.* § 7225(d).
[32] Draft Memorandum at 5.
[33] Draft Memorandum at 22 (artificial intelligence means an "artificial system" that meets one of five prongs, including "perform[ing] tasks under varying and unpredictable circumstances without significant human oversight," "solv[ing] tasks requiring human-like perception [or] cognition," "think[ing] or act[ing] like a human," "approximat[ing] a cognitive task," or "act[ing] rationally."

OMB should clarify in the final draft of the memorandum that less sophisticated algorithmic decision-making is within the scope of the guidance. In particular, OMB should clarify that systems that rely on or are derived from statistical modeling are covered by the memorandum.

That clarification is crucial because many critical, rights-impacting governmental functions are already being carried out by algorithmic systems that are derived from statistical modeling and may fall short of popular depictions of "artificial intelligence."[34] For example, a litigator with the ACLU's Idaho affiliate recently testified before a U.S. Senate Committee about his experience challenging black-box algorithms used by Idaho to determine individuals' Medicaid benefits.[35] The algorithmic system reduced or denied benefits—sometimes by more than 30 percent—without explanation.[36] The algorithmic system was implemented without notice, and the State of Idaho and its private vendor attempted to hide its functioning behind trade secrets claims.[37] The ACLU of Idaho eventually prevailed in court and learned that Idaho's system was "a set of formulas in a fairly basic Microsoft Excel spreadsheet," which computed each person's benefits in "hidden cells," leaving state officials unable to explain how or why it reached its benefits determinations.[38] Despite its outsized impact on individuals' rights, Idaho's algorithmic system lacked critical safeguards, based on underlying models that "Department staff had just brainstormed," but "never validated, standardized, or audited the instrument."[39]

Similarly, the PATTERN risk assessment developed by the U.S. Department of Justice is used to inform programming and release decisions for individuals incarcerated in federal facilities. PATTERN scores can be calculated by adding up whole numbers based on roughly a dozen pieces of information about a person, and these scores may be calculated using paper-based forms or processes.[40] While a tool like PATTERN may appear to be simple, the tool was developed using statistical modeling techniques, including "machine learning boosted regression

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[34] *See* James Vincent, *Top AI Researchers and CEOs Warn Against "Risk of Extinction" in 22-Word Statement*, The Verge (May 30, 2023), https://www.theverge.com/2023/5/30/23742005/ai-risk-warning-22-word-statement-google-deepmind-openai.
[35] Testimony of Ritchie Eppink, Hearing AI in Government Before the S. Comm. On Homeland Security & Government Affairs (May 16, 2023), https://www.hsgac.senate.gov/hearings/artificial-intelligence-in-government.
[36] *Id.* at 2.
[37] *Id.* at 3.
[38] *Id.*
[39] *Id.*
[40] See Federal Bureau of Prisons, PATTERN Risk Assessment, https://www.bop.gov/inmates/fsa/pattern.jsp (last visited November 27, 2023).

procedures,"[41] and it is used in ways that, like seemingly more complex AI systems, raise serious concerns about transparency, accuracy, and fairness.[42]

Algorithmic systems like PATTERN and the tools used in Idaho are likely pervasive,[43] and their harms are exactly the harms the Draft Memorandum is meant to address. Excluding such rudimentary systems would significantly undermine the memorandum's efficacy. Importantly, the Draft Memorandum's definition of "artificial intelligence" can be read to encompass such algorithmic systems—for example, as a "set of techniques . . . that is designed to approximate a cognitive task."[44] OMB should clarify that this language should be interpreted to include such systems that rely on statistical modeling, especially given that many of the definition's prongs seem to focus on advanced and emerging AI technologies such as those that "learn from experience and improve performance," that "solve tasks requiring human-like perception [or] cognition," or that are "designed to think or act like a human."[45]

More generally, the definition hinges on terms—like "human-like perception, "act rationally," "cognitive task," and "embodied robot," among others—that lack clear definitions in AI research or policy communities.[46] In addition, the structure of the definition, where AI systems are described as designed to "act like...human[s]," "act rationally," "achieve goals," or "perform tasks," employs a type of AI anthropomorphism that may obscure the roles and responsibilities of human decision-makers who make critical decisions shaping the design and deployment of AI systems, including deciding whether the systems are built or used in the first place.[47] Efforts to regulate government uses of AI should steer clear of definitions that may

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[41] National Institute of Justice, 2021 Review and Revalidation of the First Step Act Risk Assessment Tool at 16 (2021), https://nij.ojp.gov/library/publications/2021-review-and-revalidation-first-step-act-risk-assessment-tool.
[42] See Formal Statement of the American Civil Liberties Union For a Stakeholder Engagement Session on First Step Act Implementation, ACLU (September 27, 2022), https://www.aclu.org/wp-content/uploads/document/ACLU_PATTERN_Public_Comment.pdf; Coalition Letter on the Use of PATTERN Risk Assessment in Prioritizing Release in Response to the COVID-19 Pandemic, ACLU (April 3, 2020), https://www.aclu.org/letter/coalition-letter-use-pattern-risk-assessmentprioritizing-release-response-covid-19-pandemic; ACLU, Comment Letter to Department of Justice on PATTERN First Step Act (Sept. 3, 2019), https://civilrights.org/resource/comment-letter-to-department-of-justice-on-pattern-first-step-act/.
[43] Julia Angwin, The Seven-Year Struggle to Hold an Out-of-Control Algorithm to Account, The Markup (Oct. 8, 2022), https://themarkup.org/newsletter/hello-world/the-seven-year-struggle-to-hold-an-out-of-control-algorithm-to-account; Dillon Reisman, *How the Government Relies on Algorithms to Allocate Healthcare Benefits—and Why These Secret Formulas Threaten Patients' Fundamental Rights*, ACLU NJ (Aug. 9, 2022), https://www.aclu-nj.org/en/news/howgovernment-relies-algorithms-allocate-healthcare-benefits-and-why-these-secret-formulas.
[44] Draft Memorandum at 22.
[45] *Id.*
[46] Murray Shanahan, *Talking About Large Language Models*, arXiv (2022), https://arxiv.org/abs/2212.03551.
[47] David Watson, *The Rhetoric and Reality of Anthropomorphism in Artificial Intelligence*, 29 Minds and Machines 417-440 (2019), https://link.springer.com/article/10.1007/s11023-019-09506-6.

miscommunicate the capabilities of AI systems, contribute to unwarranted AI "hype,"[48] or diminish the role of human decision-makers, and should instead focus on the concrete inputs and outputs of AI systems and the tasks such systems are used to support or complete. Absent adjustments to the definition itself, appropriate revisions and clarifications to the "technical context" for interpreting the definition, as described below, could help mitigate these issues.

OMB could significantly clarify and strengthen the scope of "covered AI" in the memorandum with appropriate edits to the "technical context" included in the Draft Memorandum for interpreting the definition of "artificial intelligence."[49] In addition to clarifying that systems relying on or derived from statistical modeling are considered AI for the purposes of the memo, OMB should clarify part 2 of the "technical context," which states that "[t]his definition of AI does not include robotic process automation or other systems whose behavior is defined only by human-defined rules or that learn solely by repeating an observed practice exactly as it was conducted."[50] "Robotic process automation" is a term often used to describe a broad class of technologies, including systems that use or may be integrated with artificial intelligence or machine learning methods.[51] As highlighted in a recent report about government uses of AI systems, process automation of varying complexity is often closely intertwined—and at times inextricable from—government uses of statistical modeling and AI systems.[52] OMB should define or clarify what processes are considered "robotics process automation," and to the extent that the language in part 2 excludes algorithmic systems such as PATTERN or those deployed in Idaho's Medicaid benefits determinations, OMB should remove such language altogether.

OMB should also clarify part 3 of the "technical context," which states in part that "the technical complexity of a system (e.g., the number of parameters in a model, the type of model, or the amount of data used for training purposes) is not a relevant consideration for determining whether it constitutes AI."[53] Information about a model's complexity can be useful for understanding a system's functions and impacts. If the goal of part 3 is to clarify that no system should be considered too simple to be a covered AI system under the memo due to its relative

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[48] Melissa Heikkilä, *Unpacking the Hype Around OpenAI's Rumored New Q* Model*, MIT Technology Review (Nov. 27, 2023) ("And while it might be great PR, these hype cycles do more harm than good for the entire field by distracting people from the real, tangible problems around AI.").
[49] Draft Memorandum at 23.
[50] Draft Memorandum at 23.
[51] For example, several large robotic process automation (RPA) vendors with public sector clients describe how RPA and AI can be leveraged together. *See, e.g.*, *AI and RPA*, UiPath, https://www.uipath.com/automation/ai-and-rpa (last visited November 27, 2023);*Combine the Power of RPA and AI to Empower Rapid End-to-End Business Process Automation*, Automation Anywhere, https://www.automationanywhere.com/rpa/intelligent-automation (last visited November 27, 2023).
[52] Grant Fergusson, Outsourced and Automated: How AI Companies Have Taken Over Government Decision-Making, Electronic Privacy Information Center (2023), https://epic.org/wp-content/uploads/2023/09/FINAL-EPIC-Outsourced-Automated-Report-Appendix-Included.pdf
[53] Draft Memorandum at 23.

lack of technical complexity as measured through parameter count, training data size, or related metrics, that point should be made explicitly.

D. OMB Should Extend the Draft Memorandum's Provisions to Federally Funded Programs

The Draft Memorandum currently applies only to federal agencies—namely, any "executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch," with a few enumerated exceptions.[54] The scope of Draft Memorandum at the federal level is appropriately broad, and OMB should not narrow the definition of "agency" in the final memorandum. However, the Draft Memorandum appears to exclude state and local programs receiving federal assistance; this exclusion will leave many particularly dangerous uses of AI unregulated, and OMB should take steps to expand the scope of the memorandum's applicability to federally funded programs. In addition, it is crucial that OMB ensure that the Draft Memorandum reach federal contractors and AI procured by federal agencies, which the Draft Memorandum already contemplates.[55]

The exclusion of federally funded programs is particularly pernicious because federal funds may help support uses of AI with significant impacts on rights and safety. For example:

- As described, above, Idaho's Department of Health and Welfare was employing algorithmic systems to determine benefits for federally funded Medicaid programs.[56] Although the system cut some individuals' benefits by as much as 30 percent, officials were unable to explain why determinations were reached, and litigation by ACLU of Idaho revealed that the system was implemented without meaningful safeguards.
- An ACLU and Human Rights Data Analysis Group audit of an algorithmic risk-scoring system used to inform child welfare decision-making in Allegheny County, Pennsylvania highlighted several ways in which the algorithm's design and deployment could enable algorithmic bias.[57] The risk-scoring system could potentially disproportionately flag Black families and families with disabilities for investigation. The audit highlighted the

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[54] *See* 44 U.S.C. § 3502(1).
[55] Draft Memorandum at 21.
[56] Testimony of Ritchie Eppink, Hearing AI in Government Before the S. Comm. On Homeland Security & Government Affairs (May 16, 2023), https://www.hsgac.senate.gov/hearings/artificial-intelligence-in-government.
[57] Marissa Gerchick et al., *How Policy Hidden in an Algorithm is Threatening Families in This Pennsylvania County*, ACLU (Mar. 14, 2023), https://www.aclu.org/news/womens-rights/how-policy-hidden-in-an-algorithm-is-threatening-families-in-this-pennsylvania-county; Marissa Gerchick et al., ACLU, The Devil is in the Details: Interrogating Values Embedded in the Allegheny Family Screening Tool (2023), https://www.aclu.org/the-devil-is-in-the-details-interrogating-values-embedded-in-the-allegheny-family-screening-tool. Allegheny County and its Department of Human Services receive federal funds. *DHS Funding*, Allegheny County, https://www.alleghenycounty.us/Human-Services/About/Funding-Sources.aspx (last visited Nov. 22, 2023); *Allegheny, County Of*, TAGGS, https://taggs.hhs.gov/Detail/RecipDetail?arg_EntityId=swAAHUn5jiXXGX5RfqF%2Fmg%3D%3D (last visited Nov. 22, 2023).

system's use of existing government databases, including county child welfare, juvenile probation, and behavioral health records. Problematically, those databases reflect the lives of those who have more contact with government agencies and systems shaped by historical and ongoing discrimination—not necessarily those who pose greater "risk" to their children. Additionally, the outcome the tool predicts is the risk of child removal by the County, based on its historical practices. Because government databases, including those regarding child removal statistics, reflect systems shaped by historical and ongoing discrimination, using them to identify the characteristics of households more likely to have a child removed means selecting from a pool of factors that over-represents some groups of people and underrepresent others.

- "[C]rime-fighting grants" provided through the U.S. Department of Housing and Urban Development have been used by local housing authorities to deploy AI-powered surveillance.[58] For example, in "rural Scott County, Va., cameras equipped with facial recognition [technology] scan everyone who walks past them, looking for people barred from public housing."[59] Numerous other uses of facial recognition and similar technology in federally funded housing have been well documented.[60] Likewise, public housing authorities may rely on algorithmically driven tenant screening, including criminal background checks used as a prerequisite for public housing, often with discriminatory effects on over-policed populations.[61]
- Various federal programs such as the Department of Justice's Community Oriented Policing Services program and the Edward Byrne Memorial Justice Assistance Grant Program, among others,[62] fund local law enforcement deployment of AI-powered surveillance.[63] These can include facial recognition technology, automated license plate

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[58] Douglas MacMillan, *Eyes on the Poor: Cameras, Facial Recognition Watch Over Public Housing*, Washington Post (May 16, 2023), https://www.washingtonpost.com/business/2023/05/16/surveillance-cameras-public-housing.
[59] *Id.*
[60] *Id.*; Dan Bateyko, *Taken for Granted: Where's the Oversight of AI and Federal Funding?*, CDT (Aug. 7, 2023), https://cdt.org/insights/taken-for-granted-wheres-the-oversight-of-ai-and-federal-funding.
[61] DeMetria McCain, Principal Deputy Assistant Secretary for Fair Housing and Equal Opportunity, U.S. Department of Housing and Urban Development, Memorandum on Implementation of the Office of General Counsel's Guidance on Application of Fair Housing Act Standards to the Use of Criminal Records by Providers of Housing and Real Estate-Related Transactions 2 (June 10, 2022), https://www.hud.gov/program_offices/fair_housing_equal_opp/fheo_guidance ("[H]ousing providers sometimes utilize third-party companies to independently screen and reject applicants using algorithms that may contain racial or other prohibited bias in their design."); *see* Comments of the ACLU, Tenant Screening Request for Information, Docket No. FTC-2023-0024 (May 30, 2023), https://www.aclu.org/wp-content/uploads/2023/07/2023.05.30-ACLU-Comment-to-FTC-CFPB-Tenant-Screening-RFI.pdf (describing private uses of algorithmic tenant screening).
[62] Brian Naylor, *How Federal Dollars Fund Local Police*, NPR (June 9, 2020), https://www.npr.org/2020/06/09/872387351/how-federal-dollars-fund-local-police.
[63] Matthew Guariglia & Dave Maass, *How Police Fund Surveillance Is Part of the Problem*, EFF (Sept. 23, 2020), https://www.eff.org/deeplinks/2020/09/how-police-fund-surveillance-technology-part-problem.

readers, predictive policing, gunshot detection and social media surveillance.[64] Even COVID-19 relief funds have been used for such AI-driven law enforcement technologies.[65]

Excluding these use cases—and countless others—would drastically undermine the Draft Memorandum's efficacy. President Biden's Executive Order already recognizes the importance of reaching federally funded state and local level programs in part. For example, it requires the federal Secretary of Health and Human Services to issue a plan "addressing the use of automated or algorithmic systems in the implementation by States and localities of public benefits and services administered by the Secretary."[66]

OMB should follow the lead established by President Biden and ensure the protections in the Draft Memorandum extend to federally funded state and local programs. Recognizing that such programs can have complex administrative regimes, OMB has several options to ensure that the extension is effective. Those options might include empowering CAIOs to survey state and local use cases of AI in federally funded programs, to issue corresponding guidance, and to review rulemaking authority related to the use of AI in federally funded programs. In the final memorandum, OMB may also identify specific federally funded programs, including as illustrative examples, that should adhere to the requirements of the memorandum.

II. OMB Should Maintain or Expand the Scope of Rights-Impacting AI

Under the Draft Memorandum, covered agencies must implement minimum risk management practices for AI that impacts rights and safety, and OMB should either expand the scope of "rights-impacting AI" or—at minimum—refuse to narrow it.

In the Draft Memorandum, "rights-impacting AI" is defined as AI that has a "legal, material, or similarly significant effect" on individuals or communities across three critical groups of rights: (1) civil rights and civil liberties, including privacy, freedom of speech, voting, autonomy, and the right to be free from discrimination, excessive punishment, and unlawful surveillance; (2) equitable access to critical life opportunities that have traditionally been protected by the law—such as education, housing, credit, and employment; and, (3) access to critical resources or services—such as "healthcare, financial services, social services,

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[64] Tate Ryan-Mosely, *How US Police Use Counterterrorism Money to Buy Spy Tech*, MIT Technology Review (Dec. 7, 2022), https://www.technologyreview.com/2022/12/07/1064354/police-counterterrorism-money-buy-spy-tech-surveillance-fema; Brandon Block, *Federal Aid Is Supercharging Local WA Police Surveillance Tech*, Crosscut Cascade PBS (July 26, 2023), https://crosscut.com/investigations/2023/07/federal-aid-supercharging-local-wa-police-surveillance-tech.

[65] Chris Baumohl, *Two Years In, COVID-19 Relief Money Fueling Rise of Police Surveillance*, EPIC (Mar. 9, 2023), https://epic.org/two-years-in-covid-19-relief-money-fueling-rise-of-police-surveillance; Anastasia Valeeva, Wihua Li & Susie Cagle, *Rifles, Tasers and Jails: How Cities and States Spent Billions of COVID-19 Relief*, The Marshall Project (Sept. 7, 2022), https://www.themarshallproject.org/2022/09/07/how-federal-covid-relief-flows-to-the-criminal-justice-system.

[66] Executive Order 14110 of October 30, 2023, sec. 7.2(b)(i).

transportation, non-deceptive information about goods and services, and government benefits or privileges."[67]

The definition's broad scope is necessary to meet existing and imminent challenges as AI continues to develop at an incredible pace across governmental agencies and economic sectors. As described throughout these comments, artificial intelligence impacts individuals in numerous ways, including through various governmental uses:

- the use of AI-powered surveillance such as facial recognition technology and automated license plate readers by law enforcement;
- sophisticated AI-driven surveillance used by immigration agencies, including social media monitoring, facial recognition and other biometric surveillance, and automated surveillance towers "capable of identifying and capturing human faces";
- the use of AI to identify "risks" to national security and for placement on government watchlists;
- automated determinations of eligibility for governmental benefits or benefits amounts;
- scoring families for investigation by child welfare agencies; and,
- algorithmic screening of tenants in public housing.

In addition, well-documented AI usage by private entities may be reflected in governmental uses as well:

- AI tools are used to recruit and source job applicants, including through targeted advertising and specialized recruitment platforms, often with discriminatory effects on women, people of color, and older individuals;[68]

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[67] *Id.*

[68] See Sheridan Wall & Hilke Schellmann, *LinkedIn's Job-Matching AI was Biased. The Company's Solution? More AI.*, MIT Tech. Rev. (June 23, 2021), https://www.technologyreview.com/2021/06/23/1026825/linkedin-ai-bias-ziprecruiter-monster-artificial-intelligence; *Facebook EEOC Complaints*, ACLU (Sept. 25, 2019), https://www.aclu.org/cases/facebook-eeoc-complaints; Ariana Tobin & Jeremy Merrill, *Facebook is Letting Job Advertisers Target Only Men*, ProPublica (Sept. 18, 2018), https://www.propublica.org/article/facebook-is-letting-job-advertisers-target-only-men; Ava Kofman & Ariana Tobin, *Facebook Ads Can Still Discriminate Against Women and Older Workers, Despite a Civil Rights Settlement*, ProPublica (Dec. 13, 2019), https://www.propublica.org/article/facebook-ads-can-still-discriminate-against-women-and-older-workers-despite-a-civil-rights-settlement; *see* Pauline Kim & Sharion Scott, *Discrimination in Online Employment Recruiting,* 63 St. Louis University Law Journal 1, 8 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3214898 (describing study that found that simulated users who were identified as male or female and who engaged in identical web browsing activities related to job searches on Google were shown very different ads, with an ad for coaching on higher paying executive jobs shown significantly more often to men).

- automated screening tools are used to "to filter out or rank applicants with automated resume screening based on knockout questions, keyword requirements, or specific qualifications or characteristics";[69]
- targeted advertising for housing and tenant screening scores can excluded people of color, with adverse housing history, or with criminal records unrelated to their qualification for housing from being able to find housing;[70]
- the algorithms underlying credit scores, including emerging, alternative models, rely on historic data and consequently "bake in" existing systemic biases, resulting in in disproportionately lower scores for already marginalized populations;[71]
- algorithmic systems and similar technologies are used in evaluating mortgage applications[72] and in insurance underwriting,[73] which have been found to disproportionately deny loans to people of color;
- some clinical decision tools used to recommend patient care have been found to have a racial bias, despite not considering race as an express input;[74] and,
- private and public educational institutions are deploying AI acquired from private vendors to detect student behavior captured in video surveillance or to analyze student sentiment in social media posts and private messages.[75]

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[69] ReNika Moore, ACLU, Testimony Before the Equal Employment Opportunity Commission (Jan. 31, 2023), https://www.eeoc.gov/meetings/meeting-january-31-2023-navigating-employment-discrimination-ai-and-automated-systems-new/moore (citing Aaron Rieke & Miranda Bogen, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, Upturn (Dec. 10, 2018), https://www.upturn.org/work/help-wanted).

[70] Comments of the ACLU, Tenant Screening Request for Information, Docket No. FTC-2023-0024 (May 30, 2023), https://www.aclu.org/wp-content/uploads/2023/07/2023.05.30-ACLU-Comment-to-FTC-CFPB-Tenant-Screening-RFI.pdf (describing private uses of algorithmic tenant screening); Charge of Discrimination, HUD v. Facebook (Mar. 28, 2019), https://www.hud.gov/sites/dfiles/Main/documents/HUD_v_Facebook.pdf; Muhammad Ali et al., Discrimination Through Optimization: How Facebook's Ad Delivery Can Lead to Skewed Outcomes (2019), https://arxiv.org/abs/1904.02095; Kaveh Waddell, *How Tenant Screening Reports Make it Hard for People to Bounce Back from Tough Times*, Consumer Reports (Mar. 11, 2021), https://www.consumerreports.org/electronics/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426.

[71] National Consumer Law Center, Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination at 5-7 (2016), https://www.nclc.org/resources/past-imperfect-how-credit-scores-and-other-analyticsbake-in-and-perpetuate-past-discrimination; Student Borrower Protection Center, Educational Redlining at 15 (2020), https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf.

[72] Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, The Markup (Aug. 25, 2021), https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms.

[73] Ronda Lee, *AI Can Perpetuate Racial Bias in Insurance Underwriting*, Yahoo! Money (Nov. 1, 2022), https://money.yahoo.com/ai-perpetuates-bias-insurance-132122338.html.

[74] Ziad Obermeyer et al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 Sci. 447 (Oct. 25, 2019), https://www.science.org/doi/10.1126/science.aax2342.

[75] Letter from Rep. Lori Trahan et al. to Hon. Miguel Cardona, Secretary, U.S. Department of Education (Oct. 19, 2023), https://trahan.house.gov/uploadedfiles/final_edtech_letter_10.12.23.pdf; Chad Marlow et al., ACLU, Digital

The critical impacts of AI extend beyond those examples, and the broad definition of "rights-impacting AI" is necessary to cover the broad scope of AI's impact. To ensure the final memorandum provides meaningful, comprehensive protections, OMB should resist calls to narrow the scope of "right-impacting AI."

Moreover, the final memorandum should expand on—or at least maintain—the Draft Memorandum's list of presumptively rights-impacting uses of AI. Uses that are presumed to be rights impacting include "[d]ecisions to block, remove, hide, or limit the reach of protected speech," law enforcement use of risk assessments and facial recognition, school discipline, tenant screening, determining the terms of employment, and recommendations or decisions about child welfare or child custody.[76] Presumptions help reduce the cost to individuals if agencies incorrectly apply the definition of "right-impacting AI." The list of use cases that are presumed to be rights-impacting are too important and too fundamental to leave to agencies' discretion in the first instance. Instead, the presumptions appropriately place the burden on agencies to demonstrate the *lack* of impact on rights in the most critical instances.

However, many of the presumptive rights-impacting use cases are deployed by state and local governmental entities receiving federal funding—use cases that are currently excluded from the scope of the Draft Memorandum. As urged above, the final memorandum should extend its requirements to state and local programs that receive federal assistance. In addition, if the Draft Memorandum's scope is expanded to include national security systems and intelligence agencies, the list of presumptively rights-impacting uses cases should be adjusted accordingly to include national security decisions about surveillance, governmental watchlisting, searches at the border or related to immigration, and national security-related risk assessments.

III. The Final Memorandum Should Maintain the Strength of Key Minimum Practices While Bolstering Others

A. The Draft Memorandum Appropriately Requires Independent Assessments of AI Harms and Discontinuing Harmful AI

The Draft Memorandum underscores that an AI system should be deployed for a particular use case only if its harms are outweighed by its benefits and the harms have been

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Dystopia: The Danger in Buying What the EdTech Surveillance Industry Is Selling at48-50 (2023), https://www.aclu.org/report/digital-dystopia-the-danger-in-buying-what-the-edtech-surveillance-industry-is-selling; Elizabeth Laird et al., Center for Democracy & Technology, Off Task: EdTech Threats to Student Privacy and Equity in the Age of AI (2023), https://cdt.org/insights/report-off-task-edtech-threats-to-student-privacy-and-equity-in-the-age-of-ai; Ari Sen & Dereka K. Bennett, *Tracked: How Colleges Use AI to Monitor Student Protests*, Dallas Morning News (Sept. 20, 2022), https://interactives.dallasnews.com/2022/social-sentinel; Mark Keierleber, *Meet the Gatekeepers of Students' Private Lives*, The 74 (May 2, 2022), https://www.the74million.org/article/meet-the-gatekeepers-of-students-private-lives.

[76] Draft Memorandum at 12-13.

appropriately mitigated.[77] Several key components of the minimum risk management practices underscore this commitment to discontinuing—or not deploying—harmful AI:

- The Draft Memorandum instructs that AI impact assessments should assess the "potential risks of using AI, as well as what, if any, additional mitigation measures, beyond these minimum practices, the agency will take to help reduce these risks." The Draft Memorandum emphasizes, "The expected benefits of the AI functionality should be considered against its potential risks, and if the benefits do not meaningfully outweigh the risks, agencies should not use the AI."[78]
- Agencies are also required to test AI in its "real-world context," which must "mirror as closely as possible the conditions in which the AI will be deployed" and consider both the technology itself and feedback from likely operators. Through these results, agencies should demonstrate that the AI will "achieve its expected benefits while sufficiently mitigating risks associated with the AI, or else the agency should not use the AI."[79] Real-world testing must be accompanied by an independent review.[80]
- Ongoing monitoring should continue to assess risks to rights and safety, including in a real-world context, and develop new mitigation techniques to reduce those risks. Again: "Where the AI's risks to rights or safety exceed an acceptable level and where mitigation is not practicable, agencies must stop using the affected AI as soon as is practicable."[81]

The Draft Memorandum's emphasis on real-world, independent evaluation of risks and benefits of AI—and discontinuing, decommissioning, or not deploying AI with excessive risks—is appropriate and should be maintained in the final memorandum. Experience has demonstrated that real-world testing environments are necessary to identify harms from human-AI interaction, which may arise from the data used to train the model, the model's use in unintended or unanticipated environments, incorrect interpretation of its output by operators, or other factors.

For example, as highlighted by an independent analysis of the system, one lending model developed as an alternative to traditional credit scores "charged higher interest rates and origination fees" for borrowers who had attended Historically Black Colleges and Universities (HBCUs) and Hispanic-Serving Institutions (HSIs).[82] Subsequent investigations revealed that although the lending model did not rely on specific institutions, it did categorize those institutions based on "average incoming standardized test scores," which led to the

[77] Draft Memorandum at 20.
[78] Draft Memorandum at 15.
[79] Draft Memorandum at 16.
[80] *Id.*
[81] Draft Memorandum at 17.
[82] Student Borrower Protection Center, Educational Redlining at 15 (2020), https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf.

disproportionate treatment of HBCUs and HSIs.[83] Testing in a real-world context by an independent entity was critical to identifying those disparities, and it is possible that further internal real-world testing could have not only identified those disparities before the system was deployed but also led to mitigations, which are still ongoing.[84]

Further, real-world, independent evaluation of the risks and benefits of AI should include feedback from likely operators. For example, the Allegheny Family Screening Tool ("AFST") was developed and implemented by a county child welfare agency to help make screening decisions about whether or not to investigate reports of alleged child maltreatment.[85] The AFST's risk score was designed to reflect the likelihood that the agency would remove a child from the family within two years of the report—not the likelihood that a child will be abused or neglected,[86] a fact acknowledged by the AFST's creators.[87] A later study observed that call screeners who used the tool found that screeners and their supervisors disagreed with the use of child removal as a proxy for child abuse or neglect. Some explained that, based on their experience, "children were often placed in foster care without any concerns of child abuse or neglect."[88] Conversely, another caseworker indicated that a child might never enter the foster system even where legitimate concerns of child maltreatment do exist. On balance, then, the primary tool users found the risk being predicted by the tool to be both over- and under-inclusive. The dissonance between the tool developers and those who would eventually use the tool points to the importance of requiring truly independent evaluations of the pros and cons of using an AI tool and ensuring that pre-deployment real world testing includes solicitation and meaningful consideration of the views of, among others, those who would ultimately use the tool.

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[83] Relman Colfax PLLC, Initial Report of the Independent Monitor 22 (2021), https://www.relmanlaw.com/cases-406.
[84] Relman Colfax PLLC, Third Report of the Independent Monitor 8 (2021), https://www.relmanlaw.com/cases-406.
[85] Marissa Gerchick et al., *How Policy Hidden in an Algorithm is Threatening Families in This Pennsylvania County*, ACLU (Mar. 14, 2023), https://www.aclu.org/news/womens-rights/how-policy-hidden-in-an-algorithm-is-threatening-families-in-this-pennsylvania-county; Marissa Gerchick et al., ACLU, The Devil is in the Details: Interrogating Values Embedded in the Allegheny Family Screening Tool (2023), https://www.aclu.org/the-devil-is-in-the-details-interrogating-values-embedded-in-the-allegheny-family-screening-tool.
[86] Allegheny Cnty. Dep't of Hum. Servs., *Frequently Asked Questions* 6 (updated Apr. 2019), https://www.alleghenycountyanalytics.us/wp-content/uploads/2019/05/FAQs-from-16-ACDHS-26_PredictiveRisk_Package_050119_FINAL-8.pdf.
[87] Rhema Vaithianathan et al., Allegheny Family Screening Tool: Methodology, Version 2, at 7 (2019), https://www.alleghenycountyanalytics.us/wp-content/uploads/2019/05/Methodology-V2-from-16-ACDHS-26_PredictiveRisk_Package_050119_FINAL-7.pdf ("[T]here are valid concerns that the AFST model, and other models trained to predict system outcomes like out-of-home placement, may be predicting the risk of institutionalized or system response rather than the true underlying risk of adverse events."). Ethicists evaluating the AFST concluded that the mismatch between the tool's measurement and use case would be mitigated through subsequent investigation. Rhema Vaithianathan et al., *Developing Predictive Models to Support Child Maltreatment Hotline Screening Decisions: Allegheny County Methodology and Implementation,* Sec. 2, at 4 (2017), https://www.alleghenycountyanalytics.us/wp-content/uploads/2019/05/Methodology-V1-from-16-ACDHS-26_PredictiveRisk_Package_050119_FINAL.pdf.
[88] Hao-Fei Cheng et al., *How Child Welfare Workers Reduce Racial Disparities in Algorithmic Decisions*, 2022 Proc. CHI Conf. on Human Factors in Computing Sys. 13 (2022), https://dl.acm.org/doi/10.1145/3491102.3501831.

The final memorandum should embody this commitment to assessing AI harms and discontinuing harmful AI throughout its provisions. For example, Section 4 includes numerous references to removing barriers to the development and deployment of AI, but almost none to managing the risks posed by AI—and none to discontinuing AI where harms outweigh the risks. It is critical that agencies' AI strategies and other documentation center the need to discontinue harmful uses of AI. Further, the Draft Memorandum contemplates that documentation of minimum risk management practices[89]—including independent assessments of the AI—will be made available to OMB; OMB should further require that documentation to be available in an accessible, approachable format to the public.

B. The Draft Memorandum Correctly Recognizes that Minimum Practices Should Be Applicable Even if AI only Influenced the Decision or Outcome

The Draft Memorandum appropriately recognizes that although AI may not independently make decisions or fully automate a task, it may nonetheless carry risks to rights and safety. For example, the definition of "risks from the use of AI" expressly applies "regardless of whether . . . the AI merely informs the decision or action, partially automates it, or fully automates it."[90] Risks from the use of AI also include where "the humans involved . . . are not aware of how or to what extent the AI influenced or automated the decision or action."[91] Several other provisions in the Draft Memorandum, such as purposes that are presumed to be rights- and safety-impacting, apply where the AI "is used to control or meaningfully influence" an outcome.[92]

The Draft Memorandum's treatment of AI used to "influence" decisions or outcomes corresponds to how AI is actually used in practice, and OMB should maintain this approach. For example, one predictive model used in colleges and universities evaluates individual students' likelihood of academic success and assigns them a corresponding "risk score." One investigation found the model's risk scores correlated with students' race, and in some cases, expressly incorporated it as a "high-impact predictor."[93] Academic advisors often review students' risk scores, and although the model did not independently make decisions about students, its scores might nonetheless "leave advisers with an immediate and potentially life-changing impression of students and their prospects within a given major."[94] Although AI did not make the final

[89] Draft Memorandum at 13.
[90] Draft Memorandum at 24.
[91] *Id.*
[92] *Id.* at 11-12.
[93] Todd Feathers, *Major Universities Are Using Race as a "High Impact Predictor" of Student Success*, The Markup (Mar. 2, 2021), https://themarkup.org/machine-learning/2021/03/02/major-universities-are-using-race-as-a-high-impact-predictor-of-student-success.
[94] *Id.*

determination, its influence was significant, and OMB should ensure the final memorandum covers such scenarios.

C. The Discretion to Waive Minimum Practices or Otherwise Avoid the Memorandum's Obligations Should Be Further Cabined

In the final memorandum, OMB should ensure that waivers of the Draft Memorandum's provisions and other limitations on its scope are not abused. The Draft Memorandum permits agencies to waive the minimum risk management practices.[95] Under the Draft Memorandum, a waiver would be permitted for "a specific covered AI application or component" after the Chief AI Officer makes "a written determination, based upon a system-specific risk assessment, that fulfilling the requirement would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations."[96]

OMB should cabin agencies' discretion to make this determination. In particular, the final memorandum should include descriptions or definitions of what it means to increase risks to safety or rights or to unacceptably impede "critical agency operations." Examples of use cases that meet these requirements—or do not meet these requirements—would also be helpful. At minimum, OMB should clarify that ordinary administrative burdens of discontinuing an AI system due to its harms does not meet these thresholds.

In addition, the Draft Memorandum recognizes other exercises of agency discretion that limit the Memorandum's applicability:

- Agencies retain significant discretion in the first instance to determine which systems qualify as "covered AI" or rise to the level of rights- and safety-impacting AI[97] and do not appear to be required to report the former to OMB.
- "National security systems" are exempt from the Draft Memorandum's requirements altogether, and although the Memorandum incorporates an existing definition for the term,[98] it does not provide procedures for determining what systems meet that definition or reviewing those determinations.[99]
- Covered AI is also subject to the use case inventory only "to the extent practicable" and as permitted for "the protection of privacy and of sensitive law enforcement, national

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[95] Draft Memorandum at 14-15.
[96] Draft Memorandum at 14.
[97] Draft Memorandum 4-5, 10 ("Agencies must review each use of AI that they are developing or using to determine whether it matches the definition of safety-impacting or rights impacting.").
[98] 44 U.S.C. § 3552(b)(6).
[99] The term "national security system" is applicable to federal cybersecurity rules, and the law generally defers to agency heads in evaluating "information security programs" for national security systems. *See* 44 U.S.C. §§ 3555(c), 3557. Such deference is inappropriate when the evaluation is not regarding the security of an agency's own systems, but the system's impact on individuals' and communities' rights and safety.

security, and other protected information,"[100] but the Draft Memorandum provides no guidelines in assessing practicability or when covered AI implicates "sensitive" or "protected information."

These limitations create opportunities for agencies to avoid the Draft Memorandum's obligations.

OMB may avoid abuses of the waiver process and other limitations by ensuring robust reporting and review by OMB of agencies' use of those authorities. The Draft Memorandum already envisions reporting in some instances. For example, beginning "with the use case inventory for 2024, agencies will be required, as applicable, to identify and report . . . any related extensions and waivers granted under" the Draft Memorandum.[101] Agencies are similarly expected to document and report to OMB determinations that a use of AI is not, in fact, safety- or rights-impacting.[102] Other determinations, however, are not reported to OMB, including the determination that a system does not qualify as "covered AI" or is deemed to be a "national security system" or that a use case involves "sensitive law enforcement" and "other protected information."

OMB should consequently expand the Draft Memorandum's reporting requirements to include each of these scenarios. In each instance, the agency should detail the scope, justification, and evidence supporting the determination. The threshold determination that a particular system constitutes "covered AI" is particularly crucial, as the entirety of the Draft Memorandum's obligations depend on that determination. However, overextending reporting for that threshold determination could overburden both agencies and OMB. Consequently, OMB should ensure that its forthcoming "detailed instructions for the [AI use case] inventory"[103] contemplate when agencies should report liminal determinations that particular systems did *not* constitute "covered AI."

In addition to robust reporting requirements for determinations regarding "covered AI," "national security systems," and "protected information," OMB should consider other safeguards to cabin agency discretion. These safeguards might include review by the agency AI oversight board, agency civil rights authorities, or OMB. OMB should also consider time-limiting agency determinations that exempt systems from the Draft Memorandum's obligations.

D. Notice Should Be Further Bolstered and Should Be Provided Before Use of Rights- or Safety-Impacting AI

[100] Draft Memorandum at 4 n.8.
[101] Draft Memorandum at 4-5.
[102] Draft Memorandum at 11.
[103] Draft Memorandum at 4.

The Draft Memorandum envisions providing notice of AI's use through two means: "plain language documentation" in the AI use case inventory and notice to "negatively affected individuals."[104] The Draft Memorandum establishes important parameters around both sets of notices to ensure that they are meaningful for impacted individuals and communities. The inventory, for example, must be in plain language and "generally accessible" while still being "adequately detailed."[105] The inventory must also be located "in contexts where people will interact with or be impacted by the AI."[106] Similarly, the individual notice for negative actions must be timely, consistent with the Plain Writing Act, and available "in multiple languages and through alternative formats and channels," as appropriate.[107] Agencies are encouraged, but not required to provide explanations for decisions and actions by AI.[108]

In the final memorandum, OMB should provide further parameters around the notice requirements for plain language, explainability, timeliness, and accessibility. It should also consider mandating individual notice *prior* to the use of rights- or safety-impacting AI. Each of these five principles are central to the Administration's *Blueprint for an AI Bill of Rights*,[109] and OMB should integrate them into the final memorandum.

First, OMB should bolster the Draft Memorandum's plain language requirements. The Draft Memorandum contemplates agencies' adherence to the Plain Writing Act "if applicable."[110] The Plain Writing Act, however, is applicable only to communications about benefits, taxes, or legal requirements,[111] and by some measures, agency compliance with the Act has been uneven.[112] The final memorandum should supplement that baseline requirement by requiring that both the use case inventory and, especially, notices of negative actions be provided in a short form. The short form should, in clear and plain language, state the decision taken, explain how the decision was reached—as described below—and provide clear instructions for

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[104] Draft Memorandum at 18, 20.
[105] *Id.*
[106] *Id.*
[107] *Id.* at 20.
[108] *Id.* at 20.
[109] White House Office of Science and Technology Policy, Blueprint for an AI Bill of Rights (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf [hereinafter "AI Bill of Rights"].
[110] Draft Memorandum at 20; Pub. L. No. 111-274 (codified at 5 U.S.C. § 301 note), https://www.congress.gov/111/plaws/publ274/PLAW111publ274.pdf.
[111] Pub. L. No. 111-274, sec. 3(2) (codified at 5 U.S.C. § 301 note), https://www.congress.gov/111/plaws/publ274/PLAW111publ274.pdf.
[112] *See* Center for Plain Language, 2022 Federal Plain Language Report Card (2023), https://centerforplainlanguage.org/2022-federal-plain-language-report-card.

recourse.[113] The *AI Bill of Rights* similarly underscored that notices should be "brief and clear" and able to be understood quickly.[114]

Second, OMB should make explanations of AI's decisions mandatory. Under the Draft Memorandum, agencies are only "strongly encouraged to provide explanations for such decisions and actions."[115] Such explanations "might include . . . how and why the AI-driven decision or action was taken" or at least "the general nature of such AI decisions through context such as the data that the decision relied upon, the design of the AI, and the broader decision-making context in which the system operates."[116] The explanations should be mandatory. The basic tenets of due process require that a governmental "decisionmaker should state the reasons for his determination and indicate the evidence he relied on,"[117] and decisions by AI should be no different. Explainability is a cornerstone of the Administration's *AI Bill of Rights*, which stated, "Automated systems should provide explanations that are technically valid, meaningful and useful to you and to any operators or others who need to understand the system, and calibrated to the level of risk based on the context."[118]

Third, the final memorandum should include more concrete requirements for "timely" notice. Timely notice is crucial in ensuring that individuals may appeal or contest an AI's negative impacts, as contemplated by the Draft Memorandum.[119] The final memorandum should specify that the appeals process should give "people ample time and opportunities to respond . . . and opportunities to extend" deadlines,[120] while reducing "burdens such as time spent gathering records and documentation needed to prove eligibility, travel time associated with developing and submitting the collection, or even time waiting to speak with agency personnel."[121] After appeals are filed, agencies should speedily resolve them, as "lost time [waiting for a government response] operates as a kind of tax—a 'time tax'—and it imposes a serious burden on our people as they interact with the Government."[122] The *AI Bill of Rights* also recognizes the importance of notice in seeking redress, stating, "Human consideration and fallback are only useful if they are

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[113] *See* Center for Democracy & Technology et al., Civil Rights Standards for 21st Century Employment Selection Procedures at 25 (2022), https://cdt.org/insights/civil-rights-standards-for-21st-century-employment-selection-procedures.
[114] AI Bill of Rights at 43.
[115] Draft Memorandum at 20.
[116] *Id.* at 20 n.37.
[117] Goldberg v. Kelly, 397 U.S. 254, 271 (1970).
[118] AI Bill of Rights at 40.
[119] Draft Memorandum at 20.
[120] Office of Management and Budget, Improving Access to Public Benefits Through the Paperwork Reduction Act (M-22-10) at 17 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-10.pdf.
[121] *Id.* at 2; *accord* Office of Management and Budget, Strategies for Reducing Administrative Burden in Public Benefit and Service Programs at 1 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/BurdenReductionStrategies.pdf (describing informational and learning, compliance, psychological, and redemption costs).
[122] Executive Order 14058 of December 13, 2021, sec. 1, 86 Fed. Reg. 71357, 71357 (Dec. 16, 2021).

conducted and concluded in a timely manner. . . . In time-critical systems [such as in healthcare or employment], this mechanism should be immediately available or, where possible, available before the harm occurs."

Fourth, the final memorandum should more robustly address accessibility, not only in notice provided to users but also in agencies' assessment and evaluation of AI. Federal law already requires agencies to provide accessible experiences to people with disabilities, and the final memorandum should expressly incorporate those requirements. President Biden's Executive Order on "Transforming Federal Customer Experience and Service Delivery To Rebuild Trust in Government" directed agencies to "ensur[e] the accessibility of services for customers with disabilities"[123] and Section 508 of the Rehabilitation Act requires that agencies "ensure" that any "electronic and information technology allows . . . individuals with disabilities who are members of the public . . . to have access to and use of information and data" from federal agencies that is comparable to individuals without disabilities.[124] The *AI Bill of Rights* recommends that AI systems "should be designed, developed, and deployed by organizations in ways that ensure accessibility to people with disabilities" and that notices and explanations be accessible.[125] Unfortunately, in the two decades since Section 508 was passed, not all agencies have met its requirements,[126] and OMB should ensure that accessibility is a requirement in agencies' use of AI, assessing its harms, establishing appropriate risk management practices, and providing notice and explanation of AI's use.

Finally, OMB should consider expanding its notice requirement to provide meaningful notice *prior* to the use of rights- and safety-impacting AI. Timely, individual notice prior to the use of AI is essential for protecting critical rights, as recognized by the *AI Bill of Rights*,[127] such as seeking accommodations for disabilities.[128] For example, providing notice to an individual with a disability *after* AI has been used to make a negative decision about their job application gives the individual no opportunity to seek meaningful accommodations. The Equal Employment Opportunity Commission has stated that prior notice is a "promising practice" for compliance with the disabilities rights laws, including "[i]nforming all job applicants and employees who are

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[123] Executive Order 14058 of December 13, 2021, sec. 6(d), 86 Fed. Reg. 71357, 71364 (Dec. 16, 2021).
[124] 29 U.S.C. § 794d(1).
[125] AI Bill of Rights at 27, 43.
[126] U.S. Department of Justice & U.S. General Services Administration, Section 508 Report to Congress and the President at 9 (2023), https://www.justice.gov/crt/section-508-home-page-0 (finding that 55% of agency accessibility statements require "some remediation to meet requirements).
[127] AI Bill of Rights at 43 ("Users should receive notice of the use of automated systems in advance of using or while being impacted by the technology.").
[128] *See* Center for Democracy & Technology et al., Civil Rights Standards for 21st Century Employment Selection Procedures at 23 (2022), https://cdt.org/insights/civil-rights-standards-for-21st-century-employment-selection-procedures; Center for Democracy & Technology, Comments on Revised Proposed Rules to Implement Local Law 144 of 2021 on Automated Employment Decision Tools at 7 (2023), https://cdt.org/insights/cdt-comments-scrutinize-nycs-revised-rules-that-leave-even-more-workers-unprotected-from-algorithmic-bias/ (ten days' notice likely insufficient for requesting accommodations).

being rated that reasonable accommodations are available" and "[d]escribing, in plain language and in accessible formats, the traits that the algorithm is designed to assess."[129] OMB should consequently consider requiring notice to be provided to individuals *prior* to any use of rights- and safety-impacting AI, including for purportedly positive outcomes, with the burden on agencies to demonstrate that that prior notice would be impracticable.

E. Feedback Mechanisms Should be Equitable and Approachable, Consistent with Prior Federal Guidance

The Draft Memorandum appropriately requires agencies to "consult affected groups, including underserved communities, in the design, development, and use of the AI" and in "the event of negative feedback, agencies must consider not deploying the AI or removing the AI from use."[130] We suggest stating expressly that the consultation and consideration of any feedback must be meaningful, not just *pro forma*. This means the feedback should be solicited both prior to the adoption of AI and, if implemented, during deployment. In addition, the feedback should be used in the pre-adoption evaluation of AI's benefits versus its harms as well as in impact evaluations once deployed. Finally, to promote accountability for following these guidelines, agencies should be required to disclose what the feedback was and how they acted on it, much as agencies do as part of the notice and comment process for proposed regulations.

One 2019 paper underscores the importance of *meaningfully* soliciting feedback from impacted communities. The paper reported the results of workshops where individuals from "affected communities" were asked about an algorithmic risk-scoring tool used in child welfare screening decisions.[131] Aside from the limited utility of soliciting feedback only after the tool was put in use, only 18 of the 95 workshop participants were people whose families had been investigated by child welfare authorities. The remainder worked for or with the child welfare agency using the risk-scoring tool, with varying degrees of direct contact with impacted families.[132] During the workshop, participants expressed concerns with the risk-scoring tool, including system-level concerns such as "low expectations of the benefits that the system could provide"; bias among caseworkers and built into data or tool itself; lack of information about how the tool weighed data; and, families' inability to dispute a score.[133] Rather than recommending that these concerns be considered in evaluation of the tool, the authors of the paper essentially advised better messaging or tweaks to the tool that would change perceptions

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[129] U.S. Equal Employment Opportunity Commission, The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees (2022), https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence.

[130] Draft Memorandum at 19.

[131] Anna Brown, et al., Toward Algorithmic Accountability in Public Services, at 1 (2019), https://dl.acm.org/doi/pdf/10.1145/3290605.3300271.

[132] *Id.* at 3-4.

[133] *Id.* at 7-9.

but not its functioning[134]—a response that may have affected underrepresentation of impacted groups.

Moreover, agencies must ensure their methods for soliciting feedback are equitable, approachable, and accessible. The avenues for soliciting feedback envisioned by the Draft Memorandum may inadvertently be exclusionary. For example, the Draft Memorandum contemplates soliciting feedback through the Federal Register, post-transaction forms, or public hearings.[135] Although those are traditional means for agency interaction with the public—and should indeed be employed—they may require individuals to have sufficient time and resources to meaningfully respond. As OMB has observed, "these efforts are too often perceived by stakeholders and agencies alike as being siloed, inaccessible, or irrelevant compliance exercises with unclear purpose or benefit to communities, demonstrating insufficient consideration of the needs, interests, and priorities of diverse populations."[136] OMB has concluded that "there is no one-size-fts-all approach to stakeholder engagement" but identified a number of promising practices for ensuring engagement meets stakeholders where they are:[137]

- "collect[ing] feedback from communities not through a specific agency scope, but rather organized around a life event: surviving a natural disaster, a child with a disability transitioning to adulthood, and a Service member seeking civilian employment for the first time";
- deploying "well-designed mobile sites [to] drive better digital experiences";
- "directly increas[ing] community capacity by providing resources (grants, financial assistance, and procurement opportunities) directly into underserved communities"; and,
- simplifying forms through usability testing, and avoiding "legalistic, dense form[s] [that] could deter eligible [individuals] out of receiving these protections or add unnecessary stress for already stressed" communities.

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[134] For instance, since changing the variables used by the tool to calculate risk scores to include family strengths and not just weaknesses would increase costs, the authors suggested "modifications [that] would produce a model that is mathematically equivalent to the original, but which may be perceived and responded to very differently by users and affected individuals." To the extent participants questioned whether use of the tool resulted in better outcomes for families, the authors recommended "[c]onveying how making use of data and algorithms leads to improved family and process outcomes," as if that was a foregone conclusion and not a metric to incorporate into future impact evaluations. And to the extent participants raised concerns about the "opacity of algorithmic decisionmaking," the recommendation was not to disclose more information, but a concern that such disclosure would not have the (desired) impact of improving caseworker-family relationships so further research was warranted about the usefulness of being transparent. *Id.* at 9-10.

[135] *Id.*

[136] Office of Management and Budget, Study to Identify Methods to Assess Equity: Report to the President at 30 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/OMB-Report-on-E013985-Implementation_508-Compliant-Secure-v1.1.pdf.

[137] *Id.* at 32-35.

The final memorandum should direct agencies to assess burdens on impacted communities and develop strategies to reduce barriers when gathering feedback from impacted communities.

F. Non-Discrimination Considerations Should Extend Beyond Protections Currently Provided by Federal Civil Rights Law

The Draft Memorandum requires agencies to assess the discriminatory effects of AI, including disparate impact.[138] However, the Draft Memorandum generally limits those provisions to protected classes under federal civil rights laws.[139] The protections provided by federal law, however, represent an absolute minimum and may exclude characteristics worthy of protection. For example, federal protections do not extend to sources of income, education level, or history with the criminal legal system. Consequently, the final memorandum should require agencies to also assess impacts on historically marginalized groups not protected by federal law and mitigate those impacts if they are not relevant to the AI's intended use.

Conclusion

The ACLU applauds OMB's significant step forward in bolstering civil rights protections as the rapid advance of AI in government and throughout society continues. OMB's Draft Memorandum is significant, but more work is needed to build off this next step. To ensure that the final memorandum provides robust protections for civil rights and civil liberties, OMB should:

- To the extent possible, include national security systems and intelligence agencies within the Draft Memorandum's scope, clarify its application to less-advanced systems, and extend its applicability to federally funded programs;
- Maintain or expand the scope of AI use cases that are presumed to be rights-impacting;
- Strengthen key minimum practices, including by cabining agency discretion to waive or otherwise avoid the Draft Memorandum's requirements, bolstering notice provisions, and ensuring that community feedback mechanisms are equitable and approachable.

If you have any questions about these comments, please do not hesitate to contact Cody Venzke, Senior Policy Counsel, at cvenzke@aclu.org.

Sincerely,

American Civil Liberties Union

[138] Draft Memorandum at 18, 20.
[139] *Id.*

PUBLIC SUBMISSION

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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0088
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Special Competitive Studies Project

General Comment

Please see attached file

Attachments

SCSP_OMB-2023-0020-0001

To: Office of Management and Budget

From: The Special Competitive Studies Project

Subject: Response to Request for Comment on the Office of Management and Budget "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum" (OMB-2023-0020-0001)

Date: December 5, 2023

The Special Competitive Studies Project (SCSP) is a nonpartisan, nonprofit organization committed to ensuring that the United States is organized and positioned to lead globally as artificial intelligence (AI) and other emerging technologies are reshaping our national security, economy, and society. As AI advancements transform our world, the United States is in a global technology competition, which will determine the governance model – democratic or authoritarian – that will be adopted globally and will shape the international order.

Maintaining the United States's competitive edge in AI requires fostering an environment that encourages innovation, while ensuring AI and related technologies are shaped according to our laws, values, rights, and freedoms. Regulation is an effective mechanism for ensuring AI outcomes align with these requirements. However, we cannot and should not regulate every AI use case. Effective regulation that promotes innovation will focus on AI development and uses that are highly consequential to society, either because the impacts are significantly beneficial or because they are significantly harmful. A risk based approach to regulating AI also facilitates effective use of resources.

Additionally, any regulation must be agile. AI is advancing at a faster pace than our current regulatory landscape. Thus, any new AI regulatory mechanisms must be adaptive to these rapid changes.

On November 7, 2023, SCSP, in collaboration with the Johns Hopkins University Applied Physics Laboratory (JHUAPL), released the Framework for Identifying Highly Consequential AI Use Cases ("HCAI framework") (see Appendix).[1] The framework builds on the four principles for AI governance put forth by SCSP in its fall 2022 report, "Mid-Decade Challenges to National Competitiveness": 1) govern AI by use case and outcomes by sector; 2) empower and modernize existing regulators; 3) focus governance on high-consequence use cases; and 4) strengthen non-regulatory AI governance.[2] The framework, developed through a collaborative process involving multi-stakeholder engagement, serves as a blueprint for agencies and sector specific regulators to evaluate the potential societal impacts of AI use cases or classes of uses.

[1] Framework for Identifying Highly Consequential AI Use Cases, Special Competitive Studies Project (2023).
[2] Mid-Decade Challenges to National Competitiveness, Special Competitive Studies Project (2022).

The HCAI framework provides ten corresponding categories of harms and benefits of AI uses, and specific harms and benefits for each category. These examples are illustrative as specific harms and benefits will be unique to sectors. In addition, harms and benefits will be interrelated (e.g. a negative effect of an AI use on a certain subpopulation might result in a positive effect on another), and, thus, it is critical to assess the whole context. The framework also offers ways to make high consequence determinations through quantitative and qualitative magnitude assessments of the harms and benefits (e.g., probability and scope), adaptable to each specific sector and use case.

The framework is thus consistent with the Office of Management and Budget's (OMB) draft memorandum on agency use of AI and its goals of *strengthening AI governance*, *advancing responsible AI innovation*, and *managing risks from use of AI*. It offers regulators ways to think through safety-impacing and rights-impacting AI use cases by delineating harm and benefit categories, with flexibility in its application. This will help agencies and regulators best achieve the objectives stated in the memorandum.

Below, SCSP offers its comments to the specific questions asked by the OMB on the draft memorandum and on how the HCAI framework can guide federal agencies to best achieve the memorandum's objectives. SCSP remains ready to engage with the OMB in case of any questions or desire for further discussion.

Q. 3) How Can OMB Best Advance Responsible AI Innovation?

The OMB draft memorandum on "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"[3] states that agencies must improve their ability to use AI in ways that benefit the public and improve mission effectiveness, which should be achieved through internal capacity building to support responsible AI innovation. To that end, the memorandum requires agencies to develop a strategy for identifying and removing barriers to responsible AI use, including by identifying the agency's current and planned top AI use cases.

The HCAI framework can help guide agencies on best practices for identifying these use cases and maintaining AI use case inventories, which would advance innovation, streamline regulation, and focus agency efforts and resources on highly consequential AI. Furthermore, periodic reassessment of use cases will help account for technological and contextual changes. Focusing regulatory efforts where needed would support rapidly advancing and deploying low risk AI, while giving greater regulatory attention to highly consequential AI use cases.

Q. 5) Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

The OMB memorandum acknowledges that the list of AI uses presumed to be safety-impacting or rights-impacting is not exhaustive and requires agencies to report agency-specific lists annually. Similarly, the HCAI framework identifies harmful and beneficial categories, and

[3] Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence, Office of Management Budget (2023).

illustrative specific harms and benefits, under each category. Applying the framework will enable agencies to analyze the whole context of an AI use case or classes of uses. This is critical as every AI use case has the potential to have interrelated benefits and harms.

The HCAI framework allows regulators to identify a clearer picture of the impacts of any analyzed AI use case. This includes qualitatively or quantitatively evaluating the magnitude of the harms and benefits (e.g., probability and scope) and using this evaluation to identify highly consequential AI use cases, which can be done flexibly, based on sector-specific expertise. Empowering agencies to make safety-impacting and rights-impacting assessments of AI use cases as outlined in the HCAI framework is a more dynamic approach than attempting to maintain a static list of AI use cases and applications. The framework can necessarily be applied to reassess use cases, in light of ever-evolving technology and contextual considerations.

Q. 6) Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

The OMB memorandum gives agencies until August 1, 2024 to establish minimum practices for identified safety-impacting and rights-impacting AI and to bring any noncompliant AI into compliance. As the memorandum notes, these practices are only a baseline and agencies would be required to develop context-specific practices.

The HCAI framework can help implement, strengthen, and refine the minimum practices for sector-specific use cases. The framework can help agencies think through various categories of harms and benefits as well as specific harms/benefits in each category. The identified harms and benefits can support establishing and implementing minimum practices for high consequence AI use cases.

Enclosures

Framework for Identifying Highly Consequential AI Use Cases
Summary Placement: Framework for Identifying Highly Consequential AI Use Cases

Framework for Identifying Highly Consequential AI Use Cases

November 2023

Special Competitive Studies Project &
Johns Hopkins University Applied Physics Laboratory

Introduction

The Special Competitive Studies Project (SCSP) in collaboration with the John Hopkins University Applied Physics Laboratory (JHUAPL) developed the "Framework for Identifying Highly Consequential AI Use Cases."

The genesis of this collaborative effort stems from the comprehensive analysis of the United States' approach to AI governance in SCSP's 2022 *Mid-Decade Challenges to National Competitiveness* report which outlined four pivotal AI governance principles.[1] In Mid-Decade Challenges, SCSP recommends that the United States should leverage its robust sector regulatory expertise to uptake AI regulation and govern AI use cases and outcomes by sector. Regulators also need the necessary resources to adopt AI regulation. A critical AI governance principle is that U.S. regulators cannot regulate every AI use case. Rather, the U.S. regulatory approach must focus their efforts on highly consequential AI use cases, whether beneficial or harmful. This framework operationalizes these principles.

With those principles as the guiding post, this framework is a classification tool that regulators can use to determine on which AI uses and outcomes to focus their regulatory efforts. Without context and awareness of the potential harms and benefits of an AI use case, it is difficult to comprehensively classify the impacts of an AI system. This framework is intended to aid regulators in making an informed initial classification of an AI use case. It does not speak to what regulatory action should be taken, only that an AI use or class of AI use cases will significantly impact society and requires their attention.

The framework is a starting point. It is a template that regulators can modify for their sector-specific needs. However, it will need reiteration, with more input particularly from regulators, to make it more effective and implementable. It should be viewed as a living document.

The framework fits within SCSP's broader mission to strengthen America's long-term competitiveness as AI and other emerging technologies shape our national security, economy, and society. To review the breadth of SCSP's work, visit SCSP.ai.

The partnership that produced this report brought together experts and practitioners from across the national security, regulatory, and emerging technology communities through a series of roundtables. SCSP and JHUAPL would like to thank the many government experts and regulators, academics, civil society leaders, and industry experts for their time and insight. It was prepared by SCSP and JHUAPL staff and, as such, may diverge from the opinions of some expert contributors.

[1] Mid-Decade Challenges to National Competitiveness, Special Competitive Studies Project at 87 (2022).

Background

Artificial intelligence (AI) is a transformative technology with the potential to revolutionize many aspects of our lives. While AI offers benefits such as improving health, education, productivity, and solving some of the world's most pressing problems, it also has the potential to be harmful. AI use can result in the spreading of disinformation and discrimination, for example. In order to shape AI for the public good, we must both incentivize the beneficial use of AI while recognizing and mitigating the worst of the societal harms.

AI technologies must be developed and used ethically and responsibly. This requires governing AI, using both regulatory and non-regulatory mechanisms, in ways that align with established democratic values. At the same time, an American approach to AI must balance innovation with regulation.

To achieve these objectives, the Special Competitive Studies Project provided four AI governance principles in its first report, *Mid-Decade Challenges to National Competitiveness*.[2] These principles are:

- **Govern AI use cases and outcomes by sector.** The risks and opportunities presented by AI are inextricably tied to the context in which it is used. Therefore, sector-specific governance is the best approach to balancing interests to achieve optimal outcomes.

- **Empower and modernize existing regulators.** Existing regulatory bodies were created in a different technology era. The United States needs to empower and modernize its key regulators, and energize their engagement for the new AI era.

- **Focus governance on high consequence use cases.** It is impractical to govern every AI use or outcome. Regulators should focus their efforts on AI uses and outcomes that will be highly consequential to society, including potential unintended uses, whether beneficial or harmful.

- **Strengthen non-regulatory AI governance.** Strong, robust non-regulatory governance mechanisms should be used in addition to regulatory guardrails to properly shape AI development and use to ensure flexibility, adaptiveness, and relevance.

With respect to governing through regulation, sector regulators are faced with the challenge of regulating the rapidly evolving field of AI technology. AI systems are becoming increasingly sophisticated and widespread, and it is difficult to regulate every system and use case. Some AI development and use cases pose a potential for significant negative or positive impacts on society, and thus, warrant more attention than others. As a result, regulators need to be strategic about which AI use cases and outcomes they focus their regulatory efforts upon.

Multiple frameworks exist for assessing and mitigating risks associated with AI. While these mechanisms are effective for their particular missions, there is no widely accepted approach for

[2] Mid-Decade Challenges to National Competitiveness, Special Competitive Studies Project at 87 (2022).

identifying whether an AI development or use case is of high consequence to society before further regulatory actions are taken.

The United States and our allies and partners need an approach to AI regulation that promotes innovation by regulating AI systems that have the most significant consequences on society. Such an approach would allow for the continued development of beneficial AI uses, while addressing potentially significant harms from development and use.

A risk-based approach to AI regulation that identifies highly consequential AI use cases aligns with democratic values. This approach respects individual rights, liberties, and freedoms and harnesses impactful benefits of AI systems for public good, while protecting individuals and society from the worst of the harms. The draft EU Artificial Intelligence Act (the "EU AI Act") also takes a risk-based approach to regulation, meaning that it regulates AI systems based on the potential risk of harm they pose to individuals or society.[3] This framework employs a risk-based approach. However, instead of relying on a static list of technologies and applications, this framework takes into account the dynamic nature of AI technologies and provides regulators with flexibility in its application.

An approach to identifying highly consequential AI systems should be both risk-based and flexible. Such an approach should provide justified confidence in AI systems (by supporting trustworthiness & responsibility) for the public, certainty to industry, and flexibility to regulators to apply sector-specific expertise and experience, as different sectors and uses have different risk thresholds. An American approach should also provide insight into potential beneficial impacts of AI development or use on society that regulators can choose to regulate (e.g., incentivize through funding or consider whether a benefit warrants equitable access by the whole of society).

This document sets forth a framework for identifying highly consequential AI use cases (ID HCAI Framework) that might have significant benefits or harms on society. The framework is a tool that can help regulators ensure that the development and use of AI systems align with democratic values. By using this template, regulators can focus their efforts on AI systems that are highly consequential to the public, standardize their approach across sectors, and adapt their approach to the specific needs of different sectors. Additionally, by documenting their processes and decision making, regulators can help to ensure accountability and transparency. This framework template should be adopted and tailored by regulators for sector-specific needs.

Some AI use cases will require regulatory focus, while others will not. This framework aims to help regulators identify AI use cases in the "gray area." An initial high-level assessment must be made as to whether the AI use case under consideration warrants the resources to conduct a more thorough assessment of whether an AI system is highly consequential. The initial judgment will help determine whether the AI development or use case under consideration has foreseeable harms that could pose a significant impact on health, safety, or fundamental rights, or substantial benefits that should overwhelmingly incentivize the AI development and use. If not, then no

[3] Tambiama Madiega, Artificial Intelligence Act, European Parliamentary Research Service (2023).

further assessment is required and the AI use case is determined to not be of high consequence. Otherwise, the complete framework should be applied to help determine whether the AI use case is highly consequential to individuals or society. A suggested best practice is to document the process and rationale used at every decision point in the ID HCAI Framework.[4] It is also recommended that regulators establish a registry of evaluated AI use cases and their classifications with exceptions (e.g., for national security or justified industry secrecy). The registry should contain a mechanism by which the public can provide input on these evaluated AI system use cases. This will inform the public of assessments and classifications, allowing them to inform regulators of any contextual changes triggered by the continued use of the AI system that may affect periodic reassessments. It will also have the added benefit of informing industry about the regulators' evaluation process.

The framework interprets AI as computational systems that do some of the predictions, recommendations, classifications, and other decision making that traditionally are in the province of humans.[5] This definition includes systems which are not possible without AI, and those that make use of AI-based components, AI-enabled functions, or AI-derived algorithms. The framework is intended for assessments of AI systems as a whole, vice components, and their concrete impacts on society that result from how they change the context or condition of society. It further proposes that assessments be performed by regulators with input from multi-disciplinary experts,[6] including the public, which is best positioned to evaluate impacts on society. In addition, societal impacts are those resulting both from the use of the AI system as well as its development (e.g., impacts on data workers and from environmental impacts).

Three AI lifecycle points at which the framework can be applied:

- Regulators foresee a new application for AI,[7]
- A new application for AI is under development or proposed to a regulatory body, and
- An existing AI system has created a highly consequential impact that triggers an *ex-post facto* regulatory review.

The high-level steps to the framework are:

A. **Preliminary analysis:** Determine whether the AI application has foreseeable harms or benefits that could impact, for example, health, safety, or fundamental rights, and consequently may need to be regulated. This is intended to be an initial filter to determine whether a fuller assessment is needed.

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[4] Documentation should include details such as the "moment" in time that an assessment is performed, which will help inform future reassessments and address potential contextual changes (e.g., the societal relationship with the AI system), rationale for making the judgment that there are no foreseeable harms or benefits that necessitate use of the framework, and the decisions made throughout the full assessment.

[5] Artificial Intelligence Risk Management Framework, U.S. National Institute of Standards and Technology at 1 (2023) ("The AI RMF refers to an AI system as an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy (Adapted from: OECD Recommendation on AI:2019; ISO/IEC 22989:2022).").

[6] This includes domain experts that can provide research insights (e.g., from universities and Non Governmental Organizations) who understand the evolving nature of relevant/emerging impacts to consider.

[7] In this scenario, regulators should assess AI systems as they would be deployed and used.

B. **Parallel analysis of harms and benefits:** If there is foreseeable harm or benefit, conduct a more comprehensive harms/benefits analysis, which involves performing parallel harm and benefit assessments.

    a. Enumerate and evaluate the magnitude of foreseeable and actual harms from the AI system development and use.
    b. Enumerate and evaluate the magnitude of foreseeable and actual benefits from the AI system development and use.

C. **Final decision on high consequence:** Using the magnitude assessment results, determine if the AI use case is of high consequence.

    a. If yes, a sector-specific regulator must determine how best to take next steps to regulate the AI development and/or use (e.g., whether to create incentives, mitigate harms, or establish bans).

D. **Periodic reassessment:** Periodically monitor sectoral AI use to determine if the list of AI systems identified as highly consequential remains appropriate for that sector given contextual changes and whether revisions to classifications are necessary.

The potential specific harms and benefits are grouped into ten corresponding categories (see **Table 1** and **Appendix 1**). The framework provides specific harms and benefits for each category, as examples, with the recognition that specific harms/benefits will be unique to sectors. Harms and benefits are further characterized by magnitude (e.g., the scope of a harm or benefit). The framework provides factors to calculate the magnitude of an identified harm or benefit. Specifically, harms are characterized by four severity factors and four likelihood factors. Benefits are characterized by four impact factors and two likelihood factors. Lastly, the document offers ways to make high consequence determinations based on the quantification of a system analysis.

Categories of Harms and Benefits

Table 1. A list of ten harm categories (left) and benefit categories (right). Corresponding categories of harm and benefit are identified on the same row.

Table 1. ID HCAI Framework Corresponding Categories of Harms and Benefits

Harm Categories	Benefit Categories
Physical Injury	Physical Health
Emotional or Psychological Injury	Emotional or Psychological Health
Opportunity Loss	Opportunity Access
Economic Loss	Economic Access
Liberty Loss	Liberty Protection
Privacy Loss	Privacy Protection
Negative Environmental Impact	Positive Environmental Impact
Manipulation	Incentivization
Social Detriment	Social Improvement
Operational Degradation	Operational Improvement

Appendix 1 provides tables of specific harms and benefits for each category, with corresponding descriptions. These tables are intended to guide the framework user (e.g., a sector-specific regulator) through consideration of examples of the types of specific harms or benefits associated with each category. Note that potential violation of fundamental rights is incorporated into the specific harms lists. The tables are meant to be illustrative and not exhaustive lists.

As noted in the high-level steps above, this process begins with an AI development or use case for review. While no application will be completely free of any potential harm and all presumably have some potential benefit, the framework assumes that this process has been employed because the possibility of some significant AI related harm or benefit has been identified as a reasonable outcome. To determine whether the AI development or use should be regulated, a framework user should explore the extent of those potential harms and benefits.

Defining Factors for Characterizing Harm Categories

The framework employs ten categories of harms.[8] Each category includes a non-exhaustive list of specific harms, located in **Appendix 1**.

The framework user steps through each category of harms to identify and describe relevant specific harms that could result from the development and deployment of the AI application being considered.

For each specific harm, the framework user would evaluate the harm's potential severity and likelihood, and document any baselines used for comparison that led to the score determinations.[9] The severity of harm factors are scale, scope, disproportionality, and duration. The likelihood of harm factors include probability, frequency, lack of detectability, and lack of optionality. Descriptions for each of these factors are presented in **Table 2** and **Table 3**, respectively.

Table 2. Harm Factors of Severity

Factor	Description
Scale	How acutely the harm could impact a population or group throughout the AI lifecycle
Scope	How broadly the harmful impact could be experienced across populations or groups
Disproportionality	Whether an individual, group, or population is disproportionately affected by the harm over that of other individuals, groups, or populations
Duration[10]	How long the harmful impact would be experienced by a population or group

[8] To explore the harms in detail, the framework adapts the Microsoft Types of Harm List to frame AI-related harms that could emerge. See Foundations of Assessing Harm, Microsoft (2022); Types of Harm, Microsoft (2023).

[9] Baselines can include any statutory boundaries for a given sector (e.g., EEOC compliance), or corresponding harms for a non-AI counterpart. Documenting baselines may help regulators develop a library of use cases for comparison.

[10] Example considerations for this factor include the relative difficulty of an individual or group to appeal the outcome from the use of the technology (finality of outcome), difficulty in mitigating a certain risk imparted by the technology (lack of mitigation; refer to NIST RMF), or the minimal ability or speed at which the technology or an affected individual or group can recover or return to normal after a consequential event (lack of resilience). In addition, this factor should assess whether a harm occurs at a low-level continuously over time (e.g., distortion of reality due to prolonged interaction with the AI system) or whether a harm is instantaneous and acute (e.g., malfunction of threat identification system, which triggers a threat neutralization procedure resulting in bodily injury).

Table 3. Harm Factors of Likelihood

Factor	Description
Probability	The likelihood the harm could impact a population or group and whether this particular harm has occurred before (e.g., through a similar use case)
Frequency	How often a population or group would experience the harm
Lack of Detectability	Likelihood of not discovering and correcting a hazard or failure mode while it remains possible to prevent or mitigate the harm
Lack of Optionality	Limited individual choice as to whether to be subject to the effects of the technology (e.g., ability to opt-out), such as from minimal human oversight to consider and remedy problems that may be encountered from the AI system

To analyze magnitudes of harms, based on severity and likelihood factors, a framework user has "scoring" options to assess magnitude at the specific harm level or at the harm category level.

One approach is to employ different rank order categories (e.g., very low to very high, with as many categories in between as desired) with stated descriptions and explanations of the categorization of impacts.[11] The deliberative process should highlight the dimensions and factors with which each harm and harm category was evaluated.

In the alternative, a framework user can employ the Likert scale.[12] For example, the Likert scale could range from 1-5 (with 1 representing "low," 3 representing "medium," and 5 representing "high"). Note that the numbers are meant to signal categories that are relative to each other, just as using descriptive categories (e.g., very low to very high). The numbers are not meant to indicate preciseness such that a magnitude "4" is exactly twice as much as a magnitude "2."

The former approach assumes that a numerical representation is neither possible nor useful, while the latter approach assigns numerical values with some "room for flexibility." Either approach for scoring the factors allows necessary flexibility because the scales and magnitudes of the different factors will vary for different harms, and the relative judgment of what is a "very high" or "5" score will differ by sector/harm. The factors are named in such a way that a "very high" or "5" score represents a negative aspect of the harm (e.g., "long duration"). The framework user has flexibility in determining the specific weightings for each harm category given the importance of specific categories may vary depending on the sector and context. We instead provide guidance on potential dependencies for each category (see Appendix 1). Some harms may be essentially instantaneous (e.g., a physical harm), while others may extend over time (e.g., psychological harm). Thus, some magnitude factors (e.g., scope) may raise different considerations for those harm categories.

[11] Guide for Conducting Risk Assessments, U.S. National Institute of Standards and Technology at Table H-3 (2012).

[12] Rensis Likert, A Technique for the Measurement of Attitudes, Archives of Psychology 140 at 1–55 (1932).

Defining Factors for Characterizing Benefit Categories

As noted in the high-level steps above, a benefits assessment should occur in parallel with the harms assessment. To determine aspects of the AI system that could encourage development and use, the framework user should explore the extent of potential benefits stemming from the use case.

In a similar approach to the harms assessment, the framework employs ten categories of benefits.[13] Each category includes a non-exhaustive list of specific benefits, located in **Appendix 1.**

The framework user steps through each category of benefits to identify and describe relevant specific benefits that could result from the development and deployment of the AI application being considered.

For each specific benefit, the framework user would evaluate the benefit's potential impact and likelihood. The impact factors are scale, scope, duration, and proportionality. The benefit likelihood factors include probability and frequency. Descriptions for each of these factors are presented in **Table 4** and **Table 5**, respectively.

Table 4. Benefit Factors of Impact

Factor	Description
Scale	How acutely the benefit could impact a population or group throughout the AI lifecycle
Scope	How broadly the beneficial impact could be experienced across populations or groups
Duration	How long the beneficial impact would be experienced by a population or group
Proportionality	Whether a population or group is proportionally affected by the beneficial impact as compared to other populations or groups

Table 5. Benefit Factors of Likelihood

Factor	Description
Probability	The likelihood the benefit could impact a population or group and whether this particular benefit has occurred before
Frequency	How often a population or group would experience the beneficial impact

[13] The non-exhaustive list of benefits was compiled from a literature review.

To analyze magnitudes of benefits based on impact and likelihood factors at either the specific benefit level or at the benefit category level, a framework user has the same options for implementation as assessing harms - either employing different rank order categories or the Likert scale.

The factors are named in such a way that a "very high" or "5" score represents a positive aspect of the benefit, (e.g., "long duration"). Some benefits may be essentially instantaneous (e.g., physical health), others may extend over time (e.g., psychological health). Thus, some factors (e.g., scope) may raise different considerations for those benefit categories. The framework user has flexibility in determining the specific weightings for each benefits category given the importance of specific categories may vary depending on the sector and context.

Analyzing "Magnitude" for Harms and Benefits

Regulators should have flexibility, based on sector-specific expertise and experience, in analyzing the magnitude of harms/benefits based on the severity, impact, and likelihood factors ("magnitude" analyses). This document suggests that the magnitude analyses of harms/benefits focus at the categorical level.[14] One way to make this analysis is by calculating the magnitude for each specific harm/benefit and calculating an average (weighted) across categories. One advantage of assessing the magnitude factors for each specific harm/benefit in **Appendix 1**, which are then analyzed at the categorical level, is that this approach provides a comprehensive view of all relevant harms and benefits with a nuanced understanding of the interplay of all the relevant harms and benefits.

Appendix 2 provides an exemplary method of calculating the magnitude analyses for specific harms and benefits, respectively.

Ways to Make High Consequence Determinations

There are many ways a framework user may choose to apply the resulting magnitude values based on their sector-specific expertise and experience. Magnitudes can be considered within a specific category or across categories. Ultimately, any approach will need to determine whether an AI development or use case being assessed is of sufficiently high consequence to warrant continued regulatory focus.

Examples of ways to combine or compare magnitudes include:

[14] This document suggests analyzing magnitudes at the category level because: (1) specific harms/benefits will be different across sectors; (2) the number of specific harms/benefits and associated factors can result in a comprehensive, but cumbersome number of overall quantifications; (3) analyses at the categorical level account for the interaction across harms/benefits that will alter the impact of any individual harm/benefit assessed independently; and (4) analyses at the categorical level allow for standardization of categories across sectors for comparative analysis and public justified confidence.

- Does any specific harm category have a magnitude greater than threshold X?[15]
- Do one or more harm categories have a magnitude greater than threshold Y?
- Does the total of magnitudes across all harm categories exceed threshold Z?
- Are the total magnitudes across all harm categories greater than the total magnitudes of benefits across all benefit categories?
- Are there one or more harm categories that might overwhelmingly outweigh the assessed categories of benefits?
- Are there one or more benefit categories that might overwhelmingly incentivize development or use, despite the magnitude, number, or type of harm categories identified?
- Does the aggregation of low magnitude level harms/benefits change context to whether the system is considered highly consequential?

Even at the categorical level, regulators should have flexibility in analyzing the magnitude for harms/benefits. For example, a framework user may focus on the most salient harms/benefits as opposed to every possible harm/benefit that exists. The framework also recognizes that even a single harm/benefit or magnitude can signal a high consequence AI use case that requires regulatory focus.

Potential next steps would then depend on responses to the above questions. For example, if the assessed character of the benefits is determined to outweigh the assessed character of the harms, the framework user could specify that development or use of the AI system should proceed, or perhaps even be incentivized. Alternatively, if the assessed character of the harms is determined to outweigh the assessed character of the benefits, then the framework user could specify whether development or use of the AI application should be reconsidered, suggest potential alternatives that have not been considered, or provide recommendations for risk mitigation[16] based on the identified harms. These determinations require sector-specific nuance, taking into consideration aspects that do not have clear answers, such as the willingness to accept the accumulation of minor consequences over time.

Periodic Reassessment of Sectoral AI Use

At the sectoral level, AI impacts should be monitored on a periodic basis to assess if the harmful/beneficial impact(s) of a previously assessed AI system has changed (e.g., environmental change or change in use) or if there has been a contextual change due to socio-techno relationship warranting revisions to the AI classification or regulation as appropriate for that sector. These reassessments may occur at the level of the individual AI system (e.g., an AI-enabled medical

[15] Efforts are underway to establish standards, metrics, and norms for AI development and use. See Biden to Push For Government Standards on AI, Politico (2023); U.S. LEADERSHIP IN AI: A Plan for Federal Engagement in Developing Technical Standards and Related Tools, U.S. National Institute of Standards and Technology (2019).

[16] For example, the NIST AI Risk Management Framework provides a voluntary process for managing AI risks prospectively and continuously throughout the AI lifecycle. Artificial Intelligence Risk Management Framework, U.S. National Institute of Standards and Technology (2023).

device approved by the FDA) or of a class of AI systems (e.g., AI use for credit approval or election campaign use).

Questions a framework user should pose when monitoring an AI system are:

- How is the AI system adapting post classification and deployment to societal and environmental changes within the sector over time? If the AI system does adapt, how regularly will it adapt to such change(s)?
    - Framework users must assess, based on unique sector needs, the best points at which to conduct periodic reassessments.
- What aspects of assessment, classification, or regulation need to be revised given this change?
- Whose obligation it is to conduct periodic reassessments. For example, should the obligation rest on the entity responsible for the AI system to report to the regulator (i.e., modeled after reporting recall patterns and defective systems)? Or should the regulator's responsibility include the periodic reassessments?

Conclusion

This framework aims to provide a tool for regulators to identify which AI use cases and outcomes are or will be highly consequential to society, whether beneficial or harmful. Because it is impractical to govern every AI use or outcome, regulators should focus their efforts on shaping those AI technology uses and outcomes that will be maximally impactful on society. The framework provides latitude for users to identify specific rulesets to employ for determining whether a use case is high consequence, allowing for flexible implementation across sectors. Intra-agency and inter-agency consistency will result from repeatedly applying the same framework template, being transparent through documentation, and building a library of assessments that are publicly available.

Assessments, especially pre-deployment or in early stages of release, might have to be conducted on limited information and based on hypothetical assumptions. New research and data observations post-deployment enable determinations of whether initial classifications are still appropriate and whether revisions to the governance approach are necessary. The framework serves as the first step that a regulator should take in determining if an AI system necessitates further investigation or action. In doing so, the framework also informs policy makers, industry, and civil society on relevant actions to take. It will enable all framework users to focus governance on high consequence use cases, under the assumption that the rapidly expanding application space would overwhelm efforts to address and take action on every use case.

Appendix 1: Harm / Benefit Category Tables

The following appendix is meant to supplement the ID HCAI Framework. It provides a list of example harms and benefits of AI that can be used to help regulators identify use cases of AI that have either significant harm or benefit for society. The specific harms and benefits are organized into the following focus areas:

- Physical and Psychological Health
- Consequential Services
- Human Rights and Liberties
- Social and Democratic Structures
- Performance

Each focus area contains categories and example specific harms/benefits. These examples are intended to guide the framework user through consideration of the types of potentially relevant harms or benefits associated with each category. The listed harms and benefits are meant to be illustrative, and not an exhaustive list. The framework user has flexibility in determining the specific weightings for each category given the importance of specific categories may vary depending on the sector and context.

1. Physical and Psychological Health

The following section describes example harms related to the risk of injury, and example benefits related to improving health or protecting from injury.

Physical Injury / Physical Health

Table 1.1: Physical Injury: How AI systems could hurt people or create dangerous environments.

Harm	Example
Bodily injury or death	Development or use of the AI system could result in severe physical harm. Accidents could be unintended, or the result of misuse, system malfunction, reduced appropriate human oversight, or exposure to unsafe environments or situations
Damage to critical infrastructure	Development or use of the AI system could result in damage or destruction of critical infrastructure such as water, sewage, transportation, or energy systems. Damage or destruction to

Harm	Example
	infrastructure could potentially harm populations or groups, especially vulnerable populations (e.g., power loss to a hospital)
Exposure to unhealthy agents	Development or use of the AI system could result in exposure to unhealthy agents and jeopardize health
Medical misdiagnosis	Use of the AI system could result in wrong drug recommendations for a patient or detection/diagnostic errors (e.g., failure to detect a tumor on a radiological scan)
Technology-facilitated violence	Use of the AI system could incite or enable offline violence
Assessment	Assign a "5" or "Very High" if there are clear risks of physical harm (e.g., due to minimal or no safeguards, or sufficient warnings for potential dangers are not provided). Assign a "1" or "Very Low" if there is minimal risk of harm (e.g., safeguards are provided that are adequate for the functional properties of the system)
Weighting	Depends on whether the system has functionality that could hurt those directly or indirectly subject to it, or lacks relevant characteristics that could conceivably lead to accidents

Table 2.1: Physical Health: How AI systems could protect from injury or dangerous environments.

Benefit	Example
Hazard reduction	Use of the AI system could minimize health risks from tasks that can harm people through repetitive movement, exposure to unhealthy agents, or working in dangerous conditions[17]
Medical diagnosis	Use of the AI system could provide consistent analysis of patient data for more accurate diagnoses of a variety of diseases, or aid in

[17] Foundations of Assessing Harm, Microsoft (2022).

Benefit	Example
	the detection of critical diseases earlier in their progression than conventional methods[18]
Medical access	Use of the AI system could enable more patients to access care and allow medical professionals to reach larger segments of the population, particularly in underserved areas or areas with limited resources[19]
Crime reduction or prevention	AI-driven security or surveillance systems could alert human analysts of patterns or when there is abnormal or suspicious activity[20]
Assessment	Assign a "5" or "Very High" if there are clear signs that physical health and safety can be improved with use of the system, or sufficient warnings for potential dangers are provided. Assign a "1" or "Very Low" if the system provides minimal improvements in health and safety, or sufficient warnings are not provided
Weighting	Dependent on whether the system has functionality that could affect the health and safety of those directly or indirectly subject to it, or lacks relevant characteristics that could conceivably lead to protection from injury or dangerous environments

[18] Darrell M. West & John. R. Allen, How Artificial Intelligence is Transforming the World, Brookings (2018).

[19] Kanadpriya Basu, et al., Artificial Intelligence: How is It Changing Medical Sciences and Its Future?, Indian Journal of Dermatology at 365–370 (2020).

[20] Christian Davenport, Future Wars May Depend as Much on Algorithms as on Ammunition, Report Says, Washington Post (2017); Foundations of Assessing Harm, Microsoft (2022).

Emotional or Psychological Injury / Emotional or Psychological Health

Table 1.2: Emotional or Psychological Injury: How misused AI systems can lead to severe psychological/emotional distress.

Harm	Example
Distortion of reality or gaslighting	Intentional misuse of the AI system that undermines the end-user's trust in established institutions and distorts their sense of reality
Addiction/Attention hijacking	Prolonged interaction with the AI system that leads to addiction that affects the end-user's well-being, potentially at the expense of happiness and life satisfaction, sense of direction or purpose, relationships and human interactions, and personal character
Reputation damage	The AI system could make analyses, recommend actions or use language which disparages a person's characteristics or situation
Identity theft	Use of the AI system leads to loss of control over personal credentials, reputation, or representation
Dehumanization	Use of the AI system could erode, obstruct, or deny the subjectivity, individuality, agency or distinctly human attributes of people
Harassment	Use of the AI system could lead to online abuse (e.g., cyberbullying, deadnaming, doxxing, trolling, hateful or toxic language, gender-based sexual harassment)
Invalidation	Use of the AI system could result in the denial, rejection, or dismissal of a population's or group's feelings or experiences
Misattribution	Use of the AI system could result in misattribution of an action or content to a person or group of individuals
Loss of autonomy	Use of the AI system could lead the end-user to have involuntary thoughts or feelings, or perform actions that are uncharacteristic or against their will
Intrusion on emotional state	Use of technology like face recognition to detect, analyze, process, and interpret non-verbal communication cues (facial expression, eye contact, body language, etc.) in order to intrude upon, harass, or manipulate an individual(s)

Assessment	Assign a "5" or "Very High" if the prevention of unwanted uses and undesirable extensions of the scope of use have not been systematically and successfully addressed in the development and design of the system. Assign a "1" or "Very Low" if these concerns have been addressed during system development and design
Weighting	Depends on whether the system can be used in an undesirable way, if the consequences of misuse or extensions of system scope are serious or not, and if there are interactions with public environments

Table 2.2: Emotional or Psychological Health: How AI systems can improve emotional and psychological health.

Benefit	Example
Emotional analysis/ intelligence	Use of the AI system could enhance the ability to detect, analyze, process, and interpret non-verbal communication cues (facial expression, eye contact, body language, etc.) in order to better understand social cues or assist with, for example, pediatric pain management or accessibility scenarios
Companionship	Use of AI systems can provide human-like interactions where human-to-human interaction is not otherwise available, or extend the scope of human-to-human interactions by detecting where it is needed and calling on a person to do the interaction [21]
Emotional liberation	Use of AI systems can provide human-like interactions that can help reduce self-restraint, allow people to be more willing to express themselves, reduce the feeling of being judged, and make them feel more at ease[22]
Character improvement	The AI system could make analyses, recommend actions, or use language which improves a person's characteristics or situation[23]
Assessment	Assign a "5" or "Very High" if there are clear signs that emotional and psychological health can be improved with use of the system, or

[21] Laura Donnelly, Digital Assistants Could Alleviate the Loneliness of Elderly, The Telegraph (2018).
[22] Sophie Kleber, 3 Ways AI is Getting More Emotional, Harvard Business Review (2018).
[23] Foundations of Assessing Harm, Microsoft (2022).

	sufficient warnings for potential dangers are provided. Assign a "1" or "Very Low" if the system provides minimal improvements in emotional or psychological health, or sufficient warnings are not provided
Weighting	Depends on whether the system has functionality that could affect the emotional or psychological health of those directly or indirectly subject to it, and if there are interactions with public environments

2. Consequential Services

The following section describes example harms related to the denial of consequential services, and example benefits related to access to consequential services.

Opportunity Loss / Opportunity Access[24]

Table 1.3: Opportunity Loss: How AI systems could lead to decisions that limit access to resources, services, and opportunities.

Harm	Example
Employment discrimination	Use of the AI system could result in discriminatory recommendations or decisions related to employment, where the end-user is denied access to apply for or secure a job based on characteristics unrelated to merit
Housing discrimination	Use of the AI system could result in discriminatory recommendations or decisions related to housing, where the end-user is denied access to housing or the ability to apply for housing
Insurance and benefit discrimination	Use of the AI system could result in inequitable access, cost, or allocation of insurance or social benefits, where the end-user is denied insurance, social assistance, or access to a medical trial due to biased standards

[24] Because assessments of benefits and harms are especially insightful when you know the deployment context (e.g., how AI system has been deployed, what populations are impacted, and the socio-techno relationship of the technology), the "opportunity/loss" assessment for the "Consequential Services" categories might be especially challenging to perform at the anticipatory level before the AI system has been deployed in society. Thus, it is suggested that an initial assessment is conducted based on anticipatory deployment, but this assessment is periodically reassessed based on actual deployment insights.

Harm	Example
Educational discrimination	Use of the AI system could result in inequitable access, accommodations, or other outcomes related to education, where the end-user is denied access to education due to unchangeable characteristics
Assessment	Assign a "5" or "Very High" if problems of bias have not been addressed at any stage of the development, design, and testing of the system, or the system is known for being biased. Assign a "1" or "Very Low" if these problems of bias have been adequately addressed or solved
Weighting	Depends on whether system functions include activities which can negatively affect basic human interests and rights, or access to resources, services, or opportunities

Table 2.3: Opportunity Access: How AI systems could affect decisions that improve access to resources, services, and opportunities.[25]

Benefit	Example
Employment access	Use of the AI system could result in unbiased or reduction in discriminatory recommendations or decisions related to employment, where the end-user is provided access to apply for or secure a job based on merit
Employment opportunity	AI system development results in employment opportunities not otherwise available to a population or group
Housing access	Use of the AI system could result in unbiased or reduction in discriminatory recommendations or decisions related to housing, where the end-user is provided access to housing or the ability to apply for housing
Insurance and benefit access	Use of the AI system could result in more equitable access, cost, or allocation of insurance or social benefits, where the end-user has access to insurance, social assistance, or a medical trial due to unbiased standards

[25] Foundations of Assessing Harm, Microsoft (2022).

Benefit	Example
Educational access	Use of the AI system could result in more equitable access, accommodations, or other outcomes related to education, where the end-user is provided access to education regardless of unchangeable characteristics
Assessment	Assign a "5" or "Very High" if the system significantly reduces existing societal inequities, or has protocols in place to minimize their occurrence. Assign a "1" or "Very Low" if the system amplifies existing societal inequities
Weighting	Depends on whether system functions include activities which can affect basic human interests and rights, or access to resources, services, or opportunities

Economic Loss / Economic Access

Table 1.4: Economic Loss: How AI systems related to financial instruments, economic opportunity, and resources can amplify existing societal inequities.

Harm	Example
Credit discrimination	Use of AI the system (e.g., biased recommendation systems) could result in difficulties obtaining or maintaining a sufficiently high credit score, where the end-user is denied access to financial instruments based on characteristics unrelated to economic merit
Price Discrimination	Use of the AI system could result in differential pricing of goods or services for different demographics of people, where the end-user might be offered goods or services at unaffordable prices for reasons unrelated to the cost of production or delivery
Financial loss	Use of the AI system could result in underpricing of goods or services for reasons unrelated to the cost of production or delivery, which might result in financial loss for the service provider
Devaluation of individual occupation(s)	Use of the AI system could result in a broader economic imbalance by minimizing or supplanting the use of paid human expertise or labor

Assessment	Assign a "5" or "Very High" if the system amplifies existing societal inequities. Assign a "1" or "Very Low" if the system partially amplifies existing societal inequities, or has protocols in place to significantly reduce their occurrence
Weighting	Depends on whether system functions include activities which have an effect on existing societal inequities

Table 2.4: Economic Access: How AI systems related to financial instruments, economic opportunity, and resources can reduce existing societal inequities.[26]

Benefit	Example
Credit access	Use of the AI system ensures equitable access to financial instruments where the end-user is provided the ability to obtain or maintain a sufficiently high credit score
Fair pricing	Use of the AI system could ensure consistent and equitable pricing of goods or services for different demographics of people, at price points that result in favorable revenue for the service provider

Assessment	Assign a "5" or "Very High" if the system significantly reduces existing societal inequities, or has protocols in place to minimize their occurrence. Assign a "1" or "Very Low" if the system amplifies existing societal inequities
Weighting	Depends on whether system functions include activities which have an effect on existing societal inequities

3. Human Rights and Liberties

The following section describes example harms related to the infringement on human rights, and example benefits related to upholding or improving human rights.

[26] Foundations of Assessing Harm, Microsoft (2022).

Liberty Loss / Liberty Protection

Table 1.5: Liberty Loss: AI recommendations and influences on legal, judicial, and social systems can reinforce biases and lead to detrimental consequences.

Harm	Example
False accusation	Use of the AI system could result in exacerbating human bias, misattribution of suspicious behavior or criminal intent, wrongful arrest, or unreasonable searches and seizures based on historical records or incorrect inferences
Social control and homogeneity	Use of the AI system could induce conformity or compliance and affect rights to freedom of association, freedom of expression or practice of religion, or personal agency
Loss of effective remedy	The inability to follow, understand, and explain the rationale in decisions made by the AI system could lead to the lack of an ability to contest, question, or trust decisions the AI system makes
Assessment	Assign a "5" or "Very High" if the system could compel conformity or compliance, or otherwise result in loss of individual rights. Assign a "1" or "Very Low" if the system does not affect individual rights, and there is sufficient awareness of the capabilities and limitations of the system
Weighting	Depends on whether system functions include activities which have an effect on legal, judicial, or social systems

Table 2.5: Liberty Protection: How AI system recommendations and influences on legal, judicial, and social systems can reduce biases and detrimental consequences.

Benefit	Example
Criminal justice	Use of AI systems in predictive risk analysis could reduce human bias in law enforcement and sentencing systems[27]

[27] Foundations of Assessing Harm, Microsoft (2022); Darrell M. West & John. R. Allen, How Artificial Intelligence is Transforming the World, Brookings (2018).

Assessment	Assign a "5" or "Very High" if the system reduces bias and results in fairer legal, judicial, or social systems. Assign a "1" or "Very Low" if the system does not reduce biases, or otherwise results in loss of individual rights
Weighting	Depends on whether system functions include activities which have an effect on legal, judicial, or social systems

Privacy Loss / Privacy Protection

Table 1.6: Privacy Loss: The information generated by development or use of the AI system could be used to determine facts or make assumptions about someone without their knowledge.

Harm	Example
Privacy violation	Non-consensual data collection, or other operations could lead to loss of data privacy or inadequate protection of personally identifiable information (PII)
Dignity loss	Exposing, compelling or misleading users to share sensitive or socially inappropriate information, which could influence how people are perceived or viewed
Forced association	Requiring participation in the development or use of the AI system to participate in society or obtain organizational membership
Permanent record	Digital files or records of end-user activity could be retained and remain searchable indefinitely
Loss of anonymity	Data and activity monitoring by the AI system could limit the end-user's ability to navigate the physical or virtual world with desired anonymity

Assessment	Assign a "5" or "Very High" if conditions of data privacy and security are not met, or relevant data is not stored in a safe and secure way. Assign a "1" or "Very Low" if relevant data is stored or managed in a safe and secure way
Weighting	Depends on whether personal or private data is stored or managed by the system

Table 2.6: Privacy Protection: How the AI system can be used to detect or manage sensitive information.

Benefit	Example
Fraud detection	Use of the AI system could provide the ability to precisely identify possible fraudulent activities (e.g., abnormalities, outliers, or deviant cases) that might require additional investigation related to the manipulation, release, or access to sensitive data[28]
Anonymity	Use of the AI system could enhance the end-user's ability to navigate the physical or virtual world with desired anonymity[29]
Sensitive data management	Use of the AI system can provide protection for sensitive data that might accidentally be exposed to humans (e.g., routing requests for healthcare records between providers)[30]
Data tracking	AI-driven data and privacy protection platforms could help organizations identify sensitive data and track and control all data movement within and outside their enterprise[31]
Assessment	Assign a "5" or "Very High" if conditions of data privacy and security are met, or relevant data is stored in a safe and secure way. Assign a "1" or "Very Low" if relevant data is not stored or managed in a safe and secure way
Weighting	Depends on whether personal or private data is stored or managed by the system

Negative Environmental Impact / Positive Environmental Impact

Table 1.7: Negative Environmental Impact: How the environment and populations or groups could be negatively impacted by the AI system life cycle.

[28] Artificial Intelligence, Automation, and the Economy, Executive Office of the President at 27-28 (2016); Foundations of Assessing Harm, Microsoft (2022).

[29] Foundations of Assessing Harm, Microsoft (2022).

[30] David Roe, The Role of AI in Ensuring Data Privacy, CMSWIRE (2020).

[31] Remesh Rachendran, How Artificial Intelligence Is Countering Data Protection Challenges Facing Organizations, Entrepreneur (2019).

Harm	Example
Adverse environmental impacts	Development or use of the AI system could lead to damage of the natural environment, damage to the built environment or property, exploitation or depletion of environmental resources, or displacement of inhabitants where resources are located
Chemical exposure	Development or use of the AI system could expose the environment, populations, or groups to toxic chemicals
Climate change	Development or use of the AI system could lead to unnecessary carbon emissions, or cause other climate harm
Assessment	Assign a "5" or "Very High" if there is risk of long-term impact on the natural or built environment and its inhabitants that cannot be mitigated or prevented. Assign a "1" or "Very Low" if the impact on the natural or built environment and its inhabitants is very low, and short-term environmental policies and regulations have been taken into account
Weighting	Depends on whether there are relevant characteristics that can reasonably influence an ecosystem

Table 2.7: Positive Environmental Impact: How the environment and populations or groups could be positively impacted by the AI system life cycle.

Benefit	Example
Environmental impacts	Use of the AI system could improve conservation and environmental efforts, including improving recycling systems, managing renewable energy for maximum efficiency, forecasting energy demand in large cities, making agricultural practices more efficient and environmentally friendly, and protecting endangered habitats[32]
Weather and environmental forecasting	Use of the AI system could increase the accuracy of weather and environmental condition forecasts, which would be important for

[32] Foundations of Assessing Harm, Microsoft (2022).

Benefit	Example
	agriculture, utility, transportation, and shipping / logistics industries[33]
Natural disaster prediction	AI-driven systems could help experts predict when and where disasters may strike with more accuracy, allowing people more time to keep themselves and their homes safe in the case of a natural disaster, and improve emergency relief response times[34]
Assessment	Assign a "5" or "Very High" if the system provides a positive impact on the natural or built environment and its inhabitants, and short-term environmental policies and regulations have been taken into account. Assign a "1" or "Very Low" if there is minimal impact, or the risk of long-term negative impact(s) that cannot be mitigated or prevented
Weighting	Depends on whether there are relevant characteristics that can reasonably influence an ecosystem

4. Social and Democratic Structures

The following section describes example harms related to the erosion of social and democratic structures, and example benefits related to the improvement of social and democratic structures.

Manipulation / Incentivization

Table 1.8: Manipulation: How the AI system's ability to create highly personalized and manipulative experiences can undermine an informed citizenry and trust in societal structures.

Harm	Example
Misinformation	Use of the AI system could result in the unintentional release of false or incorrect information

[33] Archer Charles, Top Benefits of Artificial Intelligence, Koenig (2023).
[34] Archer Charles, Top Benefits of Artificial Intelligence, Koenig (2023).

Harm	Example
Disinformation	The AI system could be exploited to deliberately release false or incorrect information or disguise it as legitimate or credible in order to deceive people
Malinformation	The AI system could be used to maliciously share genuine information that is designed to stay private to the public sphere
Behavioral exploitation, Coercion	Use of the AI system could result in exploitation of personal preferences or patterns of behavior beyond that of typical marketing or advertising to induce a desired reaction
Fraudulent behavior	Use of the AI system to intentionally conduct a deceptive action for unlawful gain
Assessment	Assign a "5" or "Very High" if there are clear risks that end-users can be harmed by the system due to the absence of safeguards against exploitation or manipulation (e.g., guidelines for data and consumer protection). Assign a "1" or "Very Low" if safeguards are provided that are adequate for the functional properties of the system
Weighting	Depends on whether the system has functionality that could result in exploitation or manipulation

Table 2.8: Incentivization: How the AI system can encourage a decision or performance of a specific individual or societal beneficial action.

Benefit	Example
Beneficial default actions	Use of the AI system could increase the chances of a specific beneficial outcome (e.g., automatic enrollment or selection of default options)
Increased/personalized knowledge	AI system could increase informed citizenry. Use of AI systems could improve educational quality by providing personalized instruction (e.g., development of instructional strategies, resources, tutoring, and evaluations tailored for each student's capabilities and limitations), real-time feedback to student replies, or freeing up additional instructional time by expediting administrative tasks (grading, scheduling, record-keeping, etc.)

Assessment	Assign a "5" or "Very High" if use of the system increases the chances of a good or positive outcome. Assign a "1" or "Very Low" if system operations have limited impact on outcome selection
Weighting	Depends on whether the system has functionality to encourage specific outcomes

Social Detriment / Social Improvement

Table 1.9: Social Detriment: At scale, the way AI systems can negatively impact people and shape social and economic structures within communities.

Harm	Example
Loss of freedom of thought, movement, or assembly	Use of AI system could impact freedom of movement, freedom of thought, rights to association, peaceful assembly, or democratic participation in government
Erosion of democracy	Use of the AI system could result in election interference, censorship, and harm to civil liberties
Stereotype reinforcement	Use of the AI system could reinforce or amplify existing harmful social norms, cultural stereotypes, or undesirable representations about historically or statistically underrepresented demographics of people
False perception	Use of the AI system could result in the proliferation of false perceptions about individuals or groups
Loss of representation/ individuality	The AI system could make use of broad categories of generalization for individuals or groups, which can constrain, obscure, suppress unique forms of expression, or diminish individuality, identities, or designations
Social erasure	Use of the AI system could result in unequal visibility of certain social groups
Social alienation	Use of the AI system could result in a failure to acknowledge an individual or group's membership in a culturally significant social group

Harm	Example
Loss of individuality	Use of the AI system could suppress unique forms of expression and amplify majority opinions or "groupthink"
Denial of self-identity	Use of the AI system could result in non-consensual classifications or representations of a person or groups of people
Assessment	Assign a “5” or “Very High” if the system can be used to influence or erode existing democratic or socioeconomic structures for a given population, or forcefully impede the ability to improve their lives. Assign a “1” or “Very Low” if system operations have limited impact on existing democratic or socioeconomic structures for members of a given population or group
Weighting	Depends on whether the system has relevant characteristics that can influence the democratic or socioeconomic structures

Table 2.9: Social Improvement: At scale, the way AI systems can positively impact people and shape social and economic structures within communities.

Benefit	Example
Transparency and accountability	The AI system could help streamline the ability to collect and analyze large amounts of publicly available material which can be used to keep organizations and governments accountable[35]
Bias detection	Use of the AI system to process data at scale could be used to detect biases in policing and legislative actions[36]
Fact checking	Use of the AI system could automate fact-checking for identifying deepfakes and misleading information if used in combination with detection algorithms and AI classifiers.[37] AI-enabled fact-checking could also provide information to end-users to inform content engagement

[35] Khari Johnson, How AI Can Empower Communities and Strengthen Democracy, Venture Beat (2020).
[36] Darrell M. West & John. R. Allen, How Artificial Intelligence is Transforming the World, Brookings (2018).
[37] Artificial Intelligence, Automation, and the Economy, Executive Office of the President at 27-28 (2016).

Assessment	Assign a "5" or "Very High" if the system can be used to influence or improve existing democratic or socioeconomic structures for a given population, or assist in the ability to improve their lives. Assign a "1" or "Very Low" if system operations have limited impact on existing democratic or socioeconomic structures for members of a given population or group
Weighting	Depends on whether the system has relevant characteristics that can influence the democratic or socioeconomic structures

5. Performance

The following section describes example harms related to the reduction of operational performance, and example benefits related to the improvement of processes, operations, and productivity.

Operational Degradation / Operational Improvement

Table 1.10: Operational Degradation: How the AI system might worsen processes, performance, output, or the work environment.

Harm	Example
Skills atrophy	Over reliance on the AI system could lead to degradation of skills necessary for fulfilling life, complacency, and reduced accessibility and ability to use manual controls
Temporal degradation	Temporal data drifts or lack of model retraining and evaluation could result in performance degradation of the AI system over time[38]
Reduced efficiency	The AI-assisted system could provide a reduction in efficiency or workflow over the current system / state[39]
Job simplification	The adoption of AI could simplify the tasks performed by employees, and potentially result in lower wages, particularly for those who are already in a lower income bracket
Work pace	Implementation of AI to reduce tedious or dangerous tasks could increase stress to workers completing more tasks of greater intensity at a higher pace

[38] Daniel Vela, et al., Temporal Quality Degradation in AI Models, Scientific Reports (2022).

[39] Andrew Green, et al., Artificial Intelligence, Job Quality and Inclusiveness, OECD Employment Outlook 2023 (2023).

Assessment	Assign a "5" or "Very High" if the system can be used to worsen the operational performance or output of a given organization, group, or team. Assign a "1" or "Very Low" if system operations have limited impact on performance or output
Weighting	Depends on whether the system has relevant characteristics that can influence operational performance or output

Table 2.10: Operational Improvement: How the AI system might improve processes, performance, and output.[40]

Benefit	Example
Enhanced productivity	Use of the AI system could improve productivity and cost savings (time and labor), and promote the human workforce to higher-value tasks through the replacement of manual or repetitive and routine processes with automation
Customer personalization	Use of the AI system could provide personalized recommendations based on pattern recognition in customer data, which could in turn improve marketing return on investment (ROI) and boost sales
Increased revenue	Use of the AI system could aid in identifying and maximizing sales opportunities
Constant availability	The AI system can run constantly and consistently with 24/7 availability, and can theoretically work endlessly to the same standard without breaks
Faster data management, decision-making	The AI system has the ability to analyze and manage massive amounts of data and recognize patterns that aren't apparent to humans, which could reduce the time associated with making decisions and performing subsequent action(s)
Value above replacement	The AI-assisted system provides an improvement in efficiency or workflow over the current system / state

[40] Dimitri Antonenko, Business Benefits of Artificial Intelligence, Business Tech Weekly (2020).

Assessment	Assign a “5” or “Very High” if the system can be used to improve the operational performance or output of a given organization, group, or team. Assign a “1” or “Very Low” if system operations have limited impact on performance or output
Weighting	Depends on whether the system has relevant characteristics that can influence operational performance or output

Appendix 2: Calculating Magnitude of Each Specific Harm/Benefit

A. Calculating Magnitude for Each Specific Harm

For each specific harm, the framework user reviews each harm magnitude factor, assigning a score using rank order categories or using a Likert scale.[41]

For the Likert scale option, the framework user would then calculate an overall magnitude for each harm by:

1. Calculating a proportional severity score,

$$Proportional\ Harm\ Severity = \frac{\Sigma(severity\ factor\ scores)}{\Sigma(max\ possible\ severity\ scores)}$$

2. Calculating a proportional likelihood score, and

$$Proportional\ Harm\ Likelihood = \frac{\Sigma(likelihood\ factor\ scores)}{\Sigma(max\ possible\ likelihood\ scores)}$$

3. Multiplying these two scores together.

$$Harm\ Magnitude = Proportional\ Harm\ Severity \times Proportional\ Harm\ Likelihood$$

The user can then use this magnitude to identify specific aspects of the system that create harm above a specific threshold and might require regulation, provide good awareness for areas which might necessitate risk reduction or mitigation, and use it as a numerical basis of comparison for corresponding benefits of the system.

B. Calculating Magnitude for Each Specific Benefit

For each specific benefit, the framework user reviews each benefit magnitude factor, assigning a score using rank order categories or using a Likert scale.[42]

[41] See assessment and weighting guidance for each harm category in Appendix 1.

[42] See assessment and weighting guidance for each benefit category in Appendix 1.

For the Likert scale option, the framework user would then calculate an overall magnitude for each benefit by:

1. Calculating a proportional impact score,

$$Proportional\ Benefit\ Impact = \frac{\Sigma(impact\ factor\ scores)}{\Sigma(max\ possible\ impact\ scores)}$$

2. Calculating a proportional likelihood score, and

$$Proportional\ Benefit\ Likelihood = \frac{\Sigma(likelihood\ factor\ scores)}{\Sigma(max\ possible\ likelihood\ scores)}$$

3. Multiplying these two scores together.

$$Benefit\ Magnitude = Proportional\ Benefit\ Impact \times Proportional\ Benefit\ Likelihood$$

These benefit magnitudes can then be used to compare to corresponding harms of the system, and identify aspects of the system that could help allow or incentivize development.

C. Calculating magnitudes for harm/benefit categories:

Under the Likert scale approach, one way to calculate aggregate magnitudes for each harm/benefit category is to average together all the specific harm/benefit magnitudes belonging to that category; thus, arriving at a maximum of 10 magnitudes for harm categories and 10 magnitudes for benefit categories.

For example, calculation of the aggregate magnitude for the physical injury category would include the following:

$$Aggregate\ Harm\ Magnitude_{PI} = \left(\frac{\Sigma(Harm\ Magnitudes)}{total\ number\ of\ harms}\right)_{PI}$$

where *PI* = the physical injury category.

Similarly, calculation of the aggregate magnitude for the physical health category would include the following:

$$Aggregate\ Benefit\ Magnitude_{PH} = \left(\frac{\Sigma(Benefit\ Magnitudes)}{total\ number\ of\ benefits}\right)_{PH}$$

where *PH* = the physical health category.

Alternatively, the framework user can apply a weighted sum or weighted average of the harm or benefit magnitudes to obtain the aggregate magnitudes for a more accurate reflection of the level of harm or benefit imparted by each category. This would allow for flexibility in the harm/benefit analysis, and better reflect differing sector priorities.

Framework for Identifying Highly Consequential AI Use Cases

The Special Competitive Studies Project in collaboration with John Hopkins University Applied Physics Lab (JHUAPL) developed a framework for identifying AI use cases or classes of use that may be highly consequential for society— whether harmful or beneficial—to help regulators determine on which AI uses to focus their regulatory efforts.

4 Principles for American AI Governance

1. Govern AI use cases by outcome and sector.
2. Empower and modernize existing regulators.
3. Focus governance on high-consequence use cases.
4. Strengthen non-regulatory AI governance.

The Need for a High Consequence Framework

- We must balance innovation with regulation.
- The U.S. government must focus their efforts on AI that has the most significant beneficial and harmful impacts on society.
- While the U.S. must mitigate the risks that AI presents, it is critical also to harness the tremendous benefits AI offers for our society.
- This risk-based approach aligns with the EU's AI Act, the NIST AI Risk Management Framework, the Blueprint for an AI Bill of Rights, and the Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence.

When to Apply the Framework

- Regulators foresee a new application for AI;
- New applications for AI is under development or proposed to a regulatory body; or
- An existing AI system has created a highly consequential beneficial or harmful impact that triggers an ex-post facto regulatory review.

Implementation

1 Preliminary Analysis

Determine whether the AI use has foreseeable harms or benefits as an initial filter to determine whether a fuller assessment is needed.

2 Parallel Analysis of Harms and Benefits

Conduct a more comprehensive parallel analysis of categorical and specific harms and benefits.

3 Final Decision on High Consequence

Using an assessment of the magnitude of benefits and harms, determine if the AI use case is of high consequence and necessitates next steps to regulate the AI development.

4 Periodic Reassessment

Periodically monitor sectoral AI use to determine if the list of AI systems identified as highly consequential remains appropriate for that sector.

The framework provides ten corresponding categories of harms and benefits and specific harms and benefits for each category (see Appendix 1 of framework), as examples, with the recognition that specific harms/benefits will be unique to sectors. It also provides factors to calculate the magnitude (e.g., probability and scope) of identified harm(s) and benefit(s). Lastly, the framework offers ways to make high consequence determinations based on quantitative and qualitative analyses.

Harm Categories	Benefit Categories
Physical Injury	Physical Health
Emotional or Psychological Injury	Emotional or Psychological Health
Opportunity Loss	Opportunity Access
Economic Loss	Economic Access
Liberty Loss	Liberty Protection
Privacy Loss	Privacy Protection
Negative Environmental Impact	Positive Environmental Impact
Manipulation	Incentivization
Social Detriment	Social Improvement
Operational Degradation	Operational Improvement

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0089
Comment from Larry Rubendall

Submitter Information

Name: Larry Rubendall

General Comment

Comment attached

Attachments

Response for Request for comment on AI M-Memorandum

General Comments

> While generative AI is worthy of special attention, OMB should be addressing the broader issue of how the Federal government will adopt and govern the use of any disruptive technology. This is not the first (think web browser) nor the last (think general use quantum computing enabling expanded generative AI capabilities) that will disrupt operations and require rethinking of workflows for mission delivery. As an example, at the very least, we will surely begin to engage in "inhuman centered design" whereby we optimize our digital delivery to include cognizance that most of our customers will use generative AI enhanced search to find our services?
>
> Secondly, additional layers of bureaucracy rarely solve a problem, but just make decisions more time consuming; generally injecting political considerations and rewards without added value. Concentrate on leveraging the professional IT management structures and governance processes to do what they were intended to do, with Executive management review of their recommendations.
>
> Finally, establish by law, the position of Chief Technology Officer. This position is uniquely able to examine emerging technologies, evaluate their business value in consultation with business unit leaders, and create plans to develop innovative solutions for their use through proof-of-concept and proof-of-value pilot projects.

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

> By law (Clinger-Cohen Act), each CFO Act Agency and by this time most if not all smaller independent bureaus, commissions, and regulatory bodies have a CIO. The CAIO should be a role assigned to the CIO, the one senior executive who will have the expertise to responsibly adopt the new disruptive generative AI technology. Proposals, generative AI enabled product project review, approval, instantiation, and governance should be located in the Enterprise Architecture practice of each CFO Act Agency.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

> The Enterprise Architecture (EA) practice is the one governing body within each agency that has the breadth of cognizance to provide overarching AI Governance. EA encompasses business process models, solutions architecture, data inventory, and participation in periodic investment performance reviews in concert with Capital Planning and Investment Control. Adding additional layers of bureaucracy only invites redundancy, the accompanying monetary waste and confusion of responsibility and authority.

3. How can OMB best advance responsible AI innovation?

a. Encourage anticipation and response to industry changes as a key to innovation success. Establishing a Chief Technology Officer position to keep abreast of industry trends and changes is essential to the identification of new opportunities.

b. Leverage the Federal CIO Council Innovation committee. It can lead to innovative solutions by fostering collaboration among Federal organizations. Networking with other businesses and industry experts fosters a culture of shared learning.

c. Rewards for process automation should align with employee "wifm" goals. Encouraging continuous learning and providing opportunities for skill development contribute to innovation success. Monetary awards for innovative solutions should be made quickly and be substantial.

d. Pursue change management with discipline and foresight. Being adaptable to change and open to new ideas is crucial for successful innovation. Flexibility allows you to pivot when needed and capitalize on emerging opportunities.

e. Include Customer Experience Management and Human Centered Design as a key component of every project. Regular feedback from key stakeholders helps in refining and improving innovations.

f. Engage in Investment Performance Reviews that are thorough and exhaustive. Establishing KPIs and regularly evaluating the success of innovation helps in continuous improvement. Learning from both successes and failures is important for future innovation efforts.

g. Ensure product development projects are scoped, documented, and acquisition strategies prepared to take advantage of funding opportunities when they arise. Efficient time management is crucial for bringing innovations to life in a timely manner. Balancing speed with thoroughness is essential.

Organizational Structure:

a. The Office of the CTO, in consultation with business unit leaders, identifies priority risks to be addressed through technological solutions.

b. Projects are reviewed and funded through a consultive process which includes the CIO, business unit, and CFO organizations.

c. Open Innovation: For specific areas of technological interest (e.g., Gen AI) executive management may instantiate a "Tiger Team" to discuss ways the new technology can be adopted to best advantage by the organization and pilot project funded to prove efficacy.

    i. Look beyond internal resources and tap into external expertise.

    ii. Open innovation involves collaborating with external partners, citizens, or the broader community to leverage diverse ideas and insights.

d. Experimentation and prototyping: Testing ideas early and often, even with minimal viable products (MVPs), helps identify strengths and weaknesses before significant resources are invested.

e. Risk Management: Innovation inherently involves uncertainty, and a proactive approach to identifying, assessing, monitoring, and mitigating risks is crucial for innovation success.

f. Data driven decision making.

    i. Leverage data to inform decision making.

    ii. Analyzing insights into user behavior, trends, and the performance of innovative solutions, allowing for informed adjustments.

g. Design solutions with scalability in mind.

    i. Successful innovation projects are often those that grow to meet increasing demands or adapt to changing circumstances without compromising performance of user experience.

h. Invest in innovation in a way that aligns better with private sector practices.

    i. Provide funds to an established team in the CTO office that runs the process by which pilot projects are assessed, decided on and run.
    ii. The overall investment (budget provided to CTO) can be made in accordance with potential multi-year returns based on scalability of those ideas that turn out to be winners, but with the realistic expectation that not every 'innovation' will pay off. In other words, a chunk of money assigned to a responsible and capable group that aggressively stimulates controlled innovation with transparency.
    iii. Innovation will always be limited by some amount of funding but creating an 'open fund' that is managed & replenished on a year-by-year basis in accordance with appropriations would significantly increase velocity and open new doors to scalability, which is the only way innovation ever really pays off.

Creating a culture of innovation:

a. Leadership plays a critical role in setting the tone for innovation.

    i. Leaders should communicate a clear vision of innovation, express a commitment to experimentation, and support risk-taking.

    ii. Minimize organizational roadblocks to projects by identifying promising projects and creating project frameworks (project charter, project scope definition, risk analysis and mitigation plans, funding proposals, and acquisition plans) to be ready when funding becomes available.

b. Encourage open and transparent communication.

    i. Employees should feel empowered to share their ideas, provide feedback, and voice concerns without fear of reprisal.

    ii. Open communication fosters a collaborative environment conducive to innovation.

c. Provide employees with the autonomy to explore new ideas and take risks.

i. Empowerment allows individuals to feel a sense of ownership over their work and encourages creative thinking.

ii. Do not punish failure. Fail quickly, analyze thoroughly, identify lessons learned, move to the next project.

d. Recognize and reward innovative efforts.

i. This can be done through formal recognition programs, incentives, or simply acknowledging and celebrating small wins.

ii. Positive reinforcement reinforces the value of innovation.

e. Allocate time specifically for innovation.

i. This could involve dedicating a percentage of work hours or organizing regular innovation workshops and hackathons.

ii. Providing time and resources signals the importance of innovation within the organization.

f. Foster collaboration across different departments and teams.

i. Cross-functional teams bring diverse perspectives and expertise, leading to more comprehensive and innovative solutions.

g. Invest in continuous learning.

i. Providing training and development opportunities in areas such as design thinking, problem-solving, and emerging technologies can enhance employees' innovation capabilities.

h. Define key performance indicators (KPIs) for innovation.

i. Create a clear roadmap for organizational innovation priorities (Technical Statement of Direction)

ii. Establish metrics to track the progress of innovation initiatives and use data to inform decision-making and continuous improvement.

i. Instill a customer-centric mindset.

i. Encourage employees to understand customer needs, seek feedback, and actively involve end-users in the design and improvement of products and services.

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

Criteria to qualify a pilot project for consideration:

a. Resolves a risk to a mission service delivery problem identified in an unfunded liability.

b. Resolves a risk related to a mission delivery problem that is due to staff shortages.

c. Provides a direct enhancement to mission delivery addressing a customer service shortfall with respect to diversity, inclusion, equity, etc.

d. Provides a direct enhancement to mission delivery addressing a customer experience issue.

Projects we consider address the following:

a. Clear Objectives: Define specific and measurable objectives for the pilot project. Identify the problem you want to solve or the opportunity you want to explore using AI.

b. Feasibility: Ensure that the pilot project is technically feasible within the resources and expertise available in your organization.

c. Data Availability: Make sure you have access to quality data relevant to the project. Assess data availability, quality, and compatibility.

d. Impact and Value: Choose a pilot project that has the potential to deliver significant value to the organization.

e. Short Timeframe: opt for a project with a relatively short timeframe for completion.

    i. Embracing agile methodologies and being open to iterative development helps in adapting quickly to changing circumstances and refining solutions based on real-world feedback.

f. Low-Risk and Low-Cost: As it's a pilot project, aim for initiatives that have a relatively low risk and cost. This reduces the potential impact of failure while still providing valuable insights.

g. Alignment with Business Strategy: The pilot project should align with the overall business strategy and address the most critical challenges or opportunities faced by the organization.

h. Cross-Departmental Collaboration: Choose a project that involves collaboration between different departments or teams.

    i. This promotes a broader understanding of AI's capabilities and fosters a culture of innovation.

    ii. Successful innovation often comes from collaboration between individuals with diverse skills and backgrounds.

    iii. Cross-disciplinary teams can bring unique perspectives to problem solving.

i. Scalability and Transferability: Consider whether the insights and solutions from the pilot project can be scaled and applied to other areas within the organization.

j. Ethical Considerations: Ensure that the pilot project adheres to ethical principles and legal requirements. AI projects should respect user privacy, avoid bias, and be transparent.

k. Measurable Metrics: Define key performance indicators (KPIs) to evaluate the success of the pilot project. This allows for objective assessment of the project's outcomes.

l. Privacy and Data Security: As technology advances, ensuring robust data security and privacy measures is crucial.

    i. Building trust among users and stakeholders requires a commitment to protecting sensitive information.

m. Adaptability to Technology Changes: Technologies are dynamic, and successful solutions often demonstrate an ability to adapt to evolving trends and needs.

    i. Flexibility is key to long-term relevance.

n. Executive Support: Obtain support from top-level executives within the organization.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

No

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

Yes. Given the fast-evolving generative AI capabilities, baselines will have to be reviewed regularly. It is particularly important to identify what roles are essentially human and cannot be ceded to AI, much like there are inherently Federal roles within the contracting process that cannot be filled by a contractor. This will be pivotal in ensuring that AI continues to consider humanity's interests as paramount.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

In addition to Federal wide governance structures, standard documentary artifacts that prove conformance with the responsible AI guidelines are essential. It is completely wasteful to have all the CFO act agencies developing their own artifacts such as Model Cards, Data Cards, Monitoring Plan templates, etc.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

The use case inventory should include all AI projects including one's under consideration for development. It is better for the public to understand where their money is being spent before large expenditures are made on projects that will ultimately be cancelled due to public outcry.

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: National Association of Federally-Insured Credit Unions

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General Comment

NAFCU's comment.

Attachments

NAFCU Letter to OMB re AI Memorandum_December 5 2023

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National Association of Federally-Insured Credit Unions

December 5, 2023

Shalanda D. Young
Director
Office of Management and Budget
725 17th Street NW
Washington, D.C. 20503

RE: Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (OMB-2023-0020)

Dear Director Young:

On behalf of the National Association of Federally-Insured Credit Unions (NAFCU), I am writing in response to the Office of Management and Budget's draft memorandum titled *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* (the Memorandum). NAFCU advocates for all federally-insured not-for-profit credit unions that, in turn, serve 138 million consumers with personal and small business financial services products.

As community financial institutions, credit unions recognize that responsible AI deployment can help achieve important benefits for consumers. While federal banking regulators, such as the National Credit Union Administration (NCUA) and Consumer Financial Protection Bureau (CFPB), are independent agencies, they would be "covered agencies" as defined in the Memorandum.[1] AI used by federal financial regulatory agencies would therefore be subject to the Memorandum's substantive provisions addressing risk management practices, governance, and transparency.

NAFCU has generally supported non-regulatory approaches for encouraging the use of AI within the financial services sector.[2] As with other technologies, consumer financial protections and antidiscrimination rules continue to have broad applicability and are not diminished by credit union deployment of AI. Existing regulation requires credit unions to adopt robust risk

[1] OMB, Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence [Memorandum], 3 (November 2023), *available at* https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf; *see also* 44 U.S.C. § 3502(1).
[2] *See* NAFCU, Letter to NCUA re: Financial Institutions' Use of Artificial Intelligence, Including Machine Learning (RIN: 3064-ZA24), July 1, 2021, *available at* https://www.nafcu.org/comment-letter-ncua-digital-assets-and-related-technologies-rfi-File

management practices and compliance systems to ensure that the use of new technology does not jeopardize safety and soundness or the rights of individual members.

By contrast, the use of AI by federal banking regulators, such as the CFPB, is subject to fewer explicit guardrails, particular in the domain of transparency. Accordingly, NAFCU supports the Memorandum's directive to agencies to "annually submit an inventory of its AI use cases to OMB and subsequently post a public version on the agency's website."[3] The Memorandum also notes that additional guidance regarding the agency inventory process will be forthcoming. Because the scope and detail of reporting will depend significantly upon OMB's future guidance, NAFCU recommends soliciting public comment on any supplemental instructions for preparing an agency's AI use-case inventory. When developing future guidance, NAFCU recommends OMB clarify what it means for an agency to report use cases "to the extent practicable," and how that standard might apply to financial regulatory agencies.

NAFCU also recommends that OMB specify an additional category of presumptively "rights-impacting" AI usage under section 5(b)(i) of the Memorandum. This category should cover the use of AI by a financial regulatory agency for the purpose of making any material decision related to the supervision of a financial institution. A material supervisory decision could encompass a risk assessment, an examination rating, an exam-related finding, or the initial scoping of an exam—among other things. While it remains unclear whether AI is being deployed in this way by the functional banking regulators, it is likely the CFPB is one covered agency using AI as part of its supervisory prioritization process, which determines the scope and targets of future examinations of financial institutions subject to its jurisdiction.[4]

The CFPB's FY 2023 Annual Performance Report states that the CFPB continues "to assess sources and capabilities that will provide an enhanced data-driven approach to its areas of supervisory focus."[5] The report provides the specific insight that the CFPB is now "[l]everaging additional data sources as well as artificial intelligence within the supervisory prioritization process."[6] To date, the CFPB has shared very little information about its use of AI to perform supervisory prioritization.

Some important information regarding AI projects comes not from the CFPB itself, but from vendors selected to perform data analysis contracts. For example, a press release from one company describes a "Data Analytics Blank Purchase Agreement" covering "machine learning,

[3] The Memorandum, 4 (November 2023)
[4] See NAFCU, Letter to CFPB Director Rohit Chopra, "Re: Supervisory Use of Artificial Intelligence," (October 3, 2023), *available at* https://www.nafcu.org/system/files/files/10.3.2023%20Letter%20to%20CFPB%20re%20Supervisory%20Use%20of%20AI.pdf.
[5] CFPB, FY 2023 Annual Performance Report, 85 (February 2023)
[6] *Id*.

and natural language processing support."[7] However, the CFPB has never disclosed where ML or natural language processing support may be applied. One potential domain is the CFPB's consumer complaint database, where it is unlikely that manual analysis is feasible.[8]

As a matter of fairness, institutions regulated by the federal government should be aware of the inputs and processes that determine supervisory decisions and outcomes. Examinations of credit unions by the CFPB and the NCUA can be expensive in terms of time and resources. Furthermore, as member-owned institutions, credit unions must consider the costs of supervision before determining the share of profits that may be distributed to members as a dividend. Individual members and the credit union itself deserve to know whether AI-driven regulatory processes will influence the scope and length of credit union exams, since unfair or arbitrary supervisory decisions can negatively impact the performance of the credit union and the financial health of its members.

More generally, NAFCU encourages OMB to consider how it can tailor the Memorandum to promote AI transparency within the CFPB and other financial regulatory agencies. To the extent the CFPB has access to institution-specific early warning information, the agency should be willing to share that data with regulated entities. Institutions should also be afforded the opportunity to independently assess data that might inform future exam scope as early as possible. This would allow credit unions and other financial institutions to course correct prior to an examination and would afford an opportunity to explain data trends that might be perceived as problematic.

NAFCU appreciates the opportunity to comment on OMB's draft Memorandum. Where the use of AI is present, the CFPB and other financial regulatory agencies should commit to the same standards of explainability, accountability and transparency that are expected from credit unions and other regulated financial institutions. If you have any questions or concerns, please do not hesitate to contact me at amorris@nafcu.org or (703) 842-2266.

Sincerely,

Andrew Morris
Senior Counsel for Research and Policy

[7] Analytica, CFPB Data Analytics BPA Prime Award (October 20, 2022), available at https://www.analytica.net/press-release/cfpb-data-analytics-bpa-prime-award/
[8] *See* Tom Sabo, SAS Institute Inc., "Applying Text Analytics and Machine Learning to Assess Consumer Financial Complaints" (2017), available at https://support.sas.com/resources/papers/proceedings17/SAS0282- 2017.pdf

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0091
Comment on OMB-2023-0020-0001

Submitter Information

Organization: National Health Law Program

General Comment

Attached are the National Health Law Programs comments.

Attachments

Comments on OMB Proposed AI Memo NHeLP

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Executive Director

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December 5, 2023

Shalanda D. Young
Director
Office of Management and Budget

Re: OMB-2023-0020, Draft Memorandum titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"

Dear Director Young,

The National Health Law Program (NHeLP) is a public interest law firm that fights for equitable access to quality health care for people with low incomes and underserved populations and for health equity for all. For over fifty years, we have litigated to enforce health care and civil rights laws, advocated for better federal and state health laws and policies, and trained, supported, and partnered with health and civil rights advocates across the country. We believe that all people should have access to the health care they need, regardless of geography, race, ethnicity, language, income, disability, sex, gender identity, sexual orientation, immigration status, or other factors.

NHeLP welcomes the opportunity to use our experience regarding automated systems to comment on the Office of Management and Budget's (OMB) guidance on the federal use of artificial intelligence ("Proposed AI Memo").[1] NHeLP has a long history of fighting against faulty and harmful computer systems and processes that rely on automated decision making systems (ADS), including Artificial Intelligence (AI), such as assessment tools, eligibility systems, and prior authorization mechanisms that unlawfully deny people benefits to which they are entitled.[2] We have also partnered with Upturn and Legal Aid of Arkansas to form the Benefits Tech Advocacy Hub to give advocates tools to fight harmful benefits technology and force greater transparency so that harm to individuals can be

identified, prevented, or reduced earlier in the technology's lifecycle. NHeLP has also released our Principles for Fairer, More Responsive Automated Decision-Making Systems, which reflect our years of work regarding ADS, including AI, and what features and protections are needed in responsible ADS. We have real-world experience fighting the harm caused by technology in public benefits, knowledge about the how and why such harms occur, and practical ideas about policies necessary to protect against such harms.

NHeLP's decades of experience fighting to protect the rights of low-income and underserved people impacted by AI gives us a different and needed perspective on policy efforts to protect against harmful AI. We understand what the systems look like on the ground and how they impact people's rights. We also consistently see proposals to mitigate the harms of AI that fail to recognize the impact on public benefits, for which it is well-recognized that people have a "brutal need."[3] Protections of notice, transparency, and explainability already exist, are constitutionally required, and must be fully recognized in any AI policies that impact public

[1] Request for Comments on Advancing Governance, Innovation and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, 88 Fed. Reg. 75, 625 (Nov. 3, 2023) [hereinafter Proposed AI Memo].

[2] *See* Elizabeth Edwards, Nat'l Health L. Prog., *Preventing Harm from Automated Decision-Making Systems in Medicaid*, https://healthlaw.org/preventing-harm-from-automated-decision-making-systems-in-medicaid/. This advocacy includes the following cases: *A.M.C. v. Smith*, No. 3:20-cv-00240, 2023 WL 6881785 (M.D. Tenn. Oct. 18, 2023) (challenging Tennessee's termination of Medicaid coverage without proper notice and hearing, including when the automated eligibility system made errors, could not evaluate for all categories of eligibility, especially related to disability, and otherwise wrongfully terminated coverage); *Darjee v. Betlach*, No. CV 16-00489 (D. Ariz. March 11, 2019) (alleging immigration status-related errors in the eligibility system that led to individuals wrongfully being provided emergency only Medicaid coverage instead of full Medicaid benefits); *Hawkins v. Cohen*, 327 F.R.D. 64 (E.D.N.C. Aug. 9, 2018) (granting preliminary injunction to stop North Carolina's Medicaid eligibility computer system from improperly automatically terminating benefits); *L.S. v. Delia*, No. 5:11-CV-354, 2021 WL 12911052 (E.D.N.C. March 29, 2012) (finding due process and other violations over the use of an automated assessment tool to determine budgets for Medicaid home and community-based services and cut those budgets without appropriate notice, including information about the basis of the decision made by the tool); Brief for Nat'l Health L. Prog. as Amici Supporting Appellant, *J.R. v. Horizon N.J. Health*, A-002028-21, N.J. Super. Ct. App. Div. (2023) (discussing right to assessment tools determining nursing hours and harmful AI); Brief for Nat'l Health L. Prog, et. al. as Amici Supporting Plaintiff Appellees, *Wit v. United Behavioral Health Care*, 79 F.4th 1068 (9th Cir. 2023) (discussing the need for behavioral health services and the use of tools to authorize those services based on generally accepted standards of care as opposed to internal algorithms based on other factors, including financial).

[3] *Goldberg v. Kelly,* 397 U.S. 254 (1970).

benefits.[4] We welcome executive action and OMB guidance on the federal use of AI, including mitigating harm. This Proposed AI Memo is an important step in protecting rights and equity, but clarification and more detail are needed to assure that individuals' rights are not violated.

I. The definition of AI and technical context need to be broader and consistent with the Executive Order.

Policies addressing AI fairness and accountability frequently use different definitions of what types of systems are included as AI, which is confusing and causes uneven developments in protective policies. Unfortunately, the definition of AI in the Proposed AI Memo is also inconsistent with the definition in the Executive Order that the Memo is intended to implement.[5] Continuity of the executive branch's definition of AI is necessary for clarity to federal agencies. The Executive Order definition of AI is broader than that used in the Memo and will therefore apply to more of the technology that agencies already use and will use in the future. The definition of AI in the Propose AI Memo is too narrow and will exclude many systems that impact people's rights, particularly in the context of public benefits. This includes systems that determine eligibility, automate notices, and decide levels of benefits. The guidance is meant to implement the Executive Order and therefore must reflect the Executive Order's definition.

Further, the technical context of the Proposed AI Memo definition is too limiting and would exclude current automated systems that are harmful and need to be addressed by this Proposed AI Memo. While the technical context rightly notes that the level of technical complexity and autonomous functioning are not relevant to the definition of AI, the exclusions in this section are overly narrow.[6] The final guidance should not exclude robotic process automation or systems that operate only by human-defined rules. We have seen automated systems that rely solely on human-defined rules be improperly programmed, use data incorrectly, and result in improper denials and reductions of public benefits.[7] By considering AI

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[4] *Id.*; *see also* Jane Perkins, Nat'l Health L. Prog., *Demanding Ascertainable Standards*, National Health Law Program (June 11, 2021), https://healthlaw.org/resource/demanding-ascertainable-standards-medicaid-as-a-case-study/.

[5] *Compare* Exec. Order No. 14,110, 88 Fed. Reg. 75, 191 (Nov. 1, 2023) (defining AI in alignment with 15 U.S.C. § 9401(3)) *with* Proposed AI Memo, *supra* note 1, at 22-23 (defining AI by citing to § 238(g) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019).

[6] Proposed AI Memo, *supra* note 1, at 23.

[7] *See, e.g., A.M.C. v. Smith,* 2023 WL 6881785; Benefits Tech Advocacy Hub, Case Study: Wisconsin Medicaid Home and Community Based Services Terminations, https://www.btah.org/case-study/wisconsin-medicaid-home-and-community-based-services-terminations.html (describing automated eligibility system that repeatedly wrongfully terminated eligible individuals due to a system that failed to properly implement the eligibility policies); *see*

in a narrow context, ADS that regularly impact people's rights will continue to be used without the important oversight and mitigation strategies outlined in the Proposed AI Memo.

II. Requirements for Chief AI Officers and responsible AI innovation provide an important blueprint for agency AI management but need clarification.

We commend the thought put into agency AI oversight through Chief AI Officers (CAIOs) and responsible innovation measures. The inclusion of agency CAIOs and their responsibilities signifies the importance of AI oversight and how specialized knowledge and leadership are a crucial part of enacting the rest of the Proposed AI Memo. While we appreciate that much attention is paid to the authority and responsibilities of the CAIO, an assessment of whether the CAIO has the capacity to take on the duties outlined is never mentioned.[8] Simply giving an employee with the necessary level of authority these additional responsibilities without assessing whether they have the time or resources to carry them out is setting up the responsibilities to get minimal attention and time. In reality this work will need significant attention. The capacity of the CAIO to perform the task must also be part of the evaluation of the appointment and what other steps an agency may need to take to effectuate the memorandum.

We are concerned that many of the activities called for, such as conducting risk assessments and overseeing agency lists of safety- or rights-impacting AI, are softened by language such as the terms "necessary."[9] It is unclear from the Proposed AI Memo what OMB considers necessary for the purpose of AI oversight and innovation. For clarity and continuity across the federal government, we encourage OMB to define these terms and provide clear parameters to agency officials. Any such parameters should be written to result in as much oversight of risk assessment as possible, especially in the context of rights-impacting AI. The CAIO role should not be as discretionary as it is described in the Proposed AI Memo and OMB should have more criteria it can use to review and counter decisions made by the CAIOs. For example, as discussed in Section III.a *infra* the waiver authority of the CAIO is too unfettered. The CAIOs play a critical role in identifying risks in automated systems and they must have sufficient authority, capacity, and accountability to perform their important functions, including

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also Casey Ross & Bob Herman, *Denied by AI: How Medicare Advantage plans use algorithm to cut off care for seniors in need*, STAT NEWS (Mar. 13, 2023), https://www.statnews.com/2023/03/13/medicare-advantage-plans-denial-artificial-intelligence/.

[8] *See, e.g.,* Proposed AI Memo, at 4 (discussing an evaluation of authority of the designated CAIO); *id.* at 5-8 (discussing the necessary, skills, knowledge, training, expertise, responsibility, seniority, and reporting structure of the CAIO).

[9] *See, e.g.*, Proposed AI Memo at 4.

risk assessments. The more checks and balances there are on an automated system, both before and during use, the lower the risk will be of harming underserved individuals.

III. Clearer guidelines and authority are needed to adequately manage the risks of rights-impacting AI.

A critically important part of the Proposed AI Memo is that minimum practices to manage risks from rights- and safety-impacting AI must be implemented by August 1, 2024 or agencies must stop using non-compliant AI. We believe that the best response to AI that is biased, discriminatory, or at all inappropriately reduces access to public benefits like Medicaid is to not use it.[10] As discussed earlier, public benefits are only provided to those in our country who are most in need of the services provided and are often not in positions where an error or harm has a negligible impact on their lives.[11]

We also appreciate the requirement that agencies review each AI in development or use to determine if it is rights- or safety-impacting. In many of the areas that are identified as safety- and rights-impacting, the likelihood of bias is high given the pervasiveness of institutional bias in those areas, such as health care, housing, the criminal legal system, child welfare, employment, and policing. As recognized by numerous studies regarding bias in algorithmic decision-making, there are often issues with bias in the underlying data or research assumptions due to institutional biases.[12] Without thorough review, many AI uses would slip

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[10] *See generally* Ryan Calo & Danielle Keats Citron, *The Automated Administrative State: A Crisis of Legitimacy,* 70 EMORY L. J. 4 (2021), https://scholarlycommons.law.emory.edu/cgi/viewcontent.cgi?article=1418&context=elj (identifying harmful impacts in public benefits and the need to ensure tools enhance rather than undermine agency authority).

[11] *See, e.g.,* Leighton Ku et al., Health Affairs, *Florida's Medicaid Unwinding Lacks Fundamental Safeguards and Can Harm Population Health* (Dec. 1, 2023), https://www.healthaffairs.org/content/forefront/florida-s-medicaid-unwinding-lacks-fundamental-safeguards-and-can-harm-population (finding that disproportionate harm from Medicaid unwinding problems in Florida will deepen racial inequities in health care access and likely have serious health consequences).

[12] *See, e.g.,* Ziad Obermeyer, *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 SCIENCE 447 (Oct. 25, 2019), https://science.sciencemag.org/content/366/6464/447; Hannah E Knight et al., *Challenging Racism in the Use of Health Data*, 3 THE LANCET E144 (Mar. 1, 2021), https://www.thelancet.com/journals/landig/article/PIIS2589-7500(21)00019-4/fulltext; Mikella Hurley & Julius Adebayo, *Credit Scoring in the Era of Big Data*, 18 YALE J. L. TECH. 148 (2016). Relatedly, in the additional minimum practices for Rights Impacting AI, the Proposed AI Memo says that systems "should ensure that data used…is adequately representative of the communities who will be affected by the AI, and has been review for improper bias." Proposed

through the cracks and cause preventable harm. We agree that individual agencies are typically the experts in their own work and thus it makes sense to have each agency define their own additional AI uses that are presumed to be safety- or rights-impacting. However, because defining additional AI uses means additional analysis or potentially limitations on using AI tools that have decreased human workload, and thus incentivizes not finding issues, there must be oversight of this authority as well.

While we support AI use-case review and agency-specific lists, these two parts of the Proposed AI Memo would benefit from further detail. All agency activities related to mitigating the risks of rights-impacting AI as outlined in the Proposed AI Memo should have detailed oversight and accountability mechanisms. OMB should include a process for review of agency rights-impacting use cases and agency-specific lists. OMB and public comment feedback should be required on what additional use-cases the agency may have failed to include. There should also be consequences for when agencies are non-compliant with the agency review and list requirements that will be sufficiently significant to act as a deterrent. OMB must also include a mechanism to stop agencies from using non-compliant AI.

a. Needed protections are undermined by agency authority to determine that AI is not rights-impacting and allow waivers of minimum requirements.

The proposed policy to allow CAIOs to determine that AI presumed to be rights-impacting is not rights-impacting in practice creates a dangerous exception that could undermine all the critical protections in the Proposed AI Memo. If this portion of the guidance remains in the final document, further oversight of the CAIO waivers by OMB will be necessary to ensure that agencies are not using this loophole inappropriately. The Proposed AI Memo on risk assessments lacks clarity and any limits on when risks or harms are too high. There should be clearer indicators of what type of harms should be heavily weighed or presumed impossible to mitigate through the benefits. OMB should provide templates for the risk assessments and maintain authority to override or maintain final approval of the assessments. Overall, more detail on such a review process is needed in the final guidance.

Similarly, allowing agencies to waive mitigation requirements and extend the deadline for compliance with the minimum requirements could allow agencies to evade compliance. In the context of waivers, the Proposed AI Memo fails to define or provide detail on what is

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AI Memo, *supra* note 1, at 19. Given the evidence of the role of data in algorithmic bias, this evaluation of the data needs to be a requirement rather than simply a "should." Meredith Whittaker et al., AI Now, *Disability Bias & AI Report* 8-12 (Nov. 20, 2019), https://ainowinstitute.org/publication/disabilitybiasai-2019 (discussing bias in AI and data issues regarding disability); Rajiv Movva et al., *Coarse Race Data Conceals Disparities in Clinical Risk Score Model Performance* (Apr. 2023), https://arxiv.org/abs/2304.09270.

considered an unacceptable impediment. In the context of extensions, the Proposed AI Memo fails to provide detail on when an agency may find it cannot feasibly meet minimum requirements by August 1, 2024. Guidance for both must be included in such a way that maintains the highest level of mitigation requirements possible, or OMB risks agencies falling short of the goals of AI governance. Further, the ability to override or maintain final approval of such waivers and extensions is necessary. Waivers should also be time limited and require regular review to ensure they remain justified. There is also no clear guidance that would prohibit an agency from using a harmful AI. Without sufficient detail guiding agency authority and oversight by OMB, there is too much discretion instilled in the CAIO position that would allow agencies to evade the important protections in the Proposed AI Memo.

b. Agencies are not provided a roadmap for oversight of AI used by state and local governments in federally funded programs.

Many of the presumed rights-impacting AI uses occur at the state and local level rather than within the federal government, but federal agency oversight of such programs tied to funding should require the relevant agencies to apply the obligations of the Proposed AI Memo to the AI that they have a role in approving. In Medicaid, the primary context within which NHeLP works on AI, there is federal approval of the systems themselves or use of AI systems for eligibility, service approvals and denials, and other services-related systems.[13] ADS used in Medicaid frequently reduce or deny people benefits in ways that deny them Constitutional Due Process.[14]

Despite the breadth of state and local rights-impacting AI under the purview of federal agencies, such use-cases are not mentioned in the Proposed AI Memo. The final guidance must remedy this and provide a blueprint for federal agencies to work with the programs they oversee. This should include following the final AI Memo as a condition of federal funding as well as a process and timeline for federal agencies to develop their own specific guidance and best practices. Should OMB determine that it would exceed its authority to require state

[13] For example, the Centers for Medicare & Medicaid services certify Medicaid enterprise systems, including those used to determine eligibility. *See* Ctrs. for Medicare & Medicaid Servs., *Certification*, https://www.medicaid.gov/medicaid/data-systems/certification/index.html. CMS also approves the use of automated tool for services, including assessment tools used for determining services. *See* Elizabeth Edwards & Sarah Grusin, Nat'l Health L. Prog., *Opportunities for Public Comment on HCBS Assessment Tools* (Dec. 19, 2019), https://healthlaw.org/resource/opportunities-for-public-comment-on-hcbs-assessment-tools/.

[14] *See See* Miriam Delaney Heard et al., Nat'l Health L. Prog., *Medicaid Enrollees Challenge Florida's Failure to Provide Due Process During Unwinding* (Aug. 24, 2023), https://healthlaw.org/resource/medicaid-enrollees-challenge-floridas-failure-to-provide-due-process-during-unwinding/; Edwards, *supra* note 2; Perkins, *supra* note 3.

agencies to follow the guidance, the final AI Memo should still outline the responsibility of the federal agencies for their approval of any AI systems.

c. Rights-impacting AI notice minimum practices proposals lack necessary clarity and provide for dangerous loopholes that may lead to rights violations.

The Proposed AI Memo's risk management of rights-impacting AI is an important step toward realizing equity in the use of technology, particularly the requirements for human intervention and oversight. However, the notice minimum practices create significant risk that entities will follow the minimum requirements and not recognize that requirements of "applicable laws" like the Constitution require far greater notice and transparency for certain rights-impacting AI, including for public benefits.[15] The Proposed AI Memo appropriately requires notice be given to negatively impacted individuals with instructions on how to contact the agency, but only encourages agencies to provide explanation for such decisions.[16] In the context of public benefits, agencies are constitutionally required to provide adequate explanation for an individual to understand the decision being made and what the agency relied upon to reach such a decision.[17] Worryingly, footnote 37 states that explanations of AI decisions "are often not technically feasible."[18] However, if AI is used where constitutional protections require explainability, then AI that cannot explain its decisions must not be allowed to be used.

The final OMB guidance should also be clear that AI systems must be able to meet the requirements of the guidance, including notice and transparency, and not assert "protections" of intellectual property. Any AI system used should be able to explain itself publicly, but it must be able to explain the basis of its decision regardless of intellectual property protections when public benefits are in question.[19] It should be clear in the final OMB guidance that "applicable law" will require greater transparency and ascertainability for certain rights-impacting AI.

The President's Executive Order and the Proposed AI Memo are inclusive of public benefits programs, such as Medicaid, as a context in which AI is rights-impacting.[20] To the largest extent possible, OMB should include more oversight of agency action, require federal agencies to apply the guidance to AI they oversee and fund, and ensure that the minimum risk

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[15] Proposed AI Memo, *supra* note 1, at 20.
[16] *Id.*
[17] *Goldberg,* 397 U.S. at 270-71; *see also* Perkins, *supra* note 3.
[18] Proposed AI Memo, *supra* note 1, at 20 n. 37
[19] *See, e.g., Salazar v. Dist. of Columbia*, 596 F. Supp. 2d 67 (D.D.C. Feb. 6, 2009); *Ark. Dept. of Commerce, Div. of Workforce Servs. v. Legal Aid of Ark*., 645 S.W.3d 9 (S.C. Ark. 2022).
[20] Similarly, the Proposed AI Memo recognizes that rights-impacting AI includes civil rights, which include due process, and access to critical resources or services, including health care, such as Medicaid. Proposed AI Memo, *supra* note 1, at 24.

management strategies for rights-impacting AI meet minimum legal requirements, including those protecting constitutional rights and against discrimination. These measures are necessary to protect people and approach equity in AI.

We appreciate this opportunity to provide feedback on the Proposed AI Memo. If you have any questions, please reach out to Cassandra LaRose at larose@healthlaw.org and Elizabeth Edwards at edwards@healthlaw.org.

Sincerely,

Cassandra LaRose
Staff Attorney

Elizabeth Edwards
Senior Attorney

PUBLIC SUBMISSION

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0092
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Software & Information Industry Association (SIIA)

General Comment

Please see input of the Software & Information Industry Association in the attached submission. Thank you for the opportunity to comment.

Attachments

SIIA Comments on OMB AI Memo

Submission of the Software & Information Industry Association in Response to the Office of Management and Budget's Request for Comments on *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* Memorandum

Federal Register Docket 2023-24269

December 5, 2023

On behalf of the Software & Information Industry Association (SIIA), we appreciate the opportunity to provide input on the Office of Management and Budget's (OMB) draft memorandum, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* (the "Draft AI Memo"). The Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (the "AI Executive Order") will have a significant impact in promoting development and adoption of responsible AI in the United States and influence the direction of AI policy globally in a manner that supports democratic values. We are pleased to see the thorough approach OMB has taken in the Draft AI Memo and hope the comments we provide in this submission will prove helpful as OMB refines its guidance.

Introduction

SIIA is the principal trade association for the software and digital information industries. Our members include nearly 400 companies reflecting the broad and diverse landscape of digital content providers and users in academic publishing, education technology, and financial information, along with creators of software and platforms used by millions worldwide, and companies specializing in data analytics and information services. As the only association representing both those who develop and deploy these engines and those who create the information that feeds environments, SIIA is uniquely positioned to provide insight on measures for the government's responsible adoption of AI and procedures designed to advance a values-based approach to AI-related risks and opportunities.

SIIA has long supported efforts by the federal government to advance proactive AI policy efforts.[1] We have called for use-based guardrails and tailored requirements for those AI systems

[1] *See, e.g.,* SIIA, *Blueprint for Government Oversight and Regulation of AI* (July 2023) (https://www.siia.net/wp-content/uploads/2023/07/Blueprint-for-Government-Oversight-and-Regulation-of-AI.FINAL-1.pdf); SIIA, *Submission to NTIA on AI Accountability* (Jun. 12, 2023) (https://www.siia.net/wp-content/uploads/2023/06/SIIA-Response-to-NTIA-on-AI-Accountability-Policy.pdf); SIIA, *Comments on Artificial Intelligence Export Competitiveness Submitted to the International Trade Association* (Oct. 17, 2022) (https://www.siia.net/wp-content/uploads/2022/10/SIIA-Comments-to-ITA-2022-0007.pdf); SIIA, *Comments on Study to Advance a More Productive Tech Economy Submitted to NIST* (Feb. 14, 2022) (https://www.siia.net/wp-content/uploads/2022/02/SIIA-Submission-for-NIST-Emerging-Tech-Study.pdf); SIIA, *Comments on Public and Private Sector Uses of Biometric Technologies Submitted to OSTP* (Jan. 14, 2022) (https://www.siia.net/wp-content/uploads/2022/01/SIIA-Submission-on-OSTP-Biometrics-RFI.pdf); SIIA, "*Ethical Principles for Artificial Intelligence and Data Analytics* (Sept. 15, 2017) (https://history.siia.net/Portals/0/pdf/Policy/Ethical%20Principles%20for%20Artificial%20Intelligence%20and%20D

that are likely to carry the highest risk to safety and rights. Throughout, we have stressed the importance of viewing innovation and governance as complementary, rather than oppositional goals. Most recently, in October, SIIA released *The Education Technology Industry's Principles for the Future of AI in Education*.[2] These principles intend to specifically guide the education technology (ed tech) industry as the broader education community continues toward deploying these impactful technologies. Fostering trustworthy and responsible AI through measures that are tailored to the risks of AI systems will benefit U.S. innovation as a whole and raise the profile of the United States as a global leader.

SIIA is pleased that OMB recognizes the need for practical solutions that help improve outcomes and experiences of the advancement of AI. Many of SIIA's members at the forefront of AI have been leaders in advancing AI accountability and governance.[3] The reason is simple: AI that generates the most accurate information, limits unintentional bias, and builds on reliable data will be most useful to governments, businesses, and consumers. As the trade association dedicated to the information side of "information technology," SIIA applauds OMB's approach to removing barriers to AI adoption to advance government use of AI. For the U.S. to continue to lead in AI and tech more broadly, it is important for the public and private sectors to join in the shared goal of helping citizens develop the requisite skills, build and maintain the necessary physical and technological infrastructure, and continue to invest in research and development to position the United States at the forefront of responsible innovation.

The accountability measures called for by the Draft AI Memo will, overall, improve the performance of AI systems, empower their users, and help to establish trust in AI systems designed to address key needs across our society. Our recommendations are designed to help to focus government resources, advance responsible adoption of AI, and mitigate harm to individuals.

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ata%20Analytics%20SIIA%20Issue%20Brief.pdf?ver=2017-11-06-160346-990); SIIA, *Algorithmic Fairness* (Sept. 22, 2016) (https://history.siia.net/Portals/0/pdf/Policy/Algorithmic%20Fairness%20Issue%20Brief.pdf).

[2] SIIA, *Education Technology Industry's Principles for the Future of AI in Education* (October 2023) (https://edtechprinciples.com/)

[3] *See, e.g.,* Google, *A Policy Agenda for Responsible Progress in Artificial Intelligence* (May 2023) (https://storage.googleapis.com/gweb-uniblog-publish-prod/do); Meta, *Facebook's five pillars of Responsible AI* (June 2021) (https://ai.facebook.com/blog/facebooks-five-pillars-of-responsible-ai/); RELX, "*Responsible Artificial Intelligence Principles at RELX* (relx-responsible-ai-principles-0622.pdf); SIIA, *Education Technology Industry's Principles for the Future of AI in Education* (October 2023) (https://edtechprinciples.com/)

Responses to OMB Questions

> *1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?*

SIIA commends OMB for developing detailed guidance for the new Chief AI Officer (CAIO) functions, including roles and responsibilities, and we believe the framework contained in the Draft AI Memo provides sufficient flexibility for covered agencies to implement AI practices required by the AI Executive Order. Building the infrastructure necessary to effectively scope, adopt, and implement AI tools to meet critical government needs is a herculean task and will require dedicated leadership and lines of effort.

That task must be borne not just by the public sector but the private sector as well. Accordingly, information about the CAIOs and their backgrounds should be part of the public profiles of agency leadership provided online, as it will help align hiring processes across public and private sector, similar to what the Workforce Framework for Cybersecurity (the NICE Framework) has done for cybersecurity. This will also help keep the public informed while ensuring agencies consider how other roles, such as their CDO, CIO, or CISO will interact with the CAIOs, especially as it is such a cross-cutting technology. As we discuss in response to question 2, we recommend further attention to interagency infrastructure that can be leveraged by multiple agencies to provide governance, technical guidance, and technical support to help agencies achieve their objectives.

We have some concern that the minimum practices for safety-impacting and rights-impacting AI along with the additional minimum practices for rights-impacting AI will impede effective and timely adoption of AI by all agencies. We discuss this in more detail in response to questions 5 and 6. Though the Draft AI Memo would permit CAIOs to seek waivers as needed, it begins with the presumption that the minimum and additional minimum practices should be undertaken.

Given funding and human resource constraints, we recommend that OMB consider an approach that is better tailored to the risk profiles of the categories of safety-impacting and rights-impacting AI set out in Section 5.b.i and Section 5.b.ii. Rather than treating all rights-impacting AI in the same way, for example, OMB could treat certain of the minimum or additional minimum practices as recommended but not required – flipping the presumption – depending on the level of risk attendant to the use. As noted below, we recommend following the NIST AI Risk Management Framework for making such determinations.

It is critical that the government balances AI safety and the protection of rights against the governmental interests in adopting AI to achieve significant government objectives. Recognizing this balance, and incorporating it into the agency guidance, we believe will help to achieve a framework that fulfills the vision of the AI Executive Order.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

SIIA has been a leading proponent of strong interagency coordination on AI governance and accountability.[4] This is critical to leverage limited resources and advance consistency on common issues. OMB or another entity within EOP – such as the Office of Science and Technology Policy or the National AI Initiatives Office – seems best situated to handle functions around coordinating AI governance across agencies. We further recommend additional funding to NIST to undertake the necessary steps to build consistency around the NIST AI Risk Management Framework and related standards for impact assessments and other requirements – those set out in the minimum and additional minimum practices.

In addition, we recommend OMB consider centralized processes to undertake additional functions. First, it should build technical expertise to assist in the many pre-deployment and ongoing monitoring obligations, ideally in a manner that can be leveraged by multiple agencies to avoid duplication of effort and benefit from economies of scale. To do this, OMB may look to the 18F and United States Digital Service as models for creating technological expertise to provides services across the government. Second, it should coordinate the necessary outreach with non-governmental actors, including the private sector and civil society, will be necessary. We can envision situations in which the necessary coordination becomes overwhelming for some agencies; a streamlined, coordinated approach will help to conserve resources.

Within agencies themselves, there may be existing governance bodies or boards that can be leveraged, especially if they are resourced appropriately. Where a 1:1 fit does not exist, gaps should account for those existing bodies to ensure optimal coordination mechanisms are put in place. Among those coordination mechanisms, the importance of transparency via public meetings, opportunities to provide feedback, and comment periods for significant policy updates or changes will not only maintain the critical trust-building approach to integrating AI

[4] SIIA, *Blueprint for Government Oversight and Regulation of AI* (July 2023) (https://www.siia.net/wp-content/uploads/2023/07/Blueprint-for-Government-Oversight-and-Regulation-of-AI.FINAL-1.pdf).

into the public sector but also allow the government to obtain the benefits that come from such public-private partnerships.

The cybersecurity domain provides a good model of effective interagency and intra-agency coordination and coordination with non-governmental actors. We recommend that OMB consider modeling this effort on the mechanisms and programs that the Cybersecurity and Infrastructure Security Agency (CISA) has spearheaded.

3. How can OMB best advance responsible AI innovation?

OMB has a critical role in advancing responsible AI innovation both as a coordinator of administration and interagency priorities and as a liaison with Congress. In this response, we provide a handful of suggestions.

First, OMB can advocate for necessary resources for agencies to undertake new and augmented responsibilities required under the AI Executive Order and OMB's own guidance. While in some cases agencies may have necessary authorities and funding, in other cases appropriations from Congress may be required. Devising ways to create economies of scale across the interagency and build technical expertise will require OMB's leadership.

Second, OMB can prioritize efforts to fund research and development programs, including those authorized (but not funded) under the CHIPS and Science Act, and ensure that NIST, the National Science Foundation, and the Department of Energy's Science Division have requisite funds to advance responsible AI innovation. We also encourage OMB to pursue establishment and funding of programs set out in the National AI Research Resource (NAIRR) Task Force report issued earlier this year, including supporting passage of the CREATE AI Act.

Third, OMB has an important role in advancing responsible AI innovation in the education space. This is a priority for SIIA's membership given our significant work with companies across the ed tech ecosystem and involvement in a range of projects to advance responsible adoption of AI in education. Due to rapid advancements in AI models and data labeling, the diversity of populations that this technology can assist is expected to increase by the day. AI has the potential to create numerous opportunities for marginalized populations, specifically with education, health, and the workforce.

The education community is optimistic about the positive impact AI can have in the learning journeys of all students and, in particular, students with disabilities, English learners, and underserved populations. The U.S. Department of Education's (ED) recent report explains "[m]any educators are actively exploring AI tools as they are newly released to the public. AI tools should treat each person fairly and actively work to prevent unintended bias and unjust impacts on people. Educators see opportunities to use AI-powered capabilities like speech

recognition to increase the support available to students with disabilities, multilingual learners, and others who could benefit from greater."[5] From tutoring and test preparation to assessing learner performance to relatively simple tasks like checking the spelling and grammar of a document, AI technologies are and can have a great impact on teaching and learning. [6] Because of this and in order to realize AI's promise, stakeholders must address and embrace ways to encourage the safe innovation of these technologies.

SIIA believes that the successful deployment of AI technologies in education must be done in a way that supports those who use it, protects innovation in the field, and addresses the risks associated with the development and use of these new tools. AI should replace neither the educator nor the learning experience. As mentioned before, SIIA released The *Education Technology Industry's Principles for the Future of AI in Education*, which builds on experiences with and successes in using AI technologies to advance educational objectives. These principles provide a framework for how we can look to the future of implementing AI technologies in a purpose-driven, transparent, and equitable manner. These principles intend to guide the ed tech industry as the broader education community continues toward deploying these impactful technologies.

Fourth, OMB should promote, where appropriate, sector-specific guidelines developed with expert stakeholders. For example, currently, the leadership and staff at ED have taken on the important task of directly engaging with a large number of stakeholders to build out useful resources for practitioners and the broader education community like ed tech vendors, teachers, school leadership, parents, and students.

Fifth, OMB should encourage agencies to highlight the importance of using and moving to an interoperable and open public commercial cloud architecture that can support a multi-cloud environment that leverages existing investments in on-premises and government clouds to achieve the promise and security of AI.

If America wants to be the leader in AI innovation, then we believe that we must commit to develop responsible and trustworthy technologies focused on ensuring all products are purpose-driven, privacy-focused, explainable, equitable, reliable, and accountable.

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[5] U.S. Department of Education, Office of Educational Technology, *Artificial Intelligence and the Future of Teaching and Learning* (May 2023) (https://www2.ed.gov/documents/ai-report/ai-report.pdf).

[6] AI in education refers to the tools used in teaching and learning inside and outside the four walls of a classroom. AI technologies may be used in the development or deployment of software used in an educational setting but are not part of the teaching and learning experience.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

We recommend that OMB focus the use cases for safety-impacting and rights-impacting AI and provide agencies with further guidance that will promote consistency across the federal government, avoid overbreadth, and promote continuity across future administrations.

Focus Definitions of Safety-Impacting and Rights-Impacting AI on High-Risk AI.

As an initial matter, we strongly agree with the risk-based approach that OMB has endorsed in the Draft AI Memo. However, we recommend refinement to the definitions of safety-impacting and rights-impacting to promote certainty and avoid inadvertently capturing a variety of low risk activities. For example, while the use cases for rights-impacting AI[7] align with categories where high-risk applications of AI are likely to be found, there are use cases within each category that will not present the same risk profile with regard to individual rights and privileges, including equitable access, access to services, and so on.

To better approximate a risk-based approach, we recommend refining the definitions of safety-impacting and rights-impacting AI. We recommend limiting safety-impacting AI systems to those that pose a risk of loss of human life or serious physical injury. We recommend focusing rights-impacting AI systems to exclude circumstances where an AI system is incidental or accessory to making the consequential decision. Rights-impacting AI should be scoped to decisions that are already regulated by existing laws, such as non-discrimination or consumer protection, to ensure clarity around the type of activity regulated in this circumstance.

Ensure Consistency between Rights-Impacting AI Definition and Use Cases.

The Draft AI Memo defines "rights-impacting AI" as "AI whose output serves as a basis for decision or action that has a legal, material, or similarly significant effect" on a variety of rights and privileges.[8] We appreciate the effort to enumerate AI applications that are presumptively rights-impacting in Section 5.b.ii. Section 5.b.ii, however, contains language different than that used in the definition of rights-impacting AI to guide agencies in their classification of AI. There, AI is deemed to be rights-impacting "if it is used to control or meaningfully influence the outcomes of any of the [enumerated] activities or decisions."[9] It is not clear from this whether the standard in Section 5.b.ii is meant to augment or limit the standard contained in the

[7] Office of Management and Budget, Draft AI Mem. Section 5.b.ii.

[8] Office of Management and Budget, Draft AI Mem. Section 6 (at page 24).

[9] Office of Management and Budget, Draft AI Mem. Section 5.b.ii.

definition of rights-impacting AI. Read by itself, the Section 5.b.ii standard is broader than the definitional standard, but read conjunctively would function to refine the definition.

We recommend that OMB refine this language to provide further consistency to agencies and to providers of AI used by the government and to more tightly scope the definitions associated with safety- and rights-impacting AI. Effectively, as it currently stands, OMB is defining virtually all applications as high-risk in ways that will make it difficult or impossible for federal agencies to adopt AI tools. Notably, the EU's AI Act, while generally embracing a category-based approach, does define "high risk" applications subject to heightened review more narrowly than the Draft AI Memo. This is important because the classification of an AI system as rights-impacting triggers the additional minimum requirements set forth in the Draft AI Memo. We also note a similar disjunction is present in the definition of safety-impacting AI and the list of use cases in Section 5.b.i.

Narrow Rights-Impacting AI Use Cases on High-Risk Examples.

We appreciate the thoughtful approach taken in the Draft AI Memo to identify categories of AI use cases that are presumptively rights-impacting. As a general matter, we would recommend that OMB require agencies to conduct a risk assessment to determine whether particular use cases should adhere to the additional minimum requirements of rights-impacting AI. To achieve this, we recommend that OMB explicitly require agencies to apply a risk-assessment that follows the NIST AI Risk Management Framework when determining which AI applications within the different use case categories should be treated as rights-impacting AI under the definition of that term.[10]

Additionally, it is worth reiterating that the definitions of both safety- and rights-impacting AI are broad enough that they could disincentivize the government from adopting AI in positive instances. This chilling effect could discourage the adoption of new technologies that serve diverse users, including those that would spread benefits to overburdened and underserved communities.

In addition to this overarching comment, we provide the following suggestions for refinement of the use cases of rights-impacting AI set out in Section 5.b.ii to assist OMB in providing more precise guidance to agencies.

- *Section 5.b.ii.A. Decisions to block, remove, hide, or limit the reach of protected speech;*

Online content moderation outside of the government domain has for years relied on a combination of human and machine learning processes to make determinations about user-generated content that comports with content policies. While the First Amendment provides

[10] NIST, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, NIST Publication AI 100-1 (Jan. 2023) (https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf).

robust protection for these practices in the private sector, the First Amendment limits the federal government's discretion to block, remove, hide, or limit the reach of protected speech. We support the inclusion of this set of use cases as presumptively risk-impacting insofar as the intent is to limit its scope to government-run websites or platforms.

- *Section 5.b.ii.B. Law enforcement or surveillance-related risk assessments about individuals, criminal recidivism prediction, offender prediction, predicting perpetrators' identities, victim prediction, crime forecasting, license plate readers, iris matching, facial matching, facial sketching, genetic facial reconstruction, social media monitoring, prison monitoring, forensic analysis, forensic genetics, the conduct of cyber intrusions, physical location-monitoring devices, or decisions related to sentencing, parole, supervised release, probation, bail, pretrial release, or pretrial detention;*

We agree with OMB that the use of AI tools for law enforcement or surveillance-related risk assessments represents an area that is presumptively high-risk and rights-impacting. However, the description of this category captures a wide variety of potential government actions. It is not clear what is and is not included, and there is a good chance that this language will be interpreted to cover a number of otherwise low-risk AI applications. Given that, adhering to the additional minimum practices in Section 5.c.v would have the effect of impeding effective and responsible adoption of AI systems for critical governmental purposes without meaningfully adding to the protection of individuals' rights and privileges. Moreover, these seem to go beyond the scope of the AI Executive Order, which calls for the identification of "areas where AI can enhance law enforcement efficiency and accuracy, consistent with protections for privacy, civil rights, and civil liberties."[11]

We suggest the following clarifications to this category: First, disambiguate between law enforcement and surveillance-related risk assessments. While law enforcement has a well understood meaning, "surveillance-related risk assessments" could apply to anything from law enforcement to FDA inspections. The scope of surveillance-related risk assessments is not clear outside the law enforcement context and could be interpreted in different ways. Second, focus the category on those law enforcement purposes that have a direct impact on individuals' rights. Third, limit the recourse mechanisms - notification to negatively affected individuals and opt-out rights – when doing so would jeopardize important government ends such as the need to maintain confidentiality in an open investigation and is not required by the Constitution or applicable law. Fourth, consider clarification about the use case involving "the conduct of cyber intrusions."

[11] White House AI Exec. Order Section 7.1(b)(ii)(A).

- *Section 5.b.ii.C. Deciding immigration, asylum, or detention status; providing risk assessments about individuals who intend to travel to, or have already entered, the U.S. or its territories; determining border access or access to Federal immigration related services through biometrics (e.g., facial matching) or other means (e.g., monitoring of social media or protected online speech); translating official communication to an individual in an immigration, asylum, detention, or border context; or immigration, asylum, or detention-related physical location monitoring devices.*

Similar to the law enforcement context, the use of AI tools in immigration is presumptively high-risk and rights-impacting but also presents a variety of use cases where some of the additional minimum steps could unreasonably impede governmental objectives. Facial matching–which we read to mean authentication and/or verification using facial recognition technology–presents significantly less risk than do other uses of facial recognition technology - or than many of the other uses contained in this category. While safeguards are required to ensure the AI tools deliver as promised, some of the additional minimum steps could impede responsible adoption. In general, we recommend this set of use cases be further delineated in accordance with a risk-based assessment.

- *Section 5.b.ii.D. Detecting or measuring emotions, thought, or deception in humans;*

This category stands out from the others in that it is not tied to a particular field of activity. We suggest clarifying the areas in which this may arise to give agencies and the public additional guidance.

- *Section 5.b.ii.E. In education, detecting student cheating or plagiarism, influencing admissions processes, monitoring students online or in virtual-reality, projecting student progress or outcomes, recommending disciplinary interventions, determining access to educational resources or programs, determining eligibility for student aid, or facilitating surveillance (whether online or in-person);*

SIIA and the ed tech industry recognize the need to manage the risk of AI used in the field of education. The Draft AI Memo defines "safety-impacting AI" as AI that has the potential to meaningfully impact, among other things "human life or well-being, including loss of life, serious injuries, bodily harm, biological or chemical harms, occupational hazards, harassment or abuse, or mental health, including both individual and community aspects of these harms." Further, OMB's definition for "rights-impacting AI" includes impacts on an individual's "civil rights, civil liberties, or privacy, including but not limited to freedom of speech, voting, human autonomy, and protections from discrimination, excessive punishment, and unlawful surveillance."

We recognize the sensitivity around the use of AI systems in the educational context. We concur with the spirit of OMB's guidance thereto about the importance of ensuring that AI systems used in the educational context are properly designed, do not foster discrimination, and contain

safeguards to protect citizens' rights at all levels. We believe, however, that subjecting all AI systems used in the educational context to the additional minimum requirements for "rights-impacting AI" could impair the ability to use these tools to advance learning objectives, if not defined clearly.

Based on the proposed guidance, it seems that OMB has virtually captured many different uses of AI in the education context within the scope of rights-impacting AI. We believe that the deployment of AI in education must be done in a way that addresses specific risks associated with the development and use of these tools and is appropriately tailored to cover high-risk applications. However, we must point out that in the field of education, the AI tools and their reach/impact in education can have completely different effects. With the diversity of AI-based platforms, as shown above, the draft guidance will need to provide more clarity into what "rights" are impacted in education, as many different types of rights may be affected within different scenarios. For example, plagiarism might impact a "right to intellectual property," where surveillance might impact "right to privacy." Are the rights equivalent? Could they be treated the same? Designating all AI systems used in the educational context as "riskier" will subject the field of ed tech to a plethora of rules and regulations, which allows the agency to "prove" that their AI-based system is trustworthy and meets the mandatory requirements.

Furthermore, in education, we encourage OMB to consider the evolving policy landscape of existing regulations, in addition to new policy developments on the horizon, when it comes to AI in education. Ed tech vendors and educational institutions already have legal and ethical obligations to protect students online through a range of data privacy laws, including CIPA, FERPA and COPPA. OMB should consider the additional compliance methods already set in place in these areas, and consider exempting from the list of presumptively "high-risk" use cases those which education agencies are undertaking specifically to comply with statutory obligations. Our members believe that it is important that OMB's guidance on responsibly integrating AI into federal agencies' work compliments, rather than complicates current education industry requirements.

AI presents an opportunity for schools to fulfill their obligation to better implement content filtering and to deploy technology in a way that, with the right guardrails in place, improves student safety. As mentioned above, CIPA already imposes certain requirements on schools or libraries that receive discounts for internet access or internal connections through the Federal Communications Commission's (FCC) E-Rate program. To receive E-Rate funding, schools are required to certify that they have internet safety policies in place that include technology protection measures against content that is obscene, pornographic, or harmful to minors. There are also certification requirements under CIPA that require schools to have internet safety policies that monitor the online activity of minors.

Furthermore, survey research confirms that parents and educators worry deeply about children's online activity and overwhelmingly support technology protections on school-issued devices to keep kids from accessing harmful content. For example, in a July 2022 survey of more

than 2,400 public school educators and parents, 80 percent of parents and 88 percent of teachers agreed that unrestricted access to the internet on school-issued devices can be detrimental to student mental health.[12] In the same survey, 89 percent of parents and 93 percent of teachers agreed that if there were an online tool that could detect signs that a student may be at risk of harming themselves, then this technology should be deployed on a school-issued device. When implemented properly, AI can help schools achieve these broadly supported safety objectives.

Although we all agree on the importance of the safety and efficacy of AI systems in the education market, we still believe the approach of "grouping" different types of AI tools in ed tech will offer some challenges to the field the field of education, if OMB does not review the complexity of what constitutes a "right" and how differently the rights can impact AI tools within the field of education.

- *Section 5.b.ii.J. Decisions regarding access to, eligibility for, or revocation of government benefits or services; allowing or denying access—through biometrics or other means (e.g., signature matching)—to IT systems for accessing services for benefits; detecting fraud; assigning penalties in the context of government benefits;*

The government interest in detecting fraud is significant and is one where certain of the additional minimum requirements around redress – notification to negatively affected individuals and opt-out rights – would undermine governmental objectives. In addition, we recommend limiting this category to those decisions to deny access rather than decisions that also allow access to programs and systems.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

As a general matter, SIIA recommends that responsibility for impact assessment performance evaluation and ongoing monitoring lie with the system deployer rather than developer because the deployer is closer to the intended use cases. In addition, we note that several of the practices would require agencies to conduct assessments and undertake monitoring in areas where traditionally they have not had the kind of expertise or access that the Draft AI Memo

[12] Morning Consult, *EdTech in Schools: Creating Safer Digital Learning Environments* (July 2022) (https://uploadsssl.webflow.com/60db82d1be38ad3341c2ff23/6324e2698b87f308a5085bc3_Edtech%20in%20Schools%20-%20Creating%20Safer%20Digital%20Learning%20Environments.pdf)

contemplates. Agencies, with OMB's leadership, should focus on up-skilling their existing workforce in order to meet the needs of enhanced AI procedures.

Furthermore, with the existing definitions being even broader than those present in the EU's AI Act, a large swath of AI use cases will be subject to these minimum practices, many of which are not the type to cause the risk of harm the memo is concerned with. In fact, this is likely to create enough complexity and red tape to harm the speed and breadth of adoption that would help the government fulfill the promise of this technology.

Comments on Minimum Practices for Safety- and Rights-Impacting AI.

The minimum practices will require a significant amount of government resources, given the breadth of the safety-impacting and rights-impacting AI enumerated in Section 5.b. We caution that the resource requirements – specifically, the requirement to test the AI for performance in a real-world context and the requirement to independently evaluate the AI – may impede effective adoption of responsible AI to advance significant government objectives. To that end, we would encourage OMB to incorporate a risk-based assessment within both categories and identify those requirements that are required of only the highest-risk AI systems within each.

In addition to a risk-based approach, we recommend tailoring requirements for rights-impacting AI to reflect the existing legal frameworks that already provide important risk mitigation to AI tools. Education provides an excellent case study in this. As AI technologies continue to advance, it is imperative that the implementation takes into account product variability and purposes and that a specific product in education aligns with existing frameworks established by state and federal laws - including privacy, accessibility, and other important civil rights laws. Furthermore, it is important to recognize that AI tools must be designed to perform in an equitable manner, ensuring that bias and discrimination is eliminated as algorithms progress.

When considering "minimum practices" for education, one must ensure that the recommendations are practical and create a complimentary impact instead of a disparate impact. Given the growing awareness and attention to the dangers children might encounter online, SIIA encourages the federal government to consider the evolving policy landscape of existing regulations, in addition to new policy developments on the horizon, when it comes to AI in education and the practices it must follow.

In addition, as noted above in our discussion of the categories of rights-impacting AI, we believe some of the additional minimum practices will on balance impede the responsible adoption of AI without adding meaningful safeguards to affected individuals. SIIA would like OMB to reassess the possible burdens of the specific practices required of the two types of AI systems:

- *Independently evaluate the AI:* We believe that this practice will be extremely burdensome on the agencies. For most AI systems, SIIA believes self-assessments and

increased transparency measures will provide the necessary accountability while avoiding undue burden on innovation and small and midsize agencies.

- *Mitigate emerging risks to rights and safety:* We believe that this is key, however, we have a concern that this requirement is too broad when defining the word "risk." We implore OMB to further define the word "risk," specifically "emerging risks" that are related to security, privacy, and data protection.

We also encourage OMB to reexamine the requirements regarding the quality and appropriateness of the relevant data that is part of the pre-deployment AI impact assessment. In many cases, assessment of training data will be unhelpful to assess AI system performance and, likely, prove a poor investment of resources that could be spent focusing on how an AI system performs in real-world testing environments. In addition, agencies are unlikely to have access to the training data in a way that would allow for the contemplated analyses - in part for practical reasons, and in part because of the need to protect IP and proprietary data.

Related to the latter point, we encourage OMB to include provisions that would permit agencies not to disclose to the public information that is protected by IP or is otherwise sensitive or proprietary to government vendors. Indeed, the compilation of training data is a confidential commercial secret with significant competitive value. We have concerns about vendors' ability to claim trade secret protection under federal or state law if disclosure is permitted, and to that end, would encourage revision of the documentation requirements in Section 5.c.iv.a.3. We recommend relying as much as possible on testing – such as the methods contained in Section 5.c.iv.c – rather than on scrutiny of training data to provide best indications of anticipated performance by the AI model. To the extent documentation of information regarding training data is required, we suggest limiting this to summary information about the data the model was trained on and/or that demonstrates how training data is appropriate to the agency's intended use. For example, documentation could show that a model was trained on industry-specific content, such as medical literature without disclosing the specifics around the articles themselves.

Lastly, we encourage OMB to provide agencies with additional flexibility to create and evolve processes around adopting AI tools. Commercially available technologies such as privacy-enhancing technologies should be considered as a means of preserving model and AI security during the training, evaluation, and verification processes as outlined in the AI Executive Order and the recent *Guidelines for Secure AI System Development* issued by the CISA and the UK's National Cyber Security Centre (UKNCSC).[13] This would build on President's directive that "Agencies shall use available policy and technical tools, including [PETs] where appropriate, to

[13] CISA, UKNCSC, et al., *Guidelines for Secure AI System Development* (Nov. 2023) (https://www.ncsc.gov.uk/files/Guidelines-for-secure-AI-system-development.pdf).

protect privacy and to combat the broader legal and societal risks — including the chilling of First Amendment rights — that result from the improper collection and use of people's data."[14]

Comments on Additional Minimum Practices for Rights-Impacting AI.

SIIA recommends requiring the additional minimum practices apply (a) only to high-risk rights-impacting systems rather than to all rights-impacting systems and (b) only where impact assessments suggest negative impacts that require further assessment and mitigation. Government resources will be strained by requiring these steps of all rights-impacting systems and the measures contained in the minimum practices provide sufficient guardrails.

In addition, we support measures to advance equity, dignity, and fairness, and to incorporate feedback from affected groups – this is essential to build trust and public confidence in the government's use of AI – we are concerned that this requirement may prove impractical in the design and development stages. This is because much of the AI tools will be developed by non-governmental entities and the federal procurement process and budgeting deadlines present challenges. We recommend revising this language, consistent with Section 7.2 of the AI Executive Order, to avoid creating new barriers to adoption.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

SIIA appreciates the thoughtful approach to federal procurement taken in the Draft AI Memo. We provide two comments on the proposed text.

First, SIIA recommends that OMB remove the reference to "copyright" in "Aligning to National Values and Law" and replace it with the umbrella term "intellectual property."[15] The use of commercial AI by the government will raise issues around trade secret and patent law. In addition, the question of copyright and AI is exceedingly complex and raises a multitude of questions that are now being considered by all three branches of the federal government. Developing a position in all of these areas will require additional time to get right.

Second, we caution OMB to amend its requirement for generative AI models to have labeling and provenance capabilities to create flexibility as the technology develops.[16] These technologies remain in their infancy and we recommend that the government avoid aligning to

[14] White House AI Exec. Order Section 2(f).

[15] Office of Management and Budget, Draft AI Mem. Section 5.d.i.

[16] Office of Management and Budget, Draft AI Mem. Section 5.d.v.B.

a single standard for achieving the goals of authentication and provenance as the technology continues to develop and different approaches may prove more effective for different use cases.

Third, OMB should ensure agencies are able to protect the data of companies and their intellectual property insofar as it has to be exposed, collected, or provided to the government.[17] This includes using contractual clauses based in the FAR and DFARS along with any agency-specific deviations or internal policy to provide an assurance of confidentiality and exemption from FOIA disclosure with all requisite authorities to hold those who intentionally, accidentally, or otherwise disclose such information accountable.

* * *

The AI Executive Order marks perhaps the most significant measure to date reflecting the United States' approach to AI governance, and we appreciate the opportunity to comment on OMB's efforts to implement responsible AI across the federal government. We look forward to continuing to work with OMB and the Administration as this effort continues. Please direct inquiries to Paul Lekas, SIIA's Senior Vice President and Head of Global Public Policy & Government Affairs, at plekas@siia.net.

[17] Office of Management and Budget, Draft AI Mem. Section 5.d.iv.

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0093
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Microsoft Corporation

General Comment

Please see Microsoft's comments to OMB-2023-0020.

Attachments

Microsoft Comment FR Doc 2023-24269 final submission

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The Honorable Shalanda Young
Director of the Office of Management and Budget
Executive Office of the President
1650 Pennsylvania Avenue, NW
Washington, DC 20504

Subject: Comment on Draft Memorandum titled *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)* (OMB-2023-0020)

References: 88 FR 75625 (November 3, 2023); FR Document # 2023-24269

Dear Madam Director:

Microsoft appreciates the opportunity to provide comments on the draft memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI). We commend the Office of Management and Budget (OMB) for its rapid progress on promoting responsible AI innovation across the federal government and furthering the U.S. government's efforts to ensure that agencies' use of AI is safe, secure, and trustworthy.

We share the Administration's vision of AI as a strategic enabler for advancing the public interest and enhancing the efficiency and effectiveness of government operations. This year, Governor Newsom in California, Governor Burgum in North Dakota, and Governor Youngkin in Virginia released executive orders to ensure state and local governments can fully harness the capabilities of AI technology while also ensuring proper guardrails are in place. New York City released MyCity Chatbot, which uses information published by the NYC Department of Small Business Services to respond to constituents in a timely manner. NY Power Authority digitized infrastructure blueprints from 1900 to present day, allowing staff to easily ask generative AI questions about their infrastructure plans instead of having to manually search through 65,000 pdf files. Governments across the globe are leveraging AI to address urgent issues of water stress and public access to legal records as well as to open up broad opportunities with municipal services.[1] While these

[1] Microsoft Customer Story-The Société du Canal de Provence relies on data to optimize the management of water supply networks and the use of this resource in the face of climate change; Microsoft Customer Story-The City of Kelowna increases and speeds access to its services with Azure AI; Microsoft Customer Story-Mexico's Supreme Court of Justice of the Nation provides the public with digital access to the court's historical documents with the help of Azure (Microsoft Customer Story-Mexico's SCJN).

immediate public sector use cases provide enormous value, innovation potential will only expand over time as technology is deployed.

We also acknowledge that innovation and risk management must move forward together. Developing and implementing an AI policy framework that establishes clear roles and responsibilities, governance mechanisms, and best practices for AI procurement and deployment is critical to ensuring agencies use AI responsibly in support of their missions.

In summary, we recognize the enormity and importance of the U.S. government's efforts to responsibly leverage what the draft memorandum describes as "one of the most powerful technologies of our time," and we aim to be a partner to OMB and agencies on both strategy and implementation. Strengthening AI governance, advancing responsible AI innovation, and managing risks from the use of AI are the right priorities, but each is complex, even in isolation – and they must work in concert. At a high level, providing both clarity and flexibility will be critical, allowing agencies to move quickly, learn, and iterate. Consistency and integration will also be key; for example, investments in centralized guidance and processes to enable exchange across the federal community will help drive a high common baseline and rapid, applied learning.

Building from these high-level principles, we offer the following recommendations on the draft memorandum and a broader OMB strategy based on our experience and insights:

1) Enable efficient, effective, and consistent implementation of AI requirements;
2) Ensure minimum practices and procurement guidelines are clear, adaptable, and calibrated to the technology architecture;
3) Foster AI innovation through infrastructure, policy, and process investments;
4) Design multi-tiered and multi-disciplinary AI governance;
5) Facilitate iterative improvement, including through small-scale pilots.

Recommendations 1 and 2 relate to managing risks from the use of AI, focusing on ways to improve the draft memorandum's minimum practices and procurement guidelines as well as anticipating implementation needs. Recommendation 3 relates to advancing responsible AI innovation, encouraging a focus on cultural readiness as well as the draft memorandum's emphasis on enabling infrastructure. Recommendation 4 relates to strengthening AI governance, describing Microsoft's experience building out our AI governance bodies and our takeaways on the importance of multi-layered accountability structures and multi-disciplinary coordination. Recommendation 5 is applicable across each of the areas in focus in the draft memorandum, recognizing the value of more agile experimentation alongside formal policy development. Context and more detailed recommendations are also included further below.

1: Enable efficient, effective, and consistent implementation of AI guidance and requirements.

OMB's minimum practices for managing risks with rights- and safety-impacting AI, along with its recommendations for responsible federal procurement of any AI technology, will apply across many covered federal agencies, AI systems, and AI use scenarios – some of which may vary

significantly. Given this scope, defining a roadmap for how AI practices and procurement guidelines will be implemented is critical during the policy design process that's in focus in the draft memorandum. Anticipating potential challenges and opportunities with implementation at scale and with diversity can impact policy design choices, helping to ensure that requirements can be implemented efficiently, effectively, and consistently.

Lessons can be carried forward from previous waves of widely used technology, including cloud computing and software, and others' experiences with implementing AI practice requirements at scale. The federal government has established FedRAMP[2] requiring that cloud services meet or exceed security requirements and a "Common Form" for software vendor attestation of secure development practices,[3] recognizing the value of standardized and "do once, use many" approaches. Microsoft is also implementing our Responsible AI Standard[4] across many diverse use cases in partnership with engineering and product groups across the Company, defining policies and guidance that are clear and adaptable and integrating learnings across communities of practice to support iterative advancement.

Maximizing standardized and "do once, use many" approaches to facilitating or verifying conformance with agency-wide guidance and requirements strengthens efficiency, effectiveness, and consistency at scale, especially where there are variations or limitations in expertise and resources. For agencies, standardized implementation guidance can define a consistent and robust process while allowing for sufficient flexibility; for example, to support implementation of Microsoft's Responsible AI Standard across product groups, we have developed the Microsoft Responsible AI Impact Assessment Guide.[5] With vendors, "do once, use many" conformity assessments allow expertise to be concentrated, resulting in more rigorous and impactful evaluations as well as less burden on organizations with fewer resources to conduct meaningful assessments themselves. The risk of inconsistent evaluations and compliance findings can also be minimized, simplifying governance for agencies and increasing predictability for vendors.

Driving toward a standardized and consistent cross-agency approach to identifying rights- and safety-impacting AI in the draft memorandum or follow-on guidance would allow both vendors and agencies to have greater clarity as they provide and adopt AI technologies. While agencies will need some flexibility to interpret risk levels in their use scenarios, OMB could build on its definitions and set of purposes that should be presumed to be safety- or rights-impacting by developing guidance to help agencies assess whether their systems should trigger minimum practice requirements. For example, the Microsoft Responsible AI Impact Assessment Guide supports our teams through a process of determining whether any intended uses, unsupported uses, or foreseeable misuses of AI systems could trigger any "Sensitive Uses,"[6] which require additional internal oversight.[7]

[2] How to Become FedRAMP Authorized | FedRAMP.gov
[3] Secure Software Self-Attestation Common Form | CISA
[4] Microsoft-Responsible-AI-Standard-v2-General-Requirements-3.pdf
[5] Microsoft-RAI-Impact-Assessment-Guide.pdf
[6] Microsoft-RAI-Impact-Assessment-Guide.pdf; products or systems trigger our Sensitive Uses processes if they could have a consequential impact on a legal position or life opportunity; could involve a risk of physical or psychological injury; or could threaten an individual's human rights.
[7] The building blocks of Microsoft's responsible AI program - Microsoft On the Issues

Ultimately, greater clarity will be critical to enabling AI innovation by empowering agencies to move forward more quickly with lower-risk AI systems that are clearly not rights- or safety-impacting and by helping to focus agency attention on implementing minimum practices where warranted.

As currently configured in the draft memorandum, minimum practices and procurement guidelines could allow for consistent approaches to facilitating or verifying conformance, including agencies and AI vendors; however, further action is needed to ensure final requirements continue to allow for such an outcome and to define steps toward realizing it. In many cases today, federal contractors will need to provide documentation, not only to enable sufficient transparency into AI provider practices that may be required for agencies to meet relevant minimum practices but also to enable AI vendors to comply with federal procurement provisions. Common forms could allow for consistency and re-use of documentation and conformance verification across agencies. More broadly, common artifacts that demonstrate implementation of process-based frameworks – like the National Institute of Standards and Technology (NIST) AI Risk Management Framework (RMF), in alignment with defined benchmarks or other evaluation metrics – could support scalable and consistent measurement of impactful AI risk management practices.

In addition, flexibility to take advantage of future developments should be embedded in OMB's approach. For example, efforts to finalize standards and establish certification processes, such as for ISO/IEC 42001,[8] may offer a path to streamline some agency reviews of federal contractor practices by accepting certifications as sufficient to establish conformance with all or with a subset of required practices. Likewise, efforts to define benchmarks – for example, to evaluate AI safety across different use cases[9] – are ongoing and may offer alternative, more accessible mechanisms to achieve customer assurance of supplier practices consistent with desired processes. Developing an open standard for how to write AI benchmarks, and then allowing stakeholders to develop various benchmarks and converge on the most useful and important ones, could likewise provide a clear and efficient path toward measurement where appropriate. The U.S. AI Safety Institute and a related Consortium are specifically focused on establishing a new "measurement science" to identify metrics for safe and trustworthy AI, including benchmarks to evaluate AI capabilities.[10]

Integration with existing federal policies and assessment and authorization processes, including FedRAMP, should also be pursued. We are encouraged that OMB is seeking to update FedRAMP, modernizing it to allow AI technologies to help with automating FedRAMP processes and including AI products in the FedRAMP marketplace. However, cybersecurity-related and other appropriate provisions of the draft AI guidance memorandum should be rolled into FedRAMP and Executive Order (EO) 14028 software supply chain security self-attestation rather than risking redundancies or inconsistencies in a parallel compliance regime. Moreover, as necessary as part of updating

[8] ISO/IEC FDIS 42001 - Information technology — Artificial intelligence — Management system
[9] https://mlcommons.org/working-groups/ai-safety/ai-safety/
[10] U.S. Artificial Intelligence Safety Institute | NIST

FedRAMP, NIST's Secure Software Development Framework (SSDF) and companion resource to the SSDF (as tasked by EO 14110 Section 4.1(i)(B)) should be leveraged.

Recommendations:

- Provide additional guidance to help standardize processes for interpreting whether AI meets safety- and rights-impacting criteria, supporting AI innovation by allowing both agencies and AI vendors to have greater clarity and predictability.

- Design minimum practices in anticipation of the need to support consistent agency implementation. Likewise, design minimum practices and procurement guidelines in anticipation of the need to leverage to the maximum extent possible "do once, use many" approaches to assessing AI vendor implementation.

- Define a roadmap for supporting efficient, effective, and consistent implementation approaches, including through the use of common forms, common artifacts, or other cross-agency tools and processes where appropriate. For example, consider partnering with NIST to develop more detailed guidance on and common forms for impact assessments to support cross-agency consistency, providing additional opportunities for AI vendors that will likewise develop and share impact assessment documentation to comment on their approaches and lessons learned. In addition, leverage NIST's broader work as part of EO 14110 implementation and the AI Safety Institute to define safety evaluation benchmarks, ideally based on an open standard for how to write AI benchmarks as well as process-based frameworks like the NIST AI RMF, that could be used in a manner that's repeatable at scale across a representative set of use cases. Common artifacts could potentially also then be defined to demonstrate implementation of practices consistent with defined benchmarks or other evaluation metrics.

- Ensure sufficient flexibility to allow for use of more efficient, in-development processes to verify that minimum practices are implemented, both by agencies and their federal contractors, recognizing dynamism in AI safety evaluation methodologies, transparency capabilities, benchmarking research, and standards and certifications. As certifications are available for comprehensive standards like ISO/IEC 42001, agencies may also be able to leverage them to help demonstrate the conformance of some of their AI providers' practices with minimum practice or procurement requirements.

- Integrate AI requirements into existing agency and vendor requirements and conformance verification processes, including FedRAMP for cybersecurity-related provisions, wherever feasible, and avoid creating parallel or potentially redundant compliance schemes.

2: Ensure minimum practices and procurement guidelines are clear, adaptable, and calibrated to the technology architecture.

Establishing AI risk management processes and practices can help realize AI innovation when they are clear, adaptable, and calibrated to the technology architecture. One way that clarity can be achieved is by defining which processes and practices are necessary to enable responsible use of different AI systems in different scenarios, helping focus resources on durable adoption of trusted, higher-risk technology without impeding lower-risk use cases. In the draft memorandum, OMB takes this foundational risk management step, distinguishing between safety-impacting and rights-impacting AI that is subject to elevated minimum practice requirements and all AI systems that are subject to procurement guidelines.

However, there are opportunities to refine minimum practices and recommended procurement requirements to strengthen clarity, adaptability, and calibration to the technology architecture, and OMB's approach to aligning with existing and in-development guidance also requires consideration. There is ambiguity regarding how existing guidance, including NIST's AI RMF, should apply, and how implementation of its processes and practices might support broader agency and vendor compliance efforts. Section 5(c) of the draft memorandum acknowledges that agencies are encouraged to implement best practices for AI risk management from the NIST AI RMF and other resources; in addition, specific minimum practices, such as the requirement to complete an AI impact assessment, overlap with practices described in the NIST AI RMF. Likewise, Section 5(d)(v) encourages agencies to consider the NIST AI RMF for contracts for all generative AI while specific procurement recommendations, such as for transparency, overlap with NIST AI RMF practices.

For rights- and safety-impacting AI, many of the minimum practices identified are consistent with those required by Microsoft's Responsible AI Standard. For instance, the completion of a Responsible AI Impact Assessment is required by our Standard, as is ongoing monitoring, feedback, and evaluation of AI systems so that we can identify and review new uses, identify and troubleshoot issues, manage and maintain the systems, and improve them over time.[11] Consistent with our principles of transparency, reliability and safety, and accountability, the Standard also requires preparation of documentation for customers and other stakeholders, including to describe a system's intended uses and its capabilities and limitations.[12]

We also implement additional practices that we consider important to include for safety-impacting AI applications and use scenarios in particular. For such applications, incident response systems should be documented and tested. In addition, recognizing that not all use scenarios will have the same risks and needs, there is value in ensuring the ability to access a configurable safety layer for AI systems that will be used in safety-impacting scenarios.

[11] See Reliability and Safety Goals – RS3: Ongoing monitoring, feedback, and evaluation, Microsoft-Responsible-AI-Standard-v2-General-Requirements-3.pdf

[12] See Transparency Goals – T2: Communication to stakeholders; Accountability Goals – A3: Fit for purpose; and Reliability and Safety Goals – RS1: Reliability and safety guidance, Microsoft-Responsible-AI-Standard-v2-General-Requirements-3.pdf

Our experience implementing Microsoft's Responsible AI Standard across diverse product and engineering groups, and as technology and the broader ecosystem are rapidly evolving, has demonstrated the importance of adaptability along with strong governance and accountability. Minimum practices are most effective and durable when designed in a way that allows for a focus on desired processes – and when governance then holds stakeholders accountable for demonstrating that they've robustly implemented such processes. Practitioners should be required to focus on understanding the sociotechnical risks of specific AI systems – including the model and software and ways in which individuals interact with or are impacted by both – and ensure that proper mapping, measurement, and management plans are in place for each risk. Such a process helps avoid a "checklist-of-risks" mindset, where many risks are not relevant to all systems and risks unique to the system's sociotechnical context are missed.

While many of the draft memorandum's minimum practices take this process-based approach allowing for flexibility and multiple approaches to defining impactful processes consistent with desired interests or outcomes can help define a broadly applicable and agile baseline.

As with the minimum practices, many of the recommendations for responsible federal procurement of AI provide a useful starting place, though they also require further specificity to understand how they might be applied. At Microsoft, we've invested significantly in layered transparency measures, recognizing that different stakeholders have different needs and goals when it comes to transparency for different types of AI technologies, including models, platform services, and applications.[13] While maintaining visibility as needed to support product performance and enable implementation of responsible AI commitments, we've also invested significantly in policies and practices to ensure that customers maintain both control over their data and exclusive rights to use fine-tuned AI models that are based on their training data.

We also appreciate that the draft memorandum seeks to have agencies promote interoperability as one means of ensuring opportunities for competition among contractors. Interoperability is important as it allows disparate information systems from multiple vendors to readily work together and exchange data. It enables valuable business connections, whether across processes, between people and information, or among companies in a value chain. Providing interoperability helps agency customers decrease complexity and better manage heterogeneous environments while enhancing choice and innovation in the market.

Microsoft has made – and continues to make – technology and business practice investments that promote greater interoperability. Our approach includes delivering interoperability in our products and technologies; collaborating with customers, partners, and competitors; supporting the development of and using industry standards; and providing developer resources. For example, we've supported the development and use of C2PA for provenance and authenticity of AI-

[13] For example, we provide documentation like Transparency Notes for AI platform services and whitepapers for Bing Chat. E.g., Transparency Note for Azure OpenAI - Azure AI services | Microsoft Learn; Transparency Note and use cases for AI Content Safety - Azure AI services | Microsoft Learn; Transparency Note for Azure AI Language - Azure AI services | Microsoft Learn; The new Bing - Our approach to Responsible AI (microsoft.com)

generated audio-visual content.[14] In addition, we use our Azure AI Content Safety Service[15] for our own first-party Copilots as well as on Llama-2 and some of the third-party models made available on the Azure Machine Learning Model catalog.

Recommendations:

- Design minimum practices and recommended procurement requirements in a way that's risk based and process focused, accounting for how technology will evolve and the need for adaptability in implementation. Consider questions to ask about each system that help guide brainstorming about the set of risks (i.e., mapping risk), and then for each system, leveraging a set of understood risks that are applicable to it to measure and manage risk (and structuring common forms or artifacts to align with this process).
    - External AI red teaming should be required for frontier AI models but not for all generative AI. While the role of AI red teaming is a critical part of a comprehensive process of mapping risks of high-risk AI systems, flexibility in leveraging external AI red teaming, internal red teaming, and broader practices also driving toward accountability in processes for mapping risk should be allowed more broadly. In addition, the role of systematic evaluation should be emphasized, recognizing its role in complementing red teaming and other risk mapping practices as part of a holistic risk management approach.
    - Minimum practices for ongoing monitoring should recognize the role of automated processes that can be operated consistently with privacy expectations alongside periodic human review. Testing and confidence in such processes can be an input into monitoring architecture, recognizing that the role of appropriately scoped periodic human review will remain critical.
    - Processes for scaling the gathering and incorporation of feedback on fairness and inclusion metrics should be considered alongside direct engagement with groups that may be affected by AI systems. In the absence of clarity about a discrete set of affected groups, such an approach risks overemphasizing interests of certain groups or missing out on more comprehensive feedback through scaled processes. Minimum practices should also evolve as the definition of process- and outcome-oriented metrics progress.

- Ensure minimum practices are sufficiently clear, either in the draft memorandum or in follow-on guidance that OMB will develop to support consistent agency implementation.
    - Clarification of terms like "proxies" and their role in enabling agencies to meeting minimum practices for rights-impacting AI may help agencies with less familiarity working with factors contributing to algorithmic discrimination or bias.
    - Clarification that humans must oversee and have the ability to override consequential, rights-impacting decisions by AI systems, and that such ability

[14] Overview - C2PA
[15] What is Azure AI Content Safety? - Azure AI services | Microsoft Learn

should be subject to ordinary review guidelines as for agencies. This clarification may likewise be useful context for rights-impacting AI systems to maintain human oversight and remedy processes for consequential decisions.

- Consider adding minimum practices for safety-impacting AI, including requirements that incident response systems should be documented and tested and that a configurable safety layer should be made available to agencies deploying those systems.

- Provide greater clarity on recommendations for responsible federal procurement of AI as an interim step in advance of a means to ensure that AI contracts align with OMB guidance, helping strengthen AI provider readiness to meet interoperability and other requirements.
    - Requirements regarding data for AI should distinguish between rights to training data used to create an AI model or fine tune it, and rights to the AI model itself that likely also includes AI provider intellectual property. In addition, requirements regarding data for AI should allow for providers to maintain visibility needed to support product performance and implementation of responsible AI practices.

- Ensure that requirements are applied to the appropriate part of the technology architecture and in a way that reflects risk management priorities and capabilities.
    - Requirements to reliably label or establish provenance for content generated or modified by AI are more appropriately applied to platform services or generative AI applications than to AI models themselves. Where feasible, platform services can help scale practices across downstream applications, though in some cases, user interface interventions could be more impactful, enabling end users to understand capabilities and limitations in real time and allowing for feedback. Focusing labeling and provenance requirements on audio-visual content also prioritizes use cases where practices can more meaningfully be applied today.
    - Requirements for ensuring sufficient transparency and obtaining documentation should correspond with the type of AI technology (i.e., model, platform/API service, or application) being procured.

- Consider how the NIST AI RMF can be leveraged to the maximum extent possible, acting as a foundation for a consistent, impactful, and process-based approach to mapping, measuring, and managing AI risk as applicable across rights- and safety-impacting and other AI systems. NIST's ongoing work in implementing EO 14110 deliverables and developing and operating the AI Safety Institute will also be critical to leverage, ensuring ongoing alignment and best practice utilization. Defining more specific controls that support operationalization of the NIST AI RMF, as well as common artifacts that demonstrate implementation of NIST AI RMF and controls-based practices in alignment with defined benchmarks or other evaluation metrics, may especially support its application to safety- and rights-impacting AI, where more prescriptive guardrails may be

needed. Minimum practices included in the draft memorandum could also be described in relationship to the NIST AI RMF to enable greater clarity regarding how to use the NIST AI RMF in concert with efforts to meet draft memorandum obligations and to prepare for ongoing alignment as NIST's EO-related and broader efforts continue.

3. Foster AI innovation through infrastructure, policy, and process investments.

Fostering AI innovation and responsible use should be key components of an agency's AI governance functions. The development, implementation, and evolution of a clear and coherent AI innovation strategy can provide a useful starting point, considering both how to establish an enabling environment and how to concretely measure progress against identified challenges.

There are both technology-based and cultural aspects of an enabling environment. Regarding technology, AI systems rely heavily on digital data for training, learning, and making predictions; the more diverse and extensive the available datasets, the better an AI model can often perform. In addition, they rely on cloud computing infrastructure, enabling organizations to access not only the computational power needed for training and running AI models but also AI safety layers, such as Azure AI Content Safety.[16] We appreciate the draft memorandum's inclusion of data governance and cybersecurity provisions, recognizing the importance of ensuring agencies maximize appropriate access to datasets managed through sound data governance as well as to adequate, authorized infrastructure.

Cultural readiness is equally critical. Many customers have shared that AI use is uneven across their organizations, reflecting a variety of challenges, including comfort with, and understanding of how to benefit from new technology. A skilled, multi-disciplinary workforce, including AI experts, social scientists, and domain specialists, as well as AI literacy and awareness among all staff and leaders, can have compounding effects, ensuring that AI investments are well leveraged and that all resources direct attention toward innovative potential. A culture of continuous learning and effective training can also establish organizational norms of asking questions and experimenting with new technology.

The AI innovation strategy should also provide a process for identifying barriers to AI adoption and use and addressing them in turn. While many agencies may experience consistent technical, organizational, and cultural challenges, there may also be variation and opportunities to build on different existing investments to accelerate progress. Moreover, a process to identify and address barriers can be regularly re-used as agencies and their policies, leadership, enabling environments, and state of AI use continue to evolve and offer opportunities for refinement or major shifts.

In addition to strategies that require regular assessment of AI readiness and progress against metrics, teams responsible for using repositories of ideas and best practices are critical. Multiple data repositories may be relevant, including to collect and incubate AI use case ideas and to

[16] https://learn.microsoft.com/en-us/azure/ai-services/content-safety/overview

catalogue use cases in practice and their benefits. Moreover, such repositories are best leveraged not just as standing inventories but as actively managed databases, with teams responsible for leveraging them to help identify and raise awareness of high-value AI use cases.

Within Microsoft, teams are encouraged to raise ideas about AI tools or functionality they might benefit from in their work, and centralized groups prioritize what to build first. Visibility into the ideas and projects is provided within divisions so they can understand trends, make connections, and reduce duplication. Such visibility also prompts more ideation as teams can conceptually apply how one group is benefiting from AI to their distinct areas and needs. Through events like Hackathons, AI projects compete for visibility across the entire company.

Recommendations:

- Direct agencies to develop comprehensive strategies that create a culture and environment that foster AI innovation, including by incorporating investments to strengthen enabling technology, cultural readiness, and processes for regularly assessing and responding to challenges.

- Clarify how agencies should proceed when AI systems and use cases fall outside of rights- and safety- impacting scenarios, ensuring they understand how to move forward in the immediate term and with forthcoming procurement guidelines. Absent an affirmative position, agencies may default toward a posture of slow adoption, even for low-risk systems and use cases.

- Reference the role of commercial cloud services, including how agencies may benefit from OMB's policies around data center optimization and guidance regarding use of pooled, shared services, including for "sandbox" opportunities. The draft memorandum seeks to remove barriers to the responsible use of AI by ensuring agencies have the right environments; however, the memorandum focuses on agency "internal environments" without reference to commercial cloud services.

- Update, as necessary, cybersecurity authorization processes to better address the needs of AI applications, including to advance the use of continuous authorizations for AI. Consistent with Section 10.1(f) of EO 14110, agency authorizing officials should also prioritize generative AI and other critical emerging technologies in Authorizations to Operate and any other applicable release or oversight processes.

- Include both technical roles, such as data scientists and engineers, and non-technical roles, such as designers, social scientists, contracting officials, managers, and attorneys, whose contribution and competence with AI are important for successful and responsible AI outcomes, when identifying and filling workforce needs for AI.

    - Agencies should provide resources and training to develop such AI talent internally and should also increase AI training offerings for federal employees.
    - Cybersecurity professionals should be added to the draft memorandum's list, consistent with cybersecurity intersections recognized elsewhere.

- Encourage agencies to build tools and teams to collect and apply AI project ideas and use case information, providing visibility across the AI governance body and its stakeholders to prompt broad, contextualized idea generation and strong feedback loops. Consider processes to facilitate ongoing awareness of and interaction with information about cross-sector generative AI use cases and their evolving benefits within agencies or across a federal CAIO community (along with point-in-time use case guidance).

4. Design multi-tiered and multi-disciplinary AI governance.

Strengthening AI governance is appropriately in focus in OMB's memo, and requirements for agencies to designate a Chief AI Officer (CAIO), convene an AI governance body, and provide AI inventories are appropriate foundational steps. Given differences across agencies in missions, resources, and capabilities, how these structures are implemented may vary, but their roles, expectations, functions, and authorities should be consistently defined.

At Microsoft, we operate multi-layered and multi-disciplinary hub-and-spoke models to ensure clarity of policy and to facilitate both top-down and bottom-up implementation of responsible AI practices. Our Office of Responsible AI (ORA), established in 2019 and led by our Chief Responsible AI Officer, defines our Responsible AI Standard, a set of goals and requirements applicable to product and engineering groups across the company. Across product divisions and teams, ORA coordinates with Responsible AI Champions to support implementation of our Standard, bringing together engineering, product, policy, and operational expertise to provide enabling resources, manage communities of practices, and measure progress. Our Responsible AI Council, led by our Vice Chair and President Brad Smith and our Chief Technology Officer Kevin Scott, oversee responsible AI efforts across the company, regularly convening research, policy, and engineering experts along with business leaders to ensure accountability in implementing practices.

Structurally, CAIOs and agency AI governance bodies can create hub-and-spoke models at both the policy definition and implementation layers, and establishing a feedback loop across those layers will also help to ensure appropriate calibration and consistency rigor. CAIOs should be accountable for setting policies to promote AI innovation and to manage risk; they should also be accountable for driving and maintaining visibility into implementation, leveraging that context to measure progress and evolve policies and processes as needed. Within an agency governance body, operational partners should lead implementation of policies within their domains, integrating

with other policies and processes that may be established or developed and surfacing overlaps or inconsistencies to be resolved by CAIOs and partners responsible for other agency-wide policies.

CAIOs should also have a role within broader agency decision-making and resourcing forums and processes to ensure they have the necessary visibility and can appropriately reinforce implementation of their policies. While the AI governance body officials and their teams can serve to scale bottom-up implementation efforts, CAIO participation in a broader agency oversight forum can help CAIOs leverage opportunities for top-down mandates and make decisions with impacts on broader agency operations or outcomes.

Beyond individual agencies, convening CAIOs through organizations or efforts akin to the Federal CIO Council can also help to ensure that lessons learned are shared and built upon by agencies seeking to rapidly advance responsible AI innovation. Policies and processes to create and maintain inventories, define innovation strategies, and measure implementation of safeguards may be transferable – or offer a starting point or knowledge about approaches to avoid.

Recommendations:

- Define baseline governance roles, responsibilities, and desired outcomes but allow for adaptability based on differences across agencies and evolving needs in practice. While some agencies may opt to assign the CAIO role to an existing senior official, others may create a new position; likewise, some agencies may establish a new AI Governance Body whereas others may expand the remit of an existing governance body. However, minimum expectations, authorities, and accountabilities of the CAIO and an agency body focused on AI governance should be consistent. Moreover, whereas new roles and bodies may signal the importance of AI governance and benefit from being focused on AI, updating the scope of an existing role or body may enable it to leverage existing relationships and processes and help avoid fragmentation of existing functions. Thus, OMB could provide guidance to help agencies determine the appropriate path forward and mitigate risks with either route.

- Establish ongoing training on AI and its responsible deployment for any officials, advisory committees, and governance bodies, leveraging NIST expertise. Also consider leveraging private sector experts to help share their knowledge the technology, the evolving practice of responsible AI, and examples of AI governance. One example we recommend is the AI Federal Leadership Program developed by the Partnership for Public Service and supported by the private sector, including Microsoft. The program runs cohorts of SES and GS-15 employees and to date has graduated over 200 participants from dozens of agencies. We also suggest looking to the AI and responsible AI training that Microsoft, LinkedIn, and others offer as examples and resources.

- Empower CAIOs with the authority to develop, manage implementation of, and evolve agency policies for AI innovation and risk management, including by establishing baselines

and metrics, measuring internal compliance, and creating a culture of responsible innovation.

- Establish an operating model whereby CAIOs regularly convene a cross-agency AI governance body responsible for driving implementation of AI innovation and risk management policies and provide feedback that could inform policy adjustments. The AI governance body should enable meaningful coordination on policy implementation, including by reviewing AI use cases, monitoring, and assessing performance against risk management metrics, providing guidance and support on policy interpretation, and sharing best practices. It should also help scale efforts to establish a culture of AI awareness and literacy, as well as a commitment to accountable AI practices, across the agency.

- Consider sequencing the creation of a cross-agency CAIO forum for sharing best practices and resources as CAIOs and their teams are established and provided some runway to operate. While too much structure too early could overburden efforts to build governance grounded in agencies' existing operations and needs, over time, each CAIO will have learnings that are transferable and for which there's greater readiness to process and implement as relevant.

5. Facilitate iterative improvement, including through small-scale pilots.

Establishing effective AI governance, enabling AI innovation, and ensuring accountability for AI risk are each critical endeavors. And they are the appropriate tasks for federal agencies to pursue *in parallel* to deploy AI responsibly, gaining enormous benefits for agencies themselves and their constituents. Moreover, there are use cases that are ripe for safe and rights-respecting deployment today, and the U.S. government cannot wait for more clarity to arrive in a space in which early users will gain competitive advantages. The technology and risk management practices will continue to evolve, and early adopters will gain critical context for future iterations of technology and safety techniques and evaluations.

In this environment, establishing approaches and processes that facilitate iterative improvement are as important as – or perhaps even more important than – establishing any single starting point. Along with more durable, process-focused policies, pilots and ongoing public-private partnerships and best practice communities can help realize such an approach. Pilots can offer a chance for forward-leaning agencies and partners to help surface and work through challenges in advance of attempting to implement policies across the federal ecosystem. For example, in the context of EO 14028, pilots may have also helped surface agency and software providers with uncertainties about how to deliver, manage, and use software bill of materials (SBOM) information, driving greater clarity and ultimately accelerating meaningful implementation.

Recommendations:

- Incentivize and support pilots that can provide valuable insights into how to implement and verify conformance with minimum AI risk management practices, including for agencies and with their federal contractors. Provide continuous visibility into learnings and potential needs for policy adjustments across the federal ecosystem and partner communities.

- Encourage agencies to conduct pilot projects on how to surface use cases for AI, how to share learnings across the federal community, and other open questions, recognizing that such efforts can proceed alongside the more formal development and implementation of innovation strategies and governance structures that allow for flexibility in incorporating their learnings.

Conclusion

We thank OMB for the opportunity to provide feedback on the draft memorandum for federal agencies regarding their use of AI products and services. We welcome further opportunities to engage on the development and improvement of a robust and comprehensive AI policy framework that empowers agencies to leverage AI as a strategic asset for advancing the public interest and enhancing government services. We look forward to working with OMB and other agencies to implement and operationalize responsible AI across the federal government.

Sincerely yours,

Gerry Petrella

General Manager, US Public Policy

US Government Affairs

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lps-oumc-r3x6
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0094
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Scale AI

General Comment

Scale AI comment contained here

Attachments

Scale AI_OMB AI Implementation Memo_Comment_Final

Scale AI, Inc. | 155 5th St. | Floor 6 | San Francisco, CA 94103 | max.fenkell@scale.com

Scale AI Comments in Response to the Office of Management and Budget Request for Comments on Advancing Governance, Innovation and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum Docket ID: OMB-2023-0020-0001

Scale AI (Scale) appreciates the opportunity to respond to the Office of Management and Budget's (OMB) request for comments on the Proposed Memorandum for the Heads of Executive Departments and Agencies (OMB Memo)[1] on "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence". Scale looks forward to continuing work with the OMB and the rest of the Biden-Harris Administration to ensure the United States continues to be the global leader in the efficient adoption of safe, secure, and trustworthy AI.

INTRODUCTION

Scale was founded in 2016 with the mission of accelerating the development of AI. Today, our Data Engine powers every leading large language model (LLM), including OpenAI, Meta, Microsoft and Anthropic, through data fine-tuning, red-teaming, or test and evaluation. Beyond our work with LLM developers, Scale labels data for the leading autonomous vehicle programs at companies like GM and Toyota and works closely with the U.S. government. Based on Scale's role in the AI ecosystem, we have helped to pioneer nearly every major recent AI development.

As the United States leads the world in the adoption of AI, it is critical that we establish a regulatory framework that is flexible enough to enable innovation, while putting in place the proper safety guardrails. President Biden, Vice President Harris and other Administration officials echoed this sentiment, most recently when the President signed the "Executive Order on the Safe, Secure, and Trustworthy Development and Use of

[1] See, https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf

Artificial Intelligence" on October 30, 2023[2] and OMB released its accompanying memo.[3]

Scale applauds the Biden-Harris Administration for their AI approach to date and echoes Vice President Harris' sentiment and belief that "[w]hen it comes to AI, America is a global leader."

RAPID IMPLEMENTATION IS CRITICAL FOR U.S. LEADERSHIP

The OMB Memo and Executive Order put in place over 100 new requirements for agencies to implement over the course of the next 18 months, which are all critical pieces of U.S. leadership. These build on two previous Executive Orders and two pieces of bipartisan legislation, which are currently being implemented by those same agencies. Once this work begins, it is important that these new policies and regulations position the United States for success. The OMB memo starts to do this but can be improved to fully position our nation for global leadership.

The newly established Chief AI Officers[4] are a great starting point to centrally coordinate an agency's AI efforts, and they must be empowered and resourced to carry out the functions of their job effectively. The previously submitted AI use case inventories[5] were vital to understand both how each agency intends to leverage AI and show the status of its AI implementation.

Beyond empowering and resourcing, they will have no shortage of day one tasks that must be carried out by the Chief AI Officers to best set up their own Agency for future success. It will be critical for them to prioritize establishing an AI foundation that can be built on, instead of starting at the end of the journey. Scale appreciates the OMB Memo's approach to this by starting with the basics, but believes that the Chief AI Officer should also answer in their report questions related to the resources that they will need to better set long-term budgets.

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[2] See, https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/

[3] See, https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf

[4] iBid.

[5] See, https://ai.gov/ai-use-cases/

It is clear that AI is advancing faster than the government budget cycles. For example, ChatGPT launched on November 30, 2022,[6] which was after the agencies set their FY2024 budget requests, making it impossible to have included funding requests for generative AI, despite the OMB Memo's statements related to support for Agency use of the technology. Likewise, it is imperative that agencies include funding for the Chief AI Officer position and the implementation priorities, despite being close to finalizing their FY2025 budget requests. If the Chief AI Officers do not work on day one to understand their funding needs, and those needs are not adequately responded to, it is unrealistic to think that they will be properly resourced to do their jobs. We can not wait until at least FY2026 to begin to embrace AI; the rest of the world is not slowing down.

Additionally, it will be critical for NIST to expedite its work as soon as possible and that agencies support it. NIST has been a critical partner to industry and the government with their release of the AI Risk Management Framework,[7] launch of their GenAI Working Groups,[8] and the newly established AI Safety Consortium.[9] All of this work is critical to the development of safe, secure and trustworthy AI, but it is clear that it is not a small task.

Research gaps still exist related to evaluation benchmarks, determining risk classification of AI use, and more. To assist with this, Scale recently launched its Safety, Evaluation, and Analysis Lab (SEAL) that will develop methodologies, benchmark datasets, and fill the research gaps that exist today. SEAL intends to collaborate with NIST's AI Safety Consortium and standards development organizations to help build robust safety standards.

Scale is fully committed to doing our part to assist in the implementation of these new provisions. It is critical that federal agencies prioritize the early work and that Congress adequately funds these new requirements to position the United States for global leadership.

AI-READY DATA IS CRITICAL TO U.S. LEADERSHIP

For the United States to lead the world in the implementation of safe, secure and trustworthy AI, we must lead the world in AI-ready data. The output of an AI system is

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[6] See, https://www.forbes.com/sites/bernardmarr/2023/05/19/a-short-history-of-chatgpt-how-we-got-to-where-we-are-today/?sh=1ab8b38f674f

[7] See, https://www.nist.gov/itl/ai-risk-management-framework

[8] See, https://www.nist.gov/news-events/news/2023/06/biden-harris-administration-announces-new-nist-public-working-group-ai

[9] See, https://www.nist.gov/artificial-intelligence/artificial-intelligence-safety-institute

only as good as the data that it is trained on, which means that to have high quality outputs, it must have high quality, AI-ready data that has been tagged, annotated, labeled and is able to be read by the algorithm.

The DoD has long recognized the importance of AI-ready data, and its own data strategy states that “Data sets for A.I. training and algorithmic models will increasingly become the DoD’s most valuable digital assets and we must create a framework for managing them across the data lifecycle that provides protected visibility and responsible brokerage.”[10] To convert raw data to AI-ready data, the DoD set up the Chief Digital and AI Office (CDAO)[11] that has been tasked with leading the DoD’s work on “AI Scaffolding” or building out its AI infrastructure.

Relatively, the DoD is a few years ahead of the rest of the federal government because of the aforementioned efforts, and its work can serve as a blueprint for the other agencies to build out their own AI Scaffolding. The OMB Memo correctly points out the value of AI training data calling it “...a critical asset for their AI maturity[12]”and tasks the Chief AI Officers (CAIO) of each agency to craft a plan to maximize each agency’s AI infrastructure.

This work will be critical to ensuring that federal agencies are set up to harness the power of AI. Within this strategy, Scale believes that the CAIO should work to better understand what has worked well from industry and the DoD and how they can best set their own agency up to leverage the AI Scaffolding concept.

Creating AI-ready data is necessary to position the United States to leverage AI and further cement our role as the global leader in AI.

A RISK-BASED TEST AND EVALUATION REGIME IS THE RIGHT APPROACH TO AI SAFETY

One of the most pressing topics facing governments around the world is related to ensuring that AI is safe to deploy. The OMB memo addresses this topic in Section IV “Minimum Practices for Either Safety-Impacting or Rights-Impacting AI” that beginning on August 1, 2024 requires test and evaluation “before using new or existing covered safety-impacting or rights-impacting AI” and “on an ongoing basis while using new or

[10] See, https://media.defense.gov/2020/Oct/08/2002514180/-1/-1/0/DOD-DATA-STRATEGY.PDF
[11] See, https://www.ai.mil/
[12] See, See, https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf

existing covered safety-impacting or rights-impacting AI, agencies must ensure these practices are followed for the AI."[13]

Scale strongly supports this approach and believes that test and evaluation is the best way to ensure that AI is safe to deploy. Test and evaluation is a standard process for bringing any product to market or getting it procured by the government, but this does not yet exist for AI. The OMB memo rightly puts this process in place for AI, though as the draft OMB memo becomes final, Scale would recommend the following to make this approach truly comprehensive.

First, the OMB memo does not specify whether or not the test and evaluation should be one size fits all or a risk-based approach. While it specifies certain use cases within Section b. "Determining Which Artificial Intelligence Is Presumed to Be Safety-Impacting or Rights-Impacting"[14] that will serve as the basis for which AI use cases will require test and evaluation prior to deployment, the memo does not provide guidance to agencies on determining the specific benchmarks to test and evaluate against.

Test and evaluation will rely, as rightly noted in the OMB Memo, heavily on industry best practices and standards. However, these best practices and standards will not identify the specific metrics that each use case will require. A risk-based approach will build on these standards to ensure that AI is safe for its intended use, and the risk associated with the use will determine the rigor of the evaluation.

Scale fully agrees that all AI, regardless of its intended use, should undergo an independent test and evaluation process, but the standards for test and evaluation should be based on the intended use and not one-size-fits-all. For example, AI being used for "Decisions to block, remove, hide, or limit the reach of protected speech"[15] or "Decisions regarding medical devices, medical diagnostic tools, clinical diagnosis and determination of treatment, medical or insurance health-risk assessments, drug-addiction risk assessments and associated access systems, suicide or other violence risk assessment, mental-health status detection or prevention, systems that flag patients for interventions, public insurance care-allocation systems, or health-insurance cost and underwriting processes"[16] can and should require different metrics to be evaluated against given their intended use.

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[13] See, https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf
[14] iBid.
[15] iBid.
[16] iBid.

Both of the above examples will require test and evaluation, but the specific use case may require different metrics to be prioritized to ensure that it is safe for its intended use. It is critical that the agencies responsible for those use cases publish the specific metrics that they intend to evaluate against to provide the necessary long-term regulatory certainty.

Second, as agencies implement Section IV, it will be important to clarify how they can comply with the requirements. Section IV (c) correctly requires independent test and evaluation, but the OMB memo should clarify how this should be carried out. While it is critical that the developers and deployers do their own internal assessments throughout the AI development process, it is clear that an independent group should also test and evaluate the AI prior to deployment. However, the OMB memo does not provide guidance related to how this independent test and evaluation should be carried out.

Scale believes that independent test and evaluation can be a role that industry plays to stay current with the rapid pace of innovation and enable a shift towards a more performance-based approach that would see the government approve industry's work, while the government sets the safety objective or requirement.

Industry and governments around the world have heralded performance-based approaches[17] as the right approach to promote innovation and ensure a high safety bar. AI test and evaluation can and should also adopt this approach, which relies heavily on industry consensus standards, as it is best suited to meet the Administration's goals of creating a governance framework that is flexible to enable innovation and put in place the right safety guardrails.

Agencies should rely on existing best practices, standards, and documents like the NIST AI Risk Management Framework and AI Bill of Rights[18] when performing test and evaluation, as the OMB memo notes. Industry is also working to develop test and evaluation platforms that will take these guidelines and standards into account and adapt them, as needed, to new standards or best practices. Once the government sets the metrics that it intends to evaluate against, industry can incorporate those into our platforms and continuously update them to be current.

This will be required by the rapid pace of innovation. Multiple new frontier models have been released in 2023 alone, and in the next 18 months, it is anticipated that many

[17] See, https://www.ainonline.com/aviation-news/business-aviation/2017-09-05/new-faa-part-23-becomes-reality
[18] See, https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf

more will be released, as well as innovations that are not public or captured in the scope of OMB memo. A performance-based regulatory framework would ensure that test and evaluations would be current for new innovations quickly after their release, instead of requiring new rulemakings and updates to the procurement guidelines every time industry releases a new technology.

Scale believes that Section IV of the final OMB memo should be updated to reflect the above recommendations to establish a comprehensive test and evaluation regime.

CONCLUSION

Scale looks forward to continuing to work with OMB and the entirety of the federal government to ensure that the United States leads the world in the adoption of safe, secure and trustworthy AI.

Please direct any questions to the undersigned.

Max Fenkell
Head of Government Relations
Scale AI

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lps-ov5g-a6la
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0095
Comment on OMB-2023-0020-0001

Submitter Information

Organization: American Council on Education

General Comment

Attached, please find comments from the American Council on Education, which represents over 1,600 institutions of higher education, in response to the "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum."

Attachments

FINAL 120523 OMB comments on AI EO

American Council on Education®
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Washington, DC 20036
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December 5, 2023

Clare Martorana
U.S. Federal Chief Information Officer and Administrator
Office of E-Government and Information Technology
Office of the Federal Chief Information Officer
Office of Management and Budget
Eisenhower Executive Office Building
17th Street and Pennsylvania Avenue, NW
Washington, DC 20504

Re: OMB–2023–0020; Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Dear Administrator Martorana,

The American Council on Education (ACE) submits these comments in response to the "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum." This draft memorandum lays out the responsibilities of the federal agencies under recent legislation and the October 30, 2023, "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence" Executive Order in advancing "AI governance and innovation while managing risks from the use of AI, particularly those affecting the safety and rights of the public."

ACE is the major coordinating body for the nation's colleges and universities, representing over 1,600 colleges and universities, related associations, and other organizations in America and abroad. ACE is the only major higher education association to represent all types of U.S. accredited, degree-granting colleges and universities, public and private. Our members educate two out of every three postsecondary students attending accredited, degree-granting U.S. institutions. Given the diversity of our membership and the education mission of our members, our comments focus on the education-specific implications with an emphasis on the implementation of this memorandum at the U.S. Department of Education. We have also submitted comments to the United States Committee on Health, Education, Labor, and Pensions regarding the actions the committee and Congress may take regarding federal policy on AI in education.[1]

Regarding this draft memorandum, OMB is requesting feedback on several specific questions. Below please find our responses.

Question #1 focuses on the creation and role of a Chief Artificial Intelligence Officer (CAIO). The draft memorandum states that the primary responsibility for a CAIO will be "coordinating

[1] https://www.acenet.edu/Documents/Letter-Senate-AI-092023.pdf

their agency's use of AI, promoting AI innovation, managing risks from the use of AI, and carrying out the agency responsibilities." For the U.S. Department of Education (ED), the CAIO will need to coordinate and work across the various offices within ED, including the office of Federal Student Aid (FSA), as well as the Office of Postsecondary Education (OPE). Therefore, the CAIO should be specifically charged with working across the various divisions at agencies, which at ED cover K-12, postsecondary, and vocational and technical education. This can be accomplished through the proposed Agency AI Governance Boards but will need to include representation across ED's diverse divisions, as well as the relevant stakeholder communities. It will be important for the AI Governance Board at ED and other agencies to incorporate feedback and input from stakeholders as they move forward in creating and implementing AI policies and programs.

In regard to Question #4, about how agencies should take advantage of generative AI to improve agency missions or business operations, there are numerous ways AI could be used to improve customer service for federal student aid. These include identifying and granting public service loan forgiveness for qualified borrowers; identifying and working with qualifying individuals to apply for federal student aid (even before a Free Application for Federal Student Aid form is completed); and speeding up responses to inquiries for institutions and individuals at FSA. The development of a process in which a student, guided by an AI chatbot, is provided personalized information, directed to relevant resources, has questions answered, and receives prompts to initiate or complete various stages of their application process could have enormous benefits for low-income students, especially those with other external demands such as jobs or family responsibilities.

Question #5 asks if there are "use cases for presumed safety-impacting and rights-impacting AI" that should be included in the final memorandum. We are pleased that Section b (ii) "Purposes that are Presumed to be Right-Impacting" includes:

- E. In education, detecting student cheating or plagiarism, influencing admissions processes, monitoring students online or in virtual-reality, projecting student progress or outcomes, recommending disciplinary interventions, determining access to educational resources or programs, determining eligibility for student aid, or facilitating surveillance (whether online or in-person).

ED should work with the higher education community to provide guidance to institutions of higher education regarding these important issues, especially as it relates to eligibility for Title IV and other federal requirements on colleges and universities. It will be important for the ED Office for Civil Rights (OCR) to be involved in those conversations. In addition, institutions are exploring using AI to streamline, and in some cases remove, bias from some institutional processes, including the use of AI in the admissions process. In the admissions process, AI can perform initial screens of application materials to ensure that minimum requirements for admission are met before admissions personnel review them, saving countless hours of staff time. AI can also review large data sets, such as transcripts, that could reduce time and burden for institutions as part of complicated admissions decisions in areas such as transfer of credit. It will be important that any guidance coming from ED, or other agencies, does not limit or stifle innovation in these areas, which could result in discouraging first-generation and other under-represented students from pursuing postsecondary education.

To Question #7, what types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum…", the final memorandum from OMB should include directions, or at the very least encouragement, that agencies engage with the stakeholder community in developing and implementing policies and actions with AI. Specifically for ED, the higher education stakeholder community can share effective practices and institutional policies from a campus perspective, as well as providing input into how AI can be used to improve services at ED.

For question #8, "what kind of information should be made public about agencies' use of AI in their annual use case inventory," we believe it would be helpful to include information regarding whether AI had a substantial impact on speeding up responses to individual or institutional questions to ED, as well as how AI may be being applied beyond the Office of Federal Student Aid. For instance, if it is being used in the grant making process within OPE, or how it is being applied at FSA to support applications and disbursement of federal student aid.

We appreciate the proactive actions of OMB and the administration in encouraging the federal agencies to develop effective policies around AI. We look forward to continuing to engage with the administration on these important issues.

Sincerely,

Ted Mitchell
President

Cc: Derrick Anderson, Senior Vice President, Education Futures

PUBLIC SUBMISSION

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0096
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Information Technology Industry Council

General Comment

Thank you for the opportunity to submit comments on OMB's Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum. Attached please find the Information Technology Industry Council's (ITI) response.

Attachments

ITI Response_OMB-2023-0020_FR 2023-24269

ITI Promoting Innovation Worldwide

Director Shalanda Young
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Re: Comments from the Information Technology Industry Council (ITI) on the Draft Memorandum entitled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"

Submitted via regulations.gov
Docket ID: OMB-2023-0020-0001

December 5, 2023

Dear Director Young,

The Information Technology Industry Council (ITI) greatly appreciates the opportunity to comment on the draft memorandum on advancing governance, innovation, and risk management for agency use of artificial intelligence (AI). We recognize that the Office of Management and Budget (OMB) is under no obligation to release pre-decisional drafts of its M-series memoranda for public consumption. We welcome the opportunity to provide the below comments and thank you for prioritizing public-private collaboration on this effort.

ITI is the premier global advocate for technology, representing the world's most innovative companies. Founded in 1916, ITI is an international trade association with a team of professionals on four continents. We promote public policies and industry standards that advance competition and innovation worldwide. Our diverse membership and expert staff provide policymakers the broadest perspective and thought leadership from technology, hardware, software, services, and related industries.

ITI and our member companies support the government's vision of safely and responsibly developing and deploying AI and we commend President Biden for his leadership in launching the Administration's new whole-of-government approach to AI. Technology has always played an essential role in shaping the economy and AI is already revolutionizing many sectors. We appreciate the careful consideration given by the government for responsibly adopting and integrating AI in ways that can significantly enhance agency operations, and services, and cybersecurity while appropriately managing risks. We support OMB's efforts to advance trustworthy AI, which will be imperative to fostering public trust in this emerging technology. At the same time, it is important that OMB's guidance strikes a balance that fosters accountability without hindering innovation. To ensure U.S. competitiveness, the federal government must rely on the cutting-edge commercial AI technologies developed by the private sector pursuant

to commercial best practices, including widely accepted approaches for managing risk. We believe that the risk-based approach outlined in this memorandum is an important step in realizing this vision, but we urge OMB to consider our suggestions for how to fully realize a risk-based approach. To that end, our comments seek to preserve the goal of building trustworthy federal AI systems, while navigating the increasingly complex procurement environment and ensuring that the federal government can access best-in-class commercial AI solutions.

Below, we touch on a number of issues including minimum risk management practices, government access to and management of data, aligning federal contracts with AI guidance, cybersecurity governance processes and resourcing.

Our comments focus on the following recommendations:

I. Adopt Standards-Based Approaches

A. Evaluate AI models' capabilities and risks through testing and by focusing on outputs, rather than through inputs such as training data.

B. Adopt the National Institute of Standards and Technology (NIST) AI Risk Management Framework (RMF) as a common standard for evaluating and mitigating AI risk, including the RMF's focus on "high-risk" solutions and the creation of use-case profiles.

II. Leverage Innovative Commercial Solutions and Promote Competition

A. Promote innovation by prioritizing the use of commercial AI solutions to the maximum extent practicable, rather than developing government-unique requirements and solutions.

B. Promote competition by ensuring government requirements prioritize interoperable commercial AI solutions, including related technologies, in line with existing best practices and commitments.

C. Protect vendors' intellectual property and proprietary data by ensuring that government-required reporting focuses on the minimum amount of information required to address risk.

III. Clarify Public/Private Shared Accountability for Harm Prevention

IV. Improve Government Processes and Resources to Support AI Adoption

A. Ensure the U.S. Government prioritizes automation and modernizing its internal systems and practices to appropriately facilitate risk assessments and continuous monitoring of AI solutions.

B. Ensure the U.S. Government uses all available avenues and authorities to attract, retain, and develop the skilled, diverse AI workforce needed to accomplish the responsibilities described in the memo.

These recommendations are discussed in detail below.

I. Adopt Standards-Based Approaches

A. Evaluate AI models' capabilities and risks through testing and by focusing on outputs, rather than requesting inputs such as training data.

Section 5(c) of the OMB memo recommends methods based on superseded approaches that focus on the data inputs for an AI model instead of the outputs. Advances in technology are allowing us to extract greater insight from smaller and imperfect data sets. We urge OMB to consider refining the memorandum's approach away from direct inspections of data toward verifications of dataset validity and evaluations of outcomes as the vehicles for mitigating risks that impact rights and safety.

Requiring agencies to sift through and review volumes of data to ensure it is reflective of the communities the AI tool is designed to serve is an inefficient use of resources nor is it technologically feasible. We support OMB's goal of reducing bias in AI models used in government service delivery and offer a few suggestions below to both strengthen this approach and ensure the federal government can continue to access innovative commercial AI solutions that further this goal.

Additionally, Section 5(c)(iv)(A)(3) states that agencies need to fully evaluate the sufficiency of the data that underpins the development, training, testing and operation of the AI system before deployment to minimize risks from low quality or inappropriate data. However, pretrained foundation models (defined in the U.S. AI Advisory Council FAQs) have been created with massive volumes of diverse text data collated over many years.[1] For commercial companies who offer these models, documenting complete provenance and reliably assessing errors is infeasible across web-scale data sets measuring in the hundreds of gigabytes. For Foundational models, ITI urges OMB to instead require agencies to focus analysis expectations on model outputs rather than exhaustively documenting training inputs, allowing standard techniques like safety benchmarks to count toward compliance with the memo's goals. If specific requirements for data inputs are imposed, they should pertain to the agency's use of the data (e.g., for agency fine-tuning of vendor models).

B. Adopt the National Institute of Standards and Technology (NIST) AI Risk Management Framework (RMF) as a common standard for evaluating and mitigating AI risk, including the RMF's focus on "high-risk" solutions and the creation of use-case profiles.

ITI appreciates that OMB encourages agencies to fill gaps by aligning risk management best practices with the NIST AI RMF. However, we urge OMB to fully adopt the NIST AI RMF's flexible approach to evaluating and mitigating risk, rather than the current, more prescriptive approach outlined in the memorandum with its broad categories of "rights-impacting" and "safety-

[1] See https://ai.gov/wp-content/uploads/2023/09/FAQs-on-Foundation-Models-and-Generative-AI.pdf

impacting" AI and the expansive list of use cases and/or sectors that are *presumed* to impact one's rights or safety. We recognize that AI is a powerful tool that can "meaningfully influence the outcomes of [many] activities or decisions" but have concerns that these categories, as they are currently scoped, would inadvertently capture uses of AI that would not impact rights or safety and instead serve as a barrier to the government harnessing AI technologies with diverse societal benefits.[2]

Moreover, Section 6 of the memorandum defines "safety-impacting" AI as including any AI that has the "potential to meaningfully impact…safety" and it is not evident what the distinction is between AI that is presumed to impact safety compared to AI that has the "potential" to impact safety. We are concerned that the term "potential" could serve as a catch-all for any AI use case as this technology continues to mature and strongly urge OMB to clarify if and how these two terms are distinct.

We are similarly concerned that the memorandum's definition of "rights-impacting AI" may inadvertently discourage the adoption of AI tools that promote the interest of marginalized communities as it makes it hard to anticipate the breadth of potential agency actions that could be covered by the memorandum. To address this, OMB should focus on anticipating what civil and human rights risks may surface from AI products rather than presuming from the outset that they are such.

We urge OMB to consider scoping guidance on "high-risk" applications, as opposed to "rights-impacting" or "safety-impacting" applications. As it currently stands, OMB is defining virtually all applications as high-risk and therefore making it difficult or impossible for federal agencies to adopt AI tools. In our view, an AI system is considered high-risk when an outcome could materially and negatively impact fundamental human rights or safety—especially as it pertains to health, safety, freedom, discrimination, or human rights.

ITI strongly supports how NIST has used the Cybersecurity Framework (CSF) for establishing an overarching cybersecurity risk management strategy for developing standards, guidelines, and best practices within organizations to manage cybersecurity risk and believes the NIST AI RMF has the potential to achieve a similar outcome. The NIST AI RMF outlines in great detail the core functions that organizations designing, developing, deploying, or using AI should follow to manage risks and is intended to be a practical way for organizations to operationalize these strategies as AI technologies continue to mature and evolve. OMB should avoid deviating too far from the principles within the NIST AI RMF as these were developed in close coordination with industry stakeholders and reflect existing best practices for managing and documenting the risk management process for AI.

[2] See: 5(b)(ii) https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf#page=16

To better align these two risk-based approaches, we encourage OMB to consider implementing the use-case profiles presented in Section 6 of the NIST AI RMF. Incorporating use-case profiles (e.g., hiring profile, fair housing profile) would offer a more nuanced approach for understanding how to manage risks at various stages of the AI lifecycle for an agency specific use case of AI rather than defining extensive categories that may capture most possible uses of AI. We recommend that OMB leverage these use-case profiles presented by the NIST AI RMF to operationalize the goal of managing risks to rights and safety from agency use of AI without impeding the government's ability to utilize best-in-class commercial technologies for service delivery.

In developing those profiles, it is important to recognize that not all applications of AI pose equivalent risks nor do all applications of AI inflict harm on the public and warrant regulation. Additionally, if using an AI system in a high-risk context produces a more desirable result than alternative tools and/or processes, using the AI system may actually reduce safety risks. A decision based on outputs from a well-described and documented AI system has the potential to be more transparent than one made based on the personal judgment of an individual or group. It is critical that OMB works with federal agencies to ensure any required AI governance actions do not disincentivize the adoption of AI technologies that have the potential to reduce risks in high-stakes contexts.

Below, we have provided a non-exhaustive list of use cases that demonstrate how AI tools and solutions developed by industry are positively impacting the proposed risk categories in Section 5(b) of the OMB memorandum:

- **Medical Devices**: Section 5 (b) presumes that medical equipment including "medical devices, medical diagnostic tools, clinical diagnoses and determination of treatment" among other applications would potentially be safety-impacting and/or rights-impacting, but it is also important to recognize that AI applications are poised to revolutionize everything from the back office to the doctor's office, and from the emergency room to the living room in patient care. AI technologies are being used to develop insights on large patient populations to help predict, pre-empt, and prevent diseases and in early results are already more effective in delivering precision patient care.[3] As an example, AI is currently being used to "study digitized images of biopsies to detect subtle differences between tumors" and to ""sift through [volumes of data] to [identify] patterns and speed up the drug development process."[4] Consequently, it will be critical for OMB to help federal agencies develop more nuanced criteria for determining which AI medical use cases are safety-impacting or rights-impacting.

[3] How AI is Transforming the Field of Radiology. (2023, September 12). Retrieved from https://hbr.org/sponsored/2023/09/how-ai-is-transforming-the-field-of-radiology#:~:text=Using%20specific%20deep-learning%20algorithms,facilitating%20better%20disease%20progression%20monitoring.

[4] Loftus, P. (2023, November 30). J&J hired thousands of data scientists. will the strategy pay off? The Wall Street Journal. https://www.wsj.com/tech/biotech/johnson-johnson-hiring-data-scientists-ai-ccbf2c07?st=mnsc2q5tdd7fsub&reflink=desktopwebshare_permalink.

- **Financial Services**: Section 5 (b) also calls attention to the impact that AI could have on the financial services sector including "mortgage underwriting…loan-allocation processes, credit scoring…[audits] and financial system penalties" but AI tools can help to expand access to capital, allowing individuals and small businesses to take out loans that they otherwise might not qualify for. OMB should work with financial regulatory agencies to ensure that regulations and other policy actions do not discourage the use of AI systems in mortgage underwriting and loan allocations. Instead, federal agencies should encourage the use of trustworthy AI systems that support civil rights and improve equity in lending. To encourage responsible AI adoption, OMB should work with federal agencies to ensure regulatory frameworks empower regulated entities to integrate AI governance safeguards into their existing data privacy, cybersecurity, and model risk management programs. Moreover, AI can also distill complex tax laws into a personalized decision system enabling individuals to quickly and accurately file taxes. AI systems help combat fraudulent transactions, secure payments, and enhance cybersecurity throughout the financial sector. Federal AI governance requirements should enable public-sector and private-sector entities to continue deploying AI technologies for these important, beneficial purposes.

- **Law-Enforcement**: Section 5 (b) references the impact to law enforcement or surveillance-related assessments, including license plate readers and technologies that analyze biometric information. But these technologies, enhanced by AI including facial recognition technology (FRT), have transformed safety and security operations. For example, widely used biometric identity verification capabilities such as fingerprint or facial recognition support a tremendous volume of secure online commerce on a daily basis. Such tools help prevent identity theft and fraud, as well as aid in authentication and verification solutions for account access and financial transactions. These AI-powered capabilities are also used for physical security such as access control and facility security screening, and even support rapid and contactless travel experiences such as clearing customs and aviation security screening.

- **Movement of Vehicles**: Not all movement of vehicles present a risk to safety. AI has been critical in assisted driving technologies to improve driver safety and reduce the prevalence of traffic accidents. Many vehicles deploy AI technologies to assist with automatic emergency braking or to analyze complex traffic scenarios to help drivers make more informed decisions. AI allows workers to remotely operate vehicles, thereby reducing or eliminating threats to personal safety that occur in physically dangerous work environments.

- **Climate Technology**: AI also has the potential to contribute solutions to the growing climate crisis. Studies show that impacts from our changing climate fall disproportionately on underserved communities that do not have adequate resources to prepare for and recover from heat waves, poor air quality, flooding, and other impacts.[5] AI is helping to restore balance by combing through enormous volumes of data to enhance the accuracy of weather forecasts and prepare communities to reduce the impact of climate disasters through better preparation. With nearly half of the world lacking adequate warning systems for climate events like floods and wildfires, AI is an important tool in notifying vulnerable populations and saving lives in the process.[6]

- **Cybersecurity**: Defensive cyber operations is another beneficial use case where AI is already leveraged to protect networks and information systems from nation-state or other cyber threat actors that could undermine the confidentiality, integrity, and availability of the systems the government uses to protect health, safety, and fundamental rights. Network defenders need tools to monitor large amounts of security data, vulnerability information, and other telemetry, spot malign activity in real-time and launch automated response and remediation measures. Maximizing AI for this critical cyber defense use case will inevitably support both the security of those systems and the privacy of the data within which ultimately helps federal agencies protect fundamental rights.

- **Human Resources**: AI in HR has the ability to improve every aspect of the modern workforce, from recruiting and training to increasing employee engagement and retention. The OMB memorandum highlights employment as rights-impacting, but new recruiting AI software can remove unconscious biases in job descriptions. Further, specialized AI for training is interactive, continuously learning and adapting to each worker's learning style and interests. Virtual reality training, natural language bots, and self-directed apps are available at the worker's convenience, thus increasing engagement and material retention. The government should make it easier for workers to upskill and have access to trainings.

These examples of AI's ability to positively impact rights and safety demonstrate why OMB should continue dialogue with stakeholders across the AI value chain. The goal of that dialogue should be how to best characterize and scope use cases so that the government can fully leverage this transformative technology and deliver for its constituents, with the Chief Artificial Intelligence Officer (CAIO) leading the way in making these decisions and considering multiple factors that balance use case-specific considerations. Through those use cases, federal agencies

[5] U.S. Environmental Protection Agency, "Climate Change and Social Vulnerability in the United States: A Focus on Six Impacts" (2021), EPA 430-R-21-003.
[6] UNDRR and WMO (2022) "Global status of multi-hazard early warning systems: Target G", United Nations Office for Disaster Risk Reduction.

will have the flexibility to utilize the best technologies that make sense for their intended purposes, while ensuring they have robust processes to advance public trust and safety.

II. Leverage Innovative Commercial Solutions and Promote Competition

A. Promote innovation by prioritizing the use of commercial AI solutions to the maximum extent practicable, rather than developing government-unique solutions.

The federal acquisition process generally prioritizes the use of commercial products and services, rather than government-unique or custom solutions. This makes sense in the context of AI, which has largely been developed and deployed by the private sector. As OMB develops its guidance for aligning federal contracts with the guidance in this memorandum, we urge OMB to ensure agencies have the authority and direction to fully leverage commercial acquisition procedures to procure AI. To make the most of this approach, agencies will need to procure private-sector AI under commercial terms that balance the government's interest in licensing AI with the commercial firms' interests in making broader commercial use of their products and services. As discussed above, when procuring AI, the government should focus requirements around AI outcomes (e.g., optimization of air traffic or management of fraud, waste, and abuse in tax filings) as doing so will promote a collaborative engagement with industry to identify solutions that achieve those outcomes, with the broadest possible group of market participants.

It is also important to note that AI capability is not generally procured independently. Rather, it is most often a function of code that enhances the usefulness of other software that was written for a specific purpose. For example, travel and expense software may be delivered with AI capabilities to reduce the opportunity for improper payments, financial management software uses AI to enhance user experience, and generative AI to improve business operations. Indeed, many commercial software programs come standard with AI capabilities, and have for some time. The government must also prioritize the use of commercial products and services that leverage AI, to ensure a full range of access to private sector innovation.

Especially in the context of commercial providers, we are concerned that Section 5(d) of the OMB memorandum lacks guidance on how broadly these requirements will apply throughout federal contractor supply chains. For example:

- Will the requirements apply only at the prime contractor level, or will the government require prime contractors to flow requirements down to subcontractors and/or lower tier suppliers?
- Will these subcontractors and/or lower-tier suppliers potentially be required to provide reporting information directly to the federal government, even if there is no contractual privity?

We urge OMB to limit contractual requirements to the companies with which the government has a direct contractual relationship. Furthermore, we suggest that the U.S. Government consider excluding common commercial products in which AI is embedded from the scope of future rulemaking to ensure regulators are focused solely on the AI systems that present the highest levels of risk.

Additionally, we recognize that implementing new reporting and other minimum practices requirements in federal contracts represents an increased burden and cost for both the federal acquisition workforce and the vendor community—especially for small businesses that may be new to considering these requirements and commercial companies that do not factor in the cost of these additional requirements into their standard pricing. We strongly support additional training and technical assistance for both the acquisition workforce and federal suppliers to understand new minimum practices requirements and how to successfully implement them within federal contracts. This is especially needed for AI red teaming, which does not yet have a standard meaning, and may be a new concept and practice for many suppliers. It would be beneficial for OMB to consider opportunities to implement Application Programming Interfaces (API) and other assistive developer resources to help scale and automate this work.

Finally, we have questions about OMB's planned approach for developing an "initial means to ensure that AI contracts align with the guidance" in the OMB memorandum and AI EO.[7] Specifically:

- Will this be completed as a government wide mass modification or class deviation?
- Will guidance be issued to individual contracting officers to modify contracts in line with OMB guidance?
- Absent a Federal Acquisition Regulation (FAR) rulemaking process, how will OMB and/or federal agencies seek public input on the new contract language?
- Will contracts be modified unilaterally or bilaterally?
- Will existing contractors taking on new minimum practices be entitled to seek compensation through an equitable adjustment or other means?
- Will this guidance apply only when AI is delivered in a procurement, or does it also apply if AI is used by a contractor or subcontractor?

These are just some of the questions that surround the implementation of these requirements in federal contracts. To further understand the range of concerns and perspectives, we encourage OMB and/or individual agencies to seek public comments on any proposed contractual modification or other directive, ideally through the rulemaking process.

[7] See: 5(d) https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf#page=21

B. Promote competition by ensuring government requirements prioritize interoperable commercial AI solutions, including related technologies, in line with existing best practices and commitments.

Section 5(d)(iii) of the OMB memorandum requires agencies to "take appropriate steps to ensure that Federal AI procurement practices promote opportunities for competition among contractors and do not improperly entrench incumbents."[8] While ITI strongly supports government efforts to ensure a competitive environment, we are concerned about how this will be accomplished given how AI models and associated technology are sold and used. For example, if the government enters a five-year contract to procure an AI model, and then exposes that model to government data for the life of the contract, the AI model will be trained significantly over a five-year span to cater to the government's unique data needs and requirements. When the five-year contract is over, how will the government possibly ensure a level playing field for a new contract competition for the AI model? The evolving nature and trainability of AI models raise unique challenges for achieving full and open competition for a subsequent contract award.

To support robust competition and innovation, agencies should prioritize interoperability and commercially available infrastructure as they adopt AI technologies. Doing so will support a vendor-agnostic environment, permitting new or competitive technologies to be slotted in seamlessly as they become available.

Exceptions from this approach should be rare, with well-documented justification. If an agency is unable to integrate technology from new vendors, it will miss opportunities to adopt superior technologies as they become available. This risks impeding the agency's mission and exposing the agency to security risks if the incumbent technology becomes compromised. It also excludes other vendors from competing fairly to serve agencies, thus distorting the innovation ecosystem and potentially undermining the country's competitive edge.

Among other measures, OMB should clarify the meaning of Section 5(d)(v)(a) regarding responsibly procuring generative AI to ensure that the contracting process does not favor incumbents who are able to shape the "testing and safeguards" requirements to meet their existing processes (e.g., setting specific requirements that would be costly or difficult for others to achieve).

OMB should also clarify the meaning of Section 5(d)(ii)(A) on transparency and performance improvement to ensure that it is not used to advantage incumbent providers. It is critical for new entrants and competitors to be informed about the documentation that agencies require under this provision. Otherwise, incumbents will have a competitive advantage in designing technology that can meet the agency's standards.

[8] See 5(d)(iii) https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf#page=21

Finally, we note that much of the government's ability to create a competitive environment for AI technology depends on how the government chooses to define requirements for purchasing AI. For example, additional clarity is needed regarding the following points:

- How is the government thinking about procuring AI? Will the government primarily procure AI models? Or, alternatively, outputs from an AI model or tool?
- Does the government intend to pursue enterprise license agreements for AI solutions?
- What government use/data rights will be required for the AI technology procured?
- Will future government contract solicitations clearly specify when the technology to be procured is considered to be rights impacting and/or safety impacting such that minimum practices will be contractually required?
- Regarding fair competition in the contracting process, what does fair competition look like for an AI product or service? Are there specific criteria that agencies will use when evaluating AI models as part of the procurement process?

As discussed above, we strongly encourage the government to conduct robust stakeholder outreach—particularly to commercial providers—to understand how AI models and outputs are sold commercially and to ensure government acquisition processes incorporate these best practices.

C. Protect vendors' intellectual property and proprietary data by ensuring that government-required reporting focuses on the minimum amount of information required to address risk.

ITI recommends the removal of documentation requirements related to data used in AI's design, development, and training contained in Section 5(a)(ii) of the OMB memorandum. Compilation of training data is a confidential commercial secret with significant competitive value. If OMB/agency procurement officials require vendors to disclose information about such data to agencies, it may foreclose the vendor's ability to claim trade secret protection under federal or state law. These concerns are only amplified if agencies seek to use fewer but larger models, like foundation models, which are trained on a central corpus of internet scale data and are intended to be used by many customers across many use cases. The training data disclosure requirements are therefore impractical and not well suited to evaluating appropriateness for use across federal agencies.

ITI is supportive of OMB's goal in requiring agencies to assess the quality and appropriateness of data used in model development to help determine a model's performance for a particular use case, including ensuring it works with appropriate levels of accuracy and performs fairly across relevant demographic groups. However, visibility into training and evaluation datasets will not meaningfully help an agency make that determination. Training datasets vary based on many factors, including size, demographic makeup (the number and type of groups), quality (amount

of confounding variation, fit for purpose), the types and quality of labeling, and other factors. Simply because a model has been trained on certain data does not mean it will perform as needed in a specific use case. Instead, testing is the scientifically appropriate and industry-standard mechanism that provides the best indication of performance and is already required in Section 4 (b). For example, even if an agency has access to information that a model was trained on data across a variety of languages, including English, Mandarin, Hindi, Spanish, French, in order to assess how well the model performs in transcribing Mandarin in a particular application, the agency must test the model, and evaluate the outcomes.

If OMB seeks to require vendors to provide information to agencies related to model development, rather than focusing on training data, ITI recommends that OMB and agencies limit these requests for information to submissions describing: (A) the capabilities of the AI system; (B) known material limitations at the time of development of the AI intelligence system; (C) guidelines for intended use; and (D) example performance results. This will provide agencies with the most relevant information for AI system assessment and selection before they commence their own testing for their intended use case. To the extent documentation of information regarding training data is required, we suggest limiting this to summary information about the data the model was trained on and/or that demonstrates how training data is appropriate to the agency's intended use. For example, documentation could show that a model was trained on industry-specific content, such as medical records.

While we understand the government's requirement for industry to provide reports on AI technology development and security, including the results of AI red teaming, we note that there is a substantial risk of unintended consequences associated with the unauthorized disclosure of companies' proprietary or sensitive information, including capabilities that support privacy-enhancing technologies (PETs), confidential computing, or information that could jeopardize the security of network and information systems. We recommend implementing security measures and access controls that balance information sharing with protecting contractor information. Additionally, we recommend the government limit the information required to the bare minimum necessary to achieve the government's goals for this process.

III. Clarify Public/Private Shared Accountability for Harm Prevention

ITI urges OMB to modify the memorandum to clarify the extent to which the U.S. Government and the private sector will share accountability for harm prevention in the government's use of private sector-developed AI solutions.

For example, Section 5 (b) requires agencies to bring selected vendors under compliance with the minimum risk management practices or cease the agency use of that covered AI. However, additional clarification is necessary to better understand the impact on various stakeholders. OMB should clarify the extent to which vendors will be expected to perform some or all of the

minimum practices. This is particularly important in the pre-deployment phase as industry awaits agencies to build out their capacity to "independently evaluate AI."[9]

As just one example, the recent Infrastructure Investment and Jobs Act (IIJA) includes significant investment in upgrading our physical and digital infrastructure by expanding federal financial assistance for infrastructure projects, particularly to deliver broadband access to unserved and underserved communities, clean drinking water, and safe and reliable transportation. Importantly, commercial information technology (IT) is an essential component of the products and services that deliver on these objectives, and the application of technology in those projects may substantially benefit from the use of AI. It is currently unclear how the minimum risk management practices would apply to federal grants and other contracting vehicles.

While we understand that details on aligning federal contracts with the guidance in this memorandum are forthcoming, we encourage OMB to expand on Section 5 (c) that describes the set of exclusions and waivers from the minimum practices to avoid significant project delays, increased costs, and uncertainty for both the government and industry. It is important to note that the memorandum does offer agency CAIOs the option to waive one or more of the minimum requirements for specific use cases that would "create an unacceptable impediment to critical agency operations," although clarification is needed on what constitutes an "unacceptable impediment".[10] Additional questions include:

- Would a significant delay to an infrastructure project designed to repair deteriorating roads and bridges qualify, especially if the road or bridge is a detriment to public safety?
- How would an agency treat recipients of a grant simply using AI to assist in streamlining routine tasks like forecasting, routing, and other operational processes?
- If federal grant recipients are subject to these minimum risk management practices, how would that be implemented?

Finally, it is important for OMB to consider that during the post-deployment phase, security and privacy considerations differ from that of development. This means that vendors typically do not have the ability to monitor the use of their AI tools by external customers, and in fact, the government may not want vendor monitoring in order to protect sensitive data and uses. We urge OMB to be clear on what documentation will be required to perform evaluations on outputs from a model, if this will be an ongoing requirement over the lifetime of the model, and to what extent this will be a shared responsibility between the government and the AI vendor.

[9] See: 5(c)(iv)(C) https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf#page=16
[10]See: 5(c)(iii)(C) https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf#page=14

IV. Improve Government Processes and Resources to Support AI Adoption

A. Ensure the U.S. Government prioritizes automation and modernizing its internal systems and practices to appropriately facilitate risk assessments and continuous monitoring of AI solutions.

To fully leverage the benefits of innovative AI solutions, the government must prioritize the modernization of the existing systems, technologies, and processes that will interact with AI. For example, Section 4 (b) of the OMB memorandum directs agencies to prioritize critical and emerging technologies in FedRAMP's authorization process, particularly generative AI. However, FedRAMP does not have the infrastructure to handle the current scale of authorization applications. The FedRAMP marketplace lists just over 300 authorized CSOs in a commercial marketplace with multiples of 10,000 CSOs. According to the Federal Secure Cloud Advisory Committee (FSCAC), roughly 80 percent of FedRAMP resources are dedicated to continuous monitoring rather than the authorization process. As the FedRAMP process is itself being updated, we encourage OMB and GSA to work closely with industry stakeholders, and to ensure that the FSCAC is able to provide AI specific guidance.

ITI shares OMB's desire to update the agency authorization process and recognizes the potential of AI solutions to support automation goals. We recommend OMB expand on Section 4 (b) (ii) and provide additional context on how OMB envisions balancing the current backlog in the Authorization to Operate (ATO) process with the directive to prioritize critical and emerging technologies. For example, this section directs agencies to "update, as necessary, cybersecurity authorization processes to better address the needs of AI applications" but does not provide explicit details on how agencies should achieve this objective. Additional clarification is needed regarding the unique authorization requirements for AI applications. Absent that clarification, this section risks exacerbating the existing problem of agencies adopting their own approaches and therefore not leveraging the work of other agencies. Considering that FedRAMP's ability to automate certification processes that span across the whole of government will be the ultimate determinant of its long-term success, we encourage the continuation of public-private engagements to identify and tailor the authorization process for AI as necessary.

Separately, we note that Section 5 (d) of the OMB memo encourages, but does not require, agencies to conduct "adequate" testing, including external AI red teaming as part of the tailored risk management requirements for procuring generative AI. It is important to note that these AI red teaming standards that agencies are encouraged to incorporate into federal contracts do not yet exist and that the Executive Order directs NIST to develop such standards within the next 270 days. We recommend that OMB require agencies to follow NIST's standards once developed and provide a clear timeline for agencies to implement them only after the standards are published.

Additionally, the definition of "artificial intelligence red teaming" established in Section 3 (d) of the Executive Order is more broad than the traditional use of red teaming in the security

context. Traditional red teaming is already a time-consuming, costly, and specialized process, which will become even more so with the addition of large-scale data requirements. Alternately, OMB can encourage agencies to embed secure-by-design principles within the federal acquisition and ATO process, through including cybersecurity as a factor in vendor selection. Doing so would allow red teaming capabilities to focus on the most important systems and uses. It would also be beneficial for the forthcoming OMB guidance aligning federal contracts with the memorandum to clarify a few points further as there is significant ambiguity around this provision. Additionally, as mentioned above, consideration should be given to how these red teaming requirements may impact small businesses and their ability to comply. To give you a sense of the type of information that would be helpful, we would welcome input on the following questions:

- What would be considered adequate testing?
- How often are companies expected to test and how extensively?
- If the testing identifies a model is found to produce "discriminatory, misleading, inflammatory, unsafe, or deceptive outputs," what actions will be required of vendors?[11]

We urge OMB to expand the provision in Section 5(d) that encourages agencies to require external red teaming for generative AI to include both internal and external red teaming, which would align with AI companies' voluntary commitments to the White House. External red teaming should be required only where appropriate and technologically feasible.

B. Ensure the U.S. Government devotes adequate resources and uses all available avenues and authorities to attract, retain, and develop the skilled, diverse AI workforce needed to accomplish the responsibilities described in the memo.

In general, this OMB memo is broad in scope and proposes an ambitious timeline for agencies to comply with the issued guidance. While we appreciate that OMB recognizes the urgent need to build capacity and fill gaps in federal AI talent, we are concerned that the lack of additional resources will undermine the stated goals of the memorandum to develop and deploy safe and responsible federal AI systems.

Implementing minimum risk management practices throughout agency operations and within the complex federal procurement process will require agencies to elevate technology training and regulatory awareness throughout the federal workforce. The requirement for agency authorizing officials to prioritize ATOs for critical and emerging technologies like generative AI may increase the number of authorization requests in the near term and exacerbate the need to expand the federal workforce to meet the scale of these requests, before the workforce is adequately prepared. Moreover, the very technical nature of AI itself will require agencies to quickly upskill the workforce to boost awareness of key concepts and terminology and create a greater pool of knowledgeable personnel.

[11] See: 5(d)(v) https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf#page=22

ITI is encouraged OMB recognizes that to meet these workforce challenges agencies need to foster an AI-ready workforce by expanding the pool of applicants with diverse perspectives and backgrounds. Many ITI members have made commitments to increase access to educational opportunities, adapt training to enable a diverse AI-ready workforce, and assist with building pathways to careers in AI. These efforts include partnerships with government, academia, civil society, and industry stakeholders to develop programs that encompass skills, trust, and responsible use of AI technology. For example, many ITI members offer tailored learning paths and professional certification programs on artificial intelligence and machine learning that prepare the workforce with the skills and knowledge necessary to understand how these technologies work and how to successfully implement them to into their careers. We encourage OMB to leverage these commercial training programs as one of many tools to address workforce challenges.

We appreciate that OMB directs agencies to take "full advantage of available special hiring and retention authorities" to address these workforce challenges, and we encourage the federal government to continue to improve these hiring processes to attract and retain the best and brightest AI talent.[12] However, we do not believe that existing resources alone will be sufficient to meet the scope and scale of the memorandum. Therefore, to adequately prepare the federal workforce, we urge OMB to integrate this into the federal budget planning cycle and work with Congressional counterparts to secure appropriate levels of funding.

As noted in Section 3 (b), the designated CAIO within each agency has a broad set of defined roles and responsibilities for accelerating the adoption of AI tools and ensuring compliance with established risk management practices. We appreciate that OMB recognizes that AI is "deeply interconnected with other technical and policy areas including data, IT, security, [and] privacy," but clarification is necessary regarding how CAIO responsibilities will align with existing Senior Executives within the agency reporting structure where jurisdictional overlap may exist, such as the Chief Information Officer, Chief Data Officer, Chief Technology Officer, Chief Privacy Officer and Chief Information Security Officer to name a few.[13] Where possible, we recommend that OMB direct agencies to delineate and deduplicate responsibilities in order to bolster operational efficiency and support OMB's goal of reducing barriers to responsibly advancing enterprise-wide AI maturity.

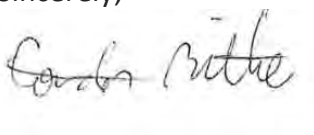
OMB should also encourage agencies to make sure the operations and outcomes of their AI applications are sufficiently understandable by subject matter experts and users, support voluntary consensus standards, encourage agency AI officers to review the NIST AI RMF, review existing applicable laws, document noteworthy AI implementation challenges and opportunities including barriers to the adoption of commercial AI applications, and consider trust and ethics in the procurement and use of AI.

[12] See: 4(b)(iv) https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf#page=9
[13] See: Section 1 https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf#page=1

Finally, we note that industry remains concerned existing resources are not sufficient to accomplish the numerous agency functions established by the memorandum, which would directly impact the ability of the federal government to procure best-in-class commercial technology solutions safely and securely. To that end, we encourage OMB to continue to open dialogue with industry and explore areas for public-private collaboration to understand how to best position an agency's organizational structure to succeed with existing resources. As one example, OMB should make interagency coordination efforts public as much as possible. Section 3(c) requires agencies to establish and convene an AI Governance Body. It would be beneficial for this body to hold open meetings, publish meeting minutes, and host listening sessions that allow the public to share ideas and concerns. Such transparency will help the public understand how agencies adopt AI and enable industry and academia to lend their expertise to support consistent government practices.

We thank you again for the opportunity to engage on this issue. To discuss any of these points in greater detail, please contact Zack Royster, Manager of Public Sector Policy, at zroyster@itic.org.

Sincerely,



Gordon Bitko
Executive Vice President of Policy, Public Sector
Information Technology Industry Council (ITI)

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lps-p30s-wxh4
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0097
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Data Foundation

General Comment

See attached file(s)

Attachments

Response to OMB AI Memo

DATA FOUNDATION
data coalition

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December 5, 2023

Submitted Electronically via Regulations.gov

RE: Proposed Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

The Data Foundation is a non-profit organization that seeks to improve government, business and society through open data and evidence-informed public policy. Our Data Coalition community is America's premier voice on data policy, advocating for responsible policies to make government data high-quality, accessible, and usable. The Data Foundation appreciates the opportunity to provide comments on behalf of our community on the Office of Management and Budget's draft guidance on responsible artificial intelligence (AI) governance, innovation, and risk management.

A cohesive national AI implementation plan must incorporate sound data management as a central component. Chief Data Officers (CDOs) within federal agencies offer invaluable expertise for facilitating ethical and responsible AI development and deployment. As data serve as the fuel for AI systems, CDO insights can strengthen processes around data quality, bias mitigation, governance, and responsible access and use. By fully integrating CDOs into unified efforts to establish national AI priorities and implementation guidance, the government can proactively address AI risks and harms through robust data oversight. Rather than treating AI implementation and data considerations in isolation, formal establishment of CDO duties will enable agencies to unify plans through reliable data stewardship. With CDOs serving as the connective tissue between data and AI, national implementation efforts can holistically account for and govern these intrinsically linked components in tandem. Failing to empower this data governance perspective risks inconsistent, siloed agency plans that lack cohesive data guardrails to prevent irresponsible AI outcomes. The unique capabilities CDOs offer must directly shape our country's AI future.

We respectfully recommend:

- **A mandate that agency CDOs co-chair new AI governance boards alongside agency Chief Information Officers. This gives CDOs an explicit role in high-level AI oversight**. Mandating CDOs co-chair agency AI boards properly elevates data considerations to be on par with technical ones. CDO insights would likely be underrepresented otherwise.
- **Codifying required data governance checklists that agency CDOs, or a CDO designee, must certify systems meet before deployment around lineage, standards, monitoring, etc.** Requiring CDO approval of data checklists

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pre-deployment establishes accountability for governance and mitigates data risks proactively rather than reactively.

- **Requiring the agency CDO, or a CDO designee, review of systems using sensitive, personal, or civil rights-related data with privacy officers before those systems can be operationalized.** Enforcing CDO review of data with civil liberties impacts brings an ethics perspective focused on potential societal harms early in the process.
- **Inclusion of the agency CDO, or a CDO designee, on AI procurement source selection teams to evaluate vendor data governance capabilities**. Having CDOs assist in AI vendor selection utilizes their expertise in evaluating long-term governance capabilities -- a key procurement consideration.

Elevating the role of CDOs in the guidance will enable more responsible and trustworthy AI by accounting for data ethics, quality, and sound governance from the start. The Data Foundation and our community urges OMB to formalize CDO responsibilities in AI policy guidance.

We applaud the Administration's collaborative approach and focus on responsible AI innovation. Incorporating robust data governance and oversight into the national AI strategy will help guarantee government AI use aligns with American values while achieving mission objectives. Please feel free to contact me if we can provide any additional perspective about these comments or provide assistance as OMB finalizes guidance to federal agencies on AI.

Sincerely,
Corinna Turbes
Policy Director
Data Foundation

PUBLIC SUBMISSION

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0098
Comment on OMB-2023-0020-0001

Submitter Information

Organization: American Federation of Government Employees

General Comment

Comments by the American Federation of Government Employees (AFGE) are in the attached pdf document

Attachments

OMB20230020 AFGE 1252023 Comments to Agency Use of AI Memo

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

Eric Bunn Sr.
National Secretary-Treasurer

Dr. Everett B. Kelley
National President

Jeremy A. Lannan
NVP for Women & Fair Practices

7y/OMB

December 5, 2023

Clare Martorana
U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management and Budget
725 17th St., NW
Washington, DC 20503

Re: OMB-2023-0020, AFGE Comments on *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* Draft Memorandum

Dear Chief Information Officer Martorana:

The American Federation of Government Employees, AFL-CIO, (AFGE) hereby submits its comments to the draft memorandum on *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* prepared by the Office of Management and Budget (AI Memo). *See* Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, 88 Fed. Reg. 75625 (Nov. 3, 2023). AFGE is the largest labor organization representing federal employees. On its own and in conjunction with its affiliated councils and locals, AFGE represents over 750,000 employees in agencies and departments across the federal government and the District of Columbia.

The responsible regulation and safe use of artificial intelligence (AI) by the federal government presents a defining public policy challenge. The Government must balance the need to control and develop outward-facing use cases with its internal administrative and workforce commitments and obligations, while ensuring that necessary safeguards in both areas are able to keep pace with a rapidly changing cyber environment. And it must simultaneously ensure that agency use of AI does not result in discrimination or bias against members of protected classes, including within the federal workforce. It is therefore of the utmost importance that the AI Memo acknowledge that federal employees and the labor organizations that represent them are key stakeholders in the governance, innovation, and risk management of agency use of AI. It is federal workers who are responsible for day-to-day agency operations, and it is these same rank-and-file federal workers who will be chiefly responsible for the implementation and application of agency AI initiatives and programs and who will also, in many instances, feel their effects. The successful rollout of agency AI initiatives thus hinges on consequential employee and union engagement. *See* Brian DeWyngaert Sr., *Want successful integration of AI at federal agencies? Engage employees through the unions*, GovExec.com (July 19, 2023), https://www.govexec.com/workforce/2023/07/want-successful-integration-ai-federal-agencies-engage-employees-through-unions/388574/.

The fact that federal worker engagement is a critical component of the effective and efficient delivery of high-quality government services is a seminal reason why the Federal Service Labor-Management Relations Statute (Statute) requires that agencies bargain in good faith with those labor organizations certified as their employees' exclusive representatives on any condition of employment. *See* 5 U.S.C. § 7114; *see also* 5 U.S.C. §§ 7102(2), 7103(a)(12), 7116(a)(5). It is also why the President has directed agency heads to bargain with their associated labor organizations over the numbers, types, and grades of employees assigned to any organizational subdivision, work project, or tour of duty, as well as over the technology, methods, and means of performing work. *See* Exec. Order 14003, § 4, 86 Fed. Reg. 7231 (Jan. 27, 2021); *see also* 5 U.S.C. § 7106(b)(1). It is, after all, the policy of the United States to protect, empower and rebuild the career Federal workforce, and to encourage union organizing and collective bargaining. Exec. Order 14003, § 1; *see also* Exec. Order 14025, § 1, 86 Fed. Reg. 22829 (April 26, 2021); 5 U.S.C. § 7101(a) ("[L]abor organizations and collective bargaining in the civil service are in the public interest.").

Consequently, the AI Memo should elevate the role of federal employee labor organizations with respect to agency use of AI. The AI Memo should, for example, expressly and specifically state that agencies must meet their obligation to bargain with the relevant labor organizations over changes to federal employees' conditions of employment arising from or related to agency use of AI before such changes may go into effect. The Statute requires more than mere consultation or feedback with respect to federal employees' conditions of employment. It requires collective bargaining. The same is true with respect to agencies' compliance with existing collective bargaining agreements. While it may be that AI will, in some ways, pose new and novel challenges for the federal workplace, such challenges do not relieve agencies from complying with their legal and contractual obligations. The obligation to bargain and to abide by agreements reached through collective bargaining is a statutory duty that may not be waived or diminished by an agency merely because a matter is complex or is one of first impression.

The potential novelty of future AI challenges, in fact, only reinforces the need for robust labor-management partnership because joint agency, employee, and union, problem-solving will promote a more durable AI governance framework. For this reason, the AI Memo should include a demonstrated commitment to and understanding of labor-management partnership among the skills, knowledge, training, and expertise, necessary to perform the role of Chief AI Officer (CAIO), and should include coordination and the sharing of workforce-related information (e.g., potential workforce impacts identified by agency AI impact assessments) with employees' exclusive representatives, i.e., labor organizations, as part of the CAIO's responsibilities. The AI Memo also should require that agencies provide labor organizations the opportunity for meaningful representation on agency AI Governance Boards. Plans made in the dark are unlikely to bear fruit. Active union participation in AI Governance Boards, however, will bring agencies the benefit of frontline workers' experience and knowledge when addressing the substantive and logistical issues that may arise from agency regulation and use of AI.

The AI Memo should, moreover, seize the opportunity to promote worker empowerment by directing agencies to prioritize the preservation and/or expansion of federal positions within existing bargaining units or, when necessary, to reorganize in a fashion that provides for

continued representation by existing exclusive representatives. In this same vein, the AI Memo should strengthen its direction to agencies that they provide training offerings for federal employees, including opportunities that provide pathways to AI occupations and assist and cultivate employees affected by the application of AI to their work. The AI Memo should direct agencies to develop, and negotiate with the pertinent labor organizations, concrete plans that, at a minimum, offer federal employees appropriate re-skilling or up-skilling opportunities any time it is foreseeable that their positions may be affected by the agency use of AI, and which provide attainable, clear, and equitable, pathways for federal employee advancement.

Lastly, the AI Memo should establish a presumption that work related to the Government's continued design, development, testing, and operation of AI will be insourced whenever doing so is feasible. The Government should, for example, eschew reliance on AI contracts for the creation, regulation, or maintenance of controls over artificial general intelligence or generative AI because these subjects raise issues that are inherently governmental in nature. The growth and retention of a deep, internal federal employee talent pool thus will help ensure the long-term sustainability and success of federal agencies' AI governance, innovation, and risk management.

AFGE thanks OMB for providing it the opportunity to submit these comments. AFGE notes that by submitting these comments, AFGE does not waive any arguments, claims, challenges, or rights that it may have, now or in the future, concerning any aspect of the AI Memo or its application.

Sincerely,
/s/ Andres M. Grajales
Andres M. Grajales
Deputy General Counsel
American Federation of Government Employees
80 F Street NW
Washington, DC 20001

PUBLIC SUBMISSION

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Tracking No. lps-pmqq-gfz6
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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0099
Comment on OMB-2023-0020-0001

Submitter Information

Organization: EDSAFE AI Alliance

General Comment

Please find attached recommendations from the EDSAFE AI Alliance for the OMB Draft Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

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Attachments

EDSAFE AI Alliance Response to OMB Guidance on AI - 12.5.23

December 5, 2023,

On behalf of EDSAFE AI Alliance, thank you for the opportunity to respond to the Office of Management and Budget's (OMB) draft memorandum titled *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI).* We appreciate the Administration's forward-looking approach to advancing AI governance and innovation while managing the risks of AI, specifically the safety and rights of the public. We are pleased that this expansive effort requires each federal agency to designate a chief AI officer, develop an agency plan for responsible AI use, and publicly share an inventory of AI use cases. We have provided recommendations for each question included in the request for information below.

Question 1

Regarding the roles, responsibilities, and structure of the Chief AI Officer (CAIO) role, we recommend the following:

- **Public Communication:** The CAIO must implement a dedicated communication strategy to better inform the public of the safety and efficacy of AI use. Specific to the U.S. Department of Education (ED), the communications focus will help ensure that states and school districts are informed about any ED guidance, support, and resources for AI use in education.

- **Equity-focused:** Particularly in education, the CAIO must prioritize the equitable implementation of technologies to decrease historical and systemic inequalities in the education system, including for communities and students who have been historically marginalized. Special attention must be paid to issues of digital access, accessibility, and inclusivity with specific strategies to address safe and ethical AI use for and with English Learners, students with disabilities, and other historically marginalized groups.

- **Education Policy Leadership**: The CAIO role at ED should be part of the department's leadership structure and report directly to the Secretary. Additionally, the CAIO must help determine AI policy and serve as a bridge between two ED entities with different but important responsibilities regarding AI use: the Office of Education Technology (OET) and the Institute of Education Sciences (IES).

- **Dual Staffing Requirements:** The CAIO must develop and promulgate two distinct sets of policies - one governing student-facing education issues and the second guiding data analytics unique to internal requirements within ED.

Interagency Collaboration and Sharing of Best Practices: The CAIO should establish mechanisms for interagency collaboration to share best practices, successes, and challenges in AI implementation. These mechanisms could lead to more cohesive and efficient AI strategies across federal agencies. The CAIO should continue collaborating with other agencies, including the National Science Foundation (NSF), building on the success of early interagency collaboration with AI, including the two co-founded AI Institutes with IES and NSF.

- **Engage Broad Coalitions of Expertise Outside Government:** CAIO should engage and partner with experts from industry, nonprofits, philanthropies, universities, and other relevant groups to stay current on existing and emerging technologies and applications to inform future policy and funding decisions.

- **Establish AI education and training for department personnel:** The CAIO should be responsible for creating workshops and training opportunities for staff to better understand the latest AI technologies, their ethical implications, and effective safeguards for department staff and contractors.

Question 2

Regarding effective coordination mechanisms and benefits or drawbacks in establishing an AI Governance Body, OMB should consider a few major requirements:

- **Consult top multi-disciplinary experts:** As reflected in the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence and the call to build capacity within the Administration, we believe that issues related to implementing effective AI strategies may be beyond the expertise of many existing agencies or boards/groups within those agencies. The policies will require education expertise in data analytics, machine learning, learning engineering, AI foundation models, security and privacy, and equity. ED should recruit the best talent from outside the government to ensure the latest expertise on AI foundation models and the specific challenges they bring for privacy, security, and potential bias for underrepresented populations through fellowships or direct hire authority. Additionally, several nonprofit groups are currently working on these issues, including the EDSAFE AI Alliance, the International Society for Technology in Education (ISTE), the Consortium for School Networking (CoSN), and Digital Promise. ED should leverage and, where possible, partner with these groups.

- **Effective multi-agency practices**: A review of previous successful governing bodies in government and their relationship to the statutory agencies can provide models for establishing both process and jurisdiction governance so that effective domain expertise can be considered. This would enable the CAIO to have areas of deep expertise in AI that other agencies can leverage to define and evaluate policy options.

- **Require full participation:** To ensure that the OMB directive is being implemented uniformly and consistently across the federal government, all agencies must be fully included and expected to produce and share, both externally and internally.

- **Proactive response to technology advances:** Much of the current efforts by the Federal government have been in response to recent developments in generative AI systems. We urge agencies to develop these governing bodies with an eye toward proactive engagement regarding

future AI systems and capabilities, including future systems that meet the Artificial Generalized Intelligence (AGI) threshold. The field of AI is advancing rapidly, and it is important for policy to keep pace rather than continually reacting to change.

Question 3

On the question of how OMB can best advance responsible AI innovation, we recommend several considerations:

- **Use of the SAFE Framework**: First, we strongly support the effort by a coalition of leading organizations from educators, solution providers (or technologists), and policy experts to develop the S.A.F.E. (Safety, Accountability, Fairness, Efficacy) Framework for AI, a set of fundamental principles guiding the ethical and effective deployment of AI in educational settings. This framework aims to prioritize the security and privacy of data and focus on a "Do No Harm" approach, ensuring accountability by clearly defining the responsibilities of all stakeholders and promoting equity and ethics while mitigating bias, including working to ensure that AI technology helps close—not widen—existing disparities in access and use, and prioritizing technologies that demonstrably improve learning outcomes. We encourage OMB to consider these guidelines to determine how federal agencies should advance AI responsibly.

- **Standards:** Additionally, OMB should work with the National Institute of Science & Technology (NIST) to ensure the continuous development of standards for data quality and interoperability, accessibility, and transparency.

- **Continuous Improvement:** OMB should commit to continuous improvement (CI) in AI implementation. It should be a critical principle to maximize opportunities and minimize risk and, as a potential model, shift to that mindset more broadly, given the potential penetration of AI in education. Any CI efforts should be conducted by collaborating with educators and other affected stakeholders.

- **Investing in Research and Development:** We strongly recommend increased support for advanced research and development activities such as the Seedlings to Scale grant program, research that prioritizes rapid cycle development, and establishing an NCADE center as currently advocated by the Institute for Education Sciences, which could help research, fund and guide groundbreaking innovations in AI in education under the S.A.F.E. framework. Responsible development for effective and safe uses of AI will require increased support for government educational research and development activities.

Question 4

Regarding how agencies should take advantage of generative AI to improve agency missions or business operations, we strongly recommend incorporating research and analysis of a variety of education data received from educational institutions. This would include using AI to analyze academic data to identify trends, predict educational outcomes, and provide insights into effective teaching strategies and outcomes. This research should be undertaken in partnership with educators, drawn on other quantitative and qualitative data sources when appropriate, and done with sensitivity to potential implications for school and educator accountability systems. AI can also help synthesize research findings, generate reports to inform policy-making and educational

practices, and analyze education data to efficiently allocate funding for the most significant impacts.

Question 5

Regarding use cases for presumed safety-impacting and rights-impacting AI that should be included, removed, or revised, we believe ED should consider use cases for AI that promote innovation while maximizing safety, privacy, security, and equity and minimizing bias. Moreover, ED should develop use cases for the effective and safe use of AI in the classroom, including personalized learning, real-time formative assessments, automated grading and feedback aligned to learning objectives and standards, professional learning and development for teachers, and improving accessibility for a wide variety of learning and physical disabilities and neurodivergence.

Regarding the examples of "rights-impacting" applications included in the guidance, we recommend that these be carefully considered specifically with education to maximize impact on learning while addressing privacy, security, accessibility, equity, and bias issues.

Question 6

Regarding "rights-impacting AI," we believe that the baselines across each agency will differ significantly depending on the intent and goals of the agency. For instance, several examples outlined in the proposed use cases for "rights-impacting AI" may be critical in developing effective online and personalized learning platform implementations and more effective real-time assessments. As proof, measures of learning outcomes may depend on the assessment of attention, engagement, and perhaps other indirect comprehension measures. Also, learning activities in virtual environments will require some forms of monitoring and evaluation.

We recognize that these implementations require safeguards against AI bias privacy and security. We recommend calibrating the required safeguards to the risk profile of the AI tool at issue. The additional minimum practices, for example, may impose burdens on limited government resourcing that are not commensurate with particular use cases within the education context. A risk-based analysis to distinguish between higher- and lower-risk AI applications will help focus resources while protecting rights.

We recommend that these implementations require safeguards against AI bias privacy and security. They should also undergo assessment through multi-agency collaboration offering expertise and guiding principles to the agency of jurisdiction. This provides oversight and consistency while remaining flexible to newer technological developments and unforeseen use cases. Leveraging the forthcoming U.S. Department of Education toolkit for developers and ensuring there is deference to the relevant agency to provide guidance in their respective sectors.

Question 7

We suggest a number of other materials and resources such as the U.S. Department of Education's *Artificial Intelligence and the Future of Teaching and Learning* report, the UNESCO recommendations for policymakers, principles for AI from the OECD (Organization for Economic Co-operation and Development), and reports from the American Enterprise Institute and All4Ed, among others. We have included these resources in the appendix that follows this letter.

Question 8

Transparency with the public is required regarding the information that should be made public about agencies' use of AI in their annual use case inventory, especially in K-12 education. A communications strategy should be developed with the help of experts to communicate privacy and security issues and to educate the public on the positive impacts AI can have on student success. The October 30th Executive Order highlights this effort's importance by requiring ED to develop an "AI toolkit for education leaders implementing recommendations from the Department of Education's AI and the Future of Teaching and Learning report…"

We are deeply committed to working individually and collectively with close, overlapping partners in technology, civil rights, and other communities to learn and inform AI policies to maximize opportunities and minimize risks. We look forward to the opportunity to engage and contribute to developing an AI strategy and ensure that the voices of the education community are represented.

Sincerely,
EDSAFE AI Alliance

Appendix - Recommended Resources and Materials

- U.S. Department of Education: *Artificial Intelligence and the Future of Teaching and Learning Insights and Recommendations*
- UNESCO: *AI and Education Guide for Policy Makers*
- European Commission AI Act
- OECD National AI Policy Dashboard
- OECD AI Principles
- All4ED: *Demystifying Artificial Intelligence for K-12*
- VISTA AI: Guidebook and Toolkit for Educational LeadersThe TeachAI Toolkit
- American Enterprise Institute: *Charting the Course for Generative AI in Education*
- Education International: *The Unintended Consequences of Artificial Intelligence and Education*

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0100
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Security Industry Association

General Comment

See attached file(s)

Attachments

SIA Comment on Draft AI Memorandum OMB-2023-0020 Final

Dec. 5, 2023

The Honorable Shalanda Young
Director, Office of Management and Budget
725 7th Street NW
Washington, DC 20503

Re: Notice of Public Comment Period, Office of Management and Budget; Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (88 FR 75625, OMB-2023-0020), Nov. 3, 2023

Dear Director Young:

The Security Industry Association (SIA) appreciates the opportunity to provide comments to the Office of Management and Budget (OMB) on its draft memorandum, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" ("draft memorandum").[1] The draft memorandum, among other things, would require agencies to apply a "minimum baseline" of practices to manage risks of "rights-impacting AI" and "safety-impacting AI." OMB also includes a series of recommendations to apply risk management approaches to federal procurement and intends to develop a system for ensuring federal contracts align with the Oct. 30, 2023, Executive Order for Safe Secure and Trustworthy Artificial Intelligence ("AI EO").

About SIA

SIA represents more than 1,400 safety and security solutions providers, ranging from large global technology firms to locally owned and operated small businesses. Our members include manufacturers, software developers and systems integrators providing solutions that help protect people, property and sensitive data across a wide variety of public- and private-sector applications.

We believe advanced technologies must only be used in a lawful, ethical, nondiscriminatory and effective manner. SIA and our members support the development and use of artificial intelligence (AI) technologies in ways that are human-centric, ethical and trustworthy and that mitigate potential risks. In part to help communicate and guide effective technology implementations that harness these innovations, SIA has formed its AI Advisory Board[2] and Identity and Biometric Technology Advisory

[1] See - https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf
[2] See - https://www.securityindustry.org/committee/ai-advisory-board/

Board.[3] SIA is also pleased to have a representative serving on the National AI Advisory Committee Subcommittee on Law Enforcement.[4]

AI-Driven Safety and Security Technologies Are Critical to Agency Missions

AI stands to provide enormous individual, societal and economic benefits in almost every sector. Within the safety and security space, AI helps to power advanced tools, enabling technology users to analyze and respond to information in a substantially quicker and more accurate manner than traditional, non-automated methods. For example, AI tools and technologies can streamline 911 call center responses, better transcribe incident reports, and analyze video feeds for high-risk safety and security situations at faster speeds. Associated techniques like machine learning, computer vision, deep learning and neural networks can dramatically improve the capabilities of security solutions and have been the primary areas of recent technological innovation in our industry, which contributes over $150 billion to the economy and employs more than a million people across the United States.

Deploying these technologies results in more preventative, as opposed to reactionary, capabilities for the security of government facilities and greater effectiveness in the performance of critical agency missions related to homeland security, law enforcement, public safety, emergency response, identity management, cybersecurity, program integrity measures and many more. Importantly, AI can also help protect against some of the broader potential risks that OMB's proposed policies are intended to prevent. For example, there is a growing body of research that shows how AI can identify and mitigate against bias in human decision making, thereby moving towards the goal of preventing unlawful bias.[5] And effective AI deployment can also help improve safety and security.

Comment on the Draft Memorandum

The draft memorandum follows and specifically responds to Section 10.1(b) of the AI EO, requiring OMB to, within 150 days, "issue guidance to agencies to strengthen the effective and appropriate use of AI, advance AI innovation, and manage risks from AI in the Federal Government."

We fully support the aims of the draft memorandum, as well as the eight principles the AI EO directs federal agencies to adhere to in the development and use of AI: 1) ensuring AI safety and security, 2)

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[3] See - https://www.securityindustry.org/committee/identity-and-biometric-technology-advisory-board-ibtab/

[4] See - https://www.ai.gov/naiac/#SUBCOMMITTEE_ON_AI_AND_LAW_ENFORCEMENT_NAIAC-LE

[5] *See e.g., Mitigation of AI/ML Bias in Context*, NCCoE, https://www.nccoe.nist.gov/projects/mitigating-aiml-bias-context ("Automated decision-making is appealing because artificial intelligence (AI)/machine learning (ML) systems produce more consistent, traceable, and repeatable decisions compared to humans . . . ."); Kimberly Houser, *Can AI Solve the Diversity Problem in the Tech Industry: Mitigating Noise and Bias in Employment Decision-Making*, 22 Stan. Tech. L. Rev. 290, 352 (2019), https://www-cdn.law.stanford.edu/wp-content/uploads/2019/08/Houser_20190830_test.pdf ("The use of AI in talent-management decisions has shown success in not only creating more successful hires, but in also creating a more diverse slate of candidates and employees. While some companies have embraced these new technologies, others fear that AI may actually cause discriminatory outcomes. As discussed, the phenomena of 'garbage in, garbage out' is real, but can be addressed paying attention to the data sets by using known sources and making sure the sets are balanced and representative of all groups."); Jon Kleinberg et al., *Discrimination in the Age of Algorithms*, 10 J. of Legal Analysis 113, 120 (Apr. 22, 2019), https://academic.oup.com/jla/article/doi/10.1093/jla/laz001/5476086 ("Our central claim, stated in simple form, is that safeguards against the biases of the people who build algorithms, rather than against algorithms per se, could play a key role in ensuring that algorithms are not being built in a way that discriminates (recognizing the complexity and contested character of that term). If we do that, then algorithms go beyond merely being a threat to be regulated; they can also be a positive force for social justice.").

promoting responsible innovation, competition and collaboration, 3) supporting American workers, 4) advancing equity and civil rights, 5) standing up for consumers, patients and students, 6) protecting Americans' privacy and civil liberties, 7) ensuring responsible and effective government use of AI and 8) advancing American leadership abroad.

That said, we are concerned that, without changes, there are ***significant issues in the draft memorandum that could lead to results that undermine these goals and a true risk-based approach***. Most notably, we are concerned that the draft memorandum's broad definitions of "rights-impacting AI" and "safety-impacting AI" combined with a broad and rigid checklist of "minimum practices" associated with their use will result in discouraging the use of AI in the federal government. Further, given the limited resources of federal agencies, these broad definitions and one-size-fits-all requirements could foster an environment in which truly high-risk uses of AI do not receive proportional attention compared to lower-risk AI uses that happen to fall under the definitions of "rights-impacting" and "safety-impacting" AI. We offer the following recommendations in three key areas to address these issues in finalizing the memorandum.

1. **AI use cases subject to "minimum requirements" must be narrowed and clarified to ensure the framework appropriately focuses on applications that are truly high-risk.**

The draft memorandum is framed as suggesting a targeted approach to AI use by agencies, in that it only proposes to impose minimum requirements on "rights-impacting AI" and "safety-impacting AI." However, it broadly defines "rights-impacting AI"[6] and "safety-impacting AI,"[7] and additionally lists broad categories of use cases that are automatically presumed to fall under these definitions. This overly broad approach risks categorizing nearly *all* AI use cases with any connection to the listed categories as high-risk, which would undermine the goals of the AI EO and the OMB memorandum, and stifle AI use and development to support federal agency missions.

In particular, the draft memorandum's sweeping definitions do not adequately differentiate between different levels of risk. The definition of "rights-impacting AI" includes, for example, "AI whose output serves as a basis for a decision or action that has a legal, material, or similarly significant effect" on individuals' or communities' privacy and access to critical resources or services, among other things.[8] Without adequate tailoring or guidance, these concepts can be construed broadly and sweep in a vast

[6] "AI whose output serves as a basis for decision or action that has a legal, material, or similarly significant effect on an individual's or community's: 1. Civil rights, civil liberties, or privacy, including but not limited to freedom of speech, voting, human autonomy, and protections from discrimination, excessive punishment, and unlawful surveillance; 2. Equal opportunities, including equitable access to education, housing, credit, employment, and other programs where civil rights and equal opportunity protections apply; or 3. Access to critical resources or services, including healthcare, financial services, social services, transportation, non-deceptive information about goods and services, and government benefits or privileges." Draft memorandum at 24.

[7] "AI that has the potential to meaningfully impact the safety of: 1. Human life or well-being, including loss of life, serious injury, bodily harm, biological or chemical harms, occupational hazards, harassment or abuse, or mental health, including both individual and community aspects of these harms; 2. Climate or environment, including irreversible or significant environmental damage; 3. Critical infrastructure, including the critical infrastructure sectors defined in Presidential Policy Directive 2143 and the infrastructure for voting and protecting the integrity of elections; or, 4. Strategic assets or resources, including high-value property, information marked as sensitive or classified by the Federal Government, and intellectual property." Draft memorandum at 25.

[8] Draft memorandum at 24.

array of AI use cases – for example, AI outputs that are just one factor in a decision made by an individual, and/or that have a potential effect on "privacy" generally even if there is no directly applicable privacy law.

The definition of "safety-impacting AI" is similarly broad. This category includes AI that "has the potential to meaningfully impact the safety" of a range of things, from "human life or well-being" to "critical infrastructure" and "[s]trategic assets or resources." The inclusion of the word "potential", as well as the broad and vague range of impacts – for example, "well-being" – does not provide meaningful parameters to help federal agencies draw lines between high-risk applications and other applications. This approach is likely to result in a set of policies and practices that may ultimately fall short of accomplishing the intended risk-based approach to regulation because it does not sufficiently differentiate, at a practical level, between that which may actually cause harm and that which is much less likely to cause harm.

Additionally, the lists of specific technologies and use cases that the draft memorandum "presume[s] to be rights-impacting" or "presume[s] to be safety-impacting" are overly broad and do not fully account for the wide variety of use cases of AI applications within the established categories. For instance, the list for "rights-impacting" AI includes broad categories such as "facial matching," "physical location-monitoring devices," and "license plate readers."[9] While such technologies – already utilized for two decades in some cases – could be high-risk under certain contexts, grouping all instances of these AI use cases together without differentiation between different risk levels is counter to a risk-based approach and could result in agencies being discouraged from using these applications for beneficial purposes even when the agency might be able to do so in a sufficiently narrow and low-risk manner.

For example, license-plate readers and plate data can be used to provide a number of services beneficial to the public that would be difficult to construe as "high-risk" such as traffic analysis and management, toll automation and smart cities applications, such as intelligent parking. Moreover, the specific AI utilized in such applications is limited to a narrow portion of the application workflow – utilizing computer vision for the purpose of character recognition. Due to the nature of this use case and the narrow capabilities of the supporting AI, it is difficult to conceive a path for the AI in this use case to provide any substantial social or security risk. The draft approach to regulating AI set forth in the memorandum, however, does not provide a sufficient framework to differentiate such a lower-risk use case from a higher-risk use case. Blanketly categorizing technologies as high-risk would undermine OMB's goals to advance AI innovation and "seize the opportunities AI presents,"[10] including to improve safety and security across the federal government.

The technologies laid out as presumptively "safety-impacting" in the draft memorandum also cover broad categories of applications that – depending on the context of deployment – may or may not be high-risk. For example, the list includes "[r]esponses to insider threats," "[a]ccess to and security of government facilities," and "movements of vehicles."[11] Again, including these blanket examples as presumptively "safety-impacting" could negatively impact the federal government's effective use of AI for beneficial purposes, including to assist it with cybersecurity and defense activities.

[9] *Id.* at 12.
[10] *Id.* at 1.
[11] *Id.* at 11.

Additionally, the draft memorandum establishes an overly broad and vague standard for when these categories trigger the presumption, explaining that a specific use case is presumptively rights- or safety-impacting when AI "is used to control or meaningfully influence the outcomes of the [listed categories of activities]." The standard of "meaningfully influenc[ing] the outcome" is vague and difficult to operationalize and risks being construed broadly to potentially include any operation that includes AI – which would be in direct tension with a risk management approach. Instead, the final OMB memorandum should, 1) strike "the outcomes of" language for clarity (so the standard would be if "it is used to control or meaningfully influence the following activities") and 2) provide clear guidance on the parameters or outer limits of what it means to "meaningfully influence." At a minimum, the memorandum should make clear that the following activities would not meet the "meaningfully influence" standard, consistent with recent proposals for high-risk categorization under consideration in the European Union's AI Act, which exclude when: 1) "the AI system is intended to perform a narrow procedural task of low complexity," 2) "the use of the AI system does not replace a human assessment relevant for the purpose of the use case [at issue], but is intended to confirm or improve an accessory factor of such assessment;" or 3) "the AI system is intended to perform a preparatory task to an assessment relevant for the purpose of the use case [at issue]."[12]

In short, we recommend that definitions for "rights-impacting" and "safety-impacting" in the draft memorandum should be narrowed to focus on truly high-risk applications, rather than listing broad categories of technologies *presumptively* falling into its high-risk framework. In addition, guidance should be provided to agencies to help assess the unique set of benefits and risks to a specific AI application, through objective and not subjective standards,[13] before classifying it as either "rights-impacting" or "safety-impacting."

2. **Agencies should be provided with more flexibility regarding "minimum practices" to tailor risk mitigation strategies to specific AI applications in greater alignment with the National Institute of Standards and Technology (NIST) Risk Management Framework (RMF).**

AI encompasses a wide range of emerging technologies with countless iterations and applications. There is no "one-size-fits-all" approach that can be used to mitigate risks across all AI applications as the technology evolves. As currently written, the draft memorandum creates a rigid checklist applicable to "rights-impacting AI" or "safety-impacting AI" that is too prescriptive. Flexibility is a longstanding and important risk management principle that addresses this issue: approaches to AI should be flexible enough to account for the wide range of ways that AI can be deployed for beneficial uses and a range of methods to appropriately address risks.

[12] See https://www.notizie.ai/pathal/uploads/2023/10/20231003-ai-act-article-6_new-filter.pdf

[13] As an analogy, the U.K. Information Commissioner's Office provides objective guidance on when an activity is presumed "high risk" (see - https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/accountability-and-governance/data-protection-impact-assessments-dpias/when-do-we-need-to-do-a-dpia/). For instance: not generically presuming the processing of sensitive data is high risk, but rather the processing of sensitive data on a large scale. Creating objective standards need not undermine each Agency's autonomy to assess (within their scope of practice and each specific use case) whether certain AI applications fall within the categories of safety-impacting or risk-impacting. By curtailing agencies autonomy to do so through generic pre-formulated categories, the draft memorandum undermines its own stated goal of allowing each Agency to conduct their own review, as the same use of a certain AI application by one agency might be different than that same use by another agency.

Unfortunately, as currently written, the draft memorandum does not afford such flexibility. Instead, it creates a rigid checklist applicable to "rights-impacting AI" or "safety-impacting AI" that is too prescriptive, particularly in light of the unsettled and rapidly evolving landscape of AI safety.

This approach stands in stark contrast to the risk-based and flexible AI RMF, which establishes governance principles and goals for AI risk management but does not include specific methods for implementation.[14] Published in January 2023, the AI RMF, together with its accompanying AI RMF Playbook,[15] is a tool for organizations of varying types and sizes to identify and manage benefits and risks when developing and deploying AI technologies. During its development, NIST collaborated with a broad range of stakeholders, so the AI RMF is aligned with existing best practices and industry standards.[16] Importantly, it is meant to be applied flexibly to a variety of use cases. Since the second draft of the AI RMF, NIST has specifically noted that the "AI RMF is not a checklist."[17]

As it finalizes its memorandum, OMB should align its "minimum practices" requirements with NIST's AI RMF to ensure that federal agencies balance AI benefits and risks. Already, the AI EO[18] and the draft memorandum[19] point to and rely on the AI RMF as a standard for proper AI risk management. In fact, the AI EO explicitly instructs OMB to specify in its guidance "required minimum risk-management practices for government uses of AI that impact people's rights or safety, including, where appropriate, the following practices derived from…the NIST AI Risk Management Framework."[20] Building from the AI EO, OMB should make targeted updates to the draft memorandum to ensure that NIST's AI RMF is touchstone for OMB in crafting its AI risk mitigation requirements for federal agencies.

Specifically, to better align with the NIST RMF, OMB's guidance should provide a menu of options[21] for federal agencies to select from to mitigate risks. Agencies should perform a risk assessment and select appropriate controls – tailored to the context of the AI deployment – to best address specific risks; they should not have to apply a pre-determined checklist of detailed steps, no matter the context. By applying a more flexible, risk-based approach, consistent with the AI RMF, OMB can more effectively mitigate risks by allowing federal agencies to tailor their risk mitigation strategies to the actual risks their

[14] *See e.g.,* NIST AI RMF Playbook § Govern 1.2, https://airc.nist.gov/docs/AI_RMF_Playbook.pdf (NIST includes governance standards such as inclusion of "characteristics of trustworthy AI" in "organizational policies, processes, and procedures," but does not dictate how that is accomplished. Instead, the NIST AI RMF Playbook suggests actions such as defining and scoping key AI terms and concepts, conducting model testing and validation processes, and outlining change management requirements."

[15] https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf; https://airc.nist.gov/AI_RMF_Knowledge_Base/Playbook

[16] https://airc.nist.gov/AI_RMF_Knowledge_Base/Roadmap

[17] https://www.nist.gov/system/files/documents/2022/08/18/AI_RMF_2nd_draft.pdf.

[18] *See e.g.*, AI Executive Order at 75199.

[19] Draft memorandum at 13 ("To fill potential risk management gaps, agencies are encouraged to promote and to incorporate, as appropriate, additional best practices for AI risk management, such as from the National Institute of Standards and Technology (NIST) AI Risk Management Framework . . .").

[20] AI Executive Order at 75218.

[21] *See e.g.,* NIST AI RMF Playbook § Govern 1.3, https://airc.nist.gov/docs/AI_RMF_Playbook.pdf (The governance principle requires, "[p]rocesses and procedures are in place to determine the needed level of risk management activities based on the organization's risk tolerance," but the section subsequently lists five examples, "suggested actions," of types of policies that could be implemented to execute those types of risk management activities."); s*ee also supra* note 31 (providing options for implementation of a governing principle).

unique deployments face. This approach will also allow agencies to continue to adapt their approaches to prevailing best practices in AI safety as the field continues to evolve in the months and years ahead.

3. **Key adjustments are needed to "minimum practices" related to testing and disclosure of data quality and use in design, development and training.**

The draft memorandum's AI impact assessment requirements include data documentation and training data disclosures that either apply directly or flow down to technology providers.[22] We are supportive of ensuring the quality and appropriateness of data used in model development to help determine a model's performance for a particular use case; however, visibility into training and evaluation datasets will not meaningfully help an agency make that determination. The fact that a model has been trained on certain data does not directly indicate how it will perform in a specific use case. Performance testing, already required under the draft memorandum's "Minimum Practices," is the scientifically appropriate and relevant way to assess this.

Rather than focusing on training data, ensuring greater visibility into how a model works, in addition to its performance, would be a more effective approach. This could include requiring documentation regarding the capabilities of the AI system, known limitations, guidelines for use and demonstrative performance results.

The collection of training data used to develop an AI system or software is often intellectual property (IP) with significant competitive value, and disclosure could affect a provider's claim to trade secret protection, compromise proprietary information and data security (where disclosure could expose it to bad actors and possibly lead to data breaches), or lead to bias and misinterpretation (where disclosing the source of data might lead to erroneous conclusions about the performance of the AI application based on only its origin from a particular group, population or data set, potentially giving one technology provider an advantage over another based not on the performance of the AI application, but on the pre-judgement of its training data). This makes training data disclosure impractical and ill suited for agency evaluation. Therefore, any information requirement regarding training data should be limited to summary information about the data the model was trained on or that demonstrates how the training data is appropriate for the agency's intended use.

Additionally, we encourage OMB to provide direction to agencies, as they implement the Minimum Practices, that they should, to the extent possible, limit administrative duplication and potential unnecessary disruptions or delays in needed AI technology implementations, by incorporating existing relevant agency polices and documentation into the AI impact assessment. For example, many "safety-impacting" and "rights-impacting" AI systems will already be accompanied by extensive privacy impact assessments (PIAs) that include required elements. Also, some AI-driven technologies are already independently and robustly tested through government evaluation programs.[23]

[22] Draft memorandum at 15-16

[23] For example, face recognition and related technologies are evaluated by National Institute of Standards and Technology (NIST), https://www.nist.gov/programs-projects/face-recognition-vendor-test-frvt, and Department of Homeland Security, https://www.dhs.gov/science-and-technology/BI-TC.

Finally, regarding the practice outlined to "Consult and incorporate feedback from affected groups," we strongly encourage OMB to provide additional direction to agencies to engage with all relevant stakeholders – including technology providers and other subject matter experts – regarding "negative feedback" regarding specific AI systems, to help ensure such feedback has merit.

Conclusion

Agency requirements under the memorandum need to balance promoting beneficial uses of AI while managing risks. The Request for Comment asks how "OMB [can] best advance responsible AI innovation."[24] The draft memorandum recognizes that AI can "improve operations and deliver efficiencies across the Federal Government"[25] and encourages agencies to identify the opportunities and benefits AI can provide to the agencies mission and "improve their ability to use AI in ways that benefit the public and increase mission effectiveness."[26]

We are concerned that, without changes, the broad scope and overly prescriptive nature of certain requirements in the draft memorandum could put up roadblocks to the federal government using AI and potentially discourage companies with AI-powered tools and solutions from engaging with federal government.

Additionally, as polices are developed to ensure federal contract alignment with the AI EO, we urge OMB to facilitate informed decision making in the federal procurement process with clear and specific requirements for procuring AI products and services. OMB should also consider creating additional guidance or tools that would help current and potential suppliers assess compliance requirements in relations to their offerings ahead of time, which could create efficiencies in procurement processes and throughout contract life cycles.

Again, we appreciate the opportunity to provide initial feedback on the draft memorandum. SIA and its members stand ready to work with OMB to ensure that government can continue to leverage AI technologies in a safe, secure and effective manner.

Sincerely,

Don Erickson
Chief Executive Officer
Security Industry Association
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[24] Draft memorandum RFC at Question 3.
[25] Draft memorandum at 8.
[26] *Id.*

PUBLIC SUBMISSION

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Tracking No. lps-q715-en2v
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0101
Comment from Charles Clark

Submitter Information

Name: Charles Clark

General Comment

I have submitted my comment on the attached pdf, which contains the original pdf version of "Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum" that I have annotated for clarification. Many thanks for your consideration.

Attachments

AI-in-Government-Memo-Public-Comment-CWC20231205

5 December 2023

Hon. Shalanda D. Young
Director, Office of Management and Budget

Dear Ms. Young -

I am much appreciative of the opportunity to offer public comment on the proposed memorandum on "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence."

The draft makes frequent reference to "responsible artificial intelligence", "responsible AI", "responsible use of AI", etc. I have marked many such instances in red; those can be found via the Bookmarks pane in this document.

There are uses of "responsible" in this document that are interpretable in plain language, e.g. "CAIOs must work in close coordination with existing responsible officials and organizations within their agencies."

"Responsible artificial intelligence" is not like "responsible officials". It is the name associated with an object of which there are various descriptions. Indeed some of these are now contained in Section 6, Definitions.

I suggest that Section 6 include a specific definition of "responsible artificial intelligence". It will make the memorandum more clear and definitive.

Respectfully submitted -

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

PROPOSED MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young

SUBJECT: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

Artificial intelligence (AI) is one of the most powerful technologies of our time, and the President has been clear that we must seize the opportunities AI presents while managing its risks. Consistent with the Artificial Intelligence in Government Act of 2020,[1] the Advancing American AI Act,[2] and President Biden's Executive Order of October 30, 2023 (Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence), this memorandum directs agencies to advance AI governance and innovation while managing risks from the use of AI, particularly those affecting the safety and rights of the public.

As set forth in the accompanying Federal Register notice, the Office of Management and Budget is requesting public comment on this proposed memorandum.

1. OVERVIEW

While AI is improving operations and efficiency across the Federal Government, agencies must effectively manage its use. As such, this memorandum establishes new agency requirements and guidance for AI governance, innovation, and risk management, including through specific minimum risk management practices for uses of AI that impact the rights and safety of the public.

Strengthening AI Governance. Managing AI risk and promoting AI innovation requires effective AI governance. As required by President Biden's October 30, 2023 Executive Order (the "AI Executive Order"), each agency must designate a Chief AI Officer (CAIO) within 60 days of the date of the issuance of this memorandum. This memorandum describes the roles, responsibilities, seniority, position, and reporting structures for agency CAIOs. Because AI is deeply interconnected with other technical and policy areas including data, information

[1] Pub. L. No. 116-260, div. U, title 1, § 104 (codified at 40 U.S.C. § 11301 note), https://www.congress.gov/116/plaws/publ260/PLAW-116publ260.pdf.
[2] Pub. L. No. 117-263, div. G, title LXXII, subtitle B, §§ 7224(a), 7224(d)(1)(B), and 7225 (codified at 40 U.S.C. 11301 note), https://www.congress.gov/117/plaws/publ263/PLAW-117publ263.pdf.

technology (IT), security, privacy, civil rights and civil liberties, customer experience, and workforce management, CAIOs must work in close coordination with existing responsible officials and organizations within their agencies.

Advancing Responsible AI Innovation. When implemented responsibly, AI can improve operations across the Federal Government. Agencies must increase their capacity to successfully and responsibly adopt AI, including generative AI, into their operations. To that end, this memorandum requires each agency identified in the Chief Financial Officer (CFO) Act[3] to develop an enterprise AI strategy. This memorandum also provides recommendations for how agencies should reduce barriers to the responsible use of AI, including barriers related to IT infrastructure, data, cybersecurity, workforce, and the particular challenges of generative AI.

Managing Risks from the Use of AI. While agencies will realize significant benefits from AI, they must also manage a range of risks from the use of AI. Agencies are subject to existing risk management requirements relevant to AI, and this memorandum does not replace or supersede these requirements. Instead, it creates new requirements focused specifically on the risks from relying on AI to inform or carry out agency decisions and actions, particularly when such reliance impacts the rights and safety of the public.[4] To address these risks, this memorandum requires agencies to follow minimum practices when using rights-impacting and safety-impacting AI, and enumerates specific categories of AI that are presumed to impact rights and safety. Finally, this memorandum also establishes a series of recommendations for managing AI risks in the context of Federal procurement.

2. SCOPE

Agency adoption of AI poses many challenges, some novel and specific to AI and some well-known. While agencies must give due attention to all aspects of AI, this memorandum is scoped to address risks specifically arising from the use of AI, as well as governance and innovation issues that are directly tied to agencies' use of AI. This memorandum does not address issues that are present regardless of the use of AI, for instance with respect to Federal information and systems in general. In addition, this memorandum does not supersede other, more general Federal policies that apply to AI but are not focused specifically on AI, such as policies that relate to enterprise risk management, information resources management, privacy, Federal statistical activities, IT, or cybersecurity. Agencies must continue to comply with applicable OMB policies in other domains relevant to AI, and to coordinate compliance across the agency with all appropriate officials. All agency responsible officials retain their existing authorities and responsibilities established in other laws and policies.

[3] 31 U.S.C. § 901(b).
[4] A full definition for "risks from the use of AI" is provided in Section 6.

a. Covered Agencies. Except as specifically noted, this memorandum applies to all agencies defined in 44 U.S.C. § 3502(1).[5] As noted in the relevant sections, some requirements in this memorandum only apply to CFO Act agencies, as identified in 31 U.S.C. § 901(b), and other requirements do not apply to elements of the Intelligence Community, as defined in 50 U.S.C. § 3003.

b. Covered AI. This memorandum provides requirements and recommendations that, as described in more detail below, apply to new and existing AI that is developed, used, or procured by or on behalf of covered agencies. The principles of this memorandum do not, by contrast, govern agencies' regulatory actions designed to prescribe law or policy regarding non-agency uses of AI.

The requirements of this memorandum apply to system functionality that implements or is reliant on AI, rather than to the entirety of an information system that incorporates AI. As noted in the relevant sections, some requirements in this memorandum apply only in specific circumstances in which agencies use AI, such as when the AI may impact rights or safety.

c. Applicability to National Security Systems. This memorandum does not cover AI when it is used as a component of a national security system.[6]

3. STRENGTHENING ARTIFICIAL INTELLIGENCE GOVERNANCE

The head of each covered agency is responsible for pursuing AI innovation and ensuring that their agency complies with AI requirements in relevant law and policy, including that risks from the agency's use of AI are adequately managed. The head of each covered agency must also consider the necessary financial, human, information, and infrastructural resources to carry out these responsibilities effectively, including providing or requesting resources via the budget process to support the responsibilities identified in this memorandum.

To improve accountability for AI issues, agencies must designate a Chief AI Officer, consistent with Section 10.1(b) of the AI Executive Order. CAIOs bear primary responsibility on

[5] The term "agency" is defined as "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency," but does not include the Government Accountability Office; the Federal Election Commission; the governments of the District of Columbia and of the territories and possessions of the United States, and their various subdivisions; or Government-owned contractor-operated facilities, including laboratories engaged in national defense research and production activities. As a result, agencies defined in 44 U.S.C. § 3502(5) (independent regulatory agencies) that were not covered by Executive Order 13960 of December 8, 2020 *are* covered by this memorandum.

[6] AI innovation and risk for national security systems must be managed appropriately, but these systems are governed through other policy. For example, Section 4.8 of the AI Executive Order requires the development of a National Security Memorandum to govern the use of AI as a component of a National Security System, and agencies have existing guidelines in place such as the Department of Defense's (DoD) *Responsible Artificial Intelligence Strategy and Implementation Pathway* and the Office of the Director of National Intelligence's *Principles of Artificial Intelligence Ethics for the Intelligence Community*, as well as policies governing specific high-risk national security applications of AI, such as DoD Directive 3000.09, *Autonomy in Weapon Systems*.

behalf of the head of their agency for implementing this memorandum and coordinating implementation with other agencies. This section defines CAIOs' roles, responsibilities, seniority, position, and reporting structure.

a. Actions

i. **Designating Chief AI Officers**. Within 60 days of the issuance of this memorandum, the head of each agency must designate a CAIO. To ensure the CAIO can fulfill the responsibilities laid out in this memorandum, agencies that have already designated a CAIO must evaluate whether they need to provide that individual with additional authority or appoint a new CAIO. Agencies must identify these officers to OMB through OMB's Integrated Data Collection process or an OMB-designated successor process, and they must update OMB within 30 days when the designated individual changes.

ii. **Convening Agency AI Governance Bodies**. Within 60 days of the issuance of this memorandum, each CFO Act agency must convene its relevant senior officials to coordinate and govern AI issues, consistent with Section 10.1(b) of the AI Executive Order and the detailed guidance in Section 3(c) of this memorandum.

iii. **Compliance Plans**. Consistent with Section 104(c)-(d) of the AI in Government Act, within 180 days of the issuance of this memorandum or any update to this memorandum and every two years thereafter until 2036, each agency must submit to OMB and post publicly on the agency's website either a plan to achieve consistency with this memorandum, or a written determination that the agency does not use and does not anticipate using covered AI. Agencies must also include plans to update any existing internal AI principles and guidelines to ensure consistency with this memorandum.[7] OMB will provide full templates for these compliance plans.

iv. **AI Use Case Inventories**. Pursuant to Section 7225 of the Advancing American AI Act, and subject to the exclusions in that Act and Section 10.1(e) of the AI Executive Order, each agency (except for the Department of Defense and the Intelligence Community) must annually submit an inventory of its AI use cases to OMB and subsequently post a public version on the agency's website.[8] OMB will issue detailed instructions for the inventory through its Integrated Data Collection process or an OMB-designated successor process. Beginning with the use case inventory for 2024, agencies will be required, as applicable, to identify and report additional detail on how they are using safety-impacting and rights-impacting AI, the risks—including risks to equity—that such use poses, how they are managing those risks, and any related extensions and waivers granted under

[7] Given the importance of context-specific guidance on AI, agencies are encouraged to continue implementing their agency's AI principles and guidelines, so long as they do not conflict with the guidance in this memorandum.
[8] Agencies must only publicly report use cases to the extent practicable and consistent with applicable law and governmentwide guidance, including those concerning the protection of privacy and of sensitive law enforcement, national security, and other protected information.

Section 5 of this memorandum.

v. **Reporting on AI Use Cases Not Subject to Inventory**. Some AI use cases are exempt from the Advancing American AI Act's inventory requirement. Of those use cases, those within the Department of Defense are otherwise within the scope of this memorandum unless they concern AI used as a component of a national security system. The Department of Defense must annually provide OMB with information on those in-scope AI use cases, including aggregate metrics about those in-scope AI uses cases, the number of such cases that impact rights and safety, their compliance with the practices of Section 5(c) of this memorandum, and any waivers granted under Section 5 of this memorandum. OMB will issue detailed instructions for this reporting through its Integrated Data Collection process or an OMB-designated successor process.

b. Roles, Responsibilities, Seniority, Position, and Reporting Structure of Chief Artificial Intelligence Officers

Consistent with Section 10.1(b)(ii) of the AI Executive Order, this memorandum defines agency CAIOs' roles, responsibilities, seniority, position, and reporting structures as follows:

i. **Roles.** CAIOs must have the necessary skills, knowledge, training, and expertise to perform the responsibilities described in this section. At CFO Act agencies, the CAIO's primary role must be coordination, innovation, and risk management for their agency's use of AI. Agencies may choose to designate an existing official, such as a Chief Technology Officer, Chief Data Officer, or similar official with relevant or complementary authorities and responsibilities, provided they have significant expertise in AI and meet the other requirements in this section.

ii. **Responsibilities.** The AI Executive Order tasks CAIOs with primary responsibility in their agencies, in coordination with other responsible officials, for coordinating their agency's use of AI, promoting AI innovation, managing risks from the use of AI, and carrying out the agency responsibilities defined in Section 8(c) of Executive Order 13960[9] and Section 4(b) of Executive Order 14091.[10] In addition, CAIOs, in coordination with other responsible officials and appropriate stakeholders, are responsible for:

Coordinating Agency Use of AI

A. serving as the senior advisor for AI to the head of the agency and other senior agency leadership and within their agency's senior decision-making forums;
B. maintaining awareness of agency AI activities, including through creating and maintaining the annual AI use case inventory;

[9] Executive Order 13960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government,* https://www.govinfo.gov/content/pkg/FR-2020-12-08/pdf/2020-27065.pdf.
[10] Executive Order 14091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, https://www.govinfo.gov/content/pkg/FR-2023-02-22/pdf/2023-03779.pdf.

C. developing a plan for compliance with this memorandum, as detailed in Section 3(a)(iii) of this memorandum, and an agency AI strategy, as detailed in Section 4(a) of this memorandum;
D. advising the agency CFO and Chief Human Capital Officer (CHCO) on the resourcing requirements and workforce skillsets necessary for applying AI to the agency's mission and adequately managing its risks;
E. supporting agency involvement with appropriate interagency coordination bodies related to their agency's AI activities, including representing the agency to the council described in Section 10.1(a) of the AI Executive Order;
F. supporting and coordinating their agency's involvement in AI standards-setting bodies, as appropriate, and encouraging agency adoption of voluntary consensus standards for AI, as appropriate and consistent with OMB Circular No. A-119;[11]

Promoting AI Innovation

G. working with their agency to identify and prioritize appropriate uses of AI that will improve their agency's mission and advance equity;
H. identifying and removing barriers to the responsible use of AI in the agency, including through the advancement of AI-enabling enterprise infrastructure, workforce development measures, policy, and other resources for AI innovation;
I. advocating within their agency and to the public on the opportunities and benefits of AI to the agency's mission;

Managing Risks from the Use of AI

J. managing an agency program that supports the enterprise in identifying and managing risks from the use of AI, especially for safety-impacting and rights-impacting AI;
K. working with relevant senior agency officials to establish or update processes to measure, monitor, and evaluate the ongoing performance of AI applications and whether they are achieving their intended objectives;
L. overseeing agency compliance with requirements to manage risks from the use of AI, including those established in this memorandum and in relevant law and policy;
M. conducting risk assessments, as necessary, of agency AI applications to ensure compliance with this memorandum;
N. overseeing development of agency-specific lists, as necessary, of purposes for which AI is presumed to be safety-impacting or rights-impacting;[12]
O. waiving individual applications of AI from elements of Section 5 of this memorandum through the processes detailed in that section; and

[11] OMB Circular A-119, *Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities* (Feb. 10, 1998), https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-119-1.pdf.
[12] See Section 5(b) of this memorandum for the OMB-defined lists to which agency-specific lists would add. Any agency-specific lists will be governed by the same processes defined in Section 5(b) for the OMB-defined lists.

P. in partnership with relevant agency officials (e.g., authorizing, procurement, legal, human capital, and oversight officials), ensuring that their agency does not use AI that is not in compliance with this memorandum, including by assisting these relevant agency officials in evaluating Authorizations to Operate based on risks from the use of AI.

iii. **Seniority.** For CFO Act agencies, the CAIO must be a position at the Senior Executive Service, Scientific and Professional, or Senior Leader level, or equivalent. In other agencies, the CAIO must be at least a GS-15 or equivalent.

iv. **Position and Reporting Structure.** CAIOs must have the necessary authority to perform the responsibilities in this section and must be positioned highly enough to engage regularly with other agency leadership, to include the Deputy Secretary or equivalent. Further, CAIOs must coordinate with other responsible officials at their agency to ensure that the agency's use of AI complies with and is appropriate in light of applicable law and governmentwide guidance.

c. Internal Agency AI Coordination

Agencies must ensure that AI issues receive adequate attention from the agency's senior leadership. Consistent with Section 10.1(b) of the AI Executive Order, agencies must take appropriate steps, such as through the convening of an AI governance body, to coordinate internally among officials responsible for aspects of AI adoption and risk management. Likewise, the CAIO must be involved, at appropriate times, in broader agency-wide risk management bodies and processes,[13] including in the development of the agency risk management strategy.[14] The agency's AI coordination mechanisms should be aligned to the needs of the agency based on, for example, the degree to which the agency currently uses AI, the degree to which AI could improve the agency's mission, and the risks posed by the agency's current and potential uses of AI.

CFO Act agencies are required specifically to establish AI Governance Boards to convene relevant senior officials no less than quarterly to govern the agency's use of AI, including to remove barriers to the use of AI and to manage its associated risks. Those agencies are permitted to rely on existing governance bodies[15] to fulfill this requirement as long as they currently satisfy or are made to satisfy both of the following:

[13] *See, e.g.,* OMB Circular No. A-123, *Management's Responsibility for Enterprise Risk Management and Internal Control* (July 15, 2016), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2016/m-16-17.pdf.
[14] *See* OMB Circular No. A-130, *Managing Information as a Strategic Resource*, Appx. I, sec. 5(b) (July 28, 2016), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A130/a130revised.pdf.
[15] An example of a qualifying body includes agency Data Governance Bodies, established by OMB Memorandum M-19-23, *Phase 1 Implementation of the Foundations for Evidence-Based Policymaking Act of 2018: Learning Agendas, Personnel, and Planning Guidance*, https://www.whitehouse.gov/wp-content/uploads/2019/07/m-19-23.pdf.

i. Agency AI Governance Boards must be chaired by the Deputy Secretary of the agency or equivalent and vice-chaired by the agency CAIO, and these responsibilities should not be assigned to other officials. Working through this Board, CAIOs will support their respective Deputy Secretaries in coordinating AI activities across the agency and implementing relevant sections of the AI Executive Order.

ii. Agency AI Governance Boards must include appropriate representation from senior agency officials responsible for key enablers of AI adoption and risk management, including at least IT, cybersecurity, data, human capital, procurement, budget, agency management, customer experience, performance evaluation, statistics, risk management, equity, privacy, civil rights and civil liberties, and officials responsible for implementing AI within an agency's program office(s). Agencies should also consider including representation from their respective Office of the Inspector General.

4. ADVANCING RESPONSIBLE ARTIFICIAL INTELLIGENCE INNOVATION

If implemented responsibly, AI can improve operations and deliver efficiencies across the Federal Government. Agencies must improve their ability to use AI in ways that benefit the public and increase mission effectiveness, while recognizing the limitations of AI and when it is not suited for a given task. To achieve this, agencies should build internal enterprise capacity to support responsible AI innovation and take actions to improve their procurement of AI.

a. AI Strategies

Within 365 days of the issuance of this memorandum, each CFO Act agency must develop and release publicly on the agency's website a strategy for identifying and removing barriers to the responsible use of AI and achieving enterprise-wide advances in AI maturity, including:

i. the agency's current and planned top use cases of AI[16];

ii. a current assessment of the agency's AI maturity and the agency's AI maturity goals based on the method established under Section 10.1(c) of the AI Executive Order;

iii. the agency's plans to effectively govern its use of AI, including through its Chief AI Officer, AI Governance Boards, and improvements to their AI use case inventory;

iv. a plan for developing sufficient enterprise capacity for AI innovation, including mature AI-enabling infrastructure for the data, computing, development, testing, cybersecurity compliance, deployment, and continuous-monitoring infrastructure necessary to build, test, and maintain AI;

v. a plan for building sufficient enterprise capacity to manage risks from the use of AI;

vi. a current assessment of the agency's AI workforce capacity and projected AI workforce needs, as well as a plan to recruit, hire, train, retain and empower AI practitioners and achieve AI literacy for non-practitioners involved in AI to meet those needs; and

[16] Consistent with Sections 7225(d) and 7228 of the Advancing American AI Act, this requirement applies to CFO Act agencies except for the Department of Defense and the Intelligence Community, as defined in 5 U.S.C. § 3003(4).

vii. specific, prioritized areas and planning for future AI investment.

b. Removing Barriers to the Responsible Use of Artificial Intelligence

Embracing innovation requires removing unnecessary and unhelpful barriers to the use of AI while retaining and strengthening the guardrails that ensure its responsible use. Agencies should create internal environments where those developing and deploying AI have flexibility and do not face hindrances that divert limited resources and expertise away from the AI innovation and risk management. Agencies should take steps to remove such barriers, paying special attention to the following recommendations:

i. **IT Infrastructure.** Agencies should ensure that their AI projects have access to adequate IT infrastructure, including high-performance computing infrastructure specialized for AI training and inference, where necessary. Agencies should also ensure adequate access for AI developers to the software tools, open-source libraries, and deployment and monitoring capabilities necessary to rapidly develop, test, and maintain AI applications.

ii. **Data.** Agencies should develop adequate infrastructure and capacity to sufficiently curate agency datasets for use in training, testing, and operating AI. This includes an agency's capacity to maximize appropriate access to internal data and share such data within the agency. Agencies should also explore the utility of public access datasets and encourage their use, where appropriate and consistent with the data practices outlined in this memorandum, to help develop, test, and maintain AI applications. These activities should be supported by resources to enable sound data governance and management practices, particularly as it relates to data curation, labeling, and stewardship.

iii. **Cybersecurity.** Agencies should update, as necessary, cybersecurity authorization processes to better address the needs of AI applications, including to advance the use of continuous authorizations for AI. Consistent with Section 10.1(f) of the AI Executive Order, agency authorizing officials should also prioritize generative AI and other critical emerging technologies in Authorizations to Operate and any other applicable release or oversight processes.

iv. **Workforce.** Consistent with Sections 5.1 and 10.2 of the AI Executive Order, agencies should take full advantage of available special hiring and retention authorities to fill gaps in AI talent, encouraging applications from individuals with diverse perspectives and experiences, and ensure the use of recruitment best practices for AI positions, such as descriptive job titles and skills-based assessments. When identifying and filling workforce needs for AI, agencies should include both technical roles, such as data scientists and engineers, and non-technical roles, such as designers, behavioral scientists, contracting officials, managers, and attorneys, whose contribution and competence with AI are important for successful and responsible AI outcomes. Agencies should provide resources and training to develop such AI talent internally and should also increase AI training offerings for Federal employees, including opportunities that provide Federal

employees pathways to AI occupations and that assist employees affected by the application of AI to their work.

v. **Generative AI.** In addition to heeding the guidance provided in Section 10.1(f) of the AI Executive Order, agencies should assess potential beneficial use cases of generative AI in their missions and establish adequate safeguards and oversight mechanisms that allow generative AI to be used in the agency without posing undue risk.

5. MANAGING RISKS FROM THE USE OF ARTIFICIAL INTELLIGENCE

Agencies have a range of policies, procedures, and officials in place to manage risks related to agency information and systems. To better address risks from the use of AI, and particularly risks to the rights and safety of the public, all agencies that are not elements of the Intelligence Community are required to implement minimum practices, detailed below, to manage risks from rights-impacting and safety-impacting AI.[17]

a. Actions

i. **Implementation of Risk Management Practices and Termination of Non-Compliant AI**. By August 1, 2024, agencies must implement the minimum practices in Section 5(c) of this memorandum for safety-impacting or rights-impacting AI, or else stop using any AI that is not compliant with the minimum practices, consistent with the details and caveats in that section.

ii. **Recommendation on AI Documentation.** Within 180 days of the issuance of this memorandum, the council described in Section 10.1(a) of the AI Executive Order will provide the Director of OMB with a list of recommended documentation that should be required from a selected vendor in the fulfillment of a Federal AI contract. As part of their recommendation, the council must consider the minimum risk management practices in Section 5(c) and the associated materials that may be required of vendors to demonstrate that they have completed such tasks.

b. Determining Which Artificial Intelligence Is Presumed to Be Safety-Impacting or Rights-Impacting

All AI within the scope of this section that matches the definitions of "safety-impacting AI" or "rights-impacting AI" as defined in Section 6 must follow the minimum practices in Section 5(c) by the appropriate deadline. Agencies must review each use of AI that they are developing or using to determine whether it matches the definition of safety-impacting or rights-impacting.

The categories in this subsection only identify a subset of specific purposes for which AI is automatically *presumed* to be safety-impacting or rights-impacting, and they do not represent an exhaustive list of purposes for which AI is safety-impacting or rights-impacting. Agencies are

[17] Although elements of the Intelligence Community are not required to implement these practices, they are encouraged to do so.

also encouraged to define specific purposes that, within their agency, are presumed to be safety-impacting or rights-impacting and so must follow the practices in Section 5(c). Agencies are required to report any such agency-specific lists to OMB on an annual basis.

Where an agency currently uses or plans to use AI for a purpose described below, the CAIO, in coordination with other relevant officials as specified by the agency, may make a determination (or reverse a prior determination) that the AI application or component[18] does not match the definitions of "safety-impacting AI" or "rights-impacting AI" and is therefore not subject to the minimum practices. The agency CAIO may make or reverse this determination only with a documented context-specific and system-specific risk assessment. Any such determination or reversal must be reported to OMB within 30 days.

i. **Purposes That Are Presumed to Be Safety-Impacting.** Unless the CAIO determines otherwise, covered AI within the scope of this memorandum is presumed to be safety-impacting and must follow the minimum practices for safety-impacting AI if it is used to control or meaningfully influence the outcomes of the following activities:
   A. The functioning of dams, emergency services, electrical grids or the generation or movement of energy, fire safety systems, food safety mechanisms, integrity of elections and voting infrastructure, traffic control systems and other systems controlling physical transit, water and wastewater systems, and nuclear reactors, materials, and waste;
   B. Physical movements, including in human-robot teaming, such as the movements of a robotic appendage or body, within a workplace, school, housing, transportation, medical, or law enforcement setting;
   C. The application of kinetic force, delivery of biological or chemical agents, or delivery of potentially damaging electromagnetic impulses;
   D. The movements of vehicles, whether on land, underground, at sea, in the air, or in space;
   E. The transport, safety, design, or development of hazardous chemicals or biological entities or pathways;
   F. Industrial emissions and environmental impact control processes;
   G. The transportation or management of industrial waste or other controlled pollutants;
   H. The design, construction, or testing of industrial equipment, systems, or structures that, if they failed, would pose a meaningful risk to safety;
   I. Responses to insider threats;
   J. Access to or security of government facilities; or
   K. Enforcement actions pursuant to sanctions, trade restrictions, or other controls on exports, investments, or shipping.

[18] CAIOs may also make these determinations across groups of closely related AI applications or components, provided that: (1) those systems have undergone a risk assessment that adequately considers the risks from each individual system; and (2) the systems are substantially identical in their risk profiles.

ii. **Purposes That Are Presumed to Be Rights-Impacting.** Unless the CAIO determines otherwise, covered AI is presumed to be rights-impacting (and potentially also safety-impacting) and agencies must follow the minimum practices for rights-impacting AI and safety-impacting AI if it is used to control or meaningfully influence the outcomes of any of the following activities or decisions:

A. Decisions to block, remove, hide, or limit the reach of protected speech;
B. Law enforcement or surveillance-related risk assessments about individuals, criminal recidivism prediction, offender prediction, predicting perpetrators' identities, victim prediction, crime forecasting, license plate readers, iris matching, facial matching, facial sketching, genetic facial reconstruction, social media monitoring, prison monitoring, forensic analysis, forensic genetics, the conduct of cyber intrusions, physical location-monitoring devices, or decisions related to sentencing, parole, supervised release, probation, bail, pretrial release, or pretrial detention;
C. Deciding immigration, asylum, or detention status; providing risk assessments about individuals who intend to travel to, or have already entered, the U.S. or its territories; determining border access or access to Federal immigration related services through biometrics (e.g., facial matching) or other means (e.g., monitoring of social media or protected online speech); translating official communication to an individual in an immigration, asylum, detention, or border context; or immigration, asylum, or detention-related physical location-monitoring devices.
D. Detecting or measuring emotions, thought, or deception in humans;
E. In education, detecting student cheating or plagiarism, influencing admissions processes, monitoring students online or in virtual-reality, projecting student progress or outcomes, recommending disciplinary interventions, determining access to educational resources or programs, determining eligibility for student aid, or facilitating surveillance (whether online or in-person);
F. Tenant screening or controls, home valuation, mortgage underwriting, or determining access to or terms of home insurance;
G. Determining the terms and conditions of employment, including pre-employment screening, pay or promotion, performance management, hiring or termination, time-on-task tracking, virtual or augmented reality workplace training programs, or electronic workplace surveillance and management systems;
H. Decisions regarding medical devices, medical diagnostic tools, clinical diagnosis and determination of treatment, medical or insurance health-risk assessments, drug-addiction risk assessments and associated access systems, suicide or other violence risk assessment, mental-health status detection or prevention, systems that flag patients for interventions, public insurance care-allocation systems, or health-insurance cost and underwriting processes;
I. Loan-allocation processes, financial-system access determinations, credit scoring, determining who is subject to a financial audit, insurance processes including risk

assessments, interest rate determinations, or financial systems that apply penalties (e.g., that can garnish wages or withhold tax returns);

J. Decisions regarding access to, eligibility for, or revocation of government benefits or services; allowing or denying access—through biometrics or other means (e.g., signature matching)—to IT systems for accessing services for benefits; detecting fraud; assigning penalties in the context of government benefits; or

K. Recommendations or decisions about child welfare, child custody, or whether a parent or guardian is suitable to gain or retain custody of a child.

c. Minimum Practices for Safety-Impacting and Rights-Impacting Artificial Intelligence

Except as prevented by applicable law and governmentwide guidance, agencies must apply the minimum practices in this section to safety-impacting and rights-impacting AI by August 1, 2024, or else stop using the AI until it becomes compliant. Prior to August 1, 2024, agency CAIOs should work with their agencies' relevant officials to bring potentially non-compliant AI into conformity, which may include voluntary requests to third-party vendors to take appropriate action (e.g., via updated documentation or testing measures). To ensure compliance with this requirement, relevant agency officials must use existing mechanisms wherever possible, for example, the Authorization to Operate process. An agency may also request an extension or grant a waiver to this requirement through its CAIO using the processes detailed below.

Agencies must document their implementation of these practices and be prepared to report them to OMB, either as a component of the annual AI use case inventory, periodic accountability reviews such as a TechStat process,[19] or on request as determined by OMB.

The practices in this section represent a minimum baseline for managing risk from the use of AI. Agencies must identify additional context-specific risks that are associated with their determined use cases and address them as appropriate. Such risk considerations may include impacts to safety, security, civil rights, civil liberties, privacy, democratic values, human rights, equal opportunities, potential harms to worker wellbeing, access to critical resources and services, and effects on market competition. To fill potential risk management gaps, agencies are encouraged to promote and to incorporate, as appropriate, additional best practices for AI risk management, such as from the National Institute of Standards and Technology (NIST) AI Risk Management Framework,[20] the Blueprint for an AI Bill of Rights,[21] applicable international standards,[22] and the workforce principles established pursuant to Section 6 of the AI Executive

[19] *Policies & Initiatives: TechStat,* U.S. Chief Information Officers Council, https://www.cio.gov/handbook/policies-initiatives/techstat/.
[20] *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, NIST Publication AI 100-1, https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.
[21] *Blueprint for an AI Bill of Rights*, White House Office of Science and Technology Policy, https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.
[22] For example, ISO/IEC 23894:2023 Information technology — Artificial intelligence — Guidance on risk management, https://www.iso.org/standard/77304.html.

Order. Agencies are also encouraged to continue developing their own agency-specific practices, as appropriate and consistent with this memorandum and the principles in Executive Order 13960, Executive Order 14091, and the October 30, 2023 AI Executive Order. The practices in this section also do not supersede, modify, or direct an interpretation of existing requirements mandated by law or governmentwide policy, and agency responsible officials must coordinate to ensure that the performance of these practices does not conflict with other applicable law or governmentwide guidance.

i. **Exclusions from Minimum Practices.** Agencies are not required to follow the minimum practices outlined in this section when using AI solely for one or more of the following purposes:
   A. Evaluation of a potential vendor, commercial capability, or freely available AI capability that is not otherwise used in agency operations, solely for the purpose of making a procurement or acquisition decision;
   B. Evaluation of a particular AI application because the AI provider is the target or potential target of a regulatory enforcement, law enforcement, or national security action;[23] and
   C. Research and development.[24]

ii. **Extensions for Minimum Practices.** Until August 1, 2024, agencies may request from OMB an extension of limited and defined duration for a particular use of AI that cannot feasibly meet the minimum requirements in this section by that date. The request must be accompanied by a detailed justification for why the agency cannot achieve compliance for the use case in question and what practices the agency has in place to mitigate the risks from noncompliance, as well as a plan for how the agency will come to implement the full set of required minimum practices from this section.

iii. **Waivers from Minimum Practices.** In coordination with other relevant officials, an agency CAIO may waive one or more of the requirements in this section for a specific covered AI application or component[25] after making a written determination, based upon a system-specific risk assessment, that fulfilling the requirement would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations. Such waivers are applicable for the duration of the AI's use, but must be reassessed by the CAIO if there are significant changes to the conditions or context in which the AI is used. An agency CAIO may also revoke a previously issued waiver at

[23] Agencies are not required to follow these minimum practices when examining AI as the target or potential target of such an action, but they are required to follow these practices when *carrying out* an enforcement or national security action. For example, when evaluating an AI tool to determine whether it violates the law, agencies need not follow the minimum practices; if agencies were using that same tool to assess a different target, they would have to follow the minimum practices.

[24] AI research and development is not excluded if it is used in agency operations other than for the purposes of research and development, such as to make agency recommendations or decisions about real people.

[25] CAIOs may also grant waivers applicable to groups of closely related AI applications or components, provided that: (1) those systems have undergone a risk assessment that adequately considers the risks from each individual system; and (2) the systems are substantially identical in their risk profiles.

any time. Agencies must report to OMB within 30 days of granting such a waiver, detailing the scope, justifications, and supporting evidence.

iv. **Minimum Practices for Either Safety-Impacting or Rights-Impacting AI.**

Starting on August 1, 2024, agencies must follow these practices *before* using new or existing covered safety-impacting or rights-impacting AI:

A. **Complete an AI impact assessment**. Impact assessments must document the following:

1. *The intended purpose for the AI and its expected benefit*, supported by specific metrics or qualitative analysis. Metrics should be quantifiable measures of positive outcomes for an agency's mission, for example to reduce costs, wait time for customers, or risk to human life, that can be measured after the AI is deployed to confirm or disprove the value of using AI.[26] Where quantification is not feasible, qualitative analysis should demonstrate an expected positive outcome, such as for improvements to customer experience or human interactions—and demonstrate that AI is a good fit to accomplish the relevant task.

2. *The potential risks of using AI*, as well as what, if any, additional mitigation measures, beyond these minimum practices, the agency will take to help reduce these risks. Agencies should document the stakeholders[27] that will be most impacted by the use of the system and assess the possible failure modes of the AI and of the broader system, both in isolation and as a result of human users and other likely variables outside the scope of the system itself. Agencies should be especially attentive to the potential risks to underserved communities. The expected benefits of the AI functionality should be considered against its potential risks, and if the benefits do not meaningfully outweigh the risks, agencies should not use the AI.

3. *The quality and appropriateness of the relevant data*. Agencies must assess the quality of the data used in the AI's design, development, training, testing, and operation and its fitness to the AI's intended purpose. If the agency cannot access such data after a reasonable effort to do so, it must obtain sufficient descriptive information from the AI or data provider to satisfy the

[26] For supervised and semi-supervised AI, agencies should use a target variable which can be reliably measured and adequately represents the desired real-world outcomes.
[27] Stakeholders will vary by use case. For example, if an agency is using AI to control a water treatment process, stakeholders may include (1) local residents; (2) state, local, tribal, and territorial government representatives; and (3) environmental experts.

reporting requirements in this paragraph. At a minimum, agencies must document:

a. the provenance and quality of the data for its intended purpose;[28]
b. how the data is relevant to the task being automated and has a reasonable expectation of being useful for the AI's development, testing, and operation;
c. whether the data contains sufficient breadth to address the range of real-world inputs the AI might encounter;
d. whether the data comes from an adequately reliable source; and
e. how errors from data entry, machine processing, or other sources are adequately measured and limited, to include errors from relying on AI-generated data as training data or model inputs.

B. **Test the AI for performance in a real-world context**. Agencies must conduct adequate testing to ensure the AI, as well as components that rely on it, will work in its intended real-world context. Such testing should follow domain-specific best practices, when available, and should take into account both the specific technology used and feedback from human operators, reviewers, employees, and customers that use the service who impact the system's outcomes. Testing conditions should mirror as closely as possible the conditions in which the AI will be deployed. Through test results, agencies should demonstrate, to the extent practicable, that the AI will achieve its expected benefits while sufficiently mitigating risks associated with the AI, or else the agency should not use the AI. Agencies are also encouraged to leverage pilots and limited releases, with strong monitoring, evaluation, and safeguards in place, to carry out the final stages of testing before a wider release.

C. **Independently evaluate the AI**. Agencies, through the CAIO, an agency AI oversight board, or other appropriate agency office with existing test and evaluation responsibilities, must review relevant AI documentation to ensure that the system works appropriately and as intended, and that its expected benefits outweigh its potential risks. At a minimum, this documentation must include the completed impact assessment and results from testing AI performance in a real-world context, both referenced in Section 5(c)(iv). Agencies must incorporate this independent evaluation into an applicable release or oversight process, or the Authorization to Operate process. The independent reviewing authority must not have been directly involved in the system's development.

[28] Consistent with OMB Memorandum M-19-15, *Improving Implementation of the Information Quality Act*, https://www.whitehouse.gov/wp-content/uploads/2019/04/M-19-15.pdf, and the National Science and Technology Council's report *Protecting the Integrity of Government Science*, https://www.whitehouse.gov/wp-content/uploads/2022/01/01-22-Protecting_the_Integrity_of_Government_Science.pdf.

Starting on August 1, 2024 and on an ongoing basis *while* using new or existing covered safety-impacting or rights-impacting AI, agencies must ensure these practices are followed for the AI:

D. **Conduct ongoing monitoring and establish thresholds for periodic human review.** In addition to pre-deployment testing, agencies must institute ongoing procedures to monitor degradation to the AI's functionality and to detect changes in the AI's impact on rights or safety. Part of this monitoring process must include periodic human reviews to determine whether the existing implementation of the minimum practices in this section adequately mitigates any new risk. Such human review, including renewed testing for performance of the AI in a real-world context, must be conducted at least annually[29], and after significant modifications to the AI or to the conditions or context in which the AI is used. Reviews must include oversight and consideration by an appropriate internal agency authority not directly involved in the system's development or operation. Agencies should also scale up the use of new or updated AI features incrementally where possible, to provide adequate time to monitor for adverse performance or outcomes. Agencies should also monitor and defend the AI from AI-specific exploits,[30] particularly those that would adversely impact rights or safety.

E. **Mitigate emerging risks to rights and safety.** Upon identifying new or significantly altered risks to rights or safety through continuous monitoring, periodic review, or other mechanisms, agencies must take steps to mitigate those risks, including, as appropriate, through updating the AI to reduce its risks or implementing non-technical mitigations, such as greater human oversight. As significant modifications make the existing implementation of the other minimum practices in this section less effective, such as by making training or documentation inaccurate, agencies must update or repeat those practices, as appropriate. Where the AI's risks to rights or safety exceed an acceptable level and where mitigation is not practicable, agencies must stop using the affected AI as soon as is practicable.[31]

F. **Ensure adequate human training and assessment.** Agencies must ensure there is sufficient training, assessment, and oversight for operators of the AI to interpret and act on the AI's output, combat any human-machine teaming issues (such as automation bias), and ensure the human-based components of the system effectively manage risks from the use of AI. Training should be conducted on a periodic basis, determined by the agency, and should be specific to the AI use case, product, or service being operated.

[29] For customer-facing services, agencies should consider customer feedback.
[30] For example, the AI-specific exploits outlined in the MITRE ATLAS framework. *See* https://atlas.mitre.org/.
[31] Agencies are responsible for determining how to safely decommission AI that was already in use at the time of this memorandum's release without significant disruptions to essential government functions.

G. **Provide appropriate human consideration as part of decisions that pose a high risk to rights or safety.** Agencies should identify AI functionality that plays a role in decisions that pose a high risk to rights or safety and ensure that the AI functionality is not permitted to intervene directly in such situations without appropriate human consideration and accountability.

H. **Provide public notice and plain-language documentation through the AI use case inventory.** Agencies must ensure, to the extent consistent with applicable law and governmentwide guidance, including those concerning protection of privacy and of sensitive law enforcement, national security, and other protected information, that the AI's entry in the use case inventory serves as adequately detailed and generally accessible documentation of the system's functionality that provides public notice of the AI to its users and the general public. Where practicable, agencies should include this documentation or link to it in contexts where people will interact with or be impacted by the AI. Where agencies' use cases are excluded from the public inventory requirements described in this guidance, they may still be required to report relevant information to OMB and must ensure adequate transparency in their use of AI, as appropriate and consistent with applicable law.

v. Additional Minimum Practices for Rights-Impacting AI.

Starting on August 1, 2024, agencies must follow the above minimum practices for AI that is *either* safety-impacting *or* rights-impacting. In addition, agencies must also follow these minimum practices *before* initiating use of new or existing rights-impacting AI:

A. **Take steps to ensure that the AI will advance equity, dignity, and fairness.** This should include at least:

1. *Proactively identifying and removing factors contributing to algorithmic discrimination or bias.* Agencies must assess whether their rights-impacting AI materially relies on information about a class protected by Federal nondiscrimination laws in a way that could result in algorithmic discrimination or bias against that protected class. Agencies should also assess whether proxies produce undue influence on their rights-impacting AI. In either case, if the AI's reliance on such information results in unlawful discrimination or harmful bias against protected classes, the agency must cease the use of the information before using the AI for decision-making.

2. *Assessing and mitigating disparate impacts.* Agencies must test their AI to determine whether there are significant disparities in the AI's performance across demographic groups, including in the AI's real-world deployment,

and, consistent with applicable law, appropriately address disparities that have the potential to lead to discrimination, cause meaningful harm, or decrease equity, dignity, or fairness. If adequate mitigation of the disparity is not possible, then agencies should not use or integrate the AI tool.

3. *Using representative data.* Agencies should ensure that data used to develop, operate, and assess their AI is adequately representative of the communities who will be affected by the AI, and has been reviewed for improper bias based on the historical and societal context of the data.

B. **Consult and incorporate feedback from affected groups.** To the extent practicable and consistent with applicable law and governmentwide guidance, agencies must consult affected groups, including underserved communities, in the design, development, and use of the AI, and use such feedback to inform agency decision-making regarding the AI. In the event of negative feedback, agencies must consider not deploying the AI or removing the AI from use. Agencies are strongly encouraged to solicit feedback on an ongoing basis from affected groups, such as customers,[32] Federal employee groups, and employees' union representatives, particularly after significant modifications to the AI or the conditions or context in which it is used. To carry out such consultations, agencies should take adequate steps to solicit input from the groups affected by the AI, which could include:[33]

1. Direct user testing, such as observing users interacting with the system;
2. General solicitations of comments from the public, such as a request for information in the *Federal Register* or a "Tell Us About Your Experience" sheet with open ended space for responses;
3. Post-transaction customer feedback collections;[34]
4. Public hearings or meetings, such as a listening session; or
5. Any other transparent process that seeks public input, comments, or feedback from the affected groups in a meaningful, equitable, accessible, and effective manner.

Starting on August 1, 2024 and on an ongoing basis *while* using new or existing covered rights-impacting AI, agencies must ensure these practices are followed for the AI:

[32] Customers can include individuals, businesses, or organizations that interact with an agency.
[33] Agencies are not required to conduct consultations in a format that would require OMB clearance under the Paperwork Reduction Act (44 U.S.C. § 3507), provided the steps the agency takes are adequate to solicit input from the groups affected by the AI.
[34] Information on post-transaction customer feedback surveys can be found in OMB Circular A-11, Section 280 – Managing Customer Experience and Improving Service Delivery, https://www.whitehouse.gov/wp-content/uploads/2018/06/s280.pdf.

C. **Conduct ongoing monitoring and mitigation for AI-enabled discrimination.** As part of their ongoing monitoring requirement cited in Section 5(c)(iv)(D), agencies must also monitor rights-impacting AI to assess and mitigate AI-enabled discrimination against protected classes that might arise from unforeseen circumstances, changes to the system after deployment, or changes to the context of use or associated data. Where sufficient mitigation is not possible, agencies must safely discontinue use of the affected AI functionality.

D. **Notify negatively affected individuals.** Where practicable and consistent with applicable law and governmentwide guidance, agencies must notify individuals when AI meaningfully influences the outcome of decisions specifically concerning them, such as the denial of benefits.[35] Such notice should be timely and written in a manner that is consistent with the Plain Writing Act of 2010,[36] if applicable. Agencies should consider the timing of their notice and when it is appropriate to provide notice in multiple languages and through alternative formats and channels, depending on the context of the AI's use. The notice must also include a clear and accessible means of contacting the agency and, where appropriate, requesting timely remediation for any related issues. Agencies are also strongly encouraged to provide explanations for such decisions and actions.[37]

E. **Maintain human consideration and remedy processes**. Agencies must provide timely human consideration and potential remedy to the use of the AI by a fallback and escalation system in the event that an impacted individual would like to appeal or contest the AI's negative impacts on them. In developing appropriate remedies, agencies should follow OMB guidance on calculating administrative burden and the remedy process should not place unnecessary burden on the impacted individual.[38] When law or governmentwide guidance precludes disclosure of the use of AI or an opportunity for an individual appeal, agencies must create appropriate mechanisms for human oversight of rights-impacting AI.

F. **Maintain options to opt-out where practicable**. Agencies must prominently provide and maintain a mechanism to conveniently opt out from AI functionality

[35] In some instances, such as an active law enforcement investigation, providing immediate notice may be inappropriate or impractical, and disclosure may be more appropriate at a later stage (i.e., prior to a defendant's trial).
[36] Pub. L. No. 111-274 (codified at 5 U.S.C. § 301 note), https://www.congress.gov/111/plaws/publ274/PLAW-111publ274.pdf.
[37] Explanations might include, for example, how and why the AI-driven decision or action was taken. While exact explanations of AI decisions are often not technically feasible, agencies should characterize the general nature of such AI decisions through context such as the data that the decision relied upon, the design of the AI, and the broader decision-making context in which the system operates. Such explanations should be technologically valid, meaningful, useful, and as simply stated as possible, and higher-risk decisions should be accompanied by more comprehensive explanations.
[38] *See* OMB M-22-10 and supporting document "Strategies for Reducing Administrative Burden in Public Benefit and Service Programs."

in favor of a human alternative where practicable and consistent with applicable law and governmentwide guidance. An opt-out mechanism must exist where the affected people have a reasonable expectation of an alternative or where lack of an alternative would meaningfully limit accessibility or create unwarranted harmful impacts.

d. Managing Risks in Federal Procurement of Artificial Intelligence

This section provides agencies with recommendations for responsible Federal procurement of AI. In addition to these recommendations and consistent with section 7224(d) of the Advancing American AI Act and Section 10.1(d)(ii) of the AI Executive Order, OMB will also develop an initial means to ensure that AI contracts align with the guidance in this memorandum.

i. **Aligning to National Values and Law**. Agencies should ensure that procured AI exhibits due respect for our Nation's values, is consistent with the Constitution, and complies with all other applicable laws, regulations, and policies, including those addressing privacy, confidentiality, copyright, human and civil rights, and civil liberties.

ii. **Transparency and Performance Improvement**. Agencies should take steps to ensure transparency and adequate performance for their procured AI, including by:
   A. obtaining adequate documentation of procured AI, such as through the use of model, data, and system cards;
   B. regularly evaluating AI-performance claims made by Federal contractors, including in the particular environment where the agency expects to deploy the capability; and
   C. considering contracting provisions that incentivize the continuous improvement of procured AI.

iii. **Promoting Competition in Procurement of AI.** Agencies should take appropriate steps to ensure that Federal AI procurement practices promote opportunities for competition among contractors and do not improperly entrench incumbents. Such steps may include promoting interoperability and ensuring that vendors do not inappropriately favor their own products at the expense of competitors' offerings.

iv. **Maximizing the Value of Data for AI**. In contracts for AI products and services, agencies should treat relevant data, as well as modifications to that data—such as cleaning and labeling—as a critical asset for their AI maturity. Agencies should take steps to ensure that their contracts retain for the Government sufficient rights to data and any improvements to that data so as to avoid vendor lock-in and facilitate the Government's continued design, development, testing, and operation of AI. Additionally, agencies should consider contracting provisions that protect Federal information used by vendors in the development and operation of AI products and services for the Federal Government so that such data is protected from unauthorized disclosure and use and

cannot be subsequently used to train or improve the functionality of commercial AI offerings offered by the vendor without express permission from the agency.

v. **Responsibly Procuring Generative AI**. Agencies are encouraged to include tailored risk management requirements in contracts for generative AI, and particularly for dual-use foundational models, including:
   A. requiring adequate testing and safeguards, including external AI red teaming, against risks from generative AI such as discriminatory, misleading, inflammatory, unsafe, or deceptive outputs;
   B. requiring that generative AI models have capabilities, as appropriate and technologically feasible, to reliably label or establish provenance for their content as generated or modified by AI; and
   C. Agencies are encouraged to consider the relevant NIST standards, as appropriate, defined pursuant to Sections 4.1(a) and 10.1(d) of the AI Executive Order when imposing such requirements.

6. DEFINITIONS

The below definitions apply for the purposes of this memorandum.

Agency: The term "agency" has the meaning established in 44 U.S.C. § 3502(1).

Algorithmic discrimination: The term "algorithmic discrimination" has the meaning established in Section 10(f) of Executive Order 14091 of February 16, 2023.

Artificial Intelligence (AI): The term "artificial intelligence" has the meaning established in Section 238(g) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019,[39] which states that "the term 'artificial intelligence' includes the following":

1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets.
2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action.
3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks.
4. A set of techniques, including machine learning, that is designed to approximate a cognitive task.

[39] Pub. L. No. 115-232, § 238(g), https://www.govinfo.gov/content/pkg/PLAW-115publ232/pdf/PLAW-115publ232.pdf.

5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.

For the purposes of this memorandum, the following technical context may assist in interpreting this definition:

1. This definition of AI encompasses, but is not limited to, the AI technical subfields of machine learning (including, but not limited to, deep learning as well as supervised, unsupervised, and semi-supervised approaches), reinforcement learning, transfer learning, and generative AI.
2. This definition of AI does not include robotic process automation or other systems whose behavior is defined only by human-defined rules or that learn solely by repeating an observed practice exactly as it was conducted.
3. For this definition, the technical complexity of a system (e.g., the number of parameters in a model, the type of model, or the amount of data used for training purposes) is not a relevant consideration for determining whether it constitutes AI.
4. This definition includes systems that are fully autonomous, partially autonomous, and not autonomous, and it includes systems that operate both with and without human oversight.

Artificial Intelligence Maturity: A Federal Government organization's capacity to successfully and responsibly adopt AI into their operations and decision-making across the organization, manage its risks, and comply with relevant Federal law, regulation, and policy on AI.

Artificial Intelligence Red Teaming: The term has the meaning established for "AI red-teaming" in Section 3(d) of the AI Executive Order.

Automation Bias: The propensity for humans to inordinately favor suggestions from automated decision-making systems and to ignore or fail to seek out contradictory information made without automation.

CFO Act Agency: Refers to the agencies identified in 31 U.S.C. § 901(b).

Dual-Use Foundation Model: Has the meaning established in Section 3(k) of the AI Executive Order.

Equity: Has the meaning established in Section 10(a) of Executive Order 14091.[40]

Federal Information: Has the meaning established in OMB Circular A-130.

Generative AI: Has the meaning established in Section 3(p) of the AI Executive Order.

[40] Executive Order 14091, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government,* https://www.govinfo.gov/content/pkg/FR-2023-02-22/pdf/2023-03779.pdf.

Intelligence Community: Has the meaning established in 50 U.S.C. § 3003.

National Security System: Has the meaning established in 44 U.S.C. § 3552(b)(6).

Research and Development: As in OMB Circular No. A-11, *Preparation Submission, and Execution of the Budget* (2023), research and development is defined as creative and systematic work undertaken in order to increase the stock of knowledge—including knowledge of people, culture, and society—and to devise new applications using available knowledge.

Rights-Impacting AI:[41] AI whose output serves as a basis for decision or action that has a legal, material, or similarly significant effect on an individual's or community's:

1. Civil rights, civil liberties, or privacy, including but not limited to freedom of speech, voting, human autonomy, and protections from discrimination, excessive punishment, and unlawful surveillance;
2. Equal opportunities, including equitable access to education, housing, credit, employment, and other programs where civil rights and equal opportunity protections apply; or
3. Access to critical resources or services, including healthcare, financial services, social services, transportation, non-deceptive information about goods and services, and government benefits or privileges.

Risks from the Use of AI: Risks related to efficacy, safety, equity, fairness, transparency, accountability, appropriateness, or lawfulness of a decision or action resulting from the use of AI to inform, influence, decide, or execute that decision or action. This includes such risks regardless of whether:

1. the AI merely informs the decision or action, partially automates it, or fully automates it;
2. there is or is not human oversight for the decision or action;
3. it is or is not easily apparent that a decision or action took place, such as when an AI application performs a background task or silently declines to take an action; or
4. the humans involved in making the decision or action or that are affected by it are or are not aware of how or to what extent the AI influenced or automated the decision or action.

While the particular forms of these risks continue to evolve, at least the following factors can create, contribute to, or exacerbate these risks:

1. AI outputs that are inaccurate or misleading;
2. AI outputs that are unreliable, ineffective, or not robust;
3. AI outputs that are discriminatory or have a discriminatory effect;
4. AI outputs that contribute to actions or decisions resulting in harmful or unsafe outcomes, including AI outputs that lower the barrier for people to take intentional and harmful actions;

[41] Section 5(b) of this memorandum lists AI applications that are presumed to be rights-impacting.

5. AI being used for tasks to which it is poorly suited or being inappropriately repurposed in a context for which it was not intended;
6. AI being used in a context in which affected people have a reasonable expectation that a human is or should be primarily responsible for a decision or action; and
7. the adversarial evasion or manipulation of AI, such as an entity purposefully inducing AI to misclassify an input.

This definition applies to risks specifically arising from using AI and that affect the outcomes of decisions or actions. It does not include all risks associated with AI, such as risks related to the privacy, security, and confidentiality of the data used to train AI or used as inputs to AI models.

Safety-Impacting AI:[42] AI that has the potential to meaningfully impact the safety of:

1. Human life or well-being, including loss of life, serious injury, bodily harm, biological or chemical harms, occupational hazards, harassment or abuse, or mental health, including both individual and community aspects of these harms;
2. Climate or environment, including irreversible or significant environmental damage;
3. Critical infrastructure, including the critical infrastructure sectors defined in Presidential Policy Directive 21[43] and the infrastructure for voting and protecting the integrity of elections; or,
4. Strategic assets or resources, including high-value property, information marked as sensitive or classified by the Federal Government, and intellectual property.

Significant Modification: An update to an AI application or to the conditions or context in which it is used that meaningfully alters the AI's impact on rights or safety, such as through changing its functionality, underlying structure, or performance such that prior evaluations, training, or documentation become misleading to users, overseers, or individuals affected by the system. This includes significantly changing the context, scope, or intended purpose in which the AI is used.

Underserved Communities: Has the meaning established in Section 10(b) of Executive Order 14091.

[42] Section 5(b) of this memorandum lists AI applications that are presumed to be safety-impacting.
[43] Presidential Policy Directive 21 (PPD-21), *Critical Infrastructure Security and Resilience*, https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/presidential-policy-directive-critical-infrastructure-security-and-resil.

Appendix I: Consolidated Table of Actions

Responsible Entity	Action	Section	Deadline
Each Agency	Designate an agency Chief AI Officer and notify OMB	3(a)(i)	60 days
Each CFO Act Agency	Convene Agency AI Governance Boards	3(a)(ii)	60 days
Each Agency	Submit to OMB and release publicly an agency plan to achieve consistency with this memorandum or a written determination that the agency does not use and does not anticipate using covered AI	3(a)(iii)	180 days and every two years thereafter until 2036
Each CFO Act Agency	Develop and release publicly an agency strategy for removing barriers to the use of AI and advancing agency AI maturity	4(a)(i)	365 days
Each Agency*	Publicly release an expanded AI use case inventory (for DoD: submit to OMB metrics on use cases other than National Security Systems)	3(a)(iv), 3(a)(v)	Annually
Each Agency*	Stop using any safety-impacting or rights-impacting AI that is not in compliance with Section 5(c) and has not received an extension or waiver	5(a)(i)	August 1, 2024 (with extensions possible)
Each Agency*	Report to OMB any agency-specific lists of AI purposes that are presumed to be rights-impacting or safety-impacting	5(b)	Annually
Each Agency*	Conduct periodic risk reviews of any safety-impacting and rights-impacting AI in use	5(c)(iv)(D)	At least annually and after significant modifications
Each Agency*	Report to OMB any determinations made under Section 5(b) or waivers granted under Section 5(c)	5(b); 5(c)(iii)	Ongoing, within 30 days of granting waiver

* Excluding agencies in the Intelligence Community.

PUBLIC SUBMISSION

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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0102
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Center for American Progress

General Comment

Re: Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum; FR Doc. 2023-24269, 23 Nov. 2023.

Dear Ms. Martorana,

Artificial Intelligence (AI) has the potential to dramatically impact nearly all the federal government's operations and engagement with the American people. The opportunities and risks of AI, combined with the power of the state, places an even greater burden on the federal government to ensure its ethical use of AI, especially when AI is used for purposes that impact safety or rights. The federal government, its contractors, and its grantees' use of AI should only be allowed if those AI systems are effective, safe, and nondiscriminatory.

The Center for American Progress (CAP) has called for the Executive Branch to take immediate action on AI and has joined the civil rights community and other allies in advocating for centering the White House Blueprint for an AI Bill of Rights (AI Bill of Rights) in any AI executive order (EO) and Office of Management and Budget (OMB) guidance. The President's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI EO) represents a strong start on the guidance needed to ensure the development of safe and effective AI.

The accompanying draft OMB guidance "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" is essential guidance for federal agencies and contractors that are already using AI systems. Particularly worthy of praise is the draft guidance's definition of safety-impacting and rights-impacting AI and purposes that are presumed to be safety-impacting and rights-impacting. These thoughtful definitions are an important step forward in outlining the conditions in which the use of AI requires extra attention and caution.

Below CAP provides the following response to the Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum; FR Doc. 2023-24269. Please contact Adam Conner (aconner@americanprogress.org) with any questions.

Sincerely,

The Center for American Progress

Adam Conner
Vice President, Technology Policy The Center for American Progress

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Attachments

CAP Draft OMB Comments Final 12.04.2023

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December 5, 2023

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Submitted electronically via www.regulations.gov

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The accompanying draft OMB guidance "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"[7] is essential guidance for federal agencies and contractors that are already using AI systems.[8] Particularly worthy of praise is the draft guidance's definition of safety-impacting and rights-impacting AI and purposes that are presumed to be safety-impacting and rights-impacting. These thoughtful definitions are an important step forward in outlining the conditions in which the use of AI requires extra attention and caution.

Below CAP provides the following response to the Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum; FR Doc. 2023-24269. Please contact Adam Conner (aconner@americanprogress.org: 202-669-5671) with any questions.

Sincerely,

The Center for American Progress

Adam Conner
Vice President, Technology Policy
The Center for American Progress

The draft OMB AI guidance puts principles from the 2022 White House Blueprint for an AI BIll of Rights into effect for the federal government's use of AI

The White House AI Bill of Rights "identified five principles that should guide the design, use, and deployment of automated systems to protect the American public in the age of artificial intelligence"[9] along with examples of how to implement those principles in practice. The draft OMB AI guidance integrates aspects of the AI Bill of Rights in its guidance to federal agencies within the limits of executive authority.

The integration of the AI Bill of Rights principles of "Safe and Effective Systems" and "Algorithmic and Discrimination Protections" into federal agency guidance is reflected in the minimum requirements for safety-impacting and rights-impacting AI, including: 1) AI impact assessments that include examining purpose and risks, 2) Testing and independent evaluation, 3) Mitigating emerging risks to rights and safety, 4) Tasks to ensure AI advances equity, dignity, and fairness.[10]

The AI Bill of Rights principle of "Human Alternatives, Consideration, and Fallback" [11] can be seen in the requirements for periodic human review, human training and assessment, and appropriate human consideration.[12] This direct application of the AI Bill of Rights practice for agencies using AI systems is essential to ensuring their trustworthiness and is how the government can lead by example by putting the AI Bill of Rights in practice.

Conversely, the draft OMB AI Guidance lacks needed specifics for agencies to implement the AI Bill of Rights Principles of "Notice and Explanation" and "Data Privacy."[13] Recommendations regarding the addition of those two principles can be found below.

Agencies must be instructed to include "Notice and Explanation" to users who encounter any AI systems

The ongoing minimum requirements for a safety-impacting or rights-impacting AI are outlined in Section 5.c.iv.D through Section 5.c.iv.H of the draft OMB guidance. In particular, Section 5.c.iv.H, "Provide public notice and plain-language documentation through the AI use case inventory," states that

> "Agencies must ensure…that the AI's entry in the use case inventory serves as adequately detailed and generally accessible documentation of the system's functionality that provides public notice of the AI to its users and the general public. Where practicable, agencies should include this documentation or link to it in contexts where people will interact with or be impacted by the AI."[14]

This language suggests that the AI's listing in the use case inventory is sufficient public notice of the use of the AI to the users, which seems an unlikely proposition as it would require users to know about and seek out an agency's AI use case inventories. The recommendation for agencies to "include this documentation or link to it in contexts where people will interact with or be impacted by the AI" is a kind of notice and explanation. But the suggestion to include or link to AI use case inventories as a way to alert users of interaction with a specific AI system and to learn more information about that AI system is a poor user experience. The existing agency AI use case inventories listed on AI.gov[15] tend to list all AI use cases in one large PDF or .csv file,[16] making it difficult to easily digest and forcing a user to search for whatever AI system they are interacting with in a PDF or spreadsheet. A more viable alternative to this approach is detailed below.

The section on practices that must be followed on an "ongoing basis" for safety-impacting or rights-impacting AI in Section 5.c.iv.D through Section 5.c.iv.H of the draft OMB AI guidance should add a separate requirement to provide notice and transparency to a public end user that is interacting with or being affected by a specific AI system. This notice and explanation requirement should, in real-time, provide information about the specific system involved and if linking to an AI use case, should link to a specific individual use case explanation, not a list of all AI use cases. This notice and transparency requirement is in line with one of the principles of the AI Bill of Rights, "Notice and Explanation", which states "You should know that an automated system is being used and understand how and why it contributes to outcomes that impact you."[17] As the AI Bill of Rights notes in its detailed discussion of the "Notice and Explanation" principle under "What should be expected in automated systems" these notices should be "Provide clear, timely, understandable, and accessible notice of use and explanations," "Provide explanations as to how and why a decision was made or an action was taken by an automated system," and "Demonstrate protections for notice and explanation."[18] Accessible notice and explanation is a fundamental expectation people should have when interacting with AI and the US Government should model its development here.

The draft OMB AI guidance does not provide guidance on "Data Privacy," one of the principles in the AI Bill of Rights

The draft OMB AI guidance does not provide guidance on implementing data privacy practices for AI systems used by the government, contractors, or grantees from the "Data Privacy" principle of the AI Bill of Rights. The guidance's primary mention of data in the minimum practices for safety-impacting and rights-impacting Artificial Intelligence is in Section 5.iv.A.3 "The quality and appropriateness of the relevant data" and Section 5.v.A.3 "using representative data."[19] While federal agencies are governed by existing laws, including the Privacy Act of

1974,[20] and understanding the need for new federal privacy legislation and to address government's use of data, there is no reason for OMB to not outline additional requirements around data privacy such as a directive to collect only strictly required information, stipulate data retention guidelines, and ensure basic data privacy protections. For example, OMB should require federal agencies to uphold the Data Privacy principle of the AI Bill of Rights by having agencies and contractors adopt new data minimization standards, such as those proposed in the bipartisan American Data Privacy and Protection Act (ADPPA) introduced in the 117th Congress.[21]

The purposes that are presumed to be Safety-Impacting or Rights-Impacting AI are among the most important contributions in the draft OMB guidance to the broader development of responsible AI

The federal government wields enormous power to potentially impact lives for the better or worse. In outlining the specific areas where AI is presumed to be safety-impacting or rights-impacting, the draft OMB AI guidance is setting out the first U.S. specific roadmap for how to think about actual scenarios where AI is poised to do the most potential harm and requires additional responsibility. This is particularly true when the entity is the federal government, which operates with tremendous power and where the public has more limited recourse than when dealing with the private sector.

As the draft OMB AI guidance only binds the federal government, contractors, and grantees in cases of AI for potential safety-impacting and rights-impacting purposes, any complaints that these minimum requirements are overly burdensome or will impact innovation should be ignored. In fact, these requirements will ensure that when the government uses AI for these purposes, innovation will explicitly not trade off against protecting safety or rights. If the approach of safety-forward innovation is adopted by those whose AI systems are used by the government, contractors, or grantees who fall under the OMB AI guidance, then that is a net innovation benefit for all.

Additional clarification and transparency are required for any determination that an AI does not meet the definition of "safety-impacting AI" or "rights-impacting AI"

Section 5b "Determining Which Artificial Intelligence Is Presumed to Be Safety-Impacting or Rights- Impacting" of the draft OMB guidance[22] states:

> "Where an agency currently uses or plans to use AI for a purpose described below, the CAIO, in coordination with other relevant officials as specified by the agency, may make a determination (or reverse a prior determination) that the AI application or component does not match the definitions of "safety-impacting AI"[23] or "rights-impacting AI"[24] and is therefore not subject to the minimum practices. The agency CAIO may make or reverse this determination only with a documented context-specific and system-specific risk assessment. Any such determination or reversal must be reported to OMB within 30 days."[25]

The determination that AI used for purposes that are presumed to be safety-impacting or rights-impacting, but that does not meet the definition of "safety-impacting AI" or "rights impacting AI," is a confusing one to imagine in execution. Additional clarity is needed to specify what can only be anticipated as the limited circumstances in which AI technology being used for safety-impacting or right-impacting purposes would not meet the definition of "safety-impacting AI" or "rights-impacting AI." Otherwise, the ability to make this determination looms large as a potential loophole that could exempt vast swathes of AI that should otherwise be subject to the minimum practices for safety-impacting and rights-impacting AI. In the draft guidance the CAIO retains sole authority to determine if an AI meets the definition of "safety-impacting AI" or "rights-impacting AI" without any potential recourse for disagreement.[26] OMB should direct agencies to create an additional level of review that allows for a decision by the CAIO to be revisited through a process that raises the definition issue to the Deputy Secretary or equivalent that the CAIO reports to.[27] Finally, these definition determinations by the CAIO must only be reported to OMB, but agencies and OMB should be required to jointly make these determinations public in order to provide transparency and prevent abuse.

Clarity and transparency are required for any waivers from minimum practices for safety-impacting and rights-impacting AI

Additional clarity is needed to outline the circumstances under which agencies can seek waivers from having to meet minimum practices for either safety-impacting or rights-impacting AI.[28] Delineating these minimum requirements will be essential to providing critical assurance to the public and those in charge of oversight that the use of AI that is safety-impacting or rights-impacting or for safety-impacting or rights-impacting purposes will be monitored. Clarity is needed to ensure a very high bar for issuance and uniformity in that approach. Similar to the note above for definitions, the draft guidance gives an agency CAIO sole authority to issue waivers from minimum practices without any potential recourse for disagreement.[29] OMB should direct agencies to create an additional level of review that allows for a waiver decision by the CAIO to be revisited through a process that raises the issue to the Deputy Secretary or equivalent that the CAIO reports to.[30] Agencies must be required to report such waivers to OMB within 30 days, make any waiver determinations public, and publish a master list of such waivers.

OMB should establish a process to add new presumed safety-impacting or rights-impacting AI purposes

As noted above, the OMB AI guidance purposes that are presumed to be safety-impacting or rights-impacting[31] are a critical step in ensuring a balanced assessment around the purpose and risk of agencies using AI. However, the guidance does not outline any process to add new presumed safety-impacting or rights-impacting AI purposes in the future. As AI technology continues to advance, flexibility should be provided to ensure these purposes can keep pace with new developments. OMB should establish a process to add new purposes to the initial list of safety-impacting or rights-impacting AI, possibly under the section "Determining Which Artificial Intelligence Is Presumed to Be Safety-Impacting or Rights- Impacting."[32] OMB should also create a mechanism by which the public can submit new safety-impacting or rights-impacting purposes for consideration. The responsibility for adding new purposes presumed to

be safety-impacting or rights-impacting should be driven by the interagency council to coordinate AI that will consist of the agencies CAIO's once designated in Section 10.1 of the AI EO.[33]

The OMB AI Guidance does not clearly state that not adopting AI that is safety-impacting or rights-impacting should always be a strong option and that failing any part of the minimum requirements should result in an agency not using or to stop using AI

The draft OMB AI guidance allows the adoption of AI by federal agencies, so long as the process requirements in the minimum practices for AI that are automatically presumed to be safety-impacting or rights-impacting are completed. The draft guidance does not and should clearly state that not adopting AI that is safety-impacting or rights-impacting should always be a strong option for an agency. OMB should issue clearer general criteria to make clear when an AI system should not be considered as an option.

OMB should also add to Section 5.iv. "Minimum Practices for Either Safety-Impacting or Rights-Impacting AI"[34] to specifically state that AI that fails to meet individual components of the minimum practices should result in the agency not using or to stop using that AI.

Failing any part of the AI impact assessment should also result in an agency not using or stopping using AI. The AI impact assessment minimum practice requirement for safety-impacting or rights-impacting AI should clearly state and require that failing any of the three parts of the AI impact assessment (purpose and benefit, risk, and quality of appropriateness of the data) should result in the agency not using the AI systems. In the current draft of the AI impact assessment requirements only the second requirement "The potential risks of using AI" section explicitly states "if the benefits do not meaningfully outweigh the risks, agencies should not use the AI."[35] The overall requirements for "Complete AI impact assessment"[36] should explicitly state that failing any three parts of the assessment below should disqualify an AI system from use by the agency. Additionally, the first requirement "The intended purpose for the AI and its expected benefit"[37] should explicitly state that if the AI cannot be shown to meet its expected purpose or benefit, it should not be used. Similarly, the third requirement "The quality and appropriateness of the relevant data"[38] should make explicit that if data cannot be shown to meet the fitness and quality to meet the AI's intended purpose, the AI should not be used.

Section 5.c.iv.C "Independently evaluate the AI"[39] should be strengthened to explicitly state that if the independent reviewing authority does not find that the AI "works appropriately and as intended, and that its expected benefits outweigh its potential risks," the AI system should not be used.

Section 5.c.iv.D "Conduct ongoing monitoring and establish thresholds for periodic human review" states that ongoing monitoring and periodic human reviews are "to determine whether the existing implementation of the minimum practices in this section adequately mitigates any new risk."[40] This should be clarified to explicitly state that if a new, inadequately mitigated risk comes to light during monitoring or periodic human review, then a process must be initiated to mitigate the risk or to stop using the AI.

Labor and Workforce
In Section 5.b.ii, we recommend the addition of "collective bargaining, workplace organizing, union membership, or concerted activity" to part G to ensure the further protection of workers from AI systems and to continue the Biden-Harris administration's historic support for organized labor and the working people of America.

Concerns Around Disability and Civil Rights
The disability community is impacted by AI in numerous safety-impacting and rights-impacting purposes and must be top of mind as a consideration in any AI usage by agencies, the OMB guidance should reflect this. While AI has great promise for increasing accessibility in both the online and real world,[41] accessibility cannot be the only issue in which the disability community is engaged. Members of the disability community have the potential to be harmed across multiple areas of presumed safety-impacting or rights-impacting purposes of AI through , and accessibility is a distinct subset of many AI issues. The draft guidance should specifically include a focus on the disability community by incorporating the following changes to the guidance.

The definitions of "Rights-Impacting AI"[42] and "Safety-Impacting AI"[43] should be modified to specifically reference and include those with disabilities (additions below in **bold and underlined**):

> Rights-Impacting AI: AI whose output serves as a basis for decision or action that has a legal, material, or similarly significant effect on an individual's or community's:
>
> 1. Civil rights, civil liberties, or privacy, including but not limited to freedom of speech, voting, human autonomy, **disability rights,** and protections from discrimination, excessive punishment, and unlawful surveillance;
> 2. Equal opportunities, including equitable access to education, housing, credit, employment, **disability rights, reasonable accommodations**, and other programs where civil rights and equal opportunity protections apply; or
> 3. Access to critical resources or services, including healthcare, financial services, social services, transportation, non-deceptive information about goods and services, and government benefits or privileges.

> Safety-Impacting AI:AI that has the potential to meaningfully impact the safety of:
>
> 1. Human life or well-being, including loss of life, serious injury, bodily harm, biological or chemical harms, occupational hazards, harassment or abuse, **language access, disability,** or mental health, including both individual and community aspects of these harms;
> 2. Climate or environment, including irreversible or significant environmental damage;
> 3. Critical infrastructure, including the critical infrastructure sectors defined in Presidential Policy Directive 2143 and the infrastructure for voting and protecting the integrity of elections; or,

4. Strategic assets or resources, including high-value property, information marked as sensitive or classified by the Federal Government, and intellectual property.

Additionally, Section 5.b.ii "Purposes That Are Presumed to be Rights-Impacting"[44] should add a section addressing the impact on the disability community:

L. Impacting those with disabilities or medical conditions including but not limited to accommodations, accessibility, protections including the Americans with Disabilities Act. Agencies should be instructed to consider the specific impact on the disabled community in all safety-impacting and rights-impacting purposes. The safety-impacting and rights-impacting purposes that are likely to impact the disability community include but are not limited to Section 5.b.ii B (Law enforcement or surveillance-risk), C (immigration, asylum, or detention status), D (Detecting or measuring emotions or attention), E (in education), F (Tenant screening), G (Determining the terms and conditions of employment), H (decisions regarding medical devices), J (government benefits or services), and K (Recommendations or about child welfare, child custody).

Finally, the OMB Guidance should recommend the appointment of a Federal Chief Accessibility Officer to coordinate the implementation of AI for greater accessibility in government.[45]

Generative AI as a new feature in existing approved and procured office productivity software

The leading office software suites, Microsoft 365 and Google Workplace,[46] have already announced they will be bringing generative AI to their millions of enterprise customers, which include almost every federal agency.[47] While most agencies use the government specific versions of office productivity software, they have very few if any functional differences with the commercial versions. Microsoft has already announced its generative AI roadmap for the government.[48]

Section 5.v.d.v "Responsibility Procuring Generative AI"[49] appears to refer to generative AI and contracts to procure it only in the future tense. It ignores the likely widespread rollout of generative AI to the federal government within existing contracts and the addition of generative AI as a feature to office productivity software systems that are already procured by nearly every federal agency. Additional procurement guidance should be provided to clarify generally the addition of AI features to existing procured software. Specifically, given the near-term widespread availability of generative AI as a feature in every federal agency's already procured office productivity software, OMB should require federal guidance before enabling widespread deployment of generative AI in existing office productivity software. OMB should task the Office of the Federal Chief Information Officer and the CIO Council to craft such guidance in coordination with the new interagency council of agency CAIOs.[50]

Procurement

OMB should clarify in the guidance that the new AI EO and accompanying draft OMB AI guidance applies to federal agencies and their contractors. OMB should also provide clarity to ensure that federal grants, especially to state and local governments, are also covered by the Memo. AI is a new technology and vendors may be prone to making promises that are unrealistic or impossible.[51] Procurement guidelines should emphasize that vendors claims should be scrutinized to pre-procurement and after-procurement and information on systems, especially false claims, should be shared across the federal government to provide maximum information for future procurements.

Elevate prior AI EO and OMB AI guidance on reporting agency statutory regulatory authorities for AI

The new draft OMB guidance "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" notes "The principles of this memorandum do not, by contrast, govern agencies' regulatory actions designed to prescribe law or policy regarding non-agency uses of AI."

While understanding regulation is not the focus of this OMB guidance, the proposed document provides an opportunity to elevate and prioritize one strong aspect of the previous Executive Order 13859 of "Maintaining American Leadership in Artificial Intelligence"[52] from February 11, 2019 and OMB guidance M-21-06 "Guidance for Regulation of Artificial Intelligence Applications"[53] from November 17, 2020. EO 13859 required "the heads of implementing agencies that also have regulatory authorities shall review their authorities relevant to applications of AI and shall submit to OMB plans to achieve consistency with the memorandum" which OMB M-21-06 noted "Executive Order 13859 requires that implementing agencies with regulatory authorities review their authorities relevant to AI applications and submit plans to OMB on achieving consistency with this Memorandum. The agency plan must identify any statutory authorities specifically governing agency regulation of AI applications, as well as collections of AI-related information from regulated entities" with a template requiring "Statutory Authorities Directing or Authorizing Agency Regulation of AI Applications. List and describe any statutes that direct or authorize your agency to issue regulations specifically on the development and use of AI applications." The Department of Health and Human Services was the only agency to publicly release their collection of AI authorities.[54] This inventory of agency regulatory authorities for AI is a strong exercise for agencies to undergo to better understand their authorities in relation to AI. This regulatory undertaking would be of immense interest to Congress, civil society, and the public as we work to understand if new AI laws are needed or if existing AI authorities are sufficient.

In order to aid all agencies in achieving the goals outlined in the President's new Executive Order 14110 "Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence,"[55] the new draft OMB AI guidance should resurface the requirement from OMB M-21-06[56] for agencies to inventory their full list of potential AI regulatory authorities, add the requirement to inventory for AI regulatory authorities for the agencies and CAIOs in Section 3.a and 3.b.,[57] require that list to be submitted to OMB and the new White House AI Council

established in EO 14110 within 90 days, and the list of such agency regulatory authorities should also be made public by the agencies and the White House on AI.gov.

Questions from the Requests for Comment

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

As noted above, the disability community is impacted by numerous purposes in the list of purposes that are presumed to be safety-impacting or rights-impacting. Too often when it comes to AI, the disability community's concerns are reduced to accessibility when the impact of AI on the disability community is much broader. The disability community's specific needs should be added as a specific consideration in Section 5(b) with language like this:

> Impacting those with disabilities or medical conditions including but not limited to accommodations, accessibility, protections including the Americans with Disabilities Act. Agencies should be instructed to consider the specific impact on the disabled community in all safety-impacting and rights-impacting purposes. The safety-impacting and rights-impacting purposes that are likely to impact the disability community include but are not limited to Section 5.b.ii B (Law enforcement or surveillance-risk), C (immigration, asylum, or detention status), D (Detecting or measuring emotions or attention), E (in education), F (Tenant screening), G (Determining the terms and conditions of employment), H (decisions regarding medical devices), J (government benefits or services), and K (Recommendations or about child welfare, child custody).

In Section 5.b.ii, we recommend the addition of "collective bargaining, workplace organizing, union membership, or concerted activity" to part G to ensure the further protection of workers from AI systems and to continue the Biden-Harris administration's historic support for organized labor and the working people of America.

Finally, we recommend a category for the administration of democratic processes, including but not limited to election administration, voter registration, public comments submitted to the government, and other aspects of the democratic process overseen by federal agencies.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

The minimum practices identified for safety-impacting and rights-impacting AI are a commendable step by the administration to set higher level safeguards for certain usages of AI in the federal government, including with contractors and grantees. However, it is critical that these determinations are made in a way that can be iterative, changed, and added to. Given the nascent yet rapidly advancing nature of the technology, there will undoubtedly be additional

uses and expanded current uses that can and should be deemed safety- or rights-impacting in the future. OMB should set out processes for evaluating new and updating existing cases in a thorough, efficient, and timely manner prior to any new or updated uses of AI in government to ensure this approach is future-proof. Specifically for existing applications of AI for new uses or with enhanced models, OMB should stipulate exact thresholds for when these are reviewed and outline the process by which agencies must do so and when.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

The annual use case inventory should be in an easily readable format and also available in a machine-readable format that does not require significant technical expertise to access, understand, or analyze. NIST should work with the interagency council to coordinate AI in government to help prototype standards to be used for this use case inventory. Additionally, it should include the below specific information for each unique use case, even when shared among the same models or system including:

- Name, description, and developer information of AI model/system
- Exact ways the model is utilized and for which use cases
- Model inputs and outputs by data type, anonymized for maximum privacy protection
- Who the intended recipients of the model's decisions are and for what purpose
- Information regarding human in the loop on AI-generated decisions
- Last time model was assessed for rights- and safety-impacting determinations and what those outcomes were

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[1] Center for American Progress and others, "Letter to the White House on Forthcoming AI Executive Order," Center for American Progress, August 3, 2023, available at https://www.americanprogress.org/wp-content/uploads/sites /2/2023/08/Letter-to-WH-on-AI-EO.pdf

[2] Adam Conner, "The Needed Executive Actions to Address the Challenges of Artificial Intelligence," Center for American Progress, April 25, 2023, available at https://www.americanprogress.org/article/ the-needed-executive-actions-to-address-the-challenges-of-artificial-intelligence/.

[3] The White House, "Blueprint for an AI Bill of Rights," available at https://www.whitehouse.gov/ ostp/ai-bill-of-rights/ (last accessed December 2023).

[4] Megan Shahi and Adam Conner, "Priorities for a National AI Strategy," August 10, 2023, available at https://www.americanprogress.org/article/priorities-for-a-national-ai-strategy/; Center for American Progress and others, "Letter to the White House on Forthcoming AI Executive Order;" and Center for American Progress and others, "Letter to the White House on Artificial Intelligence Executive Order," September 5, 2023, available at https://www.american progress.org/wp-content/uploads/sites/2/2023/09/Letter-to-WH-on-AI-Exec-Order_9-6.pdf.

[5] Executive Office of the President, "Executive Order 14110 of October 30, 2023: Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence," November 1, 2023, available at https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

[6] Center for American Progress, "STATEMENT: CAP's Alondra Nelson Praises Executive Order on Artificial Intelligence," Press release, October 30, 2023, available at https://www.americanprogress.org /press/statement-caps-alondra-nelson-praises-executive-order-on-artificial-intelligence/.

[7] Shalanda D. Young, "Proposed Memorandum For The Heads Of Executive Departments And Agencies: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," available at https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft- for-public-review.pdf (last accessed December 2023).
[8] The White House,"The Government is Using AI to Better Serve the Public," available at https://ai.gov/ai-use-cases/ (last accessed December 2023).
[9] The White House, "Blueprint for an AI Bill of Rights."
[10] Young, "Proposed Memorandum For The Heads Of Executive Departments And Agencies: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," Page 15, Section 5.iv.A and Page 17, Section 5.ivcB and Section 5.iv.C, Page 17, Section 5.iv.E and Page Section 5.v.A.
[11] The White House, "Blueprint for an AI Bill of Rights."
[12] Young, "Proposed Memorandum For The Heads Of Executive Departments And Agencies: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," Page 17, Section 5.iv.D and Page 17, Section 5.iv.F and Page 18, Section 5.iv.G.
[13] The White House, "Notice and Explanation," available at https://www.whitehouse.gov/ostp/ ai-bill-of-rights /notice-and-explanation/ (last accessed December 2023); and The White House, "Data Privacy," available at https://www.whitehouse.gov/ostp/ai-bill-of-rights/ data-privacy-2/ (last accessed December 2023).
[14] Young, "Proposed Memorandum For The Heads Of Executive Departments And Agencies: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," Page 18, Section 5.c.iv.H.
[15] The White House,"The Government is Using AI to Better Serve the Public."
[16] Department of Health and Human Services, "Artificial Intelligence Use Cases - FY2022," available at https://www.hhs.gov/sites/default/files/hhs-ai-use-cases-inventory.pdf (last accessed December 2023); and USDA, "2023 Public Inventory of AI Use Cases," available at https://www.usda.gov/sites/default/files/documents/2023%20Public%20Inventory%20of%20AI%20Use%20Cases%20-%20USDA.csv (last accessed December 2023).
[17] The White House, "Notice and Explanation," available at https://www.whitehouse.gov/ostp /ai-bill-of-rights/notice-and-explanation/ (last accessed December 2023).
[18] The White House, "Notice and Explanation."
[19] Young, "Proposed Memorandum For The Heads Of Executive Departments And Agencies," Page 15-16, Section 5.iv.A.3 and Page 19, Section 5.v.A.3.
[20] U.S. Department of Justice, "Privacy Act of 1974," available at https://www.justice.gov/opcl/ privacy-act-1974.
[21] Center for American Progress and others, "Letter to the White House on Forthcoming AI Executive Order;" and American Data Privacy and Protection Act of 2022, H.R.8152, 117th Cong, 2nd sess., (June 21, 2022), available at https://www.congress.gov/bill/117th-congress/house-bill/8152/text.
[22] Young, "Proposed Memorandum For The Heads Of Executive Departments And Agencies," Page 10-11, Section 5.b.
[23] Ibid, Page 25.
[24] Ibid, Page 26.
[25] Ibid, Page 10-11, Section 5.b.
[26] Ibid, Page 11, Section 5.b.
[27] Ibid, Page 7, Section 3.b.iv.
[28] Ibid, Page 14, Section 5.c.iii.
[29] Ibid, Page 14, Section 5.c.iii.
[30] Ibid, Page 7, Section 3.biv.
[31] Ibid, Page 10, Section 5.b.
[32] Ibid, Page 10, Section 5.b.

[33] Executive Office of the President, "Executive Order 14110 of October 30, 2023: Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence."
[34] Young, "Proposed Memorandum For The Heads Of Executive Departments And Agencies: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," Page 15, Section 5.c.iv.
[35] Ibid, Page 15, Section 5.c.iv.A.2.
[36] Ibid, Page 15, Section 5.c.iv.A.
[37] Ibid, Page 15, Section 5.c.iv.A.1.
[38] Ibid, Page 15, Section 5.c.iv.A.3.
[39] Ibid, Page 16, Section 5.c.iv.C.
[40] Ibid, Page 17, Section 5.c.iv.D.
[41] OpenAI, "Be My Eyes," March 14, 2023, available at https://openai.com/customer-stories/be-my-eyes.
[42] Young, "Proposed Memorandum For The Heads Of Executive Departments And Agencies," Page 24
[43] Ibid, Page 25.
[44] Ibid, Page 12, Section 5.b.ii.
[45] Shahi and Conner, "Priorities for a National AI Strategy."
[46] Nihal Krishan, "Microsoft rolls out generative AI roadmap for government services" *FedScoop*, October 31, 2023, available at https://fedscoop.com/microsoft-rolls-out-generative-ai-roadmap-for-government -services/; and Karen Dahut, "Accelerating the mission with generative AI," *Google*, July 31, 2023, available at https://cloud.google.com/blog/topics/public-sector/accelerating-mission-generative-ai.
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[49] Young, "Proposed Memorandum For The Heads Of Executive Departments And Agencies: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," Page 21, Section 5.v.d.v.
[50] Shahi and Conner, "Priorities for a National AI Strategy."
[51] Sharon Goldman, "Princeton University's 'AI Snake Oil' authors say generative AI hype has 'spiraled out of control,'" VentureBeat, Aug. 23, 2023, available at https://venturebeat.com/ai/princeton-university-ai-snake-oil-professors-say-generative-ai-hype-has-spiraled-out-of-control/.
[52] Executive Office of the President, "Executive Order 13859 of February 11, 2019: Maintaining American Leadership in Artificial Intelligence," February 14, 2019, available at https://www.federalregister.gov/ documents/2019/02/14/2019-02544/ maintaining-american-leadership-in-artificial-intelligence.
[53] Russell T. Vought, "Memorandum For The Heads Of Executive Departments And Agencies," November 17, 2020, available at https://www.whitehouse.gov/wp-content/uploads/2020/11/M-21-06.pdf.
[54] Department of Health and Human Services, "OMB M-21-06 (Guidance for Regulation of Artificial Intelligence Applications)," available at https://www.hhs.gov/sites/default/files/department-of-health -and-human-services-omb-m-21-06.pdf (last accessed December 2023).
[55] Executive Office of the President, "Executive Order 14110 of October 30, 2023: Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence."
[56] Vought, "Memorandum For The Heads Of Executive Departments And Agencies."
[57] Young, "Proposed Memorandum For The Heads Of Executive Departments And Agencies: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," Page 4, Section 3.a; Page 5, Section 3.b.

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0103
Comment from Matthew Mittelsteadt

Submitter Information

Name: Matthew Mittelsteadt

General Comment

See attached file(s)

Attachments

Matthew_Mittelsteadt_MercatusCenter_OMB

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George Mason University

PUBLIC INTEREST COMMENT

HOW DO WE PREPARE THE GOVERNMENT FOR AI?

MATTHEW MITTELSTEADT
Research Fellow, Mercatus Center at George Mason University

Draft memorandum titled *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)*
Agency: Office of Management and Budget
Comment Period Opens: November 3, 2023
Comment Period Closes: December 5, 2023
Comment Submitted: December 5, 2023
Docket No. 2023-24269

INTRODUCTION

As President Biden said in the AI executive order he announced on October 30, "Responsible AI use has the potential to help solve urgent challenges while making our world more prosperous, productive, innovative, and secure."[1] The promise of this technology, for both private and public application, cannot be understated. As the OMB revises its guidance, it is essential that the office both embrace and disseminate an understanding that, for public-sector application, AI is a collection not of "what ifs" but of real, transformative applications that can and must be employed today. Already, we are seeing the tip of the iceberg for truly impactful and beneficial relevant public-sector application of this technology:

- **In some cases, AI can supercharge key government services**. In November, DeepMind introduced GraphCast, a weather-forecasting algorithm that can produce higher accuracy predictions in one minute than the National Weather Service's gold standard models produce in hours.[2] Implementation of these AI models would have the added bonus of dramatically lowering the National Weather Service's staggering carbon toll.
- **In other cases, AI can help further government priorities**. Using AlphaFold, DeepMind solved the notoriously complex *protein folding problem*, providing crucial biological understanding that may supercharge rapid, ultra-targeted vaccine and drug development during future pandemics.[3]

[1] Exec. Order No. 14110, 88 Fed. Reg. 75191 (October 30, 2023).
[2] Google DeepMind, "GraphCast: AI Model for Faster and More Accurate Global Weather Forecasting," (blog), November 14, 2023.
[3] Google DeepMind, "Technologies, AlphaFold" (website), accessed December 4, 2023, https://deepmind.google/technologies/alphafold/.

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The ideas presented in this document do not represent official positions of the Mercatus Center or George Mason University.

- **Critically, AI is also helping officials manage the now unwieldy bloat of government rules.** To distill and manage its policies—a cumbersome body of text longer than 100 copies of Leo Tolstoy's 500,000-word novel *War and Peace*—the Department of Defense developed GAMECHANGER, a program that parses and navigates these policies, a task no longer humanly possible.[4]

Beyond these already mature, relevant public-sector applications, there are countless other potential use cases: Powerful agency chatbots could cost-effectively serve constituents on a 24/7 basis; conduct consular interviews; qualitatively deepen census data; monitor budgetary waste, fraud, and abuse; and provide instant translation for non-English speakers. To harness this potential, and the many mature AI applications, I urge the administration and the OMB to pivot toward a "diffusion-centric AI strategy," focused not on rules-for-rules' sake but on guidance aimed at building trust, fostering engagement, and pushing the broad, rapid diffusion of this technology across federal agencies and society where applicable.[5]

The OMB should also recognize that the significance of getting this right for the federal government goes beyond just seizing these AI opportunities. While 71 percent of government executives believe the benefits of emerging AI applications outweigh the risks,[6] a sense of AI skepticism and fear has taken root in the broader workforce. Today's government workers will be tomorrow's decision-makers, and their view of AI will have deep impacts on future policies and implementation efforts. To counter AI skepticism and fear of the AI unknown, AI diffusion is essential. Only through direct hands-on experience with AI can the government workforce understand its benefits. If public-sector AI diffusion lags, we will miss this hands-on experience: interest in AI's promise will likely fade and long-term efforts will likely fail.

With this important goal of paid AI diffusion in mind, below I highlight certain concerns and opportunities the OMB should consider to improve this guidance and serve a diffusion-centric implementation strategy:

1. Provide education on AI potential, use cases, and mature applications.
2. Consider opportunity costs for minimum practices for safety-impacting or rights-impacting AI.
3. Recognize excessive regulation as a barrier to responsible use.
4. Measure AI diffusion.

1. PROVIDE EDUCATION ON AI POTENTIAL, USE CASES, AND MATURE APPLICATIONS

Broad AI success requires energy, engagement, and understanding of the possible. Today, many in the government workforce may not understand how AI can be used and why this technology may matter in their work; for most, the concept of "AI" is often falsely limited to chatbots like ChatGPT.

For agencies and their staff to successfully identify and imagine use cases, they need to understand the wide range of AI capabilities beyond chatbots. I recommend that the OMB require each agency to hold educational sessions for staff at all levels on mature AI technologies—both their range and ability to

[4] Ken Klippensteain, "Pentagon's Budget Is So Bloated That It Needs an AI Program To Navigate It," *The Intercept*, September 20, 2023.
[5] Jordan Schneider and Matthew Mittelsteadt, "The Key to Winning the Global AI Race," *Noema*, September 19, 2023.
[6] Fedscoop, "Government Gears Up to Embrace Generative AI," October 17, 2023.

improve work. If implemented well, such sessions should help generate a sense of engagement and excitement, emboldening agencies and their staff to *want* AI rather than to feel compelled to use it.

2. CONSIDER OPPORTUNITY COSTS FOR MINIMUM PRACTICES FOR EITHER SAFETY-IMPACTING OR RIGHTS-IMPACTING AI

Responsibility is essential when implementing AI technologies, but the OMB's guidance must recognize that attaining true AI safety and responsibility is not equivalent to providing a list of rules. Opportunity costs, implementation burdens, and the potential negatives of low-tech alternatives also matter. While it's unclear whether the eight new minimum practices required for AI applications listed in this guidance will be burdensome or not, I urge the OMB to err on the side of a light touch. If process burdens are flexible, agencies will have the freedom to experiment and choose the most responsibility-enhancing IT paths forward.

To illustrate, consider the opportunity cost of forgoing machine-translation services. While human translators may be more familiar and therefore more trusted, by over-relying on this limited human labor the government will necessarily forgo the ability to make translation services accessible in real time to a diverse audience. In this case, delaying or blocking AI application may indeed be the irresponsible option.

Recognition of such opportunity cost means embracing that AI may indeed be the safest, most efficient, low-cost, and responsible option. Recognition of opportunity costs is not tantamount to blind AI boosterism; embracing this principle, likewise, means recognizing that in many cases standard digital options might indeed be the most responsible best path forward. These balanced considerations of AI responsibility and opportunity costs, however, may not be possible if excessive processes create a burden of longstanding IT implementations, bureaucratic hoops, and millions of taxpayer dollars. Faced with high effort and high costs, the ability to weigh AI benefits against traditional capacities may be removed from decision-makers, forcing them to rely on older technologies and capacities that might limit their ability to successfully carry out government functions and reap the rewards of innovation.

3. RECOGNIZE EXCESSIVE REGULATION AS A BARRIER TO RESPONSIBLE USE

I commend the guidance's emphasis on removing needless barriers to responsible AI. Building AI capacity indeed requires recognizing that bussiness as usual, and exsisting capacities, are likely insufficient. What's missing, however, from the OMB's list of barriers is perhaps the biggest barrier of all: bureaucratic process burdens. As I argued in *Noema Magazine*,

> Today's bureaucratic culture is often structured like a waterfall: Policymakers at the top of the falls make one-way decisions that flow down on top of developers and project managers who, operating under rigid strictures, struggle to build successful systems. The result is a culture of IT inflexibility, where developer ingenuity is bound by rules written by often inaccessible decision-makers. Rather than succeed at policy outcomes, systems are instead designed to follow rules.

Former Obama-Era Deputy Chief Technology Officer and Code for America founder Jennifer Phalka has concurred, arguing that the key to successful policy and IT implementation success lies in "peeling back the layers of process that have accumulated on top of policy."[7]

[7] Jennifer Phalka, "Culture Eats Policy," Niskanen Center, June 21, 2023, https://www.niskanencenter.org/culture-eats-policy/.

To achieve AI success, therefore, the OMB must adjust this guidance to recognize regulatory process as a barrier. The OMB must emphasize to agencies that flexible rules and the removal of needless processes will be the key to experimentation, appropriate design, and rapid deployment.

To build on this emphasis, one potential opportunity the OMB should consider is requiring agencies to create "regulatory burden notification channels" between the low-level staff who pen the code and contracts and the high-level officials who have power to adjust the processes. With such channels in place, process barriers can be revealed and systems adjusted, allowing the system to accommodate implantation needs. In support of the administration's emphasis on AI responsibility, providing such flexibility will allow implementors to experiment, build, and iterate on systems to maximize safety and results, rather than build to maximize adherence to rules.

4. MEASURE AI DIFFUSION

Measurement of AI diffusion will be essential for an effective rollout. In the OMB's guidance, as well as in the executive order, agencies are required to annually take stock of their AI systems inventory. What these inventories miss, however, are key metrics relating to the "depth of adoption." Are these systems being used, or are they collecting dust? Are staff failing to adapt to new AI tools? Are certain departments or offices lagging in AI uptake? Is there perhaps an overreliance on AI automation? All of these questions are important to identify capacity gaps, opportunities for change, and, for the public, transparency about the depth of AI automation in government services.

To capture essential metrics and provide the nuanced detail needed to support whole-of-government efforts, the OMB should require agencies to develop depth of adoption metrics, to illustrate not only what systems they have, but when and how deeply they are being used. Naturally, pushing for the development of such metrics may be beyond the expertise of certain agencies. To aid this process, I recommend the OMB, and perhaps expert agencies like the National Institute of Standards and Technology (NIST), develop default depth of adoption metric recommendations individual agencies can use as a template for their own metrics.

SEIZING OPPORTUNITY

The federal government must embrace the unique nature of the moment. AI is here, yet the AI future remains uncertain. While driving in the dark of AI policy, the OMB must embrace the fact that present uncertainty demands future flexibility. We cannot say what future technologies will emerge and problems will arrise in the coming years. Just as the European Union's AI Act failed to predict the rise of ChatGPT, any rule written today will no doubt fail to account for future developments. Prediction remains a challenge, but what we can say is that AI diffusion and harnessing the positive benefits of proven AI technology must be the end goals. Charting this course therefore means building an AI-ready government, with the the talent, process flexibility, and measured data needed to deploy this tech, experiment, and meet unexpected challenges as they emerge.

Working towards this goal and managing unexpected issues require building an AI-ready government, armed with an AI-educated workforce, low process burdens, and measurements needed to understand, confront, and nimbly solve future AI-related challenges.

PUBLIC SUBMISSION

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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0104
Comment on OMB-2023-0020-0001

Submitter Information

Organization: American Psychological Association

General Comment

See attached

Attachments

APA Response to OMB AI Governance RFI 12.05.23

AMERICAN PSYCHOLOGICAL ASSOCIATION SERVICES, INC.

December 5, 2023

The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Response to AI Memo Request for Comment

Submitted Electronically

Dear Cindy Martinez:

The American Psychological Association Services, Inc. (APA Services) respectfully submits the following response to the request for comment on the governance, innovation, and risk management for agency use of artificial intelligence (AI). APA Services is the companion organization of the American Psychological Association, which is the nation's largest scientific and professional nonprofit organization representing the discipline and profession of psychology, as well as over 146,000 members and affiliates who are clinicians, researchers, educators, consultants, and students in psychological science.

Helping ensure that technology shapes the future for the better requires understanding the psychology of human-technology interaction. Just as new technological tools are emerging, the psychological science on human interaction with new products and services is also developing. A burgeoning area of psychological science involves the development, use, and impact of artificial intelligence.

Psychologists who study human intelligence are unlocking ways to enhance artificial intelligence and to ensure its ethical and appropriate use. Applied psychologists are studying how important characteristics of AI technologies impact identity and psychological wellbeing. Clinicians are navigating an increasingly complex environment where AI tools can assist in evaluation and diagnosis. Meanwhile, research points out that the deployment of AI is not a one-size-fits-all solution and is perceived differently by different groups of people. For example, even when factors such as age, gender, education, technology skills, and country-level GDP per capita are held constant, those living in societies with greater inequality are more likely to perceive AI as a threat to their role in the workplace.[1]

APA stands in support of the current draft guidance being put forward to heads of agencies related to the governance and use of AI. We believe it is essential for there to be an all-

[1] Shoss, M. K., & Ciarlante, K. (2022). Are Robots/AI Viewed as More of a Workforce Threat in Unequal Societies? Evidence From the Eurobarometer Survey. *Technology, Mind, and Behavior*, *3*(2: Summer 2022). https://doi.org/10.1037/tmb0000078

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of-government approach to governing new artificial intelligence tools and their development. This requires adequate coordination and cross-coordination across government and the involvement of psychologists, well-versed in the research necessary to make the rollout and governance of these new technologies successful. We appreciate a focus on the responsible development of new AI tools and encourage more research funding and access to be main components of this effort. Similarly, the risk-mitigation focus of this proposal is essential to safeguard against the most harmful impacts of these new technologies. We believe this memo represents an important step in the right direction and appreciate the Administration's focus on this issue.

Below are additional considerations the Office of Management and Budget and others in federal agencies should consider when seeking to understand, develop, and regulate new AI-based technologies.

AI Standards

Policymakers and employers alike should be aware of the risks and benefits inherent to developing and using AI in the workplace. To maximize the efficiency and effectiveness of AI, and minimize damages to labor markets, workplaces, and employees, APA believes that artificial intelligence should:

- **Be Human-Centric –** People must remain a central part of technologies involving artificial intelligence, including in the development, deployment, and evaluation stages.
- **Elevate Ethics & Diversity –** Diversity must be present in the individuals, backgrounds, perspectives, and thought processes of those responsible for the creation and deployment of new technologies. Companies must endeavor to embed diversity and reduce unconscious and conscious discrimination in both the development of AI tools and their deployment.
- **Be Well-Researched** – Psychological science focused on the development and deployment of artificial intelligence is a relatively new area of study and more research is needed to ensure effective development of these technologies and to understand the impact of these technologies on human behavior.
- **Be Effective & Risk Adverse–** New uses for AI technologies are discovered every day and deployment of these tools is often done without proper consideration of ethics and efficacy. AI must be properly tested, and the use of these technologies must be limited to applications where it is safe and effective in achieving the intended purpose.
- **Prioritize Privacy –** The data collection fueled by the increased deployment of AI tools is leading to increased risks for individual data privacy. Companies must redouble their efforts to protect data and ensure privacy around data collected by AI technologies. This should include copyright and trademark protection.
- **Maintain Copywrite & Intellectual Property Rights –** Current AI tools and programs exist in violation of copyright and intellectual property standards required of other

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similarly situated technologies, more must be done to ensure compliance with current standards and new standards must be created where necessary.

- **Be Transparently Deployed** – The prevalence of AI tools deployed in the creation of and distribution of content is often unknown by the end user, fueling misunderstandings and misconceptions about the technologies; companies should take steps to increase transparency around the presence of these tools to ensure individuals are aware of the role AI might play in impacting their experience in real world and online environments.
- **Further Digital Literacy** – It is essential that new avenues of education be paired with the deployment of new technologies. Users should be informed about the way new AI technologies work, how they might impact their lives, and how best to interact with these platforms to minimize negative impacts.

As agencies are considering areas within the federal government to centralize AI leadership, APA believes the Office of Science and Technology Policy is well situated to create cross-cutting government policies related to AI. We also believe that there is a role for the National Science Foundation, the National Institutes of Health, specifically the National Institute of Mental Health, and the National Institute on Minority Health and Health Disparities. It is imperative that the government take concrete steps now to form governing bodies and research efforts to better understand the impact of AI.

Data privacy training should be embedded into processes for the development, deployment, and evaluation of AI tools. AI technologies collect and store large amounts of data, including personally identifiable data, and increasingly health-care related data. Federal and state privacy standards must be reexamined to adequately ensure that privacy protections are adequately robust in the fact of increasingly complex technologies. Adequate steps must be taken to ensure that the data collected by these tools is meeting privacy laws and copyright policies.

As with a requirement for data privacy, so should there be requirements for transparency around AI tools. Access for researchers should not be limited to only those that work within the company developing the tools and mechanisms must be built into new technologies that easily allow for researchers to access and analyze anonymized data.

Supporting Medical Innovation

While we need to continue to support and expand the mental and behavioral health care workforce, artificial intelligence and innovative technologies have the potential to positively impact the health care system and the future of service delivery. For example, AI technologies may improve patient care by enhancing diagnostic precision, allowing for more individualized treatment, and improving engagement. AI technologies may assist psychologists and other health professionals in their clinical work by automating administrative tasks and supporting clinical decision making. Additionally, AI could foster the early detection of behavioral health concerns and enable the scaling of interventions to reach a much broader segment of the population than

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currently can access care. For example, digital therapeutics can be used to deliver evidence-based interventions on a scale that vastly exceeds the capacity of the current clinician workforce. These developments, if realized, represent meaningful improvements in the lives of individuals, significant benefits to overall population health, and possible decreases in health care costs.

Technology aimed at identifying and treating social isolation, mental and physical health issues, and providing new tools from transportation to caregiving show promise in improving health.[2] Some of these tools provide a means for helping predict health risks or recommend personalized treatment plans, and others interface directly with patients in the form of therapeutic chatbots.[3]

Yet, the use of AI technology within mental health care raises several ethical considerations. First, AI can be susceptible to bias; if the datasets used to train AI technologies are incomplete or reflect systemic biases, then the resulting AI technologies also will reflect those biases. Ultimately, this could exacerbate existing disparities and inequities. Secondly, given the sensitivity of mental health data, there needs to be considerable attention to data safeguarding to prevent public harm. Users of apps, chatbots, and other AI-based technology must be comprehensively informed about the privacy implications, including what personal data is being collected, how it is stored, who has access to it, and what happens to their data after they stop using the tool. Thirdly, greater transparency is needed regarding the development and technology underlying AI-based tools (while protecting copyright and intellectual property), as well as rigorous testing of the AI-based tools to foster public trust, to establish efficacy, and to minimize unintended consequences.

Ultimately, finding a balance between continued health care innovation and public safety is imperative. Psychologists should be at the forefront of AI development and employment to ensure that human-technology interactions are effective and ethical.

Medical Ethics and Protecting Patients

APA wholeheartedly agrees that new AI tools should centralize transparency and effectiveness in their development and deployment. Unexpected or unacknowledged collection of data being employed in the training of AI models raises serious privacy and transparency

[2] Matheny, M. E., Whicher, D., & Israni, S. T. (2020). Artificial intelligence in health care: a report from the National Academy of Medicine. *Jama*, *323*(6), 509-510. https://jamanetwork.com/journals/jama/article-abstract/2757958; Lee, E. E., Torous, J., De Choudhury, M., Depp, C. A., Graham, S. A., Kim, H. C., ... & Jeste, D. V. (2021). Artificial intelligence for mental health care: clinical applications, barriers, facilitators, and artificial wisdom. *Biological Psychiatry: Cognitive Neuroscience and Neuroimaging*, *6*(9), 856-864. https://doi.org/10.1016/j.bpsc.2021.02.001; Dhelim, S., Chen, L., Ning, H., & Nugent, C. (2023). Artificial intelligence for suicide assessment using audiovisual cues: A review. *Artificial Intelligence Review*, *56*(6), 5591-5618. https://doi.org/10.1007/s10462-022-10290-6

[3] Fiske, A., Henningsen, P., & Buyx, A. (2019). Your Robot Therapist Will See You Now: Ethical Implications of Embodied Artificial Intelligence in Psychiatry, Psychology, and Psychotherapy. *Journal of Medical Internet Research, 21*(5). https://www.jmir.org/2019/5/e13216/

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concerns. The prevalence of AI tools is often unknown by the end user, fueling misunderstandings and misconceptions about the technologies; companies should take steps to increase transparency around the presence of these tools to ensure individuals are aware of the role AI might play in impacting their experience in real world and online environments. The use and exploitation of data will have unknown consequences on the perception and experience of AI tools.[4] AI, like humans, is varied; yet people often see AI as homogeneous. This may result in AI failures being treated as global rather than specific, affecting perception and trust in AI.[5] Trust between humans is earned. Humans, AI, and the context in which AI is employed determine trust in technology, and the limits of this trust must be closely considered.[6]

Transparency requirements should be paired with public education efforts centered around technological literacy. Users should be informed about the way new AI technologies work and use user-provided data, how they might impact their lives, and how best to interact with these platforms to minimize negative impacts.

Deployment of AI tools is often done without proper consideration of ethics and efficacy. AI must be properly tested prior to widespread deployment and the use of these technologies must be limited to applications where it is safe and effective, minimizing unknown, unintended, and inequitable impacts. These new AI technologies can be greatly improved by psychological science.[7] User experience researchers and designers with strong backgrounds in psychological science can play an important role in ensuring new tools are more human, more effective, and more ethical.

The data collection being fueled by the increased deployment of AI tools is leading to increased risks for individual data privacy. Companies must be required to redouble their efforts to protect data and ensure privacy around data collected by AI technologies, especially in the case of sensitive information possessed by health care providers and when copywritten material is present. Companies must also be more transparent related to user data practices and data used for AI training.

Practical Uses for AI in the Workplace

APA acknowledges that new AI technologies can have profound positive impacts on the workplace and worker productivity when developed, tested, and deployed in a responsible way. Already, psychologists are not only working on understanding perceptions of AI in the

[4] Sethumadhavan, A. (2019). Trust in Artificial Intelligence. *Ergonomics in Design*, *27*(2), 34–34. https://doi.org/10.1177/1064804618818592

[5] Longoni, C., Cian, L., & Kyung, E. J. (2023). Algorithmic Transference: People Overgeneralize Failures of AI in the Government. *Journal of Marketing Research*, *60*(1), 170–188. https://doi.org/10.1177/00222437221110139

[6] Kaplan, A. D., Kessler, T. T., Brill, J. C., & Hancock, P. A. (2023). Trust in Artificial Intelligence: Meta-Analytic Findings. *Human Factors*, *65*(2), 337–359. https://doi.org/10.1177/00187208211013988

[7] Gopnik, A. (2017). Making AI More Human. *Scientific American, June 2017*. alisongopnik.com/Papers_Alison/scientificamerican%20Gopnik0617-60.pdf

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workplace, but also are involved in developing AI for more effective use in the workplace. For example, psychologists recently used job descriptions, in tandem with natural-language processing algorithms, to estimate the knowledge and skills necessary for existing and even future jobs.[8]

In a recent survey fielded by APA and The Harris Poll, workers were asked about their perceptions of AI in the workplace.[9] 51% of respondents who worry about AI said their work has a negative impact on their mental health, compared with 29% of workers not worried about AI making some or all of their job duties obsolete in the future. The survey shows 46% of workers worried about AI making part or all of their job duties obsolete. We see that worry about AI is more disproportionately felt among workers with less education, high school graduates worry about AI at a rate 10 percentage points higher than those that completed a four-year degree. Similar disparities were noted in workers of color and younger workers.[10] This upheaval will impact the job satisfaction of workers as well as their security. 46% of individuals worried about AI intend to look for a new job in the next year, compared with 25% of those who did not report being worried. These disparities are likely to grow as the prevalence of AI technologies impact more parts of the workforce. It is essential to understand and create resources to serve the workers most vulnerable to worry and displacement by AI.

It is important to note that psychologists are not only working on understanding perceptions of AI in the workplace, but also are involved in developing AI for more effective use in the workplace. For example, psychologists recently used job descriptions, in tandem with natural-language processing algorithms, to estimate the knowledge and skills necessary for existing and even future jobs.[11] This work underscores the importance of including psychological scientists in the development, regulatory, and evaluation of these new technologies.

AI and Working Conditions

Three AI challenges facing policymakers are working conditions, discrimination, and job displacement. There have been recent reports that highlight the poor working conditions of those individuals responsible for training and inputting data into new AI tools.[12] Often for low wages and centralized to workers in the global south, the work necessary to create tools like ChatGPT comes at a high human cost. We know that workers in these conditions are likely to have a lower

[8] Putka, D.J., Oswald, F.L., Landers, R.N. *et al.* (2023). Evaluating a Natural Language Processing Approach to Estimating KSA and Interest Job Analysis Ratings. *Journal of Business and Psychology, 38*, 385–410. https://doi.org/10.1007/s10869-022-09824-0

[9] American Psychological Association. (2023). *2023 Work in America survey: Artificial intelligence, monitoring technology, and psychological well-being.* https://www.apa.org/pubs/reports/work-in-america/2023-work-america-ai-monitoring

[10] *Id.*

[11] Putka, D.J., Oswald, F.L., Landers, R.N. *et al.* (2023). Evaluating a Natural Language Processing Approach to Estimating KSA and Interest Job Analysis Ratings. *Journal of Business and Psychology, 38*, 385–410. https://doi.org/10.1007/s10869-022-09824-0

[12] Perrigo, B. (2023, January 18). Exclusive: The $2 Per Hour Workers Who Made ChatGPT Safer. Time. https://time.com/6247678/openai-chatgpt-kenya-workers/

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level of life satisfaction and higher prevalence of depression and anxiety.[13] These workers are also exposed to high level of graphic images, which is an activity associated with a number of other mental health symptoms.[14] Because of lack of transparency requirements currently being imposed on companies developing new AI technologies, there is not more information about these workers and their condition. The federal government can and should do more to prevent these working conditions and potential exploitation that can lead to mental health harm.

The European Union, in their recently proposed EU AI Act, have taken an important step to recognize the potential for unfairness and discrimination that new AI tools present.[15] Stating that "'diversity, non-discrimination and fairness' means that AI systems shall be developed and used in a way that includes diverse actors and promotes equal access, gender equality and cultural diversity, while avoiding discriminatory impacts and unfair biases that are prohibited by Union or national law," this regulation seeks to minimize the negative impacts we know are possible with AI. Adoption of a similar proposal at the federal level in the U.S. would be an important step forward in avoiding discrimination and furthering fairness. A similar framework has been proposed by psychological scientists that can also be considered.[16]

We are beginning to understand how AI technologies might displace individual workers or entire sections of our economy. Researchers "argue that the conditions for AI to either enhance or threaten workers' sense of identity derived from their work depends on how the technology is functionally deployed (by complementing tasks, replacing tasks, and/or generating new tasks) and how it affects the social fabric of work."[17] Agencies have the ability to set resources aside to prepare for these negative impacts and create an environment that helps to minimize them.

AI and Workplace Bias

[13] Howell, R. T., & Howell, C. J. (2008). The relation of economic status to subjective well-being in developing countries: A meta-analysis. Psychological Bulletin, 134(4), 536–560. https://doi.org/10.1037/0033-2909.134.4.536; Ridley, M., Rao, G., Schilbach, F., & Patel, V. (2020). Poverty, depression, and anxiety: Causal evidence and mechanisms. Science, 370(6522), eaay0214. DOI: 10.1126/science.aay0214

[14] Holman, E. A., Garfin, D. R., Lubens, P., & Silver, R. C. (2020). Media Exposure to Collective Trauma, Mental Health, and Functioning: Does It Matter What You See? Clinical Psychological Science, 8(1), 111–124. https://doi.org/10.1177/2167702619858300

[15] DRAFT Compromise Amendments on the Draft Report Proposal for a regulation of the European Parliament and of the Council on harmonised rules on Artificial Intelligence (Artificial Intelligence Act) and amending certain Union Legislative Acts. (n.d.). https://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/CJ40/DV/2023/05-11/ConsolidatedCA_IMCOLIBE_AI_ACT_EN.pdf

[16] Landers, R. N., & Behrend, T. S. (2023). Auditing the AI auditors: A framework for evaluating fairness and bias in high stakes AI predictive models. American Psychologist, 78(1), 36–49. https://doi.org/10.1037/amp0000972

[17] Selenko, E., Bankins, S., Shoss, M., Warburton, J., & Restubog, S. L. D. (2022). Artificial intelligence and the future of work: A functional-identity perspective. Current Directions in Psychological Science, 31(3), 272-279. https://doi.org/10.1177/09637214221091823

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The early evidence shows that decisions about AI and how it is implemented reflect the world view and values of the human beings who design them and set policy for how it is used. Given the massive and increasing influence of AI on people's lives, it is critical to better appreciate how people understand and react to such influence, especially when the AI is perceived to be biased or unfair.

As with other areas of technology, there remains an imperative for diversity, ethics, and inclusion to be a central component of any oversight model. Requiring diversity training, especially in teams developing AI tech can be an important first step to ensuring teams developing these new products are well versed in the components of DEI, which in turn can help to reduce the possibility of a biased product.[18]

There are, additionally, ethical implications for what AI learns, how AI learns, and AI's subsequent decision-making. For example, developing transparency enhancing algorithms for measuring and simulating AI bias and equity would make it possible to analyze the ethical implications of AI in a variety of domains including natural language and computer vision.[19] Alternatively, these AI methods could examine and analyze current and historical social biases and human cognition.[20] Research programs focused on this area would allow for understanding how AI is co-evolving with humanity, as AI is shaping society and impacting individuals' lives in an accelerated manner and at an unprecedented scale.

Given evidence that AI can reproduce discrimination and bias against individuals and groups, it is imperative the government leverage psychological science and examine people's expectations about and reactions to the fairness and potential discrimination of AI versus human agents. An emerging line of research suggests that people expect AI to be less biased than humans in some cases while being less outraged when they learn of bias from an AI versus human actors.[21] Algorithms appear less discriminatory than humans, perhaps incorrectly engendering trust and comfort from human users.

Without the inclusion of psychological science, we risk harming already disadvantaged populations and creating systems that perpetuate harmful stereotypes and bias. AI systems are often trained using large data sets of human attributes or demographics that have the potential to integrate biases related to gender identity, race, and other characteristics. These systems then

[18] Cowgill, Bo and Dell'Acqua, Fabrizio and Deng, Sam and Hsu, Daniel and Verma, Nakul and Chaintreau, Augustin, Biased Programmers? Or Biased Data? A Field Experiment in Operationalizing AI Ethics (June 1, 2020). In Proceedings of the 21st ACM Conference on Economics and Computation (pp. 679-681)., Columbia Business School Research Paper Forthcoming, Available at SSRN: https://ssrn.com/abstract=3615404 or http://dx.doi.org/10.2139/ssrn.3615404

[19] Steed, R., & Caliskan, A. (2021). A set of distinct facial traits learned by machines is not predictive of appearance bias in the wild. *AI Ethics 1*, 249–260. https://doi.org/10.1007/s43681-020-00035-y.

[20] Caliskan, A., & Lewis, M. (2020, July 16). Social biases in word embeddings and their relation to human cognition. https://doi.org/10.31234/osf.io/d84kg.

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spread the biases in their interactions with humans or other technology-informed systems, with implications for equity and fairness. Psychologists' research on the various forms of resulting bias and the detrimental impacts are being used to develop data sets that are less biased and AI systems that can detect and compensate for biases in data. Findings from this research should be incorporated into future deployments of artificial intelligence tools, especially when being funded or used by the federal government.

Thank you again for the opportunity to weigh in on these questions. To the extent that our psychologists can serve as a resource to your office, please feel free to reach out to Corbin Evans (Senior Director Congressional & Federal Relations, Science Advocacy) at CEvans@apa.org.

Sincerely,

Katherine B. McGuire
Chief Advocacy Officer
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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0105
Comment on OMB-2023-0020-0001

Submitter Information

Organization: AHIP

General Comment

Attached please find comments from AHIP. Thank you for the opportunity to provide input.

Attachments

AHIP Comments OMB AI Use Draft Policy_Final

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December 5, 2023

Shalanda Young
Director
Office of Management and Budget
Washington, DC 20503

Submitted electronically via regulations.gov

Re: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence-AHIP Comments

Dear Director Young,

AHIP appreciates the opportunity to provide feedback on the Office of Management and Budget's (OMB) draft memorandum entitled "*Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*," ("draft memo"). AHIP is the national association whose members provide health care coverage, services, and solutions to hundreds of millions of Americans every day. We are committed to making health care better and coverage more affordable and accessible for everyone including through leveraging emerging technologies.

Safe and ethical AI use could be transformative across all facets of American life and improve how the United States government serves its citizens. AI has the potential to offer Americans great improvements in government services, improve our national safety and security, and advance solutions to pressing societal challenges. However, integrating AI into government business practices must be done responsibly and safely. We agree that as the use of AI grows, there is a need to protect Americans' rights and safety and guard against risks. However, we must seek policies that balances risk and reward to ensure that while we are safeguarding Americans, we are not stifling transformative innovation.

Strengthening AI Governance

We support OMB's proposed policy to require agencies to designate a Chief AI Officer as well as OMB's vision to enhance agencies' expertise in AI. In addition to internal coordination, we encourage OMB to support agencies in coordinating across the federal government as well as with the private sector. We also appreciate the proposed policy's focus on alignment and compliance with relevant laws and policy. Additionally, OMB should focus on promoting appropriate transparency rather than regulating how or when AI can be used. A focus on transparency gives stakeholders the information they need to make informed decisions about using AI without impeding technological innovation or agencies' ability to leverage AI to

improve processes and workflows. However, the government should work with private sector stakeholders to develop a common definition of transparency that balance the needs of the public to understand how and when AI is used while promoting competition and protecting trade secrets.

We also ask that OMB clarify the scope of this memo to apply to government agency use of AI only. We recommend that OMB include a statement confirming that this memo addresses agency requirements for the AI governance, innovation, and risk management, but does not impose such requirements on non-governmental actors that are regulated by or receive funds from the agencies governed by this memo. As entities regulated by, or receiving funds from, numerous agencies that would be governed by this memorandum, we recommend that any requirements or standards for AI governance, innovation, and risk management for our adoption within a specific program's context be put forward through notice and comment rulemaking.

Specific to the proposal for agencies to post AI inventories, we note that annual posting of all AI uses cases may be challenging, may not be sustainable, and may not meet intended goals of transparency. Ultimately, this will likely create undue burden for the agencies. Further discussions, studies, and standards development are needed regarding model notice and transparency requirements, including if multiple models compromise a larger AI system and how that is to be reported in public-facing inventories. For example, rather than requiring an annual disclosure of all uses, OMB could require agencies to update their inventories when there is a material change in their use of AI. OMB should also clarify that these inventories focus on high risk uses, contain the minimum necessary information, and only apply to systems that are truly artificial intelligence and not simply the results of an algorithm or programming rule.

Advancing Responsible AI Innovation

AI has many advantages that include, among others, operational efficiencies, cost reduction, technical innovation (e.g., allowing users to perform tasks that could not be done before) and error reduction, but to achieve such ends the applications must be managed as they augment, not replace, human work. Thus, we support the vision of increasing agencies' expertise in AI. We agree that federal agencies should have embedded AI experts; however, agencies could also consider ways to enhance their expertise by convening advisory panels and technical expert panels to support agency staff with private sector and other outside experts.

Managing Risks from the Use of AI

We appreciate OMB's attention to managing potential risks from AI that could impact a person's safety or rights. However, we urge OMB to ensure that agency guidance is not applied in an overly broad way that could prevent Americans from benefiting from AI. Oversight of federal AI

use should rely on a risk-based framework that targets necessary safeguards within the context of specific use cases.

Leverage Existing Work to Mitigate Harm

We appreciate the federal government's work to date to promote safe and ethical AI use. AI usage today occurs against an important backdrop of existing laws and regulations at both the federal and state levels to protect consumers such as those touching on privacy, security, discrimination, and data interoperability. We have been supportive of the federal standards work through the National Institute of Science and Technology (NIST) including its AI Risk Management Framework. We again encourage agencies to defer to existing laws and consumer protections, including when considering recommendations on AI documentation. Specific to federal contractors, we also encourage OMB to ensure alignment with existing Federal Acquisition Regulations (FAR), and to enable appropriate comment processes for updates where needed.

Of note, there are also numerous ongoing voluntary activities among industry participants that go beyond law and regulation, such as the development and use of principles, best practices, and standards specific to AI use. The private sector has also started to create governance, ethical, and practice standards for organizations developing and deploying AI. For example, AHIP worked with the Consumer Technology Association (CTA) and the American National Standards Institute (ANSI), on the recent development of the consensus-driven standard, ANSI/CTA-2090, The Use of Artificial Intelligence in Health Care: Trustworthiness.[1] In September 2023, CTA released voluntary standards outlining ways to identify and manage AI bias in health care.[2] Moreover, the Coalition for Health AI (CHAI), the Health AI Partnership, and Association of Food and Drug Officials (AFDO) and the Regulatory Affairs Professionals Society (RAPS) are developing guidelines for the use of AI in the health and health care sector while the National Academy of Medicine has outlined a code of conduct for the use of AI in health, health care, and biomedical science. These standards and guidelines outline types of biases and suggest strategies to mitigate bias throughout the development process.

OMB should leverage existing federal and industry standards when considering acceptable AI use by the federal government to avoid duplication of work. As these efforts, and additional ones, continue to evolve and mature, industry and federal government agencies need to work together to consolidate and coalesce towards a set of common national standards that can be adopted consistently across organizations. Consumers should have confidence that the same or similar standards apply regardless of whether AI is used by public or private sector actors.

[1] https://shop.cta.tech/products/the-use-of-artificial-intelligence-in-healthcare-trustworthiness-cta-2090
[2] Artificial Intelligence in Health Care: Practices for Identifying and Managing Bias (CTA-2116)

Purposes that are presumed to be safety- and rights-impacting

OMB should have agencies use a risk-based approach, aligned with the NIST AI Risk Management Framework (RMF), to AI governance and minimum practices for AI uses cases. Additionally, further discussions on standards and best practices, including private industry input, are needed to advance minimum practices for these higher risk uses cases.

Minimum practices for safety-impacting and rights-impacting AI

Specific to the information or for "minimum practices," we request inclusion of language "the requirement would increase risk to safety or rights overall, could risk exposure of sensitive or other protected information, or would create an unacceptable impediment to critical agency operations" to ensure further protection of American' consumers sensitive data.

We appreciate OMB's inclusion of minimum requirements to evaluate AI. However, standards for algorithmic evaluations and audits are not yet defined and will vary by use case. Inadequate standards may risk evaluations that fail to identify issues as intended. Further discussions and standards development are needed, including private-public collaboration.

Definitions

OMB's guidance must support alignment of definitions used to established AI definitions and terminology to ensure non-AI technologies are appropriately carved out of potential requirements and oversight. We support the NIST AI RMF definition of "AI System" as an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments.

Mitigating the Risks of AI Bias

We appreciate OMB's attention to the potential of AI-enabled discrimination and outlining the need for appropriate monitoring and human oversight. We agree that bias could negatively impact certain populations necessitating monitoring and mitigation. To do this, healthcare organizations must be able to use the elements and techniques best suited for the model in accordance with sound governance frameworks and existing laws and consumer protections. For example, using demographic data could identify a lack of representativeness in data sources, or differential impact of applying the models. Then an organization can take, and document, mitigating steps such as augmenting data sources or scaling to minimize the unintended bias. Depending on the nuances of a model, mandatory data elements or precluded data elements may reduce the precision of the model for a given population and reduce the benefit. Race, for instance, was an important variable to include in health plan efforts tracking and trending COVID-19 rates to assist people with vaccination access.

It is possible, and sometimes necessary to "tune" machine learning (ML) models to so they work exceptionally well for specific groups of people who need intervention or support, or perhaps it is not realized that a targeted intervention is needed until the ML uncovers the need. These groups could be defined by having certain diseases, living in certain geographies, or of a certain socioeconomic status. ML, and the AI behind it, provides us the opportunity to optimize models to perform best among their intended populations.

While OMB may aim to mitigate risks such as algorithmic bias, overly prescriptive rules could unintentionally limit the ability of agencies to use AI to combat systemic inequality by targeting health interventions at specific underserved communities – including at-risk and historically marginalized groups. OMB should also ensure that policies meant to prevent harms from AI bias do not hamper the ability of agencies to use AI to promote equity. While we agree safeguards should exist to protect underserved communities, we recommend pending regulations focus on outcomes, not specific processes for technologies, and encourage ongoing alignment with expert-developed standards.

The use of AI holds great promise to improve processes across all facets of government and private industry. We are thankful for the opportunity to provide this feedback to OMB and we appreciate OMB's leadership in the significant work of ensuring federal government use of AI balances the value of innovation with the need to mitigate harms. We can work together to address the challenges and ensure Americans are protected while promoting innovation. Engaging a diverse set of stakeholders is essential to success, and AHIP and our health insurance provider members are eager to work with you and other stakeholders on these important efforts. If you have any questions, please feel free to contact me at dlloyd@ahip.org

Sincerely,

Danielle A. Lloyd

Danielle A. Lloyd
Senior Vice President, Private Market Innovations & Quality Initiatives

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0106
Comment on OMB-2023-0020-0001

Submitter Information

General Comment

See attached file(s)

Attachments

OMB-2023-0020-0001

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Harris County
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Building a Healthy Community

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Office of Management and Budget
725 17th Street NW
Washington, DC 20503

Subject: Response to Request for Comment on AI Governance for Federal Agencies

I am writing on behalf of Harris County Public Health in response to your Request for Comment on AI Governance for Federal Agencies. We appreciate the opportunity to provide feedback on the proposed memorandum, and we believe that effective AI governance is crucial, particularly in the context of public health.

Question 1: The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

Response: The roles and responsibilities outlined for Chief AI Officers should be adaptable to the diverse nature of federal agencies, including those within public health. It is essential that the Chief AI Officer's role be flexible to address existing and emerging challenges and emergencies in public health. Additionally, supporting roles in data integrity, privacy, and security are paramount to ensuring ethical and equitable data-driven decision-making.

Flexibility is key to the Chief AI Officer's ability to form policies, guidelines, and considerations for the use of Generative AI tools. This includes assessing feasibility, use cases, and encouraging staff usage within specified guidelines that acknowledge the tools' usefulness, concerns, and limitations.

In terms of flexibility, the Chief AI Officer must manage diverse data for AI-driven analytics in epidemiology, disease surveillance, and emergency response. This ensures a comprehensive approach to data governance and analytics in the field of public health.

Question 2: What types of coordination mechanisms would be effective for agencies to model in their establishment of an AI Governance Body?

Response: Establishing an AI governance body is crucial for government agencies. This body can facilitate critical collaboration and coordination, advancing multi-agency information sharing mechanisms and supporting unified data governance with advanced analytics. The advantages include agility in responding to new AI tools, developing subject-specific SMEs, and providing a

unified organizational approach. However, challenges include scaling up, maintenance costs, and potential conflicting guidance from existing bodies.

Question 3: How can OMB best advance responsible AI innovation?

Response: OMB can best advance responsible AI innovation for public health by advocating for AI-driven applications that enhance disease surveillance, accessibility to social and health services, community outreach, and education. This advocacy should prioritize data privacy, security, and ethical responsible use.

Question 6: Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline for all agencies and uses of AI? How can they be improved?

Response: Minimum practices for AI utilization in public health should include data standardization and a common dictionary to ensure quality, privacy, and ethical application. These practices and standardization frameworks should be continually reviewed as AI technology evolves. Additionally, specific language regarding access to the provenance and security of data should consider integrity and privacy concerns such as HIPAA.

Thank you for considering our comments on this important matter. We look forward to continued collaboration in shaping responsible AI governance for federal agencies.

Sincerely,

Harris County Public Health

HCPH is the local public health agency for the Harris County, Texas jurisdiction. It provides a wide variety of public health activities and services aimed at improving the health and well-being of the Harris County community.

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Document: OMB-2023-0020-0107
Comment on OMB-2023-0020-0001

Submitter Information

Organization: American Medical Association

General Comment

Attached please find the American Medical Association's comments and "Principles for Augmented Intelligence Development, Deployment, and Use," in response to OMB's Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum.

Attachments

2023-12-5 Letter to Young re Advancing Governance Innovation and Risk Management_AI and attachment v2

AMA
AMERICAN MEDICAL ASSOCIATION

James L. Madara, MD
CEO, EXECUTIVE VICE PRESIDENT
james.madara@ama-assn.org

December 5, 2023

The Honorable Shalanda Young
Director
Office of Management Budget
725 17th Street, NW
Washington, DC 20503

Re: Draft policy, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* (AI) OMB-2023-0020-0001

Dear Director Young:

On behalf of the physician and medical student members of the American Medical Association (AMA), I appreciate the opportunity to offer our comments to the Office of Management and Budget (OMB) on new draft policy on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI). Ensuring the responsible, equitable, ethical, and transparent design, development, and deployment of high-performing augmented intelligence (AI)-enabled tools within the health care space is a key priority for AMA members.[1] We applaud the Administration's commitment to action by releasing this proposed guidance following the Executive Order that realizes the promise of AI while managing its risks, and furthermore recognizes that the interests of Americans who increasingly use, interact with, or purchase AI and AI-enabled products in their daily lives must be protected. Such protections are especially important in critical fields like health care where mistakes by or misuse of AI could harm patients, impact costs to consumers or employers, or jeopardize safety or patient rights. We agree that the three pillars that are identified in this draft policy are critical considerations to effectuate future success from a safety or rights-impacting standpoint, both in the health care sector and beyond.

Overall, the AMA supports the actions set forth to advance the goals of strengthening AI governance, advancing responsible AI innovation, and managing risks from the use of AI. We agree with the acknowledgment that new agency requirements and guidance are both timely and necessary at this juncture. The AMA emphasizes the need for rigorous scrutiny of health care AI, as highlighted in the draft policy. We agree with the Administration that AI impacting an individual's or community's access to health care must adhere to essential standards and practices. Discussed in further detail below, the AMA has developed a set of AI Principles and health care-specific practices that should be met as AI is developed and deployed. The AMA also extends its expertise, educational resources, and unique perspectives to assist any future Chief AI Officer overseeing health care matters, as well as to assist in the development of specific AI policies and the creation of new requirements focused on the potential risks of

[1] The AMA refers to AI as "augmented intelligence"—a crucial concept in health care that emphasizes the enhancement of human decision-making through AI technologies, rather than replacing human expertise, ensuring a synergistic partnership where AI tools assist health care professionals in delivering more accurate, efficient, and personalized patient care.

relying on AI to inform or carry out agency decisions and actions, particularly when such reliance impacts safety or the rights of patients.

AMA Policy on Augmented Intelligence

AI is not a new issue to our AMA; we have been developing substantive policy and working with other stakeholders since 2018, when the AMA's House of Delegates—the AMA's policy-making body composed of every state and national specialty society—adopted our first policy on health care AI.[2] This policy provides that the AMA will leverage its ongoing engagement in digital health and other priority areas for improving patient outcomes and physicians' professional satisfaction by helping set priorities for health care AI. First and foremost, our policy supports the use of AI systems to advance the quadruple aim of health care. Specifically, AI systems should: 1) enhance the patient experience of care and outcomes; 2) improve population health; 3) reduce overall costs for the health care system; and 4) support the professional satisfaction of physicians and the health care team. Our policy supports the development of thoughtfully designed, high-quality, clinically validated health care AI that:

- Is designed and evaluated in keeping with best practices in user-centered design, particularly for physicians and other members of the health care team;
- Is transparent;
- Conforms to leading standards for reproducibility;
- Identifies and takes steps to address bias, avoids introducing or exacerbating health care disparities while actively addressing the same, including when testing or deploying new AI tools on marginalized populations; and
- Safeguards patients' and other individuals' privacy interests and preserves the security and integrity of personal information.

Initial AMA policy contemplated the use of AI in direct patient care. However, with the introduction of technologies, such as generative AI and large language models , as well as expanding use in nonclinical settings, such as payors' claims and coverage determinations, AMA policy continues to evolve. At our House of Delegates meeting in June 2023, new AMA policy[3] was adopted that recognizes that there are potential unforeseen consequences that will arise as the number of AI-enabled health care tools and systems continue to grow. The AMA has therefore recently developed new principles for AI development, deployment, and use to help foster a consistent governance structure for advancements in health care technology. Building upon current policy on AI, the principles underscore the AMA's commitment to supporting the implementation of national governance policies that prioritize the development and deployment of AI in a manner that is ethical, equitable, responsible, and transparent.

Key concepts outlined by the AMA principles include:

- **Oversight:** The AMA encourages a whole of government approach to implement governance policies to mitigate risks associated with health care AI, but also acknowledges that non-government entities have a role in appropriate oversight and governance of health care AI.
- **Transparency:** The AMA emphasizes that transparency is essential for the use of AI in health care to establish trust among patients and physicians. Key characteristics and information

[2] "Augmented Intelligence in Health Care" H-480.939.
[3] "Assessing the Potentially Dangerous Intersection Between AI and Misinformation" H-480.935; ""Use of Augmented Intelligence for Prior Authorization" D-480.956.

regarding the design, development, and deployment processes should be mandated by law where possible, including potential sources of inequity in problem formulation, inputs, and implementation.

- **Disclosure and Documentation:** The AMA calls for appropriate disclosure and documentation when AI directly impacts patient care, access to care, medical decision making, communications, or the medical record.
- **Generative AI:** To manage risk, the AMA calls on health care organizations to develop and adopt appropriate polices that anticipate and minimize negative impacts associated with generative AI. Governance policies should be in place prior to its adoption and use.
- **Privacy and Security:** Built upon the AMA's Privacy Principles, the AMA prioritizes robust measures to protect patient privacy and data security. AI developers have a responsibility to design their systems from the ground up with privacy in mind. Developers and health care organizations must implement safeguards to instill confidence in patients that personal information is handled responsibly. Strengthening AI systems against cybersecurity threats is crucial to their reliability, resiliency, and safety.
- **Bias Mitigation:** To promote equitable health care outcomes, the AMA advocates for the proactive identification and mitigation of bias in AI algorithms to promote a health care system that is fair, inclusive, and free from discrimination.
- **Liability:** The AMA will continue to advocate to ensure that physician liability for the use of AI-enabled technologies is limited and adheres to current legal approaches to medical liability.

In addition, these principles address when payors use AI and algorithm-based decision-making to determine coverage limits, make claim determinations, and engage in benefit design. We find many parallels between the proposals in the administration's draft policy and what we have developed in the principles and would welcome the opportunity to discuss how our principles may be used to influence and spark an ongoing dialogue on the impact of AI on the practice of medicine and health care delivery.

We look forward to continuing working with you to advance the integration of health care AI. Please do not hesitate to contact Shannon Curtis, Assistant Director of Federal Affairs, at Shannon.Curtis@ama-assn.org with any questions or to discuss further.

Sincerely,

James L. Madara, MD

Attachment

American Medical Association Principles for Augmented Intelligence Development, Deployment, and Use

Approved by AMA Board of Trustees on November 14, 2023

As the number of Augmented Intelligence (AI)-enabled health care tools and systems continue to grow, these technologies must be designed, developed, and deployed in a manner that is ethical, equitable, responsible, and transparent. With a lagging effort towards adoption of national governance policies or oversight of AI, it is critical that the physician community engage in development of policies to help inform physician and patient education, and guide engagement with these new technologies. It is also important that the physician community help guide development of these tools in a way that best meets both physician and patient needs, and help define their own organization's risk tolerance, particularly where AI impacts direct patient care. The AMA is committed to ensuring that AI can meet its full potential to advance clinical care and improve clinician well-being. This may only be accomplished by ensuring that physicians engage only with AI that satisfies rigorous standards to meet the goals of the quadruple aim,[1] advance health equity, prioritize patient safety, and limit risks to both physicians and patients.

These new principles build on earlier AMA policy development activities, including the 2018 foundational AMA AI policy, Augmented Intelligence in Medicine,[2] followed by 2019 policy for payment and coverage of AI.[3] However, as AI has rapidly developed beyond AI-enabled medical devices, new policy and guidance for adoption of both device and non-device uses of AI-enabled technologies is necessary to assist in deployment of these new advances to physicians and patients. These principles will serve as the foundation for AMA's evolving advocacy on AI.

The AMA is dedicated to providing continued guidance to physicians on how to best engage with new AI-enabled technologies with the understanding that policy development related to AI will likely continue to develop given the rapid pace of change in this space.

Oversight of Health Care Augmented Intelligence

There is currently no national policy or governance structure in place to guide the development and adoption of non-device AI. While the Food and Drug Administration (FDA) regulates AI-enabled medical devices, many types of AI-enabled technologies fall outside the scope of FDA oversight, including AI that may have clinical applications, such as some clinical decision support functions. While the Federal Trade Commission and the Health and Human Services Office for Civil Rights have oversight over some aspects of AI, their authorities are limited and not adequate to ensure appropriate development and deployment of AI generally, and specifically in the health care space. The AMA encourages a whole of government approach to implement governance policies that ensure overall and disparate risks to consumers and patients arising from AI are mitigated to the greatest extent possible.

In addition to government, health care institutions, practices, and professional societies share some responsibility for appropriate oversight and governance of AI-enabled systems and technologies. Beyond government oversight or regulation, purchasers and users of these technologies should have appropriate and sufficient policies in place to

[1] AI systems should enhance the patient experience of care and outcomes, improve population health, reduce overall costs for the health care system while increasing value, and support the professional satisfaction of physicians and the health care team.
[2] American Medical Association. (2018). "AI in Healthcare: A Report from the American Medical Association Board of Trustees." AMA, https://www.ama-assn.org/system/files/2019-08/ai-2018-board-report.pdf (Accessed September 14, 2023).
[3] American Medical Association. 2019). "AI in Healthcare: A Report from the American Medical Association Board of Trustees - 2019." https://www.ama-assn.org/system/files/2019-08/ai-2019-board-report.pdf (Accessed September 14, 2023).

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ensure they are acting in accordance with the current standard of care. Similarly, clinical experts are best positioned to determine whether AI applications are high quality, appropriate, and whether the AI tools are valid from a clinical perspective. Clinical experts can best validate the clinical knowledge, clinical pathways, and standards of care used in the design of AI-enabled tools and can monitor the technology for clinical validity as it evolves over time.

- Health care AI must be designed, developed, and deployed in a manner which is ethical, equitable, responsible, and transparent.
- Use of AI in health care delivery requires clear national governance policies to regulate its adoption and utilization, ensuring patient safety, and mitigating inequities**.** Development of national governance policies should include interdepartmental and interagency collaboration.
- Compliance with national governance policies is necessary to develop AI in an ethical and responsible manner to ensure patient safety, quality, and continued access to care. Voluntary agreements or voluntary compliance is not sufficient.
- Health care AI requires a risk-based approach where the level of scrutiny, validation, and oversight should be proportionate to the potential overall or disparate harm and consequences the AI system might introduce. [See also Augmented Intelligence in Health Care H-480.939 at (1)]
- Clinical decisions influenced by AI must be made with specified human intervention points during the decision-making process. As the potential for patient harm increases, the point in time when a physician should utilize their clinical judgment to interpret or act on an AI recommendation should occur earlier in the care plan.
- Health care practices and institutions should not utilize AI systems or technologies that introduce overall or disparate risk that is beyond their capabilities to mitigate. Implementation and utilization of AI should avoid exacerbating clinician burden and should be designed and deployed in harmony with the clinical workflow.
- Medical specialty societies, clinical experts, and informaticists are best positioned and should identify the most appropriate uses of AI-enabled technologies relevant to their clinical expertise and set the standard of care for AI usage in their specific domain. [See Augmented Intelligence in Health Care H-480.940 at (2)]

When to Disclose: Transparency in Use of Augmented Intelligence-Enabled Systems and Technologies

As implementation of AI-enabled tools and systems continues to increase, it is essential that use of AI in health care be transparent to both physicians and patients. Transparency requirements should be tailored in a way that best suits the needs of the end users. Disclosure should contribute to physician and patient knowledge and not create unnecessary administrative burden. When AI is utilized in health care decision-making, that use should be disclosed and documented in order to limit risks to, and mitigate inequities for, both physicians and patients, and to allow each to understand how decisions impacting patient care or access to care are made. While transparency does not necessarily ensure AI-enabled tools are accurate, secure, or fair, it is difficult to establish trust if certain characteristics are hidden.

- When AI is used in a manner which directly impacts patient care, access to care, or medical decision making, that use of AI should be disclosed and documented to both physicians and/or patients in a culturally and linguistically appropriate manner. The opportunity for a patient or their caregiver to request additional review from a licensed clinician should be made available upon request.
- When AI is used in a manner which directly impacts patient care, access to care, medical decision making, or the medical record, that use of AI should be documented in the medical record.
- AI tools or systems cannot augment, create, or otherwise generate records, communications, or other content on behalf of a physician without that physician’s consent and final review.
- When health care content is generated by generative AI, including by large language models, it should be clearly disclosed within the content that was generated by an AI-enabled technology.
- When AI or other algorithmic-based systems or programs are utilized in ways that impact patient access to care, such as by payors to make claims determinations or set coverage limitations, use of those systems or programs must be disclosed to impacted parties.

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- The use of AI-enabled technologies by hospitals, health systems, physician practices, or other entities, where patients engage directly with AI should be clearly disclosed to patients at the beginning of the encounter or interaction with the AI-enabled technology.

What to Disclose: Required Disclosures by Health Care Augmented Intelligence-Enabled Systems and Technologies

Along with significant opportunity to improve patient care, all new technologies in health care will likely present certain risks and have limitations that physicians must carefully navigate during the early stages of clinical implementation of these new systems and tools. AI-enabled tools are no different and are perhaps more challenging than other advances as they present novel and complex questions and risks. To best mitigate these risks, it is critical that physicians understand AI-driven technologies and have access to certain information about the AI tool or system being considered, including how it was trained and validated, so that they can assess the quality, performance, equity, and utility of the tool to the best of their ability. This information may also establish a set of baseline metrics for comparing AI tools. Transparency and explainability regarding the design, development, and deployment processes should be mandated by law where possible, including potential sources of inequity in problem formulation, inputs, and implementation. Additionally, sufficient detail should be disclosed to allow physicians to determine whether a given AI-enabled tool would reasonably apply to the individual patient they are treating. Physicians should understand that, where they utilize AI-enabled tools and systems without transparency provided by the AI developer, their risks of liability for reliance on that AI will likely increase. The need for full transparency is greatest where AI-enabled systems have greater impacts on direct patient care, such as by AI-enabled medical devices, clinical decision support, and interaction with AI-driven chatbots. Transparency needs may be somewhat lower where AI is utilized for primarily administrative, practice-management functions.

- When AI-enabled systems and technologies are utilized in health care, the following information should be disclosed by the AI developer to allow the purchaser and/or user (physician) to appropriately evaluate the system or technology prior to purchase or utilization:
    - Regulatory approval status
    - Applicable consensus standards and clinical guidelines utilized in design, development, deployment, and continued use of the technology
    - Clear description of problem formulation and intended use accompanied by clear and detailed instructions for use
    - Intended population and intended practice setting
    - Clear description of any limitations or risks for use, including possible disparate impact
    - Description of how impacted populations were engaged during the AI lifecycle
    - Detailed information regarding data used to train the model:
        - Data provenance
        - Data size and completeness
        - Data timeframes
        - Data diversity
        - Data labeling accuracy
    - Validation Data/Information and evidence of:
        - Clinical expert validation in intended population and practice setting and intended clinical outcomes
        - Constraint to evidence-based outcomes and mitigation of “hallucination” or other output error
        - Algorithmic validation
        - External validation processes for ongoing evaluation of the model performance, e.g., accounting for AI model drift and degradation
        - Comprehensiveness of data and steps taken to mitigate biased outcomes
        - Other relevant performance characteristics, including but not limited to performance characteristics at peer institutions/similar practice settings
        - Post-market surveillance activities aimed at ensuring continued safety, performance, and equity

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    - Data Use Policy
        - Privacy
        - Security
        - Special considerations for protected populations or groups put at increased risk
    - Information regarding maintenance of the algorithm, including any use of active patient data for ongoing training
    - Disclosures regarding the composition of design and development team, including diversity and conflicts of interest, and points of physician involvement and review
- Physicians should carefully consider whether or not to engage with AI-enabled health care technologies if this information is not disclosed by the developer. As the risk of AI being incorrect increases risks to patients (such as with clinical applications of AI that impact medical decision making), disclosure of this information becomes increasingly important. [See also Augmented Intelligence in Health Care H-480.939]

Generative Augmented Intelligence

Generative AI is a type of AI that can recognize, summarize, translate, predict, and generate text and other content based on knowledge gained from large datasets. Generative AI tools are finding an increasing number of uses in health care, including assistance with administrative functions, such as generating office notes, responding to documentation requests, and generating patient messages. Additionally, there has been increasing discussion about clinical applications of generative AI, including use as clinical decision support to provide differential diagnoses, early detection, and intervention, and to assist in treatment planning. While generative AI tools show tremendous promise to make a significant contribution to health care, there are a number of potential risks and limitations to consider when using these tools in a clinical setting or direct patient care. To manage risk, health care organizations should develop and adopt appropriate polices that anticipate and minimize negative impacts. Physicians who are considering utilizing a generative AI-based tool in their practice should ensure that all practice staff are educated on the risks and limitations, including patient privacy concerns, and additionally, should have appropriate governance policies in place for its use prior to adoption.

- Generative AI should: (a) only be used where appropriate policies are in place within the practice or other health care organization to govern its use and help mitigate associated risks; and (b) follow applicable state and federal laws and regulations (e.g., HIPAA-compliant Business Associate Agreement).
- Appropriate governance policies should be developed by health care organizations and account for and mitigate risks of:
    - Incorrect or falsified responses; lack of ability to readily verify the accuracy of responses or the sources used to generate the response
    - Training data set limitations that could result in responses that are out of date or otherwise incomplete or inaccurate for all patients or specific populations
    - Lack of regulatory or clinical oversight to ensure performance of the tool
    - Bias, discrimination, promotion of stereotypes, and disparate impacts on access or outcomes
    - Data privacy
    - Cybersecurity
    - Physician liability associated with the use of generative AI tools
- Health care organizations should work with their AI and other health information technology (health IT) system developers to implement rigorous data validation and verification protocols to ensure that only accurate, comprehensive, and bias managed datasets inform generative AI models, thereby safeguarding equitable patient care and medical outcomes. [See Augmented Intelligence in Health Care H-480.940 at (3)(d)]
- Use of generative AI should incorporate physician and staff education about the appropriate use, risks, and benefits of engaging with generative AI. Additionally, physicians should engage with generative AI tools only when adequate information regarding the product is provided to physicians and other users by the developers of those tools.

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- Clinicians should be aware of the risks of patients engaging with generative AI products that produce inaccurate or harmful medical information (e.g., patients asking chatbots about symptoms) and should be prepared to counsel patients on the limitations of AI-driven medical advice.
- Governance policies should prohibit the use of confidential, regulated, or proprietary information as prompts for generative AI to generate content.
- Data and prompts contributed by users should primarily be used by developers to improve the user experience and AI tool quality and not simply increase the AI tool's market value or revenue generating potential.

Physician Liability for Use of Augmented Intelligence-Enabled Technologies

The question of physician liability for use of AI-enabled technologies presents novel and complex legal questions and potentially poses risks to the successful clinical integration of AI-enabled technologies. As legal theories of liability and accountability for AI continue to evolve, the AMA will continue to advocate to ensure that physician liability for the use of AI-enabled technologies is limited and adheres to current legal approaches to medical malpractice.

- Current AMA policy states that liability and incentives should be aligned so that the individual(s) or entity(ies) best positioned to know the AI system risks and best positioned to avert or mitigate harm do so through design, development, validation, and implementation. [See Augmented Intelligence in Health Care H-480.939]

    - Where a mandated use of AI systems prevents mitigation of risk and harm, the individual or entity issuing the mandate must be assigned all applicable liability.
    - Developers of autonomous AI systems with clinical applications (screening, diagnosis, treatment) are in the best position to manage issues of liability arising directly from system failure or misdiagnosis and must accept this liability with measures such as maintaining appropriate medical liability insurance and in their agreements with users.
    - Health care AI systems that are subject to non-disclosure agreements concerning flaws, malfunctions, or patient harm (referred to as gag clauses) must not be covered or paid and the party initiating or enforcing the gag clause assumes liability for any harm.
- When physicians do not know or have reason to know that there are concerns about the quality and safety of an AI-enabled technology, they should not be held liable for the performance of the technology in question.

Data Privacy and Augmented Intelligence

Data privacy is highly relevant to AI development, implementation, and use. The AMA is deeply invested in ensuring individual patient rights and protections from discrimination remain intact, that these assurances are guaranteed, and that the responsibility falls with the data holders. AI development, training, and use requires assembling large collections of health data. AI machine learning is data hungry; it requires massive amounts of data to function properly. Increasingly, more electronic health records are interoperable across the health care system and, therefore, are accessible by AI trained or deployed in medical settings. AI developers may create legal arrangements, e.g., business associate agreements, that bring them under the Health Insurance Portability and Accountability Act (HIPAA) Privacy and Security Rules. Yet even HIPAA cannot protect patients from the "black box" nature of AI which makes the use of data opaque. AI system outputs may also include inferences that reveal personal data or previously confidential details about individuals. This can result in a lack of accountability and trust and exacerbate data privacy concerns. Often, AI developers and implementers are themselves unaware of exactly how their products use information to make recommendations.

It is unlikely that physicians or patients will have any clear insight into a generative AI tool's conformance to state or federal data privacy laws. Large language models (LLM) are trained on data scraped from the web and other digital

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sources (including HIPAA-covered environments),[4] yet few, if any, controls are available to help users protect the data they voluntarily enter in a chatbot query. For instance, there are often no mechanisms in place for users to request data deletion or ensure that their inputs are not stored or used for future model training. While tools designed for medical use should align with HIPAA, many "HIPAA-compliant" generative tools rely on antiquated notions of deidentification, i.e., stripping data of personal information. With today's advances in computing power, data can easily be reidentified. Rather than aiming to make LLMs compliant with HIPAA, all health care AI-powered generative tools should be designed from the ground up with data privacy in mind.

The AMA's Privacy Principles were designed to provide individuals with rights and protections and shift the responsibility for privacy to third-party data holders. While the Principles are broadly applicable to all AI developers, e.g., entities should only collect the minimum amount of information needed for a particular purpose, the unique nature of LLMs and generative AI warrant special emphasis on entity responsibility and user education.

Entity Responsibility:

- Entities should make information available about the intended use of generative AI in health care and identify the purpose of its use. Individuals should know how their data will be used or reused, and the potential risks and benefits.
- Individuals should have the right to opt-out, update, or forget use of their data in generative AI tools. These rights should encompass AI training data and disclosure to other users of the tool.
- Generative AI tools should not reverse engineer, reconstruct, or reidentify an individual's originally identifiable data or use identifiable data for nonpermitted uses, e.g., when data are permitted to conduct quality and safety evaluations. Preventive measures should include both legal frameworks and data model protections, e.g., secure enclaves, federated learning, and differential privacy.

User Education:

- Users should be provided with training specifically on generative AI. Education should address:
    - legal, ethical, and equity considerations,
    - risks such as data breaches and re-identification,
    - potential pitfalls of inputting sensitive and personal data, and
    - the importance of transparency with patients regarding the use of generative AI and their data.

[See Augmented Intelligence in Health Care H-480.940 at (4),(5)]

Augmented Intelligence Cybersecurity

Data privacy relies on strong data security measures. There is growing concern that cyber criminals will use AI to attack health care organizations. AI poses new threats to health IT operations. AI-operated ransomware and AI-operated malware can be targeted to infiltrate health IT systems and automatically exploit vulnerabilities. Attackers using ChatGPT can craft convincing or authentic emails and use phishing techniques that entice people to click on links—giving them access to the entire electronic health record system.

AI is particularly sensitive to the quality of data. Data poisoning is the introduction of "bad" data into an AI training set, affecting the model's output. AI requires large sets of data to build logic and patterns used in clinical decision-making. Protecting this source data is critical. Threat actors could also introduce input data that compromises the

[4] Feathers, T., et al. "Facebook is receiving sensitive medical information from hospital websites. The Markup. June 16, 2022." https://themarkup.org/pixel-hunt/2022/06/16/facebook-is-receiving-sensitive-medical-information-from-hospital-websites.

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overall function of the AI tool. Failure to secure and validate these inputs, and corresponding data, can contaminate AI models—resulting in patient harm.

Because stringent privacy protections and higher data quality standards might slow model development, there could be a tendency to forgo essential data privacy and security precautions. However, strengthening AI systems against cybersecurity threats is crucial to their reliability, resiliency, and safety.

AI cybersecurity considerations:

- AI systems must have strong protections against input manipulation and malicious attacks.
- Entities developing or deploying health care AI should regularly monitor for anomalies or performance deviations, comparing AI outputs against known and normal behavior.
- Independent of an entity's legal responsibility to notify a health care provider or organization of a data breach, that entity should also act diligently in identifying and notifying the individuals themselves of breaches that impact their personal information.
- Users should be provided education on AI cybersecurity fundamentals, including specific cybersecurity risks that AI systems can face, evolving tactics of AI cyber attackers, and the user's role in mitigating threats and reporting suspicious AI behavior or outputs.

Payor Use of Augmented Intelligence and Automated Decision-Making Systems

Payors and health plans are increasingly using AI and algorithm-based decision-making in an automated fashion to determine coverage limits, make claim determinations, and engage in benefit design. Payors should leverage automated decision-making systems that improve or enhance efficiencies in coverage and payment automation, facilitate administrative simplification, and reduce workflow burdens. While the use of these systems can create efficiencies such as speeding up prior authorization and cutting down on paperwork, there is concern these systems are not be designed or supervised effectively—creating access barriers for patients and limiting essential benefits.

Increasingly, evidence shows that payors are using automated decision-making systems to deny care more rapidly, often with little or no human review. This manifests in the form of increased denials, stricter coverage limitations, and constrained benefit offerings. For example, a payor allowed an automated system to cut off insurance payments for Medicare Advantage patients struggling to recover from severe diseases, forcing them to forgo care or pay out of pocket. In some instances, payors instantly reject claims on medical grounds without opening or reviewing the patient's medical record. There is also a lack of transparency in the development of automated decision-making systems. Rather than payors making determinations based on individualized patient care needs, reports show that decisions are based on algorithms developed using average or "similar patients" pulled from a database. Models that rely on generalized, historical data can also perpetuate biases leading to discriminatory practices or less inclusive coverage.[5,6,7,8]

We must ensure that automated decision-making systems do not reduce needed care, nor systematically withhold care from specific groups. Steps should be taken to ensure that these systems are not overriding clinical judgement. Patients and physicians should be informed and empowered to question a payor's automated decision-making.

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[5] Obermeyer, Ziad, et al. "Dissecting racial bias in an algorithm used to manage the health of populations." Science 366.6464 (2019): 447-453. https://www.science.org/doi/10.1126/science.aax2342.

[6] Ross, C., Herman, B. (2023) "Medicare Advantage Plans' Use of Artificial Intelligence Leads to More Denials." https://www.statnews.com/2023/03/13/medicare-advantage-plans-denial-artificial-intelligence/ (Accessed September 14, 2023).

[7] Rucker, P., Miller, M., Armstrong, D.(2023). "Cigna and Its Algorithm Deny Some Claims for Genetic Testing, ProPublica Finds." https://www.propublica.org/article/cigna-pxdx-medical-health-insurance-rejection-claims (Accessed September 14, 2023).

[8] Ross, C., Herman, B. (2023). "Medicare Advantage Algorithms Lead to Coverage Denials, With Big Implications for Patients." https://www.statnews.com/2023/07/11/medicare-advantage-algorithm-navihealth-unitedhealth-insurance-coverage/ (Accessed September 14, 2023).

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There should be stronger regulatory oversight, transparency, and audits when payors use these systems for coverage, claim determinations, and benefit design. [See Use of Augmented Intelligence for Prior Authorization D-480.956; Prior Authorization and Utilization Management Reform H-320.939]

- Use of automated decision-making systems that determine coverage limits, make claim determinations, and engage in benefit design should be publicly reported, based on easily accessible evidence-based clinical guidelines (as opposed to proprietary payor criteria), and disclosed to both patients and their physician in a way that is easy to understand.
- Payors should only use automated decision-making systems to improve or enhance efficiencies in coverage and payment automation, facilitate administrative simplification, and reduce workflow burdens. Automated decision-making systems should never create or exacerbate overall or disparate access barriers to needed benefits by increasing denials, coverage limitations, or limiting benefit offerings. Use of automated decision-making systems should not replace the individualized assessment of a patient's specific medical and social circumstances and payors' use of such systems should allow for flexibility to override automated decisions. Payors should always make determinations based on particular patient care needs and not base decisions on algorithms developed on "similar" or "like" patients.
- Payors using automated decision-making systems should disclose information about any algorithm training and reference data, including where data were sourced and attributes about individuals contained within the training data set (e.g., age, race, gender). Payors should provide clear evidence that their systems do not discriminate, increase inequities, and that protections are in place to mitigate bias.
- Payors using automated decision-making systems should identify and cite peer-reviewed studies assessing the system's accuracy measured against the outcomes of patients and the validity of the system's predictions.
- Any automated decision-making system recommendation that indicates limitations or denials of care, at both the initial review and appeal levels, should be automatically referred for review to a physician (a) possessing a current and valid non-restricted license to practice medicine in the state in which the proposed services would be provided if authorized and (b) be of the same specialty as the physician who typically manages the medical condition or disease or provides the health care service involved in the request prior to issuance of any final determination. Prior to issuing an adverse determination, the treating physician must have the opportunity to discuss the medical necessity of the care directly with the physician who will be responsible for determining if the care is authorized.
- Individuals impacted by a payor's automated decision-making system, including patients and their physicians, must have access to all relevant information (including the coverage criteria, results that led to the coverage determination, and clinical guidelines used).
- Payors using automated decision-making systems should be required to engage in regular system audits to ensure use of the system is not increasing overall or disparate claims denials or coverage limitations, or otherwise decreasing access to care. Payors using automated decision-making systems should make statistics regarding systems' approval, denial, and appeal rates available on their website (or another publicly available website) in a readily accessible format with patient population demographics to report and contextualize equity implications of automated decisions. Insurance regulators should consider requiring reporting of payor use of automated decision-making systems so that they can be monitored for negative and disparate impacts on access to care. Payor use of automated decision-making systems must conform to all relevant state and federal laws.

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PUBLIC SUBMISSION

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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0108
Comment on OMB-2023-0020-0001

Submitter Information

General Comment

The City of New York (“City”), through its Office of Technology and Innovation (“OTI”), submits the attached response to the Office of Management and Budget’s ("OMB") Request for Comment on the draft memorandum titled Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI).

Attachments

NYC OTI to US OMB Public Comment Final 2023.12.05

Before the
Office of Management and Budget
Washington, DC 20006

In the Matter of	)	
Advancing Governance, Innovation, and	)	
Risk Management for Agency Use of Artificial	)	
Intelligence Draft Memorandum	)	Docket No.: OMB-2023-0020

COMMENTS OF THE CITY OF NEW YORK

The City of New York ("City"), through its Office of Technology and Innovation ("OTI"), submits this response to the Office of Management and Budget's ("OMB") Request for Comment on the draft memorandum titled *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)*.[1] While the draft memorandum directly impacts the operations of federal agencies only, the City has a vested interest in the federal government's development and deployment of effective, useful, and practical guidelines and requirements for federal agencies, given that federal policymaking and practices often serve as a model for state and local governments.

In October 2023, the City published its own AI Action Plan ("Action Plan"),[2] a pioneering commitment by the City to meaningfully and responsibly use and govern AI within City agencies. Included in the Action Plan are a series of initiatives related to the development and deployment of guidelines and policy for City agencies that are very much aligned with the President's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence[3] and OMB's subsequent draft memorandum. The City appreciates the efforts of both federal documents and views them as critical and influential references as it proceeds in developing its own responsible AI framework.

Generally, the City believes that a framework for responsible governance of AI must strike a balance between a complex set of needs, including: ensuring the framework's constitutive parts are sufficiently comprehensive to address relevant risks and opportunities; outlining requirements such that they are both generalizable across diverse agencies and policy domains, and sufficiently specific to produce meaningful outputs; and realistically accounting for the administrative burden new requirements will pose for agencies. These dynamics may be in opposition with one another; specifically, as additional or more detailed requirements are deployed to ensure a comprehensive approach to risk or opportunity, administrative burden increases. The goal in developing such a framework should be a set of requirements that are as comprehensive as possible, generalizable across agencies while preserving unique

[1] OMB, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)*, Federal Register Vol. 88, No. 212, Docket OMB-2023-0020, https://www.regulations.gov/document/OMB-2023-0020-0001

[2] OTI, *The New York City Artificial Intelligence Action Plan,* (2023), available at https://www.nyc.gov/assets/oti/downloads/pdf/reports/artificial-intelligence-action-plan.pdf

[3] Executive Order 14110 of October 30, 2023, https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence

considerations for each, and minimally burdensome to avoid negative impacts on agencies' ability to deliver their core services.

Further, while the City believes that AI governance is context-specific, in that approaches to governance must acknowledge the unique circumstances for a particular government (or agency) and its constituents, it also believes that state and local governments will benefit from the emerging standardization of policy, practices, and other approaches at the federal level. For example, the AI Risk Management Framework[4] published by the National Institute for Standards and Technology ("NIST") and the White House Blueprint for an AI Bill of Rights[5] represent federal approaches that state and local governments may use as either a template or point of reference for their own governance, thereby encouraging shared or similar practices across governments. Similarly, the City routinely leverages the concept of "reuse" from the FedRAMP program[6], to the extent practical, for technology solutions with an existing security accreditation by the federal government or similar authorization body.

The City's comments submitted in this response reflect the value that the City places on federal policymaking and practices in informing and guiding local governments' own policymaking. While overall supportive of the requirements and recommendations within the draft memorandum, the City wishes to highlight, through the lens of the dynamic balance of factors cited above, certain areas in which the draft memorandum's commitments for federal agencies may impact the City indirectly to the extent they serve as a model for the City's own practices. These specific sections of the draft memorandum represent, generally, areas in which the City is in agreement with OMB's approach but would suggest additional considerations to support a better balance for agency efforts. While the primary effect of OMB's draft guidance is a direct call to action for federal agencies, it is the City's hope that through these comments OMB considers the secondary effect that its guidance will have serving as a model or template for state and local governments.

The sections that follow enumerate the City's comments for selected sections of the draft memorandum.

I. Section 3(a)(iv)

The City is supportive of efforts to document use of AI for the purposes of improved public transparency and accountability; the City currently publishes a "directory" of algorithmic tools, many of which are considered applications of AI, under the auspices of New York City's Local Law 35 of 2022.[7] It is the City's experience that agencies are able to more effectively and substantially report on uses of algorithms or AI when provided with guidance to navigate complex and imperfect definitions; in particular, the term "artificial intelligence," even when defined in law, is quite broad and open to interpretation. While Section 3(a)(iv) directs agencies to comply with Section 7225 of the Advancing American AI Act,[8] which

[4] National Institute of Standards and Technology, *AI Risk Management Framework*, https://airc.nist.gov/AI_RMF_Knowledge_Base/AI_RMF

[5] White House Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People*, https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf

[6] FedRAMP, *Program Basics*,

[7] New York City Office of Technology and Innovation, *CY 2022 Summary of Agency Compliance Reporting of Algorithmic Tools*, https://www.nyc.gov/assets/oti/downloads/pdf/reports/2022-algorithmic-%20tools-reporting.pdf

[8] Advancing American Artificial Intelligence Act, 40 USC 11301, Sec. 7225, https://uscode.house.gov/view.xhtml?req=advancing+american+ai+act&f=treesort&fq=true&num=1&hl=true&edition=prelim&granuleId=USC-prelim-title40-section11301

itself cites the definition of AI from Section 238(g) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019,[9] the City recommends that OMB develop additional guidance for agencies that enables them to meaningfully interpret the definition of AI and therefore appropriately comply with reporting requirements.

II. Section 3(c)

The City enthusiastically agrees with the inclusion of a wide, multidisciplinary array of agency personnel in matters related to AI governance, and equally agrees that AI risk management should be considered as part of broader risk management frameworks. However, the City finds that the draft memorandum includes few specific activities that the mandated AI governance boards are expected to carry out. In the absence of additional clarity, it is more difficult for local governments to meaningfully evaluate this approach to governance for their own purposes. Greater clarity about these boards and their responsibilities would enhance the City's ability to continue to develop its own governance apparatus.

III. Section 4(a)

The City broadly supports efforts to advance the use of AI by agencies and appreciates the breadth of planning considerations required by this section. The City however has several concerns regarding the requirement to produce annual AI strategies. First, while the apparent spirit of these strategies is to spur innovation and enable broader AI utilization within agencies, the very agencies that have reduced AI maturity (and therefore greater opportunity for increased adoption of AI) may be more challenged to produce these strategies, given the administrative resources required, including a multidisciplinary workforce with the depth and breadth of requisite AI-related subject matter. Second, all agencies that are required to produce AI strategies will also be required to produce compliance plans consistent with the requirements of Section 3(a)(iii). Agencies across the full range of the AI-maturity spectrum may find the production of both documents to be resource- and time-intensive. Additionally, some requirements for the strategies and compliance plans could be considered to overlap. For example, , Section 4(b) instructs agencies to remove barriers to responsible use of AI; to the extent that those requirements exist within the memorandum, a compliance plan pursuant to Section 3(a)(iii) should include the agency's description of plans to comply with Section 4(b). To address these concerns, the City recommends, first, that the requirements of the compliance plans and AI strategies be sufficiently differentiated. Second, the City recommends that the requirements for AI strategies be phased, such that for the inaugural report only elements (i), (ii), (iii), and (vi) be required to serve as a baseline, with the additional elements to be included beginning in the second year of reporting.

IV. Section 4(a)(iv)

The City broadly supports this initiative. However, the City recommends that the development of enterprise capacity for AI innovation, especially as it relates to the cybersecurity compliance necessary to build, test, and maintain AI, be established through updating the existing federally required security accreditation and authorization process, i.e. NIST security controls and FedRAMP authorization process. This would allow for a standardized approach to ensure cybersecurity compliance of AI-enabled systems.

V. Section 4(b)

The City is supportive of efforts to enable the use of AI within government. However, the City finds that the implication of the section's heading, "Removing Barriers to the Responsible Use of Artificial

[9] John S. McCain National Defense Authorization Act for Fiscal Year 2019, https://www.govinfo.gov/content/pkg/BILLS-115hr5515enr/pdf/BILLS-115hr5515enr.pdf

Intelligence," is not fully aligned with the enumerated recommendations that follow. The City feels that the recommendations point to valuable considerations and governance tools that can be leveraged to work in harmony with, and not in conflict with, responsible use of AI. The City recommends reframing this section heading to reflect the importance of those recommendations and the role they play in making responsible AI a reality. Further, the City also recommends the addition of "Privacy" as a sixth consideration for special attention in relation to embracing innovation. The City considers privacy as a core element to balance with innovation, not as a trade off or barrier to technological advancement. Agencies should be encouraged to review and update, as necessary, privacy protocols to account for new or novel applications related to AI. Where identifying information is concerned, privacy policies and regulation must meet the needs of responsible use of AI.

VI. Section 4(b)(iii)

As described above in paragraph IV, the City concurs that agencies should update their relevant processes for security authorization to support AI-enabled systems. However, standardized controls should be developed or updated with considerations for AI as part of the relevant and required security authorization process. This would allow for immediate benefits to be realized across the broadest set of stakeholders and avoid a segmented agency-by-agency approach.

The City incorporates the spirit of the federal government's initiative on "reuse" and "reciprocity" as it relates to security accreditation and authorization, especially for cloud-based technology solutions. While the FedRAMP program is only available to the federal sector, the City has aligned the spirit of its processes to its cloud authorization process. As an example, the City concurs with OMB's statement on "strongly incentivizing reuse of one FedRAMP authorization by multiple agencies" as described in the most recent draft memorandum, *Modernizing the Federal Risk and Authorization Management Program (FedRAMP)*[10]. The unification and alignment of this security authorization process, by incorporating AI security control considerations, would allow for greater utilization and speed to deployment for new AI capabilities embedded in technology solutions.

The City is also interested in better understanding the role OMB or other federal agencies (e.g., NIST) would have in the development of training data sets made available to government agencies for the quality assurance of AI models, should they be developed for government-wide use.

VII. Section 4(b)(iv)

The City concurs in prioritizing workforce development in AI and would recommend including the skillsets needed to promote the development of AI systems and to protect and defend them through both AI and cybersecurity.

VIII. Section 4(b)(v)

The City understands the role that generative AI is currently playing in both the national discourse and in very concrete strategic planning efforts within government bodies. Indeed, the City will be prioritizing the publication of preliminary guidance for its agencies related to generative AI as one of its first actions to implement from its AI Action Plan. However, singling out generative AI within the "Removing Barriers" section of the draft memorandum may lead to the accidental minimization of efforts to identify highly

[10] Executive Office of the President, Office of Management and Budget, *Modernizing the Federal Risk Authorization Management Program (FedRAMP), https://www.cio.gov/assets/files/resources/FedRAMP-updated-draft-guidance-2023.pdf*

beneficial use cases of other types of AI technologies. Instead the City recommends that this section be framed around proactive identification of beneficial use cases for all types of AI, including generative AI.

IX. Section 5(b)

This section indicates that agencies must annually report to OMB the list of any purposes for which AI is safety-impacting or rights-impacting. The City is interested in better understanding the role that those agency-specific lists will continue to play in defining the landscape of safety- and rights-impacting AI, and if the intent is to make it available to be shared with other government agencies. The City appreciates the draft memorandum's list of presumed use cases as a helpful guide for steering its own considerations for understanding AI impacts, but feels that additional uses surfaced by agencies would similarly be helpful if incorporated into ongoing, visible guidance.

X. Section 5(b)(ii)(C)

The City recommends that translation of official communications be considered on its own as a presumed rights-impacting purpose. Translation is a critical component of a wide array of government services—not just those associated with immigration—and while not all occurrences of translation services may be materially impactful, many are.

XI. Section 5(c)

As stated previously, federal work in the space of AI governance and risk management has been an essential point of reference for the City's work. The City encourages OMB to leverage the opportunity of this draft memorandum to help harmonize the efforts of the NIST AI Risk Management Framework and Blueprint for an AI Bill of Rights, either within the draft memorandum itself or in subsequent guidance issued to agencies. The City is also interested in OMB's approach to harmonizing the newly released DHS CISA and UK NCSC guidelines for secure AI system development[11] within the body of this draft memorandum or subsequent guidance. As local governments, including the City, embark on their own efforts to establish risk management practices, guidance on the appropriate utilization of each of the frameworks—and the relationship between them—is critical to reducing ambiguity and enabling policymakers to create coherent and effective practices.

XII. Section 5(c)(iv)-(v)

The City is immensely supportive of OMB's efforts to produce in Sections 5(c)(iv) and 5(c)(v) a set of concrete requirements to operationalize a risk management process. The City also largely agrees with most of the individual requirements contained within these sections, but does have concerns that, as currently drafted, the execution of the totality of these requirements represents a substantial administrative cost for agencies and could benefit from alignment with existing processes and management frameworks. And while the draft memorandum applies only to federal agencies, as mentioned previously, the City expects the federal model as constructed in this draft memorandum to strongly influence legislative and executive approaches to policymaking. As such, the City urges OMB to assess the drafted requirements in these sections both collectively and individually against the expected administrative impact for agencies.

Additionally, specific to Sections 5(c)(iv)(B)-(C), the City recommends additional guidance on the distinction between testing versus evaluation activities. Because definitions of testing and evaluation may

[11] Cybersecurity & Infrastructure Security Agency, *DHS CISA and UK NCSC Release Joint Guidelines for Secure AI System Development,* https://www.cisa.gov/news-events/news/dhs-cisa-and-uk-ncsc-release-joint-guidelines-secure-ai-system-development

differ from agency to agency or across policy frameworks, and given that ownership over AI testing and evaluation activities must differ as required by this draft memorandum, a clearer distinction between those activities would benefit efforts to complete testing and evaluation requirements in practice.

Finally, specific to Section 5(c)(iv)(H), and as previously stated, the City strongly supports efforts to enable transparency around the use of AI by agencies. In the City's experience, such transparency is improved when agencies report information about their AI use through a structured and standardized template. The City recommends OMB establish such a template for federal agencies.

In summary, the City wishes to convey its appreciation and support for OMB's draft memorandum and to reiterate the importance of such federal guidance within the local policymaking context. To that extent the City encourages OMB in finalizing its memorandum to consider the implications of its requirements in their final form on the efforts and trajectories of state and local governments. It is the City's sincere hope that a final OMB memorandum will continue to thoughtfully balance comprehensiveness, detail, and awareness of administrative burden, such that its utility can be expanded beyond the direct application to federal agencies.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: Centre for Information Policy Leadership (CIPL)

General Comment

The Centre for Information Policy Leadership (CIPL) welcomes the opportunity to respond to the request for comments by the Office of Management and Budget (OMB) on its draft memorandum titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence. Our comments are in the attached PDF, along with a copy of our recent report, “Ten Recommendations for Global AI Regulation."

Attachments

CIPL response to OMB Request for Comments on Agency Use of Artificial Intelligence Draft Memorandum - FINAL

cipl_ten_recommendations_global_ai_regulation_oct2023

Response by the Centre for Information Policy Leadership to OMB's Request for Comments on its Proposed Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

Docket number OMB–2023–0020
Submitted December 5, 2023

The Centre for Information Policy Leadership (CIPL)[1] welcomes the opportunity to respond to the request for comments by the Office of Management and Budget (OMB) on its draft memorandum titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence."[2]

CIPL supports the adoption of risk management practices for uses of AI that impact the rights and safety of the public. As noted in our paper "Ten Recommendations for Global AI Regulation,"[3] any regulatory approach to AI should seek to protect fundamental human rights and minimize risks to individuals and society, while enabling development and use of AI for the benefit of both.[4] A holistic risk-based approach would facilitate practical protective measures that are proportional to the risks and benefits of a particular AI system.[5] Our paper is enclosed with this submission.

Indeed, OMB's proposed memorandum recognizes the need to apply a **risk-based approach** by requiring agencies to complete an AI impact assessment.[6] CIPL has been on the forefront of promoting a risk-based approach for more than 20 years. CIPL's Accountability Framework[7] (see Figure 1) includes the core elements for any organizational privacy, data, or technology governance program. An accountability-based program seeks to ensure that organizations (as well as government agencies) implement demonstrable processes and measures that help them comply with applicable legal requirements, adopt best practices, and improve societal trust in legitimate and beneficial uses of data.

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[1] CIPL is a global privacy and data policy think tank in the law firm of Hunton Andrews Kurth LLP and is financially supported by the law firm and 85+ member companies that are leaders in key sectors of the global economy. CIPL's mission is to engage in thought leadership and develop best practices that ensure both effective privacy protections and the responsible use of personal information in the modern information age. CIPL's work facilitates constructive engagement between business leaders, privacy and security professionals, regulators, and policymakers around the world. For more information, please see CIPL's website at http://www.informationpolicycentre.com/. Nothing in this submission should be construed as representing the views of any individual CIPL member company or of the law firm of Hunton Andrews Kurth.

[2] Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, 88 FR 75625, Nov. 3, 2023, available here.

[3] CIPL, Ten Recommendations for Global AI Regulation, published October 2023, available here.

[4] *Id.*, p. 6.

[5] *Id.*

[6] OMB Proposed Memorandum for the Heads of Executive Departments and Agencies: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (Draft for Public Review), p. 15, available here.

[7] See CIPL resources and papers on organizational accountability, available here.

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Figure 1

Source: CIPL

An accountability framework expressly requires entities to perform **contextual risk assessments**, which enable them to (1) identify the impact on individuals and society of data and technology uses; (2) weigh the identified and potentially competing risks and benefits; and (3) devise appropriate mitigations and controls that reduce or minimize the risks while also preserving the benefits.

OMB's proposed memorandum appropriately requires agencies to identify "context-specific risks that are associated with their determined use cases and address them as appropriate."[8] It also requires agencies to conduct adequate testing to ensure that the AI, as well as components that rely on it, will work in its intended real-world context.[9] CIPL supports the OMB's context-specific approach.

Moreover, consistent with CIPL's approach, OMB's proposed memorandum encourages agencies to foster innovation, requiring agencies to improve their ability to use AI in ways that benefit the public and increase mission effectiveness.[10]

Indeed, the OMB's proposed memorandum appears to address all seven elements of CIPL's Accountability Framework:

1. Leadership & Oversight: Each agency must designate a Chief AI Officer, who bears primary responsibility on behalf of the head of the agency for implementing OMB's memorandum and coordinating implementation with other agencies.[11] Moreover, agencies must ensure that AI issues receive adequate attention from each agency's senior leadership.[12] Agencies identified in the Chief Financial Officer (CFO) Act must establish AI Governance Boards.[13]

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8 OMB Proposed Memorandum, *supra*, note 6, p. 13.

9 *Id.*, p. 16.

10 *Id.*, p. 8.

11 *Id.*, pp. 3-4.

12 *Id.*, p. 7.

13 *Id.*

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2. Risk Assessment: As mentioned above, agencies must complete an AI impact assessment before using AI presumed to impact the rights and safety of the public.[14]
3. Policies & Procedures: Each agency must submit to OMB and post publicly on the agency's website either a plan to achieve consistency with the memorandum, or a written determination that the agency does not use and does not anticipate using covered AI.[15]
4. Transparency: Agencies must annually submit an inventory of its AI use cases to OMB and subsequently post a public version on the agency's website.[16] Agencies must ensure that the AI's entry in the use case inventory serves as adequately detailed and generally accessible documentation of the system's functionality that provides public notice of the AI to its users and the general public. [17]
5. Training & Awareness: Agencies must ensure there is sufficient training and oversight for operators of the AI to interpret and act on the AI's output.[18]
6. Monitoring & Verification: Agencies must conduct ongoing monitoring and establish thresholds for periodic human review.[19]
7. Response & Enforcement: Upon identifying new or significantly altered risks to rights or safety, agencies must take steps to mitigate those risks, including, as appropriate, through updating the AI to reduce its risks or implementing non-technical mitigations, such as greater human oversight.[20]

CIPL has produced a considerable portfolio of thought leadership specifically related to AI governance. We incorporate the following documents by reference and invite the OMB to review them individually:

- In October 2023, CIPL published "Ten Recommendations for Global AI Regulation," which seeks to guide AI policymaking and regulation to ensure the development and deployment of accountable, responsible, and trustworthy AI.[21] (We have attached this paper as part of our submission).
- In June 2023, CIPL submitted a response to the U.S. National Telecommunications and Information Administration's Request for Comments on Artificial Intelligence Accountability.[22]
- In March 2023, CIPL submitted a response to the California Privacy Protection Agency's Invitation for Preliminary Comments on Proposed Rulemaking for cybersecurity audits, risk assessments, and automated decision-making.[23]

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[14] *Id.*, p. 15.

[15] *Id.*, p. 4.

[16] *Id.*

[17] *Id.*, p. 18.

[18] *Id.*, p. 17.

[19] *Id.*

[20] *Id.*

[21] *Supra*, note 3.

[22] CIPL Response to NTIA Request for Comment on AI Accountability Policy, June 12, 2023, available here.

[23] CIPL Response to the CPPA's Invitation for Preliminary Comments on Proposed Rulemaking on Cybersecurity Audits, Risk Assessments, and Automated Decisionmaking, March 27, 2023, available here.

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- In November 2022, CIPL filed comments on the Federal Trade Commission's Advanced Notice of Proposed Rulemaking on commercial surveillance and data security, which addressed, among other things, artificial intelligence.[24]
- In October 2022, CIPL published a white paper outlining ten key recommendations for regulating artificial intelligence in Brazil.[25]
- In September 2022, CIPL submitted a response to the UK Department for Digital, Culture, Media & Sport on its Consultation on establishing a pro-innovation approach to regulating AI.[26]
- In July 2021, CIPL submitted a response to the European Commission's Consultation on the Draft Artificial Intelligence Act.[27]
- In March 2021, CIPL published a paper on delivering a risk-based approach to regulating artificial intelligence.[28]
- In March 2020, CIPL submitted formal comments to the Office of the Privacy Commissioner of Canada in response to its proposals for ensuring appropriate regulation of artificial intelligence.[29]
- Also in March 2020, CIPL published a paper exploring the various ways in which the EU General Data Protection Regulation regulates the development and use of artificial intelligence by organizations processing personal data.[30]
- In February 2020, CIPL published a report that provides insights into emerging solutions for delivering trusted and responsible AI.[31]
- In January 2019, CIPL submitted formal comments to the International Conference of Data Protection and Privacy Commissioners on its Declaration on Ethics and Data Protection in Artificial Intelligence.[32]
- In November 2018, CIPL published its first report on AI, which describes AI's capabilities as well as AI's challenges to compliance with traditional data protection laws and norms.[33]

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[24] CIPL Comments on the FTC's ANPR on Commercial Surveillance and Data Security, submitted Nov. 21, 2022, available here.

[25] CIPL's Top Ten Recommendations for Regulating AI in Brazil, published October 4, 2022, available here.

[26] CIPL Response to UK Department for Digital, Culture, Media and Sport (DCMS) Policy Paper on Establishing a Pro-innovation Approach to Regulating AI, submitted Sept. 23, 2022, available here.

[27] CIPL Response to the EU Commission's Consultation on the Draft AI Act, submitted July 29, 2021, available here.

[28] CIPL Recommendations on Adopting a Risk-Based Approach to Regulating Artificial Intelligence in the EU, published March 22, 2021, available here.

[29] CIPL Comments on the Office of the Privacy Commissioner of Canada's Consultation on Proposals for Ensuring Appropriate Regulation of Artificial Intelligence, submitted March 12, 2020, available here.

[30] Artificial Intelligence and Data Protection How the GDPR Regulates AI, published March 12, 2020, available here.

[31] CIPL AI Second Report: Hard Issues and Practical Solutions, published Feb. 27, 2020, available here.

[32] CIPL Comments on the International Conference of Data Protection and Privacy Commissioners Declaration on Ethics and Data Protection in Artificial Intelligence, submitted January 25, 2019, available here.

[33] CIPL AI First Report: Artificial Intelligence and Data Protection in Tension, published Oct. 10, 2018, available here.

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Moreover, CIPL will be releasing a **new report on accountable AI governance** in the near future; we look forward to sharing that report with OMB upon publication.

CIPL also has a rich history of convening stakeholders for thoughtful and meaningful discussions on AI. For example:

- In November 2023, CIPL hosted a roundtable discussion in Brussels exploring the latest developments on the EU AI Act, how some long-established data protection principles may be in tension with AI, and concrete examples of current best practices to address risks and challenges.[34]
- In October 2023, in the margins of the UK's AI Safety Summit, CIPL co-hosted a London event with AI Fringe that delved into best practices from organizations building and implementing programs and procedures for responsible AI development, deployment, and compliance.[35]
- Also in October 2023, CIPL hosted a side event at the 45th Global Privacy Assembly in Bermuda that explored a range of important questions associated with the responsible development and deployment of AI and considered concrete examples of current best practices and attempts to address the risks and challenges.[36]
- In September 2023, CIPL hosted its annual Executive Retreat in Washington, DC, which focused on the future of AI, responsible innovation, the challenges posed by emerging technologies, the implications of AI's rapid rise for data regulation, policy, enforcement, and more.[37]
- In June 2023, CIPL hosted a roundtable that shed light on the technology that underpins generative AI and explored the challenges encountered while developing generative AI tools.[38]
- In May 2023, CIPL hosted a webinar on the evolving role of the Chief Privacy Officer amidst the rapid acceleration in and adoption of generative AI and other AI tools.[39]
- In May 2022, CIPL hosted a roundtable discussion with MEP Dragoș Tudorache on the European Commission's proposed AI Act.[40]
- In April 2022, CIPL hosted a roundtable discussion with MEP Axel Voss on the European Commission's proposed AI Act.[41]

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[34] Responsible AI in Focus: Regulatory Developments and Emerging Best Practices, held Nov. 15, 2023 (noted here).

[35] Building Trust in AI: Regulation and Industry Best Practices, held Oct. 31, 2023 (noted, with takeaways, here).

[36] Responsible AI in Practice: Risk Assessments, Responsibility of Different Parties, and Transparency, held Oct. 18, 2023 (noted, with highlights, here).

[37] Great Expectations: Meeting the Demands of Digital Ethics, Innovation, and Compliance in an Era of Rapid Technological Change, held Sept 19-20 (noted here).

[38] Demystifying Generative AI, held June 29, 2023.

[39] *See* "Quo Vadis, CPO? An Evolving Role in Changing Times," published on LinkedIn June 2, 2023: https://www.linkedin.com/pulse/quo-vadis-cpo-evolving-role-changing/.

[40] EU AI Act State of Play - with MEP Dragoș Tudorache, held May 23, 2022.

[41] EU AI Act State of Play - with MEP Axel Voss, held April 21, 2022.

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- In March 2021, CIPL organized a roundtable entitled "EU Approach to Regulating AI–How Can Experimentation Help Bridge Innovation and Regulation?"[42]

Given our breadth of knowledge, CIPL welcomes the opportunity to share our expertise at future hearings if needed.

[42] *See* "CIPL Organizes Webinar on EU Approach to Regulating AI and Regulatory Experimentation," posted April 2, 2021, Privacy & Information Security Blog, Hunton Andews Kurth, available here.

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Ten Recommendations for Global AI Regulation

October 2023

Centre for Information Policy Leadership
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Ten Recommendations for Global AI Regulation

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INTRODUCTION

Artificial Intelligence (AI)[i] is generating wide and growing societal benefits, including powering medical research, addressing climate change, transforming industries, and modernizing governments. At the same time, the rapid rollout and adoption of new applications, such as generative AI chatbots and image generators, have intensified longstanding concerns and raised new questions related to privacy and data protection, transparency and explainability, human rights, intellectual property, security, bias, workforce impacts, generation and dissemination of misinformation and disinformation; and other societal effects. In response, organizations are developing operational controls and governance frameworks to ensure responsible development and deployment of AI; industry experts are working to develop standards; policymakers are writing new laws; and regulators are testing the limits of existing authorities and proposing new ones.[ii] However, there is no consensus among countries on the best approach to regulating AI: should the focus be hard regulation, co-regulatory models, certifications and assurances, industry standards, or some combination?[iii]

CIPL has been a thought leader on organizational accountability and a risk-based approach to data policy and practices for over 20 years, and was an early contributor toward scoping challenges and defining solutions for AI governance and industry practices. Key CIPL contributions in this space include *Artificial Intelligence and Data Protection in Tension* (October 2018), *Hard Issues and Practical Solutions* (February 2020) and *Artificial Intelligence and Data Protection: How the GDPR Regulates AI* (March 2020).[iv] CIPL has also prepared detailed responses to public consultations on AI policy in Brazil, the European Union, the United Kingdom, and the United States.[v]

Drawing on this experience and our extensive engagement with private sector leaders developing and deploying AI technologies, policymakers, and regulators, CIPL offers in this paper ten recommendations to guide AI policymaking and regulation to enable accountable, responsible, and trustworthy AI. These ten recommendations encapsulate CIPL's view on a layered or three-tiered approach to AI regulation:

a) principle- and outcome -based rules,
b) demonstrable organizational accountability, and
c) robust and smart regulatory oversight.

Such an approach provides future-proof rules grounded in core principles that can guide ethical development and deployment of AI even as technology and use cases evolve. We describe this approach below.

Recommendations for Regulating AI

CIPL recommends a risk-based and tiered approach to regulating AI that builds on existing laws and standards and on accountable practices of organizations. This approach should be backed by innovative regulatory oversight and co-regulatory instruments.

Any legislative or regulatory approach to AI should follow these overarching recommendations:

A. Principle-and Outcome-Based Rules
   1. Create a flexible and adaptable framework that defines the outcomes to be achieved, rather than prescribing details of how to achieve them
   2. Adopt a risk-based approach that considers risks and benefits holistically
   3. Build on existing hard and soft law foundations
   4. Empower individuals through transparency, explainability, and mechanisms for redress

B. Demonstrable Organizational Accountability
   5. Make demonstrable organizational accountability a central element of AI regulations
   6. Advance adoption of accountable AI governance practices
   7. Apportion liability carefully, with a focus on the party most closely associated with generating harm

C. Smart Regulatory Oversight
   8. Create mechanisms for coordination and cooperation across regulatory bodies
   9. Institute cooperation-based regulatory oversight and enable ongoing regulatory innovation
   10. Strive for global interoperability

I. PRINCIPLE- AND OUTCOME-BASED RULES

1. Create a flexible and adaptable framework that defines the outcomes to be achieved, rather than prescribing details of how to achieve them

To be effective, AI regulations must be able to remain relevant as technology and use-cases continue to advance. Any rules should be *technology neutral*: a framework that is overly prescriptive and specific to individual technologies or current business models and practices risks becoming quickly outdated and inhibiting beneficial innovations. Indeed, an approach based on lists of specific technologies will require frequent amendments to keep up with technological change. If rules include lists of presumptively high-risk technologies and applications, they should enable those presumptions to be rebuttable and to evolve over time.

Rules should also be *principle- and outcome-based*. They should enable organizations to ensure the required outcomes (e.g., fairness, non-bias, transparency, accuracy, security, human oversight)

through risk-based, verifiable internal policies, procedures and controls that are appropriate in their specific contexts, without prescribing how to achieve these outcomes. Such an approach provides developers the flexibility to innovate, including the ability to innovate in the actual controls, technical tools and safeguards, while maintaining consistency with core principles and outcomes.[vi]

Similarly, a regulatory framework should not be overly prescriptive as to methodologies of AI impact- and risk assessments, but describe criteria that should be considered when assessing risks and benefits of an AI application and leave it to the competent regulators to provide further tailored, realistic and practical guidance in collaboration with those developing and deploying AI technologies.

At the same time, the rules should provide as much certainty as possible regarding their scope of application. For example, a regulatory framework for AI must define AI so that stakeholders can clearly understand what systems are covered by the rules. Absent such clarity and outcome-based focus, regulatory ambiguity and regulatory over-prescription will risk inhibiting investment and innovation—especially for small- and medium-sized enterprises (SMEs) and start-ups that are powerful engines of AI innovation and investment.

2. Adopt a risk-based approach that considers risks and benefits holistically

Any regulatory approach to AI should seek to protect fundamental human rights and minimize risks to individuals and society, while enabling development and use of AI for the benefit of both. Indeed, risks to individuals and society can also materialize from *not* using effective AI technologies, such as those that have the capacity to predict and prevent disease, or to reduce online harm, cybersecurity threats and fraud. A holistic risk-based approach promotes this goal by facilitating practical protective measures that are proportional to the risks and benefits of a particular AI system. Its focus is on potential impacts of AI technology in the context of specific use cases.

A risk-based regulatory framework for AI would provide non-exhaustive criteria to assist organizations to determine the likelihood and severity of any harm resulting and the measures required to mitigate it. Assessing and understanding the potential impact of their AI applications allows organizations to tailor their mitigations to the actual risks and avoid the implementation of unnecessary measures. For example, k-nearest neighbors algorithm (KNN) is a machine learning algorithm used in a variety of applications[vii]: in retail to recommend products, in healthcare to predict the risk of heart attacks and prostate cancer, in finance to detect fraudulent activity, in agriculture to predict crop yield and in transportation to predict and optimize traffic. These different uses of the same KNN algorithm have different levels of risk – the likelihood and severity of harm in recommending songs or clothing differ from the same in emergency medicine.

A risk-based framework should also assess the potential benefits of an AI system for individuals, organizations and society. These can then be weighed against the identified risks of deploying (or not deploying) AI. For example, the risks from autonomous vehicles (AVs) depend on the different surroundings in which they are deployed. There is arguably a lower risk of harm to people in deploying autonomous vehicles in mining and farming as opposed to urban or residential areas. At the same time, autonomous vehicles in the former settings offer different benefits, such as easing labor supply, supporting sustainable farming and improving productivity[viii]. The same example is helpful for highlighting the importance of weighing carefully the metrics by which to measure risk: one could assess risk of AVs versus the status quo (a world where most cars are driven by people) and/or a designated, optimal standard for AVs.

In short, the outcomes of holistic risk assessments for the use of a specific AI technology may vary significantly across use cases. From a policymaking perspective, this means that it may be hard to definitively identify high or low risk uses in advance, as the context of deployment is key. A risk-based approach is preferable to a categorical approach of defining AI systems that are automatically deemed to be high-risk. For example, considering all AI systems that are making inferences based on biometric data as high risk could encompass relatively low-risk ancillary uses, such as where AI is used to apply filters or improve video quality in video calls.

A more suitable approach would be:

A) to describe factors, criteria and potential harms that risk assessments should consider;
B) to provide, at most, an illustrative list of potentially higher vs. lower risk uses that can be rebutted in each particular case;
C) to provide ongoing guidance on how to assess risks and benefits based on learnings over time.

3. Build on existing hard and soft law foundations

A flexible and adaptable AI regime should build on existing legal frameworks, including regulations and legislation ("hard laws") and "soft law" (e.g., the OECD AI Principles). Many sectors where AI finds application are already highly regulated (e.g., healthcare, finance) and existing laws and regulations already provide requirements, compliance structures, and remedies that apply to the use of AI. However, relevant existing laws and regulations may also have to be interpreted in a new way and adapted to the realities of AI. Where there are regulatory gaps concerning AI-related risks, they should be closed with targeted regulatory and co-regulatory intervention, prioritizing sectors where existing regulations do not apply.

Relying on existing hard law frameworks to the extent possible reduces the risk of creating overlapping or conflicting rules that could lead to legal uncertainty and inconsistent protections. Existing anti-discrimination, consumer protection, intellectual property, and importantly, data protection and privacy rules are relevant to address many of the most important risks associated with AI. For example, in March 2020, CIPL produced a comprehensive analysis describing how the EU General Data Protection Regulation already regulates AI in relation to use of personal data.[ix] Where there are gaps in legislative frameworks—as in the United States, which currently lacks a comprehensive federal privacy law—filling them is an important foundation for sound AI regulation.[x] Where existing frameworks are relevant, regulatory agencies can foster compliance by issuing guidance on how those rules apply to AI. By consulting with a range of stakeholders, regulators can identify circumstances where such guidance will be most useful.

Further, it is important to recognise that existing rules may require some adaptation and evolved regulatory interpretation to align them with developments in AI technology. For example, certain principles found in many data protection law, such as lawful basis for processing, purpose specification and use limitation, may be in tension with the needs of AI systems and the way they operate.

As to the concept of lawful basis, there may not be sufficient lawful bases in current data protection laws to enable AI developers to use sensitive categories of personal data, such as health, gender, and ethnicity to ensure the AI model is trained and operates in a way that does not result in biased or discriminatory outcomes. Also, if personal data are processed based on a specific legal basis for specified purposes, and used only for those purposes or for "compatible" purposes, often with

narrow interpretations as to what constitutes "compatible", this may contradict the nature of how AI algorithms operate and learn. Given AI's potential for discovering new and unforeseen uses of data, these principles may unnecessarily thwart beneficial applications of AI unless they are given a broader interpretation for the AI context. An example for such a broader interpretation would be to apply a broader definition of "compatible" that includes any purposes that do not negate or conflict with the initial purpose and do not increase the risk of harm to individuals. Another solution would be to consider algorithmic training as a purpose on its own, separate from the purpose of deploying the algorithm to a particular use-case. This would allow broader collection and use of data in the training phase in order to ensure proper training and functioning of the algorithm. Finally, similar tensions arise with respect to the principles of data minimization and retention limitation, which may limit algorithms' opportunities to "learn" through recognition of correlations. In short, if certain traditional data protection principles are interpreted too rigidly, they may block development and deployment of beneficial AI applications—or have unintended consequences such as introducing unwanted bias, by limiting access to diverse training data.[xi] Regulators need to be able to evolve the interpretation of existing data protection principles through regulatory guidance developed in consultation with AI developers and deployers.

Finally, existing rules must be augmented with soft law frameworks, industry standards and co-regulatory tools developed in partnership with stakeholders, such as codes of conduct, certifications, and assurance models. International standards can help establish baseline requirements for development and deployment of AI that reflect shared understandings and values arrived at through multistakeholder development processes. The G7 Digital and Tech Ministers reaffirmed the key role of standards at their Hiroshima Summit in April 2023[xii] and agreed in September to develop a Code of Conduct for organizations developing advanced AI systems[xiii], while the multi-stakeholder Certification Working Group is leading promising work on AI Certification .[xiv] Leveraging soft law frameworks such as the OECD AI Principles can foster international alignment on AI regulations: for example, the Parliament's version of the EU AI Act derives its definition of "Artificial Intelligence" from those principles.

4. Empower individuals through transparency, explainability, and mechanisms for redress

CIPL has advocated for individual empowerment as a core principle of sound privacy regulation, and the same holds true for AI. For AI to be trustworthy and beneficial to all, regulations, co-regulatory frameworks, and industry practices must empower individuals through:

- **Transparency.** Developers and deployers of AI should provide context-appropriate and meaningful transparency about the inputs and operations of AI systems, while preserving privacy and data protection, security, safety, and trade secrets. Such contextualized transparency should extend to business users of AI systems, auditors, regulators, and the general public.

    - **High-risk AI systems** should document how the system is intended to be used, known inappropriate uses and risks, and recommendations for deployers on how to manage those risks.
    - **Generative AI** requires steps to ensure that users understand models' data practices and limitations. Ideally, developers and deployers should provide transparency through multiple mechanisms, including policies, terms of service, in-product notifications, and centralized resource hubs.

- **Explainability.** Explainability is an aspect of transparency and a means of boosting accountability and trust. It requires that developers and deployers meaningfully explain how AI systems affect decisions and outcomes that impact individuals, while bearing in mind trade-offs, such as between explainability and security/safety, and explainability and accuracy. The more complex and accurate the algorithm is, the harder it may be to explain how it actually works. There may also be technical constraints on explainability in some circumstances. For example, it may not always be possible to explain how large language models (LLMs) generate specific results based on individual inputs or model parameters. Organizations will have to document the relevant trade-offs to demonstrate how and why they prioritised accuracy over explainability. A case in point may be AI algorithms used in healthcare and medicine, where AI may enable certain health benefits not achievable by non-AI tools, yet may not be explainable. Under those circumstances, accuracy may take precedence over explainabilty. In short, depending on the context, risks, and potential benefits of a specific use case, requiring full explainability as a condition for use may not be appropriate in all instances.

- **User Feedback and Redress.** Where individuals do not understand an AI-made decision, or believe they have been harmed by AI, there should be clear options for user feedback, inquiries, complaints, further transparency, the right to contest the decision, a requirement for human review and, ultimately, redress, as well as action by enforcement authorities, where appropriate and necessary. Developers and business users should consider how to enable further transparency, human review in case of a contested use of AI, as well as opportunities for complaint capture and redress as part of the design of end-to-end solutions that leverage AI.

II. DEMONSTRABLE ORGANIZATIONAL ACCOUNTABILITY

5. Make demonstrable organizational accountability a central element of AI regulations

To ensure accountability within the broader ecosystem, regulations should facilitate organizations' demonstrable use of accountability frameworks and governance programs that provide the tools and processes for organizations to implement all relevant legal requirements and other standards. As in other areas of traditional corporate compliance and business ethics—and more recently in data, security, and digital spheres—accountability must be built into and implemented across all stages of the AI lifecycle and the AI "technology stack", including AI datacenter infrastructure, models, and applications.[xv]

There are a variety of accountability frameworks that provide useful models for devising organizational accountability and AI governance programs, including the U.S. NIST AI Risk Management Framework, Singapore's Model AI Governance Framework, and CIPL's own Accountability Framework described in Annexes 1-3 of this report.[xvi]

Organizations also need to be able to *demonstrate* accountability internally – to their C-suite and corporate Boards, as well as externally - to shareholders, investors, regulators and the general public. Certifications, audits, codes of conduct, and assessments are helpful tools for demonstrating accountability. Indeed, these accountability mechanisms are essential in digital policy and regulation, including for developers and deployers of artificial intelligence, for the following reasons:

- They demonstrate to all actors across the organization a commitment and the ability to ensuring that products and services meet specific criteria.
- They enable organizations to translate principle- and outcome-based legal requirements into demonstrable and risk-based controls, ensuring more effective regulation and better compliance in practice.
- They play an important role in providing legal certainty and strengthening trust, including in business-to-business contexts.

Any AI regulation should explicitly include demonstrable accountability as a core element, as well as enable development and use of co-regulatory frameworks, such as certification schemes and codes of conduct, that facilitate and demonstrate such accountability.

6. Advance adoption of accountable AI governance practices

While a core set of accountability practices should be required for organizations developing and deploying AI, policymakers and regulators should also proactively encourage and incentivize adoption of broader accountability practices, frameworks, tools and technologies. They should work with stakeholders to co-develop tools and frameworks for building and demonstrating AI accountability. The goal should be to create an environment wherein organizations see adoption of well-developed accountability frameworks as differentiators for creating value and deepening trust in their data practices, beyond fulfilling baseline legal and regulatory obligations.

Policymakers and regulators should also understand drivers and challenges with respect to accountable technology practices and technology solutions, such a Privacy Enhancing Technologies (PETs), and take steps to incentivise their further development and wider adoption.[xvii]

Consideration should be given to a broad range of potential incentives for accountability[xviii], including:

- Formally recognising demonstrated or certified accountability as a mitigating factor in enforcement actions and in assessing sanctions and/or levels of fines;
- Using demonstrated accountability as a form of "licence to operate", by giving accountable organizations greater freedom to develop and deploy AI models responsibly;
- Allowing broader use of data in AI projects for socially beneficial research that has been validated by relevant risk assessments, mitigations, oversight, and controls in accountability programs;
- Enabling parties acquiring AI systems to fulfil due diligence requirements by procuring systems that have been certified to recognized standards for responsible AI.
- Using demonstrated AI accountability as an eligibility criterion for public procurement projects, to incentivize contractors to obtain responsible AI certification.

7. Apportion liability carefully, with a focus on the party most closely associated with generating harm

Adoption of organizational accountability mechanisms by all actors in the AI ecosystem will lead to better compliance and outcomes on the ground, and likely result in less need to resort to questions around liability. Yet, where liability does raise concerns, active debates are underway regarding the appropriate apportionment across parties in the AI ecosystem.

In principle, liability should be assigned chiefly to the party most closely associated with generating the harm in question, but assigning liability may be complex in practice. The analysis will be shaped by existing legal standards and precedent, as well as the extent to which parties disclose relevant information through transparency and reporting requirements.

Depending on the circumstances, liability might be assigned to the developer, the deployer, end users, or some combination. Developers might be the appropriate focus of liability for systems that have been insufficiently tested for potential harms, or provided to users with misleading indications on capabilities. On the other hand, users share responsibility for how they use AI systems, as they determine whether to use a system for a higher risk use or in ways that are expressly contraindicated by guidance provided by developers.

As in other areas of commerce, contracts—including specific, emerging AI contracting practices—will play an important role in apportioning the responsibilities and liabilities of parties in the AI development and deployment life cycle. For example, if a developer contractually prohibits a high-risk use case of their product, the risk of misuse should shift to the user who has wilfully breached the terms of that contract. In scenarios where third parties provide AI models or AI-enabled solutions, accountability between model developers and deployers should be specified in contracts.

III. SMART REGULATORY OVERSIGHT

8. Create mechanisms for coordination and cooperation across regulatory bodies

AI is used across sectors governed by different regulations and regulators. For example, data protection authorities (DPAs) will have general competence over the processing of personal data using AI. Other regulators have more sector-specific remits over AI applications—as in in healthcare, housing, financial services, telecommunications, pharmaceuticals and in cross-cutting disciplines, such as intellectual property. In most circumstances, there should not be a need for a new, overarching AI regulator, as that would likely result in regulatory overstep, overlap, inconsistency, and lack of legal certainty. Rather, it is more appropriate to

a) enhance the competencies and capabilities of existing regulators to be ready for AI oversight and supervision; and
b) enable high-level AI policy coordination and collaboration across existing authorities.

While each regulator should maintain competence over its own remit (e.g., for purposes of legal certainty, DPAs should retain general competence over AI applications involving the processing of personal data and/or impacting individuals' privacy), a standing central governmental coordination body should be created to set high-level AI policies and goals applicable across all sectors and industries, and facilitate alignment, regulatory coordination, and joint action between different regulatory bodies, where necessary and appropriate. The coordination body can provide regulators a space in which to discuss trade-offs between different policy objectives including efficiency, productivity, fairness, privacy, security and resilience. It can also provide clarity on where parties should turn for guidance in specific circumstances of AI development and deployment.

This approach would be beneficial to both organizations and regulators by fostering consistency in regulatory approaches as well as holistic and inter-disciplinary policy and guidance that is easier to implement and monitor by specialized regulators and industry over time. Such an approach may also be helpful for harmonizing new laws and regulations with existing ones.

An example of cross-regulatory coordination is the UK Digital Regulation Cooperation Forum (DRCF). It includes a permanent CEO and staff, joint activities, joint guidance, and other regulatory action, as well as formal collaboration projects and staff secondments. AI has been a focus of the DRCF's work, as evidenced by its multi-year workstream on algorithmic transparency. [xix] Other countries, such as Australia, France, Ireland, and the Netherlands, have also established cooperation mechanisms for regulators.[xx]

9. Institute cooperation-based regulatory oversight and enable ongoing regulatory innovation

As technology continues to evolve, regulators, regulatory techniques, and tools need to evolve as well.

a) Regulators need to enhance their capabilities, capacities and how they operate in a world where there are competing and multiple interests at stake. For example, the task of data protection authorities should not be limited to protecting fundamental rights of individuals, but also to enable responsible and accountable use of data and development of AI technology for the benefit of society and economy in a way that protects fundamental rights. This requires a shift in regulatory mindset, regulatory priorities and regulatory action. This shift is essential if current regulators are to remain relevant and effective in a new digital world.

b) Regulators should take a risk-based approach in order to be strategic and effective. This requires understanding the risks and benefits of AI systems and focusing on those areas that present the highest risks to individuals and society, while preserving the benefits of AI technology and its advancement. It also requires regulators to prioritize all of their work – regulatory strategy, guidance, supervision and enforcement and to focus on areas that create the highest risks for individuals and society.

c) Traditional oversight mechanisms based exclusively or primarily on *ex post* enforcement may no longer be sufficient in a digital- and AI enabled society. Reliance on fixing market failures by enforcement alone will not result in desired outcomes. Given the pace of advancement of AI technology and the need to understand its risks and benefits, there is a pressing need for a more co-operative approach based on ongoing constructive engagement between regulators and regulated entities, sharing of experiences and information on technological developments, and working together to develop realistic compliance targets and interpretations of applicable rules. This requires both regulators and regulated entities to be transparent and ready to engage in constructive information sharing in real time as technologies and business practices change.[xxi] Investing in *ex ante* measures such as incentivizing proactive and demonstrable accountability is likely to achieve better outcomes than expensive *ex post* enforcement. Of course, enforcement should still remain a regulatory option and an important lever for repeated, serious and negligent breaches that cause real harm to individuals and society.

d) Innovative regulatory tools, such as sandboxes and policy prototyping, can be effective for regulatory oversight of new technology such as AI. They provide regulators with deeper understanding and first-hand experience of AI applications and developments, aimed at the general market. They also provide for safe harbor for industry to test the risks and benefits

of responsible innovation with a direct link to the competent regulator. Governments must provide appropriate funding and resources for regulators to develop and engage in regulatory sandboxes and be able to scale these activities for larger group of participants, including on a sectoral basis.

Regulatory Sandboxes: Regulatory sandboxes are important mechanisms for regulatory exploration and experimentation as they provide a test bed for applying laws to innovative products and services in real-life settings under the supervision of a regulator.[xxii] They can be used to help address and resolve some of the more challenging aspects of deploying AI against the backdrop of prevailing legal requirements, particularly those that appear inconsistent or in tension with new technologies. Examples include:

- The UK information Commissioner Office has run an established sandbox program since 2020, with a particular focus on emerging technologies and biometrics;[xxiii]
- The Singapore Infocomm Media Development Authority (IMDA)'s Data Regulatory Sandbox enables businesses to obtain regulatory guidance for innovative, data-intensive technologies. IMDA also operates a specific sandbox to foster development and adoption of Privacy-enhancing Technologies (PETs).[xxiv]
- The Norwegian Data Protection Authority (Datatilsynet) launched a special regulatory sandbox for AI applications;[xxv]
- The Colombian government has developed a regulatory sandbox to promote Privacy by Design and Default in AI projects;[xxvi]
- France's CNIL operates a sandbox that has completed projects in digital health and educational technology. In 2023, it announced a new initiative focused on AI[xxvii];
- The EU's draft AI Act would enable, and may ultimately require, member states to establish regulatory sandboxes for AI. Spain was the first member state to pilot an AI sandbox.[xxviii]

Regulatory sandboxes should be designed in a manner that encourages innovation, information sharing, and other modes of cooperation. Any AI regulatory framework should provide an explicit statutory basis for regulators to set up sandboxes, including cross-regulatory sandboxes with appropriate and relevant regulators including data protection, competition, media, consumer, health/pharma, telecom, and financial regulators. Regulations should be mindful of how legal authorities or enforcement priorities may affect company participation. At the same time, to ensure public trust in the results, sandboxes should include assurances that individuals will continue to be protected from harms even as policy experimentation takes place.

Policy prototyping: These are pilot projects that mobilize public and private actors to jointly explore, assess, and develop different legislative models of governance prior to their actual enactment. The process typically involves selecting a group of participants, such as early-stage technology companies, to develop and apply policy prototypes in partnership with government, industry, and academic experts. Meta's OpenLoop program has been a leading practitioner of policy prototyping, including for the EU's proposed AI Act.[xxix] Singapore's IMDA has a policy prototyping program within its Data Regulatory Sandbox that has focused on notice, consent, and disclosure; AI transparency and explainability; and transparency and consent in the metaverse, including contexts for application of legitimate interest as a basis for processing.[xxx]

10. Strive for global interoperability

Given the global nature of AI technology – from the data it uses for training, to research and development, computing infrastructure, and applications that cross borders – it is clear that no government can satisfactorily address AI policy and regulation in isolation. Cooperation at the international level is essential to ensure that individuals and societies globally can rely on the benefits of trustworthy and accountable AI and that new risks are assessed and mitigated on an ongoing basis. This work would benefit from a dedicated international forum that enables governmental and other stakeholders to cooperate on AI policy.

Furthermore, international cooperation must foster interoperability of AI policies and regulations. As CIPL has noted in the context of data protection, global interoperability enables responsible provision of services across borders, broadens access, reduces compliance costs, increases legal certainty, and ensures consistent protection of the rights and interests of individuals.[xxxi] Different jurisdictions will have their own priorities, legal traditions, and body of existing regulation, but may be able to coalesce around core principles and approaches in considering AI policy and regulation – similar to those CIPL has advanced in this paper. They can also take steps to codify interoperability through recognition and certification mechanisms, including through participation in the Global Cross-Border Privacy Rules (CBPR) system in the context of data protection and trusted cross-border data flows[xxxii]. There have been encouraging efforts toward AI interoperability through the aforementioned G7 initiative, the OECD AI Principles,[xxxiii] trade and economic agreements like the Digital Economic Partnership Agreement (DEPA)[xxxiv], and the Global Partnership on AI.[xxxv]

ANNEX I – CIPL ACCOUNTABILITY FRAMEWORK

ANNEX II – MAPPING BEST PRACTICES IN AI GOVERNANCE TO THE CIPL ACCOUNTABILITY FRAMEWORK

The following table outlines examples of accountable AI activities undertaken by select organizations of different sectors, geographies, and sizes, based on the CIPL Accountability Framework and mapped against each accountability element. The practices are not intended to be mandatory industry standards, but serve as specific examples that are calibrated based on risks, industry context, business model, size, and maturity level of organizations.

ACCOUNTABILITY ELEMENT	RELATED PRACTICES
Leadership and Oversight	• Public commitment and tone from the top to respect ethics, values, specific principles in AI development, deployment and use • Institutionalized AI processes and decision-making with escalation criteria • AI/ Ethics/ Oversight Boards, Committees (internal or external) - to review risky AI use cases and to continuously improve AI practices • Appointing a board member for AI oversight • Appointing a responsible AI lead, AI officer or AI champion • Setting up an internal interdisciplinary AI board or AI committee • Ensuring inclusion and diversity in AI model development and AI product teams
Risk Assessment	• Algorithmic impact assessment or fairness assessment tools to monitor and continuously test algorithms to avoid human bias, unfair discrimination and concept drift throughout the entirety of AI lifecycles • Ethics impact assessment / human rights impact assessment / Data protection impact assessment • Developing standardized risk assessment methodologies, which take into account the benefits and the likelihood and severity of risk factors on individuals and/or society, level of human oversight involved in individually automated decisions with legal effects as well as their explainability according to context and auditability • Trade-offs documentation (e.g., accuracy—data minimization, security—transparency, impact on few—benefit to society) for high-risk processing as part of the risk assessment • Data quality assessment via KPIs • Data evaluation against the purpose—quality, provenance, personal or not, synthetic, in-house or external sources • Framework for data preparation and model assessment – including feature engineering, cross-validation, back-testing, validated KPIs by business • Working in close collaboration between business and data experts (data analysts, data engineers, IT and software engineers) to regularly assess the needs and accuracy results to ensure that the model can be properly used
Policies and Procedures	• Adopting specific AI policies and procedures on how to design, use or sell AI • Policies on the application of privacy and security by design in AI life cycle • Rule setting the level of verification of data input and output • Pilot testing of AI models before release • Use of protected data (e.g., encrypted, pseudonymised, tokenised or synthetic data) in some models • Use of high quality but smaller data sets • Use of federated AI learning models, considering trade-off with data security and user responsibilities • Special considerations for organizations creating and selling AI models, software, applications • Due diligence/self-assessment checklists or tools for business partners using AI • Definition of escalation steps with regard to reporting, governance, and risk analysis

	• Ideation phase between all stakeholders (data scientists, business, final user, control functions) where needs, outcomes, validations rules, maintenance, need for explainability, budget, are discussed
Transparency	• Different needs for transparency to individuals, regulators, business partners and internally at the different stages of AI lifecycle based on context • Adequate disclosures communicated in simple, easy to understand manner • Take into account that AI must be inclusive and accessible by those with special needs/disabilities • Set up a transparency trail for explainability of decisions and broad workings of algorithm to make the AI system auditable • Explain that it is an AI/ML decision, if possibility for confusion (Turing test) • Provide counterfactual information • Understand customers' expectations and deploy based on their readiness to embrace AI • Implement tiered transparency • From black box to glass box—looking at the data as well as algorithm/model • Aspiration of explainability helps understand the black box and builds trust • Define criteria of deployment of AI technologies within the organization based on usage scenarios and communicate them to the user • Produce model cards (short documents accompanying AI models to describe context in which model should be used, what is the evaluation procedure) • Data hub for transparency on data governance, data accessibility, data lineage, data modification, data quality, definition, etc. • Tailor transparency to the identified risk: e.g. watermarking for generative AI output
Training and Awareness	• Data scientist training, including how to limit and address bias • Cross functional training – privacy professionals and engineers • Ethics and fairness training to technology teams • Uses cases where problematic AI deployment has been halted • Role of "translators" in organizations, explaining impact and workings of AI
Monitoring and Verification	• Capability for human in the loop in design, in oversight, in redress • Capability for human understanding of the business and processes using AI • Capability for human audit of input and output • Capability for human review of individual decisions with legal effects • Monitoring the eco-system from data flow in, data process and data flow out • Reliance on different audit techniques • Reliance on counterfactual testing techniques • Pre-definition of AI audit controls • Internal audit team specialised on AI and other emerging technologies • Processes must allow human control or intervention in the AI system where both technically possible and reasonably necessary • Model monitoring (back-testing and feedback loop) and maintenance process
Response and Enforcement	• Processes and procedures to receive and address feedback and complaints • Redress mechanisms to remedy an AI decision • Redress to a human, not to a bot • Feedback channel

[i] For this report, CIPL uses the term "artificial intelligence" in a manner consistent with the definition of "AI systems" developed by the U.S. National Institute of Standards and Technology (NIST) in its Risk Management Framework 1.0, adapted from a comparable definition developed by the Organisation for Economic Co-operation and Development (OECD): "*An AI system [is referred to as] as an engineered or machine-based system that can, for a given set of objectives, generate outputs such as predictions, recommendations, or decisions influencing real or virtual environments. AI systems are designed to operate with varying levels of autonomy*." See https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.

[ii] For example: Italian Data Protection Authority "Garante" ban on ChatGPT on March 30, 2023 available at https://www.gpdp.it/web/guest/home/docweb/-/docweb-display/docweb/9870832 ; European Data Protection Board (EDPB) creates task force on Chat GPT, available at https://edpb.europa.eu/news/news/2023/edpb-resolves-dispute-transfers-meta-and-creates-task-force-chat-gpt_en; UK Competition and Markets Authority launches initial review of artificial intelligence models, available at https://www.gov.uk/cma-cases/ai-foundation-models-initial-review; The Office of the Privacy Commissioner of Canada has launched an investigation into ChatGPT, available here https://www.priv.gc.ca/en/opc-news/news-and-announcements/2023/an_230404/; Joint statement on enforcement efforts against discrimination and bias in automated systems USA Consumer Financial Protection Bureau, Department of Justice's Civil Rights Division, Equal Employment Opportunity Commission and Federal Trade Commission available at https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf.

[iii]According to the OECD more than 800 AI policy initiatives and strategies have been designed across 69 countries, territories, and the European Union https://oecd.ai/en/dashboards/overview.

[iv] CIPL, "First Report: Artificial Intelligence and Data Protection in Tension," October 2018, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_first_ai_report_-_ai_and_data_protection_in_tension__2_.pdf; "Second Report: Hard Issues and Practical Solutions," February 2020, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_second_report_-_artificial_intelligence_and_data_protection_-_hard_issues_and_practical_solutions__27_february_2020_.pdf; "Artificial Intelligence and Data Protection: How the GDPR Regulates AI," March 2020, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl-hunton_andrews_kurth_legal_note_-_how_gdpr_regulates_ai__12_march_2020_.pdf.

[v] CIPL, "Response to NTIA Request for Comment on AI Accountability Policy," June 2023, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_response_to_ntia_ai_accountability_policy_june2023.pdf; "CIPL's Top Ten Recommendations for Regulating AI in Brazil," October 2022, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/[en]_cipls_top_ten_recommendations_for_regulating_ai_in_brazil__4_october_2022_.pdf; "Response to UK DCMS Proposed Approach to Regulating AI," September 2022, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_response_to_uk_dcms_proposed_approach_to_regulating_ai_23_09_22.pdf; "CIPL Response to the EU Commission's Consultation on the Draft AI Act," July 2021, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_response_to_the_consultation_on_the_draft_ai_act__29_july_2021_.pdf.

[vi] There are no universally accepted definitions for AI developers, deployers, and users; indeed, a 2023 taxonomy jointly developed by the EU and U.S. described the definitions of deployment, developer, and user as "pending" (See "EU-U.S. Terminology and Taxonomy for Artificial Intelligence: First Edition", https://www.nist.gov/system/files/documents/noindex/2023/05/31/WG1%20AI%20Taxonomy%20and%20Terminology%20Subgroup%20List%20of%20Terms.pdf). In this paper, we use the term "developers" to refer to parties that design and build AI systems, "deployers" as parties that make such systems available for use, and "users" as the end-users that operate those systems on an ongoing basis. A single entity could play each of these roles at different points or simultaneously.

[vii] *K-Nearest Neighbors Algorithm*, IBM, available at https://www.ibm.com/uk-en/topics/knn#:~:text=Next%20steps-,K%2DNearest%20Neighbors%20Algorithm,of%20an%20individual%20data%20point.

[viii] *3 ways autonomous farming is driving a new era of agriculture*, World Economic Forum, 2022 Available at: https://www.weforum.org/agenda/2022/01/autonomous-farming-tractors-agriculture/

[ix] CIPL, "Artificial Intelligence and Data Protection: How the GDPR Regulates AI," March 2020, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl-hunton_andrews_kurth_legal_note_-_how_gdpr_regulates_ai__12_march_2020_.pdf.

[x] For more on the intersection between AI and data protection regulation, see CIPL AI First Report - *Artificial Intelligence and Data Protection in Tension*; CIPL AI Second Report - *Hard Issues and Practical Solutions*; and CIPL/Hunton Andrews Kurth White Paper - *How the GDPR Regulates AI* – all available here https://www.informationpolicycentre.com/ai-project.html.

[xi] For more on this topic, see CIPL, "First Report: Artificial Intelligence and Data Protection in Tension," October 2018, cipl_first_ai_report_-_ai_and_data_protection_in_tension__2_.pdf (informationpolicycentre.com), and CIPL, "Second Report: Hard Issues and Practical Solutions," February 2020, AI Project - Centre for Information Policy Leadership (informationpolicycentre.com).

[xii] Ministerial Declaration The G7 Digital and Tech Ministers' Meeting 30 April 2023 (g7digital-tech-2023.go.jp)

[xiii] G7 Hiroshima AI Process: G7 Digital & Tech Ministers Statement", September 2023, accessed at 3e39b82d-464d-403a-b6cb-dc0e1bdec642-230906_Ministerial-clean-Draft-Hiroshima-Ministers-Statement68.pdf (politico.eu).

[xiv] Certification Working Group, "Unlocking the Power of AI – Steps for Effective Certification to Help Drive Innovation and Trust," June 2023, https://www.responsible.ai/post/white-paper-draft-from-the-certification-working-group.

[xv] For further discussion of governance across these layers of the AI Technology Stack, see Microsoft, "Governing AI: A Blueprint for the Future," May 2023, https://query.prod.cms.rt.microsoft.com/cms/api/am/binary/RW14Gtw.

[xvi] National Institute of Standards and Technology (NIST), "AI Risk Management Framework," https://www.nist.gov/itl/ai-risk-management-framework; Personal Data Protection Commission (PDPC), "Singapore's Approach to AI Governance," https://www.pdpc.gov.sg/Help-and-Resources/2020/01/Model-AI-Governance-Framework, CIPL, "Organizational Accountability," https://www.informationpolicycentre.com/organizational-accountability.html.

[xvii] See CIPL's report on Privacy-enhancing Technologies (forthcoming, Fall 2023).

[xviii] Incentivizing Accountability: How Data Protection Authorities and Law Makers Can Encourage Accountability, CIPL, 23 July 2018 available at https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_accountability_paper_2_-_incentivising_accountability_-_how_data_protection_authorities_and_law_makers_can_encourage_accountability.pdf..

[xix] The Competition and Markets Authority (CMA), the Information Commissioner's Office (ICO), the Office of Communications (Ofcom), and the Financial Conduct Authority (FCA) take part in the DRCF. See https://www.gov.uk/government/collections/the-digital-regulation-cooperation-forum. For more on the DRCF's algorithmic transparency workstream, please see https://www.gov.uk/government/publications/transparency-in-the-procurement-of-algorithmic-systems-findings-from-our-workshops.

[xx] In the Netherlands, the Authority for Consumers and Markets (ACM), the Dutch Data Protection Authority (AP), the Dutch Authority for the Financial Markets (AFM), and the Dutch Media Authority (CvdM) launched the Digital Regulation Cooperation Forum (SDT). See https://www.acm.nl/en/about-acm/cooperation/national-cooperation/digital-regulation-cooperation-platform-sdt. France's Center of Expertise for Digital Platform Regulation (PEReN) was formed under the authority of the Ministries of Economy, Culture, and Digital Technology. Grounded in expertise in data science, it is a source of technical expertise and support to France's digital regulators. See https://www.peren.gouv.fr/en/. Australia's Digital Platform Regulators Forum brings together the Australian Competition and Consumer Commission (ACCC), Australian Communications and Media Authority (ACMA), eSafety Commissioner (eSafety) and Office of the Australian Information Commissioner (OAIC). See https://www.accc.gov.au/about-us/media/media-

updates/communique-digital-platforms-regulators-forum. Ireland created the Economic Regulators Network, which brings together seven regulators. See https://www.econreg.ie/about/our-members/.

[xxi] See Christopher Hodges and CIPL, "Organizational Accountability in Data Protection Enforcement," October 2021, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_white_paper_on_organizational_accountability_in_data_protection_enforcement_-_how_regulators_consider_accountability_in_their_enforcement_decisions__6_oct_2021_.pdf

[xxii] See CIPL Paper "Regulatory Sandboxes in Data Protection – Constructive Engagement and Innovative Regulation in Practice - March 8, 2019 https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_white_paper_on_regulatory_sandboxes_in_data_protectionconstructive_engagement_and_innovative_regulation_in_practice__8_march_2019_.pdf.

[xxiii] ICO Regulatory Sandbox https://ico.org.uk/for-organisations/regulatory-sandbox/.

[xxiv] IMDA Data Regulatory Sandbox, https://www.imda.gov.sg/how-we-can-help/data-innovation/data-regulatory-sandbox.

[xxv] Datatilsynet AI Regulatory Sandbox, available at https://www.datatilsynet.no/en/regulations-and-tools/sandbox-for-artificial-intelligence/.

[xxvi] Sandbox on privacy by design and by default in Artificial Intelligence projects, Columbian Superintendence of Industry and Commerce, available at https://globalprivacyassembly.org/wp-content/uploads/2021/07/B6.-SIC-Colombia-Sandbox-on-privacy-by-design-and-by-default-in-AI-projects.pdf

[xxvii] CNIL, "Digital health and EdTech: the CNIL publishes the results of its first 'sandboxes'", July 2023, https://www.cnil.fr/en/digital-health-and-edtech-cnil-publishes-results-its-first-sandboxes.

[xxviii] At the time of writing, EU policymakers had not yet resolved whether to make member states' creation of AI sandboxes voluntary or mandatory. See Luca Bertuzzi, "EU Council sets path for innovation measures in AI Act's Negotiations", *Euractiv,* July 10, 2023. https://www.euractiv.com/section/artificial-intelligence/news/eu-council-sets-path-for-innovation-measures-in-ai-acts-negotiations/. See also "First Regulatory Sandbox on Artificial Intelligence Presented," *Digibyte,* June 27, 2022, https://digital-strategy.ec.europa.eu/en/news/first-regulatory-sandbox-artificial-intelligence-presented.

[xxix] See "Introducing Open Loop, a global program bridging tech and policy innovation", available at https://ai.facebook.com/blog/introducing-open-loop-a-global-program-bridging-tech-and-policy-innovation /; AI Impact Assessment: A Policy Prototyping Experiment, https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3772500_code715910.pdf?abstractid=3772500&mirid=1; and https://openloop.org/programs/open-loop-eu-ai-act-program/.

[xxx] IMDA, "Policy Prototyping," Policy Prototyping | IMDA - Infocomm Media Development Authority. Meta's TTC Labs is a partner for IMDA's program.

[xxxi] CIPL, "Ten Principles for a Revised US Privacy Framework," March 2019, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_principles_for_a_revised_us_privacy_framework.pdf.

[xxxii] CIPL, "International Data Flows: Cross Border Privacy Rules, Privacy Recognition for Processors, and Global CBPR and PRP: Frequently Asked Questions," June 2023, https://www.informationpolicycentre.com/uploads/5/7/1/0/57104281/cipl_cpbr_and_prp_faq_jun23.pdf.

[xxxiii] OECD, "Recommendation of the Council on Artificial Intelligence," May 2019, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449

[xxxiv] The Digital Economic Partnership Agreement (DEPA) is an agreement among New Zealand, Singapore, and Chile. See https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/digital-economy-partnership-agreement-depa/.

[xxxv] The Global Partnership on Artificial Intelligence, https://gpai.ai/.

PUBLIC SUBMISSION

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Tracking No. lps-tbgt-5o1z
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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0110
Comment on OMB-2023-0020-0001

Submitter Information

Organization: VISIMO

General Comment

See attached file(s)

Attachments

FINAL AI Rule Comment 2023 12 05

1. **The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?**
    - The diversity in agency size and mission necessitates that roles for Chief AI Officers be adaptable. Given the dominance of small businesses in the U.S. economy, it's vital that AI governance does not hinder their growth. Policies should be supportive and not overly complex, especially for smaller agencies with limited AI resources.
2. **What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body?**
    - Prior to establishing new AI governance bodies, we recommend conducting a study focused on streamlining existing agencies and structures. This step should ideally lead to effective consolidation, reducing bureaucratic redundancy. When considering the creation of a new AI governance entity, the emphasis should be on clearly defining its mission with a narrow focus. This approach helps to ensure that any new body is purpose-driven and avoids unnecessary expansion of bureaucratic scope, aligning with the overall goal of efficient and targeted AI governance.
3. **How can OMB best advance responsible AI innovation?**
    - To advance responsible AI innovation, the OMB should foster an environment that prioritizes incentivization over a burdensome regulatory framework. To advance responsible AI innovation, the OMB should consider the potential impact of burdensome regulations, which may inadvertently favor larger companies equipped to navigate them. This could hinder the involvement of smaller, innovative AI/ML businesses. Instead, implementing incentive structures that support ethical AI solutions from both small and large enterprises can foster a more diverse and vibrant innovation landscape. Such an approach not only upholds ethical standards but also encourages participation from a wider range of businesses, driving true innovation in AI.
4. **With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?**
    - Agencies should leverage generative AI as a tool to enhance efficiency in operations, focusing on automating routine tasks. However, expert oversight is crucial to ensure these technologies align with operational goals. The true value and impact of generative AI on agency missions should be thoroughly assessed.
5. **Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?**
    - While revising Section 5(b), it's recommended to maintain a narrowly defined list of critical use cases, in line with the broader recommendation for the prioritization of incentives over a complex regulatory framework. For example, expanding the use case of AI in unmanned systems and autonomous weapons is crucial due to their significant safety implications. Similarly, including AI in mental health assessments within rights-impacting AI use cases reflects its growing importance and potential impact. However, these additions should be carefully considered,

ensuring that the list remains focused on truly critical areas. Establishing a clear definition of 'criticality' is key, avoiding a broad or uniform approach that could impede innovation and flexibility across different AI applications. This approach aligns with promoting a regulatory environment that encourages ethical AI development while supporting technological advancement.

6. **Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?**
    - While minimum practices provide a baseline, they should not be overly restrictive. Promoting ethical AI through a framework that incentivizes best practices, rather than just setting minimum standards, could foster a more innovative and ethical AI landscape.
7. **What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?**
    - Recognizing the challenges faced by small businesses in federal contracting, it's essential to approach AI requirements in contracts with a focus on fostering innovation. By streamlining and consolidating frameworks, and emphasizing incentive structures, the government can create an environment where ethical AI practices are naturally incentivized. This strategy not only alleviates the burden of stringent compliance for small businesses but also promotes a merit-based ecosystem. Encouraging businesses to independently pursue responsible AI innovation can lead to a more vibrant and competitive marketplace, where ethical practices become a benchmark for excellence and success. To further aid these businesses, clear, detailed guidance from the government on obtaining Authorizations to Operate (ATOs) or Facility Clearance Levels (FCLs) is crucial. Step-by-step instructions, coupled with references to pertinent regulations, can demystify complex processes and empower small businesses to navigate the federal contracting landscape more effectively. This clarity and accessibility in guidance can be instrumental in enabling innovative small businesses to contribute significantly to responsible AI development in the government sector.
8. **What kind of information should be made public about agencies' use of AI in their annual use case inventory?**
    - In the spirit of fostering innovation through incentive structures, the annual AI use case inventory should be streamlined to provide essential information without overburdening agencies. This inventory could focus on highlighting exemplary uses of AI, showcasing how agencies leverage AI responsibly and effectively. By doing so, it not only serves the purpose of transparency and public accountability but also acts as an incentive for agencies to develop and utilize AI in ways that are both innovative and ethically sound. This approach aligns with a broader vision of encouraging ethical AI practices through positive reinforcement rather than stringent regulatory mandates. For small businesses like ours today, it is also crucial that this inventory includes more qualitative data, enabling us to benchmark our offerings against those of larger government contractors. Access to such detailed comparisons would provide valuable insights into the competitive

landscape, helping small businesses to identify areas for improvement, innovation, and strategic alignment with government needs. This level of transparency and detail in the AI use case inventory would be immensely beneficial in positioning smaller businesses effectively within the government contracting ecosystem.

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: American Public Human Services Association - APHSA

General Comment

See Attached File

Attachments

AI EO Draft Implementation Memo - APHSA Comment

December 5, 2023

Clare Martorana, U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management Budget
725 17th Street NW
Washington, DC 20503

Re: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI) Draft Memorandum

As the bipartisan, national membership association representing state, county, and city human services agencies, the American Public Human Services Association (APHSA) welcomes the opportunity to submit comment on the Office of Management and Budget's Proposed Memorandum: *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (memo)*, accompanying Executive Order 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (EO)*. APHSA's members administer economic assistance and child and family well-being services and benefits – such as the Supplemental Nutrition Assistance Program (SNAP), Temporary Assistance for Needy Families (TANF), child welfare, child care and others – at the state, county, and city levels. Our members are experts in overseeing and aligning these programs, which bolster community well-being through access to food, health care, employment, child care, and other key building blocks.

In addition, APHSA's members are leading experts in data analysis, health and human services IT systems, workforce development and training, and legal dimensions of the sector. By convening affinity groups such as IT Solutions Management for Human Services (ISM)[1] and the Public Human Services Attorneys (PHSA),[2] APHSA stays informed on common interests and concerns of IT and legal professionals in the human services sector. In addition to these affinity groups, APHSA convenes a Process Innovation Community of Practice, which focuses on person-centered process improvements in human services to enhance service delivery and improve customer experience, and its associated AI Workgroup. The input reflected in this comment letter is deeply informed by the insight and input of these member groups.

Overview: Inputs & Engagements Informing Response

Over the past year, APHSA engaged its membership and partner networks across the country in dialogue about Artificial Intelligence (AI), building on our established history of leading technology conversations among human services practitioners and creating productive space for person-centered innovation. Because our membership stands to be directly impacted by forthcoming federal regulations and guidance that this EO and memo direct, we consulted cross-sections of human services practitioners through the above-mentioned groups, through attendees at its conferences and events, and through special project teams to understand state, county, and city human services practitioners' reactions to

[1] For more information on ISM, see https://aphsa.org/ISM/.
[2] For more information on PHSA, see https://aphsa.org/PHSA/.

the Executive Order and Implementation Memo, their needs from forthcoming guidance, and their early ideas for how AI might enhance public programs.

From these conversations, APHSA has learned that – overall – our membership is eager to safely and securely use AI technology to optimize their service delivery and customer experience, and the available network of government partners is equally eager to support. To do this effectively, members and partners are readying themselves through early education and exploration of newly unlocked possibilities but have expressed a need for federal guidance to ensure further development, testing, and implementation of AI-enabled technologies that align with regulations and best practices.

With this, APHSA – on behalf of its membership – encourages OMB to heed the following considerations upon implementation of the Executive Order, including in the process of issuing guidance, exploring regulatory changes, developing use case inventories, and other EO required actions.

Key Considerations for Federal Agencies Implementing EO

1. **Federal level coordination is key to state, county, and city government success.** State, county, and city agencies stand to benefit greatly from a coordinated approach across federal agencies that lead human services programs such as CMS, ACF, and FNS. The coordination directives outlined in the EO and Memo represent significant steps towards this goal. See more discussion of key considerations and potential challenges to successful implementation of coordination directives in response to prompts 1 and 2 below.

2. **Federal supports can boost agency adoption of human-centered practices.** To enable the human services sector to effectively harness the potential of AI to advance Equity, Diversity, Inclusion, and Belonging as well as an ethos of customer centricity, federal supports should focus on enhancing agency skillsets in user research and human-centered design while promoting transparent procurement for technology solutions. See more discussion on this consideration in response to prompts 3, 7, and 8 below.

3. **Customer and end-user input is key to tech-enabled, community-driven process innovation**. We recognize and appreciate the EO and Memo's emphasis on equity and customer involvement. However, we believe these elements should be even more central to AI implementation, especially in domains like human services, health, labor, and other community-serving supports. In our desired future state, such inclusive and community-driven process innovations are not just beneficial, but necessary. More insights on this are provided in our response to prompt 4.

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Memo Prompt Responses

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. **Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?**

The roles, responsibilities, seniority, position, and reporting structures outlined for CAIOs outlined in the Memo are comprehensive and do offer significant flexibility in their structure. However, members and partners have highlighted potential challenges with the rapid implementation of these directives. A common anticipated challenge is in filling the CAIO position quickly, especially for agencies without a clear precursor in their Chief Technology or Data Officer, or similar roles. Insufficient capacity to recruit a well-equipped CAIO could result in inequitable levels of support and stewardship of human-centered, technology-enabled innovation at the federal level. Without strong leadership and AI sponsorship, agencies will struggle to meet the reasonable minimum standards for AI innovation outlined in the EO, which in turn may prevent human services programs from advancing their AI innovation goals.

In addition to support with recruiting and onboarding CAIO roles onto their teams, FNS, ACF, the Centers for Medicaid and Medicare Services (CMS), and other Federal agencies will benefit greatly from their CAIO's participation in intentionally coordinated bodies, as discussed in response to prompt 2 below.

2. What **types of coordination mechanisms**, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the **benefits or drawbacks** to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

State, county, and city agencies stand to benefit greatly from a well-coordinated approach to EO implementation, as is reflected in mandates in the EO and Implementation memo, including the directed approaches to meetings. Ensuring that there are dedicated positions at the agencies to drive coordination is also critical, which we appreciate seeing in the EO. However, these federal agencies currently vary vastly in their levels of readiness and face a spectrum of resource constraints. The Office of Management and Budget (OMB) can play a critical role in bolstering essential coordination by consulting with federal agencies to assess the feasibility of proposed timelines and ensure their ensuing guidance and support are comprehensive and tailored to the needs of state, county, and city governments.

As is clearly recognized in the EO and memo, effective coordination mechanisms are essential for the success of an AI Governance Body in both public and private sectors. Establishing a governance body of CAIOs requires a framework that fosters collaboration, federal alignment, and efficient operation. This is crucial to mitigate the known downstream impacts of federal silos on critical public supports like food, cash, and healthcare access. Of particular import, agency leadership personnel with technological oversight must coordinate with their counterparts who oversee program business operations and policy to ensure cohesion not only across agencies but also across functions within agencies.

To enhance coordination, OMB should consider its ability to support CAIOs through setting up peer networks of expertise and support for the individuals in these roles. Examples of such supportive actions could include facilitating regular meetings, creating digital networks, and supplying administrative assistance. This support should be both initial and ongoing, focusing on harmonizing the diverse

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capabilities of different agencies. Such alignment not only ensures compliance with governance standards but also promotes active contribution to human-centered AI innovation.

Coordination Features, Mechanisms, & Strategies:

- Coordination and alignment require intentional relationship establishment and maintenance to foster trust among members of the group.
- Coordinated bodies work together on joint activity and initiatives.
- The coordinated group has shared responsibility and accountability.
- A core feature of true coordination is regular attendance at scheduled recurring meetings that have intentional agendas and follow-up actions.

These strategies can be helpful for ensuring CAIOs and their groups are not only operational but also efficient and synergistic in their efforts.

In response to the second part of this question, we acknowledge that there are benefits and drawbacks to either of the approaches outlined: setting up a new AI governance body or expanding the scope of existing groups. While using existing bodies offers the advantage of involving individuals already invested in related areas, this approach will limit diverse representation in the new body, which is crucial for risk mitigation and bias avoidance. Even if agencies start by leveraging existing bodies, we encourage robust consideration of the additional needed perspectives and characteristics of people that make up AI governance bodies with expanded scopes and purviews.

3. How can **OMB best advance responsible AI innovation?**

To advance responsible AI innovation, we encourage OMB to focus its support on two key areas:

Coordinated AI Governance: OMB can help federal agencies in adopting a unified approach to AI governance. This should include facilitating coordinated rulemaking and providing clear guidance, particularly with regard to use of AI across agency supports that require Advance Planning Documents (APDs) for allocating costs across funding streams.[3] By ensuring that agencies work together harmoniously, OMB can help establish consistent, effective AI policies and practices across the federal landscape.

AI Competitive Procurement: OMB should encourage competition among contractors in AI-related procurements to prevent the entrenchment of incumbents and foster a diverse market of AI solutions. Requiring publication of vendor documentation requirements can further enhance transparency and accountability in this process and can be done without disclosure of proprietary knowledge, as is discussed further in response to prompt 8 below.

These strategies will contribute to a more competitive and responsible AI ecosystem, aligning various affected parties under common governance frameworks and procurement practices.

[3] For example, see overview of FNS Advance Planning Document: https://www.fns.usda.gov/sso

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4. With adequate safeguards in place, how should agencies take advantage of **generative AI to improve agency missions or business operations?**

For agencies to effectively use AI to enhance their operations and as a tool to aid in everyday tasks, approaches to implementation should focus on equity and customer involvement and prioritize best practices for seeking input from end-users. This approach builds toward modernization in a way that ensures that the technology works in service of inclusive, equitable outcomes aligned with the agency's mission. APHSA encourages agencies to anchor to our desired future state for human services when embedding AI into operations, which is importantly led by people with lived expertise and driven by a fierce commitment to equity, diversity, inclusion, and belonging.[4]

APHSA is currently leading a research project on this subject specifically focused on how AI is currently used, and how it might be used in the future, to support administrative actions agency staff complete when processing customers' SNAP cases. Through this project, a team is analyzing statutory and regulatory issues affecting current and potential future use cases for artificial intelligence in SNAP case processing, with an overarching theme of assessing potential for bias and other negative impacts to the customer. Our research in this context has led to our understanding that the incorporation of generative AI into agency business operations offers a transformative opportunity for government entities, particularly in public-serving sectors like human services, to advance their missions.

This research and related member feedback has also clarified that to harness this technology effectively and responsibly, agencies must prioritize equity and customer involvement at the core of their AI implementation strategies.

Streamlining administrative processes for customer-centered service delivery: Generative AI has the potential to revolutionize how human services agencies run by simplifying processes and workflows that

[4] For further discussion of APHSA's Desired Future State for Human Services, see:
- APHSA's 2023 Action Plan - https://files.constantcontact.com/391325ca001/81b1eb42-5f8f-4975-8b3f-8668343ee016.pdf
- APHSA's Strategic Playbook: https://files.constantcontact.com/391325ca001/a307409a-6ff4-4e11-ad9c-e3f419e0ab48.pdf

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undergird accurate and timely benefit and service delivery, and that thereby free up valuable human resources for more complex and nuanced tasks and for authentic, dignified customer interactions. State, county, and city agencies that administer benefits and services look forward to being able to use AI work aids for staff – such as AI tools can undertake rote and tedious tasks like data re-entry, scheduling, and notetaking. By automating routine functions agencies can operate more efficiently and effectively, leading more accurate benefit determinations at government agencies, more efficient and responsible use of federal funds, and ultimately and most importantly to improved service delivery for customers.

User-led technology development and service design: When developing generative AI use cases, those leading the development must build into their development process the critical step of obtaining input from end-users and impacted parties. Their feedback should guide the development and deployment of AI tools to ensure that technology truly meet the needs of those it is designed to serve.

Accessibility in communications and information sharing: Generative AI can play a significant role in enhancing user-centered communications. Its capability to assist with lingual and visual translations can reduce the impact of language barriers and make information and services more accessible to a diverse population. Furthermore, this technology can contribute to significant improvements in accessibility, ensuring equitable access to government services and information. Examples of how AI can advance accessible in the human services sector include, but are not limited to:

- Integration of advanced screen readers and audio aids into government websites and digital services;
- Conversion of text into braille for government documents, forms, and notices, ensuring that visually impaired citizens have equal access to essential information;
- Real-time transcription and translation for hearing-impaired individuals and people with limited English proficiency;
- Leveraging tools for language simplification to translate policy, legal, and bureaucratic verbiage into plain language, making government communications more accessible to individuals with various levels of literacy or those who are not native speakers of the primary language used in these communications;
- Virtual sign language interpretation to supply real-time translation of spoken or written language into sign language; and,
- Creating customizable communication formats to allow people who receive government communications about their public benefits to choose how they receive information (e.g., larger text, high-contrast colors, audio descriptions), thereby catering to various accessibility needs.

5. Are there **use cases for presumed safety-impacting and rights-impacting AI** (Section 5 (b)) that should be **included, removed, or revised**? If so, why?

It is incredibly valuable and necessary to carefully define safety-impacting and rights-impacting use cases of AI while emphasizing that in many cases, these concepts are interconnected. APHSA takes particular interest in the rights-impacting use cases detailed, which are most relevant to the health and human services sectors, and we applaud the comprehensiveness of activities and decisions detailed. It is particularly meaningful to our membership to see an acknowledgment that public benefits innovation and protection falls under “rights-impacting” AI.

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Our members have underscored the need for caution regarding AI use cases that might lead to adverse impacts on customers. Examples include AI applications for predicting behavior that could restrict service access, for determining program eligibility, for detecting fraud, and for automating other scenarios where there's potential for causing harm or perpetuating existing biases and inequalities. As we progress towards modernizing technology, it's crucial that Federal agencies approach these sensitive use cases not as initial forays into AI, but rather as areas for future consideration once a more mature phase of AI implementation is reached. This approach enables swift innovation in lower-risk scenarios and necessitates rigorous testing and de-biasing efforts to mitigate risks for broader uses so that we can collectively ensure equitable design and delivery of human services.

6. **Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies** and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

The minimum practices set for safety-impacting and rights-impacting AI are critical, so we encourage OMB and implementing agencies to carefully consider and plan for implementation, particularly in instances when these requirements will be passed down to states through federal regulations and guidance. To enhance these practices, it would be beneficial for agencies to have access to tools and tailored support to meet these standards, as is further discussed in response to prompt 7 below. Implementing these practices will also require investment of time and funding to be successful.

As the memo mentions, OMB should also encourage agencies to develop their own context-specific practices; in this aspect, support through funding, technical assistance, or other avenues would be valuable to human services leaders. Providing templates for assessments and reports, along with examples of AI project implementation checklists, best practices, and training will support state- and local-level success, ensuring that customers benefit from the intentions behind these minimum practices.

7. What **types of materials or resources** would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

IT & Data Supports. Human services agencies commonly struggle with IT infrastructure and data readiness, which are pivotal for AI maturity. Treating relevant data, including its modification such as cleaning and formatting/standardizing, as a critical asset is essential, and agencies require materials and resources to do so. In addition, agencies at the state and local levels require guidance and resource materials on what constitutes AI for human services programs (as opposed to non-AI automation). Human services agencies would also find resources and materials on how to execute or modify data sharing agreements (DSAs) with consideration for AI-enabled data systems extremely valuable, especially considering the new capacities AI stands to unlock for aligned operability across human services systems.

Vendor Quality Supports. APHSA's membership appreciates that this guidance paves a lane toward better transparency and relationship between vendors and government. To this end, agencies would benefit from access to resources like template requirements agencies can adapt and include in their vendor contracts, independent evaluator tools, vendor quality assessments, and support for confident procurement of AI and other advanced technologies.

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User Experience (UX) & Design Resources. As we have mentioned throughout, it is crucial for programs to develop and deploy mechanisms for customer feedback loops and satisfaction measurement in program design as human service system transforms into an AI-enabled, modernized state. Education and technical assistance on UX and design are vital for agencies to develop in-house expertise or manage external services effectively, ensuring they demand best practices in requests for proposals and procurements. In addition to Subject Matter Expert vendors, agencies at the state and local levels will need education and technical assistance to eventually be able to bring such functions in house, or at minimum, to develop in-house expertise for effectively managing external. When developing user research plans, our experience has been that agencies require assistance and guidance for building comprehensive processes for conducting ethical, fairly compensated user research.

8. What kind of **information should be made public about agencies' use of AI** in their annual use case inventory?

For the annual use case inventory on agencies' use of AI, the information made public should enable action toward transparent procurement and tech solutions which include implementation details, documentation or links to tools, vendors or partners involved, and costs. It will also be beneficial to include details that state-level agencies might need for their own research into AI tools for adoption. This comprehensive information will aid in making informed decisions and fostering responsible AI use within agencies. APHSA's membership appreciates that this guidance paves a lane toward better transparency and relationship between vendors and government.

Conclusion

As proposed, the memorandum would establish new requirements in areas of AI governance, innovation, and risk management, and would direct agencies to adopt specific minimum risk management practices for uses of AI that impact the rights and safety of the public. With this, we should acknowledge that a wide spectrum of responses has already begun emerging from AI skeptics to early adopters and AI champions – some are primarily fearful of risks, biases, and privacy implications that come with AI use, while others are primarily eager to innovate their programs with modern technology, and many are somewhere in the middle. This memo and ensuing federal actions stand to even out this spectrum and create a secure middle from which agencies can confidently run, modernize, and improve programs. Above all, AI implementation, especially for human serving agencies and those administering benefits and services to historically underserved populations, should be connected into a desired future state where community and people with lived experience are central to program design and service delivery.

Thank you for considering our feedback and for your dedication to enabling safe, secure innovation of government programs that support economic security and community well-being.

Sincerely,

Matthew Lyons

Senior Director, Policy & Practice
American Public Human Services Association

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: National Fair Housing Alliance

General Comment

See attached file(s)

Attachments

NFHA_OMB_AI_Comment.docx

December 5, 2023

Director Shalanda Young, OMB
Office of Management and Budget,
1600 Pennsylvania Avenue NW
Washington, DC 20580

Submitted electronically at http://www.regulations.gov

Re: Docket No. OMB- 2023-24269
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Dear Director Young,

The National Fair Housing Alliance (NFHA) and the undersigned civil rights advocacy organizations appreciate the opportunity to submit comments in response to the Office of Management and Budget (OMB) Request for Comments (RFC) on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (A1) Draft Memorandum on November 3, 2023. We commend federal regulators for seeking input on this important topic and hope our comments below will help inform the regulators' views.

Founded in 1988, the National Fair Housing Alliance (NFHA) is the country's only national civil rights organization dedicated solely to eliminating all forms of housing and lending discrimination and ensuring equal opportunities for all people. As the trade association for over 170 fair housing and justice-centered organizations and individuals throughout the U.S. and its territories, NFHA works to dismantle longstanding barriers to equity and build diverse, inclusive, well-resourced communities.

We applaud the OMB's efforts to establish novel agency requirements in AI governance, innovation, and risk management through the draft AI memorandum. The direction provided by the OMB to direct agencies to adopt specific minimum risk management for uses of AI that impact the rights and safety of the public is imperative for pushing forward a cohesive and responsible AI framework across the federal government. We welcome the opportunity to ensure the administration continues to push forward policies for mitigating the risks and maximizing the benefits of AI. A focus on equity and civil rights within the OMB's guidance is necessary to push for effective and safe AI systems that protect all minorities and underserved groups against algorithmic discrimination.

Questions posed in the RFI

Question 1. How can OMB best advance responsible AI innovation?

EVALUATION AND ACCOUNTABILITY MECHANISMS

The memorandum proposes strengthening artificial intelligence through improving accountability or AI issues. Though the memorandum states agencies must designate a Chief AI officer as is consistent with Section 10.1(b) of the AI Executive Order and that CAIOs bear primary responsibility on behalf of the agency for implementation of the proposed memorandum and coordinating implementation with other agencies, there is a lack of guidance on guidance on how agencies will be held accountable for AI misuses and failure in the case of adverse impact.

We propose the OMB implement definitive and well-structured mechanisms to ensure accountability in cases of adverse impact by agencies due to AI misuse or failure. This should be structured as a three-tiered approach:

1. Clearly Defined Responsibility: The OMB should provide explicit guidelines stipulating which parties are responsible in cases of AI misuse or failure by federal agencies. This clarity is crucial for establishing accountability and should detail the roles and responsibilities of relevant stakeholders to ensure a clear understanding of who is accountable for various aspects of AI system deployment and operation.
2. Relief Plans for Impacted Consumers: Pre-established measures for providing relief to consumers adversely affected by AI failure or misuse are needed to ensure those impacted by AI misuse or failure are not left without recourse and that standardized procedures are in place to address grievances. Measure to outline specific steps for redress, including compensation, corrective services, or other forms of support are needed.
3. Protocol for Outcome Remediation: Alongside relief measures, there should be a defined protocol for remedying the actual outcomes caused by the AI system's failure or misuse. This includes steps to rectify any errors in the system, prevent future occurrences, and restore any harm done. It is imperative that these protocols are not only reactive but also proactive, guiding agencies in reviewing and improving AI systems continuously to prevent similar incidents.

ACCESSIBILITY AND INCLUSIVITY

AI used in safety and rights-impacting decisions must be comprehensively accessible and understandable to all, including those who may speak different languages, have a disability, or belong to other marginalized groups. AI systems affecting the above groups must include all to ensure no adverse impact or disparities. Ensuring accessibility could involve translating information into multiple languages, providing alternative formats for those with visual or hearing impairments, and using clear, simple language to make the content understandable.[1] Addressing this aspect more explicitly in the guidance will reinforce its importance and effectiveness. It is imperative because many who commonly face discrimination based on protected class are more at risk of being victims of adverse impact through AI systems.[2] The OMB should also require agencies to advocate for inclusivity in AI systems by ensuring those developing AI systems consider diverse perspectives and experiences in the development of the process.

REGULAR REVIEW AND UPDATE OF POLICIES

AI technology and applications are rapidly evolving. New developments, techniques, and applications are constantly emerging; thus, policies and guidelines created at one point in time may quickly become outdated or insufficient to address new challenges or opportunities that arise. It is essential for the OMB to regularly review and update its policies and guidelines to keep pace with these changes, particularly as new use cases for AI develop that may be safety or rights impacting. A systematic, ongoing process of evaluation and modification is required to ensure that policies remain current and effective. Lastly, the public should have space to flag developing new use cases and comment on the agency inclusion of emerging risks from new use cases.

PUBLIC ENGAGEMENT AND TRANSPARENCY

The proposed agency practice of providing public notice and plain language documentation through the AI use inventory is beneficial in promoting transparency. However, a more structured approach from the OMB could be beneficial. A structured approach would ensure consistency across agencies and make it easier for the public to engage with and understand the information provided. Specific guidance on public engagement, whether it includes public forums, surveys, or open comment periods, is needed to gather various perspectives from individuals directly affected by these systems. It is important that these engagement methods are designed to capture a wide range of perspectives, including public advocacy or research groups.

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[1] Whittaker, M., Alper, M., Bennett, C. L., Hendren, S., Kaziunas, L., Mills, M., ... & West, S. M. (2019). Disability, bias, and AI. *AI Now Institute*, *8*.

[2] Orwat, C. (2020). Risks of Discrimination through the Use of Algorithms. *Berlín: Federal Anti-Discrimination Agency*.

Question 5: Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why

ADMINISTRATION OF DEMOCRATIC PROCESSES

Beyond the integrity of voting infrastructure, AI in political campaigns, voter targeting, and spreading political messages should be addressed, considering the impact on democratic processes. Political campaigns increasingly use AI for various purposes, such as analyzing voter data to tailor messages, predict voter behavior, and optimize campaign strategies. While this can make campaigns more efficient, there is a risk that AI-driven microtargeting can lead to manipulation or exploitation of voter preferences and biases. This raises ethical concerns about the influence of AI on the democratic decision-making process. AI can analyze vast amounts of data to identify and target specific voter groups with personalized political messages. Targeting may be based on demographic information, online behavior, or perceived political inclinations. While targeted messaging is not new, AI significantly enhances its precision and scale. Concerns arise about privacy invasion, the potential for deepening political polarization, and the risk of spreading misinformation tailored to individual vulnerabilities.

The alarming use of AI to spread political messages on social media can significantly impact public opinion and must be flagged. AI algorithms determine what content users see, often prioritizing content that engages users the most, which can sometimes be sensational or polarizing. Personalized content has implications for the quality of political discourse and the potential to create echo chambers, where people are only exposed to similar viewpoints. The 2016 presidential election particularly publicized the impact of sensational or polarizing content, raising concerns about AI's role in prioritizing such content and potentially influencing election outcomes.[3]

AI IN MILITARY CONTEXTS

While specific uses of AI in national security systems might be exempt from specific regulatory requirements, such as inventory under the Advancing AI Act, it is vital to distinguish general AI applications in military contexts from those specifically designated as national security systems. AI in the military spans a broad range of applications, many of which may not fall under the umbrella of national security systems but still have significant safety implications.[4] Thus, AI technologies in military contexts should be explicitly recognized as safety-impacting use cases, meaning their development, deployment, and operational use must be subject to rigorous safety

[3] Cho, J., Ahmed, S., Hilbert, M., Liu, B., & Luu, J. (2020). Do search algorithms endanger democracy? An experimental investigation of algorithm effects on political polarization. *Journal of Broadcasting & Electronic Media*, *64*(2), 150-172.

[4] Geiß, R., & Lahmann, H. (2021). The use of AI in military contexts: opportunities and regulatory challenges. *The Military Law and the Law of War Review*, *59*(2), 165-195.

assessments and oversight. Military AI applications can have profound consequences for the personnel and systems directly involved, civilians, and the global geopolitical landscape.

One of AI's most debated and critical aspects in military contexts is its use in autonomous weapon systems (AWS). AWS are capable of selecting and engaging targets without human intervention. AWS include the risk of malfunctioning, the challenges in ensuring reliable target identification and discrimination, and the unpredictability of AI behavior in complex combat environments.[5] Ethically, the delegation of life-and-death decisions to machines raises profound questions about human dignity and the laws of war.

E-COMMERCE PLATFORMS

AI plays a significant role in e-commerce platforms, from personalized product recommendations to dynamic pricing strategies. While these AI applications can improve user experience and operational efficiency, they also pose risks like manipulating consumer behavior, unfair pricing practices, or unintentional discrimination.[6] Consumer protection guidelines in e-commerce should address transparency in AI-driven recommendations, fairness in pricing, and safeguards against discriminatory practices.

Additionally, AI's ability to analyze consumer data and create personalized marketing strategies can lead to more effective and targeted advertising. However, this also raises issues around privacy, consent, and the potential for invasive or manipulative advertising practices. Guidelines in this area could focus on ensuring that consumers have control over their data, understand how it is used for marketing purposes, and are protected from misleading or manipulative advertising tactics.

Question 8: What kind of information should be made public about agencies' use of AI in their annual use case inventory?

As the landscape of Artificial Intelligence (AI) evolves into federal agency spaces, its intersection with civil rights, particularly in the domains of housing and related financial services, warrants careful consideration. AI systems and automated systems, heralded for their potential to revolutionize operational efficiency within federal agencies, also carry implications that stretch into the realm of civil rights and societal equity. We aim to provide an in-depth overview of the essential components of information that should be made public about agencies' use of AI in their annual use case inventory, highlighting

[5] Schwarz, E. (2021). Autonomous weapons systems, artificial intelligence, and the problem of meaningful human control. *Philosophical Journal of Conflict and Violence*.
[6] Soni, V. D. (2020). Emerging roles of artificial intelligence in ecommerce. *International Journal of trend in scientific research and development*, *4*(5), 223-225.

the purpose, metrics, and strategic considerations that underpin these advanced technological tools with the focus on ensuring these systems operate within the boundaries of fairness, transparency, and accountability.

GENERAL INFORMATION

Artificial Intelligence (AI) systems are often promoted as solutions intended to enhance operational efficiency. Federal Government agencies adopting AI systems or automated systems may also have justifications that include refining decision-making processes, improving workflow efficiency, and elevating the precision and effectiveness of services rendered to the public. Metrics reflecting transparency and explainability of any AI application in governmental use should be reported for the public to conduct civil rights audit of the systems. Agencies should be mandated to ensure substantial transparency in the operation of this tool. In instances where direct quantification of these attributes is impracticable, agencies should be obliged to provide exhaustive documentation and pertinent data sets sufficient for independent algorithmic auditors and trusted civil rights communities to conduct disparate impact and disparate treatment analyses on the systems. This requirement is imperative to facilitate independent evaluation of the tool's transparency by civil rights communities and research entities.

Use of an AI or automated system by agencies may span a wide array of domains, including data administration, information technology security, privacy, civil rights, and liberties and these domains often interoperate to create downstream effects on society. Hence, agencies should include information on downstream applications and processes impacted by their systems so that civil rights communities and researchers can assess if the system's functionality enhanced by seamless integration with pre-existing systems may cause societal harms that infringe on civil rights laws and liberties.

The development and implementation of AI solutions or automated systems represent significant strides toward augmenting government efficacy and public service delivery. Nevertheless, these advancements can be accompanied by inherent challenges, notably in data privacy, security, and the potential for biases and discrimination. To mitigate these concerns, the systems should be subject to continuous monitoring and periodic updates, an essential protocol to align the tool with the dynamic landscape of policy and technological advancements. Information about updates, system versions, and monitoring cadence should be shared with the public. In addition, information about the scope of the tool, whether local, state, or national, should be reported alongside demographics that civil rights communities and researchers can further use to test its impact at the community level.

PROBLEM AND DATA INFORMATION

Project goals, stakeholders' expectations, stakeholders' requirements, and stakeholders' objectives, collectively referred to as the business problem, are usually set before an AI system or automated system is designed and developed. Hence, information that could guide civil rights communities and researchers to make an informed decision about risks that the business problem may pose to consumers and society at large should be reported. Detailed information that provides answers to questions about whose interests the business problem serves and how these interests are measured at a high level with clear measurable markers to determine risks that solving the problem may pose to consumers and society should be provided.

Like information on the problem being solved by the AI system or automated system, high-level information about the type and source of data driving the system should be reported. Any business problem that has an algorithmic solution needs to be formulated as a data problem. Information that civil rights communities and researchers can use to assess data representation of the problem being solved by the AI system or automated system and information about any techniques used to mitigate risks associated with data paucity, data insufficiency, or data quality issues should be shared with the public. Information that provides answers to data questions like the following should be provided:

1. How representative are features or variables across protected class data like race, sex, and age where applicable?
2. Is an intended use case for the system appropriately defined and will the system be constrained to that use case?
3. What metrics are used to measure system performance and fairness (including potential disparate impact) of the algorithmic solution?
4. If there is a cut off score and pass rate at the decision stage of the system, what is it and how does it affect system fairness (including disparate impact)?

MODEL AND DEPLOYMENT INFORMATION

AI systems and automated systems often employ advanced algorithms tailored to manage and interpret vast, multifaceted datasets effectively. Chosen for their reliability and proficiency in similar tasks, these algorithms can enhance governmental applications to adapt to diverse data and operational needs. Information that civil rights communities and researchers can use to evaluate the design, theory, and logic used to develop the system should be provided. Demographic information and education background of the model development and model deployment teams, data collection and data transformation systems used in the development stage, methods used to decide features or variables relevant to the system objective, and techniques or metrics used to validate system performance should be reported.

In addition, the deployment of the AI system involves a strategic rollout usually planned in phases, ensuring a smooth transition and minimal disruption to existing operations. For civil rights communities and researchers to assess if the AI deployment environment is robust and secure, with stringent data protection measures in place, several key pieces of information and metrics that should be provided by the agency include:

1. Security Audit Results: Details from comprehensive security audits, including penetration testing and vulnerability assessments, should be disclosed. These results help in evaluating the robustness of the system against potential breaches or attacks that may impact consumers of color.
2. Data Encryption Standards: Information on the encryption protocols used for data at rest and in transit and metrics related to the strength of these encryption methods (like encryption key lengths) can offer insights into the security of the data and should be shared with the public.
3. Compliance with Standards: Agencies should be obliged to provide details regarding compliance with recognized security standards and frameworks, such as ISO/IEC 27001 or National Institute of Standards and Technology (NIST) guidelines. Compliance levels, certifications obtained, and any non-conformities identified in compliance audits provide a measure of the system's security posture.
4. Incident Response Metrics: Agencies should be obliged to provide data on past security incidents, including the frequency, nature, and response times to security breaches. These metrics reflect the system’s resilience and the effectiveness of its incident response protocols.
5. User Access Controls: Agencies should be obliged to provide information on access control mechanisms and policies, including user authentication and authorization procedures. Metrics related to access control breaches or unauthorized access attempts are critical for assessing system security.
6. Data Privacy Compliance: Agencies should be obliged to provide evidence of adherence to applicable data privacy laws and regulations. Metrics like the number of data privacy violations or complaints can be indicative of the system's effectiveness in protecting user privacy.

Providing these metrics and information helps stakeholders assess the robustness and security of the AI deployment environment, ensuring that it meets the necessary standards for data protection and cybersecurity.

MONITORING INFORMATION

Monitoring and human fallback mechanisms are critical to the success of an AI system or automated system. Continuous monitoring is needed to ensure the system operates

as intended and to quickly identify and resolve any issues. Regular reports that provide insights into the system's performance and highlight areas for improvement should be shared with the public. The report should include key performance indices (KPIs) and success indicators that can be used to evaluate the AI system's effectiveness. In addition to these metrics, information on feedback and complaint mechanisms in place, allowing users and stakeholders to report concerns and provide suggestions for enhancements, should be provided. This feedback loop is vital for ongoing refinement and ensuring the AI system meets the evolving needs of government operations.

Monitoring reports for AI systems should include a range of metrics and insights to effectively gauge system performance and identify areas for improvement. Key metrics should cover:

1. Accuracy and Reliability: Data on the system's accuracy in various operational scenarios, highlighting instances of incorrect predictions or decisions.
2. Efficiency: Metrics such as processing time and resource utilization, indicating the system’s operational efficiency.
3. User Satisfaction: Feedback from users regarding their experience with the system, which can be gathered through surveys or direct feedback mechanisms.
4. Error Rates and Types: Detailed analysis of errors encountered by the system, categorized by type and frequency.

Regarding feedback and complaint mechanisms, the reports should provide clear information on how users and stakeholders can report concerns or suggest enhancements. This includes:

1. Contact Channels: Details on various channels available for feedback submission, such as online forms, email addresses, or phone numbers.
2. Response Procedures: Explanation of how feedback is processed and acted upon, including typical response times and escalation paths.
3. Feedback Utilization: Examples of how past feedback has led to system improvements, demonstrating the effectiveness of the feedback mechanism.
4. Transparency Reports: Regular updates or reports summarizing the feedback received, actions taken, and improvements implemented.

Providing this information to the public ensures transparency and encourages active participation from users and stakeholders in the continuous improvement of AI systems.

CONCLUSION

The National Fair Housing Alliance and undersigned civil rights advocacy organizations appreciate the opportunity to contribute to the Office of Management and Budget's

Request for Comments on the Draft Memorandum regarding AI's governance, innovation, and risk management in agency use. Our submission highlights the need for robust and dynamic AI governance frameworks that prioritize public engagement, accountability, accessibility, inclusivity, and regular policy reviews to adapt to the rapidly evolving landscape of AI technology. We appreciate the opportunity to provide our views on the OMB's Draft Memorandum on AI. We trust that our insights will inform and enhance the regulators' perspective, leading to more equitable, safe, and responsible AI applications across federal agencies. Please direct any questions about these comments to Michael Akinwumi, Chief Responsible AI Officer, at makinwumi@nationalfairhousing.org.

Sincerely,

The National Fair Housing Alliance

National Consumer Law Center

Massachusetts Action for Justice

Access Now

Center for Responsible Lending

PUBLIC SUBMISSION

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Comment On: OMB-2023-0020-0001
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Comment on OMB-2023-0020-0001

Submitter Information

Organization: CTIA

General Comment

See attached file(s)

Attachments

CTIA Comments to OMB re AI Memo

Before the Executive Office of the President of the United States
Office of Management and Budget
Washington, D.C.

In the Matter of	)	
	)	
Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence	)	Proposed Memorandum for the Heads of Executive Departments and Agencies
	)	
	)	Document Number: 2023-24269
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I. INTRODUCTION

CTIA[1] welcomes the opportunity to comment on the Office of Management and Budget's ("OMB") Proposed Memorandum for the Heads of Executive Departments and Agencies regarding *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* ("Draft Memo").[2] Consistent with the President's directive in the October 30, 2023 Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence ("AI EO"),[3] the Draft Memo proposes "new agency requirements and guidance for [artificial intelligence ("AI")] governance, innovation, and risk management."[4] In particular, the Draft Memo proposes "minimum practices" for federal agencies when using "rights-impacting [AI]" and "safety-impacting AI,"[5] as well as "a series of recommendations for managing AI risks in the context of Federal procurement."[6]

The Draft Memo sets forth three pillars to guide federal agency use of AI—(1) "[s]trengthening AI governance," (2) "[a]dvancing responsible AI innovation," and (3) "[m]anaging risks from the use of AI"[7]—and explicitly states its intent to advance AI innovation within the federal government, making clear that "[a]gencies must increase their capacity to successfully and responsibly adopt AI, including

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[1] CTIA – The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C.

[2] Proposed Memorandum from Shalanda D. Young, OMB, on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence to the Heads of Executive Departments and Agencies (Oct. 30, 2023), https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf ("Draft Memo").

[3] Exec. Order No. 14110, 88 Fed. Reg. 75191, 75218-23 (Nov. 1, 2023), https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence ("AI EO").

[4] Draft Memo at 1.

[5] *Id.* at 2.

[6] *Id.*

[7] *Input*, AI.gov, https://ai.gov/input/ (last visited Nov. 28, 2023).

generative AI, into their operations."[8] CTIA broadly agrees with these goals; the federal government must be able to leverage the massive benefits that AI promises, which is critical for AI innovation and leadership on the global scale. However, the Draft Memo goes too far in burdening adoption of AI technology in areas that are not high risk. Specifically, the Draft Memo attempts to take a risk-based and risk-management approach, providing guidance so that agencies can both "realize significant benefits from AI" and "manage a range of risks,"[9] but its broad definitions and overly prescriptive baseline requirements cut against OMB's goals of successful adoption of responsible AI.

To better achieve its stated goals, CTIA urges OMB to adjust the Draft Memo to adopt a true risk-management approach. OMB should ensure that its Final Memo: (1) harmonizes with other federal approaches, in particular with respect to the definition of AI; (2) is narrower in scope, focusing only on high-risk AI use cases; (3) is more flexible, outlining desired outcomes but not dictating how agencies achieve such outcomes, consistent with the National Institute of Standards and Technology's ("NIST") AI Risk Management Framework ("AI RMF"); and (4) remains focused on federal agencies.

II. ADVANCING AI INNOVATION IS KEY TO ENSURING U.S. LEADERSHIP IN GLOBAL AI COMPETTION AND STANDARDS.

A. CTIA Applauds OMB's Focus on Advancing AI Innovation, Which Is Consistent with Broader Administration AI Policies.

Consistent with broader Administration goals to facilitate U.S. innovation and leadership on AI, one of the three main pillars of the Draft Memo tasks federal agencies with "[a]dvancing responsible AI innovation."[10] As the National Security Commission on Artificial Intelligence ("NSCAI") Report explained, "AI is part of a broader global technology competition. Competition will speed up

[8] Draft Memo at 2.

[9] *Id.*

[10] *Input*, AI.gov, https://ai.gov/input/ (last visited Nov. 28, 2023).

innovation. We should race together with partners when AI competition is directed at the moonshots that benefit humanity . . . ."[11]

CTIA agrees that global U.S. leadership on AI is critical. Given the transformative potential of AI—and the fact that it can be used both responsibly to improve society and also harmfully by bad actors—it is imperative that the United States lead globally, not only on innovative research and development of AI technologies and applications, but also in developing global consensus standards for AI technologies. As NIST recognizes, global consensus standards will "speed the pace of reliable, robust, and trustworthy AI technology development."[12] From a national security perspective, as the Department of Defense has acknowledged, U.S. adversaries are also investing heavily in AI, making it imperative that the United States not fall behind in the development and implementation of AI technologies.[13] As discussed below, a key aspect of promoting U.S. leadership is to refrain from erecting barriers that make it unduly burdensome for the federal government to leverage emerging AI technologies.

B. The Federal Government Should Be Able to Utilize the Benefits of AI—Especially to Promote and Protect Rights and Safety—Without Undue and Unnecessary Barriers.

The Draft Memo recognizes that "[i]f implemented responsibly, AI can improve operations and deliver efficiencies across the Federal Government."[14] CTIA agrees with this premise. AI promises massive benefits, which should be encouraged and not stifled by approaches that erect barriers to adoption without being tailored to actual AI risks. For example, AI is already being used to: (1)

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[11] Final Report, NSCAI, at 2 (Mar. 2021), https://www.nscai.gov/wp-content/uploads/2021/03/Full-Report-Digital-1.pdf.

[12] U.S. Leadership in AI: A Plan for Federal Engagement in Developing Technical Standards and Related Tools, NIST, at 22 (Aug. 9, 2019), https://www.nist.gov/system/files/documents/2019/08/10/ai_standards_fedengagement_plan_9aug2019.pdf (emphasis removed).

[13] Press Release, Department of Defense, DOD Announces Establishment of Generative AI Task Force (Aug. 10, 2023), https://www.defense.gov/News/Releases/Release/Article/3489803/dod-announces-establishment-of-generative-ai-task-force/.

[14] Draft Memo at 8.

strengthen national security and cybersecurity,[15] (2) analyze and detect fraud,[16] (3) optimize networks to promote energy efficiency and sustainability,[17] (4) improve accessibility,[18] and (5) enhance customer service and customer experiences.[19] Any approach that OMB takes to help federal agencies manage potential AI risks should fully consider and recognize these important benefits and provide a roadmap for federal agencies to leverage the full benefits of AI in a responsible way.

III. OMB SHOULD ENSURE THAT ITS FINAL MEMO IS HARMONIZED WITH OTHER FEDERAL APPROACHES AND IS MORE CLOSELY ALIGNED WITH LONGSTANDING RISK-MANAGEMENT PRINCIPLES.

A. OMB Should Align Its Definition of AI with Other Federal Approaches.

As policymakers across the federal government and internationally consider AI risk management approaches, it is critical that the United States promote harmonization among these efforts. Fragmentation poses serious issues for governments, organizations, and individuals. As CTIA explained in its comments to the White House's Office of Science and Technology Policy regarding a National AI Strategy, policy fragmentation can lead to overlapping and conflicting regulatory approaches that result

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[15] *See, e.g.*, *Artificial intelligence (AI) cybersecurity*, IBM, https://www.ibm.com/ai-cybersecurity?utm_content=SRCWW&p1=Search&p4=43700074604519824&p5=p&gclid=EAIaIQobChMI5LTukrvr_gIVEiyzAB2rIwpFEAAYASAAEgIL8_D_BwE&gclsrc=aw.ds (last visited Nov. 29, 2023); Victor Fredung, *Using AI To Compliment Cybersecurity And Threat Detection*, Forbes (Feb. 28, 2023), https://www.forbes.com/sites/forbesbusinesscouncil/2023/02/28/using-ai-to-compliment-cybersecurity-and-threat-detection/?sh=64f7d22038e0; Adam Stone, *How DARPA sparked dreams of self-healing networks*, C4ISRNET (Dec. 26, 2017), https://www.c4isrnet.com/it-networks/2017/12/26/how-darpa-sparked-dreams-of-self-healing-networks/.

[16] *See, e.g.*, Jeremy Nunn, *How AI And Machine Learning Help Detect And Prevent Fraud*, Forbes (Nov. 1, 2023), https://www.forbes.com/sites/forbestechcouncil/2023/11/01/how-ai-and-machine-learning-help-detect-and-prevent-fraud/?sh=470a776276d2; *Amazon Fraud Detector*, AWS, https://aws.amazon.com/fraud-detector/ (last visited Nov. 30, 2023).

[17] *See, e.g.*, Sibel Aydogmus Bahadir & Frida Mattsson, *What does my network do when I don't look at it?*, Ericsson (Sept. 22, 2022), https://www.ericsson.com/en/blog/2022/9/what-does-my-network-do-when-im-not-looking-look-at-it; *Analytics and AI-based automation*, AT&T, https://about.att.com/sites/labs/our-work/analytics-ai-automation (last visited Nov. 30, 2023).

[18] *See, e.g.*, *AI for Accessibility projects*, Microsoft, https://www.microsoft.com/en-us/ai/ai-for-accessibility-projects (last visited Nov. 29, 2023); Alina Tugend, *How Robots Can Assist Students With Disabilities*, New York Times (Mar. 29, 2022), https://www.nytimes.com/2022/03/29/technology/ai-robots-students-disabilities.html.

[19] *See, e.g.*, *Meet Emma, Our Virtual Assistant*, U.S. Citizenship and Immigration Services, https://www.uscis.gov/tools/meet-emma-our-virtual-assistant (last visited Nov. 30, 2023); *AI for customer service*, IBM, https://www.ibm.com/ai-customer-service (last visited Nov. 30, 2023).

in an overall drag on innovation, and impede U.S. AI competition and leadership globally when such goals should be a focus of federal AI policy.[20] Fragmentation also has direct negative impacts on individual consumers when there is confusion caused by uneven expectations and regulations.[21]

Recognizing that the federal government's use of AI will have considerations that are unique to the government and to individual agencies, OMB should still strive to promote a harmonized approach to AI risk management principles. At a minimum, OMB should use a common definition for AI across agencies, and in alignment with the latest executive and congressional guidance. As currently drafted, the Draft Memo uses a definition of AI from the 2019 National Defense Authorization Act ("NDAA")[22] and adds additional context from OMB itself to assist in interpreting the definition.[23] But the AI EO—which is the impetus for the Draft Memo—defines AI based on the National Artificial Intelligence Initiative Act of 2020.[24] Rather than rely on the 2019 NDAA's definition or its own variation, OMB

[20] Comments of CTIA, Request for Information; National Priorities for Artificial Intelligence, Docket ID: OSTP-TECH-2023-0007, at 2 (July 7, 2023), https://downloads.regulations.gov/OSTP-TECH-2023-0007-0243/attachment_1.pdf.

[21] *Id.*

[22] *See* Draft Memo at 22-23 ("The term 'artificial intelligence' has the meaning established in Section 238(g) of the John S. McCain National Defense Authorization Act for Fiscal Year 2019, which states that 'the term 'artificial intelligence' includes the following': 1. Any artificial system that performs tasks under varying and unpredictable circumstances without significant human oversight, or that can learn from experience and improve performance when exposed to data sets. 2. An artificial system developed in computer software, physical hardware, or other context that solves tasks requiring human-like perception, cognition, planning, learning, communication, or physical action. 3. An artificial system designed to think or act like a human, including cognitive architectures and neural networks. 4. A set of techniques, including machine learning, that is designed to approximate a cognitive task. 5. An artificial system designed to act rationally, including an intelligent software agent or embodied robot that achieves goals using perception, planning, reasoning, learning, communicating, decision making, and acting.").

[23] *See id.* at 23 ("For the purposes of this memorandum, the following technical context may assist in interpreting this definition: 1. This definition of AI encompasses, but is not limited to, the AI technical subfields of machine learning (including, but not limited to, deep learning as well as supervised, unsupervised, and semi-supervised approaches), reinforcement learning, transfer learning, and generative AI. 2. This definition of AI does not include robotic process automation or other systems whose behavior is defined only by human-defined rules or that learn solely by repeating an observed practice exactly as it was conducted. 3. For this definition, the technical complexity of a system (e.g., the number of parameters in a model, the type of model, or the amount of data used for training purposes) is not a relevant consideration for determining whether it constitutes AI. 4. This definition includes systems that are fully autonomous, partially autonomous, and not autonomous, and it includes systems that operate both with and without human oversight.").

[24] *See* AI EO at 75193 ("The term 'artificial intelligence' or 'AI' has the meaning set forth in 15 U.S.C. 9401(3): a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. Artificial intelligence systems use machine- and human-based inputs to perceive

should instead adopt the definition in the AI EO that will be operative across multiple agencies' activities. This straightforward step will help promote a harmonized approach to AI across the federal government by ensuring there is a consistently defined scope of governed activities.

B. The Final Memo Should Only Apply to High-Risk AI Use Cases and Not Inadvertently Sweep in Lower-Risk Applications.

There is a significant consensus that a risk-based approach to AI is the most effective way to promote the technology's benefits and manage its potential risks. For example, the AI EO encourages agencies to "address[] AI systems' most pressing security risks," promoting activities that "will provide a vital foundation for an approach that addresses AI's risks without unduly reducing its benefits."[25] As NIST explains in its landmark AI RMF: "When applying the AI RMF, risks which the organization determines to be highest for the AI systems within a given context of use call for the most urgent prioritization and most thorough risk management process."[26] This risk-based approach is sound. Focusing on high-risk applications of AI—rather than trying to address AI as a monolithic technology or treating all applications of AI the same—will allow organizations to leverage the benefits from AI without undue barriers, while effectively addressing identified risks.

The Draft Memo appears to attempt to establish a risk-based foundation by only imposing baseline requirements on applications that pose "risks to the rights and safety of the public."[27] However, this approach is undermined by the Draft Memo's definitions and presumptions, which could be read to sweep in lower-risk AI applications.

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real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.").

[25] *Id.* at 75191.

[26] Artificial Intelligence Risk Management Framework (AI RMF 1.0), NIST, at 8 (Jan. 2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.

[27] Draft Memo at 10.

The Draft Memo's definitions of "rights-impacting"[28] and "safety-impacting" [29] AI have the potential to sweep in AI applications that are not high-risk because they are overly broad and vague. Both definitions rely on relatively general and undefined goals that are subject to ongoing debate and policy discussions. For example, while individual privacy is an important consideration, the contours of what implicates "privacy" sufficient to trigger heightened "minimum standards" is neither settled nor defined. And the definitions of these terms rely on vague standards—such as "critical resources or services," "well-being," and "strategic assets or resources"[30]—which do not provide meaningful guidance to agencies for determining which AI applications are high-risk and could sweep in more applications than intended. Additionally, the definition for "safety-impacting AI" is triggered by "potential" impact—not *actual* or even reasonably likely impact—which is overly broad and ambiguous, and therefore difficult to administer.[31]

The Draft Memo also establishes a list of AI applications that are automatically presumed to be rights-impacting or safety-impacting. These lists are categorical in nature and do not sufficiently distinguish between high- and low-risk applications for any given purpose.[32] This approach sweeps too

[28] *Id.* at 24 (defining "Rights-Impacting AI" as "AI whose output serves as a basis for decision or action that has a legal, material, or similarly significant effect on an individual's or community's: 1. Civil rights, civil liberties, or privacy, including but not limited to freedom of speech, voting, human autonomy, and protections from discrimination, excessive punishment, and unlawful surveillance; 2. Equal opportunities, including equitable access to education, housing, credit, employment, and other programs where civil rights and equal opportunity protections apply; or 3. Access to critical resources or services, including healthcare, financial services, social services, transportation, non-deceptive information about goods and services, and government benefits or privileges.").

[29] *Id.* at 25 (defining "Safety-Impacting AI" as "AI that has the potential to meaningfully impact the safety of: 1. Human life or well-being, including loss of life, serious injury, bodily harm, biological or chemical harms, occupational hazards, harassment or abuse, or mental health, including both individual and community aspects of these harms; 2. Climate or environment, including irreversible or significant environmental damage; 3. Critical infrastructure, including the critical infrastructure sectors defined in Presidential Policy Directive 2143 and the infrastructure for voting and protecting the integrity of elections; or, 4. Strategic assets or resources, including high-value property, information marked as sensitive or classified by the Federal Government, and intellectual property.").

[30] *Id.* at 24-25.

[31] *Id.* at 25.

[32] *See id.* at 11-13.

broadly, as it may require agencies to treat more benign applications—including security applications—the same as high-risk applications.

Overall, the Draft Memo's overly broad approach risks creating hurdles to federal agency use of beneficial AI, which undercuts the Draft Memo's goals of enhancing innovation and reducing barriers.[33] Imposing strict and reflexive requirements on AI use generally will ultimately stifle—not enhance—agencies' "ability to use AI in ways that benefit the public and increase mission effectiveness."[34] OMB should more carefully distinguish between low- and high-risk AI applications and focus baseline requirements on a more narrowly circumscribed list of high-risk activities.

C. The Final Memo Should Be Flexible and Not Attempt to Establish a One-Size-Fits-All Approach for Addressing Complex and Dynamic AI Risks.

Flexibility is a well-established principle that has been at the heart of risk management approaches for emerging technologies for decades. As NIST recognized early in the development process for the AI RMF, an effective approach must "[b]e risk-based, outcome-focused, cost-effective, voluntary, and non-prescriptive. It should provide a catalog of outcomes and approaches to be used voluntarily, rather than a set of one-size-fits-all requirements."[35] Building in sufficient flexibility allows any AI approach to account for the complex and diverse range of AI applications, allowing organizations to tailor any risk management processes or controls to specific risks in each application's unique context. Flexibility also makes AI risk management more future-proof and adaptable to ever-changing technological developments and emerging threats. Conversely, establishing a "one-size-fits-all" checklist for any organization to use for any AI application has the opposite impact. Such a rigid approach promotes a "compliance mindset," which encourages a check-the-box approach to addressing

[33] *Id.* at 1-2.

[34] *Id.* at 8.

[35] AI Risk Management Framework Concept Paper, NIST, at 4 (Dec. 13, 2021), https://www.nist.gov/document/airmfconceptpaper.

risks. Inflexibility locks organizations into processes and controls that may quickly become ineffective and outdated. Rigid requirements can also provide valuable information to sophisticated bad actors about the controls and protections that organizations will be using, which threat actors will almost certainly work to exploit.

Unfortunately, the Draft Memo fails to adopt sufficient flexibility and instead proposes a "minimum requirements" approach that effectively requires a rigid, "one-size-fits-all" if AI falls into a certain category. Indeed, the Draft Memo contemplates more of a "checklist" style of minimum requirements for applications deemed to be rights-impacting or safety-impacting, which is not tailored to individual AI applications.

AI Impact Assessments. As part of the requirement to complete an AI impact assessment, the Draft Memo prescribes in specific detail the metrics that an agency should use, as well as the content of the impact assessment.[36] Dictating the details of risks assessments threatens to transform these tools from meaningful risk management analyses into rote, check-the-box exercises. OMB can better achieve its goal of promoting the uniform use of meaningful impact assessments by providing more general guidance to federal agencies, but not being overly prescriptive in what each assessment must look like. Given the diversity of federal agencies—including in size, mission, and AI use/adoption—each impact assessment will need to be tailored to each unique context.

Stakeholder Engagement. The Draft Memo instructs that for rights-impacting AI, agencies "*must* consult affected groups, including underserved communities, in the design, development, and use of the AI, and use such feedback to inform agency decision-making regarding the AI."[37] While the Draft Memo rightly caveats this requirement to be applied "[t]o the extent practicable,"[38] it is still overly

[36] Draft Memo at 15-16.

[37] *Id.* at 19-20 (emphasis added).

[38] *Id.* at 19.

burdensome and unnecessary to adequately assess risks in many situations. Indeed, direct community or outside stakeholder engagement is infeasible in many circumstances, especially where organizations are deploying low-risk AI systems.

Opt-out. The Draft Memo would establish rigid opt-out rules for certain rights-impacting AI applications.[39] Overly broad opt-out requirements can have unintended consequences. Many AI applications are low-risk and/or necessary to provide customized services. An overly broad opt-out may result in individuals opting out of uniquely tailored experiences or processes necessary to provide desired services—without individuals understanding the scope of their opt-out. Further, an overly broad opt-out could lead to organizations maintaining dual systems for the same functions—one AI system and one non-AI system. This would be duplicative and costly, and could result in federal agencies forgoing AI systems altogether, thereby impeding innovation using AI that would directly benefit individuals.

Rather than use the approach in the current Draft Memo, OMB should adjust its requirements for high-risk AI applications to align with—and map to—NIST's AI RMF. The AI RMF was developed at the direction of Congress, includes robust stakeholder involvement, and thoughtfully outlines a voluntary, flexible, and risk-based approach to deploying AI in a responsible manner. It provides guidance for incorporating trustworthiness considerations into the development and use of AI systems, and can be applied flexibly to a variety of use cases and in alignment with existing industry standards. This kind of risk-based approach that maintains flexibility will promote innovation while appropriately

[39] *Id.* at 20-21 ("Maintain options to opt-out where practicable. Agencies must prominently provide and maintain a mechanism to conveniently opt out from AI functionality in favor of a human alternative where practicable and consistent with applicable law and governmentwide guidance. An opt-out mechanism must exist where the affected people have a reasonable expectation of an alternative or where lack of an alternative would meaningfully limit accessibility or create unwarranted harmful impacts.").

addressing risks. And it will help to realize the White House's "commitment to seizing the opportunities and managing the risks posed by AI."[40]

The Draft Memo currently advises that "[t]o fill potential risk management gaps, agencies are encouraged to promote and to incorporate, as appropriate, additional best practices for AI risk management, such as from the National Institute of Standards and Technology (NIST) AI Risk Management Framework . . . ."[41] While encouraging agencies to utilize the AI RMF is a good starting point, OMB should go further and encourage federal agency use of the AI RMF by mapping its guidance to the AI RMF, which foregoes a "one-size-fits-all" approach to managing AI risk. While several of the requirements in the Draft Memo are drawn from the AI RMF, it is critical that OMB implement them in a flexible manner.[42] In particular, OMB should emphasize that risk management is not a uniform "checklist" approach, and that different approaches will be appropriate to address unique risks.

IV. THE SOLE FOCUS OF OMB'S FINAL MEMO SHOULD BE FEDERAL AGENCIES.

A. In Drafting Procurement Guidance, OMB Should Focus Only on AI Systems, Tools, and Services Provided to the Federal Government.

The Draft Memo indicates that OMB plans to "develop an initial means to ensure that AI contracts align with the guidance in this memorandum."[43] CTIA's members include many of the

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[40] *Biden-Harris Administration Announces New NIST Public Working Group on AI*, NIST (June 22, 2023), https://www.nist.gov/news-events/news/2023/06/biden-harris-administration-announces-new-nist-public-working-group-ai.

[41] Draft Memo at 13-14.

[42] *See NIST AI RMF Playbook, Govern 5.1*, NIST, https://airc.nist.gov/AI_RMF_Knowledge_Base/Playbook/Govern (last visited Nov. 30, 2023) ("Organizational policies and practices are in place to collect, consider, prioritize, and integrate feedback from those external to the team that developed or deployed the AI system regarding the potential individual and societal impacts related to AI risks. . . . Beyond internal and laboratory-based system testing, organizational policies and practices may consider AI system fitness-for-purpose related to the intended context of use. Participatory stakeholder engagement is one type of qualitative activity to help AI actors answer questions such as whether to pursue a project or how to design with impact in mind. This type of feedback, with domain expert input, can also assist AI actors to identify emergent scenarios and risks in certain AI applications. The consideration of when and how to convene a group and the kinds of individuals, groups, or community organizations to include is an iterative process connected to the system's purpose and its level of risk. Other factors relate to how to collaboratively and respectfully capture stakeholder feedback and insight that is useful, without being a solely perfunctory exercise.").

[43] Draft Memo at 21.

world's largest telecommunications carriers that provide voice, data, and cloud-based services, as well as information and communications technology ("ICT") products, to the federal government under contracts and subcontracts. Accordingly, CTIA urges OMB to ensure that its guidance reaches federal contractors only insofar as they are providing AI systems, tools, or services to the federal government. Already, the Draft Memo signals that OMB plans to remain focused on federal agency use of AI. In particular, the Draft Memo discusses "AI contracts."[44] As it moves forward with developing this guidance, OMB should take care to remain focused only on AI systems, tools, and services being directly sold or provided to the federal government. It should not attempt to set requirements for a contractor's more general operations or its commercial tools and services that are not directly related to their government contract.

B. OMB Should Not Create Duplicative or Overlapping Guidance for Critical Infrastructure.

The AI EO contemplates several federal government workstreams that address AI use within Critical Infrastructure. For example, "[w]ithin 180 days of the date of [the AI EO], the Secretary of Homeland Security, in coordination with the Secretary of Commerce and with [Sector Risk Management Agencies ("SRMAs")] and other regulators as determined by the Secretary of Homeland Security, shall incorporate as appropriate the AI Risk Management Framework, NIST AI 100-1, as well as other appropriate security guidance, into relevant safety and security guidelines for use by critical infrastructure owners and operators."[45] While OMB has a role to play in this guidance for Critical

[44] *Id.*

[45] AI EO at 75199-75200. *See also, e.g.*, *id.* at 75199 ("Within 90 days of the date of this order, and at least annually thereafter, the head of each agency with relevant regulatory authority over critical infrastructure and the heads of relevant SRMAs, in coordination with the Director of the Cybersecurity and Infrastructure Security Agency within the Department of Homeland Security for consideration of cross-sector risks, shall evaluate and provide to the Secretary of Homeland Security an assessment of potential risks related to the use of AI in critical infrastructure sectors involved, including ways in which deploying AI may make critical infrastructure systems more vulnerable to critical failures, physical attacks, and cyber attacks, and shall consider ways to mitigate these vulnerabilities. Independent regulatory agencies are encouraged, as they deem appropriate, to contribute to sector-specific risk assessments.").

Infrastructure,[46] that process should be conducted separately from this guidance for federal agencies, and in consultation with other agencies. OMB should refrain from providing guidance regarding Critical Infrastructure under this Draft Memo, as creating overlapping or duplicative guidance will lead to confusion and unnecessarily fragmented directives.

V. CONCLUSION

CTIA appreciates the opportunity to provide input on the Draft Memo and generally supports the goal of promoting AI innovation while managing risks. OMB should align its definition of AI with the AI EO, carefully distinguish between low- and high-risk AI use cases, and promote flexibility by further aligning with the NIST AI RMF. The Final Memo should also only focus on federal agencies' use of AI.

Respectfully submitted,

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[46] *See id.* at 75200 ("Within 240 days of the completion of the guidelines described in subsection 4.3(a)(iii) of this section, the Assistant to the President for National Security Affairs and ***the Director of OMB***, in consultation with the Secretary of Homeland Security, shall coordinate work by the heads of agencies with authority over critical infrastructure to develop and take steps for the Federal Government to mandate such guidelines, or appropriate portions thereof, through regulatory or other appropriate action. Independent regulatory agencies are encouraged, as they deem appropriate, to consider whether to mandate guidance through regulatory action in their areas of authority and responsibility." (emphasis added)).

PUBLIC SUBMISSION

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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0114
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Citizens and Technology Lab, Cornell University

General Comment

The Citizens and Technology Lab (CAT Lab) of Cornell University is pleased to provide input in response to the request for comment (RFC) on OMB's draft memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence. These comments respond to questions 2, 3, 5, and 8 of the RFC, and provide additional feedback. With our attached supporting materials we:

- Encourage the OMB to acknowledge and support the role of community/participatory science in the oversight of AI tools.
- Urge the OMB to develop guidelines for soliciting and supporting participation in AI innovation and governance from underrepresented groups who have been historically excluded from AI research and development - and who face disproportionate risks from AI systems.
- Advise the OMB to account for the labor, rights, and mental health consequences for volunteer and professional communities whose work is used to train AI systems and manage AI safety.

About the Citizens and Technology Lab

The Citizens and Technology Lab (CAT Lab) at Cornell University works alongside the public to discover effective community ideas for change in ways that advance scientific knowledge. CAT Lab has worked with communities of tens of millions of people on reddit, Wikipedia, and Twitter to study socio-technical safety and reliability questions, including online safety and discrimination.

CAT Lab is led by Dr. J. Nathan Matias, Assistant Professor at Cornell in the departments of Communication and Information Science. In 2010, he developed one of the first socio-technical testing systems for a generative language model in his capacity at one of the earliest neural network predictive text software companies (SwiftKey).

CAT Lab has particular expertise with AI systems that are built on adaptive algorithms: systems that train on their outputs such as systems for ranking and sorting, resource allocation, logistics management, and generative AI. As Dr. Matias has outlined in a recent article in Nature, the creators of these systems cannot currently make reliable assurances about the performance and safety of systems that adapt to their human

environments. He outlines the needed scientific work of testing, forecasting, and preventing harms from this kind of collective AI and human behavior, including the essential role of community/citizen science. When AI systems adapt to widely different contexts, attempts at AI transparency, accountability, and regulation will grossly fail the most vulnerable in society without significant support for community/participatory science on AI and its social impacts.

Coordination mechanisms and OMB's role advancing responsible AI innovation (questions 2, 3, 8)

OMB should direct agency heads to establish a task force to build community/participatory science-based review of AI tools.
OMB should include indicators in any system it develops to inventory AI use cases (pursuant to section 7225 of the Advancing American AI Act) to seek clarity from Federal agencies on the diversity of analysis in safety-impacting and rights-impacting AI.

To engage the public in responsible AI innovation, federal agencies should consider the roles of access to data, ethics, and volunteer labor that make up the governance systems of digital decision-making.
CAT Lab recommends that the OMB reflect on how federal agencies can approach AI governance with the role of semi-professional moderators in mind, and designate a person to lead in advancing our understanding of the role of volunteer moderators in advancing responsible AI innovation.
OMB should direct agency leads to support the work of developing best standards and practices for mitigating the mental health and secondary trauma of trust and safety teams and moderators working with AI systems.

Use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised (question 5)

Harms from human-algorithm interaction in AI systems should be considered to develop and change both in their harms and benefits over time. OMB should consider expanding the list of safety and rights impacting AI to specify arenas where the initial effect may not yet be easily observed, but where research has shown initial effects, specifically:
-The chilling effect on freedom of speech that emerges from the use of AI to establish automated law enforcement to deter behavior. This includes systems of legal action in which a computer is responsible for unsupervised decision-making, which distributes or outsources surveillance and enforcement to parties that are not governments.
- The potential for such automated law enforcement tools to be deployed in requirements to watermark generative AI content. Early research has shown that receiving takedown notices from copyright enforcement bots drives down individuals' rate of posting, on average, regardless of whether the takedown notice was legitimate or not.

Attachments

OMB-2023-0020_RFC_Citizens_and_Technology_Lab

December 5, 2023

Citizen and Technology Lab's Submission to OMB Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Office of Management and Budget
Regulations.gov Docket Number OMB–2023–0020

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- Encourage the OMB to acknowledge and support the role of community/participatory science in the oversight of AI tools.
- Urge the OMB to develop guidelines for soliciting and supporting participation in AI innovation and governance from underrepresented groups who have been historically excluded from AI research and development - and who face disproportionate risks from AI systems.
- Advise the OMB to account for the labor, rights, and mental health consequences for volunteer and professional communities whose work is used to train AI systems and manage AI safety.

About the Citizens and Technology Lab

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CAT Lab is led by Dr. J. Nathan Matias, Assistant Professor at Cornell in the departments of Communication and Information Science. In 2010, he developed one of the first socio-technical testing systems for a generative language model in his capacity at one of the earliest neural network predictive text software companies (SwiftKey).

CAT Lab's position with respect to testing, forecasting, and preventing harms from collective AI and human behavior

CAT Lab has particular expertise with AI systems that are built on adaptive algorithms-systems that train on their outputs such as systems for ranking and sorting, resource allocation, logistics management, and generative AI. As Dr. Matias has outlined in a recent article in *Nature*,[1] the creators of these systems cannot currently make reliable assurances about the performance and safety of systems that adapt to their human environments. He outlines the needed scientific work of testing, forecasting, and preventing harms from this kind of collective AI and human behavior, including the essential role of community/citizen science. When AI systems adapt to widely different contexts, attempts at AI transparency, accountability, and regulation will grossly fail the most vulnerable in society without significant support for community/participatory science on AI and its social impacts**.**

Coordination mechanisms and OMB's role advancing responsible AI innovation *(questions 2, 3, 8)*

OMB should direct agency heads to establish a task force to build community/participatory science-based review of AI tools.

Citizen/community science offers an important mechanism to overcome severe safety and inclusion risks of science and industry. When Dr. Safiya Noble wrote "Algorithms of Oppression," documenting the gross misrepresentation of Black girls with images of pornography on Google, she was drawing attention to a system problem in AI systems that went largely undetected by AI creators in academia and industry for over a decade. As one of the only Black women in information science, she was partly able to observe this problem because it affected her and her communities. Over a decade later, US Information Science as a field has not increased the rate of Black women PhDs. Given the severe under-representation of minorities in computing, work on AI safety and reliability cannot wait for academia to change in order for communities to be safe.[2] Citizen/community science can fill these knowledge gaps and transform the diversity of the scientific and industry workforce by broadening who participants in research and by creating pathways for opportunity.

The EPA's program in Participatory Science for Environmental Protection is one such model, as documented in the 2022 report "Using Participatory Science at EPA: Vision and Principles (PDF)." In establishing this task force, OMB should seek agency input on funding needs for universities, civil society, state/regional/local governments, and Tribal communities to pursue scientific inquiry along

[1] Matias, J.N. (2023) Humans and algorithms work together — so study them together. *Nature* **617**, 248-251 (2023). *https://doi.org/10.1038/d41586-023-01521-z*

[2] Matias, J.N., Lewis, N.A. & Hope, E.C. US universities are not succeeding in diversifying faculty. *Nat Hum Behav* **6**, 1606–1608 (2022). https://doi.org/10.1038/s41562-022-01495-4

community designs. It is critical to begin now to build the scientific and engineering practice to understand collective patterns of human-algorithm behavior.

OMB should include indicators in any system it develops to inventory AI use cases (pursuant to section 7225 of the Advancing American AI Act) to seek clarity from Federal agencies on the diversity of analysis in safety-impacting and rights-impacting AI.

As Dr. Matias noted in a response to *RFC NTIA Docket No. 230407-0093*,[3] the contextual dependence of AI systems perpetuates harms over long periods of time, in particular where harms occur for people underrepresented in computing. Advancing responsible AI innovation will require a coordination mechanism that reflects this context.

To engage the public in responsible AI innovation, federal agencies should consider the roles of access to data, ethics, and volunteer labor that make up the governance systems of digital decision-making.

CAT Lab notes that federal policies need to work in tandem with algorithm transparency to enable communities to produce high quality research in the public interest, and that researchers need protection from private-sector retaliation for research and documentation of harms. We have documented some of the opportunities to enable independent research in a recent Tech Policy Press article, Enabling Independent Research Without Unleashing Ethics Disasters.[4]

CAT Lab recommends that the OMB reflect on how federal agencies can approach AI governance with the role of semi-professional moderators in mind, and designate a person to lead in advancing our understanding of the role of volunteer moderators in advancing responsible AI innovation.

Though trust and safety professionals are part of the bulwark of protection against AI harms, much of the day-to-day activity of protecting online spaces and mitigating algorithmic harm is done by volunteer moderators of online communities, whose conversations have become so-called "ground truth" for the training of AI systems. Community moderators who safeguard platforms, including Wikipedia and reddit, have already experienced overwhelming amounts of information from generative AI bots escalating the amount of spam they deal with to maintain online community spaces.[5] Scholars have begun to document the disruptions from AI-generated content in these

[3] Matias, J.N. (2023). *AI Policy Will Fail Society Without Community Science.* NTIA Docket No. 230407-0093*, also available at* https://citizensandtech.org/2023/06/ntia-submission-06-2023/

[4] Lukito, Josephine, Matias, J., Gilbert, S (2023 May 10). *Enabling Independent Research Without Unleashing Ethics Disasters.* Tech Policy Press. https://www.techpolicy.press/enabling-independent-research-without-unleashing-ethics-disasters/.

[5] Clarke, Laurie (2023 April 11). *Reddit Moderators Brace for a ChatGPT Spam Apocalypse.* Vice. https://www.vice.com/en/article/jg5qy8/reddit-moderators-brace-for-a-chatgpt-spam-apocalypse.

communities; the downstream effects on generative AI systems from this potential information pollution are still poorly understood.[6]

Similarly, the software systems that help enable volunteer moderation are often built and maintained by volunteer open-source engineers. We encourage the OMB to include the governance of volunteer and open-source sociotechnical systems as part of its safety-impacting and rights-impacting AI framework. OMB should also incentivize basic research and the development of open-source software and standards focused on the mitigation of algorithmic harm.

OMB should direct agency leads to support the work of developing best standards and practices for mitigating the mental health and secondary trauma of trust and safety teams and moderators working with AI systems.

When policymakers discuss the safety and rights implications of AI, they often consider end-users of AI, but AI development also involves managing the safety and rights of the workers who train AI systems and monitor their safety. This work, as documented by Siddharth Suri and Mary Gray in "Ghost Work", Alexa Koenig and Andrea Lampros in “Graphic: Trauma and Meaning in Our Online Lives”, and by Sarah T. Roberts in "Beyond the Screen," can expose workers to severe secondary trauma and mental health risks that psychologists have still not discovered how to reliably mitigate. There is much more research to be supported in this developing field of AI mitigation, such as emerging research around AI’s ability to render style-transfer filters to mitigate impact.[7] At Cornell, we have a team currently working on compiling a systematic review of these secondary trauma issues, how to measure the psychological harms from training AI systems to be safe, and how to introduce workplace protections that safeguard the health of the people behind the screen of AI.

Use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised *(question 5)*

Harms from human-algorithm interaction in AI systems should be considered to develop and change both in their harms and benefits over time. OMB should consider expanding the list of safety and rights impacting AI to specify arenas where the initial effect may not yet be easily observed, but where research has shown initial effects, specifically:

1. The chilling effect on freedom of speech that emerges from the use of AI to establish automated law enforcement to deter behavior. This includes systems of legal action in which

[6]Lloyd, T., Reagle, J., Naaman, M. (2023). *“There Has To Be a Lot That We're Missing": Moderating AI-Generated Content on Reddit*. aRxiv. https://doi.org/10.48550/arXiv.2311.12702.
[7] Sarridis, I, Spangenberg, J., Papadopoulou, O., & Papadopoulos, S. (2023). *Mitigating Viewer Impact from Disturbing Imagery using AI Filters: A User-Study.* arXiv. https://doi.org/10.48550/arXiv.2307.10334

a computer is responsible for unsupervised decision-making, which distributes or outsources surveillance and enforcement to parties that are not governments.

2. The potential for such automated law enforcement tools to be deployed in requirements to watermark generative AI content. Early research has shown that receiving takedown notices from copyright enforcement bots drives down individuals' rate of posting, on average, regardless of whether the takedown notice was legitimate or not.[8]

* * * * *

Thank you for the opportunity to provide comments. The Citizens and Technology Lab looks forward to serving as a potential resource for policy discussions on this issue.

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[8] Matias, J.N., Mou, M., Penney, J., Klein, M., Wright, L. (2020). *Do Automated Legal Threats Reduce Freedom of Expression Online? Preliminary Results from a Natural Experiment*. https://osf.io/nc7e2/

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0115
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Muse Technologies, Inc.

General Comment

Muse Technologies Inc., a woman-owned small business, is an IT consulting firm located in Lanham, Maryland. We were founded in 2013 by Dr. Linda Cureton, the former NASA CIO, and offer a range of services, including program/project management, organizational development, IT strategy and governance, facility management, property management, and strategic communication.

The "AI in Government Memo" is a critical step towards harnessing the potential of Artificial Intelligence (AI) while safeguarding the public against its risks. It proposes comprehensive guidelines for advancing governance innovation and managing risks associated with AI deployment in federal agencies, emphasizing the necessity of balancing the technological boon of AI with the imperative to protect the safety and rights of citizens. The memo mandates the designation of Chief AI Officers in agencies, reflecting a commitment to high-level accountability in AI governance.

The requirements for AI governance include enhanced accountability and oversight, improved risk management, operational efficiency and innovation, and a balance between innovation and regulation. However, the effectiveness of these requirements depends on their implementation, particularly if agencies lack the necessary expertise, resources, or infrastructure to support advanced AI systems and governance structures.

Balancing innovation with regulation requires flexibility in the governance framework, as different AI applications may pose varying levels of risk and require different management strategies. Effective regulation should minimize risks and encourage responsible innovation, promoting ethically designed, transparent, and accountable AI applications while also effectively and efficiently addressing government objectives.

Collaboration with stakeholders, including AI experts, ethicists, and the public, is essential for formulating guidelines that are both innovative and ethically grounded. Continuous evaluation and revision of regulations and guidelines can ensure that governance keeps pace with technological advances while maintaining necessary safeguards.

Suggestions for improving accountability and effectiveness in AI governance include continuous education and training for agency heads and Chief AI Officers, instituting ethics and organizational leadership in executive capacity building, involving a broader range of stakeholders in AI governance decisions, developing clear performance metrics and reporting, and establishing feedback loops and continuous improvement mechanisms.

The evolving nature of AI technology necessitates ongoing education, adaptation, and improvement of risk management strategies. Public and private organizations should stay informed about emerging, ethical, and regulatory standards and continuously assess and enhance their approaches to AI implementation. By prioritizing ongoing education and staying abreast of evolving standards, organizations can foster an environment that embraces innovation and upholds ethical considerations and regulatory compliance.

Continuous assessment and enhancement of risk management strategies are imperative in navigating the dynamic landscape of AI. As technology evolves, so do potential risks related to data security, privacy, bias, and legal compliance. Proactive measures, such as robust governance structures, regular performance reviews, and stakeholder engagement, are critical to mitigating these risks.

The synergy between education, adaptation, and risk management is pivotal for responsibly harnessing AI's full potential. Public and private entities that commit to a culture of continuous improvement will optimize their AI implementations and contribute to the responsible advancement of AI technology on a broader scale. As we navigate the future of AI, the commitment to ethical practices and regulatory compliance will be the compass guiding organizations toward sustainable and impactful AI integration.

Muse would like to acknowledge the invaluable involvement of:

• Dustin S. Sachs, Senior Manager, Information Security Risk Management, World Kinect Corporation
• Joyce Hunter, CEO, Vulcan Enterprises, LLC

Respectfully Submitted,
Dr. Linda Y. Cureton

Attachments

RFC OMB AI (3)

OMB AI RFC Addendum (1)

Executive Summary

The rapid advancement of Artificial Intelligence (AI) technologies has presented unparalleled opportunities and challenges for government agencies. The "AI in Government Memo," drafted for public review by the Executive Office of the President, Office of Management and Budget, embodies a critical step towards harnessing the potential of AI while safeguarding the public against its risks. Under the directive of Shalanda D. Young, this memo proposes comprehensive guidelines for advancing governance innovation and managing risks associated with AI deployment in federal agencies. It emphasizes the necessity of balancing the technological boon of AI with the imperative to protect the safety and rights of citizens, aligning with the mandates of the Artificial Intelligence in Government Act of 2020, the Advancing American AI Act, and President Biden's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.

The significance of this memorandum cannot be overstated in an era where AI is increasingly integral to the operations and efficiency of the Federal Government. It establishes new requirements and guidance for AI governance, calling for robust risk management practices, especially for AI applications impacting public rights and safety. The memo mandates the designation of Chief AI Officers in agencies, reflecting a commitment to high-level accountability in AI governance. By evaluating the directives, strategies, and risk management practices outlined in the memo, this response aims to provide substantive feedback, critically examining the potential impacts of these policies on AI innovation and deployment within the

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government. The goal is to assess the feasibility and effectiveness of these guidelines and propose enhancements that could lead to more responsible and efficient AI governance in federal agencies.

Analysis of AI Governance and Innovation Requirements

Enhanced Accountability and Oversight: As proposed in the memo, the requirements for AI governance, including appointing Chief AI Officers in agencies, will likely lead to increased accountability and oversight. By assigning specific responsibilities for AI governance to high-level officials, agencies are more likely to prioritize AI's ethical and responsible use, aligning with national values and laws.

Improved Risk Management: The emphasis on risk management, particularly for AI uses that impact public rights and safety, could lead to more robust and comprehensive approaches to identifying, assessing, and mitigating potential harms associated with AI systems. This proactive stance on risk management can prevent adverse outcomes and maintain public trust in government-operated AI systems.

Operational Efficiency and Innovation: The requirements can also drive innovation within government agencies. By mandating AI governance and risk management, agencies are encouraged to explore new AI technologies and applications, which could lead to operational efficiencies and enhanced service delivery to the public.

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Challenges in Implementation: However, the effectiveness of these requirements depends on their implementation. Agencies may face challenges integrating these guidelines into their operations, particularly if they lack the necessary expertise, resources, or infrastructure to support advanced AI systems and governance structures.

Keeping the Balance Between Innovation and Regulation

Potential for Stifling Innovation: While regulation is necessary to ensure responsible AI use, there is a risk that overly stringent or prescriptive requirements could stifle innovation. Agencies might become overly cautious in adopting new AI technologies, fearing non-compliance or the complexities of navigating the governance framework.

Need for Flexibility: Balancing innovation with regulation requires a degree of flexibility in the governance framework. Regulations should be designed to adapt to the rapidly evolving nature of AI technologies. A one-size-fits-all approach may not be practical, as different AI applications may pose varying levels of risk and require different management strategies.

Encouraging Responsible Innovation: Effective regulation should minimize risks and encourage responsible innovation. This involves promoting AI applications that are ethically designed, transparent, and accountable while also effectively and efficiently addressing government objectives.

Collaboration with Stakeholders: Striking the right balance between innovation and regulation will require collaboration with various stakeholders, including AI experts, ethicists, and the

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public. Input from these groups can help in formulating guidelines that are both innovative and ethically grounded.

Continuous Evaluation and Revision: Given the dynamic nature of AI, regulations, and guidelines should be subject to continuous evaluation and revision. This adaptive approach can ensure that governance keeps pace with technological advances while maintaining necessary safeguards.

Evaluation of AI Governance Strengthening Measures

Responsibilities of Agency Heads:

- **Positive Aspects:** Assigning AI governance responsibilities to agency heads is strategic. It ensures that AI initiatives align with the overall goals and objectives of the agency, fostering a top-down approach to ethical AI use.
- **Concerns:** However, agency heads often juggle multiple priorities and may not always have the specialized knowledge required for effective AI governance. This could lead to a superficial or compliance-focused approach rather than a deeply ingrained ethical AI culture.

Requirement to Appoint a Chief AI Officer:

- **Advantages:** The creation of a Chief AI Officer role is commendable for providing a dedicated focus on AI governance. This role can bridge the gap between technical AI

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applications and strategic organizational goals, ensuring AI is used responsibly and effectively.

- **Limitations:** The effectiveness of this role depends on the authority and resources allocated to it. If the Chief AI Officer lacks sufficient influence or support, their ability to implement meaningful changes could be significantly hampered. Making this an adjunct role to the Chief Technology Officer or the Chief Data Officer will dilute the authority and dedication of the role to "duties as otherwise assigned."

Suggestions for Improving Accountability and Effectiveness in AI Governance

Continuous Education and Training:

- Implement training programs for agency heads and Chief AI Officers to keep them abreast of AI advancements and ethical considerations. This can enhance their ability to make informed decisions.
- Institute ethics and organizational leadership in baseline and continuing executive capacity building in agency heads and Chief AI Officers. Ethical leadership emphasizes principles like trust, integrity, and accountability, fostering trust and respect within the organization. It drives the organization's vision, inspires employees, and fosters innovation. Ethical leadership contributes to long-term success of AI Governance, builds trust with customers, partners, and the community, and positively impacts decision-making processes

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Stakeholder Engagement:

- Involve a broader range of stakeholders in AI governance decisions, including AI experts, ethicists, and public representatives. This can provide diverse perspectives and enhance the legitimacy of AI governance frameworks.

Performance Metrics and Reporting:

- Develop clear metrics for evaluating the effectiveness of AI governance and make these evaluations public. Regular reporting on AI projects, like we do for IT (Information Technology) projects with the Federal Information Technology Acquisition Reform Act (FITARA), can increase transparency and accountability.
- Implementing a FITARA-like process for AI can help organizations manage and optimize their AI initiatives effectively while ensuring alignment with broader business objectives.

Feedback Loops and Continuous Improvement:

- Establish mechanisms for regular feedback from both internal and external stakeholders. Use this feedback for continuous improvement of AI governance practices. Participating in developing industry-wide standards can contribute to a collective effort to address these concerns effectively.

Collaboration and Knowledge Sharing:

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- Encourage collaboration and knowledge sharing between different agencies. This can help develop best practices and learn from each other's experiences in AI governance. This could be accomplished by establishing a Chief AI Officers Council, like the Chief Data and Chief Information Officers Councils.

Management of Risks Associated with AI Use

Detailed Examination of Policies and Procedures for Managing AI-Related Risks

- **Current State:** The memo outlines that agencies must implement policies and procedures to manage risks associated with AI, particularly those affecting public rights and safety. This includes integrating risk management into the AI lifecycle, from development to deployment and monitoring.
- **Analysis:** A practical risk management framework should encompass comprehensive risk assessment methodologies, including showing potential biases, errors, and unintended consequences of AI systems. Regular audits and impact assessments are crucial in this regard.

Review of Risk Management Practices for Rights and Safety Impacting AI

Assessment: The minimum risk management practices detailed in the memo focus on ensuring AI systems do not infringe on individual rights or pose safety risks. These practices include transparency, accountability, and regular evaluation of AI systems.

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Concerns: While these practices are essential, they might not be sufficient to address the dynamic and often unpredictable nature of AI risks. The complexity and evolving capabilities of AI systems might outpace the current minimum standards.

Suggestions for Enhancing Risk Management Frameworks

Dynamic Risk Assessment Models: Implementing adaptive risk assessment models that can evolve with AI advancements is critical. These models should be capable of identifying new risks as AI technologies develop.

Stakeholder Involvement: Involving a diverse set of stakeholders, including AI ethics experts, civil society, and the public, in risk assessments can provide broader insights into potential impacts.

Regular Updates and Training: Agencies should regularly update their risk management practices and provide ongoing training to staff to keep pace with technological advancements and emerging threats. Implement continuous monitoring of AI systems to detect and address issues promptly. Regularly evaluate AI models' performance and update them to improve accuracy, fairness, and safety.

Approach to AI Procurement and Compliance with National Values

Analysis of Recommendations for Responsible Federal Procurement of AI

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- **Overview:** The memo emphasizes that AI procurement must align with national values and laws, focusing on transparency, accountability, and performance of AI systems.
- **Observations:** The procurement guidelines aim to ensure that AI systems used by federal agencies are effective, efficient, ethically aligned, and legally compliant. However, evaluating and verifying these aspects can be challenging due to the complexity and opaqueness of some AI technologies.

Discussion on Alignment of Procured AI with National Values, Laws, and Policies

- **Alignment Challenges:** Ensuring that AI systems obtained by government agencies adhere to national values and legal frameworks requires a clear understanding of these values and legal stipulations. It also demands a robust evaluation mechanism to assess compliance.
- **Ethical and Legal Considerations:** AI systems should respect privacy, confidentiality, human rights, and civil liberties. There is a need for clear guidelines on how these considerations are evaluated in the procurement process.

Recommendations for Improving Transparency, Performance, and Competition in AI Procurement

Enhanced Transparency Measures: Agencies should require detailed documentation from vendors, including explainability of AI decision-making and learning processes, to enhance transparency.

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Performance Monitoring: Implementing regular performance reviews and audits of AI systems post-deployment can ensure they continue to meet required standards and adapt to changing needs.

Promoting Fair Competition: Encouraging competition in AI procurement can be achieved by setting standards that promote interoperability and prevent vendor lock-in. This approach encourages innovation and offers agencies a wider choice of solutions.

Robustness and Resilience:

- Build AI systems that are robust and resilient to adversarial attacks or unintended inputs.
    - Test AI models under a variety of conditions to ensure their reliability in real-world scenarios (similar to DR (Disaster Recovery). COOP (Continuity of Operations), and cybersecurity tabletop exercises)
- Human in the Loop and Human Oversight:
    - Integrate human oversight (like the "data wranglers" in the CDO (Chief Data Officer) office) in AI processes, especially in critical decision-making scenarios.
    - When necessary, ensure that the AI systems are designed for human intervention and that human judgment is part of the decision-making process.

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Conclusion

The evolving nature of AI technology requires ongoing education, adaptation, and improvement of risk management strategies. Public and private organizations should stay informed about emerging, ethical, and regulatory standards and continuously assess and enhance their approaches to AI implementation. By prioritizing ongoing education and staying abreast of evolving standards, organizations can foster an environment that embraces innovation and upholds ethical considerations and regulatory compliance.

Continuous assessment and enhancement of risk management strategies are imperative in navigating the dynamic landscape of AI. As technology evolves, so do potential risks related to data security, privacy, bias, and legal compliance. Proactive measures, such as robust governance structures, regular performance reviews, and stakeholder engagement, are critical to mitigating these risks.

The synergy between education, adaptation, and risk management is pivotal for responsibly harnessing AI's full potential. Public and private entities that commit to a culture of continuous improvement will optimize their AI implementations and contribute to the responsible advancement of AI technology on a broader scale. As we navigate the future of AI, the commitment to ethical practices and regulatory compliance will be the compass guiding organizations toward sustainable and impactful AI integration.

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Continuous monitoring of AI systems is crucial to ensure their reliability, performance, and ethical behavior. Here are some ideas on how to implement continuous monitoring for AI systems:

Theme	Recommendation
Performance Metrics	• Monitor key performance indicators (KPIs) such as accuracy, precision, recall, and F1 score. • Track model inference time and resource utilization to identify potential bottlenecks. • Adopt the Federal Information Technology Acquisition Reform Act
Data Drift Detection	• Implement mechanisms to detect changes in input data distribution (data drift) that may affect model performance. • Compare current data statistics with the training data to identify potential shifts.
Model Drift Detection	• Monitor the model's performance over time and detect deviations from the expected behavior. • Implement versioning for models and continuously compare the performance of different versions.
Alerts and Notifications	• Set up automated alerts for significant deviations from expected performance. • Implement a notification system to alert stakeholders in case of critical issues.
Ethical and Bias Monitoring	• Implement tools to detect and mitigate biases in the training data and model predictions. • Regularly audit and assess the ethical implications of the AI system.
Security Monitoring	• Monitor for potential security threats, such as adversarial attacks on the model. • Implement anomaly detection techniques to identify unusual patterns in input data or model behavior.
User Feedback Analysis	• Collect and analyze user feedback to identify potential issues or areas for improvement. • Implement sentiment analysis and natural language processing on user feedback.
Continuous Training and Retraining	• Set up a pipeline for continuous model training and retraining to adapt to evolving data patterns. • Automatically trigger retraining when performance metrics fall below predefined thresholds. • Emphasize ethics in senior leadership baseline and continuous training

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Theme	Recommendation
Explainability Monitoring	• Monitor the interpretability of the model's decisions, especially in critical applications. • Implement techniques to explain model predictions and ensure transparency.
Regulatory Compliance Monitoring	• Stay informed about regulatory requirements and monitor the AI system for compliance. • Implement checks to ensure that the system adheres to privacy and security regulations.
Model Governance	• Establish a model governance framework with clear roles and responsibilities for monitoring and addressing issues. • Define and enforce model deployment and retirement protocols.
Documentation and Logging	• Maintain detailed logs of model performance, data characteristics, and system events. • Use centralized logging for easy analysis and troubleshooting.
Simulation and Testing Environments	• Create simulated environments to test the AI system under various conditions. • Conduct regular testing to ensure the system behaves as expected in different scenarios.
Collaboration and Communication	• For holistic monitoring, foster collaboration between data scientists, engineers, and domain experts. • Establish clear communication channels for reporting and addressing issues promptly.

Implementing a combination of these strategies will help create a robust continuous monitoring system for your AI applications, enabling timely detection and resolution of issues.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0116
Comment on OMB-2023-0020-0001

Submitter Information

Organization: AFSCME

General Comment

See attached for comments from AFSCME.

Attachments

OMB-2023-0020-0001.AFSCME Comment letter

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December 5, 2023

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725 17th St., NW
Washington, DC 20503

Submitted via regulations.gov.

Re: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (Docket ID: OMB-2023-0020)

Dear Ms. Martorana:

On behalf of the American Federation of State, County and Municipal Employees (AFSCME), I am pleased to submit these comments on proposed Office of Management and Budget (OMB) proposed memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence. The proposed guidance would create much needed governance structures for the use of rapidly evolving artificial intelligence (AI) technology. AFSCME supports the policy with revisions to strengthen worker input and protections and to advance job quality.

AFSCME members provide the vital services that make America happen. With 1.4 million members in communities across the nation, serving in hundreds of different occupations — from nurses to corrections officers, child care providers to sanitation workers — AFSCME advocates for fairness in the workplace, excellence in public services and freedom and opportunity for all working families. AFSCME represents state, local and federal government workers, including many who administer federally funded, state and locally administered programs.

Workers and unions must play a decision-making role in the design, implementation and continuous monitoring of AI in the workplace.

The guidance correctly points to the need to engage all stakeholders, including system users, workers and clients, in the design, implementation and continuous monitoring of AI in the workplace. AFSCME urges OMB to apply the memo's requirements and guidance to states' and local governments' administration of federally funded programs, including by adding conditions to federal funding, oversight requirements and penalties for noncompliance. Automated decision-making processes

already have federal guidance (e.g., U.S. Department of Labor programs) and could be a model for implementing similar AI guidance. Allowing states to haphazardly implement their own AI policies removes the weight of the current OMB process. Moreover, allowing each agency to release its own AI guidance places a burden on stakeholders to engage with each agency individually.

Before a decision is made to procure or implement AI and throughout the phases of product design, deployment and continuous monitoring, Chief Artificial Intelligence Officers (CAIOs) must be required to consult with workers and their representatives, such as their unions. This collaboration will serve to maintain consistency with collective bargaining agreements and ensure success of the AI tool. Workers should be formally integrated into AI governance bodies with union-designated seats. Requiring engagement with workers and their representatives would align OMB's guidance with the Biden administration's policy of promoting worker empowerment.[1]

When new technology is used in the delivery of public services without workers taking a meaningful role in design and implementation, there is an increased risk of detrimental outcomes. One example is the use of an algorithmic system implemented in Indiana to automate welfare eligibility processes. A casework-based system was replaced with a task-based system. As workers were no longer seeing cases through from the beginning to the end, this resulted in increased and more complicated paperwork, frequent errors, loss of benefits and negative impact to worker well-being.[2]

Other examples include the implementation of Pondera Solutions' fraud detection tools. Pondera Solutions offers tools that numerically score public benefits applicants and recipients based on their supposed likelihood of committing fraud, utilizing data from data brokers, social media scrapers, credit reporting agencies, location servicers and government records databases. A high-risk score may lead to a loss of benefits or subject applicants and recipients to unwarranted investigation. Benefit recipients rarely know when they have been red flagged.[3] According to a 2022 report, Pondera flagged 1.1 million California unemployment insurance claims as "suspicious," leading the state to stop payment on all of them. Upon further investigation, more than 600,000 (54%) of the "suspicious" claims were found to be legitimate.[4]

New Jersey's modernization of its unemployment insurance system demonstrates how worker-centered technology has resulted in overall improved benefits delivery and access. As with all states, New Jersey faced a surge in new claims during the pandemic. To improve its system, the state took a human-centered design approach that made worker testing and feedback an essential part of the design process. The state recognized that the most important stakeholders to

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[1] "Executive Order on Worker Organizing and Empowerment, Executive Order 14025," The White House, Apr. 26, 2021, https://www.whitehouse.gov/briefing-room/presidential-actions/2021/04/26/executive-order-on-worker-organizing-and-empowerment/.

[2] Slate Magazine, How Algorithms Can Punish the Poor, An interview with Automating Inequality author Virginia Eubanks (March 29, 2018). https://slate.com/human-interest/2018/03/automating-inequality-author-virginia-eubanks-on-how-algorithms-can-punish-the-poor.html.

[3] Electronic Privacy Information Center, *Screened & Scored in the District of Columbia*, (November 2022), https://epic.org/wp-content/uploads/2022/11/EPIC-Screened-in-DC-Report.pdf.

[4] California Legislative Analyst's Office, *Assessing Proposals to Address Unemployment Insurance Fraud* (February 15, 2022), https://perma.cc/98SC-LGYH.

engage are frontline workers serving claimants and making decisions about eligibility every day. Feedback from frontline staff was instrumental to identifying what was unclear to claimants and how process or language changes could cause further confusion. For the past two years, New Jersey has performed among the top states in benefits access and wage replacement. Its approach to incremental improvements has succeeded in improving access and efficiency.[5]

Federal agencies must be required to bargain over the use of AI in the workplace.

AFSCME strongly supports the principle that the responsible development and use of AI require a commitment to supporting American workers, in which workers have a seat at the table, including through collective bargaining, to ensure that they benefit from AI technology. Therefore, federal agencies must be required to bargain over the adoption and impacts of AI technology in the workplace.

Agencies should engage with unions as early as possible when the use of AI is being considered. Before AI technology is procured or implemented, agencies must provide timely, pre-decisional notification of AI use to the union. The notification should include all relevant background, including how the agency intends to use AI, a detailed description of the data used, whether data will be collected on workers, who can access the data, who owns the data, how data will be used and how data will be secured.

In the event of changes or updates in an AI tool or if new or altered risks to rights or safety are identified, the union must be notified immediately and have the right to demand to bargain.

AI should advance job quality and employee wellbeing.

AFSCME strongly supports the principle that AI development should be built on the views of workers and labor unions, educators and employers to support responsible uses of AI that improve workers' lives, positively augment human work and help all people safely enjoy the gains and opportunities from technological innovation. AI must not be deployed in ways that worsen job quality.

Federal agencies must ensure that AI systems are not used in such a way that reduces worker autonomy or replaces human decision-making. Automatic decision-making often negatively affects worker well-being and can result in irreparable harm to the people they serve. One example of a system that caused significant damage is the Michigan Integrated Data Automated System, or MiDAS, which was programmed to determine unemployment insurance eligibility, track case files and even intercept income tax refunds. Relying on that system's erroneous determinations, Michigan wrongly accused 40,000 people of unemployment insurance fraud between 2013 and 2015. As a result, millions of dollars in wages and tax refunds were unjustly seized.[6] AI must not perform functions that are inherently governmental. Automatic

[5] Heldrich Center for Workforce Development, *New Jersey's Worker-centered Approach to Improving the Administration of Unemployment Insurance* (September 2023), https://www.digitalbenefitshub.org/resources/new-jersey-s-worker-centered-approach-to-improving-the-administration-of-unemployment-insurance.

[6] Time Magazine, *States' Automated Systems Are Trapping Citizens in Bureaucratic Nightmares With Their Lives on the Line*, (May 2020), https://time.com/5840609/algorithm-unemployment/.

decision-making systems can make inaccurate eligibility determinations, a function only merit-based staff are legally allowed to perform in public benefits programs such as unemployment insurance, the Supplemental Nutrition Assistance Program (SNAP) and Medicaid.

Protecting job quality and worker well-being also requires that AI not be used in a way that would subject employees to excessive monitoring and a loss of privacy.

Whenever possible, AI deployment should be used to create opportunities for career advancement and to upskill employees into higher-level classifications, particularly cases in which AI enables employees to spend more work time on complex tasks.

New AI jobs in the federal workforce should be union-represented positions, accreted into existing bargaining units and covered by existing collective bargaining agreements when practicable.

Federal AI procurement policy must include worker protections.

Federal AI procurement policy should model effective regulation of responsible AI use and ensure adherence to the principles set forth in the AI Executive Order, including strong worker protections. Procurement policies must include high standards for working conditions and labor rights. Vendors should demonstrate union neutrality and a track record of abiding by labor and employment laws, including health and safety regulations.

Procurement policy should also require vendors to collaborate with workers and their unions in the development and monitoring of AI tools in the workplace. This should include utilizing and responding to worker and union feedback at each phase of design and testing.

Additionally, the memo should clarify that all federal grants to state and local governments are covered under the proposed policy. All AI technology procured using federal dollars must be safe, secure and responsible.

Federal AI procurement policy must include data oversight protections and safeguard transparency and accountability.

AI contracts must incorporate robust data oversight protections to prevent misuse and commercialization of data outputs by AI vendors. The cases of Pondera Solutions and MiDas noted above are just a few examples of participants and beneficiaries of public benefit programs who suffered harmful impacts due to improper use of data collected on them. Federal agencies should maintain ownership and control of data produced by AI systems procured.

Procurement policies must also safeguard transparency and accountability, including joint data access and control. Direct access and oversight are essential to ensuring that an AI system is safe, secure, responsible and effective over time.

Furthermore, federal agencies should retain flexibility to adapt and replace AI systems without prohibitive costs. Contracts should allow for model improvements and other changes without incurring large fees.

Use case list for safety-impacting and rights-impacting AI should be expanded.

The policy should clarify that the use case list for safety-impacting AI includes activities in all behavioral health and long-term care settings. The use case list for safety-impacting and rights-impacting AI should also be expanded to include AI used in the enforcement of worker protections and occupational health and safety regulations, such as workplace hazards assessments.

Robust accountability measures for granting waivers from minimum practices should be in place.

To safeguard accountability and transparency, waivers from minimum practices granted should be publicly reported. There should also be a process in place for impacted communities and members of the public to request AI use cases to be designated as rights- or safety-impacting or to request reevaluation after a waiver is granted. Exclusions and waivers should also be periodically reviewed as new information on harmful impacts becomes available.

Conclusion

OMB's proposed policy is an important step toward responsible AI use by federal agencies. AFSCME urges OMB to finalize the proposed policy with revisions to ensure that the federal government invests in human and worker-centered AI and thereby enhances public services and worker well-being.

Sincerely,

/s/ Dalia R. Thornton

Dalia R. Thornton
Director
Department of Research and
Collective Bargaining Services

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lps-uimg-23ep
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0118
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Center for AI and Digital Policy

General Comment

We write to you, on behalf of the Center for AI and Digital Policy (CAIDP), in response to the request for public comments on the draft memorandum titled Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI) The Notice seeks comments on the Proposed Memorandum for the Heads of Executive Departments and Agencies (hereinafter the "OMB AI Guidance").

CAIDP wrote to OMB on April 24, 2023 and October 19, 2021, regarding the need for OMB to establish regulations for the use of AI by federal agencies. We applaud the Biden-Harris Administration's Executive Order on AI (hereinafter the "AI Executive Order") and support the OMB AI Guidance as a critical step in the implementation of the AI Executive Order.

We welcome OMB's publication of the draft memorandum addressing the pressing concerns of the use of AI by federal agencies. We commend the detailed and pertinent recommendations to address responsible use of AI by federal agencies based on the principles of democratic values, human rights, and the rule of law. We believe the provisions on minimum practices for "rights-impacting" and "safety-impacting" are foundational requirements for the government's use of AI and will serve to increase public trust of AI systems.

In our detailed comments attached we provide consolidated/combined responses to questions 3, 5, 6, and 8 with reference to specific provisions of the draft memorandum. Our key recommendations in brief are:

1. Establish redline prohibitions across all agencies for systems without scientific validity and which fundamentally undermine human rights, rule of law and democratic process
2. Amend OMB AI Guidance section 5(c)(iii), "Waivers from Minimum Practices" to include strict objective criteria and a disclosure process for waiver
3. Require minimum practices for rights and safety in AI Systems to be applied "during the procurement phase" for procurement regulation with the minimum practices

As in our earlier statements to the OMB, CAIDP reiterates that the public and the Congress must be able

to hold federal agencies the for procurement of AI systems and 1) alignment of policies and goals with the tools, 2) effective use of taxpayer funds, 3) alignment between administrative law and AI system design, 4)mission effectiveness, and 5) quality and safety of public services, and 6) dependency on major vendors. We have set out recommendations and amendments to the proposes OMB AI Guidance to achieve these goals. We also underscore the need to ensure that agencies rules are established in regulation, published in the Federal Register with opportunity to public comment, and subject to judicial review as the Administrative Procedure Act requires.

We support the OMB's effort to undertake rulemaking for the deployment and use of AI systems in federal agencies. For transparency, public trust, and promotion of safe and trustworthy AI, we urge the OMB to incorporate our recommendations. Thank you for your consideration of our views.

Attachments

CAIDP-OMB-AI-Guidance-12052023

December 5, 2023

Shalanda Young
Director Office of Management and Budget
72517th St NW,
Washington, DC 20503

Re: AI Memo Request for Comment: Comments of the Center for AI and Digital Policy (CAIDP) to the Office of Management and Budget (OMB) regarding the Draft Memorandum published in Federal Register 88 FR 75625

Dear Director Young,

We write to you, on behalf of the Center for AI and Digital Policy (CAIDP), in response to the request for public comments on the draft memorandum titled *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)*[1] The Notice seeks comments on the *Proposed Memorandum for the Heads of Executive Departments and Agencies* (hereinafter the "OMB AI Guidance").[2]

CAIDP wrote to OMB on April 24, 2023[3] and October 19, 2021,[4] regarding the need for OMB to establish regulations for the use of AI by federal agencies. We applaud the Biden-Harris Administration's Executive Order on AI[5] (hereinafter the "AI Executive Order") and support the OMB AI Guidance as a critical step in the implementation of the AI Executive Order.

We welcome OMB's publication of the draft memorandum addressing the pressing concerns of the use of AI by federal agencies. We commend the detailed and pertinent recommendations to address responsible use of AI by federal agencies based on the principles of democratic values, human rights, and the rule of law. We believe the provisions on minimum

[1] Office of Management and Budget, *Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum*, 88 FR 75625, No. 2023-24269 (Nov. 3, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-24269.pdf
[2] Office of Management and Budget, *Proposed Memorandum for the Heads of Executive Departments and Agencies* (Nov. 2023), https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf
[3] CAIDP, *Statement to OMB to begin rulemaking for use of AI in Federal Agencies* (Apr. 24, 2023), https://www.caidp.org/app/download/8454950563/CAIDP-Statement-OMB-04242023
[4] CAIDP, *Statement to Office of Management and Budget on the need to establish regulations for the Use of AI by Federal Agencies* (Oct. 19, 2021), https://www.caidp.org/app/download/8350420263/CAIDP-OMB-Statement-19102021
[5] Executive Order 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, 88 FR 75191 (Oct. 30, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-01/pdf/2023-24283.pdf

practices for "rights-impacting" and "safety-impacting" are foundational requirements for the government's use of AI and will serve to increase public trust of AI systems.

In our comments below we provide consolidated/combined responses to questions 3, 5, 6, and 8 with reference to specific provisions of the draft memorandum.

About CAIDP

The Center for AI and Digital Policy (CAIDP) is an independent research and education organization, based in Washington, DC.[6] We advise national governments and international organizations regarding artificial intelligence policy. Our landmark report *AI and Democratic Values*[7] assesses AI policies and practices around the world and emphasizes the importance of transparency in national AI strategies.[8]

Recommendations and Comments

***1) Establish* redline prohibitions across *all* agencies for systems without scientific validity and which fundamentally undermine human rights, rule of law and democratic process**

The OMB AI guidance requires minimum practices for safety-impacting and rights-impacting AI systems. OMB leaves it up to each agency to make the decision whether an AI system compliant with the guidance, or to bring into conformity. However certain AI systems do not have any scientific validity, and are in conflict with human rights, civil rights and rule of law. We urge OMB establish prohibitions ("redlines") for certain AI systems that should not be used in in federal agencies:

- *Require scientific validity:* If an AI system is not scientifically valid, it should be prohibited. This requirement should be added to existing requirements for accuracy, representativeness, robustness and cybersecurity.
- *Ban predictive policing systems:* AI systems claiming to predict a crime before it occurs violate the principle of presumption of innocence and human dignity.
- *Ban emotion recognition systems*: AI systems claiming to identify or infer psychological states, emotions or intentions of natural persons on the basis of their biometric data can lead to discrimination and exclusion of certain groups.
- *Ban biometric categorization systems:* AI systems using biometric to categorize individuals into race, ethnicity, gender, political or sexual orientation, religion groups can constitute discrimination. They deny the right to freely choose one's identity.
- *Ban individualized predictive risk systems in law enforcement and immigration context.* These systems violate the principle of presumption of innocence and human dignity.

[6] CAIDP, https://www.caidp.org.
[7] CAIDP, *AI and Democratic Values* (2023), https://www.caidp.org/reports/aidv-2022/.
[8] *Id*. at 1132-33.

The use cases that involve risk and performance assessments on individuals are predictive. These predictions seek physiological, behavioral, and emotional correlation, which tend to over rely on correlation overlooking causation. The variables vary greatly by individual; and effected by a dynamic environment. They do not have any scientific basis. Moreover, they are intrusive, undermine human dignity and are inconsistent with due process guarantees.

In addition to the propose redlines, the OMB AI guidance should generally require all AI systems satisfy the conditions of auditability, traceability, and contestability in system design; pre-deployment human rights impact assessment at the scoping stage; independent testing and monitoring throughout the lifecycle of the AI system; and a public incident reporting mechanism. Furthermore, redress and remedy process should be available without caveats for rights-impacting systems and limiting language such as "to the extent practicable" should be removed from the minimum practices.

2. Amend OMB AI Guidance section 5(c)(iii), "Waivers from Minimum Practices" [9] to include strict objective criteria and a disclosure process for waiver

The draft OMB AI Guidance grants extraordinary discretion to Chief AI Officer to waive minimum practices requirements for a specific covered AI application. The "waiver" provision could quickly become the loophole that undermines the intention of the Guidance, such as "routine uses" undermined the Privacy Act of 1974.[10]

Minimum requirements waivers must have (1) strict, objective criteria; (2) time limits; (3) public disclosure on the rights-impacting AI risks the agency has considered in its waiver determination and the reasons for granting such waiver. The OMB should also establish a regulatory process that would allow the public to contest waiver determinations, and provide the opportunity for administrative appeal and judicial review of waiver determinations.

a. Strict, objective criteria

OMB must create strict, objective criteria for the waiver process. Section 5(c)(iii) states the following waiver criteria:

> [A]n agency CAIO may waive one or more of the requirements in this section for a specific covered AI application or component after making a written determination, based upon a system-specific risk assessment, that fulfilling the requirement would increase risks to safety or rights overall *or would create an*

[9] Proposed Memorandum for the Heads of Executive Departments and Agencies, Office of Management and Budget, Executive Office of the President, Section 5(c)(iii), "Waivers from Minimum Practices," 14 (Nov. 2023).
[10] John Shattuck, "Computer Matching is a Serious Threat to Individual Rights," Communications of the ACM, vol. 7, no. 26, pp. 538-41 (June 1984).

> *unacceptable impediment to critical agency operations*[11]…CAIOs may also grant waivers applicable to groups of closely related AI applications or components, provided that: (1) those systems have undergone a risk assessment that *adequately considers the risks* from each individual system; and (2) the systems are substantially identical in their risk profiles.[12] (emphasis added)

The OMB AI Guidance must create criteria for what is an "unacceptable impediment" and what would constitute "critical agency operations." Agency CAIOs must use this strict and objective criteria in their waiver determination. Further, to echo NIST AI Risk Management Framework, such narrow AI systems guardrails "will help to enhance trustworthiness, and in turn, cultivate public trust."[13]

b. Time limits

Waivers from AI governance requirements must not be indefinite. The White House Blueprint for AI asserts that AI systems need to be regularly assessed to mitigate discrimination bias and to continue public safety.[14]

The OECD AI Guidelines, which the U.S. has endorsed,[15] recommends continuous AI system assessment as well. Principle 1.4, Robustness, security, and safety, prescribes:

> AI systems should be robust, secure, and safe throughout their entire lifecycle so that, in conditions of normal use, foreseeable use or misuse, or other adverse conditions, they function appropriately and do not pose unreasonable safety risk. To this end, AI actors should ensure traceability, including in relation to datasets, processes and decisions made during the AI system lifecycle, to enable analysis of the AI system's outcomes and responses to inquiry, appropriate to the context and consistent with the state of art.

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[11] Proposed Memorandum for the Heads of Executive Departments and Agencies, Office of Management and Budget, Executive Office of the President, Section 5(c)(iii), "Waivers from Minimum Practices," 14 (Nov. 2023).
[12] Proposed Memorandum for the Heads of Executive Departments and Agencies, Office of Management and Budget, Executive Office of the President, Section 5(c)(iii), "Waivers from Minimum Practices," 14, note 25 (Nov. 2023).
[13] NIST, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, 1, (Jan. 2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.
[14] The White House, *Blueprint for an AI Bill of Rights*, 50, (Oct. 2022) https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.
[15] *U.S. Joins with OECD in Adopting Global AI Principles*, NTIA (May 22, 2019), https://www.ntia.doc.gov/blog/2019/us-joins-oecd-adopting-global-ai-principles .

Thus, waivers from compliance with the minimum requirements set out in the guidance must have specific time limits, such as "one year," "two years," or "three years," and should not be indefinite.

c. Publicly available documentation

We recommend that the OMB AI Guidance include the rights-impacting risks identified by the agency and the *justification* for the waiver. The Guidance currently requires the AI Use Case Inventory to include any related extensions and waivers granted.[16] The Guidance must also make 'basis' or 'grounds' for waivers public. The White House Blueprint for AI recommends "Notice and Explanation… Such notice should be kept up-to-date and people impacted by the system should be notified of significant use case or key functionality changes."[17]

OECD Principle 1.3, Transparency and explainability, asserts: "AI Actors should commit to transparency and responsible disclosure regarding AI systems. To this end, they should provide meaningful information, appropriate to the context, and consistent with the state of art… to make stakeholders aware of their interactions with AI systems."[18] Here, the stakeholders are the American people.

According to the AI Executive Order, the OMB AI Guidance must be consistent with the White House Blueprint and consider governance frameworks like the OECD AI Principles, which the U.S. has endorsed. The public must have access to which federal agencies have waived minimum requirements for AI applications, their reasons, and the AI risks that are considered in the determination of a waiver.

d. Administrative appeal and judicial review

We also urge the OMB to ensure that the criteria for waiver determination is set in an agency-based regulation, subject to the Administrative Procedures Act (APA), that would provide for administrative appeal and judicial review. As the APA makes clear: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.' 5 U.S.C. §702. A person subject to an adverse decision by an AI system, operated by a federal agency,

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[16] OMB AI Guidance, Section 3(a), at 4.
[17] The White House, *Blueprint for an AI Bill of Rights*, 6, (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.
[18] OECD AI Principles, *Principle 1.3 Transparency and explainability* (2019), https://oecd.ai/en/dashboards/ai-principles/P7.

that is rights-impacting yet granted a waiver should almost certainly have the opportunity to challenge waiver decision and to do so in court, if necessary.

3. Require minimum practices for rights and safety in AI Systems to be applied "during the procurement phase" for procurement regulation with the minimum practices

OMB AI Guidance Section 5(d), "Managing Risks in Federal Procurement of Artificial Intelligence," should have the same requirements as the minimum practices requirements for rights and safety in AI systems, Section 5(c).[19] Where there is reference to procurement, the AI Guidance uses "procured" AI systems, instead of "for the procurement" of AI systems. This may result in cases where a federal agency awards a contract to a vendor before the system is evaluated against the minimum practices and requirements. If the system is found to be incompatible with the requirements, it might be too late for the agency to reverse the decision and cancel the contract – wasting taxpayer money and putting the public's safety, security civil liberties, human rights and equal opportunities at risk.

The OMB AI Guidance should ensure that the deployment of AI systems through federal procurement practices are not concentrated in small groups of individuals unaccountable to the citizens of the United States. Procured AI systems should conform to the minimum practices set out in the OMB AI Guidance as well as federal procurement standards. Transparency and accountability are key. The OMB AI Guidance should mandate that vendors disclose information about their systems, including reporting how their AI systems work, how their dataset was designed, collected, and annotated, what potential risks their systems pose, and what their strategy is to ensure their models can be evaluated against federal government standards.

The AI Guidance directs many of the "minimum practices" to the 'design, development, and use' of (pp.19) AI systems.[20] Federal procurement of AI systems ought to abide by the OMB AI Guidance's "minimum practices" in order to fully comply with Section 10.1(d)(ii) of the AI Executive Order, which this Guidance asserts itself to be aligned with.[21] Section 10.1(d)(ii) refers to Section 10.1(b).

Section 10.1(b) of the Executive Order states that "the Director of OMB… shall issue guidance to agencies to strengthen the effective and appropriate use of AI, advance AI innovation,

[19] OMB AI Guidance, Sec. 5(c), "Minimum Practices for Safety-Impacting and Rights-Impacting Artificial Intelligence," at 13.
[20] OMB AI Guidance, Sec. 5(c), "Minimum Practices for Safety-Impacting and Rights-Impacting Artificial Intelligence," at 19.
[21] OMB AI Guidance, Section 5(c), "Minimum Practices for Safety-Impacting and Rights-Impacting Artificial Intelligence," at 21; *see also* The White House, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/.

and manage risks from AI in the Federal Government."[22] Further, Section 2(g) of the Executive Order urges: "It is important to manage the risks from the *Federal Government's own use of AI* and increase its *internal capacity* to regulate, govern, and support responsible use of AI to deliver better results for Americans."[23]

The *policies and principles* section of the White House Executive Order on AI states:

> Artificial Intelligence policies must be consistent with my Administration's dedication to advancing equity and civil rights … My Administration will build on the important steps that have already been taken—such as issuing the Blueprint for an AI Bill of Rights, the AI Risk Management Framework, and Executive Order 14091 of February 16, 2023 (Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government)— in seeking to ensure that AI complies with all Federal laws and to promote robust technical evaluations, careful oversight, engagement with affected communities, and rigorous regulation." *(emphasis added)*[24]

For the OMB AI Guidance to be consistent with and build upon the AI Executive Order, we recommend that the same requirements of Section 5(c), Minimum Practices[25] be expanded to section 5(d), Managing Risks for Federal Procurement. For procurement of AI, Minimum Practices should require:

a. **Follow practices derived from OSTP's Blueprint for an AI Bill of Rights and the NIST AI Risk Management Framework**

Section 5(d) reflects Section 5(c) in its reliance on NIST. However, Section 5(d) should also be aligned with the Blueprint for an AI Bill of Rights, just as in Section 5(c)[26] and in accordance with the policies and principles section of the AI Executive Order. As the OMB AI Guidance aims to comply with Section 4.1(i) of the AI Executive Order, "Developing Guidelines, Standards, and Best Practices for AI Safety and Security," federal procurement

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[22] The White House, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, Sec. 10.1(b), (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

[23] The White House, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, Sec. 2(g) (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

[24] AI Executive Order, at 75191-92.

[25] OMB AI Guidance, Section 5(c)-(d), "Minimum Practices for Safety-Impacting and Rights-Impacting Artificial Intelligence," at 13, 21.

[26] OMB AI Guidance, Section 5(c), "Minimum Practices for Safety-Impacting and Rights-Impacting Artificial Intelligence," at 13.

regulations must also follow the Blueprint for an AI Bill of Rights.[27] These considerations should not only be during the design stage but also at the scoping stage to ascertain that the decision to use AI systems by public agencies are aligned with the policy goals of the federal government and in the interest of taxpayers.

b. **Verify and Validate AI system meets the intended purpose supported by specific metrics or qualitative analysis before a procurement decision is finalized**

Section 5(d)(ii) of the Guidance, "Transparency and Performance Improvement," guides federal agencies to obtain "adequate documentation of procured AI, such as through the use of model, data, and system cards."

The OMB must expand this subsection. Use the language of Section 5(c)(iv)(C), where federal agencies "must review relevant AI documentation to ensure that the system works appropriately and as intended… this documentation must include the completed impact assessment and results from testing AI performance in a real-world context… Agencies must incorporate this independent evaluation into an applicable release or oversight process."[28] The verification and validation that AI system meets intended purpose and required performance must be conducted before procurement decision is finalized

c. **Identify potential risks of using AI, as well as what, if any, additional mitigation measures**

In Section 5(d), federal agencies are "encouraged to include tailored risk management requirements in contracts for generative AI."[29] Section 5(d) must encourage agencies to "mitigate emerging risks to rights and safety."[30] Also, as in Section 5(c)(v)(A), "If adequate mitigation of the disparity is not possible, then agencies should not use or integrate the AI tool." The risk identification and mitigation requirements must be assessed during the procurement of all rights-impacting AI systems, not only generative AI systems.

d. **Document the stakeholders that will be most impacted by the use of the system and assess the possible failure modes of the AI and of the broader system, both in isolation and as a result of human users**

Expand Section 5(d)(ii) of the Guidance, "Transparency and Performance Improvement," to document potential risks to stakeholders. As in Sec. 5(c)(iv)(A)(2), "Agencies should

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[27] The White House, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, Sec. 4.1(a)(i) (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

[28] OMB AI Guidance, Sec. 5(c)(iv)(C), at 20.

[29] OMB AI Guidance, Sec. 5(d)(v), at 21.

[30] OMB AI Guidance, Sec. 5(c)(iv)(E), at 20.

document the stakeholders that will be most impacted by the use of the system and assess the possible failure modes of the AI and of the broader system, both in isolation and as a result of human users"[31] during the procurement of AI systems. Agencies should also meet their administrative law requirements of notice, where applicable.

e. **Assess quality & appropriateness of data**

Section 5(d)(iv), "Maximizing the Value of Data for AI," urges that only the government, not private companies, should own "relevant data" and to protect data from "unauthorized disclosure."[32] Section 5(d)(iv) should also document "the provenance and quality of the data for its intended purpose;"[33] and "how errors from data entry, machine processing, or other sources are adequately measured and limited."[34] It should be the responsibility of the procuring agency to ensure that vendors make use of high-quality, representative data sets.

f. **Test the AI for performance in a real-world context**

Section 5(d)(v)(A) requires "adequate testing and safeguards" only in the context of generative AI. This provision should be clarified to include testing in "real-world context"[35] for all procured AI systems.

g. **Independently evaluate the AI for documentation of impact assessment, performance in real-world context**[36]

Independent evaluation fosters accuracy and public trust. The Blueprint for an AI Bill of Rights encourages independent testing.[37] Additionally, documentation is necessary for transparency and accountability, which unites with public trust. Since Section 5(d) is for the federal government's use of AI, federal procurement regulations must encourage such transparency. The Guidance aims to follow the White House Blueprint for AI and the AI Executive Order[38] and hence these changes should be made to align with those documents.

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[31] OMB AI Guidance, Sec. 5(c)(iv)(A)(2), at 18-19.
[32] OMB AI Guidance, Sec. 5(d)(iv)(A)(2), at 21.
[33] OMB AI Guidance, Sec. 5(c)(iv)(A)(3), at 16.
[34] OMB AI Guidance, Sec. 5(c)(iv)(A)(3), at 16.
[35] OMB AI Guidance, Sec. 5(c)(iv)(B), at 16.
[36] OMB AI Guidance, Sec. 5(c)(iv)(C), at 16.
[37] The White House, *Blueprint for an AI Bill of Rights* (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf; *see also* AI Executive Order, Sec. 10.1(b)(iv), (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.
[38] The White House, *Blueprint for an AI Bill of Rights* (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf; *see also,* The White House, *Executive Order on the Safe, Secure, and Trustworthy*

h. **Ongoing monitoring and thresholds for periodic human review**

Section 5(c)(iv)(D) states that agencies will regularly "monitor degradation to the AI's functionality and to detect changes in the AI's impact on rights or safety. Part of this monitoring process must include periodic human reviews to determine whether the existing implementation of the minimum practices in this section adequately mitigates any new risk."[39] Federal procurement process and contract clauses should reflect the requirement for ongoing risk monitoring, human input and risk mitigation measures.

The AI Executive Order recognizes the weight of "human consideration and remedies for adverse decisions made using AI" in federal government use of AI.[40] The White House Blueprint for AI urges human consideration.[41]

The OMB AI Guidance must expand Section 5(d)(v)(A), "requiring adequate testing and safeguards," to include the "minimum practice" of ongoing monitoring and establish thresholds for periodic human review.[42]

i. **Ensure adequate human training and assessment**

The OMB AI Guidance must ensure that Section 5(d) requires the adequate human training and assessment that Section 5(c) requires.[43] Human training must be periodic and "should be specific to the AI use case, product, or service being operated."[44] President Biden's AI Executive Order advises:

> The Federal Government will work to ensure that all members of its workforce receive adequate training to understand the benefits, risks, and limitations of AI for their job functions, and to modernize Federal Government information technology

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Development and Use of Artificial Intelligence, Sec. 10.1(b)(iv) (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

[39] OMB AI Guidance, Sec. 5(c)(iv)(D), at17.

[40] The White House, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, Sec. 10.1(b)(iv), (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

[41] The White House, *Blueprint for an AI Bill of Rights* 7 (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

[42] OMB AI Guidance, Sec. 5(c)(iv)(D), at 17.

[43] OMB AI Guidance, Sec. 5(c)(iv)(F), at 17.

[44] OMB AI Guidance, Sec. 5(c)(iv)(F), at 17.

infrastructure, remove bureaucratic obstacles, and ensure that safe and rights-respecting AI is adopted, deployed, and used.[45]

j. Grant human consideration and remedies for adverse decisions made using AI

Section 5(c)(iv)(E) states, "Agencies must provide timely human consideration and potential remedy to the use of the AI by a fallback and escalation system in the event that an impacted individual would like to appeal or contest."[46] The OMB must amend Section 5(d)(ii), "Transparency and Performance Improvement," to grant human consideration and remedies. This amendment will promote public trust, as the AI Executive Order centers.[47] Further, this change will align with AI Executive Order[48] and the Blueprint for AI,[49] which recommend such human involvement in adverse decision-making.

As the Blueprint states:

> The American public deserves protection via human review against these outlying or unexpected scenarios. In the case of time-critical systems, the public should not have to wait—immediate human consideration and fallback should be available. In many time-critical systems, such a remedy is already immediately available, such as a building manager who can open a door in the case an automated card access system fails.[50]

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[45] The White House, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, Sec. 2(g) (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

[46] OMB AI Guidance, Sec. 5(c)(iv)(F), at 17.

[47] The White House, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, Sec. 2(d), (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

[48] The White House, *Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, Sec. 10.1(b)(iv) (Oct. 30, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence.

[49]The White House, *Blueprint for an AI Bill of Rights* 7 (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

[50] The White House, *Blueprint for an AI Bill of Rights* 47 (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf

Federal procurement process and contract clauses should require vendors to provide plans for a possible fallback, switch over or termination of an AI system.

Additional steps for rights-impacting procured AI should be:

k. Conduct public consultation

The Blueprint for AI recommends public consultation:

> The public should be consulted in the design, implementation, deployment, acquisition, and maintenance phases of automated system development, with emphasis on early-stage consultation before a system is introduced or a large change implemented. This consultation should directly engage diverse impacted communities to consider concerns and risks that may be unique to those communities, or disproportionately prevalent or severe for them.[51]

In addition, the NIST AI Framework adds that public consultation "with domain experts and other end users" provide valuable feedback.[52]

l. Consult with affected groups and incorporate their feedback

Agencies must consult with "relevant AI actors, including affected communities, and field data about context relevant risks and trustworthiness characteristics," as the NIST AI Framework encourages.[53] Section 5(c)(v)(B) of the OMB AI Guidance requires consultation and incorporation of feedback with affected groups in rights-impacting AI. The OMB ought to amend Section 5(d) to center such requirements in procured AI as well. Such requirements will ensure human determination in AI risk management, which can encourage public trustworthiness in procured AI.

m. Notify the public of AI use

The OMB should expand Section 5(d)(ii), "Transparency and Performance Improvement," to include public notification of AI use. The Blueprint for AI endorses such public notice:

> Designers, developers, and deployers of automated systems should provide generally accessible plain language documentation including clear descriptions of the overall system functioning and the role automation plays, notice that such systems are in use, the individual or organization responsible for the system, and explanations of outcomes that

[51] The White House, *Blueprint for an AI Bill of Rights* 18 (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf

[52] NIST, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)* 31(Jan. 2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.

[53] NIST, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)* 31 (Jan. 2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.

are clear, timely, and accessible. Such notice should be kept up-to-date and people impacted by the system should be notified of significant use case or key functionality changes."[54]

Further, the NIST AI Framework recognizes that public notification is a part of the principle of transparency: "Transparency should consider human-AI interaction: for example, *how a human operator or user is notified* when a potential or actual adverse outcome caused by an AI system is detected."[55]

n. <u>Notify individuals potentially harmed by a use of AI and offering avenues for remedy</u>

Amend Section 5(d)(ii), "Transparency and Performance Improvement," to notify affected individuals. Section 5(c)(v)(D) of the Guidance requires that "agencies must notify individuals when AI meaningfully influences the outcome of decisions specifically concerning them, such as the denial of benefits. Such notice should be timely."[56] Section 5(d)(ii) ought to have this language. Notification of affected individuals promotes transparency and trustworthy AI.[57]

President Biden has endorsed that affected individuals should know "why an outcome impacting you was determined by an automated system, including when the automated system is not the sole input determining the outcome."[58] The Blueprint for an AI Bill of Rights also states: "The American public should be protected via built-in privacy protections, data minimization, use and collection limitations, and transparency, in addition to being entitled to clear mechanisms to control access to and use of their data—including their metadata—in a proactive, informed, and ongoing way."[59]

o. <u>Document terminated AI systems in detail in the AI Use Case Inventory</u>

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[54] The White House, *Blueprint for an AI Bill of Rights*, 40 (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf

[55] NIST, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, at 15-16 (Jan. 2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.

[56] OMB AI Guidance, Sec. 5(c)(v)(D), at 21.

[57] NIST, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, at 15-16 (Jan. 2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf.

[58] The White House, *Blueprint for an AI Bill of Rights*, 40, (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf

[59] The White House, *Blueprint for an AI Bill of Rights* 40 (Oct. 2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf

If an AI system is terminated, as the Universal Guidelines for AI[60] requires if human control is no longer possible, we recommend that the outcome is documented in the AI Use Case Inventory for evidence of assessment, accountability in the future, and a lesson learned.

As in our earlier statements to the OMB, CAIDP reiterates that the public and the Congress must be able to hold federal agencies the for procurement of AI systems and 1) alignment of policies and goals with the tools, 2) effective use of taxpayer funds, 3) alignment between administrative law and AI system design, 4)mission effectiveness, and 5) quality and safety of public services, and 6) dependency on major vendors. We have set out recommendations and amendments to the proposes OMB AI Guidance to achieve these goals. We also underscore the need to ensure that agencies rules are established in regulation, published in the Federal Register with opportunity to public comment, and subject to judicial review as the Administrative Procedure Act requires.

We support the OMB's effort to undertake rulemaking for the deployment and use of AI systems in federal agencies. For transparency, public trust, and promotion of safe and trustworthy AI, we urge the OMB to incorporate our recommendations. Thank you for your consideration of our views.

We welcome the opportunity to speak with you further about these recommendations.

Sincerely yours,

Marc Rotenberg
CAIDP Executive Director

Merve Hickok
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Christabel Randolph
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[60] The Public Voice, *Universal Guidelines for AI*, https://thepublicvoice.org/ai-universal-guidelines/

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: Lawyers' Committee for Civil Rights Under Law

General Comment

See attached file(s)

Attachments

Lawyers' Committee comments on proposed OMB guidance on agency use of AI

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

December 5, 2023

Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Attn: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Re: Comments on OMB–2023–0020

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") appreciates the opportunity to comment on the draft memorandum[1] issued by the Office of Management and Budget (the "OMB") on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence, released on November 1, 2023. In these comments, the Lawyers' Committee responds to the questions posed in the request for comment,[2] proposes additional areas where the draft memorandum can be improved, and discusses the disproportionate impact that AI-related harms have on Black communities and other communities of color.

[1] Office of Management and Budget, Executive Office of the President, Proposed Memorandum, Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (proposed Nov. 1, 2023) [hereinafter Proposed Memorandum].
[2] Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, 88 Fed. Reg. 75625, 75625-75626 (Nov. 3, 2023) [hereinafter RFC].

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I. Introduction

The Lawyers' Committee supports the draft memorandum as a needed measure to ensure that the federal government responsibly deploys AI and protects civil rights. By requiring agencies to implement minimum risk management practices for rights-impacting and safety-impacting AI, the draft memorandum will help agencies identify and address discriminatory harms resulting from the use of AI that disproportionately affect Black communities and other communities of color. Although we urge the OMB to take additional steps to center equity and civil rights, expand the definition of rights-impacting AI, and increase public reporting, we applaud the OMB's effort thus far.

The Lawyers' Committee for Civil Rights Under Law is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to mobilize the nation's leading lawyers as agents for change in the Civil Rights Movement. Today, the Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. The Lawyers' Committee's Digital Justice Initiative works at the intersection of racial justice, technology, and privacy to address predatory commercial data practices, discriminatory algorithms, and invasions of privacy that disproportionately affect Black people and other people of color, including people with intersectional identities, like immigrants, women of color, and LGBTQI+ people of color.

The Biden-Harris Administration has already taken a series of actions to mitigate the risks of AI, including by outlining key principles for advancing civil rights and equity in the Blueprint for an AI Bill of Rights,[3] Executive Order 14091 ("Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government"),[4] and Executive Order 14110 ("Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence").[5]

We applaud the draft memorandum as a needed next step for agencies to implement these policies and ensure that all AI systems are equitable, safe, and fair. As the OMB states, "every day, the federal government makes decisions and takes actions that have profound impacts on the lives of Americans. Federal agencies have a distinct responsibility to identify and manage AI risks because of the role they play in our society."[6] To meet this obligation, the draft memorandum establishes baseline practices for agencies to manage the risks of AI, including pre- and post-deployment testing, transparency requirements, human review, and specific safeguards against algorithmic bias and discrimination. These measures create a pathway for agencies to detect and mitigate potential harms before systems are deployed and to address discriminatory outcomes when they occur. Without such safeguards, the increased usage of AI by federal agencies is likely

[3] White House Off. of Sci. & Tech. Pol'y, White House, *Blueprint for an AI Bill of Rights* (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf [hereinafter *Blueprint*].
[4] Exec. Order No. 14091, 88 Fed. Reg. 10825 (Feb. 16, 2023).
[5] Exec. Order No. 14110, 88 Fed. Reg. 75191 (Oct. 30, 2023).
[6] Press Release, White House, *OMB Releases Implementation Guidance Following President Biden's Executive Order on Artificial Intelligence* (Nov. 1, 2023), https://www.whitehouse.gov/omb/briefing-room/2023/11/01/omb-releases-implementation-guidance-following-president-bidens-executive-order-on-artificial-intelligence/.

to accelerate and worsen existing racial disparities and discrimination. The draft memorandum is key to addressing AI-related civil rights harms and ensuring that the government responsibly and safely uses AI.

In our more detailed comments below, we address questions 1, 3, 5, and 8. The request for comment also invites commenters "to provide feedback on any topic believed to have implications for the content or implementation of the proposed memorandum."[7] Accordingly, we recommend additional areas where the OMB can improve the draft memorandum, including by requiring explanations for certain AI-driven decisions and increasing transparency about the implementation of minimum risk management practices. We urge the OMB to:

- Move forward with the draft memorandum's critical measures to prevent and mitigate AI-related harms that disproportionately impact Black communities and other communities of color.
- Explain agencies' obligation to respect constitutional and statutory rights to due process and equal protection when using AI and adopt requirements that execute this obligation.
- Clarify that Chief Artificial Intelligence Officers must have sufficient civil rights expertise to appropriately carry out their responsibilities to implement the minimum practices for safety-impacting and rights-impacting AI.
- Require that agencies' AI strategies center equity, limit law enforcement applications of AI, and impose additional safeguards to protect data privacy.
- Require agencies to report detailed information about the implementation of minimum risk management practices in their annual AI use case inventories.
- Require detailed public disclosure of agencies' waiver processes to increase transparency about the systems exempted from the minimum risk management practices.
- Add AI that affects equal opportunity in insurance, utilities, and places of public accommodation to the definition of rights-impacting AI.
- Clarify the full scope of automated decision-making systems that are included in the definition of AI.

II. The Memorandum is a Necessary First Step to Prevent and Mitigate AI-Related Harms, Which Disproporationately Impact Black Communities and Other Communities of Color.

Black communities and other communities of color face significant civil rights harms resulting from the use of AI. Agencies must not use AI that causes, contributes, or exacerbates discrimination. Already there is rampant discrimination from algorithms used in sectors spanning

[7] RFC at 75625.

housing,[8] employment,[9] financial services and credit,[10] insurance,[11] public health and healthcare,[12] education,[13] public accommodations,[14] government benefits and services,[15] and policing.[16]

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[8] Valerie Schneider, *Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice*, 52.1 Colum. Hum. Rts. L. Rev. 251, 254 (2020), https://blogs.law.columbia.edu/hrlr/files/2020/11/251_Schneider.pdf; Lauren Kirchner & Matthew Goldstein, *Access Denied: Faulty Automated Background Checks Freeze Out Renters*, The Markup (May 28, 2020), https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters; Brief of the American Civil Liberties Union Foundation, The Lawyers' Committee for Civil Rights Under Law, The National Fair Housing Alliance, and The Washington Lawyers' Committee for Civil Rights and Urban Affairs, as *Amici Curiae* Supporting Appellant and Reversal, *Opiotennione v. Bozzuto Mgmt. Co.*, No. 21-1919, (4th Cir. Dec. 17, 2021), ECF No. 49-2, https://www.lawyerscommittee.org/wp-content/uploads/2022/08/3.-Opiotennione-v.-Bozzuto-Mgmt-Corp-amicus-brief.pdf.

[9] Miranda Bogen & Aaron Rieke, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias*, Upturn, (Dec. 2018), https://www.upturn.org/static/reports/2018/hiring-algorithms/files/Upturn%20-%20Help%20Wanted%20-%20An%20Exploration%20of%20Hiring%20Algorithms,%20Equity%20and%20Bias.pdf; Alina Köchling & Marius Claus Wehner, *Discriminated by an Algorithm: A Systematic Review of Discrimination and Fairness by Algorithmic Decisionmaking in the Context of HR Recruitment and HR Development*, 13 Bus. Rsch. 795 (2020), https://doi.org/10.1007/s40685-020-00134-w.

[10] Robert Bartlett et al., *Consumer-Lending Discrimination in the FinTech Era* (Nat'l Bureau Econ. Rsch. Working Paper No. 25943, 2019), https://www.nber.org/papers/w25943; Bertrand K. Hassani, *Societal Bias Reinforcement Through Machine Learning: A Credit Scoring Perspective*, 1 AI & Ethics 239 (2020), https://link.springer.com/article/10.1007/s43681-020-00026-z.

[11] Maddy Varner & Aaron Sankin, *Suckers List: How Allstate's Secret Auto Insurance Algorithm Squeezes Big Spenders*, The Markup (Feb. 25, 2020), https://themarkup.org/allstates-algorithm/2020/02/25/car-insurance-suckers-list.

[12] Ziad Obermeyer et al., *Dissecting Racial Bias in an Algorithm Used to Manage the Health of Populations*, 366 Sci. 447 (2019), https://www.science.org/doi/10.1126/science.aax2342; Trishan Panch et al., *Artificial Intelligence and Algorithmic Bias: Implications for Health Systems*, 9 J. Glob. Health (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6875681/ (offering definitions of algorithmic bias in health systems); Natalia Norori et al., *Addressing Bias in Big Data and AI for Health Care: A Call for Open Science*, 2 Patterns (2021), https://doi.org/10.1016/j.patter.2021.100347.

[13] Todd Feathers, *Major Universities Are Using Race as a "High Impact Predictor" of Student Success*, The Markup (Mar. 2, 2021), https://themarkup.org/machine-learning/2021/03/02/major-universities-are-using-race-as-a-high-impact-predictor-of-student-success; Maureen Guarcello et al., *Discrimination in a Sea of Data: Exploring the Ethical Implications of Student Success Analytics*, EDUCAUSE Rev. (Aug. 24, 2021), https://er.educause.edu/articles/2021/8/discrimination-in-a-sea-of-data-exploring-the-ethical-implications-of-student-success-analytics.

[14] Alex P. Miller & Kartik Hosanagar, *How Targeted Ads and Dynamic Pricing Can Perpetuate Bias*, Harv. Bus. Rev. (Nov. 8, 2019), https://hbr.org/2019/11/how-targeted-ads-and-dynamic-pricing-can-perpetuate-bias; Jennifer Valentino-DeVries et al., *Websites Vary Prices, Deals Based on Users' Information*, Wall St. J. (Dec. 24, 2012), https://www.wsj.com/articles/SB10001424127887323777204578189391813881534.

[15] Rashida Richardson et al., *Litigating Algorithms 2019 Report: New Challenges to Government Use of Algorithmic Decision Systems*, AI Now Inst. (Sept. 2019), https://ainowinstitute.org/wp-content/uploads/2023/04/litigatingalgorithms-2019-us.pdf; Hadi Elzayn et al., *Measuring and Mitigating Racial Disparities in Tax Audits* 3-4 (Stan. Inst. for Econ. Pol'y Rsch. Working Paper, Jan. 30, 2023), https://dho.stanford.edu/wp-content/uploads/IRS_Disparities.pdf.

[16] Aaron Sankin et al., *Crime Prediction Software Promised to Be Free of Biases. New Data Shows It Perpetuates Them*, The Markup (Dec. 2, 2021), https://themarkup.org/prediction-bias/2021/12/02/crime-prediction-software-promised-to-be-free-of-biases-new-data-shows-it-perpetuates-them; Todd Feathers, *Gunshot-Detecting Tech is Summoning Armed Police to Black Neighborhoods*, Vice: Motherboard (July 19, 2021), https://www.vice.com/en/article/88nd3z/gunshot-detecting-tech-is-summoning-armed-police-to-black-neighborhoods.

Researchers have documented how algorithmic systems produce discriminatory outcomes that impair equal opportunity and erode civil rights protections. In the context of housing, for instance, algorithmic systems limit the ability for Black people and other people of color to access mortgage loans and public housing. A review of over two million mortgage applications found that Black applicants were 80 percent more likely to be rejected by mortgage approval algorithms when compared with similar white applicants.[17] And, in 2023, reporters discovered that the algorithmic scoring system used by the Los Angeles Homeless Services Authority discriminated against Black and Latino people, giving white applicants higher priority in the agency's housing system.[18]

Rather than leveling the playing field, algorithmic systems disproportionately disadvantage communities of color, perpetuating systemic bias and discrimination in the online economy. These disparities can occur because algorithmic systems, such as those used to evaluate prospective mortgage applicants, are trained using vast troves of data that reflect existing societal biases or inequities.[19] This data is built on generations of redlining and segregation that restricted opportunities for Black Americans to access wealth, education, employment, and healthy environments, baking these inequities into present-day technologies.[20] These datasets are compiled using predatory commercial surveillance practices that undermine privacy rights and fuel data-driven discrimination.

Despite these harms, many AI technologies lack appropriate safeguards—such as data minimization requirements, pre- and post-deployment impact assessments, and protections against algorithmic discrimination—to ensure that systems are safe, effective, and free of bias. Due to the "black box" nature of many algorithmic systems, impacted communities frequently lack transparency about when and how AI is used, denying individuals recourse to contest errors or rights violations when they occur.

Government uses of AI systems pose especially significant risks to civil rights. When deployed by governments at scale, AI systems can dramatically expand existing racial disparities in access to services and other equal opportunities. Moreover, unlike the private sector, individuals do not have the same opportunity to opt-out of AI systems deployed by the government. Already, researchers have documented how government-deployed AI poses significant and unique risks to civil rights, privacy, and transparency and accountability.[21] For instance, an automated insurance

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[17] Emmanuel Martinez & Lauren Kirchner, *The Secret Bias Hidden in Mortgage-Approval Algorithms*, The Markup Aug. 25, 2021), https://themarkup.org/denied/2021/08/25/the-secret-bias-hidden-in-mortgage-approval-algorithms.
[18] Colin Lecher & Maddy Venrer, *Black and Latino Homeless People Rank Lower on L.A.'s Housing Priority List*, L.A. Times (Feb. 28, 2023), https://www.latimes.com/california/story/2023-02-28/black-latino-homeless-people-housing-priority-list-los-angeles.
[19] Jane Chung, *Racism In, Racism Out: A Primer on Algorithmic Racism*, Public Citizen (2022), https://www.citizen.org/article/algorithmic-racism/; *Blueprint*.
[20] Yeshimabeit Milner & Amy Traub, *Data Capitalism and Algorithmic Racism*, Data for Black Lives and Demos (2021), https://www.demos.org/sites/default/files/2021-05/Demos_%20D4BL_Data_Capitalism_Algorithmic_Racism.pdf.
[21] Grant Fergusson, *Outsourced and Automated: How AI Companies Have Taken Over Government Decision-Making*, Elec. Priv. Info. Ctr. (2023), https://epic.org/wp-content/uploads/2023/09/FINAL-EPIC-Outsourced-Automated-Report-w-Appendix-Updated-9.26.23.pdf.

fraud detection system implemented by the state of Michigan's Unemployment Insurance Agency falsely accused over 40,000 residents of fraud before the state ceased its use.[22] As a result, thousands of economically vulnerable residents were unable to access needed benefits, forcing some to file for bankruptcy due to false fraud charges.[23]

Agencies have an affirmative obligation to ensure that any AI technology developed, procured, used, or funded does not cause or contribute to discrimination. Federal agencies, including law enforcement, cannot employ technology that is discriminatory. Prior to using such technologies, federal agencies must ensure AI systems comply with existing laws and are not likely to result in the violation of constitutional rights of any individual or group of individuals. Additionally, federal agencies must meet their obligations under Title VI when funding programs or activities that develop or use AI systems. Title VI of the Civil Rights Act of 1964 states, "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[24] This prohibition on discrimination applies to both intentional discrimination and practices that result in unfair disparate impacts.[25] Every federal agency is obligated to ensure that recipients of their funding comply with Title VI, including any uses of AI technologies.

In addition to the direct effects of governmental use of AI, the federal government's actions can have knock-on effects on the broader market and industry behavior. The purchasing power of governmental actors and governmental investment in research and development helps to shape the global technological landscape. As the Select Committee on Artificial Intelligence of the National Science and Technology Council noted, "[t]he federal government plays a critical role in ensuring that technologies like AI are developed responsibly, and to serve the American people."[26] When the federal government executes standards for responsible AI, its purchasing power can influence adoption of rights-respecting norms and expectations in the private sector as well.

The disproportionate impact of algorithmic bias and discrimination on Black communities and other communities of color as well as the government's obligation to ensure that AI does not cause or contribute to discrimination highlights the need for the risk management practices outlined in the draft memorandum. These practices have the potential to ensure that AI systems used by the government are safe, effective, and nondiscriminatory, thereby increasing public trust and accountability in the government's use of these technologies.

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[22] *Id.* at 21.
[23] Paul Egan, *State of Michigan Mistake Led to Man Filing Bankruptcy*, Detroit Free Press (Dec. 22, 2019), https://www.freep.com/story/news/local/michigan/2019/12/22/government-artificial-intelligence-midas-computer-fraud-fiasco/4407901002/.
[24] 42 U.S.C. § 2000d.
[25] *See* Civ. Rts. Div., U.S. Dep't of Just., *Title VI Legal Manual* § VII (2021), https://www.justice.gov/crt/fcs/T6Manual.
[26] Select Comm. on A.I., Nat'l Sci. & Tech. Council, *National Artificial Intelligence Research and Development Strategic Plan 2023 Update* viii (2023), https://www.whitehouse.gov/wp-content/uploads/2023/05/National-Artificial-Intelligence-Research-and-Development-Strategic-Plan-2023-Update.pdf.

III. The Memorandum Establishes Needed Measures for Testing, Monitoring, and Mitigating the Harms Resulting from the Use of AI.

Section 5 of the draft memorandum establishes minimum practices for mitigating the risks of AI, including heightened safeguards for rights-impacting systems. As the OMB points out, for agencies to "realize significant benefits from AI, they must also manage a range of risks from the use of AI."[27] The draft memorandum provides agencies with clear guidance, including pre- and post-deployment testing, transparency and explainability measures, human review and consideration requirements, and proactive obligations for agencies to assess and mitigate algorithmic bias and discrimination, including disparate impacts. Here we address how these risk mitigation practices are necessary for detecting and addressing AI-related harms.

First, the draft memorandum rightly addresses many discriminatory harms by broadly defining AI systems that are presumed to be rights-impacting.[28] The draft memorandum includes key areas such as law enforcement, education, employment, credit scoring, tenant screening, and government benefits within the AI applications presumed to be rights-impacting. While additional AI systems should be included in the definition of rights-impacting AI, this preliminary list is a good step forward.

Second, the draft memorandum requires agencies to institute critical pre- and post-deployment assessment, evaluation, and monitoring measures.[29] Such requirements are important for verifying that a given AI system is appropriately tailored for its intended use, detecting unforeseen harms and potential bias, and mitigating any unsafe outcomes. These robust oversight mechanisms will ensure that AI systems are reviewed for algorithmic bias and discrimination throughout the lifecycle of deployment.

Third, the draft memorandum institutes several important transparency and explainability measures.[30] These include public notice and plain language documentation and notifications for negatively affected individuals. Although algorithmic systems are used throughout the economy, most people have no knowledge about when or how they are impacted by these systems. Without this awareness, individuals cannot make informed decisions about how they interact with AI and are unable to seek redress when harm occurs. While we believe that the OMB needs to take additional steps to increase public transparency about the implementation of the risk management practices and waiver process, these initial measures will help ensure that individuals can access the information they need to know about when and how AI affects their rights and opportunities.

Fourth, the draft memorandum establishes requirements for human review, consideration, and opt-out.[31] Human oversight and opt-out provides individuals with recourse for appealing or contesting inaccurate or biased results when they occur. Additionally, human review helps to ensure that AI systems are appropriately monitored for new risks.

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[27] Proposed Memorandum at 2.
[28] *Id.* at 12-13.
[29] *Id.* at 15-17.
[30] *Id.* at 18, 20.
[31] *Id.* at 18, 20.

Finally, the draft guidance directs agencies to proactively identify and address algorithmic bias and discrimination and to test AI systems for significant disparities across demographic groups.[32] Evaluating and monitoring AI systems for such harms should be a baseline requirement for ensuring that such technologies do not produce discriminatory outcomes or compound existing racial disparities.

Together, these measures provide agencies with a pathway to increase the safety, efficacy, fairness, and transparency of their use of AI systems. While we call on the OMB to take additional steps below, we urge the OMB to move forward with the draft memorandum and require that all agencies implement these minimum risk management practices.

IV. Federal Government Use of Black-Box Algorithms to Make Unexplainable Decisions May Violate the Due Process Clause and Administrative Procedures Act, and May Raise Equal Protection Concerns.

OMB should consider the federal government's obligations to respect constitutional rights to due process and equal protection, and provide appropriate guidance for agencies using AI.

If a federal agency uses an algorithm to make or inform decisions, and it cannot explain *how* and *why* the algorithm made its recommendations, that is inconsistent with the right to due process. Due process requires that government agencies have reasoned bases for their decisions and that decisions are not made in an arbitrary fashion.[33] If an agency uses a black-box AI system without understanding how it works and without the ability to explain, every step of the way, *why* it makes the recommendations that it makes, that is an arbitrary decision-making process. For example, suppose an agency is deciding to which applicants to award scholarships. A vendor tells the agency, "Our device can determine which candidates will perform best; just have them go through our face scanner." If the agency uses this device without ascertaining that it actually works as intended and understanding *how* it decides which candidates are best, it is making decisions impermissibly arbitrarily.[34] The technology could just be scanning skin pigment, not aptitude or relevant criteria, and giving race-based results. While this example is hypothetical, it is not far-fetched; universities and bar administrators have used face-scanning technologies to proctor exams, giving rise to similar concerns of racial bias.[35] Use of a decision-making procedure of this kind, without being able to explain it, may raise constitutional concerns. An individual who is adversely

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[32] *Id.* at 18-19.

[33] *See, e.g.*, *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177 (1980) (analyzing whether Congress acted in a "patently arbitrary or irrational way"); *Kent v. United States*, 383 U.S. 541, 553 (1966) (holding state statute does not confer "a license for arbitrary procedure").

[34] *See, e.g.*, *Smith v. Goguen,* 415 U.S. 566, 578 (1974) ("[A]bsence of any ascertainable standard for inclusion and exclusion is precisely what offends the Due Process Clause."); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) ("Where, as here, there are no standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law.").

[35] Todd Feathers, *Proctorio is Using Racist Algorithms to Detect Faces*, Vice (Apr. 8, 2021), https://www.vice.com/en/article/g5gxg3/proctorio-is-using-racist-algorithms-to-detect-faces; Anushka Patil & Jonah Engel Bromwich, *How it Feels when Software Watches You Take Tests*, N.Y. Times (Sept. 29, 2020), https://www.nytimes.com/2020/09/29/style/testing-schools-proctorio.html.

affected by a decision informed by such a system may have a valid claim that their due process rights have been violated.

In addition to constitutional due process, agency uses of AI must also comply with the Administrative Procedures Act. Section 706(2)(A) of the APA provides that federal courts must scrutinize and invalidate agency actions if such actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[36] The agency in question must articulate "a rational connection between the facts found and the choice made" for its action to pass muster under arbitrary and capricious review.[37] Federal courts will only uphold an agency decision based on the reasoning in the agency's decisions; an agency's "*post hoc* rationalizations . . . cannot serve as a sufficient predicate for agency action."[38] Using an AI tool to assist in decision-making or recommendations, without being able to explain how it reached its results, would be an arbitrary and capricious act.

These concerns are particularly acute in settings involving criminal justice and government benefits.[39] Absent "minimal guidelines to govern law enforcement," there is a risk of "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections" which can result in "arbitrary and discriminatory enforcement."[40] Agencies cannot make arbitrary determinations related to bail, sentencing, parole, grants, subsidies, scholarships, and other government benefits.[41] The Constitution and APA demand a fair and explainable procedure. Agencies should not be allowed to use algorithms without the ability to explain how they work and reach their conclusions.

In addition, federal agencies' use of AI must respect Americans' rights to equal protection under the law. This means that the government cannot make decisions on the basis of protected characteristics such as race, sex, religion, national origin, disability, and other immutable traits.[42] Therefore, if an agency is using an AI system, learns that the system produces unjustified discriminatory outcomes, *and continues to use it*, that may be an equal protection violation.[43] The agency would be intentionally using a system that it knows is discriminatory.

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[36] 5 U.S.C. § 706(2)(A).
[37] *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 105 (1983).
[38] *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539 (1981).
[39] *See, e.g.*, *Kent*, 383 U.S. at 553 (holding juvenile defendants entitled to due process safeguards).
[40] *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983).
[41] *See, e.g.*, *Goguen*, 415 U.S. at 578 (criminal statute violated due process clause due to lack of clear standard); *White v. Roughton*, 530 F.2d 750, 754 (7th Cir. 1976) ("The requirements of due process [to terminate a grant] include a determination of the issues according to articulated standards."); *Holmes v. N.Y.C. Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968) (holding that for benefit determinations "due process requires that selections among applicants be made in accordance with 'ascertainable standards'"); *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1139-1140 (D.N.H. 1976) (noting that "the establishment of written, objective, and ascertainable standards is an elementary and intrinsic part of due process" in providing housing subsidies); *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (holding that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action" (citing *Youngberg v. Romeo*, 457 U.S. 307, 316 (1982))).
[42] *See Hernandez v. State of Texas*, 347 U.S. 475, 477-478 (1954) (holding Fourteenth Amendment protects against discrimination based on membership in a protected class).
[43] *See Rogers v. Lodge*, 458 U.S. 613, 624-627 (1982) (finding intentional maintenance of a discriminatory voting system violated the equal protection clause); *see also* Rashida Richardson, *Defining and Demystifying Automated*

A recent decision by the U.S. District Court for the District of Idaho is instructive.[44] Adults with developmental disabilities sued the Idaho Department of Health and Welfare, which had used certain undisclosed calculations to determine individuals' eligibility for Medicaid payments. Idaho sought a court order allowing the department to prohibit Medicaid recipients from accessing the manual that described how the assessment tool deployed to make these calculations functions. However, the court ruled that doing so would violate participants' procedural due process rights, explaining that without the manual, "the participants will not have the full context of the evidence used to reduce their budgets. Without access to the User's Manual, the [software tool] remains a black box for participants, where they see only certain inputs and outputs, but not the internal workings (e.g., the algorithm applied in the [calculation] software)."[45] The constitutional issues raised by AI can be even greater—where not just a user manual but the fundamental decision-making logic may be unexplained and unknown even to the agency.

Synthesizing the government's due process and equal protection obligations, the OMB should recognize and require that AI systems be both explainable and non-discriminatory to be permissible for agency use. Agencies have to understand and be able to explain how an AI system made a decision or recommendation. That is the due process requirement. Then, if the agency discovers that the AI system is engaging in discrimination, it has to stop using that system or otherwise remedy the discrimination. If it fails to do so, the continued use of an AI system may violate equal protection rights.

To address these concerns, we recommend that the OMB amend the requirement that instructs agencies to notify negatively affected individuals[46] by striking the last sentence of Sec. 5(c)(v)(D) and replacing it with the following: "Agencies must provide explanations for such decisions and actions. These explanations must: 1) explain why the AI system produced the result it produced for this specific individual; 2) be truthful, accurate, and scientifically valid; 3) identify at least the three most significant factors used to inform the decision; and, 4) include a summary of an individual's rights to appeal a decision impacted by AI."

V. The Memorandum Should Clarify that Chief Artificial Intelligence Officers Must Have Sufficient Expertise in Civil Rights.

The OMB asks, in question 1, whether the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers (CAIOs) are sufficiently flexible and achievable for the breadth of covered agencies.[47] Given the risks to civil rights inherent in many uses of AI,

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Decision Systems, 81 Md. L. Rev. 785 (2021) (arguing that automated teacher evaluation systems and gang databases impact rights to equal protection and due process); Ari Ezra Waldman, *Power, Process, and Automated Decision-Making*, 88 Fordham L. Rev. 613, 614 (2019) ("[T]echnologically driven decision-making process[es] . . . [seem] to defy interrogation, analysis, and accountability and, therefore, undermine[] due process."); Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 Wash. L. Rev. 1 (2014) ("Technological due process insists that automated systems include immutable audit trails to ensure that individuals receive notice of the basis of decisions against them").

[44] *D.W. ex rel. K.W. v. Armstrong*, No. 12-cv-00022, 2023 WL 5431801 (D. Idaho Aug. 23, 2023).

[45] *Id.* at *7.

[46] Proposed Memorandum at 20.

[47] RFC at 75625.

it is important that the individuals designated as CAIOs have experience that helps them identify, assess, and address those risks.

Federal agencies should not move fast and break things. Past experience with various types of chief officers at federal agencies (such as technologists and economists) informs us that absent an explicit requirement, it is unlikely that civil rights will be prioritized as highly as innovation and deployment of AI. This would run completely contrary to the goals of advancing safe, effective, and responsible AI outlined in Executive Order 14110 and the draft memorandum. If, several years from now, the civil rights and civil liberties offices at federal agencies are clashing with the CAIOs, this guidance will have failed.

In the absence of a CAIO having civil rights expertise, there is a large chance that serious risks of bias and discrimination may go unnoticed until, at least, the deployment of the AI tool and the emergence of widespread information demonstrating discrimination. Waiting until AI tools begin to harm Black communities and other communities of color is not a reasonable option. Without a background in civil rights and familiarity with practices for addressing discrimination and disparate impact, CAIOs may not be properly equipped to identify potential bias within datasets, consider how an AI tool's output may contribute to or cause discrimination, and evaluate whether available safeguards are sufficient to deploy the AI tool without violating civil rights.

A civil rights background would act as a counterweight to institutional pressure to rapidly adopt new AI technologies without adequate safeguards. As set forth in the guidelines, the CAIO will be appointed by the head of an agency and will likely come from within the agency.[48] The OMB should clarify that CAIO's must have expertise in civil rights by amending the description of CAIOs' roles on page 5 to include the following additions noted in italics: "At CFO Act agencies, the CAIO's primary role must be coordination, innovation, and risk management for their agency's use of AI, *including risks related to civil rights and equity*. Agencies may choose to designate an existing official, such as a Chief Technology Officer, Chief Data Officer, *the senior most civil rights official,* or similar official with relevant or complementary authorities and responsibilities, provided they have significant expertise in AI*, civil rights,* and meet the other requirements in this section."

The CAIO will likely be surrounded by those within the agency who wish to deploy a given AI tool. This environment will push CAIOs to prioritize factors such as government innovation, rapid adoption of new technologies, and economic factors over rigorous application of civil and constitutional rights. Given the competing priorities of the position, there is a serious risk that a CAIO could become an *impediment* to protecting rights, rather than a champion of them. Without a background in civil rights, the CAIO will inevitably be a less effective safeguard against bias, discrimination, and abuse due to these spoken and unspoken pressures. Experience in the field of civil rights will not render the CAIO immune to such effects, but it will increase the likelihood that the individual in that role takes seriously the potential for harm and provides a balanced perspective on a given systems' benefits *and* risks.

[48] Proposed Memorandum at 5.

When taxpayers look at their return on investment in AI, any harms that AI causes are tangible costs that must be internalized. If a CAIO does not have the proper expertise to recognize, prevent, and mitigate these costs, they will miss an entire side of the balance sheet.

VI. To Advance Responsible Innovation, The Memorandum Should Clarify that Agencies' AI Strategies Must Center Equity, Not Expand Law Enforcement Applications of AI, and Provide Additional Safeguards to Protect Data Privacy.

Section 3 of the draft memorandum directs agencies to "build internal enterprise capacity to support responsible AI innovation and take actions to improve their procurement of AI."[49] To do so, the OMB directs each agency to develop an AI strategy and to remove barriers to responsible use of AI. In question 3, the OMB asks how agencies can achieve these goals to advance responsible AI innovation.[50] In its current form, the draft memorandum sends agencies a mixed message about their obligations to ensure that AI systems are safe and effective. While the memorandum sets out clear guidelines for agencies to adopt minimum risk management practices, the required AI strategies place significant pressure on agencies to rapidly adopt new technologies. This may have the unintended consequence of encouraging agencies to deploy AI systems before appropriate safeguards are implemented. In this section, we address question 3 and urge the OMB to take the below steps to ensure that agency AI strategies center equity, limit law enforcement uses of AI, and include data privacy protections.

A. Agencies Should Center Equity in their AI Strategies.

Fundamentally, each agency's AI strategy should, as a threshold matter, ensure that the adoption of any new technology will not result in discrimination or compound existing disparities. At a minimum, the OMB should adopt the following three recommendations to clarify that agency AI strategies must center equity, be developed through stakeholder consultation, and be reviewed by the Department of Justice for compliance with existing civil rights laws.

First, the OMB should clarify that improving the "use [of] AI in ways that benefit the public and increase mission effectiveness"[51] means that agencies have an obligation to center equity as a primary lens of analysis in their AI strategy. To do so, the OMB should require that agencies assess how their AI strategies may cause or contribute to barriers that underserved communities face in accessing or benefitting from the agency's policies, programs, and activities. The OMB should require that each AI strategy include a written description of this assessment with detailed information about how the agency's current and planned uses of AI will mitigate such barriers and how the agency plans to ensure that any expanded use of AI does not widen existing racial and economic disparities.

Second, agencies should be required to consult with stakeholders during the development of their AI strategies. Agencies' AI strategies will have a sweeping impact on the adoption and deployment of AI across the federal government, including many public-facing applications.

[49] *Id.* at 8.
[50] RFC at 75625.
[51] Proposed Memorandum at 8.

Because of this, agencies should be required to consult with a diverse group of stakeholders, including civil rights organizations and directly impacted individuals, about the development and implementation of their AI strategies. We recommend that the OMB do so by amending the description of agency AI strategies on page 8 to include the following: "Agencies must develop their AI strategy in consultation with affected groups, including underserved communities, and use such feedback to inform the agency's uses, governance, investment, and risk management of AI."

Third, agencies should be required to consult with their most senior civil rights official during the development of their AI strategy and to submit their final strategy to the Department of Justice. As directed by the draft memorandum, agency AI strategies serve the purpose of increasing the adoption, development, and deployment of responsible AI across an agency.[52] This directive has significant implications for an agency's existing civil rights obligations, as the implementation of these AI strategies is likely to prompt many agencies to adopt AI systems for a variety of purposes including customer engagement, oversight and enforcement, and direct service delivery. Because of this, the OMB should require each agency to consult with the agency's most senior civil rights official throughout the development of the agency's AI strategy. In addition, the OMB should require the Department of Justice's Civil Rights Division to review each AI strategy for compliance with existing civil rights laws and to ensure that an agency's current and planned uses of AI do not cause or contribute to discrimination.

B. Law Enforcement Use of AI Results in Discrimination on the Basis of Race and Threatens Civil Rights. Agencies' AI Strategies Should Limit the Use of AI for Law Enforcement Functions.

Long-term racial disparities in the criminal justice system fuel the systemic over-policing of Black communities, often enabled and accelerated by the use of surveillance technologies such as AI.[53] Because AI used in law enforcement settings carries special risks to rights and freedoms, the OMB should clarify that agencies' AI strategies should not expand the use of AI for law enforcement functions absent demonstration that the technology is not discriminatory prior to use. Many AI technologies used in law enforcement settings have been shown to result in, or have the potential to result in, intentional discrimination and/or discriminatory disparate impacts. When layered on top of the existing racial disparities within the criminal justice system, AI technologies have the effect of making a discriminatory system more efficient, increasing the quantity or quality of harm. Using a technology to make a discriminatory system operate more efficiently—even if the technology is a purely neutral tool—is a harmful use. Any technology that worsens rather than alleviates discrimination cannot be considered responsible innovation; sometimes friction and inefficiency can be rights-protecting.

Facial recognition technology (FRT), for instance, is widely used by law enforcement agencies despite well-established racial biases in the technology. All known cases of wrongful arrest due to facial recognition have been of Black people—including a Black woman in Detroit

[52] *Id.* at 8.
[53] Simone Browne, *Dark Matters: On the Surveillance of Blackness* 50 (2015); Andrea Dennis, *Mass Surveillance and Black Legal History*, ACS Expert F. (Feb. 18, 2020), https://www.acslaw.org/expertforum/mass-surveillance-and-black-legal-history/.

who was wrongfully arrested when she was eight months pregnant even though the suspect was not pregnant, and a Black man in Georgia who had never been to Louisiana arrested for a crime in Louisiana.[54] In addition to the racial biases in the technology itself, FRT is often deployed in a racially discriminatory manner. One recent report found that the New Orleans Police Department disproportionately used FRT to identify Black individuals, deploying the technology on Black people over 90 percent of the time.[55]

Software developed and sold to law enforcement and courts for so-called "predictive policing," risk assessments, and criminal sentencing has been shown time and again to be racially biased against Black people.[56] For example, one tool disproportionately predicted crime in neighborhoods that had higher populations of Black, Latino, and low-income residents, often predicting little to no crime in wealthier, whiter neighborhoods.[57]

Currently, the draft memorandum's directive for agencies to develop AI strategies risks encouraging agencies to increase the adoption of AI technologies for law enforcement functions, which is likely to cause or contribute to an increase in discriminatory outcomes. The OMB guidance should recognize the heightened threat of discrimination that AI poses within law enforcement settings and clarify that agency AI strategies should not expand such uses without prior demonstration that the technology is not discriminatory.

C. Agencies' AI Strategies Should Protect Data Privacy and Establish Appropriate Limits on the Use of Data for Training, Testing, and Operating AI.

The current draft memorandum states that agencies should remove barriers to responsible AI innovation, including by maximizing appropriate access to data used for training, testing, or using AI.[58] This approach to sharing data presents the wrong message to agencies; greater safeguards should be applied to prevent inappropriate dissemination of personal information. Despite requiring such access to be "appropriate," the functional effect of the current wording is likely to increase indiscriminate access and use of data within agencies by presenting greater dissemination and use as a laudatory goal. The guidelines should be modified to reflect an approach

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[54] *See* Kashmir Hill, *Eight Months Pregnant and Arrested After False Facial Recognition Match*, N.Y. Times (Aug. 6, 2023), https://www.nytimes.com/2023/08/06/technology/facial-recognition-false-arrest.html; John Simerman, *JPSO Used Facial Recognition Technology to Arrest a Man. The Tech Was Wrong.*, nola.com (Jan. 2, 2023); https://www.nola.com/news/crime_police/jpso-used-facial-recognition-to-arrest-a-man-it-was-wrong/article_0818361a-8886-11ed-8119-93b98ecccc8d.html; Khari Johnson, *Face Recognition Software Led to His Arrest. It Was Dead Wrong*, WIRED (Feb. 28, 2023), https://www.wired.com/story/face-recognition-software-led-to-his-arrest-it-was-dead-wrong/.

[55] Alfred Ng, *'Wholly Ineffective and Pretty Obviously Racist': Inside New Orleans' Struggle with Facial-Recognition Policing*, Politico (Oct. 31, 2023), https://www.politico.com/news/2023/10/31/new-orleans-police-facial-recognition-00121427

[56] *See* Julia Angwin et al., *Machine Bias*, ProPublica (May 23, 2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing; Will Douglas Heaven, *Predictive Policing Algorithms are Racist. They Need to be Dismantled.*, MIT Tech. Rev. (July 17, 2020), https://www.technologyreview.com/2020/07/17/1005396/predictive-policing-algorithms-racist-dismantled-machine-learning-bias-criminal-justice/.

[57] Sankin, *supra* note 16.

[58] Proposed Memorandum at 9.

more in line with the cybersecurity concept the principle of "least privilege"[59]: individuals within an agency should only have the access to data that is required for the performance of their duties. Intra-agency sharing of high-quality datasets for use in AI models is efficient, but this increase in efficiency cannot come at the cost of proper controls to prevent unnecessary or inappropriate dissemination and misuse. Moreover, the OMB should clarify that agencies must obtain prior affirmative express consent from individuals to use personal data for the training, testing, or operation of an AI system.

Clarifying that agencies must adopt these safeguards for protecting data privacy is necessary for protecting individuals and preventing data misuse or breaches, as well as to ensure that information is used to train AI responsibly. Data protection is also necessary to enable individuals to securely share sensitive personal data—such as race or location—to design safe and fair AI systems and test for bias without fear that their data will be misused. In the healthcare setting, for instance, individuals feel comfortable sharing incredibly sensitive information with their doctor because they trust that this information will be protected from abuse by HIPAA's privacy regulations. Without similar data protections here, many individuals will not be willing to disclose personal information that is needed to responsibly develop safe and effective AI systems.

Encouraging agencies to use personal data without additional protections could have significant chilling effects on the public's willingness to share information with the government more broadly. In particular, people might not share their personal information to access services such as public benefits out of fear that such information may be shared with law enforcement agencies. ICE, for instance, has exploited data collected from people's basic needs for survival—access to water, heat, and electricity—in order to conduct immigration enforcement.[60] Such practices already deter many Black communities and other communities of color from participating in the Census due to distrust in government and concerns about confidentiality, privacy, and negative repercussions.[61] Similar trends will continue if federal agencies use personal information for AI without establishing sufficient data privacy protections.

People should have meaningful control over how agencies use their personal information to train, test, and operate AI, without fearing that such information will be used against them by law enforcement. The OMB should clarify that this principle must guide agencies' approach to responsible AI innovation and require that agency AI strategies include plans for protecting personal data used for AI.

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[59] Michael Nieles, *An Introduction to Information Security*, Nat'l Inst. of Standards & Tech. 81 (NIST Special Publication 800-12 Revision 1 2017), https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-12r1.pdf (capitalization altered).

[60] Nina Wang et al., *American Dragnet: Data-Driven Deportation in the 21st Century*, Geo. L. Ctr. on Priv. & Tech. 16, 42-49 (2022), https://www.americandragnet.org/sites/default/files/American_Dragnet_report_English_final.pdf.

[61] U.S. Census Bureau, *2020 Census Barriers, Attitudes, and Motivators Study (CBAMS) Focus Group Final Report* (2019), https://www2.census.gov/programs-surveys/decennial/2020/program-management/final-analysis-reports/2020-report-cbams-focus-group.pdf.

VII. The Memorandum Should Require Agencies to Report Detailed Information About the Implementation of Minimum Risk Management Practices in their Annual AI Use Case Inventories.

The OMB asks, in question 8, what information should be made public in agencies' annual AI use case inventories.[62] Here we address this question, urging the OMB to require that agencies publicly report detailed information about the implementation of the minimum risk mitigation practices and provide written justifications for systems exempted from the annual use case inventories.

The OMB should consider requiring agencies to report detailed documentation about key minimum practices in their annual AI use case inventories. This should include, at a minimum, summaries of pre-deployment impact assessments and independent evaluations, post-deployment monitoring measures, risks mitigation practices, and practices for addressing algorithmic discrimination and assessing disparate impact. These summaries should include a detailed review and description of all measures undertaken by an agency, sufficient for a person having ordinary skill in the art to understand the functioning, risks, uses, benefits, limitations, risk management practices, and other pertinent attributes of each AI use case.

In addition, the draft memorandum contains a significant loophole that may result in the omission of many safety-impacting and rights-impacting systems from annual use case inventories. In footnote 8, the OMB states, "Agencies must only publicly report use cases to the extent practicable and consistent with applicable law and governmentwide guidance, including those concerning the protection of privacy and of sensitive law enforcement, national security, and other protected information."[63] Because this exception is overly broad, interpretation between agencies is likely to vary significantly. The OMB should clarify and narrowly tailor the scope of this exception by requiring that agencies submit written justifications for systems exempted from the annual use case inventories. The aim of this guidance should be to ensure that the maximum possible number of safety-impacting and rights-impacting systems are included in the annual use case inventories.

VIII. The Memorandum Should Require Detailed Public Disclosure of Agencies' Waiver Processes.

The draft memorandum states that "an agency CAIO may waive one or more of the requirements in this section for a specific covered AI application or component," reporting an overview of the scope, justification, and evidence for such a waiver to OMB within 30 days.[64] In this section, we address the need for the OMB to institute strict requirements for this waiver process, including clarifying waiver criteria, requiring public disclosure, implementing routine external review, and establishing duration limits.

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[62] RFC at 75626.
[63] Proposed Memorandum at 4 n.8.
[64] *Id.* at 14.

The OMB should clearly and narrowly define the criteria for granting a waiver to ensure that any waiver does not compromise public safety or civil rights. Presently, the draft memorandum states that a waiver may be granted if the CAIO determines that "fulfilling the requirement would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations."[65] Many agencies are likely to use these vague criteria to deploy AI systems that pose significant risks to civil rights by arguing that such technologies serve critical operations. To avoid this potential loophole, the OMB should clarify that in order for an agency to grant a waiver related to "critical agency operations," the CAIO must determine that the benefits to the public and individuals impacted by the use of a particular AI system must, by clear and convincing evidence, outweigh the costs to such individuals' rights and safety, including intangible harms such as chilling free expression or producing stigmatizing indignities.[66] To ensure that such determinations are appropriately made, the OMB should require that all waivers must be reviewed and approved by the Department of Justice's Civil Rights Division.

The OMB should require public disclosure of the bar applied to obtain waivers from minimum practices for safety-impacting and rights-impacting AI. It is crucial that this process be stringent, transparent, and aligned with the highest standards of safety and civil rights protection. Any granted waivers should be accompanied by a detailed public justification that outlines why the waiver was necessary, the specific risk management practices that serve as the basis for a waiver, and what measures the agency is adopting to mitigate any potential risks.

The policy should also include provisions for regular external review and reassessment of the waiver process. This will ensure that each agency's use of AI remains aligned with the evolving standards of safety and civil rights protection, and that waivers are routinely updated when new risks arise. Continuous monitoring and evaluation of exempted AI systems is vital to promptly identify and address any adverse impacts these technologies might have.

We also recommend imposing a duration limit for such waivers. Rather than granting an indefinite waiver, which remains effective until potentially revoked by a CAIO, the OMB should limit the duration of each waiver to a period of one year. This finite duration necessitates that each waiver must be renewed upon expiration. This renewal process would require agencies to re-evaluate their AI systems against current standards and address any emerging concerns or technological advancements. Doing so ensures that the AI systems in use are consistently aligned with the latest safety and civil rights considerations, fostering a culture of continuous improvement and vigilance and ensuring that agencies routinely evaluate AI systems for new risks or impacts on civil rights. This approach not only reinforces the principles of transparency and responsibility in the deployment of AI technologies but also aligns with the public's expectation for modern and safe technology use within government operations.

[65] *Id.*
[66] *See, e.g.*, *Obergefell v. Hodges*, 576 U.S. 644, 674 (2015); *Heckler v. Mathews*, 465 U.S. 728, 739-740 (1984).

IX. AI that Affects Equal Opportunity in Insurance, Utilities, or Places of Public Accommodation Should be Included in the Definition of Rights-Impacting AI.

The OMB asks, in question 5, whether there are use cases for presumed safety-impacting and rights-impacting AI that should be included, removed, or revised, and, if so, why.[67] The definition of rights-impacting AI currently includes "[e]qual opportunities, including equitable access to education, housing, credit, employment, and other programs where civil rights and equal opportunity protections apply."[68] We address this question, calling on the OMB to add three additional areas of equal opportunity to this definition: insurance, utilities, and places of public accommodation.

AI systems already used in the insurance sector have been shown to produce discriminatory outcomes that disproportionately harm Black people and other people of color. Recent analyses of car insurance premiums in various states have shown that Black and Brown neighborhoods are systematically charged higher premiums than white neighborhoods of similar risk, regardless of neighborhood affluence.[69] Similar disparities could occur in the delivery of government-operated insurance programs. For example, if AI systems were introduced into the National Flood Insurance Program without adequate controls, the system could come to associate information correlated with people of color with higher flood risk because, according to the Congressional Budget Office, "communities in which most householders are Black (except for those in which the median household income is high) face the largest increases in flood risk from 2020 to 2050."[70] The biased output of such an AI tool could render flood insurance more expensive for Black Americans, which could have follow-on effects on housing segregation and continuing racial disparities in wealth.

Essential utilities—such as electricity, heat, water, municipal trash or sewage services, and internet and telecommunications services—are another critical area of equal opportunity that should be included in the definition. Many state utility regulators presently use AI systems to manage infrastructure and engage with customers.[71] The Federal Communications Commission and National Telecommunications and Information Administration oversee myriad large programs aimed at boosting equal access to broadband internet. To the extent that they employ AI in the future, as contemplated by the executive order, or that telecommunications providers use AI to manage network infrastructure and deployment, the agencies need to be careful that the AI does not exacerbate digital redlining in broadband access.[72] As such uses expand, the OMB should

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[67] RFC at 75625.
[68] Proposed Memorandum at 24.
[69] Julia Angwin et al., *Minority Neighborhoods Pay Higher Car Insurance Premiums Than White Areas With the Same Risk*, ProPublica (Apr. 5, 2017), https://www.propublica.org/article/minority-neighborhoods-higher-car-insurance-premiums-white-areas-same-risk
[70] Cong. Budget Office, *Communities at Risk of Flooding* (2023), https://www.cbo.gov/publication/59566.
[71] Diane Burman et. al., Nat. Gas P'ship, *Artificial Intelligence for Natural Gas Utilities: A Primer*, Nat'l Assoc. of Reg. Util. Comm'rs (2020), https://www.osti.gov/biblio/1996417
[72] *See* 47 U.S.C. § 1754; Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, Report and Order and Further Notice of Proposed Rulemaking, FCC 23-100 (Nov. 20, 2023).

require that agencies have appropriate safeguards to ensure that AI systems do not result in discriminatory barriers to accessing utilities.

Access to public accommodations is also an important area to avoid AI biases. Public accommodations protections are some of the most important civil rights protections in the United States, and the draft memorandum should reflect this by including public accommodations in the definition of rights-impacting AI. In general, a place of public accommodation is a business offering goods or services to the general public.[73] Public buildings, parks, and transportation facilities are public accommodations as well.[74] In this and in utilities and insurance, the responsibilities of federal agencies are twofold: they must ensure that their own use of AI does not reflect bias or perpetuate historical discrimination and they must enforce protections against discrimination by private entities using AI tools. A first step would be to include access to insurance, utilities, and places of public accommodation in the definition of rights-impacting AI so that more stringent requirements apply to agencies' use of AI in those areas.

X. The Memorandum Should Clarify that Automated Decision-Making Systems are Included in the Definition of Artificial Intelligence.

The draft memorandum adopts the definition of artificial intelligence used in the John S. McCain National Defense Authorization Act of Fiscal Year 2019 and includes additional technical context to aid agencies in their interpretation of this definition.[75] Here we address this definition and recommend that the OMB include additional technical guidance to clarify that automated decision-making systems are covered by the definition of AI.

Automated decision-making systems are some of the most common types of AI used by government entities. Within Washington, D.C. alone, government agencies use nearly 30 different automated decision-making systems for a range of purposes, including student risk assessment, predictive policing, and screening applicants for public housing.[76]

Although automated decision-making systems are widely used, the definition of AI in the draft memorandum does not explicitly state that such systems are covered by this policy guidance. The OMB should clarify that automated decision-making systems are indeed included by adding the following to the technical context guidance accompanying the definition of AI: "This definition includes automated decision-making systems that create or facilitate the creation of a product or information; promote, recommend, rank, or otherwise affect the display or delivery of material information; make a decision; or facilitate human decision making."

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[73] David Brody & Sean Bickford, *Discriminatory Denial of Service: Applying State Public Accommodations Laws to Online Commerce*, Lawyers' Committee for Civil Rights Under Law (2020), https://lawyerscommittee.org/wp-content/uploads/2019/12/Online-Public-Accommodations-Report.pdf.
[74] *See id.*; *see also* 42 U.S.C. § 2000a.
[75] Proposed Memorandum at 22-23.
[76] Thomas McBrien et al., *Screened & Scored in the District of Columbia*, Elec. Priv. Info. Ctr. (2022), https://epic.org/wp-content/uploads/2022/11/EPIC-Screened-in-DC-Report.pdf

XI. Conclusion

The Lawyers' Committee applauds the draft memorandum and urges the OMB to implement these measures to protect Black communities and other communities of color from AI-related harms. The draft memorandum imposes important safeguards on the use of AI, including pre- and post-deployment assessments, transparency and explainability requirements, and affirmative obligations to detect and mitigate algorithmic bias and discrimination. The draft memorandum is a needed first step to ensure that AI does not cause or contribute to discrimination and to increase public trust and accountability in the government's use of AI.

While we commend the draft memorandum, we urge the OMB to take following steps: explain agencies' obligation to respect constitutional and statutory rights to due process and equal protection when using AI; clarify that CAIOs must have civil rights expertise; require agency AI strategies to center equity, limit law enforcement uses of AI, and protect data privacy; require agencies to report detailed information about minimum risk management practices in annual use case inventories; require detailed disclosure of agencies' waiver process; add AI that affects insurance, utilities, and places of public accommodation to the definition of rights-impacting AI; and, clarify that automated decision-making systems are included in the definition AI.

Thank you for your attention to and consideration of these comments. Please do not hesitate to contact David Brody at dbrody@lawyerscommitee.org or Quinn Anex-Ries at qanex-ries@lawyerscommittee.org if you have any questions.

Sincerely,

By: */s/ David Brody*
David Brody
Quinn Anex-Ries
Alex Ault
Marc Epstein
LAWYERS' COMMITTEE FOR
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PUBLIC SUBMISSION

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: Enterprise Cloud Coalition

General Comment

See attached file(s)

Attachments

ECC draft OMB AI Guidance 12.05.2023

Enterprise Cloud Coalition

December 5, 2023

Clare Martorana
U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management and Budget (OMB)
Washington, D.C. 20503

Submitted Electronically

RE: Comments on Draft OMB Memorandum, Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (November 1, 2023), OMB-2023-0020-0001

Dear Ms. Martorana:

The Enterprise Cloud Coalition (ECC) appreciates the opportunity to submit comments to the Office of Management and Budget (OMB) on the Draft OMB Memorandum, Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI).

The ECC is comprised of mid-sized, enterprise-focused, cloud-based U.S. companies. Our companies' business models aim to solve inefficiencies in a variety of industries through technological innovation and prioritizing ethical standards and safeguards to promote trust. ECC members also provide enterprise software services to the federal government, including through the Federal Risk and Authorization Management Program (FedRAMP). While artificial intelligence is opening new opportunities to positively transform how people and organizations operate, we recognize that trust is essential to successfully developing and using AI. Enterprise cloud companies are well-positioned to build that needed trust through thoughtful policies and balanced frameworks.

Our successful business models have depended on offering innovative technology balanced by important privacy and cybersecurity considerations. Like other emerging technologies, U.S. leadership in AI lends itself to a risk-based regulatory approach and should be careful not to apply regulations too broadly to specific technologies or sectors. Such an approach is reflected in the National Institute of Standards and Technology's (NIST) AI Risk Management Framework (RMF), which was developed at Congress' direction through an open, multi-stakeholder process. Further, industry must be a key partner to identify and address ethical concerns while ensuring that customers can harness the economic benefits of AI innovations.

General Comments on Draft OMB AI Guidance

The ECC recognizes the challenge of offering guidance on agencies' use of AI and appreciates the complexity of developing AI guidance for large and small agencies with different risk profiles. Agencies will benefit from guidance on governance, responsible AI innovation, and how to manage risks from the use of AI, as will technology providers that will be part of these efforts.

While we appreciate the challenges of this AI Guidance, the draft directs agencies to institute processes and governance practices in a manner that may significantly delay the use of responsible AI solutions to solve agency problems. With that in mind, we offer four high-level observations and more specific comments below. First, the draft AI Guidance devotes most of its attention to establishing a new risk framework for broadly defined "safety-impacting" and "rights-impacting" AI uses without recognizing existing controls and risk management programs that already govern AI-specific risks. The NIST AI RMF, which benefits from significant stakeholder input, is almost an afterthought as it is noted as "additional best practices for AI risk management…" (13). We urge OMB to reconsider the NIST AI RMF's current role in the draft AI Guidance and to require agencies to adopt it.

Second, the governance section rightly elevates the AI portfolio in agency organizations by requiring the designation of a Chief AI Officer (CAIO), but this position is given much responsibility with limited recognition of the human capital and budget constraints these directives impose. The draft AI Guidance does list among the CAIO responsibilities "advising the agency CFO and Chief Human Capital Office on resourcing requirements and workforce skillsets…" (6), but "advising" does not provide sufficient authority to accomplish the long list of actions required of the CAIO.

Third, the innovation section of the draft AI guidance provides welcome direction to agencies to avoid bans on AI access and remove barriers to innovation. The draft AI Guidance encourages the removal of "unnecessary and unhelpful barriers" to innovation while retaining guardrails to ensure responsible use and recommends special attention to: (1) ensuring access to IT Infrastructure for AI projects; (2) adequate infrastructure and capacity to curate agency data; (3) updating cybersecurity authorization processes to address AI applications; and (4) focusing on workforce challenges.

Finally, addressing workforce challenges is a key element to encouraging innovation and responsible use of AI. Agencies' success in implementing this draft AI Guidance will hinge directly on addressing workforce issues and in particular the success of the AI and Technology Talent Task Force established under Section 10.2 of the October 30 AI Executive Order. Hiring, paying, and retaining technology talent and specifically AI talent is a difficult and time-intensive task. Without a relentless focus on actions to access talent in and outside the government, establishing the processes envisioned by this draft AI Guidance will be at best challenging and at worst will fail.

Additional Comments

In addition to the general comments outlined above, we have also provided specific comments below, which are organized by sections of the draft AI guidance.

Governance

- Ensure clear guidance to agencies on CAIO reporting structure, budgetary authority, and workforce resources. The use of existing governance structures will be important to avoid duplication. OMB should issue budget guidance to support the AI governance objectives.

- Agencies are required to issue a plan to comply with the objectives of the draft AI Guidance or a written determination that the agency does not use or anticipate using covered AI. This either/or mandate could discourage agency adoption of responsible AI, especially given the wide-ranging agency AI maturity levels.

Advancing Responsible AI Innovation

- The draft AI Guidance requires an AI strategy for "identifying and removing barriers to responsible AI use and achieving enterprise-wide advances in AI maturity" from each large agency within a year of the final guidance. This strategy would be important as a starting point to achieve success in other aspects of the draft guidance and not a year after the guidance is issued. The required strategy elements include the agency's AI workforce capacity and projected AI workforce needs. The workforce assessment is critical to all other aspects of the draft guidance and should be given priority.

Managing Risks from the Use of AI

- This section mandates agencies implement "minimum practices" for safety-Impacting and rights-Impacting AI uses or stop using such capabilities by August 1, 2024. This timeline seems arbitrary and unrealistic given other deadlines. This draft AI Guidance is to be finalized 150 days from the AI EO (October 30, 2023), which would be March 28, 2024. Recommendations on documentation expected of vendors to demonstrate compliance with minimum practices are to be issued 180 days after the draft AI Guidance is finalized, which is September 24, 2024 – a month after agencies are supposed to turn off AI or meet minimum practices. Deadlines should be aligned and/or clarified to promote compliance.

- The draft AI guidance creates significant uncertainty on what is or is not considered safety-impacting or rights-impacting AI uses. The draft guidance lists "a subset of specific purposes for which AI is automatically presumed to be safety-impacting or rights-impacting…" and adds that this is not an exhaustive list. Further, the draft AI Guidance seems to encourage expansion of these lists and potentially agency-specific lists. CAIOs are empowered to make determinations to add or revoke prior

determinations for these lists. There is no mention of a redress process for vendors impacted by such determinations. Agencies are encouraged to "identify additional context-specific risks" associated with their use cases and consider risks considerations such as an undefined "potential harms to worker wellbeing." Overall, this guidance creates uncertainty among vendors and agencies and fragmented application of AI compliance requirements across the federal government.

- Agencies should be encouraged to use the NIST AI RMF as a starting point for their AI risk management practices instead of citing to this key framework as a "best practice" among many.

- There are limited exclusions from minimum practices requirements for AI used for three general purposes. Small businesses and startups will find it difficult to deploy their AI tools in this process-heavy environment. Consider excluding AI uses for additional pilot applications and when there is no public-facing element, such as enterprise technology for threat protection and device signals for cybersecurity purposes.

- There are no required timelines for federal agencies to complete AI impact assessments, testing, or independent evaluations. This could significantly slow adoption of AI deployments in the federal government.

- Rights-Impacting AI Uses.
    - The draft AI guidance does not appear to distinguish between fully automated and human-in-the-loop tools – the latter of which is typically considered lower risk. This is important as tools that "meaningfully influence" outcomes (which is itself a vague threshold) could be considered "rights-impacting." We encourage OMB to remove "meaningfully influence from the definition of "rights-impacting" and apply regulations to AI tools that "control" outcomes.
    - Agencies would be required to obtain public feedback before using "rights-impacting" systems and then if there is "negative feedback" agencies are directed to consider not deploying the AI or removing the AI from use. The "negative feedback" term is vague and could capture minor (albeit negative) feedback that could be mitigated and should not halt deployment. Further, this vague term creates uncertainty and could discourage companies from considering providing AI solutions to the federal government.
    - The definition of rights-impacting systems broadly captures AI in employment, rather than being more specific about consequential employment decisions.

- Managing Risks in Federal Procurement of AI.
    - Additional clarification would be welcome in defining what "initial means" OMB will develop to ensure AI contracts align with the draft AI guidance.

- Ensuring transparency and adequate performance for procured AI and promoting competition are admirable objectives. We also appreciate promoting interoperability and avoiding bundling as important call outs.
- Clear and timely guidance on documentation expected of vendors will be critical to promote these objectives.
- There should be additional clarification on the intent related to the section on "maximizing the value of data for AI," and whether there is the potential for changes from existing federal procurement rules on data rights.

Definitions

- Rights-Impacting AI. This definition does not appear to have regulatory or statutory grounding. Instead, the definition is derived from a list of examples, which may be added or subtracted depending on the agency. By taking this approach agencies could develop specific lists, which would, in turn, fragment an already complicated federal procurement ecosystem.

- Risks from the Use of AI. It would be helpful to understand the origin of this list.

- Safety-Impacting AI. This definition does not appear to have regulatory or statutory grounding. Instead, the definition is derived from a list of examples, which may be added or subtracted depending on the agency. Again, by taking this approach, agencies could develop specific lists, which would, in turn, fragment an already complicated federal procurement ecosystem.

Thank you for the opportunity to participate in this critical policy discussion. The federal government's use of AI will be both an opportunity and a challenge as we all work toward responsible deployment of AI solutions to drive agencies' success in accomplishing their missions.

Sincerely,

Andrew Howell, Executive Director

Enterprise Cloud Coalition

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Submitter Information

Organization: NAACP Legal Defense and Educational Fund, Inc.

General Comment

See attached file(s)

Attachments

LDF Comment on Proposed OMB AI Memorandum

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December 5, 2023

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Submitted via www.regulations.gov

RE: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Memorandum, OMB–2023–0020

To Whom It May Concern,

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we submit the following comments in response to the Office of Management and Budget (OMB)'s Draft Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI).[1] AI systems used by public and private actors increasingly permeate every area of our lives, including employment, housing, government services and supports, and our interactions with law enforcement and the criminal legal system. Yet these systems reproduce or exacerbate racial bias, inequities, and discrimination. AI systems—some of which may themselves exhibit algorithmic bias, misrepresent their effectiveness, and/or rely on large amounts of sensitive, personal data—can also be deployed in ways that disproportionately harm communities of color, particularly by law enforcement, endangering their liberty and physical safety and risking a range of collateral consequences.

We applaud the OMB for proposing guidance that would acknowledge these civil rights harms and would require federal agencies to take steps to identify and address algorithmic bias. The Draft Memorandum's requirement that agencies follow minimum risk-management practices before using new or existing covered safety-impacting or rights-impacting AI, including law enforcement technologies, holds promise. The risk management practices—completing an AI impact assessment; providing public notice and plain-language documentation through the AI use

[1] 88 Fed. Reg. 75635 (Nov. 3, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-24269.pdf; Shalanda Young, Executive Office of the President, Office of Management and Budget, Proposed Memorandum for the Heads of Executive Departments and Agencies RE: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (Nov. 3, 2023), https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf (OMB Memo).

case inventory; assessing and mitigating disparate impact; and incorporating feedback from affected groups, including underserved communities, in the design, development, and use of the AI—create an encouraging framework for protections from algorithmic bias. If finalized, the Memorandum would take an important step in translating the White House's October 2022 Blueprint for an AI Bill of Rights[2] into binding policy requirements—including for law enforcement and criminal legal system uses of AI.

In order to fully realize the potential of this memorandum, we urge OMB to strengthen and clarify several provisions. Our key recommendations include: 1. clarifying how federal agencies can assess bias and enhance equity in federal systems; 2. building in-house agency capacity for implementation; 3. ensuring the Memorandum's requirements apply to both technology funded by federal grants and technology procured from third parties; 4. mandating that Chief AI Officers (CAIOs) have civil rights expertise; 5. expanding disclosure in AI use case inventories; 6. providing additional constraints on when and how waivers can be used to exempt AI systems from minimum risk-management requirements; and 7. guaranteeing that civil rights principles guide agencies' AI strategies.

Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law organization.[3] LDF was launched at a time when America's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. For more than 80 years, LDF has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for Black people and other people of color. LDF's mission has always been transformative: to achieve racial justice, equality, and an inclusive society.

Since its inception, LDF has worked to increase fairness and equal opportunity for Black people. Some of Thurgood Marshall's early victories in the Supreme Court came in *Shelley v. Kramer*, 334 U.S. 1 (1948), and *McGhee v. Sipes*, 334 U.S. 1 (1948), which held that the state enforcement of racially restrictive covenants violated the Equal Protection Clause. In the decades since those victories, LDF's litigation, policy advocacy, organizing, and public education programs have sought to ensure the fundamental rights of all people to quality education, economic opportunity, the right to vote and fully participate in democracy, and the right to a fair and just judicial system. LDF has continued to challenge public and private policies and practices that deny

[2] WHITE HOUSE OFFICE OF SCI. & TECH. POL'Y, BLUEPRINT FOR AN AI BILL OF RIGHTS (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf (AI Bill of Rights).
[3] LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.

Black people housing, employment, health care, and other opportunities,[4] and has fought to address unconstitutional and racially discriminatory law enforcement conduct.[5]

I. AI Systems Perpetuate Bias and Discrimination Based on Race and Other Protected Categories Across Various Sectors.

AI systems frequently replicate and amplify existing discrimination and bias, denying people of color and other protected classes equal access to housing, credit, employment, and other opportunities,[6] subjecting them to increased law enforcement contact,[7] and potentially endangering their liberty. AI systems can also be deployed in ways that disparately impact certain groups—for example, by requiring recipients of public benefits to share their biometric data in order to verify their identity,[8] or disproportionately deploying surveillance technologies in particular communities. As discussed below, researchers and litigators have found algorithmic bias across several major sectors, including lending, housing, employment, health care, education, and law enforcement.

A. *Lending and Access to Credit*

Algorithmic bias can deprive people of fair access to credit, leading them to pay more for a mortgage, credit card, or other loans or denying them credit entirely. In 2020, for example, the Student Borrower Protection Center (SBPC) tested a lending algorithm developed by a company called Upstart that incorporated educational data—including where the borrower attended college and the average SAT and ACT scores for different colleges and universities.[9] Upstart's algorithm

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[4] *E.g. Griggs v. Duke Power Co.,* 401 U.S. 424 (1971); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Pullman-Standard v. Swint*, 456 U.S. 273 (1982); *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985); and *Lewis v. City of Chi.*, 560 U.S. 205 (2010). *Linton v. Comm'r of Health & Env't*, 65 F.3d 508 (6th Cir. 1995) (preservation of Medicaid-certified hospital and nursing home beds to prevent eviction of patients in favor of admitting more remunerative private-pay individuals); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (challenge to closure of municipal hospital serving inner-city residents); *Simkins v. Moses H. Cone Mem'l Hosp*., 323 F.2d 959 (4th Cir. 1963) (admission of African-American physician to hospital staff); *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F. Supp. 427 (S.D.N.Y. 1993) (relocation of services from inner-city branch of merged hospital entity); *Rackley v. Bd. of Trs. of Orangeburg Reg'l Hosp*., 238 F. Supp. 512 (E.D.S.C. 1965) (desegregation of hospital wards); Consent Decree, *Terry v. Methodist Hosp. of Gary*, Nos. H-76-373, H-77-154 (N.D. Ind. June 8, 1979) (planned relocation of urban hospital services from inner-city community).

[5] *Tennessee v. Garner*, 471 U.S. 1 (1985) (a seminal case that held, for the first time, that police officers cannot shoot "fleeing felons" who do not pose a threat to officers or members of the public); *see also Davis, et al. v. City of New York, et al*., 902 F. Supp. 2d 405 (S.D.N.Y. 2012).

[6] Meredith Broussard, ARTIFICIAL UNINTELLIGENCE: HOW COMPUTERS MISUNDERSTAND THE WORLD 115 (2018).

[7] Rashida Richardson, et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 NYU L. REV. 192 at 41-42 (2019), https://www.nyulawreview.org/wp-content/uploads/2019/04/NYULawReview-94-Richardson_etal-FIN.pdf

[8] *Cf.* Hannah Quay-de la Vallee, Ctr. for Democracy & Tech., *Public Agencies' Use of Biometrics to Prevent Fraud and Abuse: Risks and Alternatives* (Jun. 7, 2022), https://cdt.org/wp-content/uploads/2022/06/2022-06-02-Public-Agencies-Use-of-Biometrics-to-Prevent-Fraud-and-Abuse-Risks-and-Alternatives.pdf

[9] Student Borrower Protection Ctr., EDUCATIONAL REDLINING 16 (2019), https://protectborrowers.org/wp-content/uploads/2020/02/Education-Redlining-Report.pdf (EDUCATIONAL REDLINING); Letter from LDF & Student Borrower Protection Ctr. to Dave Girouard, CEO of Upstart Network, Inc. (Jul. 30, 2020), https://www.naacpldf.org/wp-content/uploads/2020-07-30-FINAL-Demand-Letter.pdf.

divided schools into tiers based on standardized test scores.[10] The higher the incoming class's average standardized test scores, the higher the school's tier, and the more favorable the terms offered to students who attended that school.[11] Because students of color perform worse on these standardized tests due to embedded biases, schools with higher percentages of students of color were assigned to lower tranches.[12] As a result, ninety-five percent of Historically Black Colleges and Universities (HBCU) were in the bottom rankings; just two were in the top tier.[13] In practice, this translated into substantially different loan terms for borrowers of color: SBPC found that a hypothetical graduate of the well-known HBCU Howard University who applied for a loan through Upstart's lending platform, was charged nearly $3,499 more over the life of a five-year loan when compared to a similarly situated graduate of New York University, a predominantly white institution.[14] Upstart agreed to a fair lending monitorship in response to a demand letter sent by LDF and SBPC outlining how its algorithm likely violated the Equal Credit Opportunity Act and the Fair Housing Act.[15]

B. *Housing*

Algorithmic bias can also deny people access to housing. For example, housing providers frequently rely on tenant screening reports that include an algorithmically-generated score or a recommendation to accept or reject an applicant,[16] and tenant screening companies encourage housing providers to rely on this eligibility determination.[17] These scores usually include financial data from credit reporting agencies as well as information from data intermediaries and court

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[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] EDUCATIONAL REDLINING, *supra* note 9, at 16; Upstart Demand Letter, *supra* note 9.
[15] *Id.*; Press Release, LDF & Student Borrower Protection Ctr., NAACP Legal Defense and Educational Fund and Student Borrower Protection Center Announce Fair Lending Testing Agreement with Upstart Network (Dec. 1, 2020), https://protectborrowers.org/naacpldf-sbpc-upstart-agreement/
[16] Kaveh Waddell, *How Tenant Screening Reports Make It Hard for People to Bounce Back From Tough Times*, CONSUMER REPORTS (Mar. 11, 2021), https://www.consumerreports.org/algorithmic-bias/tenant-screening-reports-make-it-hard-to-bounce-back-from-tough-times-a2331058426/; Letter from the Nat'l Consumer Law Ctr. to Board of Governors of the Fed. Reserve Syst., et al., Re: Request for Information and Comment on the Financial Institutions' Use of Artificial Intelligence, Including Machine Learning (Jul. 1, 2021), https://www.fdic.gov/resources/regulations/federal-register-publications/2021/2021-rfi-financial-institutions-ai-3064-za24-c-041.pdf.
[17] Liran Koren, The Benefits of AI Tenant Screening, LUXURY PROPERTY CARE (Mar. 1, 2021), https://luxurypropertycare.com/ai-tenant-screening-benefits/ ("[Y]ou have better things to do than screening prospective tenants. . . . Think of AI as your assistant. It can get the essential process of tenant screening done, letting you be completely hands-off."). One recent study by Wonyoung So, a researcher at the Massachusetts Institute of Technology, found that housing providers penalized tenants by rejecting their applications or charging them higher security deposits "when they saw high-risk scores on the reports, rather than utilizing detailed information to make more precise judgements" even when that information was available. Wonyoung So, *Which Information Matters? Measuring Landlord Assessment of Tenant Screening Reports*, HOUSING POL'Y DEBATE (Aug. 30, 2022), https://www.tandfonline.com/doi/full/10.1080/10511482.2022.2113815.

databases on arrests, convictions, and evictions[18] which can disproportionately exclude people of color and other protected classes from housing opportunities.

Similarly, the Markup recently investigated the scoring system the Los Angeles Homeless Services Authority uses to match people in need with subsidized housing.[19] The U.S. Department of Housing and Urban Development requires the use of such a prioritization system to become eligible for certain federal housing funds under its rules.[20] The Markup's investigation found that Black and Hispanic people were significantly less likely than white people to score high enough to be placed in the "high priority" group for housing placement, even though they were overrepresented in Los Angeles' homeless population as a whole.[21]

C. Employment

Employers—including the federal government—increasingly rely on AI and other automated tools throughout the hiring process, from steering job advertisements toward certain candidates through sites like LinkedIn, to identifying strong applicants based on analyses of their resumes, and assessing candidate competencies.[22] Unfortunately, algorithmic decision-making systems used to identify strong candidates are likely to reflect existing patterns of occupational segregation. For example, algorithms that are developed using a data set where people of color are underrepresented among doctors, lawyers, and other professions, or where women are more often nurses and men are more often doctors, may take these observed patterns as a given, resulting in unfair disadvantages for people of color, women, and other protected classes.[23] As a result, researchers have found that algorithms used to decide who is shown advertisements regarding employment opportunities discriminate based on race and gender, often reflecting stereotypes about who works certain kinds of jobs.[24] Similar issues can arise when employers use ADSs to

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[18] Tech Equity Collaborative, Tech, Bias, and Housing Initiative: Tenant Screening (Feb. 23, 2022), https://techequitycollaborative.org/2022/02/23/tech-bias-and-housing-initiative-tenant-screening/.

[19] Colin Lecher & Maddy Varner, *L.A.'s Scoring System for Subsidized Housing Gives Black and Latino People Experiencing Homelessness Lower Priority Scores*, THE MARKUP (Feb. 28, 2023), https://themarkup.org/investigation/2023/02/28/l-a-s-scoring-system-for-subsidized-housing-gives-black-and-latino-people-experiencing-homelessness-lower-priority-scores.

[20] *Id.*

[21] *Id.*

[22] Alex Engler, *Auditing Employment Algorithms for Discrimination,* BROOKINGS INST. (Mar. 12, 2021), https://www.brookings.edu/research/auditing-employment-algorithms-for-discrimination/.

[23] Pauline Kim, *Manipulating Opportunity*, 106 VA. L. REV. 867, 897 (2020), https://deliverypdf.ssrn.com/delivery.php?ID=567087069087071071088126071004114125049002010083005045124081093108125018070118089067019011000043062111054092003014070126073090110049062017017095030005078085111088044054117113089111074080082003117094104072087094106113106028123076082064092030013001&EXT=pdf&INDEX=TRUE.

[24] Muhammad Ali, et al., *Discrimination through optimization: How Facebook's ad delivery can lead to skewed outcomes*, PROCEEDINGS OF THE ACM ON HUMAN-COMPUTER INTERACTION, vol. 3, Nov. 2019, at 20, 30, https://www.ftc.gov/system/files/documents/public_events/1548288/privacycon-2020-muhammad_ali.pdf; Piotr Sapiezynski, et al., *Algorithms That "Don't See Color": Comparing Biases in Lookalike and Special Ad Audiences*, PROCEEDINGS OF THE 2022 AAAI/ACM CONFERENCE ON AI, ETHICS, & SOCIETY (Jul. 2022), https://dl.acm.org/doi/10.1145/3514094.3534135; Ava Kofman & Ariana Tobin, *Facebook Ads Can Still*

screen resumes.[25] Finally, several companies market products to employers that they claim can reliably extrapolate personality traits and predict social outcomes, such as job performance.[26] Some of these tools rely on assessments of observable physical factors like facial or voice recognition,[27] despite the fact that these technologies are less accurate at assessing people with darker skin[28] and the voices of Black people.[29] As such, they may produce inaccurate results for people of color.

D. *Healthcare*

Health care providers increasingly rely on algorithms to help diagnose and treat patients, yet these algorithms can lead to Black patients to receive worse care.[30] For example, although Black Americans are four times more likely to have kidney failure, the standard algorithm used around the country to determine transplant list placement explicitly uses race as a factor and puts Black patients lower on the list than white patients, even when all other factors remain identical.[31] Many doctors now believe that the data that led the algorithm's developers to include the race coefficient is actually a reflection of both systemic health disparities and discrimination by providers, and that the continued use of the algorithm leads to negative health outcomes for Black patients.[32]

E. *Education*

Discriminate Against Women and Older Workers, Despite a Civil Rights Settlement, PROPUBLICA (Dec. 13, 2019, 5:00 AM), https://www.propublica.org/article/facebook-ads-can-still-discriminate-againstwomen-and-older-workers-despite-a-civil-rights-settlement.

[25] Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias against Women*, REUTERS (Oct. 10, 2018), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight-idUSKCN1MK08G (describing how a resume screening tool developed by Amazon, "learned" to systematically downgrade the resumes of women regardless of their qualifications for the job because the model was "trained" using resumes submitted to the company over a ten-year period—overwhelmingly from men. For example, the ADS penalized resumes that included the word "women's," as in "women's chess club captain," and downgraded graduates of two all-women's colleges.).

[26] Rebecca Heilweil, *Artificial Intelligence Will Help Determine If You Get Your Next Job*, RECODE (Dec. 12, 2019), https://www.vox.com/recode/2019/12/12/20993665/artificial-intelligence-ai-job-screen.

[27] Aaron Riecke & Miranda Bogen, UPTURN, HELP WANTED: AN EXAMINATION OF HIRING ALGORITHMS, EQUITY, AND BIAS (2018), https://www.upturn.org/work/help-wanted/.

[28] Joy Buolamwini & Timnit Gebru, *Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification,* PROCEEDINGS OF MACHINE LEARNING RESEARCH, vol. 81, 2018, http://proceedings.mlr.press/v81/buolamwini18a/buolamwini18a.pdf.

[29] Allison Koenecke, et al., *Racial disparities in automated speech recognition*, 117 PNAS 7684, https://www.pnas.org/doi/10.1073/pnas.1915768117.

[30] Donna M. Christensen, *Medical Algorithms Are Failing Communities of Color*, HEALTH AFFAIRS (Sept. 9, 2021), https://www.healthaffairs.org/do/10.1377/forefront.20210903.976632/.

[31] Rae Ellen Bitchell & Cara Anthony, *Kidney Experts Say It's Time to Remove Race from Medical Algorithms. Doing So Is Complicated,* HEALTH AFFAIRS (Jun. 8, 2021), https://khn.org/news/article/black-kidney-patients-racial-health-disparities/?utm_campaign=KHN%3A%20Daily%20Health%20Policy%20Report&utm_medium=email&_hsmi=132394588&_hsenc=p2ANqtz--4ODxarsKPHQSQeAfuOeyLJlAbaGTNgUoPyX4KJJqtvaQOUyan-ZRycCujUe8kMR623a6e7lV0KBUtZgGVacR1ynlazQ_Tte4IvXmfHP2n4J1zvI0&utm_content=132394588&utm_source=hs_email.

[32] *Id.*

Technologies used in the education sector risk entrenching the school-to-prison pipeline for Black and Brown youth. There is no independent evidence that student activity monitoring software, for example, improves student safety.[33] On the contrary, studies show that more surveillance in schools *decreases* students' perceptions of safety, equity, and support.[34] Research shows that schools with more students of color are already more likely to adopt stricter and more encompassing surveillance, security, and law enforcement methods.[35] By purchasing student activity monitoring software, administrators are investing in oppressive technologies rather than more empirically supported services to create positive school climates.[36]

F. *Law Enforcement*

Law enforcement agencies use algorithmic technologies for a wide variety of functions, from social media monitoring, crime forecasting, license plate readers, to algorithms used to decide where to deploy officers and to identify purported suspects.[37] These technologies often rely on data reflecting racially discriminatory policing practices and their use creates a feedback loop that perpetuates discriminatory patterns.[38] The use of these technologies by law enforcement officers increases officers' powers to surveil and perpetuate state violence against people of color without creating safer communities.[39] These new technologies are often deployed with little to no transparency regarding when they are used, what data sources they rely on, how they make

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[33] Todd Feathers, *Schools Spy on Kids to Prevent Shootings, But There's No Evidence It Works*, VICE (Dec. 4, 2019), https://www.vice.com/en/article/8xwze4/schools-are-using-spyware-to-prevent-shootingsbut-theres-no-evidence-it-works (*Schools Spy*). ("If there is evidence or research that is available, it's provided by the vendor. It's not provided by an independent researcher.").

[34] Mona Wang & Gennie Gebhart, *Schools Are Pushing the Boundaries of Surveillance Technologies*, EFF (Feb. 27, 2020), https://www.eff.org/deeplinks/2020/02/schools-are-pushing-boundaries-surveillance-technologies; Sarah Lindstrom Johnson et al., *Surveillance or Safekeeping? How School Security Officer and Camera Presence Influence Students' Perceptions of Safety, Equity, and Support*, J. OF ADOLESCENT HEALTH 1 (Sept. 2018).

[35] Melinda D. Anderson, *When School Feels Like Prison*, ATLANTIC (Sep. 12, 2016), https://www.theatlantic.com/education/archive/2016/09/when-school-feels-like-prison/499556/ (discussing study that "found that the concentration of students of color was a predictor of whether or not schools decided to rely on more intense [security] measures").

[36] *See, e.g.,* Cara McClellan, NAACP Legal Defense and Educational Fund, Inc., OUR GIRLS, OUR FUTURE: INVESTING IN OPPORTUNITY & REDUCING RELIANCE ON THE CRIMINAL JUSTICE SYSTEM IN BALTIMORE 2 (2018), *available at* https://www.naacpldf.org/wp-content/uploads/Baltimore_Girls_Report_FINAL_6_26_18.pdf.

[37] *See, e.g.,* TIM LAU, BRENNAN CTR. FOR JUST, PREDICTIVE POLICING EXPLAINED (2020), https://www.brennancenter.org/our-work/research-reports/predictive-policing-explained.

[38] Rashida Richardson, et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 NYU L. REV. 192 (2019), https://www.nyulawreview.org/wpcontent/uploads/2019/04/NYULawReview-94-Richardson-Schultz-Crawford.pdf.

[39] George Joseph, *What Are License-Plate Readers Good For? Automatic plate-readers catch few terrorists or violent criminals, but do plenty of harm to low-income communities of color*, BLOOMBERG NEWS (Aug. 5, 2016), https://www.bloomberg.com/news/articles/2016-08-05/license-plate-readers-catch-few-terrorists-but-lots-of-poor-people-of-color; Rashida Richardson, et al., *Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice*, 94 NYU L. REV. 192 (2019), https://www.nyulawreview.org/wpcontent/uploads/2019/04/NYULawReview-94-Richardson-Schultz-Crawford.pdf; Brian Jefferson, DIGITIZE AND PUNISH: RACIAL CRIMINALIZATION IN THE DIGITAL AGE (2020), https://www.jstor.org/stable/10.5749/j.ctvz0h9s7 ("[d]igital databases, not detention centers . . . are becoming the leading edge of criminal justice in the United States. While more than 2 million people are incarcerated . . . the Bureau of Justice Statistics estimates that 100,596,300 names are stored in criminal history databases. In some cities, 80 percent of the black male population is registered in these databases.").

decisions, whether they have been independently validated or tested for bias, or notice or explanation to people on whom they are used about why or how they may be adversely affected.

II. The Draft Memorandum Builds Upon the Blueprint for an AI Bill of Rights to Require Federal Agencies to Take Steps to Identify and Address Algorithmic Bias

We commend the administration for advancing efforts to identify and address algorithmic bias. As several federal agencies have recognized, existing civil rights and consumer protection laws—such as Title VII of the Civil Rights Act of 1964, the Fair Housing Act, the FTC Act, and the Equal Credit Opportunity Act—apply to algorithmic discrimination and, in many cases, bar the deployment of algorithms that have a disparate impact on protected classes.[40] The federal government has an obligation not only to vigorously enforce these protections, but to ensure that its own uses of AI comply with these laws and the U.S. Constitution. While the administration's Blueprint for an AI Bill of Rights articulated a set of principles to protect the public from algorithmic bias and other threats to civil rights which occur with the increased use of automated systems, its guidance was not binding. The Draft Memorandum begins the process of embedding these principles within the policies and practices of federal agencies.

In October 2022, the White House Office of Science and Technology Policy took the positive step of issuing a Blueprint for an AI Bill of Rights, which recognized that people should "not face discrimination by algorithms and systems should be used and designed in an equitable way."[41] The Blueprint acknowledges that discrimination by algorithms may, in certain circumstances, violate existing laws,[42] and recommends that "designers, developers, and deployers of automated systems . . . take proactive and continuous measures to protect individuals and communities from algorithmic discrimination and to use and design systems in an equitable way," including conducting equity assessments as part of the system design, using representative and accurate data and protecting against proxies for demographic features, and performing pre-deployment and ongoing disparity testing and mitigation.[43] The Blueprint also describes additional measures that should be taken to ensure that affected individuals receive adequate notice and explanation regarding the use of algorithms, as well as the availability of human alternatives, consideration, and fallback.[44] Unfortunately, the Blueprint is non-binding and does not mandate that companies take these steps.[45] Moreover, the Blueprint includes exemptions that suggest that current and future uses of AI by law enforcement need not be subjected to the same principles or should be weighed differently against law enforcement concerns.[46]

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[40] Rohit Chopra, Dir. of the Consumer Fin. Protection Bureau, Kristen Clarke, Assistant Att'y Gen. for the Justice Department's Civil Rights Division, Charlotte A. Burrows, Chair of the Equal Employment Opportunity Comm'n, & Lina M. Khan, Chair of the Fed. Trade Comm'n, Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems (Apr. 25, 2023), https://www.justice.gov/media/1289396/dl?inline

[41] AI Bill of Rights, *supra* note 2.

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

The Draft Memorandum would require federal agencies to embrace several of the principles of the Blueprint and take concrete steps to address algorithmic bias and increase accountability for their use of AI. The Draft Memorandum includes, among other measures:

- Broad application, including to law enforcement uses: The Draft Memorandum applies to all new and existing AI that is developed, used, or procured by or on behalf of covered agencies,[47] and requires federal agencies to take additional steps (discussed further below) to address the risks of "safety-impacting" or "rights-impacting" AI. "Rights-impacting" AI is presumed to encompass technologies that control or meaningfully influence law enforcement and decisions in the criminal legal system; the exercise of protected speech; access to education, including school admissions and student discipline; access to housing, including tenant screening and home valuation; the terms and conditions of employment; and access to financial services and credit.[48] While we believe this list should be expanded, as discussed further below, we applaud the otherwise broad definition of "rights-impacting" AI, particularly the necessary inclusion of law enforcement and criminal legal system technologies. The dangers associated with the use of AI in these contexts are among the most concerning, potentially depriving individuals of liberty and endangering their housing, employment, and their ability to parent their children and care for their loved ones. Because of ongoing systemic discrimination against communities of color by law enforcement and the criminal legal system, Black and Brown communities often bear the brunt of these harms.

- Required risk management practices: The Draft Memorandum requires federal agencies to implement the minimum practices for safety-impacting or rights-impacting AI and to stop using any AI that is not compliant with those practices.[49] These minimum practices include steps such as completing an AI risk assessment that identifies the possible risks of using AI and evaluates the quality and appropriateness of the data used in the AI's design, development, and deployment; conducting real-world testing and independent evaluation of AI documentation; performing ongoing monitoring; and mitigating risks to rights and safety at every stage of design, development, and deployment.[50] Additionally, agencies must take additional steps to ensure that rights-impacting AI do not exhibit algorithmic bias, including by proactively identifying and removing factors contributing to algorithmic discrimination or bias; assessing and mitigating disparate impacts; using representative data; and consulting with impacted communities. Importantly, the Draft Memorandum reiterates throughout that federal agencies should not use AI that cannot meet these minimum requirements.

[47] OMB Memo, *supra* note 1, at 3.
[48] *Id.* at 12-13.
[49] *Id.* at 10.
[50] *Id.* at 15-17.

- Increased transparency: The Draft Memorandum requires federal agencies "to identify and report additional detail on how they are using safety-impacting and rights-impacting AI, the risks—including risks to equity—that such use poses, how they are managing those risks, and any related extensions and waivers granted."[51] The federal government has an obligation to ensure that it can be held accountable for its actions through the democratic process. Yet the public is often not aware of when AI is used or the risks it poses, even if they themselves have been impacted by those systems. Requiring federal agencies to disclose their use of AI and the risks to equity they pose will provide needed transparency.

We applaud OMB for proposing these requirements, which would help the federal government begin to put the Blueprint for an AI Bill of Rights into practice. If strengthened and effectively implemented, the Draft Memorandum would help the federal government fulfill its nondiscrimination obligations and could provide a model for other governments seeking to strengthen their AI governance.

III. To Fully Realize Its Promise and Ensure that Civil Rights Are the Highest Priority, OMB Needs to Tighten Its Guidance and Build Capacity for Implementation.

While the Draft Memorandum includes many important measures, it should be further strengthened in order to help the federal government's use of AI does not violate civil rights and civil liberties. We recommend that OMB: 1. clarify that algorithmic discrimination is unacceptable, but collecting demographic data to assess AI systems for bias and implementing AI systems that effectively increase access to opportunity are not forms of discrimination; 2. increase agencies' budgets to support compliance with testing requirements and other risk-management practices; 3. apply the Final Memorandum to AI systems funded by federal grants and to technology procured from third parties; 4. offer clear guidance to agency staff implementing anti-discrimination testing requirements; 5. mandate that CAIOs have civil rights expertise; 6. expand the definition of what constitutes AI and "rights-impacting" AI; 7. require disclosure of information about waivers granted to specific AI systems and documentation of agencies' risk-assessment procedures; 8. significantly limit when and how waivers can be granted; and 9. ensure that civil rights principles inform agencies' adoption of AI tools, and that federal agencies are required to consult with civil rights organizations and impacted communities on their AI strategies.

A. *Clarify that No Amount of Algorithmic Discrimination is Acceptable, but that Efforts to Assess Bias and Expand Opportunity Are Not Discrimination*

The Draft Memorandum should make clear throughout that no amount of unjustified algorithmic discrimination is acceptable. At the same time, the Draft Memorandum should make clear that federal agencies may collect and use data on race and other protected characteristics to

[51] *Id.* at 4.

assess systems for bias, and that systems that effectively increase access to opportunity do not violate the Memorandum's requirements.

As currently defined, the Memorandum explains that "where the AI's risks to rights or safety exceed an acceptable level and where mitigation is not practicable, agencies must stop using the affected AI as soon as is practicable."[52] The Draft Memorandum also requires that federal agencies assess rights-impacting AI to "determine whether there are significant disparities in the AI's performance across demographic groups, and, consistent with applicable law, appropriately address disparities" and "[w[here sufficient mitigation of [AI-enabled discrimination] is not possible, agencies must safely discontinue use of the affected AI functionality."[53] However, the Draft Memorandum does not define what is an "acceptable level" of risk to rights and safety or "sufficient mitigation" of discrimination. Moreover, the Draft Memorandum does not define what "AI-enabled discrimination" by rights-impacting AI includes.[54]

Federal government use of AI should serve as an example to both state and local governments and the private sector and should be held to the highest standards. Existing civil rights laws should be viewed as the floor but not the ceiling for nondiscrimination protections. The Final Memorandum should make it clear that no amount of algorithmic discrimination is "acceptable." The Final Memorandum should also require federal agencies to identify and adopt less discriminatory alternatives even if those alternatives appear to impose material costs or perform slightly worse.[55] Finally, the Final Memorandum should use the term "algorithmic bias," which is defined in the Memorandum and appropriately includes both disparate treatment and disparate impact,[56] consistently throughout, rather than the undefined term "AI-enabled discrimination."

In addition, the Final Memorandum should also make clear how federal agencies can assess bias and enhance equity in federal systems consistent with its requirements. The Final Memorandum should state explicitly that data on race and other protected characteristics can be collected and used to determine whether a system exhibits algorithmic discrimination. In some cases, this analysis could require federal agencies to collect additional demographic data or improve their methods for collecting such data. Moreover, the Final Memorandum should make clear that AI systems that increase access to opportunity would not violate the memo's requirements provided they are consistent with existing law. For example, a federal agency could

[52] *Id.* at 17.
[53] *Id.* at 18, 20.
[54] *Id.* at 20.
[55] *See* Implementation of the Fair Housing Act's Discriminatory Effects Standard, 78 Fed. Reg. 11,460, 11,473. (Feb. 15, 2013); 88 Fed. Reg. 19450, 19491 (Mar. 31, 2023); codified at 24 C.F.R. 100 (rejecting a proposal that less discriminatory alternatives must be "equally effective.").
[56] OMB Memo, *supra* note 1, at 22 (The term "algorithmic discrimination" has the meaning established in Section 10(f) of Executive Order 14091 of February 16, 2023.); Executive Order 14091 § 10(f) ("The term 'algorithmic discrimination' refers to instances when automated systems contribute to unjustified different treatment or impacts disfavoring people based on their actual or perceived race, color, ethnicity, sex (including based on pregnancy, childbirth, and related conditions; gender identity; intersex status; and sexual orientation), religion, age, national origin, limited English proficiency, disability, veteran status, genetic information, or any other classification protected by law.").

use an AI system to expand the pool of job applicants to ensure that Black people and other people of color have equal opportunity to compete for positions. Alternatively, a federal agency could expand the criteria used to evaluate loan applications in order to ensure that they do not unfairly exclude Black borrowers.[57]

B. *In-house Capacity for Implementation*

The Draft Memorandum imposes needed requirements on federal agencies to ensure that their AI systems comply with minimum risk management practices. These requirements must be met by August 1, 2024, unless the agencies request "an extension of limited and defined duration for a particular use of AI that cannot feasibly meet the minimum requirements in this section by that date . . . accompanied by a detailed justification for why the agency cannot achieve compliance for the use case in question and what practices the agency has in place to mitigate the risks from noncompliance, as well as a plan for how the agency will come to implement the full set of required minimum practices from this section."[58] The Draft Memorandum also encourages agencies to take steps to fill gaps in their AI workforce using available special hiring and retention authorities.[59]

In order to meet the benchmarks and timelines established by the Memorandum, many federal agencies will need to significantly increase their technical capacity. We urge OMB to ensure that future budget requests account for the need to support compliance with the minimum risk-management practices, and that investments in new AI systems do not exceed agencies' capacity to evaluate them. The Final Memorandum should also specify that agencies should seek to hire additional staff with civil rights expertise in addition to technical expertise in order to ensure that the development and implementation of agencies' AI strategy and minimum risk-management practices are informed by experts who understand agencies' legal obligations.

In addition, the Final Memorandum should clarify the circumstances under which agencies can request an extension of the compliance deadline. OMB should only permit agencies to request extensions if AI evaluations are in progress according to a realistic timeline. If agencies do not have the capacity to complete testing requirements, they should not be allowed to keep requesting extensions and to continue to use the AI technology in the meantime. In that case, agencies should

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[57] For example, both Freddie Mac and Fannie Mae now give borrowers and lenders the option of submitting rental payment history for consideration as part of the entities' automated mortgage underwriting system. *Freddie Mac Takes Further Action to Help Renters Achieve Homeownership*, FREDDIE MAC (Jun. 29, 2022 10:00 ET), https://www.globenewswire.com/news-release/2022/06/29/2471417/0/en/Freddie-Mac-Takes-Further-Action-to-Help-Renters-Achieve-Homeownership.html; *FHFA Announces Inclusion of Rental Payment History in Fannie Mae's Underwriting Process*, FED. HOUSING FINANCE AGENCY (Aug. 11, 2021), https://www.fhfa.gov/mobile/Pages/public-affairs-detail.aspx?PageName=FHFA-Announces-Inclusion-of-Rental-Payment-History-in-Fannie-Maes-Underwriting-Process.aspx. The hope is that this additional information will help expand access to credit and homeownership among people of color, whom Fannie Mae found "are disproportionately represented among the 20% of the U.S. population having little to no established credit history." Hugh R. Frater, Fannie Mae, *Helping Renters Unlock the Door to Homeownership* (Aug. 11, 2021), https://www.fanniemae.com/research-and-insights/perspectives/helping-renters-unlock-door-homeownership.

[58] OMB Memo, *supra* note 1, at 14.

[59] *Id.* at 9.

be required to stop using the AI technology until they have capacity to run audits internally or to hire third-party auditors. These third-party auditors must have expertise in civil rights rather than embracing an AI-first approach.

C. *Federal Grants*

The Draft Memorandum currently only applies to AI used by federal agencies. It does not require that AI systems funded with federal dollars or created pursuant to federal mandates comply with the same minimum risk-management practices. However, the Department of Justice has created funding programs such as its "Smart Policing Initiative" (SPI) and provided grants for biased and discriminatory technologies such as predictive policing with little to no tracking.[60]

Federal funding should not be used to support AI systems that the federal government could not itself use. To the greatest extent allowed by law, federal agencies should ensure that grant funding programs such as the SPI and federally-funded AI systems comply with the minimum risk-management practices outlined in the memo. At minimum, federal agencies should consider issuing guidance or best practices to federal funding recipients.

D. *Procurement*

The current Draft Memorandum mandates that, within 180 days, "the [interagency] council described in Section 10.1(a) of the AI Executive Order [which includes the heads of all cabinet-level federal agencies] will provide the Director of OMB with a list of recommended documentation that should be required from a selected vendor in the fulfillment of a Federal AI contract. As part of their recommendation, the council must consider the minimum risk management practices in Section 5(c) and the associated materials that may be required of vendors to demonstrate that they have completed such tasks."[61]

AI used by federal agencies should comply with the same standards regardless of whether it is developed internally or procured from outside companies. In addition to requiring documentation relevant to risk management from third parties, the Final Memorandum must require that technology procured from third parties complies with the outlined minimum risk-management practices.

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[60] Dell Cameron, *Justice Department Admits: We Don't Even Know How Many Predictive Policing Tools We've Funded*, GIZMODO (Mar. 17, 2022), https://gizmodo.com/justice-department-kept-few-records-on-predictive-polic-1848660323 ("While entrusted with overseeing grants for state and local law enforcement agencies, Justice Department officials have kept no 'specific records,' a senior official has said, with regard to which agencies have tapped a leading source of DOJ funding to purchase predictive policing tools."); *Pasco County Sheriff's Office intelligence program to receive 'intensive review' by Department of Justice bureau*, 10 TAMPA BAY (Sept. 10, 2021), https://www.wtsp.com/article/news/local/pascocounty/pasco-county-sheriffs-office-intelligence-program-review-department-of-justice/67-73d9b829-e92d-4daf-bfe0-c6686820d675 (grant for "Focused Deterrence Program" provided through Smart Policing Initiative).

[61] *Id.* at 10.

E. *Anti-discrimination Testing*

Currently, the Draft Memorandum imposes "Additional Minimum Practices for Rights-Impacting AI" only apply to rights-impacting AI, not safety-impacting AI. These additional minimum practices include "tak[ing] steps to ensure that the AI will advance equity, dignity, and fairness,"; "consult[ing] and incorporating feedback from affected groups"; conduct[ing] ongoing monitoring and mitigation for AI-enabled discrimination"; "notify[ing] negatively affected individuals"; "maintain[ing] human consideration and remedy processes"; and "maintain[ing] options to opt-out where practicable."[62] Moreover, the Draft Memorandum appears to leave it to the agencies to decide which agency staff members are in charge of these testing requirements and which testing methodologies to use.

Given that several of the safety-impacting use cases can have serious consequences for the individual and community rights described in the Memorandum's definition of rights-impacting AI,[63] the Final Memorandum should require the additional minimum practices for all safety-impacting AI as well as all rights-impacting AI. At minimum, the Final Memorandum should clarify that, if a technology could be categorized as either rights-impacting or safety-impacting, agencies should apply the additional requirements for rights-impacting systems.

In order to facilitate consistent implementation across agencies, the Final Memorandum should also specify which actors are responsible for completing the testing requirements, and agencies should publicly report which anti-discrimination testing methodologies they are using. Agencies should choose testing methodologies based on input from experts on bias and discrimination in particular contexts in order to account for the ways these issues manifest in different arenas. In addition to assessing whether AI systems produce biased results, the Final Memorandum should also require agencies to assess whether they will deploy AI systems in a way that disproportionately burdens particular communities. For example, surveillance systems that are deployed more frequently in communities of color can chill the exercise of free speech, decrease privacy, and cause other harms in addition to any bias in the results produced by the system. The Final Memorandum should require agencies to mitigate those harms or stop using those systems. Finally, the White House Office of Science and Technology Policy and the National Institute for Science and Technology should provide agency staff responsible for implementing the memo with clear guidance, informed by public input—for example, guidance on acceptable testing and tolerances.

F. *Chief AI Officers*

The current Draft Memorandum requires the head of each agency to designate a CAIO responsible for coordinating agency use of AI, promoting AI innovation, and managing risks from the use of AI. The CAIO "must have the necessary skills, knowledge, training, and expertise to

[62] *Id.* at 18-21.
[63] *Id.* at 24.

perform the responsibilities described,"[64] which include identify rights-impacting and safety-impacting systems and managing the risks of those systems.[65] As such, the Final Memorandum must specifically state that CAIOs should have expertise in civil rights.

G. *AI Use Case Inventory*

The Draft Memorandum currently states that agencies must publicly report AI use cases "to the extent consistent with applicable law and government guidance, including those concerning protection of privacy and of sensitive law enforcement, national security, and other protected information," should make this documentation accessible to potentially impacted communities "where practicable," and should report relevant information to OMB about excluded use cases "as appropriate" and "consistent with applicable law and governmentwide guidance, including those concerning the protection of privacy and of sensitive law enforcement, national security, and other protected information."[66]

We urge OMB to tighten this language lest the exceptions swallow the rule. Law enforcement technologies should be disclosed publicly in the AI use case inventory, information about them should be made explicitly available to potentially impacted communities, and details on excluded use cases should be provided to OMB and should follow transparency requirements. Because law enforcement technologies can cause some of the most significant harms to impacted communities, there is a heightened need for transparency about these systems. As discussed further below, the Final Memorandum should also require agencies to publish additional information about waivers that exempt AI systems from the minimum risk-management requirements. Finally, the Final Memorandum should require federal agencies to publish all documentation produced as part of the minimum risk-assessment procedures (i.e., the impact assessment, results of real-world testing, etc.) as part of their use case inventory.

H. *Definitions*

While the Draft Memorandum's definitions of AI and systems that are presumed to be "rights-impacting" or "safety-impacting" encompass many critical technologies, they also exclude some systems that have significant civil rights implications. We urge OMB to expand and clarify these definitions in the Final Memorandum.

First, the Draft Memorandum uses a different definition of AI than the Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.[67] OMB should clarify that AI for the purposes of the memo is a machine-based system that can, for a given set of

[64] *Id.* at 4-7.
[65] *Id.* at 6.
[66] *Id.* at 4.
[67] *Compare id.* at 22 *with* Executive Order 14110 on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (Oct. 30, 2023), 88 Fed. Reg. 75191 (Nov. 1, 2023), https://www.govinfo.gov/content/pkg/FR-2023-11-01/pdf/2023-24283.pdf (AI EO).

human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments.

Second, the Draft Memorandum "encourage[s]" but does not require elements of the intelligence community to implement the outlined risk management practices for rights-impacting and safety-impacting AI.[68] The Department of Defense and the Intelligence Community are also exempt from submitting an AI use case inventory to OMB and publicly disclosing a version on their website.[69] Under the Final Memorandum, the exclusion of the intelligence community should not be used to dismiss civil rights protections for law enforcement uses of AI.

I. *Waivers*

The Final Memorandum should provide additional constraints on when and how federal agencies can exempt AI systems from the minimum risk-management requirements and should create additional transparency regarding when and how waivers should be granted. The Draft Memorandum currently allows agencies' CAIOs to waive one or more of the minimum risk-management requirements "after making a written determination, based upon a system-specific risk assessment, that fulfilling the requirement would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations."[70] Such waivers would be in effect for the duration of the AI's use.[71] This provision creates a significant loophole that could undermine the principles outlined in the Blueprint for an AI Bill of Rights and permit the federal government to knowingly or unknowingly engage in algorithmic discrimination in violation of its statutory and constitutional obligations.

The Final Memorandum should significantly limit when and how waivers exempting systems from the minimum risk-management requirements can be granted. The Final Memorandum should clearly define and limit what constitutes "an unacceptable impediment to critical agency operations" and specify that a waiver should not be granted if there is a risk that such a waiver would create a risk that the agency's use of AI would violate the Due Process Clause, the Equal Protection Clause, or any other constitutional or statutory right. The memo should explicitly require the CAIO to get consent from the Civil Rights Division at the Department of Justice and any relevant civil rights officers at their agency before granting a waiver. Waivers should only be granted for a limited period of time (i.e., one year) and should be periodically reassessed *de novo.* Federal agencies should also be required to publish information in their AI case inventory regarding why a waiver was requested, why it was granted, and when the waiver must be reevaluated.

Finally, the proposed rule permits the CAIO "to determine that an AI application does not match the definitions of 'safety-impacting AI' or 'rights-impacting AI' and is therefore not subject

[68] OMB Memo, *supra* note 1, at 10.
[69] *Id.* at 4.
[70] *Id.* at 14.
[71] *Id.*

to the minimum practices."[72] The Final Memorandum should similarly require the CAIO to get consent from the Civil Rights Division at the Department of Justice and any relevant civil rights officers at their agency before granting a waiver; to periodically review this determination based on information regarding the use of the system; and to disclose regarding why this determination was made and when it must be reevaluated.

J. *AI Strategies*

The Draft Memorandum requires CAIOs to develop AI strategies for each federal agency, and currently places significant emphasis on increasing federal agencies' adoption of AI tools, devoting an entire section to improving their ability to use and procure AI.[73] However, as described in Section I above, AI systems pose significant risks to civil rights and can rapidly harm numerous individuals. As such, the federal government must be thoughtful about AI adoption.

The Final Memorandum should require agencies, as part of the development of their AI strategies, to carefully evaluate whether and how AI tools—particularly safety-impacting and rights-impacting AI—would actually add value compared to a human alternative before adopting them. The Final Memorandum should also make clear that the principles embodied in the minimum risk-assessment requirements are not separate from agencies' AI strategies but should inform those strategies. In order to ensure that federal agencies carefully balance the civil rights risks of AI against any possible benefits, the Final Memorandum should require federal agencies to consult with civil rights organizations and impacted communities as they develop their AI strategies. Finally, the Final Memorandum should ensure that federal civil rights officials play a central role in the development of AI strategies. The 2023 Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence recognizes the importance of civil rights officials in developing AI policy and directs the "Assistant Attorney General in charge of the Civil Rights Division to convene . . . a meeting of the heads of Federal civil rights offices to discuss comprehensive use of their respective authorities and offices to . . . prevent and address discrimination in the use of automated systems, including algorithmic discrimination," among other topics.[74] The results of those conversation should also inform each agencies' AI strategies. In line with the EO, the Final OMB Memorandum should require CAIOs to consult with the Civil Rights Division and federal civil rights offices.

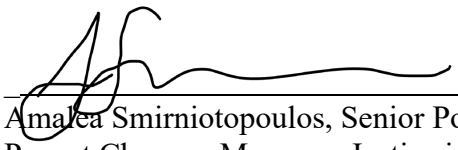
IV. Conclusion

Discrimination due to AI systems is prevalent across a variety of sectors and can cause significant harm to affected communities, the entities that use AI, and society as a whole. We appreciate the OMB Memorandum's provisions to strengthen civil rights protections against AI-related harms, but we urge OMB to tighten its guidance and build capacity for implementation in order for the Memorandum's promises to be fully realized.

[72] *Id.* at 11.
[73] *Id.* § 4.
[74] AI EO, *supra* note 71, § 7.1(a)(ii).

Thank you for the opportunity to comment. If you have any questions, please contact Amalea Smirniotopoulos, Senior Policy Counsel, at asmirniotopoulos@naacpldf.org; Puneet Cheema, Manager, Justice in Public Safety Project at pcheema@naacpldf.org; and Avatara Smith Carrington, Strategic Initiatives Law & Policy Fellow, at acarrington@naacpldf.org.

Sincerely,



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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0122
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Climate Action Against Disinformation

General Comment

The attached letter will also be shared over email to OMB and other relevant agencies of the Biden-Harris Administration.

Attachments

Climate Response to EO on AI

Dear President Biden and Vice President Harris

The undersigned organizations are encouraged by the leadership of the Biden-Harris Administration for beginning to take steps to protect the public from harms associated with artificial intelligence (AI), but have many outstanding concerns. Like many technological advancements in the past, AI has the potential to improve health and educational outcomes and access to critical information, goods, and services. Yet, as the recent Executive Order (EO) acknowledges, AI also carries significant risks. As the last month's upheavals at OpenAI shows, the governance and decision making around AI is being developed and decided upon behind closed doors, with dangerously little transparency, or input from the public that will be impacted by it. The latest corporate moves seem to have expanded Silicon Valley's control of AI only to include more of Wall Street, continuing to leave civil society and those representing the public interest outside.

We were disappointed that AI's potential to worsen the climate change crisis, which President Biden himself referred to as "the number one issue facing humanity,[1]" was not addressed as a risk associated with the widespread use of AI in the EO. Our concerns about AI focus on its potential use to spread climate disinformation, and its vastly expanding energy use, both of which require basic transparency rules that are not included in the EO. Unfounded hype from Silicon Valley says that AI can save the planet sometime in the future but research shows the opposite is actually occurring right now.[2]

This week, leaders around the world, including Vice President Harris and Special Presidential Envoy for Climate John Kerry from the Biden-Harris administration, are preparing to attend COP28 to discuss critical carbon-emitting benchmarks necessary to preserve our planet. Without significant progress in carbon reduction, we risk an acceleration of climate disasters, including deadly floods, violent wildfires, famine, drought, and species extinction. Against this dire backdrop, we must carefully consider and mitigate the ways AI might intensify the climate crisis.

The creation and use of AI large language models (LLMs) heightens the risks associated with climate change on two fronts. First, AI LLMs can more quickly, cheaply, and covertly produce and distribute targeted climate disinformation which threatens to perpetuate climate denialism and slow efforts to fight climate change.[3] Second, due to their enormous energy requirements and the carbon footprint associated with their growth and proliferation, the widespread use of LLMs can increase carbon emissions.

Generative AI threatens to amplify the types of climate disinformation that have plagued the social media era and slowed efforts to fight climate change. Researchers have been able to easily bypass ChatGPT's safeguards to produce an article from the perspective of a climate change denier that argued global temperatures are actually decreasing.[4] Elsewhere, studies have documented extensive examples of the harms caused by climate disinformation on social

[1] CNBC, "Joe Biden calls climate change the 'number one issue facing humanity'," Oct. 24, 2020, Link.
[2] CNN, "How AI could power the climate breakthrough the world needs," Nov. 27, 2023, Link.
[3] Stanford University & Georgetown University, "Can AI Write Persuasive Propaganda?", Feb. 21, 2023, Link.
[4] Inside Clilmate News, "AI Can Spread Climate Misinformation 'Much Cheaper and Faster,' Study Warns," March 31, 2023, Link.

media in the U.S. that could be further worsened by the onset of AI, including: an overall rise in the amount of climate disinformation presented to users;[5] algorithmically enhanced lies that falsely blamed oil and gas infrastructure failures on wind power;[6] enhancing the monetization of climate disinformation by both social media companies (profit generated via ads) and by climate deniers who create content (via revenue-sharing);[7] false claims linking wind power and whale deaths;[8] and the disproportionate reach and impact of climate denial narratives during global climate negotiations.[9] LLMs are likely to make this problem worse, not only because social media content is used to train such models, but also due to the ease with which people and organizations across the globe can use LLMs to produce vast volumes of climate disinformation that is specifically tailored to mislead unique audiences.

Additionally, but no less important, is the staggering amount of energy and physical resources LLMs consume over their life-cycle. While exact figures are unknown due to the unwillingness of Big Tech companies to release their data to the public, we know that data centers account for as much as 1.5 percent of total global electricity use[10] and U.S. data center consumption is predicted to double by 2030.[11] Data center energy use already exceeds the commercial airline industry.[12] AI search queries could increase energy consumption by as much as five to twenty fold, according to estimates from industry.[13] Many claim AI will reduce energy consumption, citing as much as a 50 percent efficiency gain in data centers.[14] However this is within the context of vastly expanding per-search energy use, and vastly expanding data centers. Simply put, current estimates are that it could more than double energy use.

Given the explosion in use of generative AI—ChatGPT, for example, has grown from 100 million active monthly users to 100 million active weekly users in the year since it launched—it is imperative that we better understand the extent to which it is contributing to the climate crisis.[15]

The recent EO from the Biden-Harris Administration directs the Secretary of Energy, National Climate Advisor, and others to work in collaboration with the private sector and members of academia to support development of AI tools to mitigate climate change risks. We request that this same task force consider how to ensure the AI boom does not contribute to the climate change crisis.

We urge this task force to consider how to leverage the power of the federal government to:

- Require companies to publicly report on energy use and emissions produced by the full life cycle of AI models, including training, updating and search queries.
    - Google's researchers also called for this in a 2021 peer-reviewed paper saying "To help reduce the carbon footprint of ML [machine learning], we believe energy usage and CO_2e should be a key metric in evaluating models, and we are

[5] The Times, "Climate-sceptic accounts surge after Elon Musk's Twitter takeover," April 17, 2023, Link.
[6] Friends of the Earth, "New Facebook study: 99 percent of climate disinformation goes unchecked," Sept. 21, 2021, Link.
[7] The New York Times, "Google Promised to Defund Climate Lies, but the Ads Keep Coming," May 2, 2023, Link.
[8] Media Matters for America, "Misinformation about recent whale deaths dominated discussions of offshore wind energy on Facebook," March 23, 2023, Link.
[9] Institute for Strategic Dialogue, "Deny, Deceive, Delay Vol. 2: Exposing New Trends in Climate Mis- and Disinformation at COP27," Jan. 19, 2023, Link.
[10] IEA, "Data Centres and Data Transmission Networks," Accessed November 2023, Link.
[11] McKinsey & Company, "Investing in the rising data center economy," January 17, 2023, Link.
[12] Bloomberg, "How Companies Are Seeking to Reduce the 'Invisible Emissions' of Digitization," Feb. 4, 2023, Link.
[13]Cornell University's arXiv, "Carbon Emissions and Large Neural Network Training," Accessed Aug. 14, 2023, Link
[14] MIT News, "New tools are available to help reduce the energy that AI models devour," Oct. 5, 2023, Link.Google Efficiency Report, accessed November 2023, Link
[15] TechCrunch, "OpenAI's ChatGPT now has 100 million weekly active users," November 6, 2023, Link.

collaborating with MLPerf developers to include energy usage during training and inference in this industry standard benchmark."[16]

- Study the effect AI systems can have on climate disinformation.
- Implement rigorous safeguards against the mass production of disinformation while preserving free expression and human rights.
- Require companies to provide an explanation to the general public of how generative AI models produce information, how their accuracy on climate change is measured, and the sources of evidence for factual claims they make.

Sincerely,
Accountable Tech
Action for Climate Emergency (ACE)
Amazon Employees for Climate Justice
Center for Countering Digital Hate
Check My Ads
Climate Action Against Disinformation
Ekō
Electronic Privacy Information Center (EPIC)
Fair Vote UK
Fight for the Future
Friends of the Earth
Global Action Plan
Green America
GreenLatinos
Greenpeace USA
Kairos Action
Open MIC
Roots
The Tech Oversight Project
Union of Concerned Scientists

CC: Energy Secretary Granholm, OSTP Director Prabhakar, OMB Director Young, FERC Executive Director Porter, National Climate Advisor Zaidi, Special Presidential Envoy for Climate Kerry

[16] Cornell University's arXiv, "Carbon Emissions and Large Neural Network Training," Accessed Aug. 14, 2023, Link.

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0123
Comment on OMB-2023-0020-0001

Submitter Information

Organization: National Taxpayers Union Foundation

General Comment

Please see the attached document.

Attachments

Ryan_Nabil_NTUF_AI Governance (OMB-2023-0020)

December 5, 2023

Office of Management and Budget
Executive Office of the President
725 17th Street NW
Washington, DC 20503

Re: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Ryan Nabil
Director and Senior Fellow, Technology Policy
National Taxpayers Union Foundation
122 C St NW, Suite 700
Washington, DC 20001

On behalf of National Taxpayers Union Foundation (NTUF), I welcome the opportunity to submit the following written comments in response to the Office of Management and Budget (OMB)'s request for comments on the U.S. government's draft memorandum on advancing governance, innovation, and risk management for agency use of artificial intelligence (AI). [i] Located in Washington, DC, National Taxpayers Union is the oldest taxpayer advocacy organization in the United States. Its affiliated think-tank, NTUF, conducts evidence-based research on economic and technology policy issues of interest to taxpayers, including U.S. and international approaches to artificial intelligence, emerging technologies, and data protection.

NTUF appreciates the recognition by the Biden and Trump administrations of the need to create a well-balanced approach to AI governance that seeks to promote AI innovation while reducing potential AI risks and AI misuse by federal agencies. As the U.S. government seeks to develop the U.S. AI strategy further, it has an opportunity to craft well-designed AI policies that will contribute to America's position as a global center of responsible AI innovation. We believe that the U.S. government's guidelines for agency use of AI would benefit from the following recommendations:[ii]

1. The U.S. government should develop institutional mechanisms to support the implementation of U.S. AI strategy (Question 2). [iii]

2. The U.S. government should design risk assessment and coordinating mechanisms to continuously monitor and mitigate future AI risks. Non-sensitive, non-confidential information from such a framework should be made available to the public (Question 2 and Question 8).[iv]

3. U.S. federal agencies should consider developing artificial intelligence sandboxes to understand context-specific AI risks and promote AI innovation (Question 3).[v]

4. The U.S. government should consider strengthening closer bilateral cooperation and multilateral engagement in AI governance to develop responsible AI norms and rules in the United States and internationally (Question 2).

I. Developing Coordinating Mechanisms to Support the Implementation of the U.S. AI Strategy (Question 2)

The U.S. government should consider developing mechanisms to support the implementation of the U.S. AI framework and help ensure that AI principles and guidelines are applied uniformly across different sectors. While a principles-based, context-specific approach to AI would allow the United States to develop flexible and well-calibrated rules for AI in different sectors, this strategy comes with specific challenges that would need to be addressed in the U.S. AI framework.

A central challenge is that since individual regulators have the flexibility to issue guidelines and adjust rules based on broader AI principles, there is a risk that such guidelines are not applied uniformly across different sectors.[vi] Such differences will not only create market uncertainties but will also pose a particular challenge when certain AI applications come under the jurisdiction of multiple regulators. A hypothetical example would entail the regulation of an AI-enabled investment advisory product dealing with the personal data of users – which could be subject to the overlapping jurisdiction of the Federal Trade Commission, the Federal Deposit Insurance Corporation, the Consumer Financial Protection Bureau, and even state regulators.[vii] The U.S. AI frameworks should, therefore, design preemptive mechanisms to address the potential challenge of regulatory inconsistencies that could arise in a more flexible, decentralized AI governance approach.

The UK's proposed mechanisms for the implementation of its AI framework could provide a useful starting point for U.S. policymakers to think more analytically about such issues and design policies accordingly. The UK's AI White Paper proposes seven supporting mechanisms for the following objectives: i) monitoring the overall effectiveness of the AI framework; ii) supporting the coherent application of AI principles across the economy; iii) assessing and addressing cross-sectoral risks from AI applications; iv) providing support and guidance to businesses; v) improving business awareness and consumer awareness of trustworthy AI; vi) conducting horizontal scanning for emerging risks and regulatory trends; and vii) monitoring global regulatory developments.[viii]

While the precise mechanisms would need to be calibrated and adapted to U.S. policy objectives and regulatory architecture, these proposals point to important challenges that U.S. lawmakers should

consider while pursuing a more decentralized approach to AI regulation. The table below provides some potential mechanisms – based on the UK government's AI White Paper – that Congress and the Biden administration could consider while designing the U.S. AI framework (Table 1).

Table 1. Functions to Support the Implementation of a Potential U.S. AI Framework

Functions	**Potential Activities**
1) Monitoring, Assessment, and Feedback	i) Develop and maintain monitoring and evaluation mechanisms to assess the economic impacts of the U.S. AI framework across different sectors and for the entire economy. ii) Collect data and stakeholder input from regulators, the private sector, think tanks, and academic institutions to evaluate the U.S. AI framework's overall effectiveness. iii) Monitor the framework's effectiveness in maintaining a proportionate approach to AI. iv) Assess the effectiveness of regulatory coordination between different agencies in regulating AI.
2) Coherent Implementation of AI Principles	i) Develop guidelines to support regulators in implementing the U.S. AI framework. ii) Identify potential inconsistencies in the way that different regulators apply AI principles. iii) Create a platform for regulators to discuss and address regulatory inconsistencies. iv) Monitor the continued relevance of the AI principles established in the framework.
3) Cross-Sectoral Risk Assessment	i) Create a risk register of potential AI risks to evaluate different risks and support the development of the cross-sector risk assessment framework. ii) Monitor and review prioritized risks and identify emerging risks. iii) Provide a platform to clarify regulatory responsibilities, issue joint regulatory guidance, and share regulatory best practices.
4) Support for Innovators	i) Identify potential regulatory barriers to AI innovation in different sectors. ii) Assist regulators in creating and monitoring the effectiveness of AI sandboxes.
5) Education and Awareness	i) Provide informal guidance to businesses on navigating the U.S. AI regulatory landscape. ii) Advise start-ups and companies on identifying and applying to the appropriate sandbox. iii) Improve consumer awareness and public trust about how AI is regulated in the U.S. iv) Support the creation of innovation hubs, which are typically launched by regulators to provide start-ups and companies information about AI-related legal obligations, identify business opportunities, and invest in the U.S. AI ecosystem. Innovation hubs can also help start-ups identify and apply to the appropriate sectoral AI sandbox.
6) Horizontal Regulatory Scanning	i) Monitor emerging trends in U.S. and global AI governance, new technological developments, and emerging AI risks. ii) Work with actors from the private sector, universities, and think tanks to identify, prioritize, and mitigate emerging risks.
7) International Regulatory Frameworks	i) Monitor AI-related foreign legislation and global regulatory developments and evaluate potential implications for the U.S. regulatory approach and the broader AI ecosystem. ii) Provide recommendations on improving cross-border regulatory cooperation on AI. iii) Monitor alignment between the U.S. and international AI frameworks developed by multilateral organizations like the OECD and the Global Partnership on AI. iv) Evaluate U.S. compatibility with global AI standards and identify opportunities to harmonize standards and reduce barriers to trade and cross-border data flows.

	iv) Recommend policies to the U.S. regulatory approach based on the successes and failures of regulatory approaches in the EU, the UK, Japan, and other major jurisdictions.

Source: Author based on recommendations by the UK Department of Science and Technology and the Office for AI (2023).[ix]

II. Developing Risk Assessment and Coordinating Mechanisms to Monitor and Mitigate Future AI Risks Continuously (Question 2)

A major challenge in AI governance is to develop and implement a proportionate risk-management framework to identify, prioritize, and mitigate potential risks. The differences in how various jurisdictions seek to evaluate and mitigate such risks can provide insights into how U.S. lawmakers could develop an agile, multi-stakeholder framework to identify and mitigate future risks. At the risk of oversimplification, the EU's proposed AI Act classifies AI systems into four categories of risks i) "Minimal-risk" AI systems, which require AI developers to comply with a code of conduct; ii) "Limited-risk" AI systems that require providers to comply with certain transparency requirements; iii) "High-risk" AI systems that must undergo a more rigorous conformity assessment; and iv) AI systems with "unacceptable risks," which are banned across the EU (Table 2). The EU also provides lists of AI usage that would be classified as "limited" and "high risk." (Table 2). [x]

Table 2. Categories of AI Risks Under the European Union's Proposed AI Act

Category and Requirement	**Examples**	**Statutory Basis**
Unacceptable risk: Prohibited	Social scoring, facial recognition, dark-pattern AI, and manipulation	Art. 5
High risk: Conformity assessment	Education, employment, justice, immigration, and law	Art. 6 & ss.
Limited risk: Transparency	Chatbots, deep fakes, and emotional recognition	Art. 52
Minimal risk: Code of conduct	Spam filters and video games	Art. 69

Source: Lilian Edwards, Ada Lovelace Institute (2022)[xi]

While the European Union's risk-based approach sounds reasonable on a prima facie basis, it has two major problems. First, unlike the UK's context-specific approach, the EU's one-size-fits-all approach to risk assessment fails to distinguish adequately between risks associated with different AI applications within the same sector. For instance, whereas the EU's AI Act would treat all AI-enabled tasks related to the operation and management of critical infrastructure as "high risk,"[xii] the

UK's context-specific approach recognizes that, even within high-risk sectors like critical infrastructure, not all AI-enabled tools carry the same risks and should not be subject to uniform compliance and liability standards.[xiii]

Under the European Union's proposed AI Act, low-risk AI applications within sectors classified as "high-risk" –such as education, employment, and law – would be subject to much more restrictive regulations than would be the case under the UK's AI framework (Table 2). For example, since the EU considers the use of AI in education as high risk, AI-enabled language proficiency examinations by online platforms – which often provide a much cheaper and more accessible alternative to traditional language tests like the TOEFL and IELTS– would be subject to the same compliance standards as the use of AI in other high-risk areas like medical diagnostics and critical infrastructure.[xiv] Such a restrictive approach risks hampering innovation in online learning platforms, legal services, and other areas that the EU classifies as "high risk" under the AI Act.[xv]

Notwithstanding this restrictive approach, the AI Act's risk assessment framework might struggle to be flexible in addressing future risks. Although generative AI applications like ChatGPT have become widespread since the autumn of last year, the pace and scope of their rapid development would have been difficult to predict even five years ago. Likewise, despite the best efforts of lawmakers, regulators, and technologists alike, the business of making predictions about future AI risks remains a highly uncertain one. As such, it is difficult to accurately predict the AI landscape ten years from now and the unique set of risks and challenges such developments will pose. If the U.S. adopts a similar approach of classifying prespecified AI uses as "high risk" in statutes, it risks constraining innovation while remaining less flexible in identifying and mitigating future AI risks.

Compared to the EU's approach, the UK's proposed strategy of continuously monitoring AI risks and enabling public-private collaboration to identify emerging risks represents a more flexible approach to risk management. Instead of classifying a list of AI applications as high risk, the UK has proposed a principles-based risk assessment framework, which sectoral regulators will use to evaluate risks within their regulatory remit. Furthermore, the UK government has proposed the creation of "central risk functions" – separate from sectoral regulators – that would play a central role in monitoring the effectiveness of the AI framework, monitoring current and future AI risks, and providing advice to the government on which risks should be prioritized. With closer regulatory cooperation between the government, regulators, and the private sector, this approach is more likely to enable more robust monitoring of potential AI risks, as well as the introduction or calibration of appropriate statutory instruments to address future risks as they emerge.[xvi]

A comparable U.S. mechanism – involving Congress and the federal government, sectoral regulators, the private sector, and independent risk evaluators – could be designed to identify and respond to future AI risks (Table 3). As part of this arrangement, Congress and the federal government would establish the overall U.S. AI framework and clarify risk management guidelines for sectoral regulators based on the AI framework. In turn, the sectoral regulators would enforce

such guidelines within their regulatory remit, address prioritized AI risks, calibrate rules based on regulatory experience and stakeholder input, and recommend whether the U.S. AI framework should prioritize other emerging risks (Table 3). The central risk function – ideally comprising experts, officials, and private sector representatives independent of the sectoral regulators – would evaluate the effectiveness of this framework, identify emerging AI risks, advise Congress and the federal government whether an intervention is required to address such risks, and if so, which regulators are best suited to address such emerging risks (Table 3).[xvii]

Table 3. Designing a U.S. Central Risk Function Mechanism for Artificial Intelligence Risks

Stakeholder	Identification*	Enforcement	Monitoring*
Congress and the Federal Government	i) Creates the U.S. AI framework to identify AI risks; ii) Decides which risks to tolerate, regulate, and prioritize.	Delegates the enforcement of the AI Framework to sectoral regulators.	Updates the statutory framework to address new risks if identified.
Central Risk Function Mechanism	i) Identifies and prioritizes new AI risks; ii) Provides recommendations if the new risks require government intervention.	i) Recommends which regulator(s) should address those risks; ii) Create overall risk assessment frameworks; iii) Provides advice to regulators on technical aspects of regulation; iv) Shares AI regulatory best practices.	Monitors risks and reports them to Congress and the Executive.
Sectoral Regulators	i) Identifies and prioritizes sector-specific AI risks; ii) Evaluates whether newly identified risks should be prioritized and addressed.	i) Creates regulatory guidance for businesses based on the central risk function's risk assessment framework; ii) Updates regulatory guidelines and rules based on stakeholder feedback on how effectively they are working; iii) Enforces actions against companies for violations.	Reports on the effectiveness of addressing AI risks.
Businesses	Provides information to sectoral regulators and the central risk function, as necessary and appropriate.	Complies with regulatory guidance and rules and incorporates the risk assessment framework in internal practice.	Informs the relevant regulator(s) and the central risk function mechanism if risk mitigation measures fail to address the risks.

* The mechanisms highlighted in gray comprise a regulatory feedback loop between the federal government, sectoral regulators, the central risk function, and businesses subject to the AI framework to identify and mitigate emerging AI risks.

Source: Author based on DSTI and UK Office for AI (2023)[xviii]

While such proposals need to be more carefully evaluated and adjusted to suit the unique features of the U.S. regulatory architecture and policy objectives, they provide a useful starting point for thinking more strategically about ways to address future AI risks while maintaining a flexible regulatory approach. Furthermore, identifying and addressing potential AI risks and developing mechanisms to identify and address emerging risks would help improve public trust in AI.

III. Developing Artificial Intelligence Sandboxes to Understand Context-Specific AI Risks and Promote AI Innovation (Question 3)

The U.S. government should create sectoral AI sandboxes to maximize the benefit of a flexible, innovation-focused approach to AI regulation. Such programs would allow innovative companies to offer innovative AI products under close regulatory supervision for a limited period and receive regulatory waivers, expedited registration, and/or guidance for compliance with relevant laws. Meanwhile, regulators can gain a more in-depth understanding of how emerging AI technologies and business models interact with the existing sectoral rules. Based on such insights, policymakers can craft better rules that help promote AI innovation while minimizing potential risks.[xix]

Recognizing the innovation potential of AI sandboxes, the OECD recommends the creation of such programs at the national level.[xx] Following its recently concluded consultation, the UK government is currently evaluating different models of designing AI sandbox program(s).[xxi] Likewise, as outlined in the draft EU Act, the European Commission encourages the creation of national AI sandboxes in member states (Spain launched the first such sandbox last year).[xxii] However, such programs need to be designed appropriately to maximize their innovation potential, as pointed out in our recent letter to the White House and consultation response to the UK government.[xxiii]

More specifically, U.S. lawmakers should consider creating sector-specific sandboxes to promote AI innovation in specific sectors and update sectoral legal frameworks accordingly. Furthermore, while sandboxes should entail close regulatory supervision and appropriate consumer protection provisions, they must also provide regulatory relief and guidance to make such programs attractive to innovative businesses. Finally, making AI sandboxes open to non-U.S. companies could help attract innovative foreign businesses to the United States and promote AI innovation.[xxiv]

IV. Strengthened Bilateral Cooperation and Multilateral Engagement in Responsible AI (Question 2)

Beyond AI sandboxes, the United States should consider other mechanisms – such as joint declarations, Executive agreements, and joint research programs – to strengthen tech cooperation at the bilateral level. In this context, the Joint U.S.-UK Declaration on Cooperation in AI Research and Development in September 2020 and the Atlantic Declaration in June 2023 were steps in the right direction.[xxv] Likewise, the U.S.-EU Digital Trade and Technology Council represents another forum

through which the United States could pursue closer economic and technological cooperation with the EU and EU member states. Similar opportunities also exist for bilateral cooperation with Switzerland and Japan, which seek to adopt a flexible, light-touch approach to AI governance.[xxvi] Establishing research partnerships – similar to Canada and the UK's arrangements with Japan and the EU–could also help deepen U.S. technology cooperation with like-minded nations.

Ultimately, the U.S. government must look beyond bilateral relationships and strengthen its multilateral engagement in global AI governance. Although the United States is part of several multilateral fora and institutions that are active in AI governance – such as the OECD and the Global Partnership on AI – the U.S. appears to punch below its weight in shaping AI norms through these organizations. By participating more actively in such organizations–-as has been the case with Japan and the UK's multi-stakeholder, multilateralist approach to AI governance–-the U.S. government can more actively contribute to the development of international AI norms and technical standards.[xxvii]

The development of such norms could be particularly beneficial for emerging-market and developing countries, many of which lack a robust AI governance infrastructure and look to international institutions to develop best practices in responsible AI. Along with like-minded partners – such as the EU, the UK, and Japan – the United States could play a more critical role in establishing multilateral platforms for AI governance dialogues between the governments of industrialized and emerging-market countries. As officials and lawmakers in various jurisdictions seek to develop national AI strategies, the United States and partner countries can play a more significant role in advocating a principles-based, innovation-focused AI approach that promotes economic growth and innovation while mitigating current and future AI risks.

Notes

[i] Office of Management and Budget, "Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum," *Federal Register* 88, no. 212 (November 3, 2023): 75625-75626, https://www.govinfo.gov/content/pkg/FR-2023-11-03/pdf/2023-24269.pdf.

[ii] This submission is based on the author's letter to the White House on AI governance. Ryan Nabil, "Comments to the White House: The Need for A Flexible and Innovative AI Framework," National Taxpayers Union Foundation, July 7, 2023, https://www.ntu.org/foundation/detail/letter-to-the-white-house-the-need-for-a-flexible-and-innovative-ai-framework.

[iii] Question 2: "What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?"

[iv] Question 8: "What kind of information should be made public about agencies' use of AI in their annual use case inventory?"

[v] Question 3: "How can OMB best advance responsible AI innovation?"

[vi] Ryan Nabil, "Consultation Response to the UK Office for Artificial Intelligence: Principles for a Pro-Innovation Approach to AI Governance," National Taxpayers Union Foundation, June 21, 2023, https://www.ntu.org/foundation/detail/consultation-response-to-the-uk-office-for-artificial-intelligence-principles-for-

a-pro-innovation-approach-to-ai-governance/; UK Department for Science, Technology, and Innovation (DSTI) and the Office for Artificial Intelligence, "A Pro-Innovation Approach to AI Regulation," policy paper, updated June 22, 2023, https://www.gov.uk/government/publications/ai-regulation-a-pro-innovation-approach/white-paper.

[vii] Ryan Nabil, "How Regulatory Sandbox Programs Can Promote Technological Innovation and Consumer Welfare: Insights from Federal and State Experience," *Competitive Enterprise Institute OnPoint*, no. 281 (2022), https://cei.org/studies/how-regulatory-sandbox-programs-can-promote-technological-innovation-and-consumer-welfare/.

[viii] DSTI, "Pro-Innovation Approach to AI."

[ix] DSTI, "Pro-Innovation Approach to AI."

[x] Lilian Edwards, "The EU AI Act: a summary of its significance and scope," *Ada Lovelace Institute*, April 2022, https://www.adalovelaceinstitute.org/wp-content/uploads/2022/04/Expert-explainer-The-EU-AI-Act-11-April-2022.pdf.

[xi] Edwards, "The EU AI Act."

[xii] Dechert LLP, "European Commission's Proposed Regulation on Artificial Intelligence: Conducting a Conformity Assessment for High-Risk AI - Say What?," November 16, 2021, https://www.dechert.com/knowledge/onpoint/2021/11/european-commission-s-proposed-regulation-on-artificial-intellig.html.

[xiii] DSTI, "Pro-Innovation Approach to AI."

[xiv] DSTI, "Pro-Innovation Approach to AI."

[xv] Ryan Nabil, "The EU's Recently Proposed Artificial Intelligence Act Goes Too Far," *The National Interest*, August 21, 2021, https://nationalinterest.org/blog/buzz/eu's-recently-proposed-artificial-intelligence-act%C2%A0goes-too-far-191733.

[xvi] DSTI, "Pro-Innovation Approach to AI."

[xvii] Nabil, "UK Approach to AI Governance."

[xviii] DSTI, "Pro-Innovation Approach to AI."

[xix] Nabil, "How Regulatory Sandbox Programs Can Promote Innovation."

[xx] Laura Galindo-Romero, Karine Perset, and Francesca Sheeka, "An overview of national AI strategies and policies," *Going Digital Toolkit Note*, no. 14 (2021), https://goingdigital.oecd.org/data/notes/No14_ToolkitNote_AIStrategies.pdf.

[xxi] DSTI, "Pro-Innovation Approach to AI."

[xxii] European Commission, "Proposal for AI Act."

[xxiii] Nabil, "U.S. AI Governance"; Nabil, "UK Approach to AI Governance."

[xxiv] Nabil, "How Regulatory Sandbox Programs Can Promote Innovation."

[xxv] "The Atlantic Declaration: A framework for a twenty-first century US-UK Economic Partnership," June 8, 2023, https://www.gov.uk/government/publications/the-atlantic-declaration. "Declaration of the United States of America and the United Kingdom of Great Britain and Northern Ireland on Cooperation in Artificial Intelligence Research and Development: A Shared Vision for Driving Technological Breakthroughs in Artificial Intelligence," September 25, 2020, https://www.gov.uk/government/publications/declaration-of-the-united-states-of-america-and-the-united-kingdom-of-great-britain-and-northern-ireland-on-cooperation-in-ai-research-and-development.

[xxvi] Staatssekretariat für Bildung, Forschung und Innovation [State Secretariat for Education, Research, and Innovation], "Herausforderungen der künstlichen Intelligenz: Bericht der interdeparementalen Arbeitsgruppe «Künstliche Intelligenz» an den Bundesrat" ["Challenges of Artificial Intelligence: Report of the Interdepartmental Working Group on Artificial Intelligence to the Federal Council"], December 2019, https://www.sbfi.admin.ch/sbfi/de/home/bfi-politik/bfi-2021-2024/transversale-themen/digitalisierung-bfi/kuenstliche-intelligenz.html. Der Bundesraat [The Federal Council], "Leitlinien «Künstliche Intelligenz» für den Bund: Orientierungsrahmen für den Umgang mit künstlicher Intelligenz in der Bundesverwaltung" ["Artificial Intelligence Guidelines for the Federal Government: Orientation Framework for Dealing with Artificial Intelligence in the Federal Administration"], November 2020, https://www.sbfi.admin.ch/sbfi/de/home/bfi-politik/bfi-2021-2024/transversale-themen/digitalisierung-bfi/kuenstliche-intelligenz.html. METI, "Governance Guidelines for Implementation of AI Principles."

[xxvii] METI, "Governance Guidelines for Implementation of AI Principles."

PUBLIC SUBMISSION

As of: March 22, 2024
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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0124
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Visa, Inc.

General Comment

See attached file(s)

Attachments

Visa Submission to OMB RFC on AI Draft Memorandum

Response to OMB's Request for Comment on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

December 2023

Visa, Inc.
701 Pennsylvania Ave
Suite 800
Washington, DC 20004

December 5, 2023

BY ELECTRONIC MAIL
Cindy Martinez
AI Policy Advisor
Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Document No. 2023-24269: Visa's Response to the White House Office of Management and Budget's Request for Comment on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Ms. Martinez:

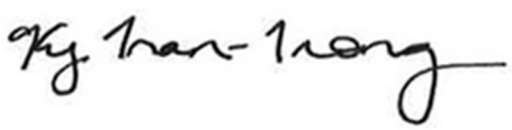
Visa appreciates the Office of Management and Budget's (OMB's) willingness to solicit multistakeholder input on its efforts to implement President Biden's Executive Order (EO) on the *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* through new artificial intelligence (AI) governance, innovation, and risk management initiatives. We welcome the opportunity to share our perspectives in response to OMB's Request for Comments (RFC) on the draft memorandum titled *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*.

As a trusted network and world leader in digital payments, Visa is committed to uplifting everyone, everywhere by being the best way to pay and be paid. We work to safely and securely connect more people, businesses, banks, and governments to the global economy. AI technologies play a crucial role in helping us achieve our mission.

In this submission, we describe how AI enables and empowers Visa in combatting fraud and facilitating secure payments. We also provide insight on our approach to cross-functional responsible AI governance, offer recommendations on how policymakers can support trustworthy AI innovation, and respond to the second and third questions in the RFC.

As OMB continues working with federal agencies to carry out the directives in President Biden's EO, we would be happy to serve as a resource and share input on federal agencies' responsible AI governance, innovation, and risk mitigation initiatives.

Yours sincerely,



Ky Tran-Trong
Vice President, Global Regulatory Affairs
Visa Inc.

Visa's AI Outlook

Artificial intelligence (AI) technologies have the potential to empower individuals, enhance business operations, boost resource efficiency and economic competitiveness, and advance the pursuit of broader societal benefits. Responsible uses of AI technologies can efficiently and accurately extract valuable insights from large amounts of data, allowing organizations to keep up with the modern demands for data-driven analyses and actionable insights.

Building trust while innovating is at the core of everything we do. Accordingly, Visa is committed to enabling a secure, reliable, and convenient payment experience for all participants in the payment ecosystem. Maintaining trust and adhering to existing laws will be key to harnessing AI capabilities across the private and public sectors. We are optimistic about opportunities for AI technologies to drive economic growth and enable positive social change, and we believe that the right legislative and regulatory safeguards can help us mitigate AI's sociotechnical risks and untap AI's manifold benefits.

How Visa uses AI

Visa has used AI technologies for more than 30 years. We first deployed AI-based technology for risk and fraud management in 1993, pioneering the use of AI models in payments.

Today, we are increasingly harnessing the power of data and data-driven technologies, including AI and machine learning (ML) systems, for a wide variety of purposes across our business, including security, network reliability, product and service delivery, fraud detection, and operational resilience. With models supporting each purpose, AI and ML capabilities at Visa have helped overcome longstanding challenges and pain points for buyers, sellers, and financial institutions in the payments ecosystem.

For example, AI and ML power several of Visa's fraud and risk management services and capabilities, including:

- Visa's Advanced Authorization (VAA) combines Visa's proprietary online authorization model with offline neural network-based ML to evaluate fraud risk in real-time, helping to mitigate potential fraud risk before transactions go through. These efforts have been effective, resulting in the prevention of approximately $27 billion in fraud globally in 2022 alone.

- Visa's Smarter Stand-in Processing (Smarter STIP) uses AI to enable transaction authorization if clients' systems are down, thereby enhancing operational resilience across the network. Smarter STIP uses deep learning methods to help financial institutions increase transaction authorizations during outages caused by natural disasters or other issues.

- Visa Consumer Authentication Services (VCAS) is an Issuer service for frictionless, data-driven authentication of e-commerce transactions. A total of 95% of transactions can be authenticated in the background, without the need for the consumer to take additional steps, creating a smooth customer experience while reducing fraud and false declines.

In the past year, we have seen the transformative potential of AI technologies, and especially generative AI technologies, as they have evolved into accessible tools and systems that businesses and individuals can leverage for various purposes. As a pioneer in AI-enabled services that powerfully combat fraud, Visa is optimistic about the continued potential of AI-for-good with the right oversight.

In the financial services industry, the National Institute of Standards and Technology (NIST) AI Risk Management Framework (RMF) continues to serve as the gold standard model for AI governance. Visa submitted comments to NIST and participated in NIST's workshops, conveying the importance of flexibly guiding organizations' efforts to effectively map, measure, manage, and govern risks, rather than taking a prescriptive, one-size-fits-all approach. As federal agencies consider how best to conduct oversight of AI use cases within their purview, we believe that allowing private-sector organizations the flexibility to customize their AI governance programs according to their individual profiles will continue to be important.

AI Policy Recommendations

Visa supports efforts to develop use-case-specific, outcomes-focused AI standards, risk management frameworks, and regulations that tailor restrictions, requirements, and incentives to potential risks and benefits. Engaging with diverse stakeholders can help policymakers understand and address the full scope of the sociotechnical risks and benefits that AI technologies can produce. Adopting a flexible, outcomes-based approach can also help regulatory frameworks remain relevant as technologies evolve and facilitate both effective risk mitigation and sustainable and scalable innovation.

Furthermore, to support responsible AI innovation, we believe that any new AI governance regulations and frameworks should aim to complement and close gaps in existing laws, rather than create conflicting or duplicative requirements. Outside of legal requirements, industry-led standards, voluntary risk management frameworks, and best practices can encourage multistakeholder collaboration on implementing AI safeguards that are suitable to the organization's sector, resources, and operational capabilities.

Federal policymakers should aim to ensure that U.S. AI regulatory frameworks are interoperable with international frameworks. Supporting interoperability helps U.S. businesses succeed in the global marketplace, given that international cooperation on AI standards and policies will promote global collaboration, consumer trust, and robust compliance.

To that end, we encourage governments and regulators to consider the following policy recommendations:

- New AI laws and regulations should not conflict with existing laws. Before creating any new regulations, policymakers should explore which existing laws could be updated or modified to address AI use cases. We recommend that governments review existing legal frameworks to assess how to apply them to AI governance, with the understanding that laws around employment, lending, and data protection already offer robust protections that may be applicable to the use of emerging technologies. It is important that any new regulations on AI are adaptable and technology-neutral. Any new regulations should also continue to foster responsible innovation, allowing beneficial AI use cases (such as fraud prevention and cybersecurity) to grow with guardrails commensurate to the level of risk involved.

- AI policies should be underpinned by a focus on consistent "good" outcomes, such as accountability, bias mitigation, and sustainable innovation. Applying these outcomes as the

benchmark for AI governance across sectors creates certainty while providing flexibility on how to accomplish the desired outcomes.

- Governments should coordinate on AI governance frameworks in order to avoid regulatory fragmentation. The United States, European Union, Singapore, and numerous other countries have already responded to the calls from civil society to develop AI governance frameworks. As policymakers around the world continue to refine their approaches to AI governance, governments should work together to avoid regulatory fragmentation and empower the private sector to collaborate on beneficial uses of AI technologies, including combatting fraud.

- AI policies should support responsible innovation and be adaptable to changing technologies. The AI space is moving rapidly, and policymakers should avoid technology-specific or prescriptive guidance that could quickly become outpaced by new innovations. Policy frameworks and/or guidance that assess the outcomes of AI use cases should ensure proper risk management, accountability, and responsible use of AI technologies while allowing organizations to operate flexibly and efficiently. This can enable organizations to keep pace with evolving technology and industry best practices. Such an outcomes- and principles-based approach can also address existing challenges effectively without producing a chilling effect on the overall advancement of AI innovation and the benefits it can deliver.

Closing

Visa recognizes the transformative potential of AI technologies. To maintain the trust we have earned from consumers and clients around the world, we are committed to trustworthy and responsible innovation. As an industry leader that continues to see the power of responsibly using AI technologies to combat fraud and build resilience across the payments ecosystem, Visa is committed to working with policymakers and other stakeholders to develop responsible, interoperable AI governance frameworks. Below, we provide our perspectives on selected questions from the RFC.

Response to Selected RFC Questions

Question 2: What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

To facilitate a coordinated approach to AI governance that mitigates risks while maximizing benefits, federal agencies should work to ensure they leverage existing sectoral laws and voluntary, industry-led risk management processes wherever possible.

Civil rights, data privacy and protection, consumer protection, competition, product liability, intellectual property, copyright, and numerous other areas of law already establish restrictions and requirements for AI developers and deployers. Furthermore, payments companies like Visa and other entities in the financial sector already operate within a highly complex framework of national and supranational sectoral laws and regulations that can help govern financial-sector AI use cases. To comply with these existing laws, agencies and the entities they regulate likely have already developed risk management and governance practices that they can use as a foundation for and/or component of AI governance programs.

To help determine whether gaps exist in current regulatory regimes, each agency should comprehensively assess how its existing authority and regulations can help facilitate AI governance. In many cases, and especially in the financial sector and other highly regulated industries, agencies may be able to effectively mitigate risks by simply clarifying or adapting the ways in which existing regulations apply to AI design, development, deployment, and oversight.

Assessing how existing laws and regulations can support trustworthy development, deployment, use, and oversight of AI technologies can help agencies avoid creating AI governance regimes that conflict with or duplicate regimes for data privacy, cybersecurity, other technologies, and other functions. This assessment can also help identify and deconflict areas in which more than one agency may have regulatory authority and facilitate inter-agency collaboration on cross-cutting AI governance priorities. By empowering businesses investing and innovating in the United States to mitigate risks without contending with undue regulatory burdens, efforts to deconflict, de-duplicate, and coordinate AI governance activities across agencies can bolster U.S. leadership in responsible AI innovation. These efforts can also promote efficient use of government resources.

Industry-led and developed standards and voluntary risk management frameworks can help federal agencies and private-sector entities establish a common set of terms and practices. In doing so, using these resources can enable interoperability and more effective collaboration across federal agencies, across private- and public-sector entities operating within the same economic sector, and across economic sectors both within the United States and internationally.

Question 3: How can OMB best advance responsible AI innovation?

OMB can best advance responsible AI innovation by continuing to help agencies develop a coordinated, outcomes-focused approach to AI governance that reflects multistakeholder perspectives. This approach

should build on existing regulations and address the potential risks and benefits that AI use cases can produce. U.S. AI governance regulations should also be interoperable with AI governance regulations in other jurisdictions around the world.

Public trust is essential to driving AI adoption and innovation. Consulting with industry and other stakeholders while developing AI governance frameworks can help ensure those frameworks reflect multiple stakeholders' priorities and conceptions of risk. Consequently, multistakeholder collaboration can help ensure AI governance frameworks build trust across numerous communities. OMB can help coordinate agencies' engagements with diverse stakeholder groups and disseminate relevant information from these engagements across federal agencies.

To promote responsible AI innovation now and in the future, AI governance frameworks also will need to be both robust and flexible, leveraging and complementing existing laws and industry-led standards. Outcomes-focused AI regulatory frameworks that establish baseline obligations, as opposed to specific, process-oriented requirements, can avoid creating conflicting or duplicative obligations and help AI governance regimes remain relevant over time. Leveraging international standards and best practices that are easier to update more frequently can help AI developers and deployers figure out how to achieve beneficial outcomes with appropriate guardrails.

We recommended above that each agency should comprehensively assess how its existing authorities, oversight activities, and procurement policies can support responsible AI governance. In our view, OMB has an important role to play in facilitating this process. For example, OMB could work with agencies to clarify and update existing regulations and help identify where tools like the NIST AI RMF can help promote responsible AI governance in line with existing regulatory requirements and goals. This exercise can also help agencies determine whether any gaps exist in existing regulatory frameworks that merit promulgating new regulations. Additionally, OMB could direct federal agencies to use their procurement policies and research partnership opportunities to incentivize AI developers and deployers to adopt standards, risk management frameworks, codes of conduct, and other best practices.

To enable U.S. AI researchers to collaborate with colleagues around the world and position U.S. companies to compete effectively in international markets, the U.S. government should work with governments around the world to promote global AI regulatory interoperability. A lack of regulatory interoperability can confuse and frustrate consumers and create undue compliance burdens that hinder growth, especially for small and medium-sized businesses. Furthermore, we believe that data governance underpins responsible AI and that promoting interoperability in data privacy frameworks will be important to achieving effective AI governance. By helping to avoid domestic AI regulatory fragmentation and to align the activities of agencies responsible for domestic and foreign policy, OMB can support global regulatory interoperability.

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0125
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Palantir Technologies Inc.

General Comment

On behalf of Palantir Technologies Inc. (“Palantir”), we respectfully offer these comments to the Office of Management and Budget (OMB) regarding the “Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum” (Docket OMB-2023-0020). Palantir welcomes these efforts to responsibly advance AI innovation in government and ensure AI safety, security and trustworthiness. In the attached document, we provide our perspective on questions raised in the RFC and look forward to future opportunities to contribute constructively to this important policy discussion.

Attachments

Palantir Response to OMB RFI

RE: Response to the Office of Management and Budget on "Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum" (OMB-2023-0020)

To Whom It May Concern:

Palantir Technologies Inc. ("Palantir") is a US-based software company that builds platforms to enable public, private, and non-governmental organizations to integrate, analyze, and collaborate on their data in a secure and privacy-protective way. We are proud to make software that enables the institutions that serve our societies to use their data responsibly and effectively. Palantir was founded in 2003 on the conviction that it is essential to preserve fundamental principles of privacy and civil liberties while using data. It is for this reason that Palantir established one of the world's first Privacy & Civil Liberties Engineering ("PCL") teams more than a decade ago, specifically to focus on the development of privacy-protective technologies and to foster a culture of responsibility around their development and use.

Our response to this Request for Comments ("RFC") is based on insights gathered over 20 years of experience building technology to uphold and enforce ethical and accountable practices in the use of our software products, including Artificial Intelligence ("AI") enablement tools and platforms. Palantir has contributed extensively to the conversation on the rise and appropriate use of AI technology through multiple public forums and responses to other RFCs to the Federal Trade Commission, National Telecommunication and Information Administration, and Office of Science and Technology Policy. In addition to these responses, we have also contributed oral and written responses to the United Kingdom's House of Lords in their Inquiry on AI in Weapon Systems, as well as the U.S. Senate Committee on Armed Services Subcommittee on Cybersecurity.

We are grateful to the OMB for the opportunity to contribute to this important policy discussion. We welcome any request for clarification and look forward to the final memorandum on these critical issues.

Sincerely,

Courtney Bowman, Global Director of Privacy and Civil Liberties Engineering
Arnav Jagasia, Privacy and Civil Liberties Engineering Lead

Responses to Questions

Question 1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

We believe that the decision to require each agency to designate a Chief Artificial Intelligence Officer (CAIO) is a constructive step to ensure the adoption of responsible AI across the Federal government in a manner that contributes to trustworthiness and accountability. Creating appropriately empowered CAIO positions within each existing agency — as opposed to positions with extra-agency authorities — as well as requiring that each CAIO "work in close coordination with existing responsible officials and organizations within their agencies,"[1] offers the best pathway to foster broader alignment with existing agency infrastructure, governance, and institutional mandates.

Based on our years of experience working alongside officials in similar technology positions across the Federal government, we can provide a set of recommendations on how to ensure CAIOs are empowered and effective in their proposed role. While each agency has diverse objectives, structures, and projects, we highlight the following generalized lessons to be considered across the breadth of covered agencies in establishing strong CAIOs:

1. It is of critical importance to imbue the CAIO position with sufficient seniority and operational authority to ensure that functional responsibilities are continually emphasized and that the role is not at risk of devolving into a ceremonial position. To ensure that new CAIOs are both sufficiently empowered and are working on mission-critical projects, it is essential that CAIOs are responsible to and report to the most senior agency officials (e.g. Secretary or Deputy Secretary level), as opposed to merely being accountable to institutional requirements. Wherever the reporting lines are situated, CAIOs should be well placed to substantively inform both technology acquisition and development efforts.

2. For senior technology officer positions more generally, we have noticed that the long-term effectiveness of individuals in these roles is often shaped by the nature and framing of their initial goals. Officers who enter their roles focused exclusively on general, high-level policy objectives are less likely to develop a firm understanding of the operational realities of their agencies' field workers and will therefore be at a substantial deficit in terms of interpersonal credibility and understanding of the specific demands of effective technology tools necessary to drive organizational change. However, those who begin their tenure by managing a very specific project and outcome are more likely able to build vertical trust with individuals across echelons, learn agency-specific knowledge on how to drive explicit outcomes, and gain credibility through tangible early wins. Following this forward-deployed field work, officers can then tackle broader agency objectives with greater authority and operational skill.

[1] See Section 1, "Strengthening AI Governance" of the draft memorandum.

3. While the CAIO will be responsible for ethical AI acquisition, development, and deployment, it is important that the CAIO works hand-in-hand with existing officials and officers who share adjacent and overlapping responsibilities with regards to ensuring programmatic and technological standards for ethics and accountability. For example, Privacy and Civil Liberties Officers will have considerable prior experience understanding the ways that agency programs and technology adoption impact fundamental rights considerations, as well as how institutional and systems capabilities may be implemented to mitigate attendant risks and vulnerabilities. CAIOs (and their counterparts) will greatly benefit from building strong working relationships with these and other officers to execute on their overlapping mission sets. This complementary benefit arises because AI is not a standalone technology, nor can the evaluation of responsible AI systems be isolated from the context of its use. As such, CAIOs will be most effective when their responsibilities are carried out in close coordination and consultation with other officers who carry complementary portfolios.

4. Just as CAIOs can benefit from the flexibility to dive deep into within-agency projects, CAIOs can also collectively benefit from the ability to reflect on the challenges of their agency-specific use cases and subsequently share lessons learned *across* agencies. Creating a forum for CAIOs to hold regular inter-agency meetings can thus be an important mechanism for information sharing, mission accountability, and even cross-agency AI collaboration. Furthermore, while the primary goal of such forums need not be directed at establishing generalized regulatory standards, they may nevertheless help to foster better cross-agency alignment on, and a more consistent outcome for, OMB's desired outcomes across the Federal government.

Question 2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

Because AI represents a general class of technologies whose benefits and risks are both tied to their contexts of application and intimately interwoven with other concerns and areas of governance consideration, we advocate against forming novel AI Governance Bodies, and instead focus on bolstering existing agency bodies with the mandate, expertise, and access required to address the implications of AI use by agencies. It is more prudent and advisable to direct efforts towards updating the scope of existing governance entities to include AI governance, as opposed to establishing a whole new body to perform AI governance.

Question 3. How can OMB best advance responsible AI innovation?

Over the last 20 years of building technology for clients across domains and jurisdictions — in both the commercial and government sectors — we offer the following recommendations on how to advance AI innovation responsibly:

- **Expand "field-to-learn" programs in AI:** We observe that the most successful government AI programs tend to succeed in large part because they employ a "field-to-

learn" or "test-fix-test" approach. Such approaches encourage rapid experimentation and iteration by allowing end-users and operators to use AI in the context relevant to their missions. In this manner, AI solutions are tested and improved through direct iteration with operators in the field. This strategy enables both technical innovation *and* ethical boundary-setting by better exposing technologists, ethicists, policy-makers, and end-users to the specific challenges of AI deployment and use, as opposed to more theoretical proposals that are disconnected from the operational setting. By encouraging agencies to adopt these kinds of programs, OMB can advance responsible and iterative AI innovation.[2]

- **Emphasize building a trustworthy data foundation:** All uses of AI will require a core data foundation to train, tune, and test AI models, as well as a software platform to safely deploy these models into production environments. Given the importance of building a strong data foundation for AI program success, OMB should encourage innovation not only in AI models and workflows, but also in core data management and data quality technologies. A trustworthy data foundation is critical for maintaining high quality data, improving information security posture, and governing appropriate use of data, among other similar processes that are necessary pre-requisites for building and using AI in operational settings. Our recommendation to emphasize the importance of building a trustworthy data foundation goes hand-in-hand with OMB's recommendations for removing barriers for responsible use of AI in Section 4(b) of the draft memorandum.

- **Encourage collaboration with multi-disciplinary stakeholders:** AI innovation should not be driven solely by data scientists and machine learning engineers. Rather, AI innovation will be most effective – and more responsible – if OMB encourages agencies to identify a multi-disciplinary set of stakeholders who can shape their strategy and approach. Building on the types of stakeholders outlined in Section 4(b)(iv)'s recommendation about the workforce, we believe relevant stakeholders for AI development, deployment, and use should include government, private sector, academic, non-profit, and civil society actors. In particular, to help identify and resolve multi-disciplinary challenges, we can encourage that stakeholder expansion include the domains of software engineering, data science, systems engineering, product design, social sciences, humanities, and technology ethics, among others.

Much of these recommendations for advancing responsible AI innovation fall within the current minimum practices outlined in Section 5(c) of the draft memorandum, as well as our recommendations for minimum practices in our responses to Questions 5 and 6 below.

Question 4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

When properly and responsibly deployed, generative AI can carry substantial promise for improving the speed and effectiveness of U.S. Government workflows. In our response below,

[2] For more on Palantir's perspective on "field-to-learn" approaches to AI development, see Palantir CTO Shyam Sankar's testimony to the US Senate Armed Services Subcommittee on Cybersecurity, and Palantir Global Director of Privacy and Civil Liberties Engineering Courtney Bowman's appearance before the UK House of Lords.

we will focus explicitly on the responsible use of Large Language Models (LLMs) to advance agency missions and business operations. For example, LLMs can lower the barrier to entry for government personnel using advanced software by allowing users to conduct analysis and give computational commands through natural language (i.e., not code). LLMs can also assist government developers in building new applications and workflows to enable faster iteration and capability development, as well as empower analysts with improved search functionality and information management. From the perspective of citizens as public services consumers, LLMs can also improve the ease with which citizens can query, solicit, and engage with government agencies.

The integration of LLMs into government workflows also carry their own unique risks and challenges. The outputs of LLMs can be complex (e.g., a paragraph-long summary of a longer document), making it difficult or impossible to define exactly what a correct answer looks like, especially when "correctness" can be a matter of opinion, interpretation, or sheer aesthetics. Perhaps most concerning, LLM responses can seem authoritative and persuasive, while still being incorrect and ungrounded in reality. And even when solving traditional supervised learning problems with LLMs, it may be exceedingly difficult to assess precisely where and how outputs deviate from reality if model developers do not start with existing manually curated training data or labels.

Fortunately, while LLM-powered workflows carry notable risks, there are responsible and effective ways to pin-point productive use cases that carry an acceptable balance of operational risk and benefit. Furthermore, there are rigorous methods to determine if and how such risks can be sufficiently mitigated for the operations at hand. More specifically, we believe that agencies can employ thorough and thoughtful Testing & Evaluation (T&E) programming to improve their ability to: (a) Identify in which contexts LLMs can make the most impact, at an appropriate level of risk, for agency personnel; and (b) Ensure that specific LLM-powered workflows are meeting the requisite benchmarks for operational efficacy, safety, security, and ethics. Such an approach combines human-centric system design and risk assessment methodologies, alongside more standard AI T&E and Operational Testing to ensure that deployed systems function accurately, robustly, and safely.

In general, it is neither desirable, nor possible, to evaluate the risks and benefits of LLM-powered workflows in abstraction. This is because the risks and benefits of LLM-powered workflows — and subsequently, decisions on the conditions under which they may be sufficiently ethical, safe, and effective to employ in real-world scenarios — are highly dependent on the context of their use and the workflows in which they are embedded. Still, we can provide some general guidance for identifying the most promising LLM-powered workflows archetypes.

Promising Use Case Archetypes

- **Semantic Search**: Semantic search uses mathematical representations of natural language learned by the LLM during its training to build a search function that reflects a more nuanced understanding of natural language queries, beyond keywords and synonyms. As a system, it is best used to augment more traditional information retrieval methods.

- **Information Extraction**: LLMs can be leveraged to extract structured knowledge from free text. For example, an LLM can be used to extract named entities or even full knowledge graphs from intel reports, as well as more nuanced extractions such as timelines for events alongside summaries of the most relevant information (e.g., converting a full medical record, including doctor notes into a series of diagnosis, treatments, and results).

- **Document Q&A**: LLMs can assist with understanding documents through a Q&A interface. Typically, this is done by adding software or AI layers on top of semantic search to summarize results for the questioner. Although there are instances of LLMs being used as a knowledge store directly, we believe this should never be the case since LLM knowledge stores are particularly and demonstrably prone to "hallucinations" (i.e., when a neural network inserts incorrect, non-factual information into a generated output, or when it produces an output that does not follow the prompt instructions). Hallucinations of this sort are dangerous both because they may appear to be presented in a confident and convincing form, and also because the underlying semantic error may be difficult (even impossible) to systematically debug. Even when extending more basic semantic search workflows, special care should be taken with use case selection, risk assessment, and workflow design in anticipation of model hallucination issues. While the risk of hallucinations makes this LLM-powered workflow too risky for many situations, it can nevertheless be a useful accelerant in lower-risk situations (e.g., allowing users to learn about an API where backing documentation provides a fail-stop way to answer questions).

- **Content Generation**: LLMs or other generative models (e.g., image, audio, multi-modal, etc.) can be utilized to produce creative content. For example, LLMs can be deployed as writing assistants and content strategists to create preliminary drafts of marketing copy and logo design. Depending on the risk profile of the application, drafts will often (or even always) require human review and refinement before extending to production environments to ensure novel content does not reflect problematic confabulations.

- **Hypothesis Generation**: Sometimes cast as "reasoning" capabilities, LLMs can use approximate retrieval and generation capabilities to generate hypotheses and suggested answers to proposed problems. This approach may also be combined with semantic search and document Q&A type workflows. For example, an LLM could be used to propose potential course-of-action (COA) suggestions to military personnel or diagnostic advice to a physician, based on the query, data, and input provided. We intentionally are not referring to this capability as "reasoning," however, because it is critical to acknowledge the fundamental limitations of such a use case, and accordingly construct any such related workflow to include *requisite verification* — through other tools or human review — of proposed answers. This use case is better considered as more of a way to "brainstorm ideas," rather than as an authoritative source of strategic advice, reasoning, or optimized solution.

- **Tool Routing**: One can use an LLM to process requests — from a human in the form of natural language — to engage with or run a specific tool. This may also include engagement with sub-components of tool selection, extraction of data for the tool, formatting data for the tool, and presenting results from the tool. Tool routing can be used to lower the barrier to entry for tool usage since end-users do not need to understand the technical details on how to find and run the tool. At the enterprise level, tool routing can enable dynamic use of information infrastructures, as well as the combining of disparate systems to create a seamless experience for the end-user.

- **Agents**: Similar to tool routing, an LLM "agent" takes machine-driven input and based on this input, can be tasked with taking an automated action. However, since full agent autonomy is rarely advisable and especially in highly consequential settings, can be explicitly prohibited or circumscribed by law or policy, hybrid situations with human oversight should be considered the most standard and defensible agent deployment use cases. A typical example here is where you have a state space model of some workflow and agents are used to manage transitions between states. Guardrails, a strong security model, and active monitoring are key design principles to constrain agent actions allowing for safe operations.

While the above use cases serve as potential archetypes for successful LLM-powered workflows, we can also highlight several common mistakes that lead to unsuccessful and/or irresponsible LLM use cases — especially when the appropriate T&E processes are not completed before real-world use.

- **Overestimating LLM Capabilities:** A primary mistake that is often made in pursuing LLM applications is the overestimation of a given LLM's capabilities. LLMs produce results that are often anthropomorphically tuned to appear to carry the voice of understanding, reasoning, and authority of human actors, when in fact the actual internal mechanics – statistics, algorithmic processes, and encoded software functions – reflect none of the actual defining characteristics of real human agents. T&E processes can help us understand the strengths, and most importantly, the weaknesses and limits of given models — the success of any use case is reliant upon an understanding and accounting of what a given LLM is (not) capable of doing.

- **Treating Models as Factual Oracles:** The process of training an LLM — which combines learning both language syntax and content from training data — can lead to content being imperfectly recalled at inference time (so called "hallucinations"). As an imperfect database, one cannot – with any reasonable degree of fidelity or reliability – apply an LLM expecting it to consistently "know" and reveal factual information. Absent other design guardrails that explicitly inhibit models from producing authoritative-sounding pronouncements, LLMs are prone to misleading the end-user by presenting factually unmoored strings of text as seemingly coherent statements.

- **Premature Automation:** A related concept to overestimating LLM capabilities involves misguided attempts to prematurely automate a process that is not sufficiently developed

or conditioned for automation. For example, consider trying to build a no-code application for executives to answer questions about their business and make decisions based on their findings. Behind the scenes, a fully-automated approach to this solution might rely entirely on an LLM to translate the executive's requests into database queries and calls to external systems to take AI-generated actions. While the use of an LLM for tool routing is appropriate in certain well-understood and -constrained contexts, completely automating this workflow might lead to risky outcomes. For example, the executive may not have the requisite technical skill to evaluate the generated database queries, both in terms of syntax and how it actually corresponds to the business question. Moreover, the AI-generated actions against external systems may not be what the executive intended. Instead, those actions could be suggested and queued for review, and then executed only once approved by a domain expert. As such, it would be irresponsible to automate the entire end-to-end workflow. Instead, intermediate workflow accelerators (e.g., tool-routing, suggested action recommendation, etc.) should be considered as more plausibly reliable applications.

Question 5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

We commend OMB for identifying critical applications of AI that should require closer consideration, especially those that might harm the safety or rights of individuals. It is possible, however, that drawing a distinction between rights-impacting and safety-impacting categories of AI applications may detract from a shared level of scrutiny and common mitigation these categories of use cases both require. As such, we propose that OMB consider a single category of "high-risk" applications of AI that encompasses use cases of AI that may cause harm to individuals. A combined "high-risk" assessment framework is advisable for the following reasons:

- **Simplifying the identification of high-risk use cases:** Creating one set of minimum practices for AI applications that impact safety or rights – or both – will simplify the identification of high-risk use cases. In the current framework, agencies may weigh whether safety-impacting AI also impacts rights in order to determine what minimum practices are relevant. The task of distinguishing between two related categories — with different assigned minimum practices — may detract from the primary objective of identifying AI applications that cause serious harm and thus deserve extra scrutiny. Unifying the categories for minimum practices will offer an easier, single threshold question to determine whether the minimum practices are relevant.

- **Reducing administrative complexity:** Currently, Section 5(c)(iv) outlines minimum principles that apply to both safety-impacting and rights-impacting AI, and Section 5(c)(v) outlines minimum practices that apply to *just* rights-impacting AI. As such, the draft as written will require agencies to keep track of two different categories of high-risk AI and two different sets of minimum best practices. This increased complexity translates to increased administrative overhead, as well as increases the likelihood for administrative and compliance error. By combining safety-impacting and rights-impacting assessments of AI — and subjecting both to the most stringent minimum practice standards — OMB can both streamline the application and accountability for

minimum practices, while bringing higher standards for responsible AI practice to more use high-risk uses cases.

- **Improving rights-protective outcomes:** Applying all minimum practices in 5(c)(iv) *and* 5(c)(v) to both safety-impacting and rights-impacting uses of AI would improve rights-protective outcomes for uses of AI that may indirectly harm individuals' rights. Moreover, the minimum practices in 5(c)(v) are helpful even for purely safety-impacting uses of AI. For example, if an agency is developing an AI tool for emergency services, which is safety-impacting per Section 5(b)(i)(A), it could also be important to notify negatively impacted individuals of adverse AI impact — a requirement that is currently only a minimum practice for rights-impacting AI as specified in Section 5(c)(v)(D). Applying the minimum practices for rights-impacting AI to all high-risk applications of AI extends these considerations of accountability and equity more broadly and can more consistently ensure that AI is used responsibly.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

The minimum practices identified for safety-impacting and rights-impacting AI comprise a helpful baseline for encouraging and enforcing the responsible adoption and use of AI by government agencies. Below we highlight several particularly helpful aspects of these minimum practices that we hope will remain in subsequent versions of OMB guidance, as well as suggested improvements to the minimum best practices.

Strengths of the current minimum practices

- **Concrete Suggestions:** In promoting Responsible AI, many organizations and agencies have produced Responsible AI "principles" that describe matters at a high-level, but often abstract away from specific values and benchmarks for responsible AI use.[3] Such value-oriented principles are helpful guidance for directing AI strategy, but they often remain too abstract for immediate adoption and implementation. As such, it is helpful that the minimum practices described in the draft memorandum present concrete, tactical suggestions that domain experts, practitioners, and engineers can implement and measure.

- **Operational Focus:** Based on our experience developing and deploying AI/ML technology, we know first-hand the importance of an "operational" focus on Responsible AI.[4] It is crucial to emphasize the operational context in which AI is used, as well as practical considerations of AI deployment such as release management, version control, and manual fallbacks, among similar tools that may not be as relevant in an academic or

[3] For examples of such value-oriented RAI principles, see those included in the Department of Defense's Responsible AI principles or the Blueprint for an AI Bill of Rights.
[4] See Response to Question 3 ("Expand 'field-to-learn' programs in AI") as well as Palantir blog post *The Efficacy and Ethics of AI Must Move Beyond the Performative to the Operational*.

research context. The focus of the minimum practices on "Operational AI," with requirements for testing in real-world contexts[5] or ensuring that there is a "human in the loop"[6], will help emphasize the considerations required for deploying AI in mission-critical, production environments.

- **Rights-Protective Approach:** Palantir has long-held that AI is both most effective and responsible when employed to assist and enhance human interests, actions, and decision-making, rather than replacing them.[7] The focus on rights-impacting AI and the minimum practices suggested are a crucial step toward advancing this shared viewpoint that AI — across all agencies and use cases — should be leveraged foremost for rights-protective outcomes. In line with our response to Question 5, we advocate that OMB propose a common set of minimum practices for all safety *or* rights impacting uses of AI. This will encourage agencies to consider rights impacts more broadly, whenever AI is used for consequential decision-making or other human-directed outcomes.

Suggested improvements to the current minimum practices

Over the past two decades of experience building technology to uphold and enforce ethical and accountable practices in the use of our software products, Palantir has built tools and helped our customers implement several workflows similar to the minimum practices outlined in the draft memorandum. Based on this experience implementing the practices of Responsible AI in our software platforms, we propose a few recommendations to bolster the minimum practices:

- **Clarify the AI Impact Assessment minimum practices.** Section 5(c)(iv)(A) outlines a minimum practice for AI Impact Assessments ("AIA"). We strongly advocate for the thorough examination of how AI is used to solve operational problems, especially for those that impact safety and human rights. For agencies to carry out these impact assessments efficiently and with the desired results, we recommend clarifying a few aspects of this requirement.

  First, when should the AIA be performed and what data is required to perform it? The memorandum requires agencies complete an AIA that documents "the intended purpose for the AI and its expected benefit, supported by specific metrics or qualitative analysis." Defining the scope of the modeling problem at the outset is crucial, but it would be beneficial to also clarify what kinds of metrics are required at this early stage. Most quantitative metrics for evaluating AI come from rigorous testing, which is only possible to carry out after the modeling problem is defined and models are developed or procured.

[5] See the "Test the AI for performance in a real-world context" minimum practice in section 5(c)(iv)(B) of the draft memorandum.
[6] See the "Provide appropriate human consideration as part of decisions that pose a high risk to rights or safety" minimum practice in section 5(c)(iv)(G) of the draft memorandum.
[7] As a recent example, see Palantir's response to the National Telecommunications and Information Administration's AI Accountability Policy RFC and related blog post, *Palantir's Response to NTIA on AI Accountability Policy*.

Second, how often should AIAs be performed? We recommend that AIAs should not be a one-time, high-investment exercise. Instead, we advocate for the continuous evaluation of the scope of the modeling problem and the suitability for an AI/ML solution throughout the entire AI lifecycle. It is sufficient to require a single AIA as a *minimum* practice, but encouraging the repeated consideration of the scope of the AI problem and solution may help guide agencies to a more iterative form of AI/ML development, which is better in line with other minimum practices, such as ongoing monitoring.[8]

Overall, it is crucial to balance the importance of conducting parts of the proposed AIA at the outset, with (1) the practical reality of when agencies will have the data required to answer those questions, and (2) the need for the AIA to stay current and not become stale. As one potential proposal, we recommend requiring a lighter-weight AIA at the outset, which would include a statement of the modeling problem, the expected benefit, and how the agency will be able to measure the success of the AI solution. Then, in subsequent minimum practices for evaluation and monitoring,[9] agencies can validate their initial AIA hypothesis and supplement it with further empirical results, or later, with the impact or outcome details tracking the AI solution's deployment in the production environment.

- **Require that agencies consider the impact to privacy of safety-impacting and rights-impacting AI.** The memorandum requires that agencies take steps to ensure that "AI will advance equity, dignity, and fairness."[10] As part of this minimum practice, we recommend that OMB require that agencies also ensure that AI will not infringe on the privacy of users or data subjects.

  Strong privacy protections are critical for the responsible use of AI. The memorandum highlights the potential risks of AI to privacy in calling out AI that has a "significant effect on [...] civil rights, civil liberties, or privacy" as rights-impacting.[11] Other government documents on Responsible AI also specifically call out the importance of privacy.[12]

  As part of the proposed minimum practices, agencies should consider how they can use data protection best practices to ensure that data or models in an AI solution do not have an adverse impact on data privacy.

Suggested additions to the current minimum practices

We also recommend that OMB consider including two additional minimum practices that address critical concerns that arise when deploying AI into operational settings:

[8] See the "Conduct ongoing monitoring and establish thresholds for periodic human review" minimum practice in section 5(c)(iv)(D) of the draft memorandum.
[9] For example, this could be a part of the "Conduct ongoing monitoring and establish thresholds for periodic human review" minimum practice in section 5(c)(iv)(D) of the draft memorandum.
[10] Section 5(c)(v)(A) of the draft memorandum.
[11] See the full definition of Rights-Impacting AI in Section (6) of the draft memorandum.
[12] For example, Data Privacy is one of the five principles of the Blueprint for an AI Bill of Rights.

- **Plan for limited releases, upgrades, downgrades, and replacements of the AI system.** As described in our Response to Question 3, we believe that AI is best developed using a "field-to-learn" methodology. This methodology, however, must be paired with rigorous pre-deployment testing, rollout, and post-deployment monitoring procedures. We recommend that as part of the minimum practices, agencies describe plans that explain how they will release and rollout AI systems to limited environments and handle upgrades, downgrades, replacements, or fallbacks on non-AI options in the event of AI failure.

  Such a release and rollout plan should entail where and when AI can be evaluated in a "limited" setting, for example in a staging or development environment. In addition, a release and roll-out plan should describe how models can be upgraded, downgraded, or replaced in the event of AI failure. Mission critical applications of AI, such as those used in some medical situations, power plant operations, and battlefield targeting, must have manual fallback workflows that meet mission requirements (i.e., "fail safe" design). By making this a minimum practice, OMB can encourage agencies to actively consider mitigations and strategies to handle AI failure proactively.[13] This is necessary to support minimum practices that mitigate emerging risks,[14] so in the event an AI model is discovered to cause adverse impacts, it can be safely rolled back and replaced with a patched model or fall back on a human solution as users encounter scenarios where AI fails or otherwise undermines operator trust.[15]

- **Plan for how to discontinue the AI system.** Agencies should be prepared to discontinue an AI system safely. When an AI system is discontinued, it should be noted as such in an agency's annual use case inventory.[16]

  We recommend that OMB consider this as a minimum practice for two reasons. First, from a governance and transparency perspective, if an AI system from production is decommissioned, it is helpful for the agency – and even the public – to know what AI approach was tried and why it failed or was otherwise deemed inappropriate or unworkable. For example, if an AI model fails because neither the model developed nor the testing conducted accounted for drift in the model inputs over time, this becomes helpful to consider for future model developers working on similar problems. Second, from a data protection perspective, if data was collected for the purpose of only building or testing an AI system, it should be deleted as appropriate, since it might no longer be

[13] It is a well-known fallacy to disregard cases where AI might fail, so agencies should account for AI failure as part of their planning. For more, see Raji, Inioluwa Deborah, et al. "The fallacy of AI functionality." *Proceedings of the 2022 ACM Conference on Fairness, Accountability, and Transparency*. 2022.

[14] See the "Mitigate emerging risks to rights and safety" minimum practice in section 5(c)(iv)(E) of the draft memorandum.

[15] See the "Maintain options to opt-out where practicable" minimum practice in section 5(c)(v)(F) of the draft memorandum.

[16] See the "Provide public notice and plain-language documentation through the AI use case inventory" minimum practice in section (5)(c)(iv)(H) of the draft memorandum. This documentation should be updated when an AI system is discontinued.

needed. By developing a process for discontinuing an AI system, an agency can consider downstream impacts of discontinuation like data deletion.[17]

Discontinuation of AI is mentioned throughout the draft memorandum,[18] so by specifically requiring agencies to plan for AI discontinuation and any downstream impacts, agencies can better uphold governance, traceability, collaboration and privacy – all key facets of Responsible AI.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

The purpose of agency reporting, as part of the annual use case inventory, should be to increase transparency and demonstrate accountability. This is crucial for collaborative, responsible development of AI across the Federal government and for the public to understand how government use of AI might impact them.

There is a comprehensive literature on best practices for AI documentation,[19] so we do not provide an exhaustive list of recommendations. Rather, we offer a sample of the types of information that can increase transparency and improve accountability:

- **Use Case Description:** Overview of AI use cases including who the end users are, how many times the system is used, and an articulation of the primary benefits of the AI system over alternatives. This could be similar to – or the same as – the AI Impact Assessment minimum practice.[20]

- **Data Governance:** Description of data governance plan for the data used to train and test the AI system, as well as any data produced by use of the AI system. This may include data protection and privacy considerations that we proposed be added to the minimum practices in our Response to Question 5.

[17] We recommend that systems are proactively designed to handle requirements like granular or systematic deletion. For more, see our blog post, *Designing for Deletion (Palantir Explained, #6): Tactics for building an effective framework*.

[18] Section (5)(c)(v)(C) of the draft memorandum requires agencies to "safely discontinue use of the affected AI functionality" if mitigation for discrimination is not possible. Footnote 31 of the draft memorandum also requires agencies to consider how to decommission AI ("Agencies are responsible for determining how to safely decommission AI that was already in use at the time of this memorandum's release without significant disruptions to essential government functions.").

[19] Mitchell, Margaret, et al. "Model cards for model reporting." *Proceedings of the conference on fairness, accountability, and transparency*. 2019; Gebru, Timnit, et al. "Datasheets for datasets." *Communications of the ACM* 64.12 (2021): 86-92; Arnold, Matthew, et al. "FactSheets: Increasing Trust in AI Services through Supplier's Declarations of Conformity." *IBM Journal of Research and Development* 63.4/5 (2019): 6-1; Bender, Emily M., and Batya Friedman. "Data Statements for Natural Language Processing: Toward Mitigating System Bias and Enabling Better Science." *Transactions of the Association for Computational Linguistics* 6 (2018): 587-604; Stoyanovich, Julia, and Bill Howe. "Nutritional Labels for Data and Models." *A Quarterly bulletin of the Computer Society of the IEEE Technical Committee on Data Engineering* 42.3 (2019).

[20] Section 5(c)(iv)(A) of the draft memorandum.

- **Risk Assessments:** Any risk assessments conducted by agencies when considering the development or deployment of their AI system should be made available as part of the use case inventory. This could include analysis of the problem AI is trying to solve, privacy or data protection impact assessments, and security assessments, among others.

- **Audit Results:** Internal and external audits of AI systems are crucial for improving accountability and ensuring that AI is used effectively and responsibly. The results of these audits should be made available for review.

- **Security Incidents and Mitigations:** Agencies may discover security incidents with the development or deployment of their AI systems. Agencies should provide reports of these incidents, as well as any mitigation efforts agencies have put in place to address such incidents.

Information provided for each agency's use case summary should not be compiled only once a year. Rather, we recommend that stakeholders in any AI project's lifecycle continuously collect and update this information throughout the development, deployment, use, maintenance, and potential discontinuation of their AI systems. While agencies can submit an annual "snapshot" of these results for their use case inventory, incorporating continuous reporting practices into the culture of AI development will best promote responsible AI innovation.

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Comment On: OMB-2023-0020-0001
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General Comment

See attached file(s)

Attachments

Indeed Comments - OMB AI Guidance

December 5, 2023

Office of Management and Budget
725 Seventeenth Street, NW
Washington, D.C. 20503

RE: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Indeed appreciates the opportunity to provide comments on the Office of Management and Budget's (OMB) draft memorandum ("Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"). Indeed is a global leading job search site, which develops and deploys responsible AI tools to help people get jobs. Indeed looks forward to being a resource in the creation and implementation of AI laws and regulations, from the perspective of the impact of AI on the labor market, as well as in the responsible development and deployment of AI.

At Indeed, our mission is to help all people get jobs. Our technology solutions, policies, and partnerships empower both job seekers and employers to improve and speed up the hiring process and help to reduce inequality and inequity in hiring. As a global leading job site, with over 350 million monthly unique visitors, we want our platform to help eliminate biases and ensure all people have access to quality work. So much so that we have publicly declared a commitment to helping 30 million job seekers who face bias and barriers in the job search process and get hired by 2030. AI is absolutely essential for large scale matching problems like employment. Thanks to AI, someone gets hired on Indeed every three seconds.

We greatly appreciate the Administration's ongoing efforts to create a risk-based approach to regulating AI, to facilitate innovation and growth, while at the same time protecting consumers against potential harms and abuses. As we believe to be the intent of the Administration's efforts, we stand at the crossroads of extraordinary innovation and disruption. With great power comes great responsibility. If we want to ensure that AI will benefit all humanity, we need to embrace our responsibility and put humanity at the center.[1]

[1] https://fortune.com/2023/09/21/indeed-ceo-ai-jobs-work-alone-making-decisions-affect-millions-people-unemployment-bias-careers-chris-hyams/

AI and the Labor Market

There is no bigger question in the world of work today than whether AI will create or destroy jobs, and what form that disruption might take. In September, Indeed Hiring Lab economists[2] published our first round of research[3] on which industries are most likely to be impacted by generative AI technologies like ChatGPT. We analyzed 2,600 skills from more than 55 million Indeed job listings to assess ChatGPT's ability to perform each task. Nearly 20%[4] of jobs were found to have "high exposure," with generative AI rated as "good" or "excellent" at performing 80% or more of the skills required by that job. Another 45% of jobs had "moderate exposure," with AI effectively performing 50% to 80% of the necessary skills. In all, more than half of required skills for nearly two-thirds of all jobs can potentially be done, at least reasonably well, by generative AI.

Jobs in fields such as child care, construction, and driving appear least impacted since they typically require physical or face-to-face interactions, for which generative AI adds little value. Sectors like legal, finance, and software development are more likely to see significant impact. In general, our research showed that generative AI is poised to impact remote jobs more than in-person jobs. Ultimately, generative AI, in the short term, is more likely to remain only decent (at best) at performing most tasks, rather than truly masterful, and is currently bad at more skills than it is good. So while virtually all jobs will be exposed to generative AI, few will be fully replaced. This does indicate that the labor market is poised to dramatically change in the coming years.

Furthermore, our latest research[5] on generative AI's impact on people shows that jobs that employ a large share of young workers aged 16-24, including food preparation & service, generally have less exposure to generative AI. As workers age into their mid-career years, they tend to move into roles that require skills that are more exposed to generative AI. Women tend to work in jobs with slightly more exposure to generative AI than men, but the differences are minor. The biggest demographic differences in exposure to generative AI are by race and ethnicity. Asian American/Pacific Islander workers tend to be more represented in jobs with the highest potential exposure to generative AI, while Latine workers are employed in occupations with the least potential exposure. Awareness of these facts is important, particularly as we weigh bias in AI.

Indeed's findings around the fields most- and least-exposed to potential GenAI-driven change clearly illustrate the different challenges posed by GenAI relative to earlier

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[2] https://www.hiringlab.org/

[3] https://www.hiringlab.org/2023/09/21/indeed-ai-at-work-report/

[4] https://www.hiringlab.org/wp-content/uploads/2023/09/Indeed-HiringLab-AI-04.pdf?isid=hiringlab_us&ikw=hiringlab_us_2023%2F09%2F21%2Findeed-ai-at-work-report%2F_textlink_https%3A%2F%2Fwww.hiringlab.org%2Fwp-content%2Fuploads%2F2023%2F09%2FIndeed-HiringLab-AI-04.pdf

[5] https://www.hiringlab.org/2023/10/26/indeed-ai-at-work-report-people/

industrial and commercial automation efforts. Many of the jobs most in demand from employers in today's tight labor market are among those with the least potential exposure

to GenAI-driven change. Unlike earlier advances in robotics and computing that largely impacted and replaced manual labor, it is knowledge workers who are more likely to be impacted by this evolution in GenAI technology. As the labor market continues to adjust to the rise of remote work, the higher the odds are that a job can be done remotely, the greater its potential exposure is to GenAI.

How people work will inevitably change as GenAI gains wider adoption, with GenAI tools augmenting or replacing certain tasks and forcing a rethink of some traditional work profiles. The most automatable tasks—debugging code, documenting work, and identifying relevant data for a diagnosis—will be replaced/supported by GenAI. But as we've seen, at its best GenAI is generally good but not great at certain tasks, and at its worst is simply bad. As such, it's likely that deep, diverse, expert, and uniquely human knowledge will stay in high demand. A person's capacity for on-the-job adaptation and lifelong learning, already critical today, will only become more important tomorrow.

AI Constraints

AI is powered by data, data comes from humans, and humans are far from perfect. This is especially true in employment: in a well-known 2003 study,[6] candidates with Black-sounding names required 50% more applications to receive the same number of callbacks for interviews than those with white-sounding names for identical resumes. A 2016 study[7] from the Institute of Labor Economics (IZA), found that job applicants with a Turkish name wearing a headscarf had to send 4.5 times as many applications as identical applicants with a German name and no headscarf for the same results. When AI models are built from data with embedded bias, the resulting models encode, replicate, and scale that bias.

A recent study[8] graphically represented this phenomenon. When asked to create images related to job titles and crime, generative AI consistently amplified stereotypes about race and gender. White Americans make up 70% of fast-food workers, but 70% of image results depicted workers with darker skin tones. Women make up 39% of doctors in the U.S., but only 7% of the image results. Throughout the study, higher-paying roles were represented primarily by perceived male workers and those with lighter skin, while lower-paying jobs were dominated by perceived female workers and those with darker skin. Images generated for "inmate," "drug dealer," and "terrorist" likewise amplified stereotypes.

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[6] https://www.aeaweb.org/articles?id=10.1257/0002828042002561

[7] https://www.iza.org/publications/dp/10217/discrimination-against-female-migrants-wearing-headscarves

[8] https://www.bloomberg.com/graphics/2023-generative-ai-bias/

In addition to potentially harmful factual knowledge, there are numerous examples of how generative AI can be "tricked" into revealing its inherent bias.[9] These problems become considerably more urgent when AI is applied in life or death arenas like medicine, criminal justice, and national defense.

Despite the staggering innovation all around us, AI is still in its infancy. If we hope to continue to benefit from the promise of AI, we need to focus considerable time and energy on addressing the risks.

Governance

Indeed's development and use of AI tools and services are centered around key guidelines and principles,[10] which, in conjunction with existing laws, regulations, and best practices, help to guide our responsible use of AI:

Job seeker first. Indeed's mission is to help people get jobs. We work hard to open access to opportunities for all job seekers. No job seeker pays for access to the jobs found on Indeed. The development, management, and use of AI is guided by our mission and this principle above all others.

Center fairness and equity. Talent is universal, but opportunity is not. Without proper care, the unfair biases and barriers that job seekers face can be reinforced or amplified at the scale that AI enables. Appropriate controls and oversight, including the principles of data protection described in Indeed's Privacy Policy, are essential to the success of AI systems and important for the protection of the people that depend on Indeed to find meaningful employment. We are committed to fairness and equity in our products, to building products that enable job seekers to benefit from AI, and to building a team that is diverse and representative of job seekers.

Listen and learn. A commitment to fairness and equity requires nuance, expertise, and commitment. These concepts are highly contextual and vary within and between cultures. There is no single or settled definition of fairness or equity. We use data, both quantitative and qualitative, to rigorously evaluate our products' fairness from initial design onward. We incorporate the lived experiences of job seekers. We know that learning is a journey and that this work is never done.

Hiring is human. AI provides exciting opportunities to augment, assist, and support people in doing their best work. However, hiring is a fundamentally human process, and humans will always have vital roles to play in job seeking and hiring. Decisions about jobs and hiring are among the most important in peoples' lives, and we want to preserve the

[9] https://www.thedailybeast.com/openais-impressive-chatgpt-chatbot-is-not-immune-to-racism

[10] https://www.indeed.com/esg/ai-ethics

human element in those decisions while continuing to improve and simplify the experience of finding the right job or candidate.

Innovate responsibly. The rapid development of AI has opened many exciting new doors for job seekers and employers. However, embracing these developments responsibly will require care, consideration, and clear-eyed assessment. It's important that we work to make these systems accountable for the outcomes, transparent in clear and simple ways how they impact people and well-governed with robust security and safety described in Indeed Safety, ensuring they respect human rights, and carefully considering the risks and potential benefits that they may bring. We welcome open dialogue about the uses of AI in the job -seeking, advertising, and hiring space.

To create truly responsible AI systems, developers and deployers need to fundamentally change the way AI systems are built. To start, we need to prepare the current and next generation of tech workers for the profound implications of technology and its impact on people's lives. Along with statistics and linear algebra, technologists should be required to study history, philosophy, ethics, and literature. A formal code of ethics for AI practitioners, such as an adaptation of the physician's Hippocratic oath,[11] would be an important starting point.

Critically, we also need to change who is building these systems. Every day, people are making vital decisions in rooms with little to no representation from marginalized groups—those that are most likely to be negatively impacted by those decisions. Women make up roughly 20% of recent Computer Science Ph.D.s—and barely 6% of Ph.D. holders are Black or Latine.[12] Representation on its own will not solve the fundamental challenges facing AI, but we will not overcome those challenges if marginalized groups do not have an equitable seat at the table.

Regulation

Any approach to regulating AI should protect and empower vulnerable and marginalized populations, encourage responsible innovation and competition, and be flexible enough to address the rapidly changing technological landscape, while also mitigating against a patchwork of inconsistent laws and regulations. Existing laws and regulations, including standards in the White House Executive Order on AI, present a strong baseline whereby developers and deployers of AI can operate in a responsible manner. Indeed looks forward to continuing to be a resource in the development of AI regulation, legislation, and best practices.

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[11] https://www.theguardian.com/science/2019/aug/16/mathematicians-need-doctor-style-hippocratic-oath-says-academic-hannah-fry

[12] https://aiindex.stanford.edu/wp-content/uploads/2021/03/2021-AI-Index-Report-_Chapter-6.pdf

Indeed was pleased to join the Future of Privacy Forum and industry partners in releasing Best Practices for AI and Workplace Assessment Technologies.[13] The opportunities for AI in hiring and employment are immense, and so are the opportunities to align on the right controls for responsible development and deployment of such systems. On behalf of Indeed, we advocate for the following principles in any legislative or regulatory framework as we believe it will support a thriving American workforce and enable technology innovation for years to come:

1. Human Involvement - AI provides exciting opportunities to augment, assist, and support people in doing their best work. AI tools with consequential impacts should be designed and operated with informed human oversight and engagement.

2. Consistent Standards for Governance - Standards for internal governance policies, procedures, and testing should be established, where reasonably feasible, to mitigate against unfair bias, protect civil rights, accommodate the lifecycle of the AI system and any variations of the system which might occur, and where applicable and appropriate allow for internal and external feedback on the development and deployment of such AI systems. We advocate for a single standard, which will allow for ease of implementation for all sizes of companies, across relevant jurisdictions.

3. Transparency and Protection - Users or consumers of AI systems should have a reasonable opportunity for understanding of the AI systems they experience. Personal data should be protected and appropriately controlled. At the same time, developer and deployers' proprietary information should be appropriately protected in any such disclosure.

We look forward to working with you on the implementation of responsible AI policy and appreciate the opportunity to share our perspective, as a developer and deployer of AI systems, and as a thoughtful leader in labor market insights. We are available as a resource at your convenience – thank you for your consideration and interest in our perspective.

[13] https://fpf.org/wp-content/uploads/2023/09/FPF-Best-Practices-for-AI-and-HR-Final.pdf

PUBLIC SUBMISSION

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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0127
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Google

General Comment

Google appreciates the opportunity to submit the attached comment in response to OMB's Request for Comments on the Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

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Attachments

Google Comments - OMB AI RFC - 12-05-2023

Office of Management and Budget
Response to Request for Comment:
Advancing Governance, Innovation, and Risk Management
for Agency Use of Artificial Intelligence Draft Memorandum
88 Fed. Reg. 75625 (Nov. 3, 2023)
Docket No. OMB-2023-0020
December 5, 2023

Google welcomes the Office of Management and Budget's (OMB's) request for comment on a draft memorandum that would establish new agency requirements on minimum risk management practices for procuring AI (Draft Memorandum).[1] OMB's Draft Memorandum is timely and important, and we appreciate the opportunity to provide suggestions on how OMB can support U.S. innovation and leadership in the development and deployment of trustworthy AI systems in support of critical government missions.

Executive Summary

The Draft Memorandum provides a strong foundation for federal agencies to deploy AI technologies to advance and protect vital public interests. Broad adoption and implementation of responsible practices for the procurement of trustworthy AI technologies will help advance U.S. leadership in AI, improve government functions, reduce costs, and ensure accountability. Below, we summarize the objectives that we recommend OMB consider when finalizing its guidance. We also provide responses to each question posed in OMB's request for comment.

Facilitate Government Adoption of AI. Government agencies and the public interest that they serve stand to gain from adopting AI in at least two ways. *First*, governments can leverage AI to improve the delivery of services to citizens, which has the additional benefit of familiarizing people with the underlying technologies and building trust that AI can be used in helpful ways. *Second*, by adopting AI, government agencies can model a forward-looking approach to the private sector and other organizations for the bold and responsible adoption of AI. The scale of government deployment and investment can ultimately help further catalyze a domestic AI ecosystem and, by requiring standards in terms of AI system performance, also help enhance the quality and safety of commercial and enterprise AI products.

Ensure a Risk-Based Approach that Supports AI Adoption and the Delivery of Government Services. Agencies should take a risk-based approach to AI procurement and deployment, which factors in AI's tremendous public interest benefits while balancing the need to mitigate potential risks. The Draft Memorandum defines a comprehensive list of Minimum Practices for agencies to adopt before and when using "safety-impacting" and "rights-impacting" AI. Less helpfully, "safety-impacting" and "rights-impacting" AI are defined so broadly as to capture a wide range of AI applications, including potentially many

[1] *Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum*, OMB, 88 Fed. Reg. 75625 (Nov. 3, 2023).

well-established tools, such as mapping technologies, spam filters, and search tools, that have been incorporating AI for many years to the benefit of American businesses and consumers. Unless those requirements are defined more specifically and applied carefully, they could unduly limit the government's deployment of AI in ways that would support the delivery of government services to citizens.

We appreciate that the Draft Memorandum recognizes this range of risk profiles to some extent by allowing agencies to waive certain requirements for a specific AI application or component. But this creates a default presumption against deploying, rather than encouraging agencies to deploy AI where it is in the public interest. We also urge OMB to make explicit in the Draft Memorandum that agencies should not take a one-size-fits-all approach but should instead implement the Minimum Practices in Section 5 based on any specific risk of the intended application.

Clarify Roles and Responsibilities to Ensure Agency Alignment and Transparent Processes. To ensure that the regulatory and procurement processes are fair, scalable, and repeatable, agencies need to communicate clear and detailed documentation requirements and details of the agencies' own risk assessment reviews (e.g., when and how reviews are conducted, on what cadence, and with whom the results will be shared), ideally in a machine-readable and extensible way (e.g., with structured content within documentation, reflecting consistent definitions and metrics). *Recommendations*:

- Call for agencies to clarify whether and to what degree vendors or agencies will be held accountable if new issues are identified following deployment. In general, liability and accountability should be assigned to the actor that has the most information about the intended use and potential forms of abuse.
- Clarify the extent to which AI vendors, rather than the agencies themselves, will be expected to perform some or all of the Minimum Practices for safety-impacting and rights-impacting AI that OMB would require agencies to implement. This point is particularly important to clarify for practices in the pre-deployment phase and as agencies build capacity to test AI performance and to "independently evaluate the AI."
- Refine the descriptions of some of the purposes presumed to be safety-impacting AI to focus on use cases that are reasonably likely to be unsafe.

Support U.S. Competitiveness and Innovation. OMB should guide agencies to regulate or procure AI in ways that support U.S. competitiveness and innovation leadership. Government should promote public-private partnerships that build a robust, responsible AI ecosystem and enhance the public sector's ability to deliver critical services. The U.S. government should also protect U.S. companies' valuable sensitive and proprietary intellectual property, carefully protecting any companies' AI information it obtains as part of its regulatory processes, and enforcing federal laws protecting companies against economic espionage and theft of trade secrets. *Recommendations:*

- Encourage different types of safety testing appropriate to the risk presented by the application and reflective of existing capabilities—including recognizing the role of internal red-teaming. For example, the Draft Memorandum's endorsement of "external AI red-teaming" should be expanded to internal *and* external red-teaming, which would

also align with the voluntary commitments made by Google and other AI companies in conjunction with the Biden-Harris Administration.

- Encourage agencies to replicate and expand public-private partnerships like the AI Village DefCon Generative AI Red Team events and the Defense Advanced Research Projects Agency AIxCC Grand Challenge to explore important and novel use cases for AI, which will benefit the public and private sectors.
- Protect sensitive and proprietary information and intellectual property developed by the private sector by guiding agencies to ask for only the information they need (minimizing federal access to sensitive trade secrets), providing agencies with the authority to withhold such information from public disclosure and enforcing federal laws protecting companies against economic espionage.

Focus on System Performance. OMB should ensure that agencies have adequate governance structures and implementation mechanisms (overseen by OMB through means like the cross-agency priority goal framework) to enable repeatable, scalable, efficient, and effective use of AI to produce optimal outcomes for the public. *Recommendation:*

- Focus on outputs rather than inputs, avoiding requirements for access to vendors' AI training data (which may include competitively sensitive trade secrets and generally will not explain the outputs of AI systems). OMB should also clarify that data input access requirements do not apply to vendor training of the base or foundation model but to agency management of federal data used by the agency to fine-tune the base models provided by vendors.

Encourage Security-by-Design. OMB should prioritize national security by ensuring that agencies embed "security-by-design" principles in their AI procurement policies, including using cybersecurity as a factor in selecting vendors. The Draft Memorandum should be clear that security must be a shared responsibility between agencies and AI providers. *Recommendation:*

- Advise agencies to monitor how AI product vendors manage security issues. Agencies should consider requiring mitigation plans from vendors to ensure that underlying security weaknesses in the product are comprehensively addressed.

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Question 1. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

Chief AI Officers (CAIOs) will be vital to overseeing AI policy within their agencies and coordinating AI policy across other agencies. Given the importance of this role, OMB should adopt measures that hold CAIOs to the highest standards of leadership and accountability, and agencies should be transparent in providing information about CAIOs and their qualifications.[2]

[2] The Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI EO) directs OMB to specify the requirement that agencies appoint CAIOs and specify

The Draft Memorandum outlines some minimum qualifications for CAIOs based on seniority and authority[3] and establishes a procedure for agencies to identify their CAIOs.[4] Information about the CAIOs should also be publicly available, as such transparency can instill further trust in agencies while helping members of the private sector understand the type of individuals that could fulfill such a role for their organization. Accordingly, OMB should require agencies to publicly list their CAIOs' backgrounds and qualifications. These actions will keep constituents informed and align with the current approach that some agencies take with regard to posting information about members of leadership.[5] It would also be useful for OMB to consider how Chief Data Officers, Chief Information Security Officers, and Chief Information Officers will interoperate with the new CAIOs, as AI development is a cross-cutting issue.

Question 2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

An AI Governance Body, or AI Governance Board, can play a substantial role in shaping agency actions on AI. Such a governance Body or Board can be particularly effective if it ensures transparency and leverages existing frameworks and resources from government and industry. Further, in many cases, agencies have existing internal governance bodies that consider the agencies' use of AI in their specific remit. These existing, expert entities should be tasked with assessing, enabling, and promoting broader AI tools rather than tasking a new body to perform AI governance. We offer the following suggestions to help OMB establish coordination mechanisms that facilitate the continued adoption of AI in the federal government.

Emphasizing Transparency and Engagement with Stakeholders

Government transparency is crucial to promoting trust. Accordingly, agencies' AI development and deployment efforts should be made public as much as possible. For example, an AI Governance Board can hold open meetings, share meeting minutes and outputs, and host listening sessions to permit the public and the AI community to share ideas and concerns at a regular cadence. It could also report annually on its efforts.[6] Such operational transparency will

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the "roles, responsibilities, seniority, position, and reporting structures" for these officers. Executive Order No. 14110, Sec. 10.1(b)(i) and (b)(ii).

[3] CAIOs for CFOs Act agencies would need to "be a position at the Senior Executive Service, Scientific and Professional, or Senior Leader level, or equivalent." and for other agencies "be at least a GS-15 or equivalent." Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence, OMB, Sec. 3(b)(iii) (Nov. 1, 2023) ("Draft Memorandum"). CAIOs must also have sufficient authority to execute their responsibilities under the Draft Memorandum.

[4] Draft Memorandum Sec. 3(a)(i).

[5] *See, e.g.*, *Members and Leadership*, U.S. Chief Information Officers Council (last visited Dec. 2, 2023); *Council Members*, Federal CDO Counsel (last visited Dec. 2, 2023).

[6] For example, Google annually releases AI Principles progress reports to share lessons learned on issues such as responsible AI, algorithmic transparency, privacy-enhancing technologies, and AI R&D. *See* *Implementing Our AI Principles*, Google AI (last visited Dec. 4, 2023).

allow the public to understand how agencies adopt AI and enable industry and academia to lend their expertise to support consistent government practices.

An AI Governance Board can enhance transparency further by allowing the AI community to participate in the development of documentation requirements and agency compliance plans. By publishing drafts for public comment and holding listening sessions, agencies can identify their specific information needs and capitalize on the AI community's specific domain knowledge and experience to create effective policies that are quick to implement, consistent across agencies, and enable secure, scalable adoption of AI. Public-private working groups and other public proceedings can also create opportunities for widespread participation. Indeed, the government successfully employed these approaches in creating one of its foundational AI guidance documents, the National Institute of Standards and Technology's (NIST's) AI Risk Management Framework (AI RMF).[7] Meaningfully involving interested constituents and industry stakeholders in agencies' internal governance of AI should lead to more beneficial outcomes.

OMB should also support federal participation in non-federal settings that involve AI innovation, including allowing federal employees to do outside work in academic or research settings, allowing federal employees to participate in nonprofit organizations' activities or discussion fora, and enabling specific Public-Private Talent Exchanges such as the Department of Veterans Affairs VHA Executive Management Fellowship,[8] military and civilian fellowships with Federally Funded Research and Development Centers and industry, and the Department of State's Eagleburger Fellowship.[9]

Encouraging Alignment with Well-Developed Frameworks

To promote a cohesive agency approach to AI and leverage existing resources, OMB should recommend that agency-adopted policies align with established, effective risk management frameworks and best practices currently in use by the industry. For example, we recommend encouraging agency policies to mirror the AI RMF,[10] which is already being incorporated by industry and other organizations into their AI policies and principles.[11] Notably, the AI RMF complements the cybersecurity and privacy frameworks previously developed by NIST that have been voluntarily and widely adopted in the U.S. and abroad.[12]

Industry-developed policies and frameworks can also provide useful starting points for agency policies, and we recommend alignment with these types of resources as well. For example, Google's Secure AI Framework (SAIF), which is inspired by security best practices and supports AI risk mitigation and scale protections, offers a practical approach for public and

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[7] *Artificial Intelligence Risk Management Framework (AI RMF 1.0)*, NIST (Jan. 2023) ("NIST AI RMF").
[8] *VHA Executive Management Fellowship*, Institute for Learning, Education and Development (ILEAD), U.S. Department of Veterans Affairs (last visited Dec. 2, 2023).
[9] *About the Fellowship*, Eagleburger Fellowship (last visited Dec. 2, 2023).
[10] *See* NIST AI RMF.
[11] *See The public sector guide to getting started with generative AI*, Google, at 57 (2023) ("[Google's AI Principles] guide our work including how we map to key frameworks, like the [NIST] AI Risk Management Framework.") ("GAI Public Sector Guide").
[12] *See NIST Cybersecurity Framework*, NIST (2023); *NIST Privacy Framework*, NIST (2020).

private sector users to address security trends and risks specific to AI systems.[13] Similarly, Google's AI Governance reviews[14] and Responsible AI Practices[15] provide a model for responsible AI.

Drawing on Existing Expert Governance Bodies

OMB asks about the benefits and drawbacks of having agencies establish new bodies for AI governance versus relying on existing groups.[16] We urge agencies to use their existing groups (e.g., bodies focused on information technology and cybersecurity) where possible to consider AI within that specific context. Using existing bodies will help ensure that domain experts integrate AI into their work. It will also avoid overlapping governance mechanisms and needless bureaucracy or red tape that could otherwise make it more difficult to deploy new tools.

Question 3. How can OMB best advance responsible AI innovation?

As agencies expand their AI use, they can foster responsible innovation by adopting policies that encourage competition, prioritize security, and provide developers with the tools necessary to confront society's greatest challenges. We believe that the following measures will help agencies lead on this front.

Interoperability and Access to Data and the Tools for Innovation Will Support Responsible AI Development

As the government seeks to implement AI technologies, it should do so in a way that establishes a level playing field for existing vendors and new market entrants. *First*, to support robust competition and innovation, we recommend that agencies prioritize interoperability and commercially available infrastructure as they adopt AI technologies. Doing so will support a vendor-agnostic environment, permitting new or competitive technologies to be slotted in seamlessly as they become available. Exceptions from this approach should be rare, with well-documented justification. If an agency cannot integrate technology from new vendors, it will miss opportunities to adopt superior technologies as they become available. This risks impeding the agency's mission and exposing the agency to security risks if the incumbent technology becomes compromised. It also excludes other vendors from competing fairly to serve agencies, thus distorting the innovation ecosystem and potentially undermining the country's competitive edge.

Further, tools exist today that can assist agencies with adopting an interoperable approach. For example, Google Cloud Platform offers developer-friendly hybrid/open solutions, providing

[13] *Introducing Google's Secure AI Framework*, The Keyword (June 8, 2023).
[14] *See AI Governance reviews and operations*, Google AI (last visited Dec. 2, 2023).
[15] *See Responsible AI practices*, Google AI (last visited Dec. 2, 2023) ("Google Responsible AI Practices").
[16] *Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum*, OMB, 88 Fed. Reg. 75625, 75625 (Nov. 3, 2023).

access to public datasets, Anthos, Apigee, Kubernetes, and more.[17] These kinds of resources democratize access to important tools, sparking innovation and accelerating growth.

Second, we encourage OMB to advise agencies to make government data (e.g., scientific data) available where possible and to enable data portability. These actions will ensure that government data can be used to develop beneficial AI applications, that the public can learn and benefit from data, and that datasets can be easily used by different vendors (while including safeguards to respect vendors' intellectual property rights).[18] This approach bolsters competition and enables widespread research and innovation.

Third, we recommend that the guidance promote equal access to the tools for innovation. The Draft Memorandum instructs agencies to "ensure adequate access for AI developers to the software tools, open-source libraries, and deployment and monitoring capabilities necessary to rapidly develop, test, and maintain AI applications."[19] We applaud this approach, which will accelerate innovation, expand opportunity on an equitable basis, create jobs, and offer agencies access to the best possible technologies to serve their missions.

To maximize these benefits, OMB should promote and provide the resources necessary for agencies to set up "sandboxes" or "Discovery Zones" as spaces for innovation. These environments, which might be modeled on Google's Vertex AI Discovery Zone, would allow for testing and running a proof of concept or prototype as research and development.[20] They would also give developers the flexibility needed to test a solution and measure the potential impact before triggering risk-mitigation requirements.

Clear Expectations for Procured AI Will Promote Competition and Encourage Responsible Development

At the outset, in assessing whether to use AI tools, agencies should undertake a holistic assessment. Such an assessment would factor in the resources and costs that would otherwise be incurred to perform the same tasks without using AI. Specifically, a holistic assessment would weigh: (1) the risk of unlawful discrimination and harmful bias from using non-AI methods, and the costs to mitigate those risks; and (2) the risk of unlawful

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[17] *See* Datasets, Google Cloud (last visited Dec. 2, 2023); Apigee API Management, Google Cloud (last visited Dec. 2, 2023); Hybrid and Multi-cloud: Anthos and Google Kubernetes Engine, Google Cloud Learn (last visited Dec. 2, 2023); Why Open Cloud?, Google Cloud (last visited Dec. 2, 2023).

[18] Google's Data Commons project synthesizes publicly available data from government agencies and other authoritative sources into an open source, API-accessible knowledge graph available to everyone. It links references to unique entities (e.g., cities, counties, and organizations) that exist across different datasets to nodes on the graph, such that users can access data about a particular entity aggregated from different sources without the significant data wrangling procedures required to clean or join records. Data Commons is also now using LLMs to create a natural language interface that allows users to ask questions, making it even more useful. *See* About Data Commons, Data Commons (last visited Dec. 2, 2023).

[19] Draft Memorandum Sec. 4(b)(i).

[20] As a roadmap for creating Discovery Zones, an agency might start with a project kickoff and follow through with use case exploration, pre-built demos, workshops, a secure enterprise-wide sandbox environment, training programs, and professional services for "jumpstart" offerings focused on discovery via search, summarization via conversational AI, and automation via classification/summarization.

discrimination and harmful bias from using AI methods, and the costs to mitigate those risks. Using holistic assessments will help agencies to make the most of AI's cost-saving potential on behalf of the public.

There are two items in the draft that should be clarified to promote careful evaluation of AI systems and robust competition among vendors:

- OMB should clarify the meaning of Sec. 5(d)(ii)(A), which states that agencies should obtain "*adequate documentation* of procured AI" to "ensure transparency and adequate performance."[21] New entrants and competitors should know upfront what documentation agencies require under this provision. Otherwise, incumbents would have a leg up in designing technology that can meet the agency's standards.
- OMB should also clarify the meaning of Sec. 5(d)(v)(a) to ensure that it does not advantage incumbents. This provision recommends that, in their procurement contracts, agencies require "adequate testing and safeguards" for generative AI.[22] Through contracting, incumbents could scope the meaning of "testing and safeguards" to be narrowly tailored to their existing processes, leading to requirements that would be unnecessarily costly or difficult for others to achieve. OMB should advise agencies to adopt contracting policies that help avoid such conduct, perhaps by allowing vendors to satisfy "adequate testing and safeguards" requirements in varied ways.

Agencies and vendors should also have a shared understanding of the allocation of accountability. The guidance should recommend that agencies clarify whether and to what degree vendors or agencies will be held accountable if risks that were not identified in the pre-deployment phase are identified in the post-deployment phase. For example, if vendors take appropriate precautions to avoid reasonably foreseeable harms, they should not be held liable for events that cause harm after completing pre-deployment risk mitigation. This approach makes sense because agencies will have superior information about the intended use of procured technology and potential forms of abuse. The agency's pre-deployment requirements for risk mitigation will be the best method for vendors to verify that their products are safe for use as the agency intends.

Finally, agencies should evaluate the security of their AI solutions. Security is a shared responsibility between agencies and vendors, and the OMB guidance should reflect this. It is important that agencies monitor how AI product vendors manage security issues. Vendor products with a history of exploitation present a heightened risk for agency use, and when problems arise, agencies should evaluate whether to continue using such vendor's products.

Existing Statutes and Regulations Establish a Solid Framework for Responsible AI Use

We recommend that agencies prioritize relying on existing statutes and regulations for regulating technology, rather than assuming a completely new regime is needed to address AI. This approach mirrors the U.S. government's approach to other new technologies and has a proven record of enabling responsible innovation.

[21] Draft Memorandum Sec. 5(d)(ii)(A) (emphasis added).
[22] Draft Memorandum Sec. 5(d)(v)(a).

Many issues around responsible AI are also common to the operation of complex software already used by retailers, banks, insurance companies, manufacturers, and others. For example, cybersecurity frameworks and best practices such as the NIST Cybersecurity Framework,[23] which have been used to secure critical infrastructure and valuable financial, health, and national security information, can also be used to secure AI systems. Expanded use of existing anti-fraud measures can help AI systems maintain accuracy and protect against inaccuracies. Appropriate enforcement of economic espionage and trade secrets laws can protect sensitive intellectual property and encourage innovation. And established intellectual property law (particularly the doctrine of fair use) provides a framework for balancing the interests of existing and new creators and inventors.

Question 4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

Generative AI can unlock efficiencies in data processing and analysis and service provision, accelerate scientific research, and develop new groundbreaking technical and policy solutions.

Core Capabilities and Applications

The core capabilities of generative AI are **creation** (bringing thoughts and ideas to life), **summarization** (condensing and summarizing large quantities of knowledge into an understandable format), **discovery** (helping users find what they are looking for), and **automation** (automating services across multiple channels). These capabilities give agencies powerful tools like **chat** (a natural way to interact with AI models suitable for improving user interactions, enhancing product capabilities, training employees, and more), **search** (allowing users to draw from across a specific knowledge base for tailored and targeted interactions), **content generation** (creating high-quality text, images, speech, and code), and **associative reasoning** (the ability to suggest associations in information based on context, frequency, or proximity, bringing new ways to interpret data).

Roadmap for Maximizing Generative AI's Capabilities

Agencies may find this roadmap useful for deciding how to maximize generative AI's core capabilities.[24]

[23] *NIST Framework for Improving Critical Infrastructure Cybersecurity*, NIST (2018).
[24] GAI Public Sector Guide at 12.

STRATEGY FOR FIRST 30 DAYS		**Step 1**: Identify a specific domain.
Step 2: Select a job or function in that domain.	**Step 3**: Determine data sources needed for job or function.	**Step 4**: Assemble "tiger team," including mission or key stakeholder, prompt engineer, IT operations lead, and data owner.
Step 5: Define intentions, objectives, and outputs.	**Step 6**: Design prompts for model with tiger team.	**Step 7**: Build user experience and user interface.
Step 8: Expand access to more individuals.	**Step 9**: Build a "Language Model operations plan."	**Step 10**: Expand usage to additional cases within the same domain.

STRATEGY FOR DAYS 30-90	**Step 1**: Host a hackathon.
Step 2: Spread the word through innovation challenges or accelerators.	**Step 3**: Encourage civic engagement.
Step 4: Create a center of excellence.	**Step 5**: Bring in partners.

Identifying Opportunities and Use Cases

Agencies should adopt recurring processes to consider where generative AI may be advantageous and which new generative AI technologies may be more effective than current approaches. These processes should be open to the public, and agencies should invite industry to share information that will assist decisionmaking.

Agencies should also consider priority use cases, such as:

- **Improving agency operations** – Technologies that summarize and derive insights from data banks are enormously useful for government agencies, whose employees often need to look through hundreds of pages of documentation for policy questions.[25]

[25] For example, Google's "Vertex AI Search for Government" uses the same semantic search technology as Google Cloud Search to search across an entity's Google Workspace data as well as third-party data sources, but with greater control over the way the search engine is configured. It uses Google's search technology to deliver relevant results, and it can be customized to meet agencies' specific needs. *See* GAI Public Sector Guide at 33.

- **Enhancing constituent services** – Agencies can also leverage AI to answer stakeholders' questions whenever and wherever.[26]
- **Improving accessibility** – Generative AI technologies can also assist agencies with receiving stakeholder input, making agencies more accessible and responsive and furthering compliance with the Americans with Disabilities Act.[27]

Targeted Red-Teaming

AI risk-management requirements should be tailored to the specific application of AI technology. This approach would align with OMB's guidance that "[a]gencies are encouraged to include tailored risk management requirements in contracts for generative AI, and particularly for dual-use foundation models."[28] Tailoring means that external red-teaming should be required only where "appropriate and technologically feasible." It would also accord with OMB's language for other requirements in this subsection of the Draft Memorandum[29] and properly narrow the scope of the requirements.

OMB should also recommend that agencies use different types of safety testing to reflect both the potential risk presented by the application and existing capabilities—including recognizing the role of internal red-teaming. For example, the Draft Memorandum's inclusion of "external AI red-teaming" as a risk management requirement should be revised to cover internal and external red-teaming, which would also align with the White House voluntary commitments.[30]

Question 5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

We appreciate OMB's focus on AI use cases that may affect safety and rights. That said, the Draft Memorandum's broad scoping of "safety-impacting AI" and "rights-impacting AI" may preclude the adoption of AI tools that could advance the public interest. OMB should instead provide for more fine-grained multi-factor assessments of AI tools that balance a variety of use case-specific considerations, with a significant role in this for the CAIO and consistent with a risk-based approach. We thus suggest tailoring the definitions of safety- and rights-impacting AI to target high-risk systems and removing the general presumption that a specified list of AI use cases should trigger full risk assessments while also ensuring that such a

[26] For example, agencies could use Google's "Vertex Conversation for Government" to deploy multilingual virtual agents that draw on agency data to answer questions in real time. *See* GAI Public Sector Guide at 34.

[27] Google's "Multilingual Chat" offers several solutions to help agencies interact with constituents across language barriers and cultural differences. And Google Cloud's "Natural Language API" provides rapid insights based on large sets of text, such as call center logs, comment fields in surveys, or internet content, including social media posts and news stories. *See* GAI Public Sector Guide at 35; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).

[28] Draft Memorandum Sec. 5(d)(v).

[29] Draft Memorandum Sec. 5(d)(v) (Generative AI models should "have capabilities, *as appropriate and technologically feasible*, to reliably label or establish provenance for their content as generated or modified by AI." (emphasis added)).

[30] See *Fact Sheet: Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI*, The White House (July 21, 2023).

list of use cases does not result in additional hurdles to the procurement process particularly and adoption of AI generally. Doing so will help ensure that procurement policies facilitate use of trustworthy technology and AI's benefits can be fully realized.

Refining the Scope of Technologies Covered by "Safety-Impacting AI"

AI is a valuable tool that can enhance human safety at the workplace, on the roads, and beyond.[31] Any requirements adopted by OMB should enable AI systems to advance the public interest while also taking appropriate steps to address risks to safety.

Section 5(b)'s broad definition of safety-impacting AI[32] should be revised to align with American tort law's focus on the material risks of direct injury to people.[33] Many existing technologies that use AI (e.g., search, mapping and geolocation, translation, spam-filtering) could have hypothetical impacts on "safety" if misused, and the current definition would discourage, if not block, federal agencies from using them.

Below are some examples of specific areas where current definitions are overbroad—but we urge a careful look at the entire list.

- Not all "physical movements" are safety-impacting. Instead, this section should be narrowed to prosthetics or robotic appendages that can cause significant physical injury or transport heavy or hazardous materials.
- "The movement of vehicles" should be changed to "the autonomous operation of vehicles under conditions in which human operators cannot take control of the vehicle or other automatic safety mechanisms are not in place." This targets the systems that present the highest safety risk if an error occurs, as the human operator would be unable to take control of the vehicle.
- "Responses to insider threats" should be clarified to identify what activities would be covered, as not all responses would necessarily impact safety.

Improving the Scope of Technologies Covered by "Rights-Impacting AI"

We believe that AI can also be a powerful accelerant to progress in civil and human rights. We recommend that agencies actively look for ways to leverage AI to progress civil and human rights, such as rights to civic participation, education, and work. Examples of AI use cases addressing human rights challenges include: classifying the effects of 71 million genetic mutations to pinpoint the cause of diseases;[34] broadening access to important

[31] *See, e.g.*, *How AI Is Helping To Improve Transportation Safety On A Global Scale*, Forbes (May 12, 2023); *Artificial intelligence and on-the-job safety*, Safety and Health Magazine (Dec. 19, 2021).
[32] *See* Draft Memorandum Sec. 5(b)(i), Sec. 6.
[33] *See e.g.*, Dan B. Dobbs, et al., *The Law of Torts* § 161 (2d ed. 2023) ("Courts routinely apply some form of risk-utility weighing as a means of determining whether conduct was negligent.").
[34] *See e.g.*, *A catalogue of genetic mutations to help pinpoint the cause of diseases*, Google DeepMind (Sept. 19, 2023).

health-scanning technology[35] and improving clinician access[36] to patient health data; and building new technologies that serve diverse users.[37]

As with its overly broad definitions of "safety-impacting AI," Section 5(b)'s definitions of "rights-impacting AI" could inadvertently discourage the adoption of AI tools that promote the interests of historically overburdened and underserved communities. The breadth of the current definitions also makes it hard to properly anticipate the range of potential agency actions that could be covered by OMB's guidance. As discussed below, we recommend aligning the scope with a risk-based approach that facilitates the adoption of beneficial AI tools while dedicating agency resources to assessing and mitigating the risk of higher-risk applications.

Avoiding Unnecessary General Presumptions About AI Technologies

OMB should focus on anticipating what civil and human rights risks may surface from AI products. Rather than presuming at the outset that a specified list of AI use cases impacts rights and safety (automatically triggering a full set of assessments),[38] agencies could undertake a pre-procurement review of whether an AI use case is actually likely to materially impact rights or safety. OMB has already effectively authorized this approach by allowing CAIOs to issue waivers.[39] But putting the burden on agencies to conduct a full assessment for each of the listed use cases assumes the existence of a problem until proven otherwise and is likely to slow federal agency adoption of many beneficial tools. Many AI applications developed to date have widespread and inclusive benefits that significantly outweigh their risks, and agencies should be free to use them.

OMB's guidance should start by aligning requirements for documentation, risk assessment, and management practices with relevant and evolving standards, frameworks, and industry best practices.[40]

OMB can look to industry for models on how to assess the impact of an AI use case. Google, for example, has implemented scalable frameworks to conduct due diligence throughout the product development lifecycle. Teams consider relevant rights, such as non-discrimination, accessibility, privacy, bodily autonomy, and access to information on a continuous basis as well as at three key inflection points:

- **Data** – AI models may replicate (or correct) biases present in the data they were trained on, so Google invests in diversifying and debiasing training datasets as appropriate.

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[35] *See, e.g.*, *The Check Up: our latest health AI developments*, The Keyword (Mar. 24, 2022).
[36] *See, e.g.*, *How fact checkers and Google.org are fighting misinformation*, Google Cloud (Oct. 9, 2023).
[37] *See, e.g.*, *A partnership with Howard University to improve speech technology for Black voices*, The Keyword (Sept. 20, 2023); *3 ways AI is scaling helpful technologies worldwide*, The Keyword (Nov 2, 2022).
[38] *See* Draft Memorandum Sec. 5(b).
[39] *See* Draft Memorandum Sec. 5(c)(iii).
[40] *See e.g.*, NIST AI RMF; *Artificial Intelligence Management System*, ISO/IEC FDIS 42001 (2023); *Requirements for bodies providing audit and certification of artificial intelligence management systems*, ISO/IEC DIS 42006 (last visited Dec. 2, 2023).

- **Model development** – Google takes great care to test, revise, and deploy AI models that are fit for global users. Essential parts of model development that help Google mitigate the potential adverse human and civil rights impacts of an AI tool include: development of algorithmic refinements; fine-tuning; adversarial testing; safety filters and feedback features; and involvement of external stakeholders in testing. The iterative nature of this process leads to continuous improvement.
- **Product application** – To maximize a product's potential for societal benefit while minimizing the potential for negative impacts, Google employs strategies such as controlling product availability through licensing, sign-ins, and allow-listing; monitoring use patterns; and enforcing Acceptable Use Policies that prioritize the protection of vulnerable groups like children, people with disabilities, and communities disproportionately targeted with hate speech.

We also consider the societal impacts that are surfaced in our own research and feedback from external partners as a regular part of bringing new and enhanced products to market. We evaluate whether products are safe and if they are likely to lead to harms, such as discrimination, violence, unfair stereotyping, and deep fakes. As one example, Google's decision not to make facial recognition AI available for law enforcement or any public use reflects how seriously we consider such impacts. OMB can look to industry best practices as a model for assessing the risk of an AI use case. Adopting a risk-based approach conserves limited agency resources by requiring assessments only on high-risk AI systems and enables agencies to adopt lower-risk AI systems that can meaningfully support the delivery of government services to citizens.

Question 6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

We applaud OMB's efforts to set rigorous standards for responsible AI use; indeed, several of the Draft Memorandum's Minimum Practices align with Google's own approach to the responsible development and deployment of trustworthy AI tools.[41] For example, Google's Responsible AI Practices include assessing the human impact of AI systems during development, evaluating the model via multiple metrics, examining the raw data, rigorously testing the system, and monitoring and updating the system post-deployment. Encouraging the use of best practices for responsible AI helps ensure AI development and use properly accounts for risk. We recommend the following modifications to OMB's proposed Minimum Practices.

[41] *Compare* Draft Memorandum Sec. 5(c), *with* Google Responsible AI Practices (assessing the human impact of AI systems during development; evaluating the model via multiple metrics; examining the raw data; rigorously testing the system; monitoring and updating the system post-deployment). Since we launched our AI Principles in 2018, we've built and tested an industry-leading governance process to align AI projects across the company with those Principles. *See generally* Our Principles, Google AI (last visited Dec. 2, 2023).

First, OMB should clarify the extent to which AI vendors, rather than agencies, are expected to implement some or all of an agency's Minimum Practices for safety-impacting and rights-impacting AI. This is especially critical in the pre-deployment phase and as agencies build capacity to "test the AI for performance" and "independently evaluate the AI."[42]

Second, OMB should ensure that agencies are clear about the documentation required to evaluate outputs (while safeguarding vendors' intellectual property).[43] In the post-deployment phase, vendors cannot typically monitor the use of their tools due to security and privacy considerations.

Third, OMB should urge agencies to ensure that any AI opt-out mechanisms, such as those discussed in Section 5(c)(v)(F), do not undermine the use of AI tools. An opt-out mechanism that effectively requires agencies to maintain duplicate functionality between AI tools and non-AI operations would likely increase costs, lower effectiveness, and increase confusion. Human review should be available in appropriate cases but should not create parallel AI and non-AI tracks.

Fourth, the Draft Memorandum should clarify how certain obligations would work in practice. For example, it is unclear whether fine-tuning a model would be considered the development of a new model. Would a general-purpose AI tool (i.e., one that is not itself rights- or safety-impacting AI) that is then fine-tuned and integrated into a rights-impacting application constitute a newly developed AI system? This lack of clarity could lead an agency to insist that it needs information on the copious data underlying a general-purpose model (which would likely be of little or no value to it) when, in fact, it needs information only regarding the data used to fine-tune the specific model used to deliver the services procured.

Fifth, we recommend encouraging training for employees on the deployment and use of AI tools. Proper training will be crucial for the responsible use of rights- and safety-impacting AI tools, to address potential biases, and to uphold transparency standards.[44]

Sixth, OMB should refine the scope of the impact assessments that agencies must complete before using new or existing safety-impacting or rights-impacting AI. Section 5(c)(iv)(A)(3) should shift focus to evaluating *outputs* rather than data *inputs*. Its present emphasis on evaluating the "quality and appropriateness of the relevant data" is an increasingly outdated approach.[45] Rapid advances in computer science are finding new ways to extract greater value from smaller datasets by using algorithmic improvements to make up for and even learn from imperfections in datasets. For example, the best way to teach a large language model not to

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[42] *See* Draft Memorandum Sec. 5(c)(iv)(B) and (C).

[43] *See* Draft Memorandum Sec. 5(c)(iv)(C) (requiring agencies to "review relevant AI documentation to ensure that the system works appropriately and as intended, and that its expected benefits outweigh its potential risks").

[44] Agencies might consider Grow with Google, which offers a comprehensive suite of training programs to develop essential skills and knowledge. For example, our responsible AI course provides a framework for organizations aiming to operationalize responsible AI practices. With courses covering AI fundamentals, ethics, and practical implementation, Grow with Google empowers employees to harness the benefits of AI responsibly. *See* *Responsible AI: Applying AI Principles with Google Cloud*, Google Cloud (last visited Dec. 2, 2023).

[45] *See* Draft Memorandum Sec. 5(c)(iv)(A)(3).

create Nazi content is not to remove all Nazi content from training data (which would mean that it could not describe what happened in 1930s Germany), but to expose it to such content and teach it to avoid generating similar material without appropriate social and historical context.

If specific requirements for data inputs are imposed, they should pertain to the agency's use of the data (i.e., for agency fine-tuning of vendor models) rather than be imposed on vendors. Additionally, this assessment should not require vendors to disclose base model AI training data, which may be competitively sensitive and present security issues.

Question 7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

Agencies should leverage existing resources to incorporate the OMB guidance into their contracts—and ground their agreements in existing laws and best practices that have worked well for procuring innovative technologies. Federal acquisition law prioritizes the prompt, efficient, and cost-effective acquisition of commercial products and services needed to meet government requirements. This approach makes particular sense for AI, which has been largely developed and deployed by the private sector. OMB should ensure that agencies have the authority and direction to procure AI through commercial acquisitions, and it should also encourage agencies to pursue acquisition of commercial AI through non-traditional means, such as Other Transaction Authority[46] and Commercial Solutions Opening[47] agreements.

Further, we recommend that the guidance identify ways to build capacity and capability for commercial acquisition that leverages AI innovation. Agencies will need to procure AI under commercial terms that balance an agency's interest in licensing AI with the commercial firm's interest in making broader commercial use of its products. Additionally, in drafting contracts for AI services, agencies should clearly articulate their requirements for outcomes (e.g., optimization of air traffic or management of waste, fraud, and abuse in tax filings). This focus on outcomes will promote collaborative engagement with industry to identify solutions that achieve those goals.

OMB should also equip agencies with the authorities and tools necessary to ensure the protection of companies and their intellectual property. This includes adequate bases in Federal Acquisition Regulation (FAR) clauses and agency acquisition clauses for the submission of any information regarding AI models under an agency assurance of confidentiality, such that this information will be exempt from Freedom of Information Act disclosure. These authorities should be reflected in any agency contract to ensure that private entities have legal recourse against the government in the event of a breach. Agencies should also have adequate information technology and security tools to protect such information from theft, insider threats, and accidental disclosure, among other risks.

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[46] "Other Transaction Authority" was first created in 1958 for NASA, and has since been expanded by Congress to at least 11 other federal agencies, including the Department of Defense (10 U.S.C. §§ 4021 and 4022), the intelligence community (50 U.S.C. § 3024(n)), the Department of Energy (42 U.S.C. § 7256 and 42 U.S.C. § 16538(f)), and the National Institutes of Health (42 U.S.C. § 282(n)).

[47] *See* *Commercial Solutions Opening (CSO) Guide*, Procurement Innovation Resource Center (June 1, 2018).

Question 8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

In general, the public should have access to the same information about government use of AI as it does to information about other government uses of technology. AI represents an enormous opportunity, and the government should consider publicizing its use of AI to demonstrate this technology's potential to other public and private sector entities. This may also inspire AI developers to find ways to make this technology even more useful.

At the same time, OMB should advise agencies to balance the need to inform the public about agency operations with the need to protect sensitive and proprietary information. The private sector will not be incentivized to partner with agencies if doing so means exposing their intellectual property. Agencies should also be prohibited from requesting information unnecessary to meet federal needs.

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Google believes in AI's tremendous potential and supports OMB's efforts to establish new agency requirements and policies on the responsible development and use of trustworthy AI tools to support crucial agency missions. We look forward to continuing to work with OMB on these important matters.

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lps-w2q7-i555
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0128
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Just Futures Law, Surveillance Resistance Lab, Center for Race and Digital Justice, MediaJustice, Mijente + 30 orgs

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General Comment

Our organizations submit these comments in response to President Biden's Executive Order of October 30, 2023 for Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI Executive Order, AI EO) and subsequent draft guidance promulgated by the Office of Management and Budget (AI OMB).

The signatories to this letter include organizations who have deep experience in advocating to protect and expand rights of immigrants. This includes decades-long expertise in immigration law (particularly at the intersection of criminal justice and immigration law), as well as our work in protecting the rights of communities from the harms of policing by the immigration policing components of the Department of Homeland Security (DHS). Our collective constituencies represent millions of people who have been harmed by or face significant risk of harm due to DHS use of technology. For decades, we have tried to increase transparency and hold DHS accountable for violations of rights—including through its Office of Civil Rights and Civil Liberties. We have advocated against the use of "smart" border technologies that exacerbate migrant deaths, facial recognition technologies that reinforce systemic bias, and automated decision systems that are rigged to deny liberty. We have pushed for limits on widespread data collection without meaningful consent—including the collection of DNA at the border and in ICE detention—and DHS reliance on corporate data brokers that collect, aggregate, and share highly sensitive data.

Attached are the full comments to this guidance, which were organized by Just Futures Law, Surveillance Resistance Lab, Center for Race and Digital Justice, MediaJustice and Mijente and supported by:

Access Now
Arkansas Justice Reform Coalition
Athena Coalition
Carolina Migrant Network
CCTV Center for Media + Democracy
Center on Privacy and Technology at Georgetown Law

Connecticut Shoreline Indivisible
Decarcerate Sacramento
DRUM - Desis Rising Up & Moving
Families for Freedom
Fight for the Future
Georgia Latino Alliance for Human Rights
Government Information Watch
Grassroots Leadership
Illinois Coalition for Immigrant and Refugee Rights
Immigrant Legal Resource Center
Kapor Center
La Resistencia
Muslim Advocates
NAKASEC
National Immigrant Justice Center
National Partnership for New Americans
ORALE
People's Tech Project
Project On Government Oversight
Pueblos de Lucha y Esperanza
Robert F. Kennedy Human Rights
Tarjimly
United We Dream
Voces Unidas RGV

Attachments

OMB AI Comments - DHS and law enforcement

To: Office of Budget and Management
Re: Submission to Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, OMB-2023-0020-0001
Date: 12/5/2023

Our organizations submit these comments in response to President Biden's Executive Order of October 30, 2023 for Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI Executive Order, AI EO) and subsequent draft guidance promulgated by the Office of Management and Budget (AI OMB)[1].

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Given the challenges we have faced in accessing meaningful transparency or accountability from DHS—an agency whose core mission is grounded in policing, incarceration, and exclusion of those who have minimal legal protections—we have grave concerns about the governance framework proposed by the OMB guidance.

- First, we cannot trust DHS or other agencies with track records of rights violations to implement and self-police the guidance. Key policing agencies of DHS, such as Immigration and Customs Enforcement (ICE) and Customs and Border Protection (CBP), have a well-documented track record of violating civil and human rights.[2]

[1] Office of Management and Budget, OMB-2023-0020-0001. Full text available at: https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf

[2] https://rfkhumanrights.org/exposing-systematic-abuse-of-immigrants-in-ices-jails;
Weissman, Deborah M. and Clark, Havan and Snodgrass Godoy, Angelina, The Final Act: Deportation by ICE Air (September 5, 2020). UNC Legal Studies Research Paper , Available at SSRN: https://ssrn.com/abstract=3705685 or http://dx.doi.org/10.2139/ssrn.3705685;
https://www.hrw.org/news/2019/07/12/ice-raids-us-immigrant-families-risk-serious-abuses-0

- Second, the minimum standards for the AI certification process provided in the OMB guidance are not sufficient to curb the risks to privacy and civil rights abuses in the immigration system, especially those who are targeted by DHS at the nexus of the criminal and immigration systems.
- Third, we are concerned that intelligence and law enforcement-related technologies will fall under "critical agency operations," allowing agencies to avoid scrutiny, and enabling the procurement and implementation of harmful technologies that do not meet minimum standards. We are additionally concerned about these issues being relegated to the National Security Memo where they could receive even less public scrutiny.

Since its founding, DHS has grown substantially and is now one of the largest federal agencies in the United States, with nearly 200,000 employees. The agency has broad jurisdiction over all noncitizens within the United States, and its actions have significant impacts on all residents, including citizens, as well as at the country's borders and beyond. Nearly half of full-time federal law enforcement agents—whose primary function is criminal investigation and law enforcement—work for DHS, making it the largest federal police agency in the United States.[3] DHS is also one of the biggest jailers in the United States—since January, DHS has booked over 250,000 people into detention[4] and as of November 18, supervising over 189,000 people under its Alternatives to Detention program[5]—more people than in the custody of the Bureau of Prisons or incarcerated in Texas state prison.[6]

For years, we have seen how the agency's use of AI tools has obfuscated and enhanced discriminatory and expansive policing, detention, and exclusion practices. For example, in 2020 a lawsuit in New York revealed that ICE had been using a data-driven (or "AI") system to inform decisions about whether ICE should release or detain someone who had been arrested.[7] Disclosures about how the tool was programmed revealed that before Trump took office, 53% of people labeled "low risk" were recommended for detention without bond by the tool but from June 2017 through September 2019, the tool recommended that 97% of "low risk" individuals still be detained. The tool effectively offered the Trump administration a means through which to launder their "no release policy" while continuing the appearance of considering a complex set of factors.

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[3] Federal Law Enforcement Officers, 2020 (updated September 29, 2023), Bureau of Justice Statistics, US Department of Justice (last visited November 8, 2023). https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/fleo20st.pd

[4] CBP ICE Book Ins ICE Detention 11/18/2018 to 11/18/2023, Transactional Research Access Center, Syracuse University. (last visited November 26, 2023) https://trac.syr.edu/immigration/detentionstats/book_in_agen_program_table.html

[5] U.S. Immigration and Customs Enforcement Detention Management website; https://www.ice.gov/detain/detention-management.

[6] "Total Federal Inmates," Bureau of Prisons Statistics, https://www.bop.gov/about/statistics/population_statistics.jsp (last visited November 29, 2023); Texas statistics: https://www.statista.com/statistics/203757/number-of-prisoners-in-the-us-by-states/

[7] "ICE's New York Office Uses a Rigged Algorithm to Keep Virtually All Arrestees in Detention," Sam Biddle, The Intercept, March 02, 2020, (last visited November 16, 2023), https://theintercept.com/2020/03/02/ice-algorithm-bias-detention-aclu-lawsuit/.

In addition, we remain disappointed seeing a continuation in prioritizing AI for good. Between the President's Executive Order and the OMB draft policy, AI innovation is consistently listed ahead of protecting against AI harms. We must leave open the possibility to question whether AI should be used at all, and be careful not to gloss over the current harms of AI systems—including widespread data harvesting of people with few legal protections (including biometrics) and government use of social media surveillance targeting people engaged in activities protected under the First Amendment. We are also disappointed that the OMB guidance does not cover how grant funding from federal agencies is then used to procure technology at the local level. This is especially problematic when local law enforcement agencies use federal funding to procure technologies for which the harms of police use on the civil and human rights of the most marginalized has been well documented.[8]

The following content in this comment explains more about DHS's poor record on privacy and technology surveillance and further elaborates on our recommendations. A summary of recommendations are below the comment.

I. Background on the Department of Homeland Security's Poor Record on Privacy and Technology Surveillance

The OMB guidance governance framework will perpetuate civil rights harms of communities most impacted by criminalization and deportation because it relies on federal agencies, including DHS, to police themselves.

The President's AI governance strategy articulated by the EO and the OMB guidance are unsatisfactory. We are deeply concerned that the EO and OMB rely on a self-policing framework, where "responsible AI" will be best achieved by internal governance boards that are staffed by agency employees and agency-embedded Chief Artificial Intelligence officers (CAIOs).[9] A framework that relies on employees to enforce safeguards that were created by the very same employees raises classic accountability concerns—such as lack of transparency, bias and abuse. Even more damaging are self-policing frameworks in law enforcement and intelligence agencies, such as DHS or the DOJ, because of the particularized risk of creating and/or exacerbating harms to "affected groups" and "underserved communities," such as immigrant communities and communities of color.[10]

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[8] For example, the Electronic Privacy Information Center wrote a letter to the Department of Justice asking them to review their grant funding to SoundThinking, formerly know as ShotSpotter. EPIC's letter can be referenced here https://s3.documentcloud.org/documents/24034716/epic-letter.pdf and highlights the ways that ShotSpotter as a technology discriminates against people of color. Similarly, research and reporting from the Center for Democracy & Technology found that Housing and Urban Development grants were being used by local public housing to install facial recognition equipped surveillance cameras. Video footage from some of these surveillance cameras were then that were then used to harass and surveil tenants. CDT's research and reporting on this topic can be found here https://cdt.org/insights/taken-for-granted-wheres-the-oversight-of-ai-and-federal-funding/.

[9] Executive Order, Section 10(b); OMB Guidance Sec 3.a.

[10] See OMB Guidance 5(iv)(5). E.O. 14091 of Feb 16, 2023 defines "underserved communities" as:

DHS' recently released AI protocols and policies do not follow risk mitigation practices named in the OMB guidance.

DHS has been an early adopter of powerful and invasive surveillance technologies, usually technologies outsourced from corporations that raise serious questions about their compliance with privacy, data protection, and 4th amendment rights. Earlier this year, DHS released a department-wide policy "Acquisition and Use of Artificial Intelligence and Machine Learning Technologies by DHS Components (DHS AI Policy)."[11] Despite commitments to civil rights and privacy in the policy, DHS continues to rapidly integrate AI products, even though this culture of fast track deployment has hurt communities people most vulnerable to racial profiling, criminalization and deportation. The most recent directive on facial recognition does not appear to ameliorate risks presented by these technologies, while also evading public scrutiny. It also exacerbates retaliation and surveillance harms to immigrants engaged in protected First Amendment activity.

DHS is already using machine learning technologies, such as facial recognition technologies, without mitigating risks to rights and safety that are described in the OMB guidance. One disturbing example is the "Use of Face Recognition and Face Capture (FR/FC) Technologies" directive issued by DHS.[12] For many years, FR/FC technology has been used extensively by DHS in enforcement operations at the border and in the interior. In addition to many advocates, the GAO has issued several reports raising concerns over DHS oversight, use of and agency training on FC/FR technology, and bias against people with darker skin tones.[13] The policy fails to include stronger mitigating practices recommended by the OMB guidance even though DHS specifically identified FC/FR technologies as "privacy sensitive."[14]

For instance, advocates discovered that ICE holds contracts with Clearview AI only after protracted research and litigation.[15] Clearview AI has built the most dangerous facial recognition database in the country and allows law enforcement, government, and private companies to identify, locate, and track people—where they go, who they're with, and what they say—at the touch of a button on a mobile device. DHS contracted with Clearview AI services, even though Clearview AI has come under worldwide criticism, incurred significant fines and penalties worldwide, and has been known to extract pictures and

(b) The term "underserved communities" refers to those populations as well as geographic communities that have been systematically denied the opportunity to participate fully in aspects of economic, social, and civic life, as defined in Executive Orders 13985 and 14020.

[11] Policy Statement, 139-06, August 8, 2023. https://www.dhs.gov/sites/default/files/2023-09/23_0913_mgmt_139-06-acquistion-use-ai-technologies-dhs-components.pdf

[12] "Use of Face Recognition and Face Capture Technologies," DHS Directive, Directive Number 026-011, Issued 9/11/2023. https://www.dhs.gov/sites/default/files/2023-09/23_0913_mgmt_026-11-use-face-recognition-face-capture-technologies.pdf

[13] "Federal Law Enforcement Agencies Should Take Actions to Implement Training, and Policies for Civil Liberties," GAO Highlights, September 2023. https://www.gao.gov/assets/gao-23-105607-highlights.pdf

[14] "Id.

[15] https://www.justfutureslaw.org/facial-recognition (last visited November 26, 2023.)

information from the internet without consent.[16] Several lawsuits have been brought against Clearview AI in the United States for violations of federal and state statutes.[17] Over several years, scholars, advocates, and privacy agencies around the world have raised concerns over face-matching errors, algorithmic bias and discrimination, and its use against protesters engaged in First Amendment protected activity. Multiple legal scholars have also shared concerns over Clearview AI, specifically around social media scraping without consent.[18] Still, DHS continues to contract with Clearview AI, despite worldwide calls to freeze the Clearview AI contracts. Despite these problems, the DHS FC/FR policy failed to include basic protections such as notice to the individual (beyond opt outs for US citizens for non law enforcement use) or options for meaningful redress for individuals who are injured by these systems.[19] In short, the directive repeatedly claims that they will comply with civil rights and civil liberties but without sharing specifics with the public about how they will do that and whether their methods will be transparent and effective. The directive also does not provide additional protections for data collected or used through FC/FR, beyond "applicable authorities, statutes, regulations, information sharing and access agreements (ISAA), and policies."[20] DHS frequently includes this disclaimer in all its guidance and it has failed to protect the rights of affected groups, particularly around privacy and consumer protection. Lastly, DHS did not incorporate feedback from affected groups before releasing this guidance.

DHS already uses powerful social media surveillance tools, such as Babel X, designed for large scale monitoring of US citizens and immigrants.[21] Federal immigration officers have long engaged in a pattern of surveillance of—and outright retaliation against—individuals advocating for immigrants across the country.[22] A 2020 study identified over a thousand instances of alleged retaliation by government

[16] "Clearview AI used nearly 1m times by US police, it tells the BBC," BBC News, March 27, 2023; Office of the Privacy Commissioner of Canada, "Clearview AI's Unlawful Practices Represented Mass Surveillance of Canadians, Commissioners Say," press release, March 2, 2021. Privacy Determination, Office of the Australian Information Commissioner, November 3, 2021; Vincent Manancourt, "Controversial US Facial Recognition Technology Likely Illegal, EU Body Says," Politico, June 10, 2020."Italy Fines US Facial Recognition Firm Clearview AI," Agence France-Presse, March 9, 2022.

[17] Renderos et al. v. Clearview AI, Inc. et al., No. RG21096898 (Superior Ct. Alameda County) https://static1.squarespace.com/static/62c3198c117dd661bd99eb3a/t/63a1ee56112da22f8dd970ff/1671556696900/2022-12-16+-+Clearview+AMENDED+COMPLAINT.pdf; More resources showing advocacy efforts with other federal agencies around data brokers: https://www.justfutureslaw.org/fighting-data-brokers

[18] Amici Brief of Science, Legal, and Technology Scholars in Renderos et al. v. Clearview AI, Inc. et al., No. RG21096898 (Superior Ct. Alameda County); Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4238870.

[19] "Use of Face Recognition and Face Capture Technologies," DHS Directive, Directive Number 026-011, Issued 9/11/2023. https://www.dhs.gov/sites/default/files/2023-09/23_0913_mgmt_026-11-use-face-recognition-face-capture-technologies.pdf

[20] Id at 6.

[21] "Homeland Security Uses AI Tool to Analyze Social Media of U.S. Citizens and Refugees," Joseph Cox, Motherboard/Tech by VICE, May 17, 2023. https://www.vice.com/en/article/m7bge3/dhs-uses-ai-tool-babel-x-babel-street-social-media-citizens-refugees (last visited November 26, 2023)

[22] Targeted But Not Silenced: A Report on Government Surveillance and Retaliation Against Immigration Organizers in the United States, Mijente and Just Futures Law Take Back Tech Fellowship report, August 2021

officials against immigrant organizers during the Trump administration.[23] Federal agents, including DHS agents, in Portland, Oregon used social media programs on activists and protesters suspected of engaging in Black Lives Matter protests.[24] Many more activists, particularly activists advocating for Black Lives Matter, have been subjected to these technologies in many other states. These technologies are also not included on the AI inventories nor were affected and underserved groups consulted before their use and deployment.

For over 20 years, DHS has enrolled hundreds of thousands of people into mobile monitoring systems in their so-called "Alternatives to Detention" program but only released a privacy impact assessment in 2023.[25] Through a combination of ankle shackles and a digital shackling program, SmartLink DHS has enrolled nearly 200,000 immigrants, collecting "a trove of sensitive information, including personally identifying information, geolocation data, phone numbers of contacts, and vehicle and driver data."[26] This 20 year delay is unacceptable. Data about the ATD program is hard to find, and it is difficult to discover how the program operates.

Despite evidence of widespread misuse and privacy concerns, DHS routinely contracts with corporations that collect, use, sell or share personal and sensitive data of immigrants, their families, friends and communities.[27] Companies like RELX and Thomson Reuters possess dossiers on millions of people,

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https://static1.squarespace.com/static/62c3198c117dd661bd99eb3a/t/62df0174233afe04b60c0891/1658782076288/Targeted+But+Not+Silenced.pdf (last visited November 26, 2023.)

[23] See Nick Pinto, Across the U.S., Trump Used ICE to Crack Down on Immigration Activists, the iNteRcePt (Nov. 1, 2020), https://theintercept.com/2020/11/01/ice-immigration-activists-map/ (quoting JFL legal director Sejal Zota commenting on crack downs by ICE officers in Portland and explaining that "We've now seen the machinery of DHS go after non-immigrants, as part of the uprising," but that "this is part of a longer history of targeting immigrant activists.").

[24] "Wyden Releases New Details About Surveillance and Interrogation of Portland Demonstrators by Department of Homeland Security Agents," Website of Senator Wyden (OR), DHS Dossiers of 2020 Protesters Included Lists Of Friends and Family, Travel History, Social Media And Other Records Unrelated to Securing Federal Property or Homeland Security; Documents Reveal Trump Appointees at DHS Endorsed Baseless Conspiracy Theories As Excuse to Violate Oregonians' Civil Rights. https://www.wyden.senate.gov/imo/media/doc/I&A%20and%20OGC%20Portland%20Reports.pdf (last visited November 26, 2023.)

[25] ICE released a PIA for the ATD programs in March 2023. Privacy Impact Assessment for hte Alternatives to Detention Program, DHS, .https://www.dhs.gov/sites/default/files/2023-08/privacy-pia-ice062-atd-august2023.pdf

[26] "How a private company helps ICE track migrants' every move," Tonya Riley, Cyberscoop, September 26, 2023. (last visited November 29, 2023)
https://cyberscoop.com/ice-bi-smartlink/

[27] *LexisNexis Under Growing Pressure to Sever Ties with ICE*, Chris Mills Rodrigo, The Hill, July 17, 2022. https://thehill.com/policy/technology/3564893-lexisnexis-under-growing-pressure-to-sever-ties-with-ice/(last visited Nov. 28, 2022); "How Data Brokers Assist ICE in Cook County," Mijente and Just Futures Law Fact Sheet, 2023, Available at: https://static1.squarespace.com/static/62c3198c117dd661bd99eb3a/t/65283e83622fff1ee8837590/1697136260425/Final+Cook+County+Fact+Sheet+and+Graphic+2.pdf; "American Dragnet - Data Driven Deportation in the 21st Century," Center for Privacy and Technology, Georgetown Law (2022), https://www.americandragnet.org/ (last visited December 4, 2023).

including more than two-thirds of U.S. residents.[28] Because AI/machine learning systems require vast amounts of data, DHS continues to procure data broker services despite concerns around improper or illegal data sharing or selling. In fact, DHS currently contracts with data brokers like Lexis/Nexis that collate and collect information from thousands of commercial data companies to create a suite of powerful surveillance tools that include "email addresses and IP address locations, real-time jail booking data, facial recognition services, and cellphone geolocation data analysis tools."[29]

DHS also lacks an internal enforcement body for civil rights compliance. As a law enforcement agency that conducts a blend of criminal and civil enforcement actions, DHS employees will use law enforcement and national security exemptions to escape civil liberties and civil rights oversight. Recently released AI policies reiterate a commitment to civil rights, but do not contain mechanisms on how those rights will be enforced. This is no different than what DHS does right now—a circular process that does not allow AI technologies to receive an independent review that assesses the rights of communities most impacted by these technologies.

The OMB guidance allows federal agencies to use the National Institute of Standards and Technology (NIST) or any "other appropriate agency office with existing test and evaluation responsibilities" for third party evaluations.[30] In the case of DHS, the DHS announced the Science and Technology Division of DHS, not the NIST, will lead AI evaluations and recommend mitigation practices.[31] The OMB guidance should prevent DHS S&T from developing an entirely new risk framework outside of the NIST framework, especially the requirement for independent evaluations.

Over its 20 year existence, we have seen DHS protocols and practices on raids, detentions, profiling, and surveillance radically shift administration to administration. This indicates that little to no meaningful infrastructure exists to address civil rights concerns and provide redress to affected groups and individuals that have suffered harm from these violations.[32]

II. Recommendations to OMB on the proposed guidance

1. The risk assessment framework is fundamentally flawed, and should be abandoned if the government's intention is to provide the strongest risk mitigation and rights protections.

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[28] Id at 35.

[29] US Border Agency's Data Broker Deal Masks Spy Tools, Critics Say, Tonya Riley, Bloomberg Law, November 16, 2023. https://news.bloomberglaw.com/privacy-and-data-security/us-border-agencys-data-broker-deal-masks-spy-tools-critics-say (last visited November 26, 2023). Also, see articles and research on Lexis/Nexis at https://www.justfutureslaw.org/fighting-data-brokers.

[30] OMB guidance Sec 5(c)(iv)(C)

[31] See "Artificial Intelligence" website for DHS. https://www.dhs.gov/science-and-technology/artificial-intelligence

[32] See multiple reports on how DHS exploits data that are bought or shared by commercial entities, raising serious questions of civil rights, privacy, and confidentiality problems. Reports in multiple jurisdictions can be viewed here: https://www.justfutureslaw.org/take-back-tech-fellowship.

Alternatively, short of abandoning this framework, we suggest that you adopt recommendations 2 through 10.

The minimum practices mitigation tools outlined by OMB, including the additional minimum requirements for rights-impacting AI, have similar structural deficiencies as DHS's risk assessment tools that have been used by DHS and other law enforcement bodies for many years—and both purportedly aim to reduce civil rights violations and abuse in immigration enforcement and detention. Because law enforcement interests are deferred to in both, the calculus of civil rights abuses against the value of the technology defaults to favor technology. DHS has repeatedly demonstrated their ability to avoid these known risks in the field (e.g.privacy impact assessments are ineffective) and in the immigration courts, i.e. Executive Office for Immigration Review. Additionally, the risk assessment methodology forecloses the option of reviewing whether AI is even necessary at the outset.

For example, DHS routinely utilizes law enforcement exemptions to prevent the disclosure of vital information to an individual or their attorney, let alone the public, about what information is used by a data-driven system to result in an unfavorable outcome. This means the person has never been able to receive or contest information that has been used to make critical decisions in their case. DHS often releases privacy impact assessments (PIAs) to the public; however, PIAs do not contain enforcement mechanisms or meaningful requirements about how a person can correct or obtain the information. Several reports have examined DHS risk assessment tools, noting that they have failed to reduce the number of people in detention.[33] As a result, under these technology-use PIAs and risk assessment tools, prisons have expanded, police have become more militarized, and surveillance more invasive.

These problems necessitate incorporating the following set of recommendations if the OMB determines that the risk assessment framework is viable.

2. **The OMB guidance must further limit exemptions and waivers for intelligence and law-enforcement related AI technology and agencies, especially for DHS, and must release their decision-making on exemptions and waivers to the public.**

Under the OMB guidance, agency CAIOs carry enormous power to determine what risks matter and how they will be mitigated—this weakens accountability and threatens implementation of effective risk mitigation practices. DHS, like many law enforcement agencies, often avoids accountability mechanisms and procedures through routine use of law enforcement and national security exemptions, making DHS one of the least transparent federal agencies.[34] ICE refers to its "mission critical" use of the technologies

[33] Mary Ellen Callahan, U.S. Dept. of Homeland Sec., Privacy Impact Assessment Update for the Enforcement Integrated Database (EID) at 4 (Apr. 6, 2012), https://www.dhs.gov/xlibrary/assets/privacy/privacy_piaupdate_EID_april2012.pdf [https://perma.cc/4XLC-X6YS]

[34] "While many agencies use the exemption, the Department of Homeland Security uses it far more frequently than any other agency. In the last 10 years the department was responsible for more than half of the government's use of Exemption 5, ranging from a low of 54% in 2018, when the agency cited it 32,962 times, to a high of 83% in 2009, with 59,510 instances." "Information Act Exemption Still Needs to be Reined In," Nick Schwellenbach, POGO,

delivered by RELX and its subsidiary LexisNexis, Thomson Reuters, and other data collection companies; subsequently, ICE has not released details regarding the full extent of those services and how the agency employs them.[35] There is little reason to believe that DHS would comply with OMB draft policy and stop the use of FR systems like Clearview AI even if they fail to meet minimum standards. More likely, DHS will exploit the loopholes of the current OMB draft policy to ask for indefinite extensions and exemptions for the use of any of their AI technologies, even though their use of AI technology is among the most harmful use cases for right-impacting AI. The self-policing process helmed by the CAIO will only perpetuate problems around bias and discrimination.

3. **The OMB guidance should amend the purposes that are presumed to be rights impacting in Sec 5.b.ii.C:**
   More specifically, the OMB policy must:

- **Strike "[D]eciding immigration, asylum, or detention status" and add "[P]re-investigation, investigation, identification, assessment, review, determination, or adjudication of any immigration status, immigration benefit, federal benefit, asylum, detention, removability, exclusion, or for the purpose of immigration enforcement, including surveillance;"**
- **Add to end of Sec 5.b.ii.C: "Biometric collection (including face, iris, fingerprint, voice, gait, DNA) for immigration purposes**
- **Add a new category to Sec.5.b.ii. "Consumer products or information that are used, accessed or produced by credit bureaus or agencies, including consumer credit reports, credit ratings, credit header data, and credit reporting methods."**

The OMB guidance identifies and suggests mitigation protocols for certain AI technologies, including the risks for surveillance and violations of rights of communities impacted by policing or immigration.[36] We recommend adding the suggested language because it better captures outcomes or processes in the immigration system—from applying for a work permit to initiating an investigation for removal proceedings. Immigration enforcement has profound impacts on individuals, communities and children because of the scenario that people could be separated from their loved ones or family, which impact civil rights and familial rights. Moreover, it will better protect people who fall under statutory protections of asylum law and the Convention Against Torture.

Additionally, the OMB neglected to include biometrics, a core data collection item for most law enforcement and immigration functions. Most immigration enforcement tools, especially the AI tools, are procured to identify, surveil, monitor, track, detain and monitor noncitizens, their family members, or their associates and friends. Biometrics are some of the most personal and sensitive data and any use

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February 6, 2020. https://www.pogo.org/analysis/the-most-abused-foia-exemption-still-needs-to-be-reined-in (last visited November 26, 2023)

[35] Ramirez et. al v. LexisNexis Risk Solutions, (N.D. IL 2022) 1:2022cv05384 https://static1.squarespace.com/static/62c3198c117dd661bd99eb3a/t/635c14235d4769714665c318/1666978851837/Castellanos+et+al.+v.+LexisNexis+Risk+Solutions+-+Complaint+%5BFor+Filing%5D.pdf

[36] OMB Guidance Section 5(b)(ii)

or collection should be designated as rights-impacting. DHS collects a huge amount of biometrics as part of routine immigration processing. For example, CBP has implemented a nationwide DNA Collection program that could be used to detain or separate family members. CBP is also incorporating AI for language access. This could impact how arriving persons access asylum-related protections or are charged with criminal offenses.[37] The ramifications of this collection and its incorporation into AI systems necessitates that biometric collection be viewed as risk-impacting.

Credit bureaus are of particular concern as the unregulated trade in credit header data facilitates data brokers' aggregation of data about particular consumers from a wide variety of data sources by enabling them to triangulate between the credit header data points and untold other sources. For example, a Big 3 credit agency like Experian may provide this data to another data broker and so on, until it flows together to one of the two major data brokers that aggregate data from thousands of sources, RELX and Thomson Reuters. These companies then sell access to hundreds of millions of comprehensive dossiers—which may contain errors about consumers—to public and private entities that may use them to deny a consumer access to housing, employment, or even to subject them to criminalization and deportation. Advocates have discovered ICE has contracts with many types of databrokers who obtain information from credit bureaus.[38]

4. **The OMB guidance should place the burden on the agency to demonstrate good faith efforts to implement the minimum practices and disclose those efforts to the public before obtaining a waiver, extension or exemption from the August 1, 2024 deadline for minimum practices compliance.**

Because the CAIO holds enormous discretion over what minimum standards can be waived or delayed, agencies can continue procuring AI technologies without meeting minimum standards. Moreover, the thresholds for acquiring a waiver are quite low. For example, the CAIO can waive a requirement if the requirement "presents an unacceptable impediment to critical agency operations."[39] A declaration from an ICE or CBP agent that the waiver would potentially interfere with any law enforcement or investigatory purpose could easily constitute an unacceptable impediment. DHS law enforcement related technologies are often characterized as necessary or critical to agency operations. DHS has already stated that AI will "greatly augment the arsenal of tools available to succeed against new and existing threats."[40] We believe the OMB guidance must do more to ensure that DHS' immigration enforcement tools do not evade minimum practices requirements.

[37] https://www.cbp.gov/newsroom/spotlights/artificial-intelligence-harness-key-insights-cbp

[38] See letters to the Consumer Financial Protection Bureau and members of Congress on the troubling use of credit header data by ICE. https://www.justfutureslaw.org/fighting-data-brokers

[39] OMB Guidance Section 5(b)(iii).

[40] "Acquisition and Use of Artificial Intelligence and Machine Learning Technologies by DHS Components (DHS AI Policy)," Sec. II, Policy Statement 139-06 at 1, August 8, 2023. https://www.dhs.gov/sites/default/files/2023-09/23_0913_mgmt_139-06-acquistion-use-ai-technologies-dhs-components.pdf

5. **The OMB guidance should expand the list of risk considerations for "rights impacting artificial intelligence" to include broader definitions of privacy and consumer protection rights.[41] It should also recognize harms created by federal agency use of commercial data for AI/machine learning systems. The OMB guidance should explicitly recommend that minimum practices apply whether or not the subjects are non-citizens.**

Data brokers have incredible reach into the personal lives of affected and impacted communities and consumers. As data brokers employ more machine learning tools and algorithms, the harm created by unregulated data collection and sharing must be specifically addressed by the OMB guidance. Harmful and abusive practices by these data brokers violate consumers' financial rights, privacy, and civil liberties—prioritizing profit above consumer protection. For example, data brokers buy and sell hundreds of millions of names and addresses gathered by essential utilities companies without consumers' knowledge or consent—often in violation of consumer protection laws. Specifically, the guidance should recognize harms from 1) data harvesting from impacted communities, 2) third party data selling and sharing of commercial data by federal agencies, 3) unfettered use of biometrics collected by federal agencies, and 4) social media surveillance and collection, particularly against people engaged in First Amendment protected activities.

The first change that OMB must make to their draft policy is that OMB must add *consumer protection harms* among the list of harm considerations is one way to address the harms caused by data harvesting. For example, DHS runs millions of searches to generate target lists for deportation, under contracts with data broker companies like Lexis/Nexis or Thomson Reuters.[42]

Second, OMB should consider including the concept of collective privacy because worker and labor organizing or immigrants rights advocacy often mean that individual privacy and collective privacy are intertwined. Reducing the risk of retaliation against labor organizing or people engaged in protected First Amendment activity requires assessing the needs of organizing collectives engaged in that enterprise.[43]

Third, the OMB guidance should explicitly recommend that minimum practices apply whether or not the subjects are non-citizens. This is necessary because noncitizens and citizens alike are protected under the First Amendment. However, privacy law protections cover US citizens and Legal Permanent Residents; each administration elects to use or not use their discretion to extend privacy law protections to other noncitizens. This recommendation may reduce inadvertent exclusions of noncitizens, such as people who have been granted Temporary Protected Status holders, Deferred Action for Childhood Arrival, withholding of removal or Convention Against Torture relief.

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[41] See OMB Guidance Sec. 5c, pg. 13.

[42] See reports and cases involving DHS' use of databrokers and the risks presented by credit rating agencies. . https://www.justfutureslaw.org/fighting-data-brokers

[43] "Weaving Privacy and Power: On the Privacy Practices of Labor Organizers in the U.S. Technology Industry," Sayash Kapoor, Matthew Sun, Mona Wang, Klaudia Jazwinska and Elizabeth Anne Watkins, Center for Information Technology Policy, Princeton University. P. 23

6. **The Administration's reliance on artificial intelligence impact assessment (AIIA) tools as a core minimum standard certification requirement is short-sighted and should be abandoned. If AIIAs are used, the agencies should publicly disclose all data sharing agreements, including information sharing access agreements (ISAAs.)**

History has shown that privacy impact assessments have been ineffective in reducing privacy violations because law enforcement agencies have found ways to avoid privacy laws. Artificial intelligence impact assessments run the risk of following the same trend. Most AI technologies will be developed by vendors contracted by DHS. DHS has been unable to control how vendors collect, use or share sensitive data. Data may be shared with other commercial entities or other law enforcement bodies. In some cases, the data is not owned by DHS. Furthermore, redress options are opaque and inaccessible to the public. As a result, DHS sub agency privacy protocols have come under intense criticism by advocates and oversight bodies.[44]

One illustrative example is the Homeland Advanced Recognition Technology (HART), a next-wave biometric repository and data platform that would utilize artificial intelligence and machine learning technologies. Initially projected to cost $4.3 billion and years behind schedule in completing its first phase,[45] the Government Accountability Office and advocates criticized HART for significant privacy and civil rights implications for hundreds of millions of people. DHS has shrouded HART in secrecy with little oversight and few accountability mechanisms. The HART PIA included a handful of weak mitigation measures.[46] For example, US citizens and legal permanent residents could file a Privacy Act request under the Judicial Redress Act to learn more about their entry in HART.[47] Instead of disclosing data sharing agreements, DHS elected to refer to other use technology PIAs to explain how commercial data was to be used.[48] These measures were unproductive and worked against the principle of transparency.

7. **When the OMB develops "an initial means to ensure that AI contracts align with the guidance," the OMB should specifically elaborate when and how contracts are terminated or altered if they cannot meet the August 1, 2024 deadline or the rights-mitigating practices. OMB should require that federal agencies make public the process they will use for**

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[44] HART Attack: How DHS' Massive Biometrics Database will supercharge surveillance and threaten rights, Just Futures Law, Immigrant Defense Project, and Mijente, May 2022. https://surveillanceresistancelab.org/resources/hart-attack-how-dhss-massive-biometrics-database-will-supercharge-surveillance-and-threaten-rights/; "DHS Privacy Office Needs to Improve Oversight of Department-wide Activities, Programs, and Initiatives," Office of the Inspector General- DHS, November 4, 2020. https://www.oig.dhs.gov/sites/default/files/assets/2020-12/OIG-21-06-Nov20.pdf (last visited November 26, 2023

[45] "The Department of Homeland Security (DHS) initially expected to implement the entire Homeland Advanced Recognition Technology (HART) by 2021; however, no segments of the program have been deployed to date." US Government Accountability Office (GAO), "DHS Needs to Fully Implement Key Practices in Acquiring Biometric Identity Management Systems," June 8, 2021, 1, https://www.gao.gov/products/gao-21-386.

[46] Privacy Impact Assessment for Homeland Advanced Recognition Technology System (HART), Increment, Office of Biometric Identity Management - DHS, February 20, 2020. https://www.dhs.gov/sites/default/files/publications/privacy-pia-obim004-hartincrement1-february2020_0.pdf

[47] Id at 34.

[48] Id at 41.

terminating or suspending AI products if the agency fails to meet rights-impacting mitigation practices.

We strongly recommend DHS terminate the Clearview AI contract and Lexis/Nexis contracts because these contracts fail to meet basic rights-mitigation practices.[49] The current guidance currently disincentivizes corporations contracting with federal agencies to follow the "minimum standards" because it does not specifically include federal procurement enforcement mechanisms, such as contract termination, for failing to meet the "minimum standards."[50] This means that federal agencies can continue to procure technologies that fail to meet minimum civil rights standards.

8. **The OMB guidance must (1) narrowly apply the law enforcement privilege to the AI inventory of federal law enforcement agencies such as DHS and DOJ, (2) enforce proposed reporting requirements for changes to the AI inventory and update them quarterly, and (3) require agencies to identify vendors in the AI inventory. Without these measures, technologies presenting the highest risks to rights will continue to face limited scrutiny by the public.**

Executive Order 13690 established requirements for federal agencies to set up AI product inventories.[51] Under this EO, federal agencies are required to "make their inventories available to the public, to the extent practicable and in accordance with applicable law and policy, including those concerning the protection of privacy and of sensitive law enforcement, national security, and other protected information." Subsequently, the OMB issued a circular providing more detailed guidance on inventory requirements and now recommends annual updates.[52] DHS has removed, re-inserted, and simply failed to include many AI technologies. DHS should follow the new OMB requirements and regularly report out, in a quarterly fashion, "additional detail on how they are using safety-impating and rights-impacting AI, the risks—including risks to equity—that such use poses, how they are managing those risks and any related extensions and waivers granted under Section 5 of this memorandum."[53] We believe this frequency is needed because of the scale and frequency of AI procurement within the agency. Moreover, this requirement will facilitate the ability of affected groups to engage with DHS on oversight over these technologies if they are aware of these changes. For example, data broker technologies and certain social media meta-analysis products, such as Babel X, have not been included. When DHS adds or updates technologies, the inventory should be promptly updated. Moreover, we strongly recommend including names of vendors in the AI inventory. This gives added transparency, which is necessary to move towards harm reduction in the use of AI by the federal government. Moreover, it is possible that a product from one vendor may be more harmful than another.

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[49] OMB Guidance Sec. 5.d.
[50] OMB guidance Sec 5.d.
[51] 1 Exec. Order No. 13960, 85 Fed. Reg. 78939 (Dec. 3, 2020). https://www.cio.gov/assets/resources/2023-Guidance-for-AI-Use-Case-Inventories.pdf
[52] OMB Circular A-130.https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/circulars/A130/a130revised.pdf;OMB Guidance 3(a)(iv), 3(a)(v).
[53] OMB Guidance, Section 3a(iv).

9. DHS's role in the President's responsible development of AI requires strict oversight because of its poor record in civil rights, privacy and transparency.

DHS has set up a confusing series of accountability measures for so-called "responsible AI." The information regarding leadership and accountability measures are difficult to find on the DHS website. DHS established several task forces such as the AI Task Force[54] and the AI Policy Working Group[55] to advance and coordinate the deployment of AI. The documents are difficult to find and it is not clear how to identify locus points for accountability. However, civil rights agencies within DHS simply do not have enforcement authority under their own statutory mandates, making enforcement of civil rights violations in DHS unlikely.

Moreover, DHS is structurally ill-equipped to assume a leadership position[56] in the President's AI strategy for "responsible and ethically developed AI." DHS has an abysmal record of safeguarding privacy and protecting civil rights.

- Their own internal processes failed to protect immigrant communities and US citizens from a myriad of DHS programs widely recognized to systematically violate civil and human rights, such as the discriminatory travel ban called the Muslim Ban[57] and the separation of children from their families during the "zero tolerance policies" of the Trump Administration. As DHS grew to one of the largest jailers in the United States, its record of abuses within immigration detention centers have also grown—such as abusive detention conditions at the border through

[54] The AI Task Force (AITF) which will advance and integrate AI into DHS missions. The AITF includes a Responsible Use Group (AITF RUG) which is led by the DHS Office of Civil Rights and Civil Liberties (DHS OCRCL)."Establishing a DHS Artificial Intelligence Task Force," DHS, April 20, 2023. https://www.dhs.gov/sites/default/files/2023-04/23_0420_sec_signed_ai_task_force_memo_508.pdf. "DHS Announces New Policies and Measures Promoting Responsible Use of Artificial Intelligence," DHS Press Release, September 14, 2023 https://www.dhs.gov/news/2023/09/14/dhs-announces-new-policies-and-measures-promoting-responsible-use-artificial.

[55] The AI Policy Working Group will develop policies related to acquisition and use of AI. The AIWPG is helmed by the DHS Chief Information Officer, Under Secretary for Science and TEchnology, the Officer for Civil Rights and Civil Liberties, The Chief Privacy Officer and the Under Secretary for Strategy, Policy and Plans. "Acquisition and Use of Artificial Intelligence and Machine Learning Technologies by DHS Components (DHS AI Policy)," Sec. II, Policy Statement, 139-06, August 8, 2023. https://www.dhs.gov/sites/default/files/2023-09/23_0913_mgmt_139-06-acquistion-use-ai-technologies-dhs-components.pdf

[56] "FACT SHEET: Biden-Harris Administration Executive Order Directs DHS to Lead the Responsible Development of Artificial Intelligence," DHS, October 30, 3023. https://www.dhs.gov/news/2023/10/30/fact-sheet-biden-harris-administration-executive-order-directs-dhs-lead-responsible

[57] "Five years after Trump's "Muslim Ban"," NPR, March 4, 2022. https://www.npr.org/2022/03/04/1084565893/five-years-after-trumps-muslim-ban (last visited November 26, 2023)

"hieleras,"[58] or sterilization procedures at the notorious Georgia prison, Stewart Detention Center.[59]

- Privacy controls within DHS fail to provide strong oversight of department wide privacy initiatives in DHS, especially when it comes to data flows and use within the agency.[60] In September 2023, it was discovered that DHS ignored privacy protocols involving commercial telemetry data and often did not protect against unauthorized access to sensitive and personal data.[61]

10. **Because DHS OCRCL has a poor record remediating civil rights abuses, OMB must strengthen civil rights protocols used by OCRCL.**

More specifically, the OMB must strengthen civil rights protocols used by OCRL, such as:

- **As a threshold measure, DHS OCRCL must provide a clear map of decision-making around the designation process for "risk-related" artificial intelligence and release their findings to their public, including the process they used to decide to "approve" an AI technology.**
- **DHS OCRCL should be required to release civil rights assessments on current AI products in use at DHS, focusing on facial recognition, risk assessment algorithms used in ATDs, and data broker systems.**
- **OCRCL must consult with affected groups before making a decision on procurement or use of AI/machine learning technologies, particularly in procurement decisions or ongoing monitoring of such products.**

We are deeply troubled that the DHS Chief Artificial Intelligence Office (CAIO) will rely on the DHS Office of Civil Rights and Civil Liberties (OCRCL) to mitigate the harms presented by AI technologies[62] because they are ineffective, weak and have failed to effectively intervene in major civil rights events through

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[58] "Hieleras (Iceboxes) in the Rio Grande Valley Sector, Lengthy Detention, Deplorable Conditions, and Abuse in CBP Holding Cells,"Guillermo Cantor, Ph.D, American Immigration Council, December 17, 2015. https://www.americanimmigrationcouncil.org/research/hieleras-iceboxes-rio-grande-valley-sector (last visited November 26, 2023)

[59] "Senate Committee Finds Medical Abuse of Detained Women at Georgia ICE Facility," TIME, Jasmine Aguilera, November 22, 2022. https://time.com/6234031/medical-abuse-georgia-women-detained/ (last visited November 26, 2023)

[60] "DHS Privacy Office Needs to Improve Oversight of Department-wide Activities, Programs, and Initiatives," Office of the Inspector General- DHS, November 4, 2020. https://www.oig.dhs.gov/sites/default/files/assets/2020-12/OIG-21-06-Nov20.pdf (last visited November 26, 2023).

[61]"CBP, ICE, and Secret Service Did Not Adhere to Privacy Policies or Develop Sufficient Policies Before Procuring and Using Commercial Telemetry Data (REDACTED)," DHS OIG, September 28, 2023.https://www.oig.dhs.gov/sites/default/files/assets/2023-09/OIG-23-61-Sep23-Redacted.pdf
"Summary Report: Persistent Data Issues Hinder DHS Mission, Programs, and Operations," DHS Office of the Inspector General, May 24, 2021. https://www.oig.dhs.gov/sites/default/files/assets/2021-05/OIG-21-37-May21.pdf

[62] "FACT SHEET: Biden-Harris Administration Executive Order Directs DHS to Lead the Responsible Development of Artificial Intelligence," DHS, October 30, 3023. https://www.dhs.gov/news/2023/10/30/fact-sheet-biden-harris-administration-executive-order-directs-dhs-lead-responsible

DHS' 20 year existence.[63] Limited to policy development, OCRCL has *no* enforcement authority and has limited jurisdiction over enforcement actions, especially on matters where DHS coordinates with state and local law enforcement authorities.[64] Because it can only *suggest* policy to DHS, it is unlikely OCRCL will succeed in making DHS comply with civil rights and civil liberties mandates. Disturbingly, DHS' most recent AI policy articulates roles that OCRCL plays but does not disclose any decision-making so that the public can better understand why DHS OCRCL greenlit policies. Moreover, OCRCL's work and efficacy entirely depends on DHS priorities, which shift with each presidential administration.

OCRCL has also failed to surface concerns or rights violations in newly issued DHS directives and policy on AI, such as the "Use of Face Recognition and Face Capture (FR/FC) Technologies."[65] DHS OCRCL has failed to protect activists and organizers engaged in protected First Amendment activities, even when DHS used aggressive technology surveillance tools, such as social media scraping, against people who have fought for immigrant rights and civil rights.[66]

Conclusion

Our organizations represent a substantial constituency. Forty-six million people in the United States are foreign-born[67], with an estimated 16.2M in mixed-status families (a mix of US citizens, legal permanent citizens, other regularized statuses such as Deferred Action for Childhood Arrivals or Temporary Protected Status, asylum seekers, and undocumented people).[68] Immigrant communities are "underserved communities" per the Executive Order on Advancing Racial Equity, EO 14091, which defines "underserved communities" as populations as well as geographic communities that have been systematically denied the opportunity to participate fully in aspects of economic, social, and civic life.[69]

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[63] "Building Meaningful Civil Rights and Liberties Oversight at the U.S. Department of Homeland Security,"Scott Shuchart, Center for American Progress (2019). https://www.americanprogress.org/article/building-meaningful-civil-rights-liberties-oversight-u-s-department-homeland-security/ (last visited November 26, 2023)

[64] https://www.dhs.gov/sites/default/files/publications/crcl-directive-3500.pdf

[65] "Use of Face Recognition and Face Capture Technologies," DHS Directive, Directive Number 026-011, Issued 9/11/2023. https://www.dhs.gov/sites/default/files/2023-09/23_0913_mgmt_026-11-use-face-recognition-face-capture-technologies.pdf

[66] Targeted But Not Silenced: A Report on Government Surveillance and Retaliation Against Immigration Organizers in the United States, Mijente and Just Futures Law Take Back Tech Fellowship report, August 2021 https://static1.squarespace.com/static/62c3198c117dd661bd99eb3a/t/62df0174233afe04b60c0891/1658782076288/Targeted+But+Not+Silenced.pdf (last visited November 26, 2023.

[67] "The immigrant population in the U.S. is climbing again, setting a record last year," Joel Rose, NPR, September 14, 2023 (last visited November 9, 2023). https://www.npr.org/2023/09/14/1199417599/immigrant-population-us-foreign-born-census-bureau

[68] Fact Sheet: Mixed Status Families and COVID-19 Economic Relief, August 12, 2020, National Immigration Forum (last visited November 9, 2023). , https://immigrationforum.org/article/mixed-status-families-and-covid-19-economic-relief/

[69]Executive Order on Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, January 20, 2021, 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/;

The OMB guidance encourages agencies to "consult affected groups, including underserved communities, in the design, development, and use of the AI, and use such feedback to inform agency decision-making regarding the AI."[70] In this spirit, we offer these recommendations to truly diminish risks to their safety, as well as their civil, privacy, and consumer protection rights. Should you have any questions, please do not hesitate to contact Paromita Shah at paromita@justfutureslaw.org, Mizue Aizeki at Mizue@surveillanceresistancelab.org, or Akina Younge at aki@raceanddigitaljustice.org.

Thank you,

Just Futures Law
Surveillance Resistance Lab
Center for Race and Digital Justice
MediaJustice
Mijente
Access Now
Arkansas Justice Reform Coalition
Athena Coalition
Carolina Migrant Network
CCTV Center for Media + Democracy
Center on Privacy and Technology at Georgetown Law
Connecticut Shoreline Indivisible
Decarcerate Sacramento
DRUM - Desis Rising Up & Moving
Families for Freedom
Fight for the Future
Georgia Latino Alliance for Human Rights
Government Information Watch
Grassroots Leadership
Illinois Coalition for Immigrant and Refugee Rights
Immigrant Legal Resource Center
Kapor Center
La Resistencia
Muslim Advocates
NAKASEC
National Immigrant Justice Center
National Partnership for New Americans
ORALE
People's Tech Project
Project On Government Oversight

[70] https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf: 19

Pueblos de Lucha y Esperanza
Robert F. Kennedy Human Rights
Tarjimly
United We Dream
Voces Unidas RGV

Appendix: Summary of Recommendations

1. The risk assessment framework is fundamentally flawed, and should be abandoned if the government's intention is to provide the strongest risk mitigation and rights protections. Alternatively, short of abandoning this framework, we suggest that you adopt recommendations 2 through 10.
2. The OMB guidance must further limit exemptions and waivers for intelligence and law-enforcement related AI technology and agencies, especially for DHS, and must release their decision-making on exemptions and waivers to the public.
3. The OMB guidance should amend the purposes that are presumed to be rights impacting in Sec 5.b.ii.C:
    a. Strike "[D]eciding immigration, asylum, or detention status" and add "[P]re-investigation, investigation, identification, assessment, review, determination, or adjudication of any immigration status, immigration benefit, federal benefit, asylum, detention, removability, exclusion or for the purpose of immigration enforcement, including surveillance;"
    b. Add to end of Sec 5.b.ii.C: "Biometric collection (including face, iris, fingerprint, voice, gait, DNA) for immigration purposes
    c. Add a new category to Sec.5.b.ii. "Consumer products or information that are used, accessed or produced by credit bureaus or agencies, including consumer credit reports, credit ratings, credit header data, and credit reporting methods."
4. The OMB guidance should place the burden on the agency to demonstrate good faith efforts to implement the minimum practices and disclose those efforts to the public before obtaining a waiver, extension or exemption from the August 1, 2024 deadline for minimum practices compliance.
5. The OMB guidance should expand the list of risk considerations for "rights impacting artificial intelligence" to include broader definitions of privacy and consumer protection rights. It should also recognize harms created by federal agency use of commercial data for AI/machine learning systems. The OMB guidance should explicitly recommend that minimum practices apply whether or not the subjects are non-citizens.
6. The Administration's reliance on artificial intelligence impact assessment (AIIA) tools as a core minimum standard certification requirement is short-sighted and should be abandoned. If AIIAs are used, the agencies should publicly disclose all data sharing agreements, including information sharing access agreements (ISAAs.)
7. When the OMB develops "an initial means to ensure that AI contracts align with the guidance," the OMB should specifically elaborate when and how contracts are terminated or altered if they

cannot meet the August 1, 2024 deadline or the rights-mitigating practices. OMB should require that federal agencies make public the process they will use for terminating or suspending AI products if the agency fails to meet rights-impacting mitigation practices.

8. The OMB guidance must (1) narrowly apply the law enforcement privilege to the AI inventory of federal law enforcement agencies such as DHS and DOJ, (2) enforce proposed reporting requirements for changes to the AI inventory and update them quarterly, and (3) require agencies to identify vendors in the AI inventory. Without these measures, technologies presenting the highest risks to rights will continue to face limited scrutiny by the public.
9. DHS's role in the President's responsible development of AI requires strict oversight because of its poor record in civil rights, privacy and transparency.
10. Because DHS OCRCL has a poor record remediating civil rights abuses, OMB must strengthen civil rights protocols used by OCRCL, such as the following
    a. As a threshold measure, DHS OCRCL must provide a clear map of decision-making around the designation process for "risk-related" artificial intelligence and release their findings to their public, including the process they used to decide to "approve" an AI technology.
    b. DHS OCRCL should be required to release civil rights assessments on current AI products in use at DHS, focusing on facial recognition, risk assessment algorithms used in ATDs, and data broker systems.
    c. OCRCL must consult with affected groups before making a decision on procurement or use of AI/machine learning technologies, particularly in procurement decisions or ongoing monitoring of such products.

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lps-wfun-bedh
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0129
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Asian Americans Advancing Justice - AAJC

General Comment

Attached

Attachments

OMB AI Comment _ December 2023 (1)

December 5, 2023

Clare Martorana
U.S Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management and Budget
725 17th St NW, Suite 50001
Washington, DC 20503

Re. Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Memorandum (Docket OMB–2023–0020)

Dear Ms. Martorana,

On behalf of Asian Americans Advancing Justice | AAJC, we submit our views on the request for comments on advancing governance, innovation, and risk management for agency use of Artificial Intelligence (A.I), docket No. OMB-2023-0020.

Asian Americans Advancing Justice | AAJC ("Advancing Justice | AAJC") is dedicated to furthering civil and human rights for Asian Americand and to promoting a fair and equitable society for all. We provide the growing Asian American community with multilingual resources, culturally appropriate community education, and public policy and civil rights advocacy. In the communications field, Advancing Justice | AAJC works to promote access to critical technology, services, and media for our consumers.

Question 3: How can OMB best advance responsible AI innovation?

Automated decision-making practices can be highly invasive and discriminatory towards communities of color, including Asian Americans. These processes may introduce bias into decision making processes, when it shows individuals different options for housing, employment, and credit opportunities or reproduces historical patterns of bias, it can result in illegal discrimination.[1]

For Asian Americans and other communities of color, the harms of automated decision-making practices are especially magnified for those who have Limited English Proficiency (LEP) or have been historically monitored and surveilled. Such individuals are vulnerable to privacy invasions, data breaches, and targeted disinformation. It is crucial that OMB consider how data collection and use practices have been

[1] https://www.brookings.edu/articles/fairness-in-algorithmic-decision-making/

intentionally manipulated, misused, and biased against these populations throughout history when developing guidelines for government agencies.

Data is not neutral and when decisions are made without addressing the discrimination embedded in the data, the results are inevitably also discriminatory. Many studies and and other data collection methods throughout history exclude Asian Americans, Native Hawaiian, and Pacific Islander (AANHPI) communities entirely from the data collection, limit data collection populations to only those who speak English, or fail to disaggregate any of the data. Up to 50% of AANHPIs have Limited English Proficiency (LEP)[2], and these populations are often in greatest need of protections and services. Any data collection methods that fail to reach and accurately represent the metrics of these communities excludes AANHPIs as a demographic group[3] and/or skews the data significantly by oversampling the most convenient groups (those that speak English proficiently). Even through the AANHPI communities are one of the most diverse and complex[4], data sets rarely ever disaggregate the data. For example, disaggregated data shows that LEP rates among Asian Americans and Pacific Islanders vary significantly:

- Among Asian Americans, nearly 12.3% of Japanese Americans have LEP while 57.6% of Burmese Americans have LEP.[5]
- The average LEP rate among Pacific Islanders also varies among different ethnic groups, from 14% of Micronesian Americans to 2.3% of Native Hawaiians.

Instead of documenting these differences these discrepancies are disregarded and Asian American, Native Hawaiian, and Pacific Islander demographics and experiences are conflated, lumping immensely different people into one group.

We have also seen how AI can reinforce and perpetuate existing biases in data. Recent studies on large language models found a disproportionate association made between Muslims and violence when using tools like GPT-3,[6] presenting an extreme risk in the use of AI when making decisions and determinations about individuals and groups of people. Until more research is done to debias AI tools that draw from inherently non-neutral data, the probability of discriminatory outcomes when using AI applications remains problematically high.

The data used to make automated decisions for many AANHPIs fails to accurately represent them, acknowledge, or include them at all. Representative data is necessary because omitting models' access to race or other protected categories can make discrimination harder to detect. Many variables are highly correlated with race, ethnicity, and gender making them proxy variables that models can still learn to discriminate based on. This means that even if the social identifiers were intentionally removed from the database, models that are not intentionally designed to avoid discrimination may still produce biased outcomes. Without contextualizing, fixing, and augmenting data with more accurate metrics, the data used to make decisions for the AANHPI community will continue to be inaccurate, biased, and ultimately

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[2] https://aapidata.com/infographic-limited-english-2-2/
[3]https://www.urban.org/urban-wire/asian-americans-are-falling-through-cracks-data-representation-and-social-services
[4] https://www.pewresearch.org/short-reads/2021/04/29/key-facts-about-asian-origin-groups-in-the-u-s/
[5] https://data.census.gov/table/ACSSPP1Y2021.S0201?t=-04:-05:012:031&moe=false
[6] Large language models associate Muslims with violence | Nature Machine Intelligence

harmful. Data sets must be audited for fairness, inclusivity, accuracy, and transparency before they are used to make significant decisions for individuals.

Question 5: Are there use cases for presumed rights-impacting A.I that should be included, removed, or revised?

1. **Education**

AI plagiarizing-detecting tools are already widely integrated into schools and universities. For example, over 16,000 academic institutions rely on Turnitin to detect plagiarism. However, "Turnitin's tool was much more likely to flag international students' writing as AI-generated."[7] Flaws and biases in plagiarizing-detecting tools constitute genuine threats to international or ESL students' academic reputations and visa statuses. Beyond Turnitin, early research shows that AI generators in general are more likely to flag English as a second language (ESL) students' work as plagiarized, a high number of which are Asian American students. A Stanford study found that the plagiarism-detection software "...exhibit[s] significant bias against non-native English authors, as demonstrated by their high misclassification of TOEFL essays written by non-native speakers."[8] Importantly, these biased flaws in plagiarizing-detecting tools can harm academic reputations and even the security and safety of ESL learners and international students; A charge of academic misconduct, even one backed by false results from a plagiarizing-detecting tool, could lead to expulsion or suspension. For international Asian American students, this could threaten their visa status.[9] When assessing and mitigating disparate impacts, it is essential to recall that plagiarism-detecting AI tools have shown significant bias toward Asian American ESL students.

AI performance reflects and amplifies the conscious or unconscious bias of humans who code it and the data it draws from. This phenomenon is particularly alarming when integrating AI into college admissions processes. AI will often draw from stereotypes or use flawed data to make biased conclusions about applicants: "If success standards are defined by the data of a majority group, then the AI will have an implicit bias and default to excluding minority groups."[10] Moreover, the use of AI in admissions presents an issue of efficacy; there is a risk that AI fails to distinguish between cultural differences, putting minority applicants at a disadvantage and altering admissions unfairly. Specifically, drawing on stereotypes of Asian Americans poses a particularly harmful threat. The model minority myth or misconceptions of Asians as a racial monolith may lead AI to unfairly rate Asians as unsuitable candidates for admissions.

Schools integrate self-harm monitoring technologies into virtual classes with the intent of protecting students and flagging any behavior seen as a threat to one or many students' well-being. However, Black and other disadvantaged groups such as low-income students and other students of color, may experience

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[7]https://themarkup.org/machine-learning/2023/08/14/ai-detection-tools-falsely-accuse-international-students-of-cheating

[8]https://www.cell.com/patterns/fulltext/S2666-3899(23)00130-7?_returnURL=https%3A%2F%2Flinkinghub.elsevier.com%2Fretrieve%2Fpii%2FS2666389923001307%3Fshowall%3Dtrue

[9]https://themarkup.org/machine-learning/2023/08/14/ai-detection-tools-falsely-accuse-international-students-of-cheating

[10] https://www.ism.edu/ism-insights/ai-and-bias-in-university-admissions-3.html

this form of monitoring as surveillance. As students whose racial identities are subjected to existing undue scrutiny, AI-based surveillance may be an additional resource for teachers and administration to target students unfairly. Moreover, with privacy concerns, LGBTQ+ students face a particular threat in that they may intentionally hide their identity for safety reasons. LGBTQ+ students may also be less likely to report incidences of abuse or hate, rendering these systems ineffective at preventing bullying and harassment.[11] The model minority myth may disadvantage Asian American students' well-being if AI fails to acknowledge or even consider warning signs in Asian American students. The model minority myth may lead AI to disassociate Asian Americans students with mental health struggles, leaving them undetected.

Despite misconceptions of AI and machine learning tools' objectivity and accuracy, these technologies rely on human programming and human data, both of which are inherently flawed and contain both conscious and unconscious bias. As a result, AI can make flawed assumptions based on stereotypes and therefore limit or misdirect students' access to education resources or programs. A Princeton University found that "For just about every kind of bias that's been documented in people, including gender stereotypes and racial prejudice, we were able to replicate it in today's machine-learning models."[12] Not only are these stereotypes replicated but certain AI models exacerbated stereotypes.[13] Given the proven potential bias of AI, it is plausible that in the education world, AI could unfairly dictate the educational resources students are available to. For example, in utilizing AI to aid students' access to educational programs, AI could disproportionately place male students in STEM programs or recommend students of color to take race-specific studies rather than cater to students' genuine interests. Integrating a biased AI model into schools could result in limiting the educational resources available to marginalized groups, such as women, low-income students, and students of color. AI may unfairly lead Asian Americanstudents to pursue stereotypically Asian-dominated programs/majors such as STEM majors. By limiting the resources available to Asian American students based on bias and stereotypes, AI will disadvantage Asian American students' autonomy over their education. AI may also connect Asian students with Asian language classes, inhibiting their ability to explore more diverse topics.

2. Immigration

While the OMB memo purports to lay out minimum practices as guide rails for the use of AI in safety-affecting or rights-affecting situations, the use of AI to make legal determinations raises particular concerns given the possible consequences of those legal determinations. The following information must be taken into consideration as part of the minimum practices outlined in the memo when it comes to immigration and education-related rights-affecting use of AI.

The OMB memo correctly identifies decisions about immigration, asylum, or detention status as a rights-affecting use of AI. Whether someone is a citizen, for example, has immense consequences for someone convicted of a crime. Unfortunately, existing databases are often inaccurate about immigration or detention status. ICE and CBP officers relying on such databases have previously detained and arrested U.S. citizens.[14] One contributing factor for these errors is that it is not always easy to determine whether

[11] https://studentprivacycompass.org/resource/self-harm-monitoring/
[12] https://www.cs.princeton.edu/news/bias-machine-internet-algorithms-reinforce-harmful-stereotypes
[13] https://www.bloomberg.com/graphics/2023-generative-ai-bias/
[14] https://www.gao.gov/assets/gao-21-487.pdf.

someone is a U.S. citizen, due to complexities in U.S. immigration laws.[15] The use of AI to make those complex legal decisions would be disastrous. Lawyers using AI in legal settings have been sanctioned for failing to meet the ethical standards for accuracy,[16] which indicates that it should not be used to make legal judgments.

We are significantly concerned about the use of AI to make risk assessments about individuals who intend to travel, or have already entered, the U.S. or its territories. Experts have noted the difficulties in precisely identifying what "risk" is in the context of AI vetting.[17] In the context of the "Extreme Vetting Initiative" proposed by the previous administration, experts noted that: 1) a lack of clear definitions would allow the government to arbitrarily flag individuals as risks; 2) even the best algorithms show an unacceptable rate of error when predicting rare events like crime and terrorism; and 3) such error (false positives) would have serious repercussions.[18]

The use of AI to control border access, including the use of facial recognition technology, raises similar problems, and already has shown bias toward certain populations.[19] The data sets used to train such technology are likely to further exacerbate existing disparities and biases, especially among communities of color, including people of Asian descent. The lack of diversity and representation in training data is evident in the data used in facial recognition technology. Machine learning modules learn based on the data they are given, and the majority of open-source facial image datasets are dominated with images of white men. According to a report by the National Institute of Standards and Technology (NIST), facial recognition systems were 100 times more likely to falsely identify West and East African faces and East Asian faces when compared to Eastern European faces.[20] This is especially concerning as immigration and federal law enforcement agencies use artificial intelligence and facial recognition technology for the purpose of monitoring and tracking migrants and other marginalized communities.

The use of AI tools in the "alternatives to detention" setting, or specifically as related to "physical location-monitoring devices" faces the same concerns as other uses of AI in this context. Since 2004 Immigrations and Customs Enforcement (ICE) has enrolled incoming migrants and asylum seekers into an alternative to detention program. While advertised as a humane solution to detention centers, reports suggest that this program causes migrants physical and psychological harm.[21] One of the most prevalent alternatives to detention is SmartLink, a phone application equipped with facial recognition technology (FRT). SmartLink requires that those enrolled in the program upload a photo of themselves during check-ins which is then matched to an existing photo on file using FRT, which raises the concerns mentioned above. In addition, the collection of location data can easily be used alongside other algorithms designed to predict the likelihood of criminal activities.[22] While predictions and decisions made by

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[15] *Id.*
[16] https://www.thomsonreuters.com/en-us/posts/government/generative-ai-courts/; https://caselaw.findlaw.com/court/us-dis-crt-sd-new-yor/2335142.html
[17] https://www.brennancenter.org/sites/default/files/Technology%20Experts%20Letter%20to%20DHS%20Opposing%20the%20Extreme%20Vetting%20Initiative%20-%2011.15.17.pdf
[18] *Id.*
[19] https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias
[20] https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf
[21] https://notechforice.com/digitalprisons/
[22] https://www.ojp.gov/pdffiles1/nij/grants/249888.pdf

artificial intelligence are perceived as objective, it's important to note that these models reflect the sentiments of society. For example an algorithm used to determine how likely a given defendant is to commit another crime for probation and parole, was twice as likely to incorrectly predict Black defendants as high risk than white defendants.[23]

Finally, the use of AI in translation should be approached with great caution. We recommend that no AI tools be used for interpretation, because of the undeniable propensity and gravity of consequences for mistranslated testimony and documents. As just one example, the use of AI translation to translate Pashto and Dari has had negative effects on asylum applicants from Afghanistan.[24] A report from the Guardian found that AI-powered tools are particularly unreliable for languages that are considerably different from English or less comprehensively documented.[25]

OMB should additionally establish further privacy protections to protect individuals and communities from having their personal data from being collected, stored, and sold without meaningful consent or explicit and limited acceptable use cases. OMB should use this guidance as an opportunity to establish data privacy policies for when government agencies develop, procure, or use artificial intelligence.

Question 6: Do the minimum practices identified for rights-impacting A.I set an appropriate baseline that is applicable across all agencies?

Due to language issues it can be more difficult for individuals with LEP to fully understand and exercise their privacy rights, making opt-out choices inadequate in ensuring consumers are protecting their data and instead puts them at increased risk to digital privacy threats. This poses a particular issue for the six million LEP AANHPIs who speak over 100 different languages other than English and who must navigate terms and services, privacy notices, and cookie settings that are laden with technical jargon and often inaccessible for English proficient users. This means that opt-out choices are ineffective in protecting those with limited English language abilities, who likely cannot understand the language used in cookie notices well enough to refuse data collection. In instances where translations exist, notices are difficult to comprehend, as they are often written in technical jargon or grammatically incoherent without review by a native speaker.

Language access is critical to address this problem because it would allow people in these communities to better understand what rights they have. Information centers, learning modules, notices, and other consumer resources must be available in non-English languages, publicized in-language with trusted community members and centers, and tested with users to ensure intended audiences can actually use the systems that are built for them. Translations must be accessible and understandable to individuals, especially those with lower digital literacy abilities. Opt-outs are only useful if users actually have the knowledge and ability to control their options.

[23]https://sitn.hms.harvard.edu/uncategorized/2020/fairness-machine-learning/
[24] https://restofworld.org/2023/ai-translation-errors-afghan-refugees-asylum/
[25] https://www.theguardian.com/us-news/2023/sep/07/asylum-seekers-ai-translation-apps

Federal agencies should ensure that all materials and communications, including communications regarding the use and implementation of A.I and any official agency communications, are written in simple English that can be easily translated. Only native-level speakers with deep knowledge of the community, cultural context, and familiarity with the vernacular should be utilized for translations. Community groups and leaders should be consulted before translations are published to ensure they are accessible and understandable to the target audience. Furthermore, some languages do not have written alphabets, posing unique challenges for groups like Rohingya refugees who do not have a universally accepted script and require additional in-language audiovisual support. Translations should also include PSAs on local ethnic broadcast stations and resources that community organizations can easily distribute to clients. It is critical that OMB establish guidelines that prevent agencies from using A.I to translate official communications and require that agencies use a native speaker for these translations to ensure accuracy and readability.

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Asian Americans Advancing Justice - AAJC thanks you for the opportunity to provide comment on this Memo. For more information please contact Emily Chi, Senior Director for Telecommunications, Technology, and Media at Asian Americans Advancing Justice - AAJC at echi@advancingjustice-aajc.org.

Sincerely,
Asian Americans Advancing Justice - AAJC

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0130
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Center for Democracy & Technology

General Comment

The Center for Democracy & Technology respectfully submits the attached comments in response to the Office of Management and Budget Reuest for Comments regardint the draft memorandum for agency use of artificial intelligence.

Attachments

CDT Comments on OMB-2023-0020 Draft Guidance for Agency Use of AI

CENTER FOR DEMOCRACY & TECHNOLOGY

December 5, 2023

To: Director Shalanda D. Young
The Office of Management and Budget
725 17th St. NW
Washington, DC 20503

Submitted via regulations.gov

Re: Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum | 88 FR 75625

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Introduction

The Center for Democracy & Technology (CDT) respectfully submits these comments in response to the Office of Management and Budget (OMB) Request for Comments regarding the draft memorandum for agency use of Artificial Intelligence (hereinafter "draft Memo"). CDT is a nonprofit 501(c)(3) organization that works to advance civil rights and civil liberties in the digital age. Among our priorities, CDT advocates for the responsible and equitable use of technology by government agencies, and promotes the adoption of robust, technically-informed solutions for the effective regulation and governance of AI systems.[1]

We commend OMB for its leadership in setting AI accountability policy. The draft Memo shows a continued commitment to advancing equity, civil rights, and innovation, and recognizes the importance of providing implementing guidance to ensure that commitment is carried out effectively and consistently across the federal government. CDT welcomes OMB's incorporation of key elements from the Administration's Blueprint for an AI Bill of Rights in the draft Memo's required minimum practices, such as requiring AI impact assessments, human consideration

[1] Center for Democracy & Technology, *Comments to Office of Science and Technology Policy on National Priorities for Artificial Intelligence* (Jul. 7, 2023), https://cdt.org/wp-content/uploads/2023/07/CDT-comment-to-OSTP-on-national-AI-strategy23.pdf.

and accountability, and notice and plain language documentation, as well as heightened requirements for uses impacting people's rights such as disparate impact assessments, opt-outs, and consultation with affected groups. These requirements are essential to effectuating the Administration's guiding principles for AI as set forth in the Executive Order on Safe, Secure & Trustworthy Development and Use of Artificial Intelligence.

Despite the strength of the Memo's guidance, there are several places where it should be bolstered to increase transparency to help agencies and the public better understand federal uses of AI systems, and to improve consistency and ease agencies' burden in interpreting the Memo. In addition, OMB must act quickly to issue further guidance on the key work streams needed to achieve the Memo's goals, including more detailed guidance on AI use case inventories, disparate impact testing, and the waiver process, as well as necessary updates to federal procurement processes and guidance.

RFC Question 1: *Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?*

Recommendation #1

The Chief AI Officer should have responsibility for, and issue guidance for, agencies' grantmaking for AI uses.

The draft Memo does not extend to grants and federal financial assistance, and in so doing fails to provide guidance on a central way in which federal agencies cause the development and use of AI systems. Already, federal agency grantmaking has directly led to AI misuses: for example, when public housing authorities used funding from the Department of Housing & Urban Development to purchase surveillance cameras not only to monitor crime–as HUD intended–but also to monitor and discipline residents.[2]

OMB should clarify that the responsibilities of the CAIO includes managing risks and providing resources for responsible grantmaking with respect to AI, and provide agencies with guidance to mitigate these risks. For example, OMB could:

- clarify that Chief AI Officers' responsibilities include managing risks from the use *"and federal funding of"* (draft Memorandum sections (3)(b)(ii)(J); (3)(b)(ii)(L));

[2] Dan Bateyko, *Taken for Granted: Where's the Oversight of AI and Federal Funding?,* Center for Democracy & Technology (Aug. 7, 2023), https://cdt.org/insights/taken-for-granted-wheres-the-oversight-of-ai-and-federal-funding/.

- clarify that the Chief AI Officer's responsibility to "maintain awareness of agency AI activities" includes AI-related grantmaking activities (section (3)(b)(ii)(B));
- clarify that agencies' compliance plans under the draft Memorandum should include grantmaking programs (section(3)(b)(ii)(C));
- provide, or direct a relevant office (such as 18F or USDS) to provide, guidance on supporting responsible AI development and use for agency grantmakers – for example by directing agencies to work with legal counsel to review grants that implicate AI before the award of funds using the substantive practices set forth in the draft Memorandum, and convening experts to grant review boards.[3]

Translating OMB's guidance on AI Accountability policy to grantmaking is in keeping with the Executive Order on Further Advancing Racial Equity,[4] which aims for agencies to have comprehensive equity strategy in their programs and policies, and OMB M-21-27, which urges the use of high-quality evidence in government decision-making.[5] Such guidance would reduce information silos and support grant reviewers that welcome timely consideration of grant applications by other agency staff.[6]

RFC Question 5: *Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?*

Recommendation #1

Periodically review the presumed use cases; provide clearer guidance for agencies to use the list.

The current list of presumed use cases is effective, and should not be altered by removing any items (we recommend several additions and clarifications below). The list reflects the Administration's extensive work and public consultation in developing the Blueprint for an AI Bill

[3] *Id.*
[4] The White House, *Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government* (2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.
[5] Office of Management and Budget, M-21-27, EVIDENCE-BASED POLICYMAKING: LEARNING AGENDAS AND ANNUAL EVALUATION PLANS, (2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/M-21-27.pdf.
[6] For more on agency grantmaking reforms, *see, e.g.* Eloise Pasachoff, *Federal Grant Rules and Realities in the Intergovernmental Administrative State: Compliance, Performance, and Politics*, YALE J. REGUL. (2020), https://openyls.law.yale.edu/handle/20.500.13051/8307.

of Rights, and is backed by a strong evidence base of harms documented in news coverage, policy reports, court cases, and academic literature.[7]

However, OMB should take further steps to ensure that agencies are consistently and appropriately interpreting the Memo. Specifically, OMB should:

- **Revisit and update the list of presumed use cases regularly**, with an opportunity for relevant experts and the public to recommend changes and provide comments (see further response on the process for soliciting public input in Q6).
- **Underscore that the list of presumed safety- and rights- impacting uses is not exhaustive** in any guidance, training, or other interactions, , and that agencies must conduct their own assessments to ensure that uses are appropriately designated.
- **Include specific examples of the presumed use cases** to help agencies understand them and recognize uses raising similar concerns (this could leverage the list of examples documented in the Administration's Blueprint for an AI Bill of Rights).[8]
- **Provide examples of how data that implicates protected characteristics – like disability or race – can be processed in ways that create rights-impacting concerns**, even when that data is not ultimately used in a decision-making context. Such examples would clarify to agencies how AI systems that seem to function in a facially neutral way may in fact harm particular marginalized communities, and would affirm that agencies are obligated to scrutinize such AI uses for unanticipated harms.[9]
- **Require that agencies identify in their AI inventories whether or not a use case has been deemed safety- or rights-impacting in its AI inventory, with a justification, by making this a mandatory field in the AI inventory**. This requirement would build off existing reporting by agencies, which already must report on outcomes of stakeholder

[7] *See* Data & Society's regulatory submission in response to this RFC for further detail. *See also, e.g.,* Elizabeth Laird and Maddy Dwyer, Center for Democracy & Technology, *Off Task: EdTech Threats to Student Privacy and Equity in the Age of AI* (2023), https://cdt.org/insights/report-off-task-edtech-threats-to-student-privacy-and-equity-in-the-age-of-ai/; Michael Yang, Center for Democracy & Technology, *The Promise and Peril of Data & Technology Use By Public Housing Agencies* (2023), https://cdt.org/wp-content/uploads/2023/03/2023-03-17-Civic-Tech-Technology-in-Public-Housing-Agencies-final.pdf; Lydia X.Z. Brown et al., Center for Democracy & Technology, *Challenging the Use of Algorithm-Driven Decision-Making in Benefits Determinations Affecting People with Disabilities* (2020), https://cdt.org/insights/report-challenging-the-use-of-algorithm-driven-decision-making-in-benefits-determinations-affecting-people-with-disabilities/; Hannah Quay-de la Vallee, Center for Democracy & Technology, *Public Agencies' Use of Biometrics to Prevent Fraud and Abuse: Risks and Alternatives* (2022), https://cdt.org/insights/public-agencies-use-of-biometrics-to-prevent-fraud-and-abuse-risks-and-alternatives/.

[8] Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Examples of Automated Systems* (2022), https://www.whitehouse.gov/ostp/ai-bill-of-rights/examples-of-automated-systems/.

[9] For example, the guidance lists "detecting or measuring emotions, thought, or deception in humans." An AI system might perform such functions to help detect and prevent suspicious behavior based on speech, eye contact, bodily movements, and similar data points. Because of how the system might be designed and how its outputs might be used, it could adversely affect people with disabilities, Black and brown people, and transgender people.

engagements that identify AI applications that are within the agencies' regulatory authorities.[10] Agencies' AI inventories should cite the regulatory authorities that apply to each use case, as this will provide further insights into whether the use case meets the guidance's definitions of rights- or safety-impacting AI.

Recommendation #2

Clarify the list of presumed rights-impacting use cases to include further law enforcement-related activities in immigration; uses in public housing; and uses targeting labor and collective bargaining.

OMB should clarify the draft Memo's application to certain AI uses in the immigration system which raise similar concerns to the use-cases listed in paragraphs 5(b)(ii)(B) and (C) but are not squarely covered by either paragraph. Immigration and Customs Enforcement (ICE) engages in law enforcement activities to investigate not just criminal, but civil and administrative law violations:[11] These activities include the use of AI for surveillance through license plate recognition, face recognition scans, DNA testing, and other functionalities.[12] Such uses are rights-impacting and far-reaching: one report finds ICE has used facial recognition technology on driver's license photographs belonging to 1 in 3 adults in the U.S.[13] The draft Memo should be amended to include the proposals in Just Futures Law's comment for Section 5(b)(ii) to expressly include processes in the immigration system, biometric collection, and the use of credit bureaus.[14]

The draft Memo should also expand to cover uses in public housing, such as the surveillance of tenants. Earlier this year, investigative reporting revealed that public housing authorities used "Emergency Safety and Security Grants" administered by the Department of Housing and Urban Development to purchase surveillance cameras—many equipped with face surveillance technologies. Those cameras were then used by housing authorities to surveil tenants, detect violations of lease terms (including those unrelated to tenant safety), and evict tenants.[15] As HUD has since advised, such uses were not eligible for the emergency grants.[16]

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[10] Office of Management and Budget, M-21-06, *Guidance for Regulation of Artificial Intelligence Applications* (2020), https://www.whitehouse.gov/wp-content/uploads/2020/11/M-21-06.pdf.
[11] Nina Wang et al., *American Dragnet: Data-Driven Deportation in the 21st Century* (2022), https://www.americandragnet.org/.
[12] *Id.*
[13] *Id.*
[14] See Just Futures Law's regulatory submission in response to this RFC for further detail.
[15] Douglas MacMillan, *Eyes on the Poor: Cameras, Facial Recognition Watch Over Public Housing*, Washington Post (May 16, 2023), https://www.washingtonpost.com/business/2023/05/16/surveillance-cameras-public-housing/.
[16] Dept. of Housing and Urban Development, Notice PIH 2023-10, *Emergency Safety and Security Grants Annual Funding Notification and Application Process* (2023), https://www.hud.gov/sites/dfiles/PIH/documents/2023PIH10.pdf.

OMB should also amend the list of rights-impacting use cases to include "collective bargaining, workplace organizing, union membership, or concerted activity" in part G to further ensure the protection of workers from the use of automated worker surveillance systems that interfere with the right to organize for better and safer working conditions.[17]

RFC Question 6: *Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?*

Recommendation #1

Issue public guidance on analyzing AI risks to identify, evaluate and mitigate safety- and rights- impacting use cases, subject to stakeholder input.

The minimum practices require agencies to identify and analyze safety- and rights-impacting use cases. This welcome policy will face a persistent challenge: people fail to recognize high-risk AI uses. Even experts struggle. In one study, graduate-level computer scientists asked to pinpoint risks in an AI system made poor judgment calls over who was at risk, what the harms were, and what caused the harm.[18]

Agencies need to rely on more than their best guesses when identifying AI risks. Compounding the problem, agency officials have been given mixed signals through varying government definitions of what counts as "AI." Without good, consistent guidance, agency officials will struggle to classify AI,[19] as an Inspector General's report on NASA's AI management strategy illustrates:

> "Personnel we interviewed stated *they reported AI based on their own individual understanding of what the term means rather than a formal definition* provided by the

[17] *See* Center for American Progress's regulatory submission in response to this RFC for further detail.
[18] Emily Black et al., *Toward Operationalizing Pipeline-Aware ML Fairness: A Research Agenda for Developing Practical Guidelines and Tools*, *in* EQUITY AND ACCESS IN ALGORITHMS, MECHANISMS, AND OPTIMIZATION 1 (2023), https://dl.acm.org/doi/10.1145/3617694.3623259.
[19] Chloe Autio et al., *A Snapshot of Artificial Intelligence Procurement Challenges* (2023), https://files.thegovlab.org/a-snapshot-of-ai-procurement-challenges-june2023.pdf (finding, e.g. "Civilian agencies like the Department of Transportation (DOT) describe a more conservative approach to AI procurement, given the agency's mandate to protect public safety.")

> Agency. As a result, NASA does not have a singular designation or classification mechanism to accurately classify and track AI or to identify AI expenditures within the Agency's financial system, making it difficult for the Agency to meet federal requirements to monitor its use of AI."[20] (emphasis added)

OMB should issue further guidance, provide support and establish oversight mechanisms to help agencies accurately categorize their uses. Any such guidance should be publicly available, and agency AI system classification accuracy should be regularly reviewed to evaluate the guidance's effectiveness. Additionally, OMB should implement any of the following to further support agency staff:

- **Stand up a cross-agency working group.** A working group, supported by OMB, can discuss implementation across agencies. Cross-agency information sharing will be vital, especially with statistical, scientific, and cybersecurity agencies with experience in managing datasets, AI tools, and their attending cybersecurity risks. Any products from these working groups could be made accessible to all agencies.
- **Designate a point-of-contact at OMB in charge of compliance and support for agencies in determining AI use cases.**
- **Consult with NIST on a standard for Algorithmic Impact Assessments (AIA).** There is no formal standard for an AIA. NIST could help develop and define this standard based on the level of risk presented, similar to how NIST established federal standards for information processing to determine whether risks have low, moderate, or high security impacts.[21] Agencies should be encouraged to add sector-specific additions to the AIAs. Such a standard, too, must be open to stakeholder feedback.
- **Improve guidance through public consultations and workshops inviting academics, civil society, and other impacted members of the public**. When engaging with those affected by an AI use case, OMB must meet them where they are by providing multiple ways to provide input.
- **OMB should provide clearer guidance to help agencies interpret the list of presumed safety- and rights-impacting use cases,** and **require agencies to disclose in the AI inventory whether an AI use case has been designated safety- or rights-impacting, with an explanation,** to help OMB and the public ensure consistency across agency interpretations.

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[20] Office of Inspector General, National Aeronautics and Space Administration, NASA's Management of Its Artificial Intelligence Capabilities (2023), https://oig.nasa.gov/docs/IG-23-012.pdf.

[21] *See, e.g.* National Institute of Standards and Technology, FIPS PUB 199, *Standards for Security Categorization of Federal Information and Information Systems* (2004), https://doi.org/10.6028/NIST.FIPS.199; National Institute of Standards and Technology, NIST SP 800-53, *Security and Privacy Controls for Information Systems and Organizations* (2020), https://doi.org/10.6028/NIST.SP.800-53r5.

Recommendation #2

Require AI Impact Assessments to document agency justifications for their AI uses *relative to non-AI options.*

The draft Memo requires agencies to document the expected benefit of an AI system, supported by specific metrics or qualitative analysis. This appropriate requirement pushes agencies to provide evidence that the AI system is a good fit to accomplish agency goals and related tasks. **To build on this culture of evidence,[22] OMB should require agencies to document the expected benefit *relative to other, non-AI options*.**

Documenting the benefit of AI relative to non-AI options has several upsides. First, agencies that document alternative options in an AI Impact Assessment will be prompted to consider efficacy risks particular to AI.[23] Second, agencies would provide a useful baseline to compare the AI's benefits and drawbacks for any affected groups providing feedback on whether to remove the AI from use when called for consultation under Section 5(v)(B). Lastly, instead of simply determining whether an AI system achieves its goal, having this additional point of comparison would allow agencies and people to determine if the goal could be better accomplished without AI.

This recommendation may require only a simple change to AI or Algorithmic Impact Assessments: for example, the Algorithmic Impact Assessment questionnaire hosted at CIO.gov asks respondents what other approaches to solving the problem were considered.[24] This and any similar sections should be amended to ask agencies to provide details about any non-AI approaches that were considered.

Recommendation #3

Provide further guidance to agencies on steps to assess and mitigate bias.

As part of the additional minimum practices required for rights-impacting AI, agencies must take steps to ensure that the AI will advance equity, dignity, and fairness, including proactively identifying and removing factors contributing to algorithmic discrimination; assessing and

[22] M-21-27, *supra* note 5.
[23] For risks particular to AI, *see, e.g.* Inioluwa Deborah Raji et al., *The Fallacy of AI Functionality*, in *2022 ACM Conference on Fairness, Accountability, and Transparency* 959 (2022), https://dl.acm.org/doi/10.1145/3531146.3533158.
[24] Federal Chief Information Officers Council, *Algorithmic Impact Assessment*, https://www.cio.gov/aia-eia-js/#/ (last visited Nov 29, 2023).

mitigating disparate impacts; and using representative data. For many agencies, these steps will involve creating wholly new processes requiring additional support from OMB.

For example, **OMB should issue guidance to agencies to address the lack of adequate demographic data used in identifying and removing algorithmic discrimination**. The Racial Equity EO 14091 directed agencies to create Equity Action Plans and for OMB to consider how the President's Budget can support these plans. One review of those plans found that 21 out of 25 agencies saw their lack of demographic data as a barrier to implementation.[25] While navigating this challenge is not unfamiliar in regulated and sensitive contexts such as employment, credit, and healthcare,[26] agencies have incentives not to collect demographic data or correct bias. In a Government Accountability Office report, one testimonial reflects how employees "prefer to remain unaware [of bias] because they consider this the safest way of proceeding" given risks of litigation and other anti-discrimination liabilities.[27] OMB guidance may help to structure and place appropriate guardrails around the gathering of demographic data to alleviate these concerns. To this end, a policy report from the Stanford Institute for Human-Centered AI offers OMB-relevant proposals, including:

- **Interpreting the Paperwork Reduction Act to speed up the gathering of demographic data** on surveys,[28]
- **Interpreting The Privacy Act to exempt bias assessments**, which fall under the exempt "statistical research" category,[29] and
- Promulgating **guidance for agencies around how to place technical and institutional protections around demographic data** to ensure it is only used for bias measurement and lawful bias mitigation efforts, and to build agency personnel's confidence in using the data safely.[30]

OMB should consider **providing advice on when agencies or their vendors should consider the use of imputation techniques such as BISG** (Bayesian Improved Surname Geocoding)[31] or

[25] Arushi Gupta et al., *The Privacy-Bias Tradeoff: Data Minimization and Racial Disparity Assessments in U.S. Government*, in 2023 ACM Conference on Fairness, Accountability, and Transparency 492 (2023), https://dl.acm.org/doi/pdf/10.1145/3593013.3594015.
[26] Miranda Bogen et al., *Awareness in Practice: Tensions in Access to Sensitive Attribute Data for Antidiscrimination*, in 2020 Conference on Fairness, Accountability, and Transparency (2020), https://arxiv.org/abs/1912.06171v1.
[27] U.S. Government Accountability Office, GAO-21-519SP, *Artificial Intelligence: An Accountability Framework for Federal Agencies and Other Entities* (2021), https://www.gao.gov/products/gao-21-519sp.
[28] GUPTA ET AL., *supra* note 25.
[29] *Id.*
[30] *Id.*
[31] *See, e.g.* Marc N. Elliott et al., *A New Method for Estimating Race/Ethnicity and Associated Disparities Where Administrative Records Lack Self-Reported Race/Ethnicity*, 43 HEALTH SERV. RES. 1722 (2008), https://pubmed.ncbi.nlm.nih.gov/18479410/; Kosuke Imai et al., *Addressing Census Data Problems in Race Imputation via Fully Bayesian Improved Surname Geocoding and Name Supplements*, 8 SCI. ADV. eadc9824 (2022), https://www.science.org/doi/10.1126/sciadv.adc9824.

proxies such as zip code to conduct bias analyses, taking into account the benefits and limitations of such approaches.[32] For some protected characteristics (such as race and ethnicity), such techniques may be readily available due to established use by industry and regulators for nondiscrimination purposes, while for others (such as sexual orientation or religion) there may be compelling reasons to avoid such an approach.[33]

Additionally, OMB should consider adding force to the requirement that **agencies test AI for significant disparities by requiring agencies (or their vendors) to search for a "less discriminatory algorithm" (LDA).**[34] Current computer science findings suggest that an "equally accurate, but less discriminatory alternative algorithm almost always exists."[35] These alternative algorithms are not apparent without proactive testing, but such testing generally imposes little cost, as the steps taken to compare model candidates before selecting one for use are already standard in the development of AI systems.[36] Agencies looking for mitigations to disparate impact might start by performing such a search or requiring an AI vendor show sufficient proof that such a search has been conducted.

In no case should a lack of demographic data be considered a free pass for agencies to avoid confronting potential discriminatory treatment or impacts of a system. **Agencies should be obligated to make best efforts to understand whether such impacts are likely**, even if doing so requires manual review of input data for obvious proxies or for qualitative analysis to identify potentially detrimental outcomes likely to fall most heavily on marginalized communities. In clarifying these minimum practices further, OMB will be following its concurrent obligation under the Racial Equity EO 14091 to embed equity into government-wide processes.[37]

Recommendation #4

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[32] Under some conditions, methods like Bayesian Improved Surname Geocoding (BISG) may over- or under-estimate demographic disparities, but they are still useful in identifying directional disparities. See, e.g. Aaron Rieke et al, *Imperfect Inferences: A Practical Assessment,* ACM Conference on Fairness, Accountability, and Transparency (2022), https://dl.acm.org/doi/10.1145/3531146.3533140. However, improper use of imputation approaches can risk misrepresentation and reinforcement of social categories. McKane Andrus et al, *Fairer Algorithmic Decision Making & Its Consequences Interrogating the Risks and Benefits of Demographic Data Collection, Use, and Non-Use*, Partnership on AI (2022), https://partnershiponai.org/paper/fairer-algorithmic-decision-making-and-its-consequences.

[33] Fairer Algorithmic Decision Making, *supra* note 32.

[34] Emily Black et al., *Less Discriminatory Algorithms*, Washington University in St. Louis Legal Studies (2023), https://papers.ssrn.com/abstract=4590481 (last visited Nov 22, 2023).

[35] *Id.*

[36] *Id.*

[37] *Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, *supra* note 4.

Strengthen and concretize the waiver process to clarify when waivers may be granted and increase transparency.

Under the draft Memo, an agency may request a waiver to the minimum practices through its Chief AI Officer if fulfilling the minimum practices "would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations." Without further checks, such a waiver incentivizes agencies to skip the procedural requirements of the draft Memo. OMB can look to existing laws and practices for examples of how to improve the waiver process.

OMB can look to principles from administrative law for standards to review waivers. In reviewing agency justifications for skipping rulemaking procedures due to "good cause" or emergencies, courts have rejected certain arguments that would incentivize end-runs around procedural requirements. Those arguments include bald assertions of an emergency, the need to meet an agency's own efficiency goals, and the agency's aim to comply with a statutory deadline.[38] An agency-induced delay to meet its mission should not be cause for a waiver. OMB can also look to the Federal Communications Commission (FCC)'s forbearance rules. Under these rules, the FCC reviews telecom carriers' petitions asking the FCC to waive enforcement of its regulations, and will grant those petitions only if all requirements are met, including meeting the three statutory requirements.[39] The forbearance rules enumerate procedural requirements[40] relevant to waivers submitted to OMB.

OMB should further clarify its process for granting waivers and provide transparency into the process. The review process should include a **strong presumption against issuing waivers**. Further, OMB should provide **strong and clear standards for bulk waivers** contemplated at Footnote 25 of the draft memo, such as granting them only in extraordinary circumstances.

A related exclusion that requires further guardrails is the one allowing AI research and development to skip the minimum practices. Agencies that conduct **research and development**

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[38] Jared P Cole, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, CONGR. RES. SERV. (2016), https://crsreports.congress.gov/product/pdf/R/R44356.
[39] 47 U.S. Code § 160; Pub. L. 104–104, title IV, § 401, Feb. 8, 1996, 110 Stat. 128.
[40] Federal Communications Commission, Forbearance Procedural Rules, https://www.fcc.gov/general/forbearance-procedural-rules. Those three statutory requirements are "(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest." 47 U.S. Code § 160; Pub. L. 104–104, title IV, § 401, Feb. 8, 1996, 110 Stat. 128.

that involves human subjects should not skip the minimum practice, given that such research may affect the welfare of human subjects.[41]

RFC Question 7: *What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?*

Recommendation #1

Guide agencies towards AI-specific procurement policies that provide for pre-award vendor evaluation and post-award governance.

Modern federal procurement policy is inadequate to ensure responsible AI practices. Improving contracting will necessarily involve improving acquisition planning.

The comments below begin with an illustrative table of how AI-specific risks will require the procurement process to change. We next present some high-level considerations for pre-award vendor evaluation and post-award governance. These **acquisition planning considerations can be implemented by formal changes to the Federal Acquisition Regulation (FAR), OMB central guidance, or at the discretion of individual agencies**.

The following chart from CDT's forthcoming report, *How to Not Buy Magic: Updating Procurement Policies to Support the Federal Government's Responsible Use of AI*, is illustrative of how procurement processes will need to change to manage AI-specific risks, as characterized by NIST.[42]

How NIST characterizes the AI-specific risk	How the risk might affect the procurement process
The data used for building an AI system may not be a true or appropriate representation of the context or intended use of the AI system, and the ground truth may either not exist or not be available. Additionally, harmful bias and other data quality issues can affect AI system trustworthiness, which could lead to negative	A hallmark principle of public procurement is that up-front competition will lead to the best vendor selection, but **adequate testing and monitoring of a solution in production will need to be built into procurement processes** because full evaluation is not possible *ex ante.*

[41] For how research may impact welfare, *see, e.g.* Office for Human Research Protections, *Dept. of Health and Human Services*, *The Belmont Report* (1979), https://www.hhs.gov/ohrp/regulations-and-policy/belmont-report/index.html.

[42] How to Not Buy Magic: Updating Procurement Policies to Support the Federal Government's Responsible Use of AI, (Center for Democracy & Technology, Forthcoming).

How NIST characterizes the AI-specific risk	How the risk might affect the procurement process
impacts.	
Intentional or unintentional changes during training may fundamentally alter AI system performance.	Procurement rules require formal processes (such as change orders or modifications) to address changes after "acceptance" of a service or supply. These **processes should be triggered when intentional changes are made, and when unintentional changes are detected or suspected** due to system performance.
Datasets used to train AI systems may become detached from their original and intended context or may become stale or outdated relative to deployment context.	Procurements are often structured toward the creation of long-term contracts (typically, 5 years). **Retraining AI will need to be built into procurements**.
AI systems may require more frequent maintenance and triggers for conducting corrective maintenance due to data, model, or concept drift.	Without effective management practices, there is a significant likelihood that "Operations and Maintenance" budgets will compete with "Development, Modernization, and Enhancement" budgets or incentivize **agencies to underinvest in post-award monitoring and improvement**.
Increased opacity and concerns about reproducibility.	A lack of transparency can create distrust and prevent accountability between government and industry and harm the public's trust in government. Appropriate **transparency and explainability requirements will need to be built into contracts** with internal technical expertise to analyze disclosures.
Difficulty in performing regular AI-based software testing, or determining what to test, since AI systems are not subject to the same controls as traditional code development.	Structuring procurements with appropriate evaluation criteria is already difficult. **Developing and tailoring appropriate evaluation criteria for AI will require additional technical capacity** within the government.
Inability to predict or detect the side effects of AI-based systems beyond statistical measures.	Without mature post-award governance models, it may not be clear **who has the legal and financial burden to deal with unintended consequences**.

i. Pre-award vendor evaluation

Agencies rely on vendors to evaluate performance, but vendors are exploiting confusion over what AI can accomplish.[43] The market for AI tools, particularly in the generative AI space, is filled with hyperbole.[44] In light of the unique risks from AI-based systems and the challenging market, OMB guidance should help prepare agencies for acquisition planning.

1. Advise agencies to prepare a template RFI or questionnaire in advance for market research.

OMB should lead in publishing a template questionnaire which would lay out requirements for responsible AI that agencies could then adapt according to their assessment of the needs they want an AI tool to meet. Such a template would serve two purposes: a template will help government agencies evaluate the market and signal to industry the government's goals for responsible AI. For example, the questionnaire could require vendors to explain:

- Their procedures for assessing and documenting their products' accuracy rates and disparate outcomes for marginalized groups
- Their governance over how their systems are used, and the systems' reliability for intended and likely actual uses
- The sourcing of training data and actual inputs, and representation of different demographics in this data
- Data minimization and other data protection measures applied to their systems, and how vendors provide for agencies to have and retain control over the data
- Procedures for monitoring and improving system performance, including through stakeholder engagement, as well as processing of complaints and appeals.[45]

Including such requirements in the template questionnaire would give agencies insight into vendors' practices that would streamline agencies' implementation of minimum practices when proceeding with a chosen system. Agencies would use responses to the questionnaire to refine their request for proposals (RFPs) and contracts. **OMB should lead not only by publishing this**

[43] *Id.*

[44] Sharon Goldman, *Princeton University's 'AI Snake Oil' Authors Say Generative AI Hype Has 'Spiraled Out of Control,'* VENTUREBEAT (Aug. 23, 2023), https://venturebeat.com/ai/princeton-university-ai-snake-oil-professors-say-generative-ai-hype-has-spiraled-out-of-control/.

[45] For further detail about these and other requirements agencies should consider, *see* Hannah Quay-de la Vallee and Natasha Duarte, Center for Democracy & Technology, *Algorithmic Systems in Education: Incorporating Equity and Fairness When Using Student Data* 27 (2019), https://cdt.org/wp-content/uploads/2019/08/2019-08-08-Digital-Decision-making-Brief-FINAL.pdf.

template, but also by educating agencies in how to use and evaluate responses to the questionnaire for AI procurement.

2. Empower agencies to use their authority to test systems before purchase.

Unlike in traditional procurement, vendor evaluation of AI relies more heavily on the vendor's assertions that a system works as described. These assertions are difficult to check without thorough vetting of the system in the context in which it is intended to be used. For that reason, agencies should consider "pre-evaluating" systems. Agencies already have the authority to conduct technical evaluations before making an award. **OMB should encourage agencies to use this authority to incorporate more rigorous evaluation methods such as "show, not tell" demonstrations**.[46]

3. Obligate Chief AI Officers to ensure all contracts for AI systems receive legal review.

Contracting offices have triggers and thresholds at which a contract must receive legal review. **A safety- or rights-impacting use of AI should be considered another trigger for a contract to be subject to legal sign-off.** Agency attorneys should ensure that acquired AI is consistent with civil rights laws, and EO 14091's requirement for agencies to deliver equitable outcomes.[47] Due to the harms arising from the use of personally identifiable information (PII) in AI, agency attorneys should also review how AI contracts implicate PII or otherwise pose privacy concerns.

4. Ensure procurement offices have adequate staffing and training.

In our forthcoming report in which we interview experts working with the federal government, multiple interviewees noted that there are not enough individuals within government with the time or expertise to oversee AI vendors.[48] **The government must grow its capacity to oversee AI vendors in order to innovate on AI uses.**

As the government grows to accommodate these **new skills, training modules, ideally incorporated into existing procurement curriculum, will help**. For example, the Digital IT Acquisition Profession (DITAP) program is one training model that might bring in new training

[46] *See, e.g.* Dept. of Homeland Security Procurement Innovation Lab, *PIL Boot Camp Innovation Technique 2 - Product or Technical Demonstration*, https://www.fai.gov/sites/default/files/periodic_table/PIL_Boot_Camp_workbook-Innovation_Technique_2.pdf**.** As we write in a forthcoming report, "if a vendor is unable to meet the government's requirements, the government would be better off eliminating them *pre-award*. To accomplish this requires the government to conduct pre-award evaluations and technical demonstrations." How to Not Buy Magic: Updating Procurement Policies to Support the Federal Government's Responsible Use of AI, *supra* note 42.

[47] *Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, *supra* note 4.

[48] How to Not Buy Magic: Updating Procurement Policies to Support the Federal Government's Responsible Use of AI, *supra* note 42.

specific to AI procurement. In this effort, the United States Digital Service and the Office of Federal Procurement Policy could work with DITAP providers to incorporate AI accountability policy into the curriculum, ensuring a broader reach of training.[49]

ii. Post-award governance

Post-award governance is critical to agency innovation in the use of AI. The realities of managing AI systems—realities such as training AI systems and assigning legal and financial responsibilities to any unintended consequences—must be handled with post-award governance practices. Such practices are often either unfamiliar to agencies or deprioritized.[50] Yet successful adoption of AI requires foresight and planning throughout the agency's use case. The responsibilities and costs for managing AI systems should be developed early in procurement. Agencies should also establish *redress processes*, to assign responsibility for fixing issues that occur in deployment. IEEE's forthcoming AI procurement standards for AI and automated systems may also be instructive in this stage.[51]

1. Advocate for the addition of specific reporting requirements that correspond to the AI RMF and AI Bill of Rights in the FITARA scorecard.

Agencies have improved their IT adoption and inventorying under the Federal Information Technology Acquisition Reform Act (FITARA) in large part due to the success of the FITARA scorecard, which grades agencies performance on implementation.[52] A **similar scorecard for responsible AI practices would likely similarly improve AI management**, because, as detailed in a forthcoming report, "every [expert] interviewee expressed doubt that agencies are meaningfully planning for post-award monitoring of AI."[53]

2. **Develop and publish an "oversight guide" for reviewing agency acquisition activities.**

OMB can **develop an "oversight guide" like that developed by GAO[54] for use by agency officials, congressional representatives, inspectors general, and civil society**. Such a guide would help these government actors and stakeholders monitor the responsible use of AI by offering example questions to ask and corrective actions to take.

[49] *Id.*
[50] *Id.*
[51] IEEE Standards Association, *Standard for the Procurement of Artificial Intelligence and Automated Decision Systems,* https://standards.ieee.org/ieee/3119/10729/ (last visited Nov 12, 2023).
[52] U.S. Government Accountability Office, GAO-22-105659, *Information Technology: Biannual Scorecards Have Evolved and Served as Effective Oversight Tools* (2022), https://www.gao.gov/products/gao-22-105659.
[53] How to Not Buy Magic: Updating Procurement Policies to Support the Federal Government's Responsible Use of AI, *supra* note 42.
[54] U.S. Government Accountability Office, *supra* note 27.

RFC Question 8: *What kind of information should be made public about agencies' use of AI in their annual use case inventory?*

Recommendation #1

Clarify guidance to ensure agencies' compliance with disclosure obligations.

The AI Executive Order and draft Memo emphasize transparency as a key element of agencies' responsible AI governance. However, the Memo must be strengthened to achieve effective transparency, and to ensure that agencies interpret the guidance consistently in a manner that makes their disclosures useful to government actors and the public.

Currently, AI inventories are falling short of expectations, with agencies missing the mark on compliance, quality, completeness, and accessibility. Many agencies failed to publish inventories despite a previous Executive Order mandate: a review by Stanford Law scholars of 220 agencies found that 3 out of every 4 agencies potentially required to publish an AI use case inventories did not.[55] Moreover, agencies that did publish inventories often left them incomplete: a review by CDT in summer 2023[56] showed that agencies' entries ranged considerably from one-line descriptions to full paragraphs, with case summaries often using vague and inaccessible language that fails to convey the purpose of a tool, or whom the tool may affect. Entries typically lack dates, making it difficult to know when updates happened. Delays in reporting abound.[57] Agencies varied widely in where they host the inventory online and in which format, despite attempts by The Chief Information Officers Council (CIO Council) to standardize this process.[58]

OMB must take warning from this flawed start and issue clear, specific directives to make the AI inventories into the effective transparency tool the Executive Order and draft Memo envision.

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[55] Christie Lawrence et al., *The Bureaucratic Challenge to AI Governance: An Empirical Assessment of Implementation at U.S. Federal Agencies*, in Proceedings of the 2023 AAAI/ACM Conference on AI, Ethics, and Society 606 (2023), https://dl.acm.org/doi/pdf/10.1145/3600211.3604701. Among 49 agencies with publicly known AI uses—including AI uses core to the agency's mission—nearly 50% did not publish an AI inventory. Notably, agencies with missions that significantly bear on equity concerns, like the Department of Housing and Urban Development, Small Business Administration, and U.S. Postal Service, have failed to publish known AI uses.

[56] Bowman Cooper, *Like Looking for a Needle in an AI-Stack, Center for Democracy & Technology* (Jul. 21, 2023), https://cdt.org/insights/like-looking-for-a-needle-in-an-ai-stack/.

[57] Lawrence et al., *supra* note 55 (*see,* Appendix D.)

[58] Federal Chief Information Officers Council, *Guidance for Creating Agency Inventories of AI Use Cases Per EO 13980* (2023), https://www.cio.gov/assets/resources/2023-Guidance-for-AI-Use-Case-Inventories.pdf.

Specifically OMB should:

1. **Clarify agencies' obligation to disclose AI uses and give specific guidance on permissible exceptions.**

OMB must emphasize agencies' obligation to disclose AI uses and give clearer guidance on permissible exceptions. Currently, the draft Memo states that "Agencies must only publicly report use cases to *the extent practicable and consistent with applicable law and governmentwide guidance*, including those concerning the protection of privacy and of sensitive law enforcement, national security, and other protected information."[59] (emphasis added)

This language, drawn from the 2023 Advancing American AI Act,[60] provides insufficient guidance for agencies to consistently interpret and effectuate the transparency goals of the Memo and AI Executive Order. OMB must guide agencies on how to interpret the language of the statute, by:

- **Clarifying in what circumstances reporting could be deemed "not practicable"** and ensure this language is narrowly construed.
- Giving **further explanation on how guidance regarding "sensitive law enforcement, national security, and other protected information"** should be interpreted. Such guidance is essential to avoid this exception being misused to avoid reporting, when the draft Memo expressly recognizes that many law enforcement uses are presumptively safety- and/or rights-impacting and warrant heightened scrutiny.
- **Clarifying the reporting obligations of sub-agencies and departments**.
- **Reinforcing to agencies that these inventories support stated objectives of the President** to support agency transparency, accountability, coordination, and innovation – and are not mere compliance exercises.
- **Reviewing, alongside other relevant parties and on a regular basis, agencies' determinations that systems may be exempt from public disclosure** and challenge overbroad interpretations where they are identified.

2. **Develop an annex for sensitive and classified use cases.**

The executive office should never be left in the dark about classified AI uses by federal agencies. The draft Memo currently exempts intelligence agencies from AI inventory requirements, and (as noted above) permits agencies to withhold reporting when consistent with law and guidance concerning sensitive law enforcement, national security and other protected

[59] Office of Management and Budget, Exec. Office of the President, *Proposed Memorandum for the Heads of Executive Departments and Agencies, Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* (2023), https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf.
[60] Pub. L. No. 117-263, div. G, title LXXII, subtitle B, §§ 7224(a), 7224(d)(1)(B), and 7225 [Sec. 7225(a)(2)].

information. To ensure agency accountability and meet the information-sharing purposes of the AI Inventory while preserving secrecy obligations, **OMB should work with agencies to create a classified annex to the Inventory.** Such an annex should be made available to relevant oversight bodies like the House and Senate Select Committees on Intelligence, GAO, and the National Security Council. The annex at minimum should include the same kind of information the Department of Defense provides to OMB for its AI Uses not subject to inventory: namely, a summary of the AI Use, along with relevant metrics as laid out in Section 3(a)(v) of the draft Memo. Independent overseers, like the Privacy and Civil Liberties Oversight Board, should have a role in reviewing these disclosures.

3. **Lead by example.**

OMB and other offices within the Executive Office of the President should lead by example by publishing their own AI use cases in the consolidated inventory. The White House can set a precedent in transparent and responsible AI by proactively publishing details of their AI applications.

Recommendation #2

Ensure the inventories' utility by establishing submission standards, quality checks, and a centralized inventory.

1. **Establish basic requirements for AI uses case summaries**

A reader should understand the *what, why, when*, and *how* of each AI use case from its summary. Summaries in use case inventories currently miss that mark: some summaries tell us *what* the agency's goal is[61] but not *how* AI is involved and vice versa.[62]

To meet this criteria, **an AI use case summary should include the following**:

- What inputs the AI system uses
- What the AI system predicts or decides
- What is the agency's stated goal in using an AI system to fulfill the task
- How the agency will measure the success of the AI system

[61] For example, listings for the National Institutes of Health provide descriptions that simply state "Protection of Windows and Mac endpoints from Cyberthreats" or "This project will help to reduce the energy usage for producing chilled water to cool the NIH campus." Available at: Department of Health and Human Services: Artificial Intelligence Use Cases Inventory (last updated Aug. 2023), https://www.hhs.gov/about/agencies/asa/ocio/ai/use-cases/index.html.

[62] For example, a listing in the Department of Agriculture's inventory states: "AI-type statistical techniques are used to model predictive relationships between variables. We routinely use modeling approaches such as random forest, artificial neural networks, k-nearest neighbor clustering, and support vector machines, for statistical prediction." Available at: Dept. of Agriculture, *Inventory of USDA Artificial Intelligence Use Cases* (last updated May 2023), https://www.usda.gov/data/AI_Inventory.

- When the agency uses AI in a certain process
- How long the agency plans to use the AI system
- What departments or agency actors will use the AI system[63]

OMB can include such requirements in its revised memo, as well as change fields in the current inventories like "*where did/does the training data originate*" and "*What specific AI techniques were used"* from "optional" to "required".[64]
Providing guidance in the revised memo to this effect will better serve the Memo's transparency goals, promote consistency, and make OMB's role in administering the policy easier because agencies will adopt more uniform approaches from the start.

2. **Establish quality checks on agencies' Inventory submissions**

OMB must ensure agency submissions are complete and easily understood by the broader public. To maximize efficiency for OMB and agencies alike, this should be achieved through clear guidance and parameters at the data entry phase, as well as auditing**.** OMB should draw on guidance from Inspectors General for managing spending records,[65] including:

- **Provide example language and structured questions**
- **Ensure that entries (and modifications) are dated**
- **Consider minimum length requirements** for fields that warrant longer explanations, such as the AI Use Case Summary (clarifying that a 1-2 sentence submission is insufficient)
- **Instruct agencies to avoid jargon** and abbreviations[66]
- **Develop automated checks and controls** in the submission system, for example via required fields.

3. **Require the maintenance of a consolidated inventory and long-term recordkeeping**

The website *ai.gov* currently hosts an inventory consolidating agencies' disclosures, but the inventory does not appear to be mandated by the draft Memo or other documents (CIO Council

[63] For risks stemming from cross-departmental technical tool use*, see, e.g.* Mary Pat Dwyer and Rachel Levinson-Waldman, Brennan Center for Justice, *A Realignment for Homeland Security Investigations* (2023), https://www.brennancenter.org/our-work/research-reports/realignment-homeland-security-investigations.
[64] *Guidance for Creating Agency Inventories of AI Use Cases Per EO 13980*, *supra* note 58.
[65] U. S. Government Accountability Office, *DATA Act: OIGs Reported That Quality of Agency-Submitted Data Varied, and Most Recommended Improvements | U.S. GAO*, (2020), https://www.gao.gov/products/gao-20-540.
[66] *See, e.g.* Office of Inspector General, Dept. of Homeland Security, *DHS Has Made Progress in Meeting DATA Act Requirements, But Challenges Remain* (2020), https://www.oig.dhs.gov/reports/2020/dhs-has-made-progress-meeting-data-act-requirements-challenges-remain/oig-20-62-aug20 ("DHS did not use plain English language when reporting award descriptions as required. Officials used shorthand descriptions, abbreviations, or terminology that could only be understood by officials at the Department or component that made the award.")

instructions state only that use cases "will be linked at ai.gov.").[67] OMB should support efficient, centralized information-finding for the public and government actors alike, consistent with OMB's long standing open data policies.[68] This should include:

- OMB should **require the creation and maintenance of a central, consolidated inventory, with requirements to ensure consistency of data, ease of access, and the capacity to grow** to accommodate more frequent reporting.
- OMB should **publish a list of agencies that have yet to submit their required inventories** on AI.gov or another centrally findable location.
- **Create a mechanism for users to receive alerts** about updates and modifications to the consolidated inventory.
- **Make use cases accessible through programmatic means, like an API**[69]
- **Post the consolidated inventory data at data.gov**
- **Maintain an archive or other permanent historical record** of the inventory for users to see changes to the inventory over time
- **Support agencies that wish to voluntarily disclose or update** their uses on a regular basis.

Recommendation #3

Establish AI inventories as the central place to report whether a use-case is deemed safety- or rights- impacting; whether a waiver was secured; and to publish any AI Impact Assessment

1. **Require agencies to report in the AI inventory whether or not an AI use case was deemed safety- or rights-impacting, with a justification**

As noted in our response to Question 5, the draft Memo or implementing guidance should require agencies to **report in their AI inventories whether or not a use case has been deemed safety- or rights-impacting in its AI inventory, with a justification.** Such a step will help OMB, other agencies, and the public understand how agencies are interpreting their obligations under the Memo and consolidate this information in a centralized location for ease of use. Agencies' AI inventories should also cite the regulatory authorities that apply to each use case, as this will provide further insights into whether the use case meets the guidance's definitions of rights- or safety-impacting AI.

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[67] *Guidance for Creating Agency Inventories of AI Use Cases Per EO 13980*, *supra* note 58.
[68] *See, e.g.* Office of Management and Budget, Exec. Office of the President, M-13-13, *Open Data Policy—Managing Information as an Asset* (2013), https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2013/m-13-13.pdf.
[69] *See, e.g.* api.data.gov, https://api.data.gov/ (last visited Nov 29, 2023).

2. **Require agencies to report in the AI inventory waivers from minimum practices, and OMB to conduct annual look-back of waiver use**

Under the draft memo, agency Chief AI Officers may grant waivers to the minimum practices, and must report to OMB detailing the waivers' scope, justifications, and supporting evidence. To ensure waivers are being appropriately and consistently evaluated across agencies, OMB should:

- Require agencies to report in the AI inventory entry for a use case whether a waiver was sought from minimum practices. Reports for rights- or safety-impacting systems that are granted waivers should be accompanied by an explanation of why such a waiver was granted. By publishing their written determinations, agencies will be acting with a commitment to transparency and accountability to the public, and help other federal agencies see what practices meet the standard set by OMB for waiver.
- OMB should evaluate the reports it receives from each agency to confirm whether reported uses are rights- or safety-impacting, and **publish an annual report analyzing the extent to which waivers are being granted appropriately for such uses**.

3. **Require agencies to publish AI Impact Assessments in a manner that is findable via their AI inventory submission**

For safety- and rights-impacting uses, OMB should require agencies to **publish their AI Impact Assessment (AIA) in a manner that is findable via their inventory submission** (for example, with a permanent link to an AIA for each use case included in their inventory submission). Public AIAs should, among other things, report any raw figures related to the agency's independent evaluation, like the number of items in each training dataset used by the system being evaluated, a breakdown of the demographic groups for whom the agency measured the system's impacts, and aggregated statistics about the system's outcomes specific to each demographic group. An abbreviated version may also suffice, should it contain answers to questions of high public interest like any prohibited uses of the AI, who has access and ownership, the number of users, any known causes of failure, and, if applicable, the vendor's terms of service.[70]

Recommendation #4

Prepare agencies for public requests for information

Lastly, agencies should be prepared for public follow up for further information. While OMB already instructs agencies to include an email address for public input in their inventories, it is

[70] *See, e.g.* a proposal for Ecosystem Graphs, which includes detailed fields for transparency in foundation models, Rishi Bommazani et al., *Ecosystem Graphs: The Social Footprint of Foundation Models*, Stanford Institute for Human-Centered Artificial Intelligence (2023), https://arxiv.org/pdf/2303.15772v1.pdf.

important that one or more individuals within each agency is formally designated to monitor that inbox and respond to inquiries and feedback in a timely manner. Agencies need to be responsive to public feedback on agency use cases.

Conclusion

We applaud the Office of Management and Budget (OMB)'s thoughtful work in developing the draft Memo, and its openness to receive public feedback on the proposed memorandum.

In revising the draft Memo, OMB should recognize the value and significance of this guidance, which, with effective execution, will play a significant role in effectuating the Administration's commitment to advancing safe, secure and trustworthy AI. The modifications suggested in this document are each designed to more effectively achieve the Memo and Executive Order's stated goals, by providing clarity and actionable guidance for agency decisionmakers, supporting consistency across agency interpretations, and easing administrative burden for OMB by prioritizing upfront guidance rather than post-hoc compliance efforts once agencies' work has already begun.

OMB's Memorandum and the resulting agency practices have the opportunity to establish the Federal government as a leader in responsible AI development, funding, and use – creating a model that will be looked to by state, localities, and other governments around the world. CDT thanks OMB for focusing on the important issue of advancing robust AI governance and strengthening U.S. leadership on responsible, rights-respecting innovation.

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0131
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Future of Life Institute

General Comment

Please find our comments attached as a file below.
Organization: Future of Life Institute.
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Attachments

OMB Request for Comments

Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Memorandum

Organization: Future of Life Institute

Point of Contact: Hamza Tariq Chaudhry, US Policy Specialist. hamza@futureoflife.org

We would like to thank the Office of Management and Budget (OMB) for the opportunity to provide comments on OMB–2023–0020, or the Memorandum on 'Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence' (hereafter referred to as 'the Memorandum'). The Future of Life Institute (FLI) has a long-standing tradition of work on AI governance to mitigate the risks and maximize the benefits of artificial intelligence. For the remainder of this Request for Comment (RfC) document, we provide a brief summary of our organization's work in this space, followed by substantive comments on the Memorandum. The 'substantive comments' section provides responses to the questions outlined in the RfC. The 'miscellaneous comments' section offers general comments outside the scope of the questions outlined in the Federal Register. We look forward to continuing this correspondence and being a resource for the OMB's efforts in this space in the months and years to come.

About the Organization

The Future of Life Institute (FLI) is an independent nonprofit organization with the goal of reducing large-scale risks and steering transformative technologies to benefit humanity, with a particular focus on artificial intelligence. Since its founding ten years ago, FLI has taken a leading role in advancing key disciplines such as AI governance, AI safety, and trustworthy and responsible AI, and is widely considered to be among the first civil society actors focused on these issues. FLI was responsible for convening the first major conference on AI safety in Puerto Rico in 2015, and for publishing the Asilomar AI principles, one of the earliest and most influential frameworks for the governance of artificial intelligence. FLI is the UN Secretary General's designated civil society organization for recommendations on the governance of AI and has played a central role in deliberations regarding the EU AI Act's treatment of risks from AI. FLI has also worked actively within the United States on legislation and executive directives concerning AI. Members of our team have contributed extensive feedback to the development of the NIST AI Risk Management Framework, testified at the Senate Insight Forums, participated in the UK AI Summit, and helped connect leading experts in the policy and technical domains to policymakers across the US government.

FLI's wide-ranging work on artificial intelligence can be found at www.futureoflife.org.

SUBSTANTIVE COMMENTS

Comments in Response to Questions 5 and 6 from the Federal Register: Definitions of and best practices regarding safety-impacting and rights-impacting AI.[1]

The Memorandum establishes a clear minimum threshold for safety (Section 5,c,iv) that must be attained before agencies are allowed to use AI systems, applicable to both systems being used presently and those intended for use in the future.[2] The requirements for these agencies - which include impact assessments, real-world testing of AI systems before deployment, independent evaluations and periodic post-deployment testing - are a positive step towards minimizing the safety risks from government use of AI models.

We would, however, welcome further details for agencies on the periodic reviews that occur post-deployment to specify that these reviews would also include red-teaming and other auditing processes that make up portions of the pre-deployment review process. In addition, while we appreciate the inclusion of language prohibiting agencies from using AI systems in cases where 'the benefits do not meaningfully outweigh the risks', we invite the OMB to support this language with quantitative examples, as risks may capture both probability and magnitude of harm, especially in the case of safety concerns. For instance, even if the probability of any given risk is found to be considerably lower than that of potential benefit, the magnitude of a risk (e.g., a bio-weapon attack) may be so high that it overrides the benefit despite being of low probability. Agencies should be required to establish, subject to public comment and external review, risk tolerances for activities for which use of AI systems is anticipated, including unacceptable risks to individuals, communities, and society that would disqualify the system from adoption. Establishing these thresholds prior to testing and adoption would help prevent drift in risk tolerance that could gradually rise to insufficient levels.

The Memorandum provides adequate definitions for two categories of potential harm posed by AI systems - safety-impacting AI systems and rights-impacting AI systems. FLI, which predominately focuses on AI safety, supports the broader definition of safety-impacting AI systems offered in the Memorandum, which captures a more expansive set of AI models and does not rely on technical thresholds. We believe this best

[1] 5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

[2] We are particularly pleased to see that the scope of this Memorandum applies not just to use and application of AI systems in the future, but also those currently in use by relevant agencies.

positions the executing Agencies to exercise appropriate oversight over use of AI models. In addition, we are pleased to see that under the proposed definition, many models are *presumed* to be safety-impacting (Section 5,b). This is critical as it relieves relevant agencies of administrative burdens and time delays that would otherwise occur in evaluating each system with risk assessments, instead allowing them to devote more time and resources to setting up adequate guardrails. On the same token, we are pleased that additional risk assessments can be conducted to expand the scope of systems receiving due scrutiny. .

Finally, when it comes to 'use of AI', we support efforts to include cases in the Memorandum of procurement in addition to direct use (Section 5, d). However, the language of the Memorandum currently forwards guidance on procurement and contracts not as a set of requirements but as a set of recommendations. It is imperative that the OMB set up robust *requirements* for government purchasing of AI systems that mirror requirements on direct use, ensuring that procurement of AI systems includes consistent, robust evaluation to protect the safety and rights of the American public. This has the potential to minimize harm from government use of AI, and to inform best practices for the private sector, where most of that state-of-the-art models are created.

Comments in Response to Questions 1 and 2 from the Federal Register: Role of Chief AI Officer and the benefits and drawbacks of central AI governance body.[3]

We agree that effective oversight of AI adoption by government agencies should rely on AI governance bodies within each agency to coordinate and supervise AI procurement and use across the broad functions of the agency.This structure facilitates oversight and accountability to ensure that minimum requirements as set out in the Memorandum are met by each agency writ large, while giving different offices within each agency the capability to exercise their mandate when it comes to specific use cases. In addition, we believe such a body can facilitate effective communication across different offices, bureaus and centers within the agency to ensure that poor communication feedback does not lead to under-reporting of use cases or use of AI that could lead to potential harm. Finally, we believe such a body would appropriately empower the Chief AI Officer (CAIO) to exercise their mandate as specified in the Memorandum.

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[3] 1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?
2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

However, we contend that this "hub and spoke" structure of a centralized AI governance body coordinating and overseeing domain-specific AI governance should be implemented on a whole-of-government level. In other words, we believe that just as there are benefits to having a new central body *within* each agency that helps enforce requirements laid out within the Memorandum, these bodies themselves would benefit from a single governance body that has representation and oversight *across* different agencies. This would facilitate interagency coordination, provide a central hub of expertise to advise agencies where appropriate, avoid costly redundancies in efforts by various agencies, and provide a body to inform and evaluate government AI adoption where domain-specific agency jurisdiction is not clear.

Comments in Response to Question 8 from the Federal Register: Nature of information that should be publicly reported by agencies in use case inventories.[4]

While we welcome provisions within the Memorandum which require annual reporting of use cases of covered AI systems by the relevant agencies (Section 3, a), we are concerned that further elaboration is not provided by the OMB on the details of these use case inventories. We believe that the public should have access to information on the full results of the impact assessments, real-world testing, independent evaluations, and periodic human reviews, wherever possible. Where it is not possible to provide this information in full, we believe it is vital to provide redacted iterations of these documents upon the filing of a Freedom of Information Act (FOIA) request. Secondly, considering that there is some precedent of agencies neglecting to report all use cases in the past, we believe that the Memorandum would benefit from having explicit provisions to guard against under-reporting of use cases. This could, for instance, include guidance for Inspectors General to audit these use cases periodically within their respective agencies. Finally, while we recognize this as a positive first step towards creating transparency in use cases, we emphasize that this does not ensure sufficient accountability in and of itself, and will require further guidance and requirements on empowering the OMB and the CAIOs, and other relevant authorities, to take against violations of use case guidance set up in the Memorandum.

MISCELLANEOUS COMMENTS

Comments on Scope

Section 2 ('Scope') explicitly exempts the intelligence community ('covered agencies', Section 2, a) and cases where AI when it is used as a component of a national security system ('applicability to national security systems', Section, c). As the Memorandum is

[4] 8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

intended to minimize the risks of government use of AI systems, we believe it is critical to establish robust requirements for the intelligence and defense communities, as these are likely to be the highest risk cases of government AI use with the greatest potential harm, and hence the most urgent need for scrutiny. Where it is within the remit of the OMB to set up requirements within these domains, we ask that they urgently do so.

Comments on Definitions

We are pleased to see that Section 6 ('Definitions') outlines an expansive definition of "artificial intelligence" that is broader than the definition offered in the AI Executive Order. In addition, we support that the Memorandum's description of AI systems encompasses all those across different ranges of autonomous behavior, technical parameters and human oversight. However, we believe that it is vital to ensure that the definition of AI employed in this section is treated as an 'or' definition as opposed to an 'and' definition. In other words, we believe that any system which fulfills any of these criteria should fall within the definitional scope of AI. For the same reason, we are concerned that the definition of 'dual-use foundation models' mirrors the definition included in the AI Executive Order, which offers an 'and' definition leading to very few models coming under definitional scope, and potentially excluding those which pose safety risks but do not meet other criteria.[5]

The Memorandum also employs the AI Executive Order definition for 'red-teaming'.[6] While this definition outlines *what* red-teaming would cover, it does not provide any detail on how rigorous this red-teaming must be, and for what period within the lifecycle of the AI system. We support further clarification from the OMB in this regard to ensure that red-teaming as defined in guidance adequately tests models for safety harms for the duration of their procurement and use.

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[5] Section 3 of the AI Executive Order defines such as model in the following way: “dual-use foundation model” means an AI model that is trained on broad data; generally uses self-supervision; contains at least tens of billions of parameters; is applicable across a wide range of contexts; *and* that exhibits, or could be easily modified to exhibit, high levels of performance at tasks that pose a serious risk to security, national economic security, national public health or safety, or any combination of those matters.” (Emphasis added).

[6] Section 3 of the AI Executive Order defines red-teaming as: The term “AI red-teaming” means a structured testing effort to find flaws and vulnerabilities in an AI system, often in a controlled environment and in collaboration with developers of AI. Artificial Intelligence red-teaming is most often performed by dedicated “red teams” that adopt adversarial methods to identify flaws and vulnerabilities, such as harmful or discriminatory outputs from an AI system, unforeseen or undesirable system behaviors, limitations, or potential risks associated with the misuse of the system.

We endorse the OMB's decision to establish a broad definition for what would count as 'risks from the use of AI' as well as the expansive definition of 'safety-impacting AI'. However, we recommend the addition of loss of control from use of AI systems to the considerable list of risk factors identified in the definition of 'safety-impacting AI'.

Comments on Distinguishing between Generative and Other AI

We believe that all advanced AI systems, whether they are generative or otherwise, should be subject to appropriate requirements to ensure safety. Hence, we are pleased to see that, in a slight divergence from the AI Executive Order, the Memorandum bases requirements on potential harms from AI and does not distinguish between generative AI and other AI systems.

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: The Leadership Conference on Civil and Human Rights

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General Comment

See attached file(s)

Attachments

Leadership Conference OMB AI Comments

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Re: Request for Public Comment on Draft Memorandum - *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI); FR Doc. 2023-24269, 23 Nov. 2023.*

Dear Ms. Martorana,

On behalf of The Leadership Conference on Civil and Human Rights (The Leadership Conference), its Center for Civil Rights and Technology, and the undersigned organizations, we write in response to the Office of Management and Budget's (OMB) *Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum* (Memo). The Leadership Conference is a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the civil and human rights of all persons in the United States. Through its membership, its Center for Civil Rights and Technology, and its Media/Telecommunications Task Force, The Leadership Conference works to ensure that civil and human rights, equal opportunity, and democratic participation are at the center of communications, public education, and technology policy debates. We have been actively engaged in policy development to ensure civil rights are central to the development and use of new technologies, especially where those technologies are rights and safety impacting.

Introduction

As AI systems and tools are being adopted across a broad range of agency tasks, including those that impact individuals who are the most marginalized, the provisions of the OMB Memo are imperative.

With the Memo, OMB is taking a significant step in ensuring AI is effectively governed across the federal government. New agency requirements and guidance for AI governance, innovation, and risk mitigation, including through specific risk management practices for

uses of AI that impact the rights and safety of the public, are critical. While AI has the potential to improve operations and efficiency across the federal government, those outcomes will only be achieved if people impacted by those systems trust the decisions being made and are not harmed by them. The Memo provides actionable guidance to agencies that sets out how to ensure the use of AI upholds our democratic values and earns that trust.

Here we underscore important elements of the Memo that should not be diluted as the draft is finalized, as well as offer some suggestions for improvement:

AI systems and tools must be shown to be safe, trustworthy and enabling of right protecting outcomes before it is put into use. The Memo centers equity and rights. In an August 4, 2023 letter to the White House, leading civil rights and civil society organizations said, "(F)ederal agencies funding, acquiring, or using an AI system have a responsibility to ensure that the system works and is fit for purpose." The groups further urged that the federal government should not use AI systems unless they are shown to be effective and safe. No definition of safe and effective is meaningful unless it is explicit and clear that it includes being non-discriminatory and non-violative of civil and human rights. Simply put, AI should work, and work for everyone.[i] Therefore, it is right that protecting civil liberties and advancing equity should be at the center of the Memo. The American public should be protected against existing and potential harms from AI, including threats to people's rights, opportunities, jobs, economic well-being, and access to critical resources and services.

The marginalized communities served by the different agencies across the federal government are those that bear the most risk from the use of untested and unsafe AI systems. People expect that risks associated with other regulated products will be identified, mitigated, and made known. Likewise, we expect that AI technology is safe and effective –i.e. that it works for everyone.

The Memo builds on administration actions to ensure equitable AI and address AI harms. People who face discrimination on the basis of race, ethnicity, national origin, religion, sex, sexual orientation, gender identity, income, immigration status, or disability are more likely to be harmed by automated systems and often lack the resources to respond to harms when they occur. These harms are well documented and span numerous sectors, including housing,[ii] employment,[iii] financial services and credit,[iv] insurance,[v] public health and health care,[vi] education,[vii] public accommodations,[viii] government benefits and services,[ix] and policing.[x]

The Memo continues the measures this administration has already taken to begin the process of mitigating the risks of AI, including Executive Order 14091 ("Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government"),[xi] the AI Bill of Rights, NIST's AI Risk Management Framework,[xii] the 2023 National AI Research and Development Strategic Plan,[xiii] and the plan for the National AI Research Resource.[xiv] Executive Order 14091, for example, instructs federal agencies to use all of their available authorities to combat algorithmic discrimination.[xv] The National AI R&D Strategic Plan calls for investments in technical research to develop frameworks for accountability, fairness, privacy, and bias, as well as research to understand and mitigate the social and ethical risks of

AI.[xvi] These efforts provide a strong basis for a national AI strategy that is centered on equity and civil rights. These efforts, and their operationalization as detailed in the Memo, are crucial.

The Memo puts in place appropriate and reasonable requirements. We appreciate the administration's continued commitment to equity and civil rights related to the development and use of AI. These values underpin our democracy and are reflected in the Memo. Prior to procuring, using, or funding powerful new AI technology, agencies must also ensure that the technology works. That means that the technology has had sufficient, transparent testing to ensure that it will produce intended, fair, equitable, and unbiased results and will not produce inequitable outcomes for historically disadvantaged groups.

Ideally, these AI systems would be designed, procured, and deployed with equity in mind, wherever possible. The Memo delivers on this outcome by providing appropriate and reasonable guidance to agencies looking to use AI. These requirements in the Memo are critical to achieving the administration's goal to advance equity and protect civil rights and need to be kept in the final version.

The Memo puts the rights-protecting principles of the AI Bill of Rights into practice across agencies. The Memo lists categories of "right-impacting" AI uses that trigger risk assessment and mitigation requirements. It also provides a process for identifying future rights-impacting AI that would put those uses in scope and trigger risk management and other requirements detailed in the Memo. Recognition of use cases that are rights or safety impacting is significant and necessary for agencies to take action to implement appropriate safeguards. Not surprisingly given the ubiquitous adoption of AI, that list is broad. Given the rapid speed of the creation of new technology, and the use of existing system in new ways, it is important that the Memo provides the opportunity to add additional AI use cases. It is also vital that the Memo calls for transparency, as well as human review and recourse, and applies those requirements across the federal government. Taken together, these safeguards will help ensure that the American public will be broadly protected, as well as realize potential benefits.

By focusing on agency governance structures, the Memo appropriately includes provisions that will help ensure AI is properly managed. A sound AI governance structure, including through the appointment of Chief AI Officers (CAIOs), actionable measures to ensure cross-agency coordination, and staff training, is an important starting point. A clear reporting structure, with defined roles and responsibilities and with appropriate authority and resources, will be necessary for the implementation of the Memo's requirements. Cross-agency coordination, and collaboration across the federal government, will help ensure consistency in the implementation of AI policy. Staff guidance is also critical to meet the Memo's objectives. For example, training on how to conduct assessments, real-world testing, and ongoing monitoring, as well as determinations called for by the Memo, such as whether an AI use case is rights-impacting, will help ensure compliance with it. Compliance plans will help keep agencies on track and accountable for achieving consistency with the Memo. Likewise, detailed AI use case inventories, as well as reporting on use cases deemed to be not subject to the inventory, will help provide the means to hold agencies accountable.

The Memo appropriately focuses on ensuring that innovation is equitable and used to benefit the public. As AI becomes more prevalent in society, we must consider both the benefits and challenges of incorporating these tools into daily life, including by government agencies. With the widespread use of AI, individuals are grappling with the impacts of discriminatory rights-impacting systems, leading to the loss of economic opportunities, higher costs or denial of loans and credit, adverse impact on their employment or ability to get a job, lower quality healthcare, and barriers to housing. Just because an AI system is available does not mean it should be put to use. Questions about the systems, including whether they are suitable or fit-for-purpose, as well as whether better alternatives are available, must be asked.

Even with these concerns, we recognize that AI offers the potential to expand opportunities and ensure people are treated fairly, but only if innovation is equitable. There cannot be responsible AI without equitable innovation. To that end, the Memo should be clear that equitable innovation, not just innovation, is a priority and should include metrics for agencies to facilitate ensuring public benefit remains at the core of use of technology. This is an aspect of AI where civil society and civil rights groups, including those organizations that represent diverse communities, can provide constructive views as agencies move forward to implement the Memo.

Risks from right-impacting and safety-impacting AI must be managed. Just as we know of the harms biased and broken AI systems can cause, we know what can be done to identify, prevent, or mitigate those harms. The Memo includes concrete, measurable, and scalable actions that agencies will be required to take to ensure that AI systems work, and risks are managed. In fact, these actions reflect practices already discussed in tech policy, such as the EU AI Regulation, and reflect the "responsible AI principles" adopted by many companies and industry sectors. We agree that agencies should consider disparate impact relative to the use of AI and that requirement should remain in the Memo.

The Memo's success will rest on how well it guides agencies toward more beneficial and equitable outcomes and whether it focuses agencies on making decisions based on democratic values, such as fairness, safety, privacy, inclusiveness, transparency, and accountability. To that end, the Memo includes the following sound requirements: implementation of risk management requirements; pre-deployment impact assessments; real world testing; independent evaluations and ongoing monitoring; requirements for explainability and transparency; training for staff procuring or using AI; a requirement to consult with affected groups; and the need for agencies to provide for remedies and recourse.

Clarifying provisions of the Memo will close potential loopholes and addressing shortcomings and gaps. Clarifications of some aspects of the Memo will assist agencies in complying with the Memo, help to ensure accountability, and enable the government to achieve the Memo's objectives, furthering the administration's goals.

Beyond this, OMB should look to improve the Memo by doing the following:

Build clearer parameters around when CAIOs can seek waivers or exceptions from having to meet risk management requirements. Providing greater clarity, and imposing limits on the circumstances where a waiver or exception is granted, is needed so that the public can be assured that AI systems work

as intended. The Memo provides the CAIO with significant control to grant waivers and exceptions. The Memo should include a check on that authority. For example, there should be a process for recourse or appeal to another senior official where there is disagreement about a decision about a waiver or exception. In addition, more certainty is needed related to the factors used to determine whether to exclude or provide waivers on designating AI uses cases as rights-impacting. Specifically:

- When a waiver or exception is granted, there must be the ability to seek reconsideration of that decision. For example, should new information, such as testing or real-world experience, indicate that harm is occurring because of AI, use of that system should cease until it can be reevaluated.
- The Memo should be clear that waivers and exceptions sunset so the system can be periodically reevaluated.
- The Memo should require that agencies consider less rights-impacting alternatives before granting waivers or exceptions.
- The Memo should require that agencies be transparent about the waivers or exceptions that have been granted through public reporting.

Provide the opportunity to the public to request AI use cases be designated as rights or safety impacting. Impacted communities and the public at large should be provided the opportunity to request that use cases be evaluated as rights or safety impacting. Those who may be subject to the technology are often in the best position to identity harms and potential harms. To the extent a use case may not have been designated as rights or safety impacting, or an existing system is used for a new purpose, communities should have a path outlined in the Memo to engage with agencies.

Fully resource and fund agency governance structures including the establishment of Civil Rights Offices to meet the challenges identified in the Memo.

Provide clarity to ensure that federal grants, especially to state and local governments, are also covered by the Memo.

Provide guidance with public input to assist agency staff with responsible implementation of the Memo. It is unclear whether there will be adequate guidance for agency staff tasked with implementing the Memo. For example, guidance on acceptable testing and tolerances will be critical in assessing areas such as whether a system is "fair."

Provide clarity and more details on how to put easily understandable public reporting into practice, including related to the AI use case inventories. In the August letter, the signatories also urged the administration to expand the required questions for AI use case inventories required under EO 13960 and OMB M-21-06 guidance.[xvii] Use case inventories should include information that would allow the public to assess adherence with the White House's AI Executive Order and the Memo. OMB should also publish the inventories in a format that is understandable and usable by the American people. Finally, agencies should publish an annual report assessing their progress in implementing the Memo for their AI use cases.

Develop best practices for federal agencies overseeing public benefits programs. The Memo is clear that public benefits are a rights-impacting use and therefore those use cases must meet the Memo's risk mitigation requirements. The missing issues in this respect are that the Memo's notice and remedy requirements for rights-impacting AI do not meet the minimum constitutional due process requirements for public benefits decisions. In addition, most public benefits decisions are made at the state and local level. The Memo currently does not, but should, include guidance to federal agencies to construct best practices for the benefits programs they oversee.

Algorithmic systems in benefits can cause a number of harms, including by making determinations based on corrupt or discriminatory data, arriving at determinations with no explanation or without transparency. Applying the risk management protections for benefits determinations will help to address these concerns.

Require agencies to consider the impact of AI on people with disabilities. People with disabilities continue to face accessibility challenges in using AI systems, despite the Executive Order's call for accessibility. Agencies need to intentionally include people with disabilities by building systems that conform to accessibility standards and be mindful that the disability community is a heterogenous group comprising multiple subpopulations. Agencies should also consider the impact that differences in language may have to ensure accessibility for the communities where AI systems are used. Including people with disabilities on AI teams is an effective harm prevention strategy as agencies identify the impact of AI on this diverse population. Careful consideration must be given to disability inclusion as agencies respond to the new requirements from OMB and hire people with disabilities who understand disability rights and other civil rights laws.

Establish a process for ongoing and regular public engagement, including with civil society and civil rights organizations on agencies' use of AI. The public has the most to gain or lose from the use of AI. It is critical that the public interest is respresented. Agencies should be required to establish defined programs to proactively seek community input as they implement the Memo and in their ongoing operations that are covered by the Memo.

Innovate for good. Agencies should ensure that AI is used to make progress in tackling societal challenges, such as accessibility, health disparities, food insecurity, equity, and justice. Likewise, how to innovate to advance equity needs more focus in order to take hold and become a reality. It is critical that agencies seek community engagement as part of this process. The Memo should include a specific mandate to achieve this outcome.

Further tools and practices. It will be important to establish expectations—presumably created by NIST—for the standards-making and/or other processes that agencies will put into place. Specifically, any standards or testing developed pursuant to the Memo, for example for auditing or risk assessments, should be evaluated against the tenets of the AI Bill of Rights and AI Executive Order, to ensure that the Memo furthers the goals of equity and inclusion.

Conclusion

We appreciate this opportunity to comment on the Memo, which sets out a practical and actionable approach for identifying, measuring, and mitigating harms before AI is put into use, as well as evaluating existing systems. If properly implemented, the Memo could be a significant step toward achieving equitable innovation.

For the use of AI to be successful, agencies must ensure that the benefits and risks of AI are considered early on and throughout the AI lifecycle, through design, development, and deployment. Before procuring or using an AI system, an agency should understand its limitations, recognize its intended uses as well as potential misuses, consider how to ensure the AI works for the people, and prevent harm. Thank you for your consideration of our concerns and views. Please direct any questions about these comments to Koustubh "K.J." Bagchi, vice president of the Center for Civil Rights & Technology at The Leadership Conference on Civil and Human Rights, at bagchi@civilrights.org or Frank Torres, civil rights and technology fellow at The Leadership Conference on Civil and Human Rights, at torres@civilrights.org.

Sincerely,

The Leadership Conference on Civil and Human Rights
A. Philip Randolph Institute
Access Now
American Association of People with Disabilities
American Federation of Teachers
Americans for Democratic Action (ADA)
Asian Americans Advancing Justice – AAJC
Center for American Progress
Center for Democracy & Technology
Center for Law and Social Policy (CLASP)
Clearinghouse on Women's Issues
Common Cause
Disability Rights Education and Defense Fund (DREDF)
Electronic Frontier Foundation
Fund for Leadership, Equity, Access and Diversity
Houston Immigration Legal Services Collaborative
Impact Fund
Japanese American Citizens League
League of Women Voters of the United States
National Association for Latino Community Asset Builders (NALCAB)
National Center for Learning Disabilities
National Center for Parent Leadership, Advocacy, and Community Empowerment (National PLACE)
National Coalition for Literacy
National Consumer Law Center (on behalf of its low-income clients)

National Disability Rights Network (NDRN)
National Employment Law Project
National Fair Housing Alliance
National Health Law Program
National Hispanic Media Coalition
National Organization for Women Foundation
National Partnership for Women & Families
National Urban League
National Women's Law Center
NETWORK Lobby for Catholic Social Justice
Southern Echo Inc.
The Policing Project at NYU School of Law
The Trevor Project
UnidosUS
United Church of Christ Media Justice Ministry

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[i] *Letter from the Center for American Progress, The Leadership Conference on Civil and Human Rights, and The Center for Democracy and Technology to the White House*, Aug. 4, 2023.

[ii] Valerie Schneider, Locked Out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice, 52.1 Colum. Hum. Rts. L. Rev. 251, 254 (2020), https://blogs.law.columbia.edu/hrlr/files/2020/11/251_Schneider.pdf; Lauren Kirchner & Matthew Goldstein, Access Denied: Faulty Automated Background Checks Freeze Out Renters, The Markup & N.Y. Times (May 28, 2020), https://themarkup.org/locked-out/2020/05/28/access-denied-faulty-automated-background-checks-freeze-out-renters; Brief of the American Civil Liberties Union Foundation, The Lawyers' Committee for Civil Rights Under Law, The National Fair Housing Alliance, and The Washington Lawyers' Committee for Civil Rights and Urban Affairs, as Amici Curiae Supporting Appellant and Reversal, Opiotennione v. Bozzuto Mgmt. Co., No. 21-1919, (4th Cir. 2021), ECF No. 49-2, https://www.lawyerscommittee.org/wp-content/uploads/2022/08/3.-Opiotennione-v.-Bozzuto-Mgmt-Corp-amicus-brief.pdf.

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in big data and AI for health care: A call for open science, 2 Patterns (2021), https://doi.org/10.1016/j.patter.2021.100347.

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[x] Aaron Sankin et al., *Crime Prediction Software Promised to Be Free of Biases. New Data Shows It Perpetuates Them*, The Markup (Dec. 2, 2021), https://themarkup.org/prediction-bias/2021/12/02/crime-prediction-software-promised-to-be-free-of-biases-new-data-shows-it-perpetuates-them; Todd Feathers, *Gunshot-Detecting Tech is Summoning Armed Police to Black Neighborhoods*, Vice: Motherboard (July 19, 2021), https://www.vice.com/en/article/88nd3z/gunshot-detecting-tech-is-summoning-armed-police-to-black-neighborhoods.

[xi] White House, Executive Order on Further Advancing Racial Equity and Support of Underserved Communities Through the Federal Government, 2023, [hereinafter E.O. 14091].

[xii] *See*, National Institute of Standards and Technology, Artificial Intelligence Risk Management Framework (2023).

[xiii] *See*, National Science and Technology Council, National Artificial Intelligence Research and Development Strategic Plan 2023 Update (2023).

[xiv] *See*, National Artificial Intelligence Research Resource Task Force, Strengthening and Democratizing the U.S. Artificial Intelligence Innovation Ecosystem: An Implementation Plan for a National Artificial Intelligence Research Resource (2023).

[xv] E.O. 14091.

[xvi] Nation AI R&D at 12-13.

[xvii] Executive Office of the President, Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government, Executive Order 13960, December 3, 2020; Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies: Guidance for Regulation of Artificial Intelligence Applications, November 17, 2020,

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lps-x2kq-pdqw
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0133
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Center on Race and Digital Justice

General Comment

Please see comment for Center on Race and Digital Justice attached.

Attachments

OMB Draft Policy_CRDJ comments_12052023

TO: Office of Management and Budget

FROM: Center on Race and Digital Justice

SUBJECT: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, OMB-2023-0020-0001

DATE: December 05, 2023

By notice published on November 3, 2023 the Office of Management and Budget ("OMB") requested public comments on their draft policy on the use of AI by federal government agencies.[1] Our comments mostly focus on responding to OMB's questions 3-8 per the notice.

Pursuant to the OMB's notice, the Center on Race and Digital Justice submits these comments to express strong concerns and significant recommendations for the OMB's draft policy. At The **Center on Race and Digital Justice**, our mission is to strengthen a community of academic researchers, leaders, and practitioners operating at the intersection of data, technology, power, and racial justice. Our work cultivates accountability, drives equity, and seeks to contribute to the restoration and expansion of civil, sovereign, and human rights that are threatened by digitally networked systems of power and control. We focus on who holds power, how to redistribute power, and the ways in which data and technology reflect power structures. We stay grounded, not abstract – it is the real experiences of people that motivate us, and real people for whom we work with to make change.

Based on years of research and our current work with partner civil society organizations, organizers, and advocates, we urge OMB to revise the draft policy to meet the current, past, and future potential harm of AI. Higher standards and fewer loopholes are needed to ensure that the most vulnerable people are not harmed by AI. Without stronger regulations and policies, we will never meet AI's innovation potential. Deploying this technology absent mindedly and heedless to its present harms will continue to trap us in a reinforcing loop of our country's past harms and traumas.

Our critiques of the OMB policy stem from OMB's failure to put their draft policies in the right framework. We are disappointed that the OMB draft policies foreground "responsible AI

[1] "Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum." Federal Register Vol. 88, No. 212 (November 3, 2023). Available at https://www.regulations.gov/document/OMB-2023-0020-0001

innovation" ahead of managing risks of AI.[2] The correct framework would be one where OMB policies first address harms before diving into further development for "innovation" with AI.

AI has already been in use by federal government agencies under the guise of improving government services and more equitably serving the American people. These uses are sometimes disclosed[3] and sometimes not.[4] Despite this intention, there are many examples about how people implementing what they think are well intentioned AI systems have instead caused deep harm to vulnerable communities.[5] Communities that have been harmed should receive redress and repair for the harm they have already endured and the government must focus first on healing past harm, mitigating current harm, and preventing future harm before moving towards a pollyannaish approach of AI innovation. Moving forward without addressing harms both ignores the real world impact reality of the harm AI is causing today and risks recreating systems of harm into the future. The current OMB framework puts AI innovation ahead of managing AI risks, and this is a fundamental failure.

Our more specific concerns about the OMB draft policy guidance all flow from this fundamental failure. From this, our main categories of criticism include:

1. **The OMB policies cover how federal government agencies use AI and procure AI, but these policies must also cover how federal agencies distribute resources outside of the agencies that further the use of AI.** Most rights and safety-impacting AI is

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[2] On the website to "Make Your Voice Heard" about the draft OMB policy ("Make Your Voice Heard - AI.gov"), OMB writes: "The document focuses on three main pillars: 1. Strengthening AI governance; 2. Advancing responsible AI innovation; and 3. Managing risks from the use of AI by directing agencies to adopt mandatory safeguards for the development and use of AI that impacts the rights and safety of the public." This front page listing of three pillars mirrors the order of how the pillars appear in the OMB draft policy guidance itself (which can be found here "Proposed Memorandum for the Heads of Executive Departments and Agencies"). As you can see, OMB's policy and presentation of its policy to the public continually and consistently puts the risks and harms to people from AI last. Not only does the policy and its public presentation continually put mention of risk last, it fails to use the word harm in describing what risks it is managing, euphemizing and abstracting the real, tangible, negative harms of AI that are happening now. Additionally, in saying "managing" the risk, OMB policy fails to discuss how the government will redress, repair, or remedy the harms that people have already suffered from AI.

[3] In OMB's announcement about their draft policies on AI (which can be found here "OMB Releases Implementation Guidance Following President Biden's Executive Order on Artificial Intelligence"), OMB wrote that in 2023, federal agencies identified 700 ways that AI is already being used in government. And linked to https://ai.gov/ai-use-cases/.

[4] Research and reporting from Tate Ryan-Mosley at MIT Technology Review in her article "The NYPD used a controversial facial recognition tool. Here's what you need to know" (April 2021); Ryan Mac, Caroline Haskins, Brianna Sacks, and Logan McDonald from Buzzfeed in their article "How A Facial Recognition Tool Found Its Way Into Hundreds Of US Police Departments, Schools, And Taxpayer-Funded Organizations" (April 2021); and Mijente, Immigrant Defense Project, Just Futures Law, and ACLU NorCal in their Press Release "Immigrant Advocates FOIA for Info on Clearview AI Contract with ICE for Facial Recognition Technology" (October 20, 2020) all are examples of how government deployed AI without disclosing its use to the public.

[5] Examples of how the government has deployed AI systems that then harmed communities are documented in research and reporting by Joseph Cox from Vice in his article "Homeland Security Uses AI Tool to Analyze Social Media of U.S. Citizens and Refugees" (May 2023); Sally Ho and Garance Burke from AP News in their article "An algorithm that screens for child neglect raises concerns" (April 2022); and Sam Biddle from The Intercept_ in his article "ACLU Sues to End ICE's Rigged Algorithm for Detaining Immigrants" (March 2020).

procured and deployed on the local level. Federal agencies implicitly and explicitly participate in the development, deployment, and procurement of these AI through funding to local municipalities or local government agencies. The OMB policies must be applied to all the ways that the federal government is providing resources for development, procurement, or deployment of AI technology – that includes through funding to the local level.

2. **In order to meet the scope and depth of past, current, and future harms, the OMB must improve their draft policy by closing the loopholes for items exempt from the minimum standards and strengthening the minimum standards.** The draft OMB policy has loopholes for agencies to self-determine if an AI system deserves a waiver to not meet minimum requirements, but agencies should not be allowed to self-enforce such important decisions. The draft policy also allows the process to receive an extension to be continuous and indefinite, with no enforcement to ensure that the AI system is moving towards compliance. This makes waivers and extensions easy loopholes to allow an agency to never reach minimum standards on AI. OMB must close loopholes for extensions and waivers and improve minimum standards to make the policy meaningful.
3. **The OMB policies must have clear consequences for failures to comply.** Policy must always have a mechanism for accountability or else the policy by default incentivizes noncompliance. The OMB draft policy currently fails to list any consequences for agencies or their contractors who fail to comply with the OMB policy. OMB must include consequences that are serious enough to change behavior, ensuring that the priority is protecting people rather than maintaining contractors' profits or merely increasing government efficiency.

The harms to people from AI already exist and are far too serious to feign ignorance by prioritizing developing AI for its supposed innovation potential. If we continued with the OMB draft policy as is, by focusing on the innovation over harms, OMB would be deliberately disregarding the people who have been harmed by AI and the people who have been researching and speaking out about the harm for decades.

The next sections in our comment go into further depth about our concerns, reference specific language in the draft policy, and enumerate our recommendations for improving the draft policy. From our analysis, the OMB draft policy on use of AI in the federal government has some elements that are noteworthy, but significant work needs to be done to meet the moment.

I. Background: Why AI harms and redress must be the first focus

The continual fascination with AI, its supposed potential for good, and the potential for what some call the existential risk of sentient machines is misguided. We are disappointed to continue to see political leaders and government officials prioritize these viewpoints over the well documented reality of harms caused by AI.

These perspectives are misguided for two important reasons. First, AI's current rise in popularity as a term should be seen for what it is – a successful maneuver from corporate actors to consolidate their power. By popularizing the term AI, corporate actors are able to market predictive algorithms as being able to do more than they can, monopolize the field for further development of this technology, and capture the regulatory space to prevent the "doomsday scenario." Second, prioritizing AI innovation and seeing the biggest threat as the existential risk of robot intelligence overpowering humans ignores the existing and currently exacerbated existential harms caused by algorithms, automated decision making, and unbridled innovation in technology controlled by big tech.

AI's rise as a popular term over the past few years has been an industry led effort. It has successfully helped industry leaders be the majority representation in multiple recent Congressional Committee Hearings and helped executives garner invites to closed door meetings with legislators and government officials.[6] While tech executives claim that regulation is needed in their sector, they provide no specificity on what regulation should look like. Knowing that companies making generative AI products have low scores on transparency for their models,[7] tech executives calling for regulation create an inevitable closed loop where they are the only ones who can make the regulation. If regulation must happen but companies do not share any information to allow for regulation nor do they give any specific recommendations for regulation, then it makes it seem like the tech company executives are the only ones with the knowledge to make sufficient regulations. Even more unsurprising, those involved in making the most recent generative AI technologies want to focus on an existential risk. They frame themselves as the only people who have the knowledge and expertise to understand this risk. In reality, they are worst positioned to regulate their own industries. To maintain their power, tech company executives have to continue this charade of expertise enabled by their lack of transparency.

It is the non-tech executives who see and understand the existential risk of AI to everyday people. Instead of focusing on computer domination over humans as the pathway towards human extinction, scholars, activists, advocates, and organizers have been highlighting how we are already on a pathway towards various forms of existential destruction. The use of ShotSpotter, a technology that uses a form of artificial intelligence through its use of a neural network, was existential to Adam Toledo.[8] The use of commercial algorithms in healthcare can be existential to

[6] For examples, attendees to the Senate Judiciary's subcommittee on Privacy, Technology, and the Law's hearing "Oversight of A.I.: Rules for Artificial Intelligence" (May 2023) and the House Science, Space, and Technology Committee's hearing "Artificial Intelligence: Advancing Innovation Towards the National Interest" (June 2023) had predominantly hearing speakers who still have affiliations with the tech industry. Additionally, tech executives met with Commerce Secretary Gina Raimondo, White House chief of staff Jeff Zients, and other officials according to reporting NPR's Franco Ordoñez in "These tech giants are at the White House today to talk about the risks of AI" (September 2023).

[7] Please review the microsite Foundation Model Transparency Index for the research paper "The Foundation Model Transparency Index" by Rishi Bommasani, Kevin Klyman, Shayne Longpre, Sayash Kapoor, Nestor Maslej, Betty Xiong, Daniel Zhang, Percy Liang (October 2023).

[8] "Chicago Awaits Video of Police Killing of 13-Year-Old Boy" by Jamie Kalven from The Intercept_ (April 2021).

Black patients.[9] The energy consumption from computers to run large language models and its long term environmental impact is existential for our planet.[10] The harms of AI are real across many policy areas and are tangible to communities now. These harms can lead to undue surveillance, increased rates of incarceration, denial of jobs, more expensive rents and mortgages, increased harassment, worsened environmental degradation, and much more.[11]

Until we address the harms that AI is causing now, any new AI will replicate and accelerate these same harms. Additionally, by focusing on the existential risk to communities and our environment, we future proof ourselves to prevent other existential threats. It would be irresponsible to leapfrog over our current conditions of harm to blindly promote AI for good or defend against existential risks that don't yet exist when existential harm already does exist. As such, all of our recommendations for the OMB draft policy guidance center on first tackling the harms caused by AI before any other goals.

II. Recommendations: 3 top recommendations with further details

Given the reality that AI has captured the attention of legislators, government officials, and the public, we are presented with an opportunity to grapple with the real problems of AI – the harms AI has caused to people and its role in exacerbating inequality.

In order to mitigate current harms, redress for past harms, and minimize future harms, government officials and legislators must be intentional with their policy making. We are excited to see that OMB is grappling with policy related to the use of AI by federal agencies. But, we believe the OMB draft policy lacks the intentionality needed to make it meaningful to deal with the harms of AI. Below we enumerate the necessary changes that OMB must make to their draft policy if they want to make the policy intentional and impactful.

1. The OMB policies cover how federal government agencies use AI and procure AI, but these policies must also cover how federal agencies distribute resources outside of the agencies that further the use of AI.

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[9] "Dissecting racial bias in an algorithm used to manage the health of populations" by Zian Obermeyer, Brian Powers, Christine Vogeli, and Sendhil Mullainathan as published in Science (Ocotber 2019).

[10] The concern of the energy consumption for large language models was first highlighted in Timnit Gebru, Emily M Bender, Angelina McMillan-Major, and Shmargaret Shmitchell's paper "On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?" (2021). Additional research on the energy consumption of generative AI has been reported by Zoe Kleinman and Chris Vallance of the BBC in their article "Warning AI industry could use as much energy as the Netherlands" (October 2023) and by Matt O'Brien and Hannaha Fingerhut of the Associated Press in their article "Artificial intelligence technology behind ChatGPT was built in Iowa — with a lot of water" (September 2023).

[11] While the research and coverage of these issues are too long to list, we recommend reviewing the research by Dr. Safiya Noble's *Algorithms of Oppression*; Ruha Benjamin's *Race After Technology*; Virginia Eubanks's *Automating Inequality*; Cathy O'Neil's *Weapons of Math Destruction;* Xiaowei Wang and Shazeda Ahmed's recent report "Bodily harms: how AI and biometrics curtail human rights;" and Rashida Richardson, Jason M. Schultz, and Kate Crawford's article "Dirty Data, Bad Predictions: How Civil Rights Violations Impact Police Data, Predictive Policing Systems, and Justice."

While we are pleased to see the development of any policy about federal government use of AI, we are disheartened to see that it only covers the AI systems that the federal government uses or procures directly.

We know that the federal government also involves itself in the use, development, and procurement of many AI systems through a variety of resources. The clearest example of how the federal government gives resources that further the use, development, and procurement of AI outside of federal agencies are the use of federal grants for AI systems. For example, based on calculations by the Electronic Privacy Information Center, since 2021, the Department of Justice has given nearly $4 million in grants to local police departments to improve "'data-driven' policing, 'smart' policing, and related practices."[12] One example of technology that these local grants cover that should be subject to any proposed minimum practices from the OMB policy would be ShotSpotter. ShotSpotter has been repeatedly shown to be discriminatory against communities of color, leads to few arrests or solved cases, and does not improve safety in the neighborhoods where it is installed.[13] However, with the current OMB draft policy, a technology like ShotSpotter would be free to continue operating as is with all its flaws. Similarly, reporting from the Washington Post found that the grants from the Department of Housing and Urban Development were being used by local housing authorities to install surveillance cameras with facial recognition. The Post found that these cameras, while supposedly installed to prevent crime, were more often used to find grounds to evict the low-income tenants in the housing complex on minor violations.[14] These facial recognition surveillance systems used by local housing authorities, but bought with federal agency money, would not be covered under OMB's current draft policy.

In order to address this, the OMB policy must apply the minimum practices for technologies secured by monies dispersed by federal agencies, including monies dispersed in the form of local grants. The OMB thinks their draft policies will set a standard for local governments to follow as is (meaning without addressing the money given to local governments for their own AI use), but in reality, the current draft policy would cover so little of the most harmful rights and safety impacting AI that any standard it sets would be barely noticed. Many of the systems that fall under the rights and safety impacting AI are being used and procured at the local level. Instead of setting a standard, by not including technology procured with federal agency grant funding at the local level, the OMB policy is only serving to maintain the many problematic AI systems

[12] Letter from the Electronic Privacy Information Center to the Department of Justice on Title VI and federal grant funding for ShotSpotter (September 2023).
[13] The letter cited above (Letter from the Electronic Privacy Information Center to the Department of Justice on Title VI and federal grant funding for ShotSpotter (September 2023)) provides many citations that are relevant. In particular, we'd like to highlight the research from the Chicago Office of Inspector General "The Chicago Police Department's Use of ShotSpotter" (August 2021) and research and litigation by the MacArthur Justice Center.
[14] "Eyes on the poor: Cameras, facial recognition watch over public housing" by Douglas MacMillan from the Washington Post (May 2023).

without scrutiny. As is, the policy would maintain and exacerbate the incentives for AI companies' to target local governments for their faulty and harmful AI products.

Again, our recommendation is that OMB must include language in their policy to ensure that technology procured with federal agency grants is also subject to the same minimum practices as the technology used by the federal government itself.

2. ***In order to meet the scope and depth of past, current, and future harms, the OMB must improve their draft policy by closing the loopholes for items exempt from the minimum standards and strengthening the minimum standards.***

While we are pleased to see that in the current OMB draft policies Section 5.c states that "Except as prevented by applicable law and governmentwide guidance, agencies must apply the minimum practices in this section to safety-impacting and rights-impacting AI by August 1, 2024, or else stop using the AI until it becomes compliant,"[15] we were disappointed to see how easy it is for agencies to ask for exemptions (waivers and extensions), completely nullifying the minimum practices. It is a positive step for federal governments to expect that agencies must stop using AI if it is not compliant with some set of minimum standards, but that framework of stopping the use of non-compliant AI is made meaningless when an agency can so easily request for their AI systems to be exempt from these standards or ask for indefinite extensions.

The process for getting extensions to meet minimum practices and getting waivers from minimum practices in the OMB draft policy is so general that it allows agencies to essentially avoid any accountability. Two things are particularly problematic for the extensions and waivers.

First, it is highly problematic that the determination of whether an AI system is eligible for an extension or waiver is self-regulated by the agency itself. While we understand that every agency and its use of AI is different, many agencies that have the biggest impact on rights and safety-impacting AI have the worst track record of disclosing their use of AI and have often used exemptions to avoid accountability.[16] We have little reason to have faith that agencies would be scrupulous actors when it comes to self-regulating their use of AI.

Second, the OMB draft policy essentially incentivizes agencies to obtain a waiver or extension for any AI system. According to the draft policy, agencies are given waivers and extensions by default in good faith. For extensions, the agency must provide a "a detailed justification for why the agency cannot achieve compliance for the use case in question and what practices the agency has in place to mitigate the risks from noncompliance, as well as a plan for how the agency will come to implement the full set of required minimum practices from this section," but there is no requirement to stop using the system until the minimum practices are reached, no expectation of

[15] OMB's Proposed Memorandum for the Heads of Executive Departments and Agencies (November 2023).
[16] Please see our joint comments with Just Futures Law, Surveillance Resistance Lab, Mijente, Media Justice, and others for a case study of DHS's failures to comply with various regulations and stated commitments to changes related to their use of surveillance technology.

how long an agency has for an extension, and no mention for consequences if the agency fails to follow through their their "practices…to mitigate risk from noncompliance" or their "plan…to implement…minimum practices."[17] Essentially an extension becomes a self-reported rubber stamp to continue to use a technology. For waivers, the agency must make "written determination, based upon a system-specific risk assessment, that fulfilling the requirement would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations."[18] It is easy for any agency to make a case that fulfilling minimum practices on an AI system would "create unacceptable impediment to critical agency operations," especially when a key actor who is approving the waiver is the agency's internal Chief AI Officers (CAIO). Obtaining a waiver also comes with no consequences if the AI system is found to harm people and no timeline for re-evaluation. A waiver allows an agency to continue using their AI as is without any adjustments towards minimum practices and relies on an agency's own self-reporting and self-determinations of waiver worthiness.

In order to solve these two major issues, we recommend that the OMB policy default to all AI systems needing to meet minimum practices. If the policy language must include opportunities for extensions to meet minimum practices, the OMB must amend the policy language for extensions to include that agencies must stop using the AI system for which they are asking for an extension until it can reach minimum practices. This will incentivize agencies to actually get their systems up to minimum practices rather than allowing an indefinite amount of time for compliance, which incentivizes making no changes to meet the minimum practices. Policy language on waivers should not be included – if an AI system cannot meet minimum practices, agencies should be required to find ways to achieve their work without that system. Most agencies have existed for decades and have done their work before these AI systems. We must leave space for the possibility that AI systems are not the solution for improved government service delivery.

We also believe that the OMB draft policy's minimum practices could be strengthened. As mentioned above, we must leave open the possibility that AI technology is not actually necessary for improving government functions. The impact assessment, while it has many good categories, comes from a fundamental assumption that the AI system is necessary. OMB must require that the impact assessment include a review for whether or not an AI system is even necessary to achieve the purpose of the agency's work. If it is not necessary, the model and its data should be destroyed and disgorged so that it cannot be accidentally used or swept up into another system and misused. Similarly, OMB must add policy language that for any system that is found to fail the minimum practices, agencies must stop use of that system or end the contract for that system immediately. The associated system, its model, and its underlying dataset in these scenarios should also be destroyed and disgorged.

[17] OMB's Proposed Memorandum for the Heads of Executive Departments and Agencies (November 2023).
[18] OMB's Proposed Memorandum for the Heads of Executive Departments and Agencies (November 2023).

To reiterate our recommendations and include some additional specific recommendations to address our concerns about extensions, waivers, and minimum practices:

- OMB must limit extensions and waivers further. These limits should especially apply for intelligence and law-enforcement related AI technology and agencies whose work is almost entirely rights and safety impacting.
- OMB should not have a waiver for any AI systems.
- OMB must release their decision-making on exclusions and extensions to the public.
- OMB must strengthen the language around extensions by including language that requires agencies to pause the use of their AI until it meets minimum practices if an extension is given.
- OMB must strengthen the minimum practices by requiring the impact assessment in the minimum practices to include an assessment on whether or not the technology is actually necessary (Section 5.c.iv.A).
- OMB should have the minimum practices also include Consentful Tech framework as a baseline for systems design.
- OMB must include language in their policy that for any AI that is found to not meet minimum practices, the agency must destroy the model and must disgorge the associated data set. If this AI was procured by the federal government, the federal agency must immediately terminate the contract and demand that the contractor disgorge their dataset and destroy the model.

3. ***The OMB policies must have clear consequences for failures to comply.***

With improved OMB policy, consequences for an agency's failure to comply becomes key to enforcement. From the current OMB draft policy and from hearing from OMB staff at various public events with advocates, it remains unclear what the consequences are for agencies if they fail to comply with this policy. OMB seems to be naively expecting agencies to follow through with disclosing all the AI technology they use, writing complete information about these systems and their compliance with minimum practices, and being honest about following up with any necessary practices, plans, or steps to keep the systems in compliance. This blind faith is not effective for achieving compliance.

Many agencies, especially those with work that is rights and safety-impacting, are most notorious for failing to disclose technologies and failing to comply with improvements that are required or that they have publicly committed to.[19] Knowing that many agencies are partnering with for-profit companies for their AI systems, it also becomes essential that the consequences for complying do not become merely "the cost of doing business," but true consequences that force contractors and agencies to put people and their rights first.

[19] Please refer to our joint comments with Just Futures Law, Surveillance Resistance Lab, Mijente, Media Justice, and others for more details on how DHS, as an example, has failed to disclose or improve technologies their agency uses.

Currently the OMB draft policy, to our reading, has no consequences for agencies or the companies with whom they contract. Given our experiences with federal agencies' failure to comply with reporting and accountability measures for technology so far, here are some examples in the OMB draft policy where a lack of consequences is especially problematic.[20]

- Failure to report a use case in the AI Inventory (Section 3.a.iv and Section 3.a.v).
- Failure in stopping use of non-compliant AI (Section 5.a.i).
- Failure of agency to identify an AI as risk or safety impacting (Section 5.c).
- Failure for an agency to provide sufficient justification for why they cannot achieve compliance for a use case of AI (Section 5.c.ii).
- Failure to meet the plan for how an agency will come to implement minimum practices for AI for which the agency received an extension (Section 5.c.ii).
- CAIO's giving waivers without sufficient rationale, CAIO making inappropriate determinations for what is eligible for a waiver (Section 5.c.iii).
- Failure of the CAIO to reassess AI for which a waiver was received (Section 5.c.iii).
- Withholding or incomplete information in an AI impact assessment (Section 5.c.iv.A).
- Insufficient testing of AI (Section 5.c.iv.b).
- Conducting an AI evaluation that is found to not be sufficiently independent (Section 5.c.iv.C).
- Failure to comply with instituted ongoing monitoring and periodic human review guidelines (Section 5.c.iv.D).
- Failure to update or sufficiently update AI based on new or significantly altered risks (Section 5.c.iv.E).
- Failure to complete sufficient training and assessment of AI or failure to comply with instituted plans to ensure sufficient training, assessment and oversight of AI (Section 5.c.iv.F).
- Failure to provide public notice for AI use case inventory (Section 5.c.iv.H).
- Failure to take steps to advance equity, dignity, and fairness (ex: knowingly or unknowingly maintaining factors that contribute to algorithmic discrimination and bias, falsely assessing disparate impacts, failure to mitigate disparate impact, failure to use representative data) (Section 5.c.v.A).
- In situation where it is practicable and consistent with applicable law and governmentwide guidance, failing to consult affected groups in the design, development, and use of AI (Section 5.c.v.B),
- After receiving consultation from affected groups, failing to implement feedback for insufficient reasons (Section 5.c.v.B).
- Failure to conduct ongoing monitoring and mitigation for AI-enabled discrimination (Section 5.c.v.C).
- Failure to notify negatively affected individuals or failure to notify negatively affected individuals in a timely manner (Section 5.c.v.D).

[20] OMB's Proposed Memorandum for the Heads of Executive Departments and Agencies (November 2023).

- Failure to provide negatively affected individuals with a means of contacting the agency or failure to provide available agency staff to respond to individuals' outreach to the agency after being negatively affected (Section 5.c.v.D).
- Failure to maintain a remedy process (Section 5.c.v.E).
- Failure to maintain an opt-out in an AI where it is possible, or failure to provide a prominent and convenient mechanism to opt out (Section 5.c.v.F).
- Failure of a contractor to meet minimum standards for AI (Section 5.c).

Since there appears to be no consequences for failure to comply with much of the policy, OMB is at risk of creating a document that is entirely unenforceable. Even with weak consequences, OMB would be able to assess whether the policy is sufficiently changing behavior and in what ways. We recommend that the consequences the OMB policy should include range from fines and fees that go towards a reparations fund for those harmed by AI systems; disgorgement of data sets for non-compliant AI; deletion of models and algorithms related to non-compliant AI; and immediate contract termination for contractors who are unable to comply with minimum standards or subsequent evaluations, plans, or practices.

III. Conclusion

As the Center on Race and Digital Justice, the expanse of our work allows us to see the interconnections between power, race, technology, data, and AI across a variety of policy areas. We are impressed with legislators, government officials, and the public in their current desire to make a difference in these fields. However, we are disheartened to see the continued misguided focus on AI's innovation potential over the reality of AI's harm to communities and society.

The OMB draft policy is a first step towards improving our relationship with AI and protecting people from worsening inequality. But, as is, the draft policy is wholly insufficient. We hope that these comments offer clear opportunities for improvement to the OMB draft policy and we look forward to the improvements you will make on the policy. If you need to follow up on any of these items, please reach out to Akina Younge at aki@raceanddigitaljustice.org.

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0134
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Gigamon

General Comment

Please see Gigamon's comments to the proposed Memorandum Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence. We thank OMB for the opportunity to provide our feedback in this important area.

Attachments

Gigamon Comments to OMB Draft Memo re AI Final

Gigamon®

Comments from Gigamon on the Draft Memorandum entitled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"

Gigamon appreciates the opportunity to comment on the proposed memorandum *Advancing Governance, Innovation, and Risk Management for Agency Us of Artificial Intelligence* (OMB AI Guidance). Among other things, President Biden's Executive Order on Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence and the proposed memorandum seek to manage risk associated with the use of AI. To that end, Gigamon recommends that OMB more clearly articulate risk associated with the (1) security of the underlying IT infrastructure that support AI Systems, and (2) integrity of the data used to build/train and test AI/ML classifiers.

1. Risk associated with the underlying infrastructure.

Gigamon recommends that OMB specifically highlight risk associated not just with the training and application of the AI systems themselves, but also risk associated with the security of the underlying IT infrastructure that support AI systems. This includes (1) the compute infrastructure which hosts that AI system (which may be distributed across multiple infrastructures), and (2) the environment(s) that hosts the compute infrastructure(s).[1]

As recent high profile attacks demonstrate, infrastructure is not immune to supply chain attacks or exploitation of vulnerable source code. These risks are magnified in the context of AI systems. By way of example, many AI systems are built on top of a very large and rapidly innovating series of open- and closed-source libraries and modules. In this rapidly changing environment, a motivated adversary may attempt to trojanize or backdoor an open source library and/or associated package manager, which is then accessed by the AI System.[2] This is just one threat vector, but traditional OS vulnerabilities in the operating system, supply-chain delivered implants in hardware, attacks on the cloud service provider are all possible as well.

[1] As these environments are highly complex, Gigamon recommends against conflating the AI application (and associated models), the compute-infrastructure which hosts that application, and the environment in which that compute infrastructure is hosted. This will increase the likelihood that departments and agencies will be able to identify and manage risk more comprehensively for the supporting infrastructure and the IA system.

[2] While comparisons could be made with critical software like Linux, which also pulls in a large number of packages to make a distribution, the community has developed well-understood processes and distributions, and manage security via well-structured processes. At this time, there is no equivalent in the AI field.

As such, departments and agencies should consider and mitigate risk associated with AI systems that trust down implicitly without proof of trustworthiness. While there have been some technical advances in making trust-down assumptions more reliable, they are nonetheless exploited regularly via things like supply chain attacks. Consistent with zero trust principles being adopted across the federal enterprise, AI systems should not implicitly trust libraries and operations systems; and operating systems should not implicitly trust firmware, drivers, and hardware.

To mitigate such risk, monitoring of the running infrastructure to detect aberrant behavior correlated with threat actor behavior is essential. For example, the appearance of an unexpected network connection could be a command and control channel from a backdoored PyPI package[3]. This monitoring should be pervasive and, using CISA's Extensible Visibility Reference Framework terminology, should be across multiple "Visibility Surfaces". So, traditional logging, network behavior, configurational data, static source code analysis data would all be viable visibility surfaces that should be correlated and analyzed. Of note, the ingestion of these "visibility surfaces" into a cybersecurity focused AI application would allow correlation and prediction, which would readily identify deviations which correspond to risk which warrants an investigatory and potentially corrective response.

2. Data used to build/train and test AI/ML classifiers

While the NIST *Artificial Intelligence Risk Management Framework* (AI RMF 1.0)[4] articulates risk associated with the integrity of data used to build/train and test AI/ML classifiers, the potential high impact of adversary efforts to impact the functionality and trustworthiness of the AI System through data poisoning/tampering attacks at any stage of the data lifecycle, and up and down the data supply chain, justifies articulating it explicitly in the OMB AI Guidance so that agencies consider and mitigate risk as part of their data and cybersecurity strategies.

[3] Typical AI infrastructures are built on large numbers of libraries, both open source and commercial/closed source. As of the time of writing, many of these libraries are under active development by highly distributed teams of international developers. They are rapidly innovating, and subject to constant development and regular updates. The supply chain "attack surface" is broad and highly challenging to see. See https://blog.inedo.com/python/package-dependencies/ for additional discussion.

[4] See https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf, at pages 5, 8, 15 and 16.

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Submitter Information

Organization: Data & Society

General Comment

See attached.

Attachments

Data and Society comment on OMB memo 12-5-23

DATA&
SOCIETY

December 5, 2023

Response to the Request for Comments on OMB's
Advancing Governance, Innovation, and Risk Management
for Agency Use of Artificial Intelligence Draft Memorandum

Data & Society is an independent, nonprofit research institute studying the social implications of data-centric technologies, automation, and artificial intelligence. Through empirical research and policy and media engagement, our work illuminates the values and decisions that drive these systems and helps shape futures grounded in equity and human dignity.

OMB's draft guidance takes important steps toward AI accountability. As detailed in response to the questions below, the OMB guidance rightly identifies many AI systems that have caused harm to the public and appropriately requires federal agencies to institute key practices to protect the public against further such harms.

Critically, the OMB guidance starts with the presumption that certain uses of AI impact people's rights. The procedure to determine whether an AI use case is rights-impacting, described in the draft memo, includes a predetermined list of systems where harms have previously been demonstrated and which are presumed to require the described risk mitigation practices. Employing this presumption based on the predetermined lists is a useful mechanism that has the potential to allow agencies to guard against harms without being required to conduct extensive and potentially time-consuming risk assessments in cases where AI system harms are already publicly known. Essentially, OMB has already conducted the risk assessment on their behalf.

The memo mandates a floor of minimum practices that an agency must meet in order to use an AI system. The required minimum practices for rights-impacting AI systems include sociotechnical approaches to AI accountability, including impact assessments and public consultation. Such approaches, appropriately used in combination, represent the best known standards for AI accountability across a wide variety of AI systems. The OMB memo requires that if minimum practices are not met, or if testing required by these practices reveals concerns, agencies cannot use the system in question. This prohibition on unrestricted use is key to future effectiveness of this guidance.

We applaud these steps and encourage OMB to keep these important measures in their final guidance. The procedures described by the draft memorandum are both achievable and necessary to protect the public from the demonstrated harms of rights-impacting AI systems. We encourage OMB to preserve these needed protections in its final guidance, and particularly to maintain the requirement that federal agencies may not use systems that fail to meet the identified minimum practices.

In response to OMB's specific questions, we provide the following additional thoughts.

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Consult and incorporate feedback from affected groups (Section 5.c.v.B) 21

3. How can OMB best advance responsible AI innovation?

Key to the private sector's successful use of responsible AI innovation is the federal government's oversight of that use in ways that support safety and rights. As part of the National AI Talent Surge, enforcement agencies such as the Department of Justice Civil Rights Division, the Federal Trade Commission, the Equal Employment Opportunity Commission, and the Consumer Financial Protection

Bureau must receive significantly more staffing. Such agencies are often overlooked when considering technical talent, but should be provided staffing to build AI auditing systems and conduct assessments.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

AI systems that should be presumed to be rights-impacting

Research and reporting have demonstrated harms from the AI systems that are already included in OMB's list of systems presumed to be rights-impacting. In support of keeping *all* such systems on this list and requiring they meet a minimum bar of protective practices, we include references to the documented harms of these systems below. Additionally, we suggest below specific systems that should be added to the list based on similarly documented harms. We note that the preface to the list of systems is appropriate and should not be substantially modified — it is important that the list not only includes AI systems that directly control outcomes but those that influence them, since a human is often in the loop for rights-impacting decisions. The preface states that the below AI systems should be presumed to be rights-impacting AI "if it is used to control or meaningfully influence the outcomes of any of the following activities or decisions":

Purposes That Are Presumed to Be Rights-Impacting.

A. Decisions to block, remove, hide, or limit the reach of protected speech;[1]
B. Law enforcement or surveillance-related risk assessments about individuals,[2] criminal recidivism prediction,[3] offender prediction,[4] predicting perpetrators' identities,[5] victim prediction,[6] crime

[1] Dixon, L., Li, J., Sorensen, J., Thain, N., & Vasserman, L. (2018, December). Measuring and mitigating unintended bias in text classification. In *Proceedings of the 2018 AAAI/ACM Conference on AI, Ethics, and Society* (pp. 67-73); Thompson, A. (2017, October 25). Google's Sentiment Analyzer Thinks Being Gay Is Bad. *Vice*. https://www.vice.com/en/article/j5jmj8/google-artificial-intelligence-bias ; Jessica Guynn. Facebook while black: Users call it getting 'Zucked,' say talking about racism is censored as hate speech. USA Today. Apr. 24, 2019. https://www.usatoday.com/story/news/2019/04/24/facebook-while-black-zucked-users-say-they-get-blocked-racism-discussion/2859593002/

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[4] Stroud, M. (2021, May 24). Heat Listed. *The Verge.* https://www.theverge.com/c/22444020/chicago-pd-predictive-policing-heat-list

[5] Brayne, S. (2020). Predict and Surveil: Data, discretion, and the future of policing. Oxford University Press, USA.

[6] Lipari, J. L. (2020, January 23). Advisory Concerning the Chicago Police Department's Predictive Risk Models. *Report of the Public Safety Section of The Office of Inspector General, OIG FILE #18-0106*. https://igchicago.org/wp-content/uploads/2020/01/OIG-Advisory-Concerning-CPDs-Predictive-Risk-Models-.pdf ; Mick Dumke and Frank Main. A look inside the watch list Chicago police fought to keep secret. The Chicago Sun Times. May 18, 2017. https://chicago.suntimes.com/2017/5/18/18386116/a-look-inside-the-watch-list-chicago-police-fought-to-keep-secret

forecasting,[7] license plate readers,[8] iris matching,[9] facial matching,[10] facial sketching,[11] genetic facial reconstruction,[12] social media monitoring,[13] prison monitoring,[14] forensic analysis,[15] forensic genetics,[16] the conduct of cyber intrusions,[17] physical location-monitoring devices,[18] or decisions related to sentencing, parole, supervised release, probation, bail, pretrial release, or pretrial detention;[19]

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[7] Lum, K., & Isaac, W. (2016). To predict and serve?. *Significance*, *13*(5), 14-19.; Ensign, D., Friedler, S. A., Neville, S., Scheidegger, C., & Venkatasubramanian, S. (2018, January). Runaway feedback loops in predictive policing. In *Conference on fairness, accountability and transparency* (pp. 160-171). *PMLR*.; Sankin, A., Mehrotra, D., Mattu, S. and Gilbertson, A. (2021, December 2). Crime Prediction Software Promised to Be Free of Biases. New Data Shows It Perpetuates Them. *The Markup*. https://themarkup.org/prediction-bias/2021/12/02/crime-prediction-software-promised-to-be-free-of-biases-new-data-shows-it-perpetuates-them ; Sankin, A. and Mattu, S. (2023, October 2). Predictive Policing Software Terrible At Predicting Crimes. *The Markup*. https://themarkup.org/prediction-bias/2023/10/02/predictive-policing-software-terrible-at-predicting-crimes

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[9] Electronic Frontier Foundation. Iris Recognition. https://www.eff.org/pages/iris-recognition

[10] Hill, K. (2020, June 24). Wrongfully Accused by an Algorithm. *The New York Times*. https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html ; Hill, K. (2023, August 6). Eight Months Pregnant and Arrested after False Facial Recognition Match. *The New York Times*. https://www.nytimes.com/2023/08/06/business/facial-recognition-false-arrest.html ; Johnson, K. (2023, February 28). Face Recognition Software Led to His Arrest. It Was Dead Wrong. *WIRED*. https://www.wired.com/story/face-recognition-software-led-to-his-arrest-it-was-dead-wrong/

[11] Chloe Xiang. (2023, February 7). Developers Created AI to Generate Police Sketches. Experts Are Horrified. *Motherboard*. https://www.vice.com/en/article/qjk745/ai-police-sketches

[12] Southall, A. (2017, October 19). Using DNA to Sketch What Victims Look Like; Some Call It Science Fiction. *The New York Times.* https://www.nytimes.com/2017/10/19/nyregion/dna-phenotyping-new-york-police.html ; Xiang, C. (2022, October 11). Police Are Using DNA to Generate 3D Images of Suspects They've Never Seen. *Motherboard*. https://www.vice.com/en/article/pkgma8/police-are-using-dna-to-generate-3d-images-of-suspects-theyve-never-seen

[13] Levinson-Waldman, R. (2018). Government Access to and Manipulation of Social Media: Legal and Policy Challenges. Howard Law Journal, 61, 3. p. 523-562.

[14] Bender, E. M. and Tatman, R. (2021, October 9). AI surveillance in prisons is a terrible idea, both technologically and ethically. *Geek Wire*. https://www.geekwire.com/2021/guest-post-ai-surveillance-prisons-terrible-idea-technologically-ethically/ ; Asher-Schapiro, A. and Sherfinski, D. (2021, November 16). 'Scary and chilling': AI surveillance takes U.S. prisons by storm. *Reuters*. https://www.reuters.com/article/usa-prisons-surveillance-idUSKBN2I01H0/

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[17] Ibid.

[18] Glaser, A. (2021, July 5). Incarcerated at home: The rise of ankle monitors and house arrest during the pandemic. *NBC News*. https://www.nbcnews.com/tech/tech-news/incarcerated-home-rise-ankle-monitors-house-arrest-during-pandemic-n1273008

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a. Suggested change: ensure that the closing clause includes "decisions *or risk assessments* related to …" to ensure that, for example, pretrial risk assessments[20] are included in this list.

C. Deciding immigration, asylum, or detention status;[21] providing risk assessments about individuals who intend to travel to, or have already entered, the U.S. or its territories;[22] determining border access or access to Federal immigration related services through biometrics (e.g., facial matching) or other means (e.g., monitoring of social media or protected online speech);[23] translating official communication to an individual in an immigration, asylum, detention, or border context;[24] or immigration, asylum, or detention-related physical location monitoring devices.[25]

a. Suggested change: in the first clause "deciding" should be changed to "deciding or providing risk assessments related to" to ensure that detention risk assessments[26] are included.

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[20] The Leadership Conference for Civil and Human Rights. The use of pre-trial "risk assessment" instruments: a shared statement of civil rights concerns. http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf ; Carrie Johnson. Flaws plague a tool meant to help low-risk federal prisoners win early release. NPR. Jan. 26, 2022. https://www.npr.org/2022/01/26/1075509175/flaws-plague-a-tool-meant-to-help-low-risk-federal-prisoners-win-early-release ; Carrie Johnson. Justice Department works to curb racial bias in deciding who's released from prison. NPR. Apr. 19, 2022. https://www.npr.org/2022/04/19/1093538706/justice-department-works-to-curb-racial-bias-in-deciding-whos-released-from-pris ; National Institute of Justice. 2021 Review and Revalidation of the First Step Act Risk Assessment Tool. National Institute of Justice NCJ 303859. Dec., 2021. https://www.ojp.gov/pdffiles1/nij/303859.pdf

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   b. Suggested additions: surveillance systems used to support routine immigration enforcement[27]

D. Detecting or measuring emotions, thought, or deception in humans;[28]

E. In education, detecting student cheating or plagiarism,[29] influencing admissions processes,[30] monitoring students online or in virtual-reality,[31] projecting student progress or outcomes,[32] recommending disciplinary interventions,[33] determining access to educational resources or

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programs,[34] determining eligibility for student aid,[35] or facilitating surveillance (whether online or in-person);[36]

a. Suggested additions: AI used as part of student advising,[37] or facial recognition or other biometrics used in the context of education.[38]

F. Tenant screening or controls,[39] home valuation,[40] mortgage underwriting,[41] or determining access to or terms of home insurance;[42]

a. Suggested additions: housing advertising,[43] facial recognition or other biometrics when used in the context of public housing.[44]

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G. Determining the terms and conditions of employment,[45] including pre-employment screening,[46] pay or promotion,[47] performance management,[48] hiring or termination,[49] time-on-task tracking,[50] virtual or augmented reality workplace training programs,[51] or electronic workplace surveillance and management systems;[52]
    a. Suggested additions: algorithmic disciplinary actions based on third party ratings,[53] automated scheduling,[54] or worker classification.[55]

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H. Decisions regarding medical devices,[56] medical diagnostic tools,[57] clinical diagnosis and determination of treatment,[58] medical or insurance health-risk assessments,[59] drug-addiction risk assessments and associated access systems,[60] suicide or other violence risk assessment,[61] mental-health status detection or prevention,[62] systems that flag patients for interventions,[63] public insurance care-allocation systems,[64] or health-insurance cost and underwriting processes;[65]
    a. Suggested additions: AI systems used to summarize doctor's notes and/or analyze health records[66]

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I. Loan-allocation processes,[67] financial-system access determinations,[68] credit scoring,[69] determining who is subject to a financial audit,[70] insurance processes including risk assessments,[71] interest rate determinations,[72] or financial systems that apply penalties (e.g., that can garnish wages or withhold tax returns);[73]
J. Decisions regarding access to, eligibility for, or revocation of government benefits or services;[74] allowing or denying access—through biometrics or other means (e.g., signature matching)—to IT

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systems for accessing services for benefits;[75] detecting fraud;[76] assigning penalties in the context of government benefits;[77] or

K. Recommendations or decisions about child welfare, child custody, or whether a parent or guardian is suitable to gain or retain custody of a child.[78]
    a. Suggested changes:
        i. in the opening phrase, change "recommendations or decisions about" to read "recommendations, decisions, or *risk assessments* about" to include child welfare risk assessments.[79]
        ii. in the phrase "IT systems for accessing services for benefits" change to "IT systems for accessing services, benefits, *or voting*.[80]"
    b. Suggested additions: adoption matching,[81] elder abuse and neglect,[82] or intimate partner violence.[83]

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[83] Ibid.

In addition to the presumption that some use cases are rights-impacting, there are two key components of the determination of whether a system is required to follow the minimum practices that we believe deserve further clarification: the definition of AI and the waiver process.

Clarification to the definition of AI

As evidenced by agencies' drastic underreporting to OMB and the public in previous AI use case inventories,[84] which excluded many AI use cases that were publicly known, agencies need further clarification and encouragement to report all their AI use cases. As appropriately clarified in the draft memo, this includes all machine learning systems. We suggest that OMB strengthen that section of the guidance to make it clear that the inclusion of all such systems as within scope of the guidance is not simply a suggestion, but a requirement. Specifically, we suggest changing "For the purposes of this memorandum, the following technical context may assist in interpreting this definition" to read "For the purposes of this memorandum, the following technical content guides the interpretation of and extends this definition."

Waiver process

The requirements and process that agencies must satisfy to be given a waiver from instituting the minimum practices for identified safety- or rights-impacting AI systems are unclear, which may undermine the federal government's efforts to protect Americans from algorithmic harms. Currently, the draft memo states that some components of the minimum practices can be waived "after making a written determination, based upon a system-specific risk assessment, that fulfilling the requirement would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations."

First, waiving *all* minimum practices in such situations is inappropriate — OMB can and should always expect agencies to test their systems for effectiveness and discrimination, among other minimum practices. We encourage OMB to add the following as minimum practices that may *not* be excluded from the requirements through the waiver process:

- Complete an AI impact assessment (Section 5.c.iv.A)
- Test the AI for performance in a real-world context (Section 5.c.iv.B)
- Conduct ongoing monitoring and establish thresholds for periodic human review (Section 5.c.iv.D)
- Mitigate emerging risks to rights and safety (Section 5.c.iv.E)
- Take steps to ensure that the AI will advance equity, dignity, and fairness (Section 5.c.v.A)
- Conduct ongoing monitoring and mitigation for AI-enabled discrimination (Section 5.c.v.C)

The above steps—appropriately identified by OMB as *minimum* practices—are necessary to ensure basic functioning, safety, and non-discrimination of any AI system. The federal government should not use AI systems that do not meet this bare minimum bar.

[84] Heilweil, R. and Adler, M. (2023, August 16) OMB acknowledges issues with process for inventorying AI use cases. *FedScoop*. https://fedscoop.com/omb-acknowledges-issues-with-process-for-inventorying-ai-use-cases/

Second, OMB should clarify in its final guidance that waivers require a justification and a risk assessment for *each* minimum practice for which the waiver is desired. Given that these practices are a *minimum* bar, and given that the practices already include caveats throughout such as "where appropriate," "where possible," and "to the extent practicable," the requirements for risk assessment and reporting to OMB and the public about waivers to these reasonable and necessary minimum practices should be strict. Waivers should be a tool of last resort, and should only be granted per system and per minimum practice waived, with justification for each such practice waived.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

Overall, the minimum practices identified are appropriate and necessary to ensure the safe and rights-respecting functioning of AI, although we offer some suggested edits and additions below. The requirements for impact assessments and public consultation are especially important parts of public accountability for AI, and must be coupled with robust public transparency into the methods and results of these assessments. Our specific suggestions for reporting requirements for the AI use case inventory are below in response to question 8, but we note here that impact assessments require such reporting in order to be a successful form of AI accountability.[85]

Guidance throughout the draft memo identifies that if a minimum practice can not be met (for example, if a demographic disparity can not be mitigated), then agencies should not use or integrate the AI tool. These requirements that agencies not use AI tools that do not work or otherwise do not meet federal government expectations are of key importance and must not be weakened in the final guidance.

Consult and incorporate feedback from affected groups (Section 5.c.v.B.)

The draft memo's directive for federal agencies to "consult and incorporate feedback from affected groups" is a critical component of the federal government's AI governance. AI researchers increasingly have identified public participation in technology design, deployment, and oversight as a critical safeguard.[86] Research indicates that public participation, when done well, improves decision-making by incorporating the viewpoints of those most likely to be impacted by technologies.[87] Further, the memo's incorporation of public input "*before* initiating use of new or existing rights-impacting AI" is important—

[85] Moss, E., Watkins, E. A., Singh, R., Elish, M. C., & Metcalf, J. (2021, June 29). Assembling accountability: algorithmic impact assessment for the public interest. *Data & Society Report.* https://datasociety.net/library/assembling-accountability-algorithmic-impact-assessment-for-the-public-interest/

[86] https://dl.acm.org/doi/10.1145/3551624.3555290; https://arxiv.org/pdf/2310.00907.pdf.

[87] Gilman, Michele E., Beyond Window Dressing: Public Participation for Marginalized Communities in the Datafied Society (November 2, 2022). Fordham Law Review, Vol. 91, 2022, University of Baltimore School of Law Legal Studies Research Paper Forthcoming, Available at SSRN: https://ssrn.com/abstract=4266250; Michele Gilman, *Democratizing AI: Principles for Meaningful Public Participation*, Data & Society (Sept. 27, 2023), https://datasociety.net/library/democratizing-ai-principles-for-meaningful-public-participation/.

for participation to be meaningful, affected groups should be involved at the beginning of the process, particularly in establishing the desirability or need of the system in the first place.

However, as currently drafted, the guidance only requires federal agencies to consult affected groups "to the extent practicable and consistent with applicable law and governmentwide guidance," leaving a substantial loophole for federal agencies to bypass public input. Specifically, many federal agencies—already facing capacity and staffing constraints—may find that additional procedures such as holding public meetings, gathering public input, soliciting comments through an RFI, and consulting with federal employees' unions on the use of AI to fall beyond "the extent practicable."

The key issue with public participation is that *it works only when done well*.[88] Under the memo as drafted, many federal agencies may either ignore the directive, or go through rote motions of cursory listening sessions and RFIs without meaningfully elevating the voice of marginalized communities. The guidance could be strengthened by omitting "To the extent practicable," which would encourage robust adoption of participatory methods while still preserving the condition that agencies' public consultation be "consistent with applicable law and government guidance."

Missing practices

Two key principles of the Biden-Harris administration's Blueprint for an AI Bill of Rights[89] are missing or only partly satisfied by the minimum practices of the draft memorandum: explanation and data privacy.

Data privacy

Excluding data privacy from the minimum practices entirely misses a major opportunity to safeguard people's rights because, as the draft memo identifies, data is a key part of any AI system. Given OMB's role in overseeing compliance with the Paperwork Reduction Act, this also misses an opportunity for further oversight and/or consolidation. The key minimum practice to add related to data privacy is data minimization, which is also a key pillar of the bipartisan American Data Privacy and Protection Act.[90] Specifically, we suggest adding the following minimum practice from the Biden-Harris administration's Blueprint for an AI Bill of Rights to the final guidance:

> ***Data collection and use-case scope limits****. Data collection should be limited in scope, with specific, narrow identified goals, to avoid "mission creep." Anticipated data collection should be determined to be strictly necessary to the identified goals and should be minimized as much as possible. Data collected based on these identified goals and for a specific context should not be used in a different context without assessing for new privacy risks and implementing appropriate mitigation measures, which may include express consent. Clear timelines for data retention should be established, with data deleted as soon as possible in accordance with legal or policy-based limitations. Determined data retention timelines should be documented and justified.*

[88] Ibid.
[89] The White House. (2022, October). Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People. https://www.whitehouse.gov/ostp/ai-bill-of-rights/
[90] 117th Congress. (2022). H.R. 8152 American Data Privacy and Protection Act. https://www.congress.gov/117/bills/hr8152/BILLS-117hr8152rh.pdf

Explanation

Explanations, especially of adverse decisions about individuals, are necessary in order for those individuals to seek meaningful recourse. Explanations are broadly understood as important and form a core pillar of Leader Schumer's SAFE Innovation Framework for future AI legislation.[91] Additionally, such explanations are already required under federal law in the case of adverse action notices by financial institutions—even in cases where AI informs decisions—as made clear by the CFPB.[92] Explanations as required by the CFPB must be specific and "accurately indicate the principal reason(s) for the adverse action."[93] Such explanations are useful to people and, importantly, *are technically feasible to generate* no matter the type of AI system. Footnote 37 of the draft OMB memorandum states that "exact explanations of AI decisions are often not technically feasible." While it's true that an "exact" explanation would require a re-explanation of the entire AI system and is thus not *useful* to a person, it's certainly possible to generate. More importantly, meeting the standard set by the CFPB for AI system explanations is both useful and technically feasible. Common methods[94] have readily available software packages[95] that can be used to generate feature importance values that are model-agnostic. We suggest adding the following minimum practice to the continuing practices part of Section 5.c.v, adapted from OMB's draft memorandum footnote 37:

> ***Explanations***. *Agencies must provide explanations to individuals when AI meaningfully influences adverse actions by rights-impacting AI systems which specifically impact them. Explanations provided to the individual shall: explain why the AI system produced the result it produced for this specific individual; be scientifically valid, meaningful, useful, and as simply stated as possible; accurately indicate the principal reason(s) for the adverse action; and include more comprehensive explanations for higher-risk decisions.*

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

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[91] Schumer's SAFE Innovation Framework https://www.democrats.senate.gov/imo/media/doc/schumer_ai_framework.pdf

[92] The Consumer Financial Protection Bureau. (2023, September 19). Adverse action notification requirements and the proper use of the CFPB's sample forms provided in Regulation B. *Consumer Financial Protection Circular 2023-03.* https://www.consumerfinance.gov/compliance/circulars/circular-2023-03-adverse-action-notification-requirements-and-the-proper-use-of-the-cfpbs-sample-forms-provided-in-regulation-b/

[93] The Consumer Financial Protection Bureau. (2023, September 19). Adverse action notification requirements and the proper use of the CFPB's sample forms provided in Regulation B. *Consumer Financial Protection Circular 2023-03.* https://www.consumerfinance.gov/compliance/circulars/circular-2023-03-adverse-action-notification-requirements-and-the-proper-use-of-the-cfpbs-sample-forms-provided-in-regulation-b/

[94] Lundberg, S. M., & Lee, S. I. (2017). A unified approach to interpreting model predictions. Advances in neural information processing systems, 30. https://dl.acm.org/doi/10.5555/3295222.3295230 ; Ribeiro, M. T., Singh, S., & Guestrin, C. (2016, August). " Why should I trust you?" Explaining the predictions of any classifier. In *Proceedings of the 22nd ACM SIGKDD international conference on knowledge discovery and data mining* (pp. 1135-1144). https://dl.acm.org/doi/abs/10.1145/2939672.2939778

[95] SHAP python package https://github.com/shap/shap; LIME python package https://github.com/marcotcr/lime

Concern that the values language in the draft memorandum does not center equity

We are concerned that the procurement section (Section 5.d) of the draft memorandum introduces new principles focused on values in the particular context of procurement that do not align with the requirements in Executive Order 14110. The values language included in this section does not address the Administration's existing equity commitments. Specifically, the procurement section copies language from Executive Order 13960, which says that AI should be:

> Lawful and respectful of our Nation's values. Agencies shall design, develop, acquire, and use AI in a manner that exhibits due respect for our Nation's values and is consistent with the Constitution and all other applicable laws and policies, including those addressing privacy, civil rights, and civil liberties.

The procurement section of the draft memorandum similarly says:

> Aligning to National Values and Law. Agencies should ensure that procured AI exhibits due respect for our Nation's values, is consistent with the Constitution, and complies with all other applicable laws, regulations, and policies, including those addressing privacy, confidentiality, copyright, human and civil rights, and civil liberties.

Yet Executive Order 14110 clearly states that:

> Artificial Intelligence policies must be consistent with my Administration's dedication to advancing equity and civil rights. My Administration cannot—and will not—tolerate the use of AI to disadvantage those who are already too often denied equal opportunity and justice. From hiring to housing to healthcare, we have seen what happens when AI use deepens discrimination and bias, rather than improving quality of life. Artificial Intelligence systems deployed irresponsibly have reproduced and intensified existing inequities, caused new types of harmful discrimination, and exacerbated online and physical harms. My Administration will build on the important steps that have already been taken—such as issuing the Blueprint for an AI Bill of Rights, the AI Risk Management Framework, and Executive Order 14091 of February 16, 2023 (Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government)—in seeking to ensure that AI complies with all Federal laws and to promote robust technical evaluations, careful oversight, engagement with affected communities, and rigorous regulation. It is necessary to hold those developing and deploying AI accountable to standards that protect against unlawful discrimination and abuse, including in the justice system and the Federal Government. Only then can Americans trust AI to advance civil rights, civil liberties, equity, and justice for all.

and Executive Order 14091 states that:

> When designing, developing, acquiring, and using artificial intelligence and automated systems in the Federal Government, agencies shall do so, consistent with applicable law, in a manner that advances equity.

The Biden-Harris administration's commitment to equity, as evidenced through many executive orders (including 13985, 14091, 14110, and others) and administration practices, go beyond a minimal commitment to upholding existing civil rights law as stated in the draft memorandum. The minimum

practices identified by OMB in the draft also ensure more than this minimum standard. **We strongly encourage OMB to revise these principles in the context of procurement and follow the clear directives in favor of equity from this administration; as written, the procurement principles do not meet the expectations of EOs 14091 or 14110.**

Contract requirements that include the minimum practices

There should be no difference between the requirements for agency use of AI based on whether the agency procured the system or developed it in-house; contract requirements should be based on the minimum practices detailed in the OMB draft memorandum. The process of determining whether a system is safety- or rights-impacting is already detailed in the draft memorandum and should also be followed for procured systems. Similarly, the AI use case inventory should include procured systems. **Contracts can incorporate these requirements by**:

1. **Instituting the minimum practices** of the draft memorandum as required clauses in any safety-impacting or rights-impacting AI system contract;
2. Simultaneously **procuring an external evaluator** to conduct independent testing and monitoring of the AI system, for example using the existing JAIC contract vehicle[96]; and
3. **Requiring detailed reporting** via the AI use case inventory as part of both contracts.

We encourage the Office of Federal Procurement Policy (OFPP) to build on the strong foundation laid by the minimum practices described in the draft memorandum—these practices can and should be applied to procurement as well. There is no need to reinvent the wheel. The procurement section of the draft memorandum introduces new practices focused on generative AI, but the draft memorandum already covers generative AI within its definition of AI. Procurement guidelines should follow this approach.

Detailed reporting and the AI use case inventory

Including the detailed reporting via the AI use case inventory is an important part of public accountability for these systems and will also serve to provide contracting agents with information they need to appropriately assess a system to determine whether it is safe, effective, and rights-protecting. **We thus encourage OFPP to examine the responses to question 8 of this RFI**; there may be cases where OMB decides not to incorporate detailed questions and responses into the public-facing portion of the AI use case inventory, yet these questions can provide a useful starting point for contracting officers aiming to privately assess a system. A similar approach that relies on an assessment of detailed questions answered by a vendor is used by an industry consortium to assess HR vendor systems that can include AI.[97]

Federal grants must also require the minimum practices

Finally, we encourage OMB's Office of Federal Financial Management to work with OFPP to learn from this procurement process and incorporate similar protections into their grant guidance. Federal grants

[96] JAIC Public Affairs. (2022, February 11). AIC Offers New Enterprise-Wide Contract Vehicle for Rapid Procurement of AI Test & Evaluation. https://www.ai.mil/blog_02_11_22_jaic_new_contract_vehicle.html
[97] Data & Trust Alliance. Algorithmic Safety: Mitigating Bias in Workforce Decisions. https://dataandtrustalliance.org/our-initiatives/algorithmic-safety-mitigating-bias-in-workforce-decisions

have a substantial impact on state and local governments and communities. The federal government should not be providing monetary support to instituting AI systems that would violate the government's own guidelines and present risks to the public's safety or rights.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

Public reporting on agencies' AI uses—including impact assessments, risk mitigation procedures, and demographic disparity measurements and results, among other items—are key to effective AI accountability.[98] OMB's plans to integrate the collection of this data into its annual Integrated Data Collection process represent an important step, and ensuring that information about *all* safety-impacting and rights-impacting AI systems is reported publicly will be critical for building public trust in these systems.

Including all AI systems in the inventory

As also described above in response to question 5, previous AI use case inventories have not included all AI systems;[99] as part of this renewed AI use case inventory, OMB must close existing loopholes and make clear to agencies that *all* AI use cases must be reported. For example, in the existing AI use case inventory, the Department of Justice reported only 4 AI use cases,[100] but did not include the facial recognition services that GAO has reported[101] are used by DOJ, nor did they include the DOJ-developed PATTERN risk assessment tool.[102] Two possible loopholes that should be closed by OMB include:

1. Lack of reporting of commercially developed software used by the federal government through acquisition, and
2. Lack of reporting of tools perceived to be less sophisticated than cutting-edge AI systems.

Given that the OMB guidance applies to agency "use of AI" and is clearly meant to apply to acquired systems as well, OMB should make clear to agencies that they are required to report on their use of commercially developed AI, such as the facial recognition tools identified by GAO as in use by DOJ. Additionally, some agencies may be under-reporting AI systems because they interpret trained regression

[98] Moss, E., Watkins, E. A., Singh, R., Elish, M. C., & Metcalf, J. (2021, June 29). Assembling accountability: algorithmic impact assessment for the public interest. *Data & Society Report.* https://datasociety.net/library/assembling-accountability-algorithmic-impact-assessment-for-the-public-interest/

[99] Heilweil, R. and Adler, M. (2023, August 16) OMB acknowledges issues with process for inventorying AI use cases. *FedScoop*. https://fedscoop.com/omb-acknowledges-issues-with-process-for-inventorying-ai-use-cases/

[100] Department of Justice. AI Use Case Inventory Submission on Open Data. https://www.justice.gov/open/page/file/1517316/download

[101] U.S. Government Accountability Office. (2023, September 12). Facial Recognition Services: Federal Law Enforcement Agencies Should Take Actions to Implement Training, and Policies for Civil Liberties. https://www.gao.gov/products/gao-23-105607

[102] U.S. Department of Justice. (2021, December). 2021 Review and Revalidation of the First Step Act Risk Assessment Tool. *NIJ report NCJ 303859*. https://www.ojp.gov/pdffiles1/nij/303859.pdf; Ryan Labrecque. (2023, March). 2022 Review and Revalidation of the First Step Act Risk Assessment Tool. *NIJ report NCJ Number 305720.* https://nij.ojp.gov/library/publications/2022-review-and-revalidation-first-step-act-risk-assessment-tool

tools (like those that make up PATTERN[103]) as not being within scope of the definition of artificial intelligence under the 2019 NDAA, as also used in the OMB draft memorandum. But linear regression, logistic regression, and other such models *are* machine learning models,[104] which should be considered within the scope of the definition of artificial intelligence used by OMB since (as OMB rightly notes in its definitional clarification in the draft memorandum) the definition encompasses machine learning. We suggest that OMB make this needed clarification by changing "For the purposes of this memorandum, the following technical context may assist in interpreting this definition" to read "For the purposes of this memorandum, the following technical content guides the interpretation of and extends this definition"—and make it clear that agencies are expected to fully report their AI use cases.

Summary reporting of excluded AI systems

Given the waiver process and that some systems are additionally excluded from public reporting as part of the AI use case inventory, it is important that there be public reporting summarizing these exclusions. Such reporting should include at least the following information:

- Number of AI systems excluded from public reporting per agency and per rationale (whether excluded via Section 5.c.i or via a different mechanism);
- Number of AI systems subject to an extension for compliance with minimum practices per agency (Section 5.c.ii);
- Detailed justifications and plans to meet the minimum requirements per AI system that has been granted an extension for compliance with minimum practices (Section 5.c.ii);
- Number of waivers granted per agency and per minimum practice (Section 5.c.iii); and
- The risk assessment done to justify each granted waiver or detailed justification of agency need for critical operations (Section 5.c.iii).

Detailed reporting of testing and risk as part of the AI use case inventory

For each minimum practice described in the draft memo, the public should receive information and assurances through the AI use case inventory that the agency took the required protective steps. This should include providing specifics about risk mitigation practices and resulting findings. Example questions for a few key minimum practices are included below, but a more comprehensive exercise should be undertaken to ensure detailed and specific reporting for each practice. The below suggested questions for the AI use case inventory draw directly from the documentation suggested by and needed to meet OMB's draft memo list of minimum practices.

Complete an AI impact assessment (Section 5.c.iv.A)

The intended purpose for the AI and its expected benefit (Section 5.c.iv.A.1)

- What is the intended purpose of the AI system?
- What is the expected benefit of the AI system?

[103] U.S. Department of Justice. (2021, December). 2021 Review and Revalidation of the First Step Act Risk Assessment Tool. *NIJ report NCJ 303859*. https://www.ojp.gov/pdffiles1/nij/303859.pdf; Ryan Labrecque. (2023, March). 2022 Review and Revalidation of the First Step Act Risk Assessment Tool. *NIJ report NCJ Number 305720.* https://nij.ojp.gov/library/publications/2022-review-and-revalidation-first-step-act-risk-assessment-tool.
[104] Russell, S. and Norvig, P. (2022) Artificial Intelligence: a modern approach. 4th U.S. edition. https://aima.cs.berkeley.edu/, see Chapter 19.6 on linear regression https://aima.cs.berkeley.edu/contents.html

- What performance metrics and/or qualitative analysis was used to assess the fitness to purpose and expected benefit of the AI system?
- What were the quantitative and/or qualitative results found by the above described analysis?

The potential risks of using AI (Section 5.c.iv.A.2)

- What stakeholders will be most impacted by the use of the AI system?
- What possible failure modes may result from use of the AI and of the broader system, both in isolation and as a result of human users and other likely variables outside the scope of the system itself?
- What are the potential risks to underserved communities?
- Describe how the expected benefits of the AI functionality were weighed against its potential risks and how it was determined that the benefits meaningfully outweigh the risks. Note that if the benefits do not meaningfully outweigh the risks, agencies should not use the AI.

The quality and appropriateness of the relevant data (Section 5.c.iv.A.3)

- What is the provenance and quality of the data for its intended purpose?
- How is the data relevant to the task being automated and why does it have a reasonable expectation of being useful for the AI's development, testing, and operation?
- Does the data contain sufficient breadth to address the range of real-world inputs the AI might encounter? How was that assessed?
- Does the data come from an adequately reliable source? How was that assessed?
- How are errors from data entry, machine processing, or other sources measured and limited? What are the associated data error rates? This should include errors from relying on AI-generated data as training data or model inputs.

Take steps to ensure that the AI will advance equity, dignity, and fairness (Section 5.c.v.A)

Proactively identifying and removing factors contributing to algorithmic discrimination or bias (Section 5.c.v.A.1)

- What is the process by which factors were assessed for bias?
- List any factors which were proactively removed based on this assessment.

Assessing and mitigating disparate impacts (Section 5.c.v.A.2)

- What metrics and/or qualitative analysis was used to assess disparities in the AI's performance across demographic groups?
- What demographic groups were included in the assessment?
- How was demographic data acquired or inferred to perform the assessment?
- What were the quantitative and/or qualitative results found by the above described analysis per demographic group?
- How was the AI system's real-world deployment impact assessed, and what did that assessment find?
- How were identified disparities that have the potential to lead to discrimination, cause meaningful harm, or decrease equity, dignity, or fairness mitigated? Note that if adequate mitigation of the disparity is not possible, then agencies should not use or integrate the AI tool.

Using representative data (Section 5.c.v.A.3)

- What communities will be affected by the AI system?
- What demographic groups are included in the data used to develop, operate, and assess the AI system?
- How was demographic data acquired or inferred to perform the assessment?
- What is the total number of people represented in the training data? What is the total number of people represented in the test data?
- What is the number of people from each of the demographic groups in the training data and in the test data?
- How was the data used to develop, operate, and assess the AI collected?
- What is the historical and societal context of the data and data collection process?
- Describe how any improper bias in the data has been assessed and mitigated.

Consult and incorporate feedback from affected groups (Section 5.c.v.B)

- On what date(s) was consultation with affected groups, including underserved communities, conducted about the design, development, and use of the AI?
- What affected groups were consulted? Affected groups may include customers, federal employee groups, and employees' union representatives among other members of the public.
- What type of consultation was conducted? Choose from the following (you may choose more than one):
    1. Direct user testing, such as observing users interacting with the system;
    2. General solicitations of comments from the public, such as a request for information in the Federal Register or a “Tell Us About Your Experience” sheet with open-ended space for responses;
    3. Post-transaction customer feedback collections;
    4. Public hearings or meetings, such as a listening session; or
    5. Any other transparent process that seeks public input, comments, or feedback from the affected groups in a meaningful, equitable, accessible, and effective manner.
- If the consultation listed above was some other transparent process (option 5), describe that process.
- If consultation with affected groups was not conducted because doing so was inconsistent with applicable law or governmentwide guidance, describe the applicable law or governmentwide guidance that is inconsistent with such consultation.
- Provide a URL to any public documentation of the consultation, such as resulting RFI submissions.
- Give a summary of the key findings of the consultation.
- Describe any changes made to the AI system and/or planned rollout in response to the consultation.

Respectfully submitted,

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PUBLIC SUBMISSION

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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0136
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Benefits Data Trust

General Comment

See attached file(s)

Attachments

BDT OMB Advancing Governance Innovation and Risk Management for Agency Use of AI Comment

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Response to the Office of Management and Budget Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

Response Submitted by Benefits Data Trust

December 5, 2023

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Clare Martorana
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Office of the Federal Chief Information Officer
Office of Management Budget.
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Washington, DC 20503

Dear Chief Information Officer Martorana:

Thank you for the opportunity to respond to this Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence.

For nearly 20 years, Benefits Data Trust (BDT) has harnessed the power of data, policy, and technology to provide efficient and dignified access to assistance. A cornerstone of BDT's work is identifying individuals who are enrolled in one means-tested program but are eligible for more and helping them access additional assistance. As the digital landscape evolves, we recognize the transformative potential of artificial intelligence (AI) in optimizing service delivery and improving outcomes for those we serve. BDT is exploring how AI might be beneficial in human services, including advancing a more intelligent, dignified, and effective delivery of public benefits services to people in need. We are tackling questions such as: "How can AI assist front-line workers who lead and run government programs that are essential to fighting poverty and meeting people's basic needs? "How should we make the most of new AI tools that can modernize and streamline work, while guarding against risks that can harm people's health and well-being and contribute to inefficiency and inequity in the public benefits system?"

A nonprofit since 2005, BDT has secured more than $10 billion in benefits for households across the country, building pathways to economic mobility and a more equitable future. BDT has nearly 20 years of experience in using data and technology to target outreach and awareness campaigns to connect people to essential benefits and services such as SNAP, WIC and Medicaid, informing public policy strategies, and incorporating human-centered design to ensure services are informed by — and responsive to — clients' needs. This is the perspective and history BDT is bringing to the AI conversation generally and to the comments and recommendations contained in this submission.

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BDT applauds and supports the Office of Management and Budget's recognition of the transformative effects AI can have on the way the federal government operates and serves its constituents while also recognizing the imperative need to establish safeguards to mitigate the inherent risks in inserting AI into this domain. When applied to the government's administration of and people's access to public benefits such as Supplemental Nutrition Assistance Program (SNAP) and Medicaid, AI is entering a sensitive rights-affecting and life-impacting terrain. Done well, AI can boost productivity by relieving government workers of rote tasks, cutting through unproductive processes and practices, and bringing greater analytical horsepower to operations. But done poorly, without due concern for inherent ethical and socio-technical vulnerabilities AI can have unintended consequences. In this regard, AI can cause a range of harms such as replacing human judgment in areas unsuited to automation, introducing automated bias into programs already laced with off-putting complexity and historic exclusion, and exacerbating illness, insecurity, and other challenges facing people and communities human service agencies are charged with serving. It is important to navigate this AI landscape in the context of the existing Executive Order on Transforming Federal Customer Experience and Service Delivery to Rebuild Trust in Government. The Order stated, "we must use technology to modernize Government and implement services that are simple to use, accessible, equitable, protective, transparent, and responsive for all people of the United States." This paradigm should be used as the federal government explores ways to add AI to its processes and services. This is particularly true in the context of AI in the public benefits sector.

Maximizing the use of AI in the public benefits sector will require further improvement and execution of data sharing or computer matching agreements across multiple government agencies. BDT's extensive experience in assisting states in executing data sharing agreements across benefit programs has demonstrated time and again that challenges with these agreements can stymie data analysis, client outreach, and streamlining benefits access. At the federal level, there are strong examples like the use of National Verifier, where federal data sources including Medicaid enrollment, federal housing assistance programs, Federal Pell Grant and Veteran Pension and Survivors Benefits are shared to verify enrollment in the Affordable Connectivity Program and Lifeline. Further encouragement is needed to have greater coordination amongst Federal agencies to appropriately share information for AI purposes to fully reap the benefits of government efficiencies and improved experiences for consumers.

The breadth and depth of what is possible with AI in the federal government context is expansive. Millions of individuals engage with the federal government through federal and federally assisted benefits programs each year. Imagining ways AI can be used to assist these individuals' experiencing poverty and relying on social safety net programs to make accessing benefits more streamlined and easier to use and maintain is a worthy priority. BDT is contributing to and learning from cross-sector conversations to build ethical guiderails on these kinds of human engagements in AI development and distribution. It is from these learnings and BDTs own exploration in bringing AI into the public benefits sector that BDT offers the following recommendations.

(5) MANAGING RISKS FROM THE USE OF ARTIFICIAL INTELLIGENCE.

(b) Determining Which Artificial Intelligence Is Presumed to Be Safety-Impacting or Rights Impacting.

(ii) Purposes That Are Presumed to Be Rights-Impacting.

BDT supports that presumed rights impacting activities includes "decisions regarding access to, eligibility for, or revocation of government benefits or services; allowing or denying access—through biometrics or other means (e.g., signature matching)—to IT systems for accessing services for benefits; detecting fraud; assigning penalties in the context of government benefits."

Integrating AI into decisions regarding eligibility and enrollment in these programs imparts profound influence on individual's everyday lives. As such we support recognizing eligibility and enrollment in government benefit programs as "presumed rights impacting" activities and decisions.

(c) Minimum Practices for Safety-Impacting and Rights-Impacting Artificial Intelligence.

(iv) Minimum Practices for Either Safety-Impacting or Rights-Impacting AI.

(A) Complete an AI Impact Assessment.

(1) The intended purpose for the AI and its expected benefit. Sometimes the addition of technology into human services can unwittingly create barriers to access due to the way that technology translates into the experience of the consumer in engaging with the technology. **BDT recommends that agencies should be required to consult with and document work with internal or external groups focusing on customer service delivery, including clients themselves, to ensure the AI does not result in more burdensome experiences for the consumer.** Groups with this expertise can assist with pinpointing the ways AI can actually improve the customer experience in addition to the efficiencies it will create for the federal agencies.

BDT recommends that AI impact assessments should be required to ensure the AI initiative efforts are in line with government capacities. There are a myriad of ways AI could be integrated into federal agencies' benefits delivery systems. However, it is important to consider government capacities as AI initiatives and opportunities are vetted. Though this guidance is directed towards federal agencies, BDTs experience in supporting state benefit delivery systems informs that when there is a new federal initiative there is a trickledown effect of burden on state and local governments as well as the consumer. In addition, there is sometimes confusion on the part of the state with understanding and implementing new federal guidance. This tension often intersects with state efforts to improve the ways in which they serve individuals. This is an opportunity where the use of AI could reduce the burden to governments and the consumer if done well. Impact assessments should strategically prioritize AI efforts where the expected benefit and impact outweigh the expected burden to federal and state government as well as the individual. In weighing these factors an AI impact assessment should provide insight into how and why this initiative is being prioritized. The goal of this introspection being avoidance of overwhelming benefits delivery systems.

(3) The quality and appropriateness of the relevant data. OMB has noted the importance of "proactively identifying and removing factors contributing to algorithmic discrimination or bias" in the Proposed Memorandum. **BDT recommends that agencies must document in the AI impact assessment how the agencies have assessed the data for inherent biases affecting marginalized and underserved populations and the mitigation measures the agency will take to help reduce the risk of discriminatory outcomes.**

(v) Additional Minimum Practices for Rights- Impacting AI.

(A) Take Steps to Ensure that the AI Will Advance Equity, Dignity, and Fairness.

(1) Proactively *identifying and removing factors contributing to algorithmic discrimination or bias.* BDT supports the requirement that agencies assess whether rights-impacting AI materially relies on information about a class protected by Federal nondiscrimination laws in a way that could result in algorithmic discrimination or bias against that protected class. Accounting for these characteristics and communities will help ensure that the insertion of AI into the public benefits sector will not further worsen already existing gaps in access to public benefits.

(B) Consult and Incorporate Feedback from Affected Groups.

BDT supports the requirement that agencies must consult affected groups, including underserved communities, in the design, development, and use of the AI, and use such feedback to inform agency decision-making regarding the AI. Marginalized and underserved communities have unique needs and perspectives that should be considered in the AI design, implementation and review processes. These communities often face the consequences of systemic biases. In the context of public benefits this means that individuals can be forced to go without necessities like food and healthcare or endure an unduly burdensome process to attain these supports. Actively involving these communities in the AI development process can help identify and mitigate biases that might otherwise go unnoticed and further worsen systemic inequities. Sometimes access to public benefits is intertwined with cultural contexts and nuances. Incorporating user experience from marginalized communities helps to achieve culturally competent AI systems and outcomes as well.

Sometimes the use of technology in human services systems can unwittingly create barriers for the consumer, such as issues with digital literacy. **BDT also recommends that agencies should be encouraged to consult and document work with internal or external groups focusing on customer service delivery including ensuring the AI does not result in more burdensome experiences for the consumer.**

(C) Conduct ongoing monitoring and mitigation for AI-enabled discrimination.

BDT supports the requirement that agencies must also monitor rights-impacting AI to assess and mitigate AI-enabled discrimination against protected classes that might arise from unforeseen

circumstances, changes to the system after deployment, or changes to the context of use or associated data.

(D) Notify Negatively Affected Individuals and (E) Maintain Human Consideration and Remedy Processes.

BDT supports the requirements that agencies must notify negatively affected individuals and maintain human consideration and remedy processes. **BDT recommends that agencies should be required to plan for how AI, which meaningfully influences eligibility decisions and/or the appeals processes, both ensures accessibility and accommodates diverse levels of technological literacy.** Due to the complex nature of AI algorithms, there is concern that individuals may be unable to understand the basis for eligibility or appeals process decisions negatively affecting them. Agencies should be able to provide clear, plain explanations that detail the factors that influenced the decision using an AI algorithm.

The use of AI in public benefits administration should not erode the eligibility or appeal process by being too complicated to pinpoint reasons for adverse outcomes. It should not create additional or unduly burdensome hurdles for eligibility or appeals processes. Benefits systems do individuals a disservice if efficiencies at the agency are prioritized at the expense of the consumer experience for the individual.

(F) Maintain Options to Opt-Out Where Practicable.

BDT supports the requirement that agencies maintain options to opt-out from AI functionality in favor of a human alternative where practicable. This is a way in which agencies can maintain individual choice in this new AI landscape. Government agencies are often seeking ways to improve the level of trust their constituents have in the agency. Providing the option for a human alternative to AI builds trust and recognizes differing levels of comfort with the new technology. It is important to honor individual choice and recognize that providing AI without a human alternative may make individuals wary of eligibility processes and have a chilling effect on benefits access overall.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0137
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Computing Community Consortium

General Comment

See attached file(s)

Attachments

OMB Draft Policy RFC_ CCC Final Response

The Computing Community Consortium's Response to the Office of Management and Budget's Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

December 5, 2023

Written by: David Danks (University of California, San Diego), Haley Griffin (Computing Community Consortium), David Jensen (University of Massachusetts Amherst), Chandra Krintz (University of California Santa Barbara), Daniel Lopresti (Lehigh University), Rajmohan Rajaraman (Northeastern University), Matthew Turk (Toyota Technological Institute at Chicago), and Holly Yanco (University of Massachusetts Lowell)

This response is from Computing Research Association (CRA)'s Computing Community Consortium (CCC). CRA is an association of nearly 250 North American computing research organizations, both academic and industrial, and partners from six professional computing societies. The mission of the CCC, a subcommittee of CRA, is to enable the pursuit of innovative, high-impact computing research that aligns with pressing national and global challenges.

Please note any opinions, findings, and conclusions or recommendations expressed in this material are those of the authors and do not necessarily reflect the views of the authors' affiliations.

This response pertains to questions 1-6, and 8 (each numbered and copied below in italics) from the Request for Comments:

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

We strongly endorse the notion that the Chief AI Officers should be at the senior level in order to maximize their impact. They will be responsible for helping to shepherd our government through one of the most significant technological transitions in our nation's history. Our

impression is that it will be a dual-hatted position, so we also emphasize that they should be provided with all necessary resources, including sufficient staffing and a highly qualified deputy with expertise in a wide range of emerging AI topics.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

A new body to perform AI governance is the right approach because there is danger in following the status quo given the speed and scale of AI developments today. It is essential to look for new ways of thinking, and this can be actualized through AI Governance Bodies that consist of individuals who are studying pressing AI issues both broadly and deeply. We also propose that the AI Governance Bodies at each agency have several members who are Special Government Employees (SGEs), bringing insights from outside of each agency while still understanding key aspects of each agency's mission. In particular, we encourage the Bodies to include SGEs such as researchers participating in NSF AI Institutes, professional organizations with long-standing expertise in AI including the Computing Research Association (CRA), Association for the Advancement of Artificial Intelligence (AAAI), Institute of Electrical and Electronics Engineers (IEEE), Association for Computing Machinery (ACM), etc., and members of potentially impacted communities. Given the breadth of AI's impact, interdisciplinary contributions from a wide range of fields will be critical in order to provide appropriate perspectives about research and impact on communities. AI Governance Bodies should not only include experts in computing, but also those with expertise in other disciplinary approaches, such as health and human services, transportation, and the social sciences.

Additionally, we believe that there needs to be a transparent mechanism for interactions across AI Governance Bodies of different agencies. While AI Councils are mentioned as a potential vehicle for coordination, the draft policy lacks a description of how the collaboration between these bodies will take effect. We believe such collaborations will be vital for reducing duplication of effort and, ultimately, for success of this effort, but these benefits will not be realized without careful design.

3. How can OMB best advance responsible AI innovation?

It is essential for responsible AI innovation advancement to…

- Bring in non-agency and non-vendor expertise, perhaps through outside individuals on advisory boards for agencies, both technical experts and average citizens. The work of such boards should be observable and transparent where possible (so that the public can give feedback as needed).
- Prioritize that the outcomes from using AI are trustworthy, fair, and reliable. While using good, clean data is important in developing AI systems, the results and impacts on individuals and communities need to be top of mind especially since even good data can be misused.
- Implement monitoring mechanisms that recognize that even if a large number of individuals have used an AI system over a period of time and have not yet reported any issues, that does not mean that the AI system is safe or reliable. Rare but impactful edge cases are common across all fields of computing.
- Reevaluate an AI/ML system each time a software update is implemented, or a dataset is changed. We recognize that there are difficult questions about exactly when a software or dataset update is significant enough to require re-evaluation. We do not propose a hard-and-fast rule, but we contend that any such criterion should err on the side of too much re-evaluation, rather than too little.
- Encourage independent evaluation and testing of all AI/ML systems so as not to become dependent on vendors who may employ differing criteria.
- Actively plan and prepare for unforeseen deleterious impacts because the behavior of many AI systems remain unpredictably complex.
- Release metrics and reasons for determinations that an AI is neither “safety impacting” nor “rights impacting.” The public should have access to these measures given the significant incentives for companies to claim their systems are neither safety- nor rights-impacting in order to minimize scrutiny.
- Use a more fluid characterization of an AI system, as the impact of such technology can change rapidly and needs to be reconsidered often.
- Encourage and support public scrutiny of the AI use case inventories that Agencies are releasing. There is always a possibility they are choosing to display the work they know will please the public instead of a random/average sample.
- Require that AI use cases be published with a sufficient level of detail and, where appropriate, representative data, so that outside independent experts can evaluate potential risks and provide constructive feedback for ongoing improvement of AI deployments.

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

At this early stage in the development of generative AI, we urge a cautious, carefully considered approach to employing generative AI in agency missions and business operations. We applaud current research on generative AI, and we are optimistic about the tremendous possibilities that it offers, but caution should be taken. Systems and processes built around generative AI should be prepared to deal with errors and unanticipated outputs. The private sector is going through processes of trial and error in the generative AI space, and will continue to do so for the immediate future; there is wisdom in letting them work through the growing pains of this new technology before taking any large scale measures as a government. Additionally, at this time business operations can oftentimes be more improved by non-generative AI solutions; agencies should not presume that generative AI systems are the only, or even the best, way to advance their missions and operations.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

The following challenges should be considered when categorizing use cases:

- *The challenge of AI software components* — One fundamental challenge is that a vast number of computer systems could be deemed to be "AI" because one (perhaps largely incidental) component of that system uses some form of AI technology. For example, consider
    - a video-conferencing system that uses a computer vision model to identify the background of an image (to add blur to that background).
    - an email system that uses a simple Bayesian classifier for spam detection.
    - a word processor that uses a simple language model for autocomplete.
- *The challenge of update frequency* — Software components based on machine learning have the potential to dramatically increase the frequency, scope, and potential impact of updates to software that is routinely used by agencies.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

There should be an open mechanism for affected groups/users of an AI system to have a redress path that leads back to the appropriate AI experts in the agency. When a decision is being made

by a human, there is a human to complain to, and a process for the complaint to be taken up the chain of command as needed. It is crucial that especially for rights or safety-impacting AI, that there is a clear process for perceived harms to be documented and addressed.

On a similar note, if possible there should be a notice to an individual if they were negatively impacted by an AI system. If an error was made and is being fixed, they should be updated on this change. This is similar to what happens today when there is a data breach and private information is stolen from a website.

Additionally, in regards to data usage in these AI systems, legacy data should automatically be considered suspect until proven otherwise since so much data from the past contains inherent biases, as has been demonstrated through numerous published studies. All data used to develop AI needs to newly pass the criteria outlined in the minimum practices, just like the AI systems themselves will have to do.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

Given the huge impact AI can have on our society and competing interests, many of which are powerful and well-funded, special efforts will be needed to make sure the public receives a true and accurate picture of what AI can and cannot do, and how it is being applied in government. So use cases should include an interpretation, explanations, and examples that the average citizen can follow, understand, and question when necessary. There should also be a process to make sure that the case the agency is providing is either random or average so they can not choose to just display their best examples.

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Submitter Information

Organization: Oakland Privacy

General Comment

See attached file for Oakland Privacy comments on The Office of Management and Budget (OMB) Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

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Attachments

Oakland Privacy Comments - OMB Federal Agency use of AI

The Office of Management and Budget (OMB)
Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

FR Doc. 2023–24269
Publication Date: November 2, 2023

December 5, 2023

We appreciate the opportunity to give comments on the Office of Management and Budget's (OMB) proposed guidance on Advancing Governance, Innovation, and Risk Management for Agency Use in relation to President Biden's Executive Order for Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence.

Oakland Privacy is a citizens' coalition that works to defend the right to privacy, enhance public transparency, and promote oversight regarding the use of surveillance techniques and equipment. We develop frameworks for the implementation of equipment with respect for civil rights, privacy protections and community control and engage in other public information awareness efforts that support civil, human and privacy rights.

Despite the recent proliferation of the use of AI, the public's trust has not evolved with it. A survey released in 2023 on AI trends indicated that most Americans express reservations about AI for high-value applications such as accessing government benefits or healthcare. 78% of those polled indicated that they are very or somewhat concerned that AI can be used for malicious intent.[1]

Consumers and the general public are not alone in their concerns about the use of AI. A recent report found that organization leaders have concerns about the bias and ethics of AI systems.[2] Of the organizations polled, most organizations reported having encountered ethical issues relating to the use of AI within the last 3 years. Furthermore, 77% of executives claimed to be uncertain about the ethics and transparency of the AI systems used by their organizations. Finally, in 9 out of 10 organizations, executives admitted to having awareness of at least one case in which the use of their AI tools resulted in ethical issues.

[1]https://www.mitre.org/news-insights/news-release/mitre-harris-poll-finds-lack-trust-among-americans-ai-technology
[2] https://www.capgemini.com/wp-content/uploads/2019/08/AI-in-Ethics_Web.pdf

It is vital that both the public and entities have trust in the development and deployment of AI systems, and that those systems and tools are ethical, protect civil rights and privacy.

Limitations on use of AI
A balanced guidance should outline instances where restrictions or a complete ban on the use of AI are appropriate.

The use of biometric related AI should be severely restricted, in part because the full potential dangers of applications of this type of AI are still unknown and - just as important - because of significant related privacy issues. Unlike other personal information like banking details or a medical records, biometrics are not easily reset, providing intimate, unique and unchanging details about individuals and their relatives..

A decade ago, it was generally thought that if biometrics became more prevalent and their use became more widespread, more agencies and states would regulate their use; however, that has not happened in a meaningful way. In fact, agencies are already using biometrics to administer programs without guardrails which is extremely problematic. Several states have utilized facial recognition on applicants in order to access unemployment insurance programs.

Facial recognition has been established to be biased and otherwise problematic, and has prevented people with legitimate claims from applying and receiving funds in a time of dire need during the pandemic.[3] The Department of Veterans Affairs lists over 40 uses of AI that include predictive modeling and several relying on biometrics.[4] Biometrics are also used by state and federal agencies to manage border ports of entry, issue electronic passports, administer voter registration and identification verification, and issue disbursements. The use of facial recognition by law enforcement has already resulted in several black men being wrongfully arrested for crimes they did not commit.[5]

An “error” can mean the denial of a benefits claim, an arrest record, and/or the loss of work and income. Restrictions on the use of AI that can result in substantial harms is appropriate and warranted. Just because you can, doesn’t mean you should.

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

The qualifications and training necessary for a Chief AI Officer (CAIO) should be further elaborated. In addition to a general background in AI, a CAIO should have knowledge in areas such as tech ethics and digital safety and security, among others. The CAIO should have experience implementing programs with the aforementioned areas of expertise. Additional resources and references on AI - and tech - ethics generally should be curated and be made available to agencies, such as this collection[6] from the National Institute of Standards and Technology (NIST).

[3] https://www.abcactionnews.com/news/local-news/i-team-investigates/facial-recognition-meant-to-stop-unemployment-fraud-is-blocking-legitimate-applicants
[4] https://www.research.va.gov/naii/ai-inventory.cfm
[5] https://www.technologyreview.com/2021/04/14/1022676/robert-williams-facial-recognition-lawsuit-aclu-detroit-police/
[6] https://www.nist.gov/system/files/documents/2021/08/23/ai-rmf-rfi-0040.pdf

3. How can OMB best advance responsible AI innovation?

The statement that "promoting innovation and growth of AI is a high priority of the U.S. government" should also make it clear that the priority is in safe and trustworthy AI. While this question refers specifically to responsible AI innovation, the OMG guidance specifically emphasizes the objective of "identifying and removing barriers to the responsible use of AI," but does not sufficiently address related AI harms.

Oftentimes rules and regulations are placed at odds with innovation, when in reality, innovation will happen despite regulation. Appropriate regulation will help protect people and resources from exploitation, reduce negative externalities, and disincentivize the development of irresponsible AI products and services. Moreover, thoughtful rules regulation can avoid favoring or further helping entrenched incumbents which in turn reduces competition and a large and diverse AI ecosystem. The development and deployment of AI should not come at the expense of people's civil liberties and should have robust guardrails, so the question of advancing AI innovation is really a question of mitigating related harms.

Guidance proposed for the use of safety-impacting or rights-impacting AI in particular should also include a clear and concise reporting mechanism for individuals who feel they have been harmed in a way that is accessible and user friendly.

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

Generative AI holds the potential of automating many repetitive and time-consuming tasks and enabling parts of the federal workforce to conduct more creative assignments. However, the increased efficiency of automating these tasks must not result in enhanced bias, discriminatory outcomes or erroneous outputs. Where judgment comes into play, humans must remain in the loop. Further, agencies should be prepared to proactively discover and address harms before such AI deployment becomes entrenched and the harms become too unmanageable.

In particular, AI data leak risks should be adequately addressed and mitigated. Specifically with generative AI, data leaks are happening despite strong guardrails, as reported by Google's DeepMind researchers with OpenAI's ChatGPT. This erodes trust and raises significant privacy issues.[7]

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

Item K under "Purposes That Are Presumed to Be Rights-Impacting" should be expanded to include foster youth. There is not really much information about the impact of data collection or the use of AI systems to deliver services to foster youth and other wards of the court. For one, because foster youth as wards of the court are under significant government supervision, there is a lot more data - and sensitive data in particular - collected and documented about them. This includes things like school special education plans, mental health treatments and reproductive care. These and other factors have put this population at high risk of exploitation such as identity theft as a result. While there are some current laws to protect foster youth, just the fact that more data points are collected about this population makes them especially vulnerable. Furthermore, having more data collected on this

[7] https://www.zdnet.com/article/chatgpt-can-leak-source-data-violate-privacy-says-googles-deepmind/

population can have negative impacts on various other areas of their lives long-term, such as obtaining loans, securing housing or pursuing education.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

Agencies should strive to go beyond the minimum practices outlined in the OMB guidance, particularly in safety and right-impacting uses of AI.

Under the “Mitigate Emerging Risks to Rights and Safety” section, the guidance directs agencies to cease the use of safety and right-impacting AI when “...risks to rights or safety exceed an acceptable level”. “Acceptable level” should be further defined to give agencies direction on either a baseline or how to establish a baseline for their particular agency.

Strengthening these minimum practices will provide more robust protections in instances where potential for AI harms are greatest and potentially highly detrimental.

Law Enforcement

The OMB guidance should absolutely and unequivocally address the use of AI by law enforcement and the harmful impacts of its use on already underserved and marginalized communities in particular.

Although the OMB guidance is directed at government agencies, the symbiotic relationship of government and the commercial tech sector cannot be glossed over. With ever growing use of AI, marginalized and underserved communities are over-surveilled by the government and the commercial surveillance complex is complicit in this endeavor.

People who are not under suspicion of committing crimes become victims of surveillance, having vast troves of personal information collected by both the private sector and law enforcement, who in turn share this data with other government agencies and data brokers.

This practice of rampant data-sharing has multiple negative impacts including unwanted law enforcement contacts. One example is that the Sacramento Department of Welfare in California had installed license plate readers in their parking lot and fed geolocation data from that parking lot to a cloud database accessed by a number of local law enforcement agencies, including the municipal police and sheriff's departments as well as numerous federal agencies. People collecting assistance benefits - which is not a crime - forced them to be victims of law enforcement surveillance. Public uproar forced the agency to remove the license plate readers from the premises.[8]

Managing Data

AI and its data is a double-edged sword. While data is addressed in the second section under “removing barriers to the responsible use of AI”, it is not sufficiently addressed in the third section under “Managing Risks”. As mentioned in the earlier section on generative AI, due to potential risks and privacy issues, further consideration about data management should be given including accounting and addressing data leaks. There is a lot of emphasis on the trustworthiness of data

[8] https://www.sacbee.com/news/local/article216093470.html

processed by algorithms, but that should also extend to all data an algorithm has seen in the various stages of pre-training and training.

Exclusions and Waivers
Research and development should not be excluded from minimum practice guidelines. As there are both established ethical concerns and potential risks stemming from AI use in research and development, OMB should establish some guidelines.

Clearview AI, a surveillance tech company which uses facial recognition and is used by law enforcement agencies used the troubling practice of scraping data from the likes of Google and Facebook.[9] One issue is the unethical means by which Clearview AI obtained the data used to train its algorithms. It is so problematic that there are numerous publications around the ethical use of ill-gotten data.[10] For example, there should be more scrutiny about the use of data that became available through web scraping, data leaks or other unethical means as the people this data references have likely not consented to its use by third parties or for said research. If the government is to lead by example, it should not accept such practices from either within various agencies or vendors relating to the use of AI. Agencies should demand that vendors abide by sound ethical standards with the development and deployment of AI tools.

The ability for agencies to apply for and obtain waivers is also overly broad and is ripe for exploitation. Law enforcement agencies in particular have been circumventing fundamental civil rights protections to conduct surveillance and are highly likely to continue to circumvent accountability and oversight with regard to their use of AI tools. We insist that the OMB work on closing these various loopholes and provide further guidance to agencies.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

OMB guidance should include information for agencies to conduct due diligence on vendors and establish service level agreements into contracts related to AI tech.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

Agencies should be encouraged to supply and make public as much information as possible about their use of AI, including:

- Vendor information
- Related extensions and waivers granted to the agency
- Research and development using AI
- Related complaints and subsequent investigations
- Start and stop dates of deployments

[9]https://www.cnet.com/news/privacy/clearview-ai-hit-with-cease-and-desist-from-google-over-facial-recognition-collection/
[10]https://www.cambridge.org/core/services/aop-cambridge-core/content/view/8B21B19600D708551026B42025830B7C/S1049096520000323a.pdf/analyzing_the_ethical_implications_of_research_using_leaked_data.pdf

AI Maturity
The guidance defines “Artificial Intelligence Maturity” as “A Federal Government organization’s capacity to successfully and responsibly adopt AI into their operations and decision-making across the organization, manage its risks, and comply with relevant Federal law, regulation, and policy on AI.” AI maturity should be further defined, possibly outlining various maturity models or reference an existing maturity model.

Federal Procurement of AI
Further guidance should be outlined regarding the procurement of AI, including the responsibilities and requirements placed on contractors, vendors and other third parties who handle data, including data brokers and white-label services. While agencies may be procuring AI products or services from one vendor, the actual underlying AI data set or model may come from one or more third-party suppliers which is essentially white-label data or AI. This is especially problematic for trustworthy and accountable AI, as the agency may lack adequate information about the AI they are using within their agency, and hampers their ability to implement meaningful oversight. Agencies should require that vendors supplying AI tools and services furnish information about the scope and context of the deployment of their AI. Without impacting IP, this information will provide both agencies and the public with greater transparency as to how AI is being deployed and their contexts, and greater accountability on the part of vendors.

Privacy
Due to the risks associated with the use of AI, the OMB guidance should strengthen privacy protection requirements. For agencies to implement the requirements outlined in the guidance, they will need to evaluate how commercial data is collected and used. Therefore privacy protections should be in place governing the ownership of data, collection of data, data management, storage, and restrictions on the use of data. Furthermore, agencies should establish and implement privacy-preserving measures with the procurement, training and deployment of AI.

For government agencies to lead in the responsible deployment of AI, they must have robust guardrails in place that foster trust, mitigate harms and protect fundamental civil rights and privacy. Agencies should not only adopt the minimum standards outlined in the OMB guidance but strive to go beyond to create and implement processes and procedures for high risk use of AI that is safety-impacting and rights-impacting. Agencies should strive for transparency and meaningful public engagement for oversight and accountability.

Respectfully,

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: AI Now Institute

General Comment

See attached file(s)

Attachments

OMB Docket Submission (1)

December 5, 2023

Clare Martorana
U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management Budget
725 17th St., NW
Washington, DC 20503

Dear Ms. Martorana:

We appreciate the opportunity to submit these notes on the OMB's proposed memorandum for the heads of executive departments and agencies. We write on behalf of the AI Now Institute, a leading policy research center founded in 2016 to address the burgeoning impact of artificial intelligence technologies on the public.

AI Now has long viewed government AI procurement processes as a key lever of intervention to ensure that AI systems are accountable to the contexts and communities they are meant to serve, especially when these systems mediate or replace public functions. In this note we draw from this broader body of work including *Confronting Black Boxes: A Shadow Report of the New York City Automated Decision System Task Force* (a formal review prepared by a broad based NGO coalition of a government report);[1] an international collaboration with multiple city governments in Europe that included model contractual provisions for AI contracts with government bodies,[2] and recommendations to other government agencies.[3]

It is critical that in its guidance the OMB uphold the Biden Administration's stated commitment to ensuring that the rights and safety of the public are foregrounded in its use of artificial intelligence technology, and that it center the need for fair competition in its execution of the mandates outlined in the EO.[4] These are precisely the right goals for the

[1] Rashida Richardson, ed., "Confronting Black Boxes: A Shadow Report of the New York City Automated Decision System Task Force," AI Now Institute, December 4, 2019, https://ainowinstitute.org/ads-shadowreport-2019.html.
[2] AI Now Institute, City of Amsterdam, City of Helsinki, Mozilla Foundation and Nesta, "Using Procurement Instruments To Ensure Trustworthy AI," AI Now Institute, n.d., https://assets.mofoprod.net/network/documents/Using_procurement_instruments_to_ensure_trustworthy_AI.pdf
[3] AI Now Institute, "Submission to the Australian Human Rights Commission Human Rights & Technology Discussion Paper," March 13, 2020, https://humanrights.gov.au/sites/default/files/2020-07/51_-_ai_now_institute_nyu_2.pdf
[4] White House, "Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence", Oct. 30, 2023,

White House to be foregrounding at a moment where many companies are racing to commercialize artificial intelligence systems before they're ready.[5] This means that many products on the market lack adequate testing and validation, and their compliance with existing law remains uncertain.[6]

While ensuring that the US government is at the cutting edge is a laudable goal, blanket adoption of AI does not offer a shortcut to innovation. A responsible approach would foreground the need for agencies to critically evaluate whether AI is necessary, appropriate, and fit for a particular task, and whether its use opens up the possibility of other detrimental effects, alongside considering what measures should be implemented to ensure when AI is used, it is deployed in ways that mitigate potential harms.[7]

We have two broad observations that apply across the Guidance, alongside more specific comments below.

First, elements of the Guidance Memo, as currently structured, could incentivize reckless, wasteful and misguided adoption of AI, as well as an overreliance on waivers to escape obligations. To mitigate this, there needs to be more stringent evaluation of the value proposition of using AI in a particular context, its impact on fair competition, and procedural safeguards to prevent routine waivers from risk assessment. For example, there are many examples where litigation following the reckless adoption of AI ended up costing the agencies and taxpayers more than the 'efficiencies' of these technologies saved them.[8]

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https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/

[5] Karen Weise, Cade Metz, Nico Grant and Mike Isaac, "Inside the A.I. Arms Race That Changed Silicon Valley Forever," *New York Times,* Dec. 5, 2023, https://www.nytimes.com/2023/12/05/technology/ai-chatgpt-google-meta.html

[6] Michael Atleson, "Keep your AI claims in check", *Federal Trade Commission,* February 27, 2023, https://www.ftc.gov/business-guidance/blog/2023/02/keep-your-ai-claims-check

[7] Rashida Richardson, "Best Practices for Government Procurement of Dataa-Driven Technologies," *SSRN,* June 1, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3855637

[8] See, for example, "State of Michigan Announces Settlement of Civil Rights Class Action Alleging False Accusations of Unemployment Fraud, *Michigan Department of Attorney General,* October 20, 2022, https://www.michigan.gov/ag/news/press-releases/2022/10/20/som-settlement-of-civil-rights-class-action-alleging-false-accusations-of-unemployment-fraud. The AI Now Institute has held several convenings making observations about litigation practices that challenge government use of artificial intelligence systems, see Litigating Algorithms: Challenging Government Use of Algorithmic Decision Systems, Sept. 2018 https://ainowinstitute.org/publication/litigating-algorithms-3 and Litigating Algorithms 2019 US Report: New Challenges to Government Use of Algorithmic Decision Systems, Sept. 2019, https://ainowinstitute.org/publication/litigating-algorithms-2019-u-s-report-2.

We would underscore first and foremost that the benefits of some types of AI use remain untested,[9] and in some cases blanket AI adoption mandates can contribute to both harm and waste. **In its implementation of the Executive Order, OMB should foreground that the presumption that AI adoption will in all cases enhance operations or efficiency, or will inherently improve innovation, has historically proven to be flawed.** In many instances, wholesale adoption mandates for implementation of AI technologies can do the opposite by increasing waste, exacerbating social harms, and simply failing to work as intended.

Second, it is **critical that the OMB's guidance be crafted to ensure that federal procurement of artificial intelligence technology, a significant buyer in this technology market, is structured to avoid deepening the significant concentration that already exists within the sector**.[10] Promoting fair competition is an issue that the Biden administration has prioritized in both its Executive Orders on AI and on Competition. **To align with this priority, the OMB guidance can be more specific in its competition** provisions: we are particularly concerned that absent sufficient measures to ensure otherwise, there is a risk that the mandate for AI adoption across government will ultimately deepen lock-in to dominant firms' technological ecosystems.

As we describe with more specificity below, this includes:

1. **Avoiding infrastructural dependencies** to ensure competition and avoid the creation of single points of failure through which risk can disseminate across government.[11] Particular measures to prioritize include ensuring that egress fees for data transfers be zero or at cost, and that interoperability mandates ensure that third party services both connect seamlessly and under the same conditions as dominant firms' products.

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[9] See, for example, the use of a flawed emotion recognition system by Customs and Border Patrol, a multimillion dollar contract for an AI system that relied on methods disregarded by the scientific community as pseudoscientific: Joseph Cox, "The A.I. Surveillance Tool DHS Uses to Detect 'Sentiment and Emotion'", *404 Media,* Aug. 24, 2023, https://www.404media.co/ai-surveillance-tool-dhs-cbp-sentiment-emotion-fivecast/.

[10] Nihal Krishan, "Federal gov spending on AI hit $3.3b in fiscal 2022: study," *FedScoop,* https://fedscoop.com/us-spending-on-ai-hit-3-3b-in-fiscal-2022/.

[11] See, for example, Gary Gensler's recent remarks on the systemic risk introduced by the reliance on a limited number of large-scale AI models: Stefania Palma and Patrick Jenkins, "Gary Gensler urges regulators to tame AI risks to financial stability," *Financial Times,* Oct. 15, 2023, https://www.ft.com/content/8227636f-e819-443a-aeba-c8237f0ec1ac; the Treasury Department has outlined similar concerns in its cloud report, https://home.treasury.gov/news/press-releases/jy1252, and the Department of Health and Human Services compiles threats to the security of healthcare systems due to its use of cloud computing, including tracking of the effects of cloud outages on health systems: https://www.hhs.gov/sites/default/files/threats-in-healthcare-cloud-computing.pdf.

2. **Minimizing firms' access to data** through the implementation of strong data security mandates and evaluating any anti-competitive advantages firms may already have in certain sectors (such as healthcare and finance) as well as advantages they may gain through access to agency data.
3. **Apply competition protections to public investment measures,** particularly the pilot of the National AI Research Resource, to ensure that public investments are deliberately structured so the benefits do not directly accrue to already dominant firms rather than serve the interests of the broader public.[12]
4. **Evaluate levels of corporate dependency on particular firms across government agencies**, enabling clear insight in to the level of concentration in adoption of technology services.

Our specific recommendations are as follows:

1. **Amend Section 3(b)(ii) on "promoting AI innovation" to ensure that the directive to identify and prioritize appropriate uses of AI does not overtly incentivize use and undercut the risk evaluation directives that follow.**

Current OMB Guidance:

CAIOS, in coordination with other responsible officials and appropriate stakeholders, are responsible for: [...]

Promoting AI Innovation

G. working with their agency to identify and prioritize appropriate uses of AI that will improve their agency's mission and advance equity;
H. identifying and removing barriers to the responsible use of AI in the agency, including through the advancement of AI-enabling enterprise infrastructure, workforce development measures, policy, and other resources for AI innovation;
I. advocating within their agency and to the public on the opportunities and benefits of AI to the agency's mission

Recommended amendment:

[12] AI Now Institute and Data & Society Institute, "Democratize AI? How the National AI Research Resource Falls Short", Oct. 5, 2021, https://ainowinstitute.org/publication/democratize-ai-how-the-proposed-national-ai-research-resource-falls-short.

ADD [[None of the above should be construed as a bias or presumption in favor of AI as necessarily beneficial. AI must only be used in cases where there is a demonstrated value proposition (see Section 5(c)(iv)(A)). In addition, any promotion of AI within agencies should be accompanied by awareness of known risks and failures and costs associated with risk mitigation, as described below.]]

2. **Amend Section (5)(c)(iv)(A)(1)(p15) to explicitly state that if there is no clear value proposition in terms of the intended benefit of the AI use case, then such AI use should be abandoned. The costs associated with necessary risk mitigation (including human review) must be factored into this assessment, as well as indirect costs introduced by the use of the AI system and an evaluation of alternative uses of the funding.**

Current OMB Guidance:

The intended purpose for the AI and its expected benefit, supported by specific metrics or qualitative analysis. Metrics should be quantifiable measures of positive outcomes for an agency's mission, for example to reduce costs, wait time for customers, or risk to human life, that can be measured after the AI is deployed to confirm or disprove the value of using AI. Where quantification is not feasible, qualitative analysis should demonstrate an expected positive outcome, such as for improvements to customer experience or human interactions—and demonstrate that AI is a good fit to accomplish the relevant task.

Recommended amendment:

The intended purpose for the AI and its expected benefit, supported by specific metrics or qualitative analysis. Metrics should be quantifiable measures of positive outcomes for an agency's mission, for example to reduce costs, wait time for customers, or risk to human life, that can be measured after the AI is deployed to confirm or disprove the value of using AI. Where quantification is not feasible, qualitative analysis should demonstrate an expected positive outcome, such as for improvements to customer experience or human interactions—and demonstrate that AI is a good fit to accomplish the relevant task.

ADD [[Note that any personnel and financial costs associated with risk mitigation that will be required for the AI use (including human review) must be factored into the assessment, as well as ancillary elements introduced by the system such as an increase in energy usage or other costs. Finally, based on such assessment, where it is found that AI is not an appropriate fit to accomplish the relevant task, or if the costs or detrimental factors outweigh the benefits, such use should be abandoned.]]

3. **Retain text in Section (5)(c)(iv)(A)(2)(p15) mandating that Agencies engage in a risk/benefit analysis prior to utilization of an artificial intelligence system.**

Current OMB Guidance:

The potential risks of using AI, as well as what, if any, additional mitigation measures, beyond these minimum practices, the agency will take to help reduce these risks. Agencies should document the stakeholders that will be most impacted by the use of the system and assess the possible failure modes of the AI and of the broader system, both in isolation and as a result of human users and other likely variables outside the scope of the system itself. Agencies should be especially attentive to the potential risks to underserved communities. The expected benefits of the AI functionality should be considered against its potential risks, and if the benefits do not meaningfully outweigh the risks, agencies should not use the AI.

Recommendation:

RETAIN this text as is.

4. **Eliminate language in (5)(c)(iii)(p14) on when CAIO's may waive minimum protective practices for safety and rights-threatening technologies, which introduces a dangerous loophole for avoiding accountability measures.**

Current OMB Guidance:

Waivers from Minimum Practices. In coordination with other relevant officials, an agency CAIO may waive one or more of the requirements in this section for a specific covered AI application or component after making a written determination, based upon a system-specific risk assessment, that fulfilling the requirement would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations. Such waivers are applicable for the duration of the AI's use, but must be reassessed by the CAIO if there are significant changes to the conditions or context in which the AI is used. An agency CAIO may also revoke a previously issued waiver at any time. Agencies must report to OMB within 30 days of granting such a waiver, detailing the scope, justifications, and supporting evidence.

Recommended amendment:

REMOVE this provision entirely.

5. **Amend 5 (d) (iii) to ensure competition provisions introduce necessary requirements for fair competition in artificial intelligence.**

Current OMB Guidance:

Promoting Competition in Procurement of AI. Agencies should take appropriate steps to ensure that Federal AI procurement practices promote opportunities for competition among contractors and do not improperly entrench incumbents. Such steps may include promoting interoperability and ensuring that vendors do not inappropriately favor their own products at the expense of competitors' offerings.

Recommended amendment:

ADD [[Require that all procured systems work across multiple cloud environments, that third party services can be used seamlessly and under the same conditions as the services of infrastructure providers, and ensuring that Agencies can seamlessly port data into and out of a system at cost and without additional fees. Given the need for Agencies to conduct ongoing auditing and assessment of procured systems, these provisions should further extend to the provision of sandboxes or other testing environments, as well as to the procurement of systems for the National AI Research Resource Pilot.

The OMB should also produce an annual review quantifying and evaluating the degree of concentration in government contracts with technology providers.]]

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Thank you for considering these recommendations. If you have any questions about our submission or if we can provide any additional information that would be helpful as you continue your important work, please do not hesitate to contact us:

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Submitter Information

Organization: Electronic Privacy Information Center (EPIC)

General Comment

See attached PDF for EPIC's full comment.

Attachments

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COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

OFFICE OF MANAGEMENT AND BUDGET

Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

No. 2023-24269

December 5, 2023

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INTRODUCTION

The Electronic Privacy Information (EPIC) submits these comments in response to the Office of Management and Budget (OMB)'s Request for Comments on its "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" Draft Memorandum, published on November 3, 2023.[1]

EPIC is a public interest research center in Washington, D.C., established in 1994 to secure the fundamental right to privacy in the digital age for all people through advocacy, research, and litigation.[2] We advocate for a human-rights based approach to AI policy that ensures new technologies are subject to democratic governance.[3] Over the last decade, EPIC has consistently advocated for the adoption of clear, commonsense, and actionable AI regulations across the country.[4] EPIC has litigated cases against the U.S. Department of Justice to compel production of documents regarding "evidence-based risk assessment tools"[5], against the U.S. Department of Homeland Security to produce documents about a program purported to assess the probability that an individual will commit a crime,[6] and against the National Security Commission on Artificial Intelligence (NSCAI) to enforce its transparency obligations under the Freedom of Information Act and the Federal Advisory Committee Act.[7] EPIC has also published extensive research on

[1] Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, 88 Fed. Reg. 75625 (Nov. 3, 2023).
[2] *About Us*, EPIC, https://epic.org/about/ (2023).
[3] *See, e.g.*, *AI and Human Rights*, EPIC, https://epic.org/issues/ai/ (2023); *AI and Human Rights: Criminal Legal System*, EPIC, https://epic.org/issues/ai/ai-in-the-criminal-justice-system/ (2023); EPIC, Outsourced & Automated: How AI Companies Have Taken Over Government Decision-Making (2023), https://epic.org/outsourced-automated/ [hereinafter "Outsourced & Automated Report"]; Letter from EPIC to President Biden and Vice President Harris on Ensuring Adequate Federal Workforce and Resources for Effective AI Oversight (Oct. 24, 2023), https://epic.org/wp-content/uploads/2023/10/EPIC-letter-to-White-House-re-AI-workforce-and-resources-Oct-2023.pdf; EPIC, Comments on the NIST Artificial Intelligence Risk Management Framework: Second Draft (Sept. 28, 2022), https://epic.org/wp-content/uploads/2022/09/EPIC-Comments-NIST-RMF-09-28-22.pdf.
[4] *See, e.g.*, Press Release, EPIC, EPIC Urges DC Council to Pass Algorithmic Discrimination Bill (Sept. 23, 2022), https://epic.org/epic-urges-dc-council-to-pass-algorithmic-discrimination-bill/; EPIC, Comments to the Patent and Trademark Office on Intellectual Property Protection for Artificial Intelligence Innovation (Jan. 10, 2020), https://epic.org/wp-content/uploads/apa/comments/EPIC-USPTO-Jan2020.pdf; EPIC, Comments on the Department of Housing and Urban Development's Implementation of the Fair Housing Act's Disparate Impact Standard (Oct. 18, 2019), https://epic.org/wp-content/uploads/apa/comments/EPIC-HUD-Oct2019.pdf.
[5] *EPIC v. DOJ*, 320 F. Supp. 3d 110 (D.D.C. 2018), *voluntarily dismissed,* 2020 WL 1919646 (D.C. Cir. 2020), https://epic.org/foia/doj/criminal-justice-algorithms/.
[6] *See EPIC v. DHS – FAST Program*, EPIC, https://epic.org/documents/epic-v-dhs-fast-program/ (last visited Dec. 5, 2023).
[7] *EPIC v. NSCAI*, 419 F. Supp. 3d 82, 86, 95 (D.D.C. 2019), https://epic.org/documents/epic-v-ai-commission/.

emerging AI technologies like generative AI,[8] as well as the ways that government agencies develop, procure, and use AI systems around the country.[9]

At all levels of government, administrative agencies are granted authority to exercise a wide array of enforcement, adjudicative, and rulemaking powers due to their unique expertise—and agencies' reliance on AI systems when exercising these powers can erode the accuracy, reliability, and legitimacy of government decisions.[10] Government AI systems can undermine individuals' control over their data and fortify the position of data-extractive technologies and data brokers.[11] They can perpetuate and obscure inaccuracies and bias within data in ways that undermine individuals' civil rights and access to government services.[12] And without sufficient transparency and oversight, government AI systems can undermine decades-old processes for ensuring that government agencies meet their legal and regulatory obligations.[13]

RECOMMENDATION

EPIC submits these comments to **(1)** express support for OMB's inclusion of several key responsible AI provisions that will rebuff many risks imposed by government AI uses, including but not limited to AI impact assessments, a publicly available AI use case inventory, and AI-specific procurement processes; **(2)** recommend additional refinements to these responsible AI provisions, including additional refinements for AI impact assessments and AI use case inventories; **(3)** urge OMB to encourage AI adoption only where AI can serve as a curated tool to meet predefined agency needs; **(4)** caution OMB against implementing the Draft Memorandum without mechanisms to ensure agency compliance; and **(5)** urge OMB to narrowly construe national security system exclusions throughout the Draft Memorandum.

[8] EPIC, Generating Harms: Generative AI's Impact & Paths Forward (2023), https://epic.org/gai [hereinafter "EPIC Generative AI Report"].
[9] Outsourced & Automated Report; EPIC, Screened & Scored in the District of Columbia (2022), https://epic.org/wp-content/uploads/2022/11/EPIC-Screened-in-DC-Report.pdf [hereinafter "Screened & Scored Report"].
[10] *See* Outsourced & Automated Report at 6–25; Ryan Calo & Danielle Citron, *The Automated Administrative State: A Crisis of Legitimacy*, 70 Emory L.J. 797, 799–800 (2021).
[11] Outsourced & Automated Report at 12; *see also* Danielle Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. Rev. 793, 845–55 (2022).
[12] Outsourced & Automated Report at 17–20; *see also* Screened & Scored Report at 17, 19–21; Mary Flanagan et al., *Embodying Values in Technology: Theory and Practice*, *in* Information Technology and Moral Philosophy 322, 322–47 (Jeroen van den Hoven & John Weckert eds., 2008).
[13] *See* Outsourced & Automated Report at 21–25; Calo & Citron, *supra* note 10, at 799–800; Deirdre K. Mulligan & Kenneth A. Bamberger, *Procurement as Policy: Administrative Process for Machine Learning*, 34 Berkeley Tech. L.J. 781, 787–88 (2019).

I. KEY ASPECTS OF OMB'S DRAFT MEMORANDUM CAN AND SHOULD BE FORTIFIED

Safety-Impacting and Rights-Impacting AI Designations

Responsive to Questions 5-7

EPIC applauds OMB's adoption of comprehensive risk designations and minimum risk managements practices required for agencies using any AI system deemed safety-impacting or rights-impacting. Ensuring that agencies maintain both pre-deployment and ongoing testing, evaluation, and risk management processes is foundational for any responsible AI paradigm. In particular, EPIC applauds the inclusion of (1) pre-deployment impact assessments to identify intended uses, risks, limitations, and data misuse or overuse and ongoing; (2) ongoing and independent AI testing to ensure federal AI systems are accurate, reliable, and unbiased; (3) human training and assessment provisions to ensure agency employees have the skills and resources they need to adequately oversee AI development, procurement, and use; (4) public, plain-language notice of AI use to ensure the public is aware of how their government is using AI; (5) requirements to involve—and inform—affected groups when a federal AI systems may impact them; and (6) a provision requiring convenient opt-outs in favor of human alternatives. Many government AI systems are still prone to serious errors and biases,[14] and these minimum safety requirements are a strong mechanism for mitigating AI harms and maintaining accountability for agency use of AI technologies.

In part because OMB's suggested minimum practices are robust, EPIC fears that agencies and AI contractors may seek to circumvent OMB's minimum practices altogether either by determining that edge-case AI applications fall outside the scope of OMB's safety-impacting and rights-impacting AI designations or by liberally granting waivers to the minimum practices. The challenge of determining whether edge-case AI applications should receive greater evaluation and oversight is not new. In Europe, for example, regulators drafting the European Union's AI Act have struggled to draw clean lines between risk designations for newer and emerging AI technologies like foundational models.[15] And while the European Commission has more recently

[14] *See, e.g.*, Outsourced & Automated Report at 5–25.
[15] *See, e.g.*, Will Henshall, *E.U.'s AI Regulation Could be Softened After Pushback from Biggest Members*, Time (Nov. 22, 2023), https://time.com/6338602/eu-ai-regulation-foundation-models/ ("Big tech companies, largely headquartered in the U.S., have been lobbying to weaken the proposed E.U. legislation throughout its development."); Supantha Mukherjee & Foo Yun Chee, *EU Lawmakers Face Struggle to Reach Agreement on AI Rules—Sources*, Reuters (Oct. 23, 2023), https://www.reuters.com/technology/eu-lawmakers-face-struggle-reach-agreement-ai-rules-sources-2023-10-23/; Billy Perrigo, *Big Tech is Already Lobbying to Water Down Europe's AI Rules*, Time (Apr. 21, 2023), https://time.com/6273694/ai-regulation-europe/.

suggested moving toward light touch "codes of practice,"[16] such a compromise position will *not* ensure that AI systems are accurate, reliable, trustworthy, or responsibly deployed.

Similarly, consider edge-case AI applications like automated notice generation systems.[17] While OMB's Draft Memorandum presumes that AI decisions about, e.g., someone's eligibility for public benefits or loans are rights-impacting, it is currently silent on automated systems used to notify applicants of outstanding documents, process expectations, eligibility determinations, or options for appeal. These automated notice generation systems may not directly influence the outcome of a decision-making process, but any errors they produce *can* hinder an applicant during the decision-making process: delays in notice delivery, errors in the substance of the notice, and the failure to generate notices can all undermine an applicant's ability to provide proper documentation, respond to questions, and pursue timely appeals. Faced with robust minimum practices for safety-impacting and rights-impacting AI systems and no required AI practices for AI systems deemed outside the scope of either designation, agencies and contractors will be incentivized to circumvent the Draft Memorandum's risk practices through narrow interpretations of risk designations and waivers.

RECOMMENDATION

To mitigate the risk that harmful AI use cases and agency practices evade proper scrutiny under the Draft Memorandum, **EPIC proposes four recommendations**:

1. OMB should require agencies to incorporate certain **minimum risk practices for *all* federal AI use cases**, such as ensuring adequate human training and completing a rudimentary AI impact assessment when determining whether an AI system is safety-impacting or rights-impacting.

2. OMB should **explicitly prohibit or deem presumptively noncompliant AI use cases that are provably harmful or biased**, including emotion recognition, biometric categorization, social scoring, and one-to-many facial recognition.

3. OMB should incorporate **explicit principles of data minimization** into federal AI development, procurement, and use standards.

4. OMB should include **additional protections for sensitive personal data**—protections that may include a **strict necessity data minimization** standard.

[16] *See* Luca Bertuzzi, *AI Act: EU Commission Attempts to Revive Tiered Approach Shifting to General Purpose AI*, Euractiv (Nov. 20, 2023), https://www.euractiv.com/section/artificial-intelligence/news/ai-act-eu-commission-attempts-to-revive-tiered-approach-shifting-to-general-purpose-ai/.
[17] *Cf.* Outsourced & Automated Report at 11, 35.

a. Recommendation One: Expand Minimum Practices and Oversight

OMB should require agencies to incorporate certain minimum risk practices for *all* federal AI use cases—and implement an independent oversight process for determinations concerning safety-impacting and rights-impacting designations. Universally applicable AI risk management practices and independent AI designations would ensure that the agencies tasked with evaluating AI applications and mitigating AI risks do not cut corners by trying to circumvent the risk management process altogether. In addition, universally applicable AI risk management practices would ensure that AI vendors could not creatively market their products to avoid proper scrutiny.[18]

Several minimum practices already outlined within OMB's Draft Memorandum would be feasible as universally applicable AI risk management practices. For example, Section 5(b) of the Draft Memorandum already requires agencies to "review each use of AI that they are developing or using to determine whether it matches the definition of safety-impacting or rights-impacting." To make these impact determinations, an agency official will need to conduct some form of rudimentary AI impact assessment for all agency AI use cases. Rather than permit agencies to determine what procedures to follow when making these initial determinations, OMB could incorporate elements of its minimum practices at the determination stage to expand basic AI risk management to all AI use cases. For example, OMB could require an agency, when determining an AI system's designation as safety-impacting or rights-impacting, to report (1) its intended purpose and limitations, (2) the data used in the AI's design, development, training, testing, and operation, and (3) any human training or oversight measures undertaken.

OMB could seamlessly incorporate basic AI risk management practices into other reporting programs as well. Under Section 208 of the E-Government Act of 2002, for example, federal agencies are required to conduct, review, and publish PIAs before "developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form" or before initiating a new collection of information.[19] And while Section 208 dictates minimum requirements for PIAs, it grants OMB broad authority to determine the exact contents of PIAs.[20] Many government AI systems rely on the collection, transfer, and use of identifiable information to produce outputs like risk scores, predictions, recommendations, and inferences,[21] so when an agency uses AI to collect, process, store, or analyze identifiable

[18] Similar industry lobbying around AI designations has hindered European AI regulations. *See* Henshall, *supra* note 15; Perrigo, *supra* note 15.
[19] 44 U.S.C. 3501 note at 208(b)(1)(A); *see also* Memorandum from EPIC to the Exec. Off. of the President, the Vice President, and OMB on Integrating AI requirements into Section 208 Privacy Impact Assessments (Aug. 8, 2023), https://epic.org/wp-content/uploads/2023/10/EPIC-208-Memo.pdf [hereinafter "EPIC Section 208 AI Memo"].
[20] 44 U.S.C. 3501 note at 208(b)(3); *see also* EPIC Section 208 AI Memo.
[21] *See* Outsourced & Automated Report at 11–16; Screened & Scored Report at 11–15.

information, such use would cleanly fall within the definition of "information technology" covered by Section 208, requiring a PIA.[22] Integrating minimum AI impact requirements within OMB's existing PIA reporting program would not only align with OMB's statutory authority under the E-Government Act, but also align with the Biden-Harris Administration's priorities on responsible AI use.[23]

b. Recommendation Two: Prohibit Provably Harmful AI

OMB should include a list of AI use cases that are presumed noncompliant with the AI risk management practices set forth in the Draft Memorandum. For comprehensive AI oversight mechanisms to be effective, they must not only highlight the practices, policies, and procedures that agencies should follow, but also those that they should *avoid*. While the exact form of these prohibitions may vary, EPIC urges OMB to explicitly prohibit or deem presumptively noncompliant AI use cases that have proven to be particularly harmful and prone to algorithmic bias, including emotion recognition, biometric categorization, and one-to-many facial recognition.

Emotion recognition systems rely on the false premise that both universal emotions and a clear correlation between emotion and facial expression exist—a premise that has been repeatedly disproven.[24] Similarly, biometric categorization systems are based on the belief that certain physical characteristics can be linked to specific traits. This is essentially a form of digital phrenology.[25] Companies providing these AI systems have claimed to be able to predict anything from the likelihood of terrorist leanings to sexuality based solely on the analysis of facial features.[26]

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[22] EPIC Section 208 AI Memo.
[23] *Id.*; *see also* Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 Fed. Reg. 75191 (Oct. 30, 2023), https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence [hereinafter "Executive Order 14110"].
[24] Kate Crawford, *Artificial Intelligence is Misreading Human Emotion*, Atlantic (Apr. 27, 2021), https://www.theatlantic.com/technology/archive/2021/04/artificial-intelligence-misreading-humanemotion/618696/; Lisa Feldman Barret et al., *Emotional Expressions Reconsidered: Challenges to Inferring Emotion from Human Facial Movements*, 20 Ass'n for Psych. Sci., 1, 46 (2019), https://journals.sagepub.com/doi/pdf/10.1177/1529100619832930; *see also generally* Kuba Krys et al., *Be Careful Where You Smile: Culture Shapes Judgments of Intelligence and Honesty of Smiling Individuals*, 40 J. Nonverbal Behav. 101 (2016), https://link.springer.com/article/10.1007/s10919-015-0226-4; Charlotte Gifford, *The Problem with Emotion-Detection Technology*, New Econ. (June 15, 2020), https://www.theneweconomy.com/technology/the-problem-with-emotion-detection-technology.
[25] *See* Blaise Aguera y Arcas et al., *Physiognomy's New Clothes*, Medium (May 6, 2017), https://medium.com/@blaisea/physiognomys-new-clothes-f2d4b59fdd6a.
[26] See Sally Adee, *Controversial Software Claims to Tell Your Personality From Your Face*, New Scientist (May 27, 2016), https://www.newscientist.com/article/2090656-controversial-software-claims-to-tellpersonalityfrom-your-face/; *Researchers are Using Machine Learning to Screen for Autism in Children*, Duke Pratt Sch. of Eng'g (July 11, 2019), https://pratt.duke.edu/about/news/amazon-autism-app-video; Paul

Lastly, one-to-many facial recognition systems—also known as biometric identification systems—involve indiscriminate and ongoing privacy violations of millions of people in the hopes of identifying a single suspect. As Senators Wyden, Markey, Padilla, and Booker put it, "[n]ot only does this violate individuals' privacy, but the inevitable false matches associated with one-to-many recognition can result in applicants being wrongly denied desperately-needed services for weeks or even months as they try to get their case reviewed."[27] Further, one-to-many recognition systems have been shown to falsely identify people of color as criminals at rates as much *as 100 times higher* than those for people of Eastern European descent.[28] All of these AI applications exhibit persistent and inherent inaccuracy, bias, and harm that are central and inseparable from the AI systems themselves; they cannot be corrected in a way that mitigates harm while permitting the AI application to continue.[29] These systems are harmful by their very nature and EPIC urges OMB to prohibit them expressly within its Draft Memorandum.

c. Recommendation Three: Incorporate Data Minimization Principles

OMB should incorporate explicit principles of data minimization into federal AI development, procurement, and use standards.[30] Given the data-dependent nature of AI development and use, as well as the number of potential risks and stakeholders impacted by AI systems, the risk of data misuse, cyber incidents, and other potential harm is high even when agencies evaluate the quality and appropriateness of data used. In other words, the *quantity* and *redundancy* of personal data used by many AI applications is also a source of serious AI risk.

Lewis, *"I was Shocked it was so Easy": Meet the Professor Who Says Facial Recognition Can Tell if You're Gay*, Guardian (July 7, 2018), https://www.theguardian.com/technology/2018/jul/07/artificialintelligence-can-tell-your-sexuality-politics-surveillance-paul-lewis; Madhi Hashemi & Margaret Hall, *Criminal Tendency Detection from Facial Images and the Gender Bias Effect*, 7 J. Big Data, 1, 1 (2020), https://journalofbigdata.springeropen.com/articles/10.1186/s40537-019-0282-4 (since retracted); Luana Pascu, *Biometric Software that Allegedly Predicts Criminals Based on Their Face Sparks Industry Controversy*, Biometric Update (May 6, 2020), https://www.biometricupdate.com/202005/biometric-software-that-allegedlypredicts-criminals-based-on-their-face-sparks-industry-controversy.

[27] Letter from Senators Wyden, Markey, Padilla, and Booker to FTC Chair Lina Khan 1 (May 18, 2022), https://epic.org/wp-content/uploads/2022/05/Letter-to-FTC-on-ID.me-deceptive-statements-051822.pdf.

[28] *Id.*

[29] *See* Section II, *infra.*

[30] *See* American Data Privacy and Protection Act (ADPPA), H.R. 8152, 117th Cong. § 101 (2022), https://docs.house.gov/meetings/IF/IF00/20220720/115041/BILLS-117-8152-P000034-Amdt-1.pdf [hereinafter "ADPPA"]; Cons. Reps. & EPIC, How the FTC Can Mandate Data Minimization Through a Section 5 Unfairness Rulemaking 3 (Jan. 26, 2022), https://epic.org/wp-content/uploads/2022/01/CR_Epic_FTCDataMinimization_012522_VF_.pdf.

Most government AI use cases can be achieved without individuals' personal data being transferred to private vendors or used for an unrelated secondary purpose.[31] And in fact, an agency's collection, use, and transfer of personal data to private parties may already violate existing data privacy laws.[32] Incorporating data minimization into the Draft Memorandum is a viable, well-tested, and robust measure for preventing many forms of government AI risk.

Data collection, processing, and use are *prerequisites* for any government AI system, whether procured from the private-sector or developed by an agency. Much of the collection of personal data—both commercial and for government collection—happens so routinely and automatically that Americans have little to no knowledge of its scope[33]: everything from browsing the internet and using smart devices to filing your taxes and interacting with everyday government services can collect personal information that is then used to train and operate a wide variety of AI systems.[34] In fact, many of the most commonly procured government AI systems—systems used to, e.g., detect fraud, generate risk scores, and verify identities—are developed and sold by major data brokers that regularly and surreptitiously collect, process, repackage, and sell granular personal data.[35] Therefore, OMB cannot ensure responsible AI development, procurement, and use without also ensuring responsible government data collection, storage, transfer, and use

To capture and adequately mitigate the AI risks stemming from improper government data collection, processing, storage, transfer, and use, EPIC recommends amending the language to the data quality and appropriateness provision in Section 5(c)(iv)(A) of the Draft Memorandum as appears on the following page (**changes bolded in blue**):

[31] For example, an agency-developed AI system used only for its intended purpose would avoid unnecessary risk caused by relying on private AI vendors, transferring government data to private vendors, or passing sensitive personal data through an AI system trained on commercial data collected haphazardly. *See* EPIC, Comment on the FTC's Proposed Trade Regulation Rule on Commercial Surveillance & Data Security 30–66 (Nov. 21, 2023), https://epic.org/wp-content/uploads/2022/12/EPIC-FTC-commercial-surveillance-ANPRM-comments-Nov2022.pdf (discussing data minimization principles broadly) [hereinafter "EPIC FTC Commercial Surveillance Comment"].
[32] *See, e.g.*, E-Government Act of 2002, 44 U.S.C. § 3501 note; Privacy Act of 1974, 5 U.S.C. § 552a.
[33] EPIC FTC Commercial Surveillance Comment at 33–34.
[34] *Id.*; *see also* Kevin Collier, *U.S. Government Buys Data on Americans with Little Oversight, Report Finds*, NBC News (June 13, 2023), https://www.nbcnews.com/tech/security/us-government-buys-data-americans-little-oversight-report-finds-rcna89035; Justin Pot, *Tax Apps Collect Your Data: How Worried Should You Be?*, PC Mag. (Apr. 1, 2022), https://www.pcmag.com/news/tax-apps-collect-your-data; *cf. Privacy Impact Assessments*, EPIC, https://epic.org/issues/open-government/privacy-impact-assessments/ (last visited Dec. , 2023).
[35] *See* Outsourced & Automated Report at 14–16, 31–35, 38–40.

"3. *The quality, **appropriateness, and necessity** of relevant data*. Agencies must assess the quality of the data used in the AI's design, development, training, testing, and operation**; its fitness to the AI's intended purpose; and its necessity and proportionality to effect the AI's intended purpose.** If the agency cannot access such data after a reasonable effort to do so, it must obtain sufficient descriptive information from the AI or data provider to satisfy the reporting requirements in this paragraph. At a minimum, agencies must document:

a. the provenance and quality of the data for its intended purpose;
b. how the data is **necessary and proportional to the task being automated, the AI's intended purpose, and the AI's development, testing, and operation;**
c. whether the data contains sufficient breadth to address the range of real-world inputs the AI might encounter;
d. whether the data comes from an adequately reliable source; and
e. how errors from data entry, machine processing, or other sources are adequately measured and limited, to include errors from relying on AI-generated data as training data or model inputs.

Unless otherwise required by law, agencies must not collect, process, purchase, or transfer data for the purposes of developing, training, or using AI unless the collection, processing, purchasing, or transfer is limited to what is reasonably necessary and proportionate to effect a purpose permitted by law that benefits those to whom the data pertains."[36]

RECOMMENDATION

d. Recommendation Four: Adopt Additional Protections for Sensitive Personal Data

EPIC encourages OMB to include additional protections for sensitive personal data, including children's data; data pertaining to race, sex, ethnicity, religion, and national origin; and other similarly sensitive types of personal information. AI systems that use these categories of data are particularly vulnerable to inequitable or otherwise harmful outcomes—including data breaches and discrimination—and should always be considered rights-impacting.[37] For example, hiring

[36] *See* ADPPA; Cons. Reps. & EPIC, *supra* note 30.
[37] *See, e.g.*, Compl. for Permanent Inj. & Other Equitable Relief at 34–35*, FTC v. CompuCredit Corp.*, No. 1:08–CV–1976–BBM–RGV (N.D. Ga. Oct. 8, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/06/080610compucreditcmptsigned.pdf (FTC suit against credit card company that allegedly used undisclosed behavioral scoring algorithm to determine credit limitations based on consumer conduct); James Vincent, *The Invention of AI 'Gaydar' Could be the Start of Something Much Worse*, Verge (Sept. 21, 2017), https://www.theverge.com/2017/9/21/16332760/ai-sexualitygaydar-photo-physiognomy; Claudia Garcia-Rojas, *The Surveillance of Blackness: From the Trans-*

algorithms and automated workplace management systems can produce racially discriminatory employment determinations.[38] Criminal and pretrial risk scores can exacerbate racial disparities in sentencing and bail decisions.[39] And a wide variety of AI use cases—from fraud detection to facial recognition—can incorporate protected characteristics into automated decision-making in potentially harmful ways through "proxy variables" like ZIP codes and last names.[40]

Because of the heightened risk of harm that the collection, processing, and use of sensitive personal data implicates, EPIC advocates for a heightened *strict data minimization* standard for AI use cases involving sensitive personal data: agencies must only collect, process, transfer, or use personal data pertaining to a legally protected characteristic like race, sex, national origin, or age—as well as any personal data of individuals under 18—when *strictly necessary* to achieve a purpose permitted by law and intended to benefit those to whom the data pertains.[41]

Funding for AI Risk Management, Training, & Compliance

Responsive to Question 7

Responsible AI development, procurement, and use takes time and resources. Before agencies can ensure that AI use is safe, reliable, responsible, and trustworthy, they must, at minimum, (1) learn what data inputs an AI system requires, (2) learn how an AI system produces outputs, (3) train their employees on AI system uses and limitations, (4) test the AI system for accuracy, reliability, security, and lack of bias, (5) evaluate AI system performance across relevant, real-world environments, and (6) develop ongoing testing and oversight procedures to ensure that an AI system remains safe, responsible, and trustworthy over time.[42] For AI systems procured

Atlantic Slave Trade to Contemporary Surveillance Technologies, Truthout (Mar. 3, 2016), https://truthout.org/articles/thesurveillance-of-blackness-from-the-slave-trade-to-the-police/ (discussing Professor Simone Brown's research on how race and anti-Black colonial logics inform contemporary surveillance practices).

[38] EPIC FTC Commercial Surveillance Comment at 116–17; *see also* Miranda Bogen & Aaron Rieke, Upturn, Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias 21, 26, 28–29, 39 (2018), https://www.upturn.org/work/help-wanted/.

[39] *See* Ben Winters, EPIC, Liberty at Risk: Pre-trial Risk Assessment Tools in the U.S. 9–10 (2020), https://epic.org/documents/liberty-at-risk/; Julia Angwin et al., *Machine Bias: There's Software Used Across the Country to Predict Future Criminals. And It's Biased Against Blacks*, ProPublica (2016), https://www.propublica.org/article/machine-bias-risk-assessments-in-criminal-sentencing.

[40] Outsourced & Automated Report at 17–20; *see also* Anya E.R. Prince & Daniel Schwarcz, *Proxy Discrimination in the Age of Artificial Intelligence and Big Data*, 105 Iowa L. Rev. 1257 (2020), https://perma.cc/SC2T-8RHN; Ruha Benjamin, Race After Technology 1 (2019).

[41] *See* EPIC FTC Commercial Surveillance Comment at 176.

[42] *See* OSTP, Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People 7, 18–20, 35, 46, 49–51 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf [hereinafter "Blueprint for an AI Bill of Rights"]; NIST, Artificial Intelligence Risk Management Framework (AI RMF 1.0) 23, 26–27, 29–30, 32 (2023), https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf [hereinafter "NIST AI RMF"].

from private developers, agencies must also ensure they have access to enough information to accomplish these tasks on an ongoing basis.[43] And these substantive oversight procedures must also pair with ongoing transparency and reporting mechanisms to ensure that OMB and the general public can hold agencies accountable for their AI use. All these tasks require resources, so funding for AI risk management must be at the core of any responsible AI use paradigm.

OMB has taken a strong stance on AI risk management funding by including explicit language within its Draft Memorandum requiring the "head of each covered agency… [to] consider the necessary financial, human, information, and infrastructural resources to carry out these responsibilities effectively, including providing or requesting resources via the budget process."[44] Despite this strong language, however, ensuring that agencies devote sufficient resources to AI risk management in practice may still pose a challenge. Following the passage of the E-Government Act of 2002, for example, federal agencies were required to conduct and report Privacy Impact Assessments (PIAs) when "developing or procuring information technology that collects, maintains, or disseminates information that is in an identifiable form" or "initiating a new collection of information" using information technology.[45] However, EPIC has uncovered several agencies that have failed to conduct and publish PIAs when required, including the Federal Bureau of Investigation, the Census Bureau, and the U.S. Postal Service.[46]

RECOMMENDATION

To ensure that agencies comply with the substantive requirements of the Draft Memorandum, OMB should consider **conditioning agency budget approvals and funding recommendations under the Draft Memorandum on ongoing compliance** with the Draft Memorandum's substantive provisions—and ongoing documentation proving that agencies are directing this dedicated funding directly and solely toward AI risk management.

[43] *See* Outsourced & Automated Report at 51–53.
[44] Draft Memorandum from Shalanda D. Young, OMB, to the President on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence 3 (Nov. 1, 2023), https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf [hereinafter "Draft OMB AI Guidance"].
[45] 44 U.S.C. § 3501 note at 208(b)(1)(A)(ii).
[46] *See, e.g.*, *EPIC v. USPS*, No. 1:21-cv-02156, 2022 WL 888183 (D.D.C. 2022); *EPIC v. Commerce*, 928 F.3d 95 (D.C. Cir. 2019); *EPIC v. FBI*, 72 F. Supp. 3d 388 (D.D.C. 2014).

AI Use Case Inventories

Responsive to Questions 6–8

EPIC applauds OMB's inclusion of long overdue, government-wide AI use case inventories within its Draft Memorandum. While several agencies have already begun to publish AI use case inventories[47] pursuant to Executive Order 13960,[48] the information included in existing AI use case inventories are thus far insufficient to ensure responsible AI development, procurement, and use. Some existing use case inventories, like that of the Department of Health and Human Services, only include a use case name, designated federal office, and 200-word summary of the AI system.[49] Others, like the Department of Energy's use case inventory, are riddled with blank entries.[50] Given the variety of AI use case inventories in both format and quality, OMB's AI use case inventory requirement has the potential to set a robust benchmark for responsible AI documentation across government.

AI use case inventories are valuable only insofar as they provide sufficient information to ensure agencies' compliance with their substantive AI risk management obligations. Inventory information should be granular enough for OMB, auditors, and concerned citizens to understand both how an agency is using its AI systems and how an agency is testing, evaluating, and mitigating AI risks. Anything less undermines government accountability, government transparency, and AI risk management.

[47] *See* Ben Winters, *Agencies Begin to Comply with 2020 Executive Order on AI Transparency*, EPIC Blog (Aug. 3, 2022), https://epic.org/agencies-begin-to-comply-with-2020-executive-order-on-ai-transparency/.
[48] Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government, 85 Fed. Reg. 78939 (Dec. 3, 2020), https://www.federalregister.gov/documents/2020/12/08/2020-27065/promoting-the-use-of-trustworthy-artificial-intelligence-in-the-federal-government.
[49] *See* Dep't Health & Hum. Servs., Artificial Intelligence Use Cases – FY 2022 (2022), https://www.hhs.gov/sites/default/files/hhs-ai-use-cases-inventory.pdf.
[50] *See* Dep't Energy, Agency Inventory of AI Use Cases (2022), https://www.energy.gov/sites/default/files/2022-07/DOE_Agency_Inventory_of_AI_Use_Cases.pdf.

RECOMMENDATION

To ensure AI use case inventories complement other substantive AI risk management practices and incentivizes agency compliance with the Draft Memorandum, **OMB should require, at minimum, the following six (6) pieces of information within an AI use case inventory**:

1. **Agency determinations** that an AI system is safety-impacting or rights-impacting;

2. Agency **requests for extensions to or waivers** of OMB's minimum practices, alongside explanations or justifications;

3. **AI impact assessments**, alongside any documentation of the methods used and results produced.

4. Any agency **documentation of how an AI system was developed or procured**, including any contractors or vendors involved, any finalized contracts, any training methods used, and any pre-deployment testing, evaluation, validation, or verification completed;

5. The procedures for and results of any **ongoing AI testing** undertaken by the agency;

6. **Incident reports** following the identification of any errors, biases, or other documented harms of an agency AI system, alongside any remedial changes that the agency plans to adopt to mitigate the identified issue.[51]

[51] OMB may wish to consult existing incident reporting procedures from agencies like the National Transportation Safety Board (NTSB) for examples of what these reports could look like. *See* Nat'l Transp. Safety Bd., *Investigation Report*, NTSB.org, https://www.ntsb.gov/investigations/AccidentReports/Pages/Reports.aspx (last visited Dec. 5, 2023). At minimum, these reports should include (1) details about the documented risk or incident, (2) an analysis of any factual data, (3) evaluations of likely root causes, and (4) a remedial compliance plan to mitigate the identified issue.

In addition, EPIC recommends the following amendment to Section 3(a) of the Draft Memorandum, which draws on both existing federal AI guidelines[52] and EPIC's own research into effective AI oversight and accountability mechanisms[53] (**changes bolded in blue**):

RECOMMENDATION

"AI Use Case Inventories. Pursuant to Section 7225 of the Advancing American AI Act, and subject to the exclusions in that Act and Section 10.1(e) of the AI Executive Order, each agency (except for the Department of Defense and the Intelligence Community) must annually submit an inventory of its AI use cases to OMB and subsequently post a public version on the agency's website. OMB will issue detailed instructions for the inventory through its Integrated Data Collection process or an OMB-designated successor process. Beginning with the use case inventory for 2024, agencies will be required, as applicable, to identify and report additional detail on how they are using safety-impacting and rights-impacting AI, the risks—including risks to equity—that such use poses, how they are managing those risks, and any related extensions and waivers granted under. **These additional details must include, at minimum:**

a. **The name of the AI system;**
b. **The intended uses and limitations of the AI system;**
c. **All required data inputs for the AI system;**
d. **A determination on whether the AI system is generative AI;**
e. **Documentation and results of all testing and evaluation procedures completed since the previous submission;**
f. **Any completed incident reports relevant to the AI system;**
g. **Documentation on AI system development or procurement, including information on related vendors, sources of data, and relevant contracts."**

Under Section 5(c) of its Draft Memorandum, OMB also requires agencies to "provide public notice and plain-language documentation through the AI use case inventory," including documentation or links to the information "where people will interact with or be impacted by the AI."[54] **Whenever possible, EPIC urges OMB to ensure that as much information about**

[52] NIST, *NIST AI Risk Management Framework Playbook – Govern* 7 (Jan. 28, 2023), https://github.com/usnistgov/AIRMF/blob/nist-pages/govern/govern.pdf; Blueprint for an AI Bill of Rights at 21; *cf. also The Government is Using AI to Better Serve the Public*, AI.gov, https://ai.gov/ai-use-cases/ (last visited Dec. 5, 2023) (existing AI use case inventories).
[53] *See, e.g.*, Accountable Tech, AI Now Institute, EPIC, Zero Trust AI Governance (2023), https://ainowinstitute.org/wp-content/uploads/2023/08/Zero-Trust-AI-Governance.pdf; EPIC Generative AI Report.
[54] Draft OMB AI Guidance at 17–18.

agency AI risk management practices as possible is also made publicly available in a plain-language and approachable format—including all information suggested in the list above. Civil society organizations and concerned members of the public can and should play a role in holding agencies accountable for their compliance with the Draft Memorandum, but they cannot do anything unless they have access to information about what AI systems the federal government uses, how those systems impact them, and how federal agencies are managing the risks of AI use.

AI Impact Assessments

Responsive to Questions 6–8

Truly responsible AI requires rigorous, supported oversight infrastructure and careful moderation. Without oversight, measurable demonstrations of compliance efforts, and the possibility of enforcement or other legal liability, AI actors have few incentives to spend the time and resources necessary to conform their practices to the standards that OMB and individual agencies set out. Without actionable transparency and accountability mechanisms, there can be no public trust in the government's use of AI.

Building on existing federal AI guidelines[55] and EPIC's own research into effective AI oversight and accountability mechanisms,[56] EPIC recommends further amending Section 5(c)(iv) of the Draft Memorandum—as appears on the following page—to bolster OMB's oversight capabilities through more robust AI impact assessment requirements (**changes bolded in blue**, **previous data minimization amendment bolded in green**):

[55] NIST, *NIST AI Risk Management Framework Playbook – Govern* 7 (Jan. 28, 2023), https://github.com/usnistgov/AIRMF/blob/nist-pages/govern/govern.pdf; Blueprint for an AI Bill of Rights at 21; *cf. also The Government is Using AI to Better Serve the Public*, AI.gov, https://ai.gov/ai-use-cases/ (last visited Dec. 5, 2023) (existing AI use case inventories).
[56] *See, e.g.*, Accountable Tech, AI Now Institute, EPIC, Zero Trust AI Governance (2023), https://ainowinstitute.org/wp-content/uploads/2023/08/Zero-Trust-AI-Governance.pdf; EPIC Generative AI Report.

RECOMMENDATION

"3. *The quality, **appropriateness, and necessity** of relevant data*. Agencies must assess the quality of the data used in the AI's design, development, training, testing, and operation**; its fitness to the AI's intended purpose; and its necessity and proportionality to effect the AI's intended purpose.** If the agency cannot access such data after a reasonable effort to do so, it must obtain sufficient descriptive information from the AI or data provider to satisfy the reporting requirements in this paragraph. At a minimum, agencies must document:

a. the provenance and quality of the data for its intended purpose;
b. **the inputs and logics of the AI system;**
c. **the type or types of data generated by the AI system;**
d. how the data is **necessary and proportional to the task being automated, the AI's intended purpose, and the AI's development, testing, and operation;**
e. whether the data contains sufficient breadth to address the range of real-world inputs the AI might encounter;
f. whether the data comes from an adequately reliable source; and
g. how errors from data entry, machine processing, or other sources are adequately measured and limited, to include errors from relying on AI-generated data as training data or model inputs.
h. **The process and results of regular AI system validation studies;**
i. **Any downstream uses for AI system outputs beyond the system's intended purpose;**
j. **Any agency data management policies and procedures relevant to the AI system;**
k. **The process and results of any environmental impact statements or similar analyses regarding the AI system;**
l. **Any agency procedures for human review or interaction with the AI system;**
m. **The results of any risk-benefit analysis conducted for the AI system.**

Unless otherwise required by law, agencies must not collect, process, purchase, or transfer data for the purposes of developing, training, or using AI unless the collection, processing, purchasing, or transfer is limited to what is reasonably necessary and proportionate to effect a purpose permitted by law that benefits those to whom the data pertains."[57]

[57] *See* ADPPA; Cons. Reps. & EPIC, *supra* note 30.

EPIC has organized and published comparisons of impact assessments in current regulations, law, and proposed law.[58] While these impact assessment requirements vary, there are two notable consistencies throughout. **First**, in nearly all of the AI assessments introduced in state legislatures, assessments required (1) a description of the AI system's intended purpose and proposed use; (2) information on necessity of the automated decision-system; (3) a cost-benefit analysis weighing AI risks with benefits; (4) information regarding the effects of an AI system on civil, constitutional, and legal rights; (5) disparate impact evaluations; (6) risk mitigation plans; (7) data quality assessments; (8) performance or benchmark auditing requirements; and (9) bias audits or similar testing.[59] **Second**, to determine when AI assessments are required, laws or bills in Canada and the United Kingdom—as well as California, Vermont, and Washington—require AI assessments for *all* AI systems that contribute to or replace a decision-making process, rather than restricting AI assessments to categories like safety-impacting or rights-impacting AI.[60]

EPIC remains eager to assist OMB in finalizing protective and workable AI impact assessment and audit requirements to align government use of AI with the priorities of OMB and the Biden-Harris Administration.

Decommissioning Noncompliant AI

Responsive to Question 6

EPIC strongly supports OMB's inclusion of AI decommissioning requirements "[w]here the AI's risks to rights or safety exceed an acceptable level and where mitigation is not practicable."[61] Decommissioning or disgorging AI systems when mitigation fails has been a core element of several recent federal efforts to manage AI risks, including the White House Office of Science and Technology Policy (OSTP)'s Blueprint for an AI Bill of Rights,[62] the National Institute for Standards and Technology (NIST)'s AI Risk Management Framework,[63] and several recent Federal Trade Commission (FTC) enforcement actions.[64] Several AI and machine learning practitioners—including Amazon Web Services AI researchers Alessandro Achille, Michael Kearns, Carson Klingenberg, and Stefano Soatto—have also proposed model disgorgement and

[58] For a full table containing side-by-side comparisons of impact assessment requirements around the world, see Kara Williams, *Assessing the Assessments: Comparing Risk Assessment Requirements Around the World*, EPIC Blog (Dec. 4, 2023), https://epic.org/impact-comparison/.
[59] *Id.*
[60] *Id.*
[61] Draft OMB AI Guidance at 17.
[62] Blueprint for an AI Bill of Rights at 5, 15.
[63] NIST AI RMF at 23, 33.
[64] *See, e.g.*, Jevan Hutson & Ben Winters, *America's Next "Stop Model!": Model Disgorgement* 9–11, 14–16 (Priv. L. Scholars Conf. Draft Paper, 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4225003.

deletion as a best practice for responsible AI development and use.[65] Achille and colleagues argue that model disgorgement and deletion could "address a wide range of issues, such as reducing bias or toxicity, increasing fidelity, and ensuring responsible usage of intellectual property."[66]

RECOMMENDATION

Given the wide-ranging benefits of model decommissioning as a risk management practice, EPIC strongly encourages OMB to **expand the procedures, expectations, and oversight for AI decommissioning under its Draft Memorandum**, including, *inter alia*, provisions establishing a minimum acceptable level for all federal AI applications, independent review of agency AI use to identify systems in need of decommissioning, and an **interagency blacklist of decommissioned AI systems** to inform future agency decisions around AI development, procurement, and use.

AI Procurement Procedures and Contract Language

Responsive to Questions 1, 6, and 7

EPIC applauds OMB's inclusion of additional procurement requirements for federal AI procurement, particularly the requirements to keep procured AI transparent, maintain AI testing and risk management practices for procured AI, and promote competitive bidding. In fact, many of OMB's suggested procurement requirements mirror recommendations from EPIC's own research into government AI procurement.[67] EPIC's research highlighted to core barriers to responsible AI procurement: (1) procurement officials' lack of knowledge, access, and resources they need to properly oversee the AI procurement process and (2) noncompetitive procurement processes like cooperative purchasing that powerful AI vendors have used to capture government contracts without serious scrutiny.[68] OMB's draft AI procurement provisions are an important step toward overcoming both barriers. For example, OMB's provision encouraging agencies to "take appropriate steps to ensure that Federal AI procurement practices promote opportunities for competition among contractors and do not improperly entrench incumbents"[69] is in line with

[65] *See, e.g.*, Alessandro Achille et al., *AI Model Disgorgement: Methods and Choices*, arXiv (Apr. 7, 2023), https://arxiv.org/pdf/2304.03545.pdf.
[66] *Id.* at 1. For more on model disgorgement, decommissioning, and deletion, see Hutson & Winters, *supra* note 64.
[67] *See* Outsourced & Automated Report at 50–62.
[68] *See id.* at 32–36, 54.
[69] Draft OMB AI Guidance at 21.

EPIC's findings that cooperative purchasing agreements have been abused by powerful AI vendors like Deloitte and Thomson Reuters to entrench their position across agencies.[70]

Although OMB's Draft Memorandum goes further than other AI guidance to implement AI risk management into the procurement process, it currently ignores the power imbalance between several agency procurement offices and major AI vendors. For example, vendors may attempt to pressure procurement officials to ignore transparency or testing requirements within AI contracts or seek to market their products outside the scope of OMB's safety-impacting or rights-impacting designations. In practice, there is only so much an agency can do to monitor the AI systems they procure under existing contracts. From provisions that grant AI vendors exclusive rights to maintain and operate an AI system[71] to data privacy provisions that fail to restrict how vendors use AI outputs created using government data,[72] many AI contracts benefit vendors far more than agencies. These contracts reflect the relative power and knowledge of the contracting parties: because many agencies lack the expertise and resources to check or overwrite provisions that favor AI vendors, they often agree to contractual language that restricts or undermines their authority.

RECOMMENDATION

To support agency procurement offices in similar circumstances, EPIC encourages OMB to provide agencies with **sample contract language or similar templates** for responsibly navigating the AI procurement process and managing procured AI.[73] EPIC has identified three contractual provisions that OMB should focus on to maximize the ability of agency procurement officials to effectively manage the risks of procured AI:

1. Improving data oversight and control;
2. Imposing transparency and reporting requirements on vendors; and
3. Incorporating sunsetting clauses and procedures to transition ownership to agencies.

[70] *See* Outsourced & Automated Report at 33–35; *cf.* Grant Fergusson, *Public Benefits, Private Vendors: How Private Companies Help Run Our Welfare Programs*, EPIC Blog (Jan. 26, 2023), https://epic.org/public-benefits-private-vendors-how-private-companies-help-run-our-welfare-programs/.
[71] *See* Contract between D.C. Dep't Hum. Servs. and Pondera Solutions (2020), https://epic.org/wp-content/uploads/2022/06/EPIC-21-06-25-DC-DHS-FOIA-20210719-Production-Pondera-Contract.pdf.
[72] *See* Carahsoft Master Agreement with Aisera Pricing Schedule (2016), https://epic.org/wp-content/uploads/2023/09/Carahsoft-NASPO-Master-Agreement-Aisera-Pricing-Schedule.pdf.
[73] EPIC attorneys are involved with the IEEE's draft AI procurement standard, P3119. *See Standard for the Procurement of Artificial Intelligence and Automated Decision Systems*, IEEE SA, https://standards.ieee.org/ieee/3119/10729/ (last visited Dec. 5, 2023). EPIC would be happy to discuss responsible AI procurement further.

a. Provision One: Improving Data Oversight and Control

EPIC's research into AI procurement suggests that government AI contracts often fail to consider what secondary uses a vendor may have for agency data, meaning that vendors could use the data agencies provide (or inferences derived from that data) for other purposes after the contract requirements are met.[74] Stronger data oversight provisions in government AI contracts can ensure that AI vendors do not misuse or profit off government data in secondary commercial markets. However, the opposite is also true: agencies should not attempt to use AI contracts to access vendor data beyond what government agencies are entitled to collect directly.

Of the 621 AI contracts EPIC reviewed, few included strong data protection and control provisions.[75] However, EPIC has identified at least one example of strong contract language concerning government data oversight and control—language taken from a contract between the Illinois Department of Employment Security and Pondera Solutions, a Thomson Reuters subsidiary:

> *All work performed or supplies created by Vendor under this contract, whether written documents or data, goods or deliverables of any kind, shall be deemed work for hire under copyright law and all intellectual property and other laws, and the [Contracting Agency] is granted sole and exclusive ownership to all such work, unless otherwise agreed in writing.*[76]

While EPIC does not believe this language should be adopted as-is, the Illinois AI contract goes further than many to ensure that data inferences, AI models, and other resources generated by a vendor under the contract remain solely within the government's control.

b. Provision Two: Imposing Transparency and Reporting Requirements

While researching AI procurement, EPIC identified several instances in which agencies outsourced the entire operation of AI systems to vendors. These contracts—often described as "software as a service" contracts—make it difficult for agency officials to understand how procured AI systems work or why they produce certain outputs.[77] Without direct access to and

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[74] *See* Carahsoft Master Agreement with Aisera Pricing Schedule (2016), https://epic.org/wp-content/uploads/2023/09/Carahsoft-NASPO-Master-Agreement-Aisera-Pricing-Schedule.pdf.
[75] *See* Outsourced & Automated Report at 41–48; *Outsourced & Automated*, EPIC, https://epic.org/outsourced-automated/ (full contract database available for reference).
[76] *Id.* at 43–44; *see also* Contract between Ill. Dep't Emp. Sec. and Pondera Solutions (2020), https://epic.org/wp-content/uploads/2022/06/EPIC-21-10-22-IL-IDES-FOIA-20211110-Illinois-Pondera-Contract.pdf.
[77] *See* Contract between D.C. Dep't Hum. Servs. and Pondera Solutions (2020), https://epic.org/wp-content/uploads/2022/06/EPIC-21-06-25-DC-DHS-FOIA-20210719-Production-Pondera-Contract.pdf.

independent oversight of the processes used to produce AI outputs, agencies cannot ensure that the AI systems they procure and use are fair, accurate, or reliable.

Robust and independent audits of AI systems and their outputs are the gold standard for responsible, transparent AI use[78]—and ongoing audit requirements like those found in Section 5(c)(iv)(C) of the Draft Memorandum can and should be incorporated into government AI contracts. These audit requirements could come into play at two stages of the AI procurement process. **First**, AI vendors and contractors could be required to disclose a detailed description of their AI system's capabilities, data requirements, intended uses, and limitations when they bid on a federal contract.[79] Agency procurement officials could then compare AI systems' capabilities with their agencies' needs to determine whether the AI system is appropriate—or even whether an AI system is necessary. **Second**, state agencies could include contractual provisions requiring AI audits as part of the bidding process or during the contract term.[80]

Only a few of the 621 AI contracts EPIC reviewed contained an AI audit requirement. However, EPIC has identified at least one example of strong contract language concerning independent AI audits—language taken from a contract between the Michigan Department of Technology, Management, and Budget and Deloitte Consulting:

> *Contractor will deposit with [an] escrow agent… the Source Code for the [AI System Software], as well as the Documentation and names and contact information for each author or other creator of the [AI System Software] … At [Agency's] request and expense, the escrow agent may at any time verify the [Source Code,] compar[e] it to the [AI System Software], and review[] the completeness and accuracy of any and all material.*[81]

While EPIC does not believe this language should be adopted as-is, the Michigan AI contract goes further than many to ensure that vendor-provided AI systems are independently audited throughout the contract term.

[78] For example, the White House recommends audits as part of the Blueprint for an AI Bill of Rights, and NIST includes audits, testing, and evaluation as core features of its AI Risk Management Framework. Blueprint for an AI Bill of Rights at 20–21, 24, 38; NIST AI RMF at 16, 19, 26–30.
[79] *See* Outsourced & Automated Report at 52–53.
[80] *Id.*
[81] *Id.* at 48; *see also* Contract between Mich. Dep't Tech., Mgmt., & Budget and Deloitte Consulting (2023), https://epic.org/wp-content/uploads/2023/09/Michigan-Deloitte-uFACTS-Contract.pdf.

c. Provision Three: Incorporating Sunsetting Clause and Procedures to Transition Ownership to Agencies

EPIC identified several government AI contracts that gave vendors complete and exclusive control over the operation of the AI system. These contracts, which can last for several years, restrict agencies' ability to change how they use AI systems and which vendors they use—unless they spend a large amount of money to terminate contracts and initiate another procurement process.[82] Although EPIC was unable to find contract language supporting AI system sunsetting and ownership transition, these provisions can ensure that agency officials maintain sufficient control over government AI systems to comply with the requirements of OMB's Draft Memorandum.

II. AGENCIES SHOULD NOT ADOPT AI SOLELY FOR AI'S SAKE

We recognize the desire of the White House to promote the research and development of AI used for beneficial purposes. However, EPIC urges OMB to remove provisions that explicitly call for the adoption of AI in general, rather than considering the best approach for each issue. As several federal government agencies—as well as President Biden and Vice President Harris—have recognized in no uncertain terms, there are serious and ever-present issues of discrimination and inaccuracy with AI use today.[83] The administration should not make an unforced error by justifying the rapid research and development of AI "solutions" in search of problems. If innovation must be the primary goal, rather than civil rights and privacy protection, there must be a more balanced perspective of what true innovation is—one that focuses on responsibility and integrates innovative methods for AI risk management throughout the AI lifecycle.

[82] For example, the Michigan Unemployment Insurance Agency was forced to abandon its $47 million MiDAS system after litigation revealed thousands of false fraud allegations. *See Michigan Unemployment Insurance False Fraud Determinations*, Benefits Tech Advoc. Hub, https://www.btah.org/case-study/michigan-unemployment-insurance-false-fraud-determinations.html. To replace the faulty system, Michigan paid Deloitte $59 million. *See* Contract between Mich. Dep't Tech., Mgmt., & Budget and Deloitte Consulting (2023), https://epic.org/wp-content/uploads/2023/09/Michigan-Deloitte-uFACTS-Contract.pdf.

[83] Vice President Harris, Remarks by Vice President Harris on the Future of Artificial Intelligence at the U.S. Embassy in London (Nov. 1, 2023), https://www.whitehouse.gov/briefing-room/speeches-remarks/2023/11/01/remarks-by-vice-president-harris-on-the-future-of-artificial-intelligence-london-united-kingdom/; Khari Johnson, *Joe Biden Wants US Government Algorithms Tested for Potential Harm Against Citizens*, Wired (Nov. 1, 2023), https://www.wired.com/story/joe-biden-wants-us-government-algorithms-tested-for-potential-harm-against-citizens/; Rohit Chopra et al., Joint Statement on Enforcement Against Discrimination and Bias in Automated Systems (Apr. 25, 2023), https://files.consumerfinance.gov/f/documents/cfpb_joint-statement-enforcement-against-discrimination-bias-automated-systems_2023-04.pdf.

The need to protect innovation is often raised as a reason to oppose or weaken proposed privacy protections.[84] However, OMB must recognize that innovation in AI guardrails, oversight mechanisms, evaluation methods, and risk management practices must come before innovation in AI models. Expediting AI research and development is not responsible AI innovation, but *irresponsible* AI innovation. For federal AI development, procurement, and use to be truly responsible, the United States must instead focus on being first-in-class for AI oversight, risk management, and harm prevention.

AI Systems are Frequently Discriminatory

Responsive to Questions 3–4

Numerous governmental bodies, including NIST, the Government Accountability Office (GAO), OSTP, and many others, have published reports outlining key issues with AI, such as bias, discrimination, and inaccuracy.[85] As publicly funded institutions, these bodies and other agencies are well positioned to be a trusted source for expertise on matters of AI accuracy, bias, and disparate impact. EPIC urges OMB to leverage the expertise and public trust of federal agencies to publish key information about how AI is used in different sectors, and how that use affects the public.

For example, in 2022, NIST published Special Publication 1270, "Towards a Standard for Identifying and Managing Bias in Artificial Intelligence," which identifies three types of bias that infiltrate AI—systemic bias, human bias, and statistical or computational bias—and provides recommendations to mitigate these biases for AI developers and users.[86]

Another NIST study, published in 2020, reviewed 189 algorithms from 99 developers and found that facial recognition technology had widespread issues identifying non-White faces.[87] Patrick Grother, a NIST computer scientist who worked on the report, said, "While it is usually

[84] *See*, *e.g.*, Calli Schroeder et al., *We Can Work It Out: The False Conflict Between Data Protection and Innovation,* 20 Colo. Tech. L. J. 251, 256–60 (2023), https://ctlj.colorado.edu/wp-content/uploads/2023/02/3-We-Can-Work-it-Out_091922.pdf.
[85] *See generally* GAO, GAO-21-519SP, Artificial Intelligence: An Accountability Framework for Federal Agencies and Other Entities (2021), https://www.gao.gov/assets/gao-21-519sp.pdf; GAO, GAO-21-7SP, Artificial Intelligence in Health Care: Benefits and Challenges of Technologies to Augment Patient Care (2020), https://www.gao.gov/products/gao-21-7sp; Blueprint for an AI Bill of Rights at 23–29; Reva Schwartz et al., NIST, Towards a Standard for Identifying and Managing Bias in Artificial Intelligence (NIST Special Publ'n 1270, Mar. 15, 2022), https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf.
[86] Schwartz et al., *supra* note 85.
[87] *NIST Study Evaluates Effects of Race, Age, Sex on Face Recognition Software*, NIST (May 18, 2020), https://www.nist.gov/news-events/news/2019/12/nist-study-evaluates-effects-race-age-sex-face-recognition-software.

incorrect to make statements across algorithms, we found empirical evidence for the existence of demographic differentials in the majority of the face recognition algorithms we studied."[88]

AI Systems are Frequently Inaccurate

Responsive to Questions 3–4

Automated systems, encompassing both generative and non-generative modalities, confront substantial accuracy challenges that necessitate vigilant human intervention.[89] Despite advancements in AI language generation, image recognition, and decision making, AI systems are intrinsically susceptible to fallibility, particularly when confronted with intricate or nuanced scenarios.[90] Generative AI models like GPT-4 and DALL-E 2 exhibit a capacity for contextually coherent yet fundamentally inaccurate information generation. The absence of genuine comprehension within these models renders them susceptible to producing misleading or erroneous content, particularly in response to ambiguous inquiries or situations characterized by incomplete data. Due to the importance of many interactions with government, these results are particularly dangerous.

Automated decision-making within governmental services is susceptible to AI bias and often proves incapable of accurately navigating diverse and dynamic nature of real-world application contexts.[91] These systems heavily rely on training data, and if the data incorporated during their development is biased or incomplete, consequential inaccuracies may emerge in AI predictions and decisions.[92] The innate inflexibility of AI systems to adapt to unforeseen circumstances renders them unreliable in contexts where adaptability is paramount. The

[88] *Id.*
[89] Arun Shastri, *Generative AI Errs Differently Than Classical AI,* Forbes (Sept. 4, 2023), https://www.forbes.com/sites/arunshastri/2023/09/04/generative-ai-errs-differently-than-classical-ai/.
[90] Oceane Duboust, *Unreliable Research Assistant? False Outputs from AI Chatbots Pose Risk to Science, Report Says,* Euronews (Nov. 20, 2023), https://www.euronews.com/next/2023/11/20/unreliable-research-assistant-false-outputs-from-ai-chatbots-pose-risk-to-science-report-s; Tate Ryan-Mosley, *Catching Bad Content in the Age of AI*, MIT Tech. Rev. (May 15, 2023), https://www.technologyreview.com/2023/05/15/1073019/catching-bad-content-in-the-age-of-ai/ (explaining how generative AI's difficulty handling nuanced information presents problems for content moderation).
[91] *See* Matt Burgess et al., *This Algorithm Could Ruin Your Life*, Wired (June 3, 2023), https://www.wired.co.uk/article/welfare-algorithms-discrimination; Stephanie Wykstra, *Government's Use of Algorithm Serves Up False Fraud Charges*, Undark (June 1, 2020), https://undark.org/2020/06/01/michigan-unemployment-fraud-algorithm/; Kashmir Hill, *Wrongfully Accused by an Algorithm*, N.Y. Times (June 24, 2020), https://www.nytimes.com/2020/06/24/technology/facial-recognition-arrest.html.
[92] *See* Mona Rakibe, *The Significance of Data Quality in the World of Generative AI*, Medium (June 21, 2023), https://mona-rakibe.medium.com/the-significance-of-data-quality-in-the-world-of-generative-ai-5f84eb524299.

unwillingness of AI developers to devise their systems in a way that explains the reasoning for the output of a system leads to an impossibility of accountability.[93]

AI Systems Perpetuate Harmful Data Practices

Responsive to Questions 2–4

AI systems are tools with specific uses and limitations, not general-purpose tools that agencies can apply to every problem. Defining problems that need AI is crucial for any AI innovation or adoption to be responsible.

Agency adoption of Generative AI poses privacy risks.[94] These risks are inherently harmful, but also lead to compounding harms. Many generative AI tools use models built on data scraped from publicly available websites.[95] This information often includes personal information posted on social media and other websites.[96] When companies scrape personal information and use it to create generative AI tools, they undermine consumers' control of their personal information by using the information for a purpose for which the consumer did not consent. The individual may not have even imagined their data could be used in the way the company intends when the person posted it online.[97] Individual storing or hosting of scraped personal data may not always be harmful in a vacuum, but there are many risks. Multiple datasets can be combined in ways that cause harm: information that is not sensitive when spread across different databases can be extremely revealing when collected in a single place, and it can be used to make inferences about a person or population.[98] Even "anonymized data" has been shown to be easily tied to a

[93] *See* Blueprint for an AI Bill of Rights at 21, 45.
[94] Security Staff, *Data Privacy Among Top Concerns for Workplace Generative AI Use*, Sec. Mag. (Oct. 16, 2023), https://www.securitymagazine.com/articles/100028-data-privacy-among-top-concerns-for-workplace-generative-ai-use; Simon Fondrie-Teitler & Amritha Jayanti, *Consumers Are Voicing Concerns About AI*, FTC Tech. Blog (Oct. 3, 2023), https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2023/10/consumers-are-voicing-concerns-about-ai; Lily Li, *International: Privacy Implications for Organizations Using Generative AI*, OneTrust DataGuidance (June 2023), https://www.dataguidance.com/opinion/international-privacy-implications-organizations; D. Reed Freedman Jr. et al., *Data Scraping, Privacy Law, and the Latest Challenge to the Generative AI Business Model*, ArentFox Schiff (July 17, 2023), https://www.afslaw.com/perspectives/privacy-counsel/data-scraping-privacy-law-and-the-latest-challenge-the-generative-ai.
[95] Sara Morrison, *The Tricky Truth About How Generative AI Uses Your Data*, Vox (July 27, 2023), https://www.vox.com/technology/2023/7/27/23808499/ai-openai-google-meta-data-privacy-nope; *see also* Thomas Claburn, *How to Spot OpenAI's Crawler Bot and Stop it Slurping Sites for Training Data*, Register (Aug. 8, 2023), https://www.theregister.com/2023/08/08/openai_scraping_software/.
[96] Geoffrey Fowler, *Your Instagrams are Training AI. There's Little You Can Do About It*, Wash. Post (Sept. 27, 2023), https://www.washingtonpost.com/technology/2023/09/08/gmail-instagram-facebook-trains-ai/.
[97] *Id*.
[98] *See* Boris Lubarsky, *Re-Identification of "Anonymized Data"*, 1 Geo. L. Tech. Rev. 202, 211 (2017), https://georgetownlawtechreview.org/re-identification-of-anonymized-data/GLTR-04-2017/; Sandra Wachter

specific individual.[99] And because scraping makes a copy of someone's data as it existed at a specific time, the company also takes away the individual's ability to alter or remove the information from the public sphere.

The privacy harms that follow from indiscriminate scraping of personal information for AI training data also create potential chilling effects for confused or concerned consumer.[100] Basic data minimization principles dictate that peoples' personal information should only be collected or used for the specific purpose for which each person provided the information.[101] But there are currently no statutes that prohibit companies from scraping people's personal information and using it to train generative AI tools.

Privacy laws in the U.S. exempt most publicly available information from regulation based on a concern that the collection and use of this information is protected by the First Amendment.[102] However, data brokers and AI companies scrape more than just publicly available information when building AI tools, regularly violating individual users' privacy.[103] In drafting regulations about potential agency use of these tools, OMB must be careful not to encourage extractive, invasive, or otherwise harmful data practices by agencies or AI developers seeking to enrich their underlying AI models with individuals' or government data.

OMB Should Revise Provisions Promoting AI Adoption for AI's Sake

Responsive to Questions 2–4

Much of Section 4 of the Draft Memorandum encourages AI adoption for AI adoption's sake, but OMB should revise its Draft Memorandum to instead reflect the concerns around responsible AI use and risk management described above. It is inappropriate for OMB to encourage the use of a specific modality, especially one as risky as AI, without sufficient regard

& Brent Mittelstadt, *A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI*, Colum. Bus. L. Rev., no. 2, 2019, at 502–520, https://journals.library.columbia.edu/index.php/CBLR/article/view/3424/1370.

[99] Lubarsky, *supra* note 98, at 208–12.

[100] Moritz Buchi et al., *The Chilling Effects of Digital Dataveillance: A Theoretical Model and an Empirical Research Agenda*, Big Data & Soc'y (Jan. 6, 2022), https://journals.sagepub.com/doi/10.1177/20539517211065368.

[101] Cons. Reps. & EPIC, *supra* note 30.

[102] David Stasis & Stacey Weber, *How Do the CPRA, CPA, VCDPA Treat Publicly Available Information?*, Husch Blackwell (Jan. 27, 2022), https://www.bytebacklaw.com/2022/01/how-do-the-cpra-cpa-vcdpa-treat-publicly-available-information/.

[103] *See, e.g.*, Müge Fazlioglu, *Training AI on Personal Data Scraped from the Web*, IAPP (Nov. 8, 2023), https://iapp.org/news/a/training-ai-on-personal-data-scraped-from-the-web/; EPIC, Comment on the CFPB's Request for Information Regarding Data Brokers and Other Business Practices Involving the Collection and Sale of Consumer Information (July 14, 2023), https://epic.org/wp-content/uploads/2023/07/EPIC-CFPB-data-brokers-RFI-comments-071423.pdf.

or safeguards for meaningful oversight. EPIC has four suggested changes to the Draft Memorandum.

First, from Section 3(b) of the Draft Memorandum, the below tasks are assigned to Chief AI Advisors. On the following page, EPIC recommends maintaining the relationship between AI adoption and specific circumstances of use and need (**changes bolded in blue, deletions crossed out**):

RECOMMENDATION

H. identifying and **instituting the requisite oversight necessary to achieve truly** responsible use of AI in the agency, including through ~~**the advancement of AI-enabling enterprise infrastructure,**~~ workforce development measures, policy, and other resources for AI innovation;

I. advocating within their agency and to the public **in plain language** on **proposed AI use cases that align with the agency's mission and assist operations;**

Second, EPIC is concerned that the introductory paragraph of Section 4 of the Draft Memorandum encourages agencies to 'move fast and break things,' when in fact this is in tension with responsible AI use by a government that works for the people and has immense obligation. Here, EPIC's recommendations hinge on ensuring the oversight and evaluation structure is supported—and that those developing and deploying AI are integrated into the relevant teams and processes where those AI systems will be instituted (**changes bolded in blue**):

RECOMMENDATION

"Agencies should create internal environments where those developing and deploying AI have flexibility **and opportunities to build subject matter expertise relevant to managing AI risk. These internal environments should be integrated into the appropriate agency teams to achieve** AI innovation **that is appropriate to the needs of the agency** and **prioritizes** risk management **throughout the AI lifecycle**."

Third, in Section 4(a) of the Draft Memorandum, OMB currently requires CFO Act agencies to "remove barriers to the use of AI." In Section 4(b), this phrase is used again, but with the word responsible included. **EPIC recommends that OMB delete both instances of the phrase or reorient the phrase's language around *support* for proper safeguards and oversight mechanisms as foundations for responsible AI innovation.**

Fourth, EPIC is deeply concerned at the promotion of generative AI as a technology worth adopting in and of itself. In Section 4(b)(v) of the Draft Memorandum, OMB encourages agencies to "assess potential beneficial use cases of generative AI in their missions and establish adequate safeguards and oversight mechanisms that allow generative AI to be used in the agency without posing undue risk."[104] **EPIC urges OMB to delete this provision entirely or reword it substantially to account for the severe privacy, accuracy, and bias concerns that generative AI technologies have demonstrated.**[105] This provision, as well as most of the Section 4 does work for AI companies by legitimizing the use and development of AI.

III. OMB Must Prioritize Transparency & Accountability

Responsive to Questions 2 and 8

RECOMMENDATION

OMB guidance without compliance is ineffective, and agency compliance without transparency risks being unaccountable. To ensure that OMB's Draft Memorandum effectively advances responsible government AI development and use, EPIC urges OMB to:

1. carefully consider how it could **use its existing budgetary and oversight authorities to incentivize or mandate strict compliance** amid differing agency priorities and interpretations of OMB's guidance;
2. revisit compliance protocols for and coordination with related, existing reporting requirements like **privacy impact assessments (PIAs) under the E-Government Act of 2002**;[106] and
3. **expand the scope and accessibility of information** that agencies are expected to make publicly available.

As discussed in Section II, *supra*, the mere existence of minimum AI risk management practices and OMB reporting requirements[107] will not ensure agency compliance. Despite decades-

[104] *Cf.* Executive Order 14110.
[105] *See generally* EPIC Generative AI Report.
[106] 44 U.S.C. § 3501 note.
[107] The Draft Memorandum currently requires covered agencies to provide OMB with, e.g., (1) the identities of their appointed Chief AI Officers (CAIOs), (2) their compliance plan under the Draft Memorandum or a "written determination that the agency does not use and does not anticipate using covered AI," (3) an inventory of their AI use cases, (4) any agency-specific lists concerning safety-impacting or rights-impacting AI use

old PIA requirements under the E-Government Act of 2002,[108] for example, many federal agencies still fail to generate and publish PIAs when required.[109] To incentivize compliance with the Draft Memorandum and Executive Order 14110, EPIC urges OMB to condition agency budget approvals and funding recommendations on compliance with all minimum practices and reporting requirements under the Draft Memorandum, including conditions on including agency budget requests within consolidated budget proposals prepared for the President pursuant to the Budget and Accounting Act of 1921.[110] Additionally, EPIC encourages OMB to prioritize review of agency determinations that AI systems are *not* safety-impacting or rights-impacting, as well as waivers of minimum practices and other related decisions concerning the applicability of the Draft Memorandum to an agency's practices. Historically, agencies have faced less OMB scrutiny for deregulatory measures than pro-regulatory measures,[111] but given the time and resources required to adequately comply with the Draft Memorandum, many agencies will be heavily incentivized to underreport AI use cases and deprioritize ongoing AI testing and evaluation measures even in circumstances where serious AI risks remain. Strong OMB oversight—built atop stringent reporting requirements and independent review—will be crucial for ensuring responsible AI development, procurement, and use throughout government.

The Draft Memorandum's minimum practices and reporting requirements do not exist in a vacuum either. Agencies are already obligated to document and report to OMB a large array of information related to their data and technology needs under statutes like the E-Government Act of 2002.[112] To ensure these other oversight and reporting requirements complement, rather than compete with, agency compliance with the Draft Memorandum, EPIC encourages OMB to revisit existing compliance and reporting programs to determine how agency CAIOs and similar officials should coordinate overlapping compliance requirements and effectively manage limited resources. For example, EPIC recently published a memorandum detailing how AI impact assessment requirements could be incorporated into PIAs under the E-Government Act.[113] OMB could

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cases, (5) any agency determinations—or reversals of determinations—that an AI use case is not safety-impacting or rights-impacting and thus need not be subject to the minimum practices listed within the Draft Memorandum, (6) any documentation of agency implementation of the minimum practices listed within the Draft Memorandum, and (7) any waivers from minimum practices granted by the agency's CAIOs, which must detail the scope, justifications, and supporting evidence. Draft OMB AI Guidance at 4, 10–11, 13–15, 26.

[108] *Id.*

[109] *See, e.g.*, *EPIC v. USPS*, No. 1:21-cv-02156, 2022 WL 888183 (D.D.C. 2022); *EPIC v. Commerce*, 928 F.3d 95 (D.C. Cir. 2019); *EPIC v. FBI*, 72 F. Supp. 3d 388 (D.D.C. 2014). For more on EPIC's work involving PIAs, see *Privacy Impact Assessments*, EPIC, https://epic.org/issues/open-government/privacy-impact-assessments/ (last visited Dec. 5, 2023).

[110] *See* 31 U.S.C. §§ 1104, 1105, 1108.

[111] *See* Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 Colum. L. Rev. 1260, 1271 (2006), https://www.jstor.org/stable/4099416.

[112] 44 U.S.C. § 3501 note.

[113] EPIC Section 208 AI Memo.

similarly publish guidance clarifying whether and how PIA requirements and related OMB guidance relates to the minimum practices and reporting requirements under the Draft Memorandum. If more expansive implementations of OMB's oversight and budgetary authorities can pressure agencies to comply with the minimum practices and reporting requirements of the Draft Memorandum, coordinating compliance with other agency programs and reporting regimes will help lower barriers to adequate and ongoing compliance.

Lastly, EPIC urges OMB to incorporate the public as a co-evaluator and source of pressure for agencies through increased transparency efforts around agency compliance with the Draft Memorandum. Civil society organizations like EPIC, as well as concerned citizens and independent researchers, can serve a valuable role as auditors, evaluators, co-regulators, researchers, and sources of pressure for agencies conducting the minimum practices and reporting requirements outlined in OMB's Draft Memorandum—but only if we have access to key information about federal AI development, procurement, and use. To the extent possible under existing laws, EPIC urges OMB to make public all procedures, documentation, compliance plans, testing results, and AI impact assessments produced by agencies under the Draft Memorandum so organizations like EPIC and academic researchers can evaluate agency practices, flag issues, and suggest innovative paths forward for federal AI risk management.

IV. OMB Should Narrowly Construe National Security Exemptions

Responsive to Questions 3 and 5

EPIC urges OMB to make every effort to narrowly define national security and other exempted uses to increase transparency and accountability around the most dangerous AI systems. Many of the most dangerous systems—those that violate the principles espoused in Executive Order 14410—are the very ones that need a meaningful public assessment. These systems are also likely to be used in part for ostensible national security purposes.[114] Without

[114] GAO, GAO-21-386, DHS Needs to Fully Implement Key Practices in Acquiring Biometric Identity Management System 7 (2021), https://www.gao.gov/assets/gao-21-386.pdf (reporting that DHS's HART/IDENT biometric database is used for verifying identity of persons in national security matters); Sam Biddle, *How Peter Thiel's Palantir Helped the NSA Spy on the Whole World*, Intercept (Feb. 22, 2017), https://theintercept.com/2017/02/22/how-peter-thiels-palantir-helped-the-nsa-spy-on-the-whole-world/; EPIC et al., Comments on Use of HHS Information Collection for Immigration Enforcement (Nov. 6, 2018), https://www.scribd.com/document/392614190/November-6-2018-Comments-to-HHS-and-DHS (explaining how information collected by HHS could be used to harm immigrant communities and in particular vulnerable children).

strong guardrails on national security exemptions, agencies may use these exemptions to avoid oversight altogether.

RECOMMENDATION

OMB should interpret the exceptions outlined in the Advancing American AI Act[115] narrowly by:

1. adopting a **use-case approach** to defining national security systems;
2. explicitly **requiring review of dual-use systems**; and
3. requiring agencies to **justify the rationale behind exempting systems** for national security reasons.

The Draft Guidance outlines several carveouts from the requirements of the guidance for national security purposes. The "Intelligence Community" is fully exempted from the Guidance under the Advancing American AI Act, while the Department of Defense (DoD) is partially exempted. Agencies outside the intelligence community can still claim an exemption which extends to AI "when it is used as a component of a national security system".[116] The Intelligence Community, as statutorily defined, covers both freestanding agencies like the National Security Agency (NSA), and agency subcomponents like the Office of Information and Analysis (I&A) withing the Department of Homeland Security (DHS), the Bureau of Intelligence and Research in the State Department, and "intelligence elements" of the armed forces, the DEA, and the FBI.[117] For agencies that are fully exempted like the NSA, OMB must still be careful not to exempt systems shared between agencies from all scrutiny. The task is more difficult when considering exempted sub-components in otherwise covered agencies, like DHS' I&A. Here OMB should be especially careful to ensure that agencies do not use these exemptions to avoid scrutiny by misclassifying their AI systems because of de minimis national security or intelligence community involvement.

Without careful guardrails and oversight from OMB, there is a substantial risk that agencies will designate all systems with some minimal national security purpose as exempted from the Draft Guidance, a loophole that could swallow the rule. By statute, "national security systems" are defined broadly to include "any information system" used by an agency where the "the function, operation or use of" the system "involves intelligence activities."[118] The State Department's Visa

[115] 40 U.S.C. § 11301 note; Pub. L. No. 117-263, 136 Stat. 3668.
[116] Draft OMB AI Guidance at 3 (Section 2(c)).
[117] 50 U.S.C. § 3003.
[118] 44 U.S.C. § 3552(b)(6)(A).

Records System (SORN State-39)[119] and Consular Consolidated Database[120] illustrate the risk that overbroad exemptions will fail to protect a substantial number of individuals from rights-impacting and harmful AI systems.

Visa Records is the overarching system used by the State Department to hold information on everyone who applies for a visa to visit the U.S., individuals who sponsor visa-holders, and a broad array of relevant information collected from various sources. The system holds sensitive personal information, biometrics like fingerprints and facial images, and extensive records. Visa Records lists routines users including several agencies within the Intelligence Community, and is marked as both a Classified and Unclassified system.[121] The Consular Consolidated Database is the State Department's overarching records system for both U.S. persons and non-U.S. persons, housing sensitive personal information including biometric data.[122] The CCD system also "serves as a gateway" to the State Department's facial recognition system.[123] CCD is integrated with other databases across the federal government, including DHS's massive biometrics data HART/IDENT and is accessible via information sharing memoranda of understanding with intelligence community agencies.[124]

Together these systems hold records on hundreds of millions of people and are used for substantial rights-impacting purposes like determining visa eligibility and screening for access to consular services for American citizens.[125] AI used for facial recognition and data analytics run off these systems collectively impacts millions of Americans and people around the world every year.[126] These systems are used mainly for straightforward determinations on access to services

[119] System of Records Notice Visa Records, State-039, 83 Fed. Reg. 280362 (Nov. 8, 2021), https://www.state.gov/wp-content/uploads/2021/11/State-39-Visa-Records-SORN-Web-Post-2021.pdf [hereinafter "Visa Records SORN"].
[120] U.S. Dep't of State, Privacy Impact Assessment for Consular Consolidated Database (CCD) (2022), https://www.state.gov/wp-content/uploads/2023/05/Consular-Consolidated-Database-CCD-PIA.pdf [hereinafter "CCD PIA"].
[121] Visa Records SORN at 1, 3.
[122] CCD PIA at 2.
[123] U.S. Dep't of State, Privacy Impact Assessment for Consular Consolidated Database (CCD) at 2 (2015), https://2009-2017.state.gov/documents/organization/242316.pdf; 2022 CCD PIA at .
[124] *See EPIC v. State Department (Facial Recognition Database)*, No. 19-1468 (D.D.C. Mar. 12, 2019), https://epic.org/documents/epic-v-state-department-facial-recognition-database/. EPIC successfully obtained many of the memoranda of understanding allowing other agencies access to CCD through a FOIA case, revealing for the first time the full extent to which CCD is used by the federal government.
[125] *Id.*
[126] U.S. Dep't of State, *Table I: Immigrant and Nonimmigrant Visas Issued at Foreign Service Posts Fiscal Years 2018–2022*, *in* Report of the Visa Office 2022 (2023), https://travel.state.gov/content/travel/en/legal/visa-law0/visa-statistics/annual-reports/report-of-the-visa-office-2022.html (reporting that the U.S. issued 6.8 million visas in 2022); *Exclusive: Security Gaps Found in Massive Visa Database*, ABC News (Mar. 31, 2016), https://abcnews.go.com/US/exclusive-security-gaps-found-massive-visa-database/story?id=38041051 ("the database contains more than 290 million passport-related records, 184 million visa records and 25 million records on U.S. citizens overseas.")

and travel authorization.[127] Such systems require meaningful investigation and oversight to ensure that individuals are not wrongfully denied services by biased, misused, or inaccurate AI. Yet an overly broad reading of the national security exemptions could remove these entire systems from OMB's purview because intelligence community agencies make some use of the systems.

OMB has significant latitude in how to interpret the broad "national security system" definition and can limit the reach of the exemption in full accordance with its statutory authority by adopting a use-case approach for AI systems. Under a use-case approach, AI systems would only be exempted from the Draft Guidance when they are used for a national security purpose or by a fully exempted intelligence community agency. For example, CCD's facial recognition system would be subject to the requirements of the Draft Guidance, but any use that the NSA makes of that facial recognition system would not be. A use case approach would also ensure that AI used for data analysis like Palantir would not be exempted from scrutiny when it is used by Health and Human Services or law enforcement,[128] even if it is also used by intelligence community agencies.[129]

The use-case definition should be paired with a requirement in the Draft Guidance that agencies must include dual-use systems in review and oversight. Dual-use systems are systems like CCD with a substantial non-national security purpose that are also used for some national security purposes. OMB should be explicit that such systems are covered by the Draft Guidance, subject to limited carveouts for elements of the system that are used for national security purposes. OMB should also be careful to note that just because a system collects information or intelligence that is ultimately used for national security does not mean that such a system falls under the national security system definition. Finally, OMB can limit abuse of the national security system exemption by requiring agencies to justify their exemptions. The onus should be on agencies to identify which systems are legitimately exempted and justify those exemptions to OMB with enough detail for OMB to provide meaningful oversight.

[127] CCD PIA at 10. ("Yes, the information in the CCD centralized database supports the implementation of the Department of State's visa, America citizens and passport programs. The information is required to make determinations for granting the various consular services being requested to validate applicant information and to provide centralized storage of information internally for use by posts, in addition to sharing and validating information with other government agencies.")
[128] Dave Nyczepir, *HHS makes Palantir data analytics platform available to all its agencies*, FedScoop (May 4, 2022), https://fedscoop.com/hhs-palantir-platform-bpa/; Mark Harris, *How Peter Thiel's Secretive Data Company Pushed Into Policing*, Wired (Aug. 9, 2017), https://www.wired.com/story/how-peter-thiels-secretive-data-company-pushed-into-policing/.
[129] Biddle, *supra* note 114.

CONCLUSION

EPIC welcomes OMB's efforts to ensure responsible AI development, procurement, and use throughout the federal government and applauds the OMB's inclusion of several key responsible AI provisions within the Draft Memorandum, including greater funding for AI risk management, a cross-agency AI use case inventory, procedures to decommission AI systems that fail to meet minimum safety standards, required training data cleaning and labeling, and additional procurement requirements when seeking AI systems. OMB can and should use its budgetary and oversight authorities to:

1. enforce agency compliance with the Draft Memorandum,
2. refine responsible AI provisions like AI impact assessments and AI use case inventory reporting to increase transparency and accountability for more types of AI systems,
3. increase agency data management practices through additional data minimization provisions and reinvigorated privacy impact assessment reporting requirements,
4. encourage AI adoption only where AI can serve as a curated tool to meet predefined agency needs, and
5. monitor national security systems and mandate AI risk management practices when they are used for other purposes covered by the Draft Memorandum.

We appreciate this opportunity to comment on OMB's Draft Memorandum and are willing to engage with OMB further on any of the issues raised within our comment, including universal AI evaluation requirements; coordination between AI impact assessments and privacy impact assessments; AI procurement reform; the risks of national security AI systems; and the need for greater transparency over government AI use. These recommendations relate closely to the goals of Executive Order 14410 and bolster the responsible AI provisions within OMB's Draft Memorandum to ensure that government development, procurement, and use of AI is safe, equitable, and trustworthy both now and long into the future.

Respectfully submitted,

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PUBLIC SUBMISSION

As of: March 22, 2024
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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0141
Comment from Carolyn Gideon

Submitter Information

Name: Carolyn Gideon

General Comment

Please see my attached comment on OMB-2023-0020 Draft Proposed Memorandum for the Heads of Executive Department and Agencies Regarding Advancing Governance, Innovation and Risk Management for Agency Use of Artificial Intelligence.

Attachments

Gideon Comment on OMB-2023-0020

Gideon Alg Gov draft Sept 2023

Comment on Docket: OMB-2023-0020

I appreciate the opportunity to comment on the OMB's proposed Memorandum associated with the President's Executive Order on AI. The following contains my comments on the OMB draft Proposed Memorandum for the Heads of Executive Departments and Agencies regarding Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (the Memorandum). I am on the Executive Faculty of the Fletcher School at Tufts University and hold a PhD in Public Policy from Harvard University. My area of expertise is information and communication policy, and one of my current research projects analyzes several possible approaches to regulating automated decision-making, which includes AI systems. I also teach professional graduate students International Communications, and Public Policy Analysis and have been doing so for almost 20 years. It is in these capacities that I comment on the Memorandum.

Comment 1:
There are many things in the Memorandum that are promising for improving the use of AI by the Federal Government. Most notably, this includes the (1) specific assignment of responsibility for AI to a senior official in each agency, (2) mandatory periodic risk assessments, (3) presumptions of safety and rights impact, and (4) procurement requirements.

(1) The assignment of a senior official as CAIO in each agency is essential for prioritizing the level of attention and resources necessary for reviewing the potential risks of AI. Since AI operates as an evolving black box, significant resources are required to evaluate and monitor the AI, particularly when it is used for government decision-making or providing information, to be sure that it is achieving its purpose, complying with existing laws, and consistent with the values and policies of the Federal Government and specific Agencies. Too often decisions are made to use AI based on an incomplete assessment of the relevant costs and benefits. One of these shortcomings is the assumption that labor hours will be saved by automating tasks and learning, without consideration of the labor hours required to test and monitor for risks and effectiveness. Another is the assumption that the AI-based process will be more accurate and more efficient. This has often proven not to be the case. The third shortcoming is a short-term evaluation, missing an analysis of the dynamic effects of how the AI might evolve and other adaptations that will result. Also, the assignment of senior officials of an agency to meet regularly with the CAIO as an AI Governance Body ensures that a multidisciplinary perspective is in place for governing the use of AI. While it is necessary to have technological expertise, understanding of the subject matter and implications of design and practices is equally critical for identifying potential benefits, costs and risks in actual use, and often outside the scope of the technologist's expertise.

(2) The mandatory periodic risk assessment is critical to responsible use of AI. AI, by its very definition, is never static. These systems learn and evolve, often in unforeseeable ways, and must be reassessed for continued compliance with laws and continued non-violation

of safety and rights to all segments of society, as noted in the Executive Order and the Memorandum.

(3) The presumption of safety and rights impact of the systems noted in Section 5(b) serve a very important purpose. This removes the burden of proof of finding that an AI or AI component is impacting safety or rights on an ex-post basis. Such an ex-post burden of proof is highly problematic as it requires efforts and knowledge that are insurmountable, especially in light of the extreme information asymmetry that exists. The burden of proof must clearly and explicitly be on those who would claim the systems described in Section 5(b) are not safety- or rights-impacting. This must be clear and explicit and require strong evidence that conforms to a very high level of statistical confidence. The presumption of safety- and rights-impact also prevents harms which can quickly escalate, as well documented by many, including O'Neil (2016).

(4) The procurement requirements are critical for contracting AI that complies with the Executive Order. Agency use of contracted AI cannot be responsible without compliance with these standards.

For these reasons, I strongly encourage the OMB to maintain these aspects of the Memorandum.

Comment 2:
Benefits exceeding the risks of AI is not an appropriate criterion for Safety- and Rights-impacting AI. Section 5(c)(iv)(A)(2) (p. 15), in describing what must be documented in an AI impact assessment as part of the Minimum Practices for Either Safety-Impacting or Rights-Impacting AI, states: "The expected benefits of the AI functionality should be considered against its potential risks, and if the benefits do not meaningfully outweigh the risks, the agencies should not use the AI." This criterion is ill suited to this context. The weighing of benefits relative to costs, or risks, is a measure of efficiency. While efficiency is an important criterion for policy, it is not the only criteria. Other criteria, such as equity, fairness, justice, legitimacy, for example, are at least as important in the context of these decisions. Particularly when considering violation of rights, safety, or compliance with law. In such an instance, a determination could be made that the benefits of an AI, which might include expedited service for many citizens and reduced cost to the agency, which benefits all citizens, exceeds the risk to safety and rights of a minority population, especially one that is underserved. Such decisions negate the purpose of reducing the risk to safety and rights of Americans stated to be the purpose of this Executive Order and Memorandum. Rather, the criteria should state that certain levels of risk to any minority population are unacceptable regardless of the broader benefits. While it might be difficult to determine that level of risk that is unacceptable, it is necessary to avoid continued excessive burdens on the already otherwise disadvantaged sectors of our society. (Noet that the criteria of equity, dignity, and fairness are listed for rights-impacting AI in Section 5(v)(A) on p.180.)

Comment 3:

Explanation of independent review of rights-impacting AI needed. Section 5(c)(iv)(C) (p.16) states that AI must be evaluated independently. The only stipulation of who might conduct this independent review is that 'The independent reviewing authority must not have been directly involved in the system's development." This is insufficient. There should be description of qualifications of the independent reviewers, and if they may be from government or from industry. This is somewhat related to the research I am currently [producing. Please see the attached draft for an example of methodology to determine the relative efficacy of different types of reviews by different types of reviewing parties (Gideon 2023). Reviewers must include technical expertise and also agency-relevant knowledge to understand impacts in use.

Comment 4:
Soliciting feedback from affected groups regarding Rights-Impacting AI should be a requirement, not merely encouraged. Section 5(c)(v)(B) (p.19) states that for Additional Minimum Practices for Rights-Impacting AI "[a]gencies are strongly encouraged to solicit feedback on an ongoing basis from affected groups…" This should be a requirement, not an encouragement. Historically the groups most often and severely adversely impacted by our systems are not represented in the decision-making bodies, or the leadership in the development of the technology. This leads to a blindness of potential effects. Thus, soliciting this input is a requirement if the intent is to minimize the risk to rights of such underrepresented individuals and groups.

Comment 5:
Disclosure requirements for procured AI must be explicit and detailed and far-reaching, and periodic. Section 5(d)(ii) (p. 21) lists Transparency and Performance Improvement requirements for procured AI. The requirements in this section are too vague and will likely lead to insufficient documentation and information provided by the contractors. There must be an explicit requirement in procurement contracts that agencies can deeply inspect the AI provided. Too often contractors provide statistical information that sounds very good but is misleading, providing the wrong conditional probabilities or probabilities of error or success that are not quite the same thing as the agency would need to know. Those without advanced familiarity with statistical methods such as Bayes Theorem will not be prepared to adequately assess such statements. There must be requirements for rigorous independent review of procured AI, similar to that required for agency AI that is safety- or rights-impacting (see Gideon, 2023).

Comment 6:
Related to Comment 5 above, OMB should address the question of existing contracts for AI in agencies that do not meet the requirements of the Executive Order and Memorandum, and how these contracts might legally be made consistent with the risk management requirements contained in the Memorandum.

Comment 7:
The standard for designating an AI use or component listed in the Memorandum in Section 5 not to be safety- or rights-impacting. Must be very high and explicit. This must be stated clearly with necessary conditions for such designation to avoid under-inclusion, which would undermine thie Memorandum and the Executive Order.

Comment 8:
Consider expanding scope to any recipients of Federal funding and or grants. This would include state and local governments and many universities and research institutions, and some businesses. Expanding the impact of this rules in what is likely to be a very long period before any legislation for regulation of AI will have very large benefits for society.

Thank you for your consideration of my comments. Please contact me with any comments or questions or for further discussion.

Sincerely,

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December 5, 2023

References:

Gideon, Carolyn. 2023. "Evaluating Algorithmic Governance Regimes: A Game Theoretic and Empirical Analysis." *SSRN*, 2023. [Attached]

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Evaluating Algorithmic Regulation Policies: A Game Theoretic Analysis

Introduction

The term 'algorithmic governance' has two meanings in the policy debate and existing literature: (1) the role of algorithms in governing our lives, and (2) the governance of the algorithms. Algorithms govern our lives both explicitly and implicitly. Explicitly, the public sector and governance institutions use algorithms, often outsourced to contractors, to fulfill their missions, such as allocating policing resources and determining prison sentencing. Implicitly, they govern many aspects of our lives, such as the shape of discourse in our digital public sphere, qualifications for loans, insurance premiums, employment eligibility, movie recommendations, the routes we drive to work, airline fares, college admissions, and more. With our lives increasingly shaped by digital platforms of social media and search engines, these opaque private-sector algorithms may be governing our lives more than the laws of our governments (MacKinnon 2013). The harms of these governing algorithms in the context of public sector and private sector use have been well documented (see for example O'Neil 2016, Noble 2018). These algorithms lack transparency and legitimacy, and sometimes violate existing laws. This presents a situation where we must think through how to extend governance to be sure laws are maintained when algorithms are used, i.e. the second meaning of algorithmic governance. This paper attempts to increase our understanding of how to govern these algorithms by exploring incentives and effects of different policies on how algorithms and AI are developed and deployed.

Several algorithms have been found to violate laws, human rights, and cause disparate harm by replicating and amplifying racial and other biases. An algorithm used by the Dutch government to detect fraud in social services was found by Dutch courts in 2020 to violate Article 8 of the European Convention on Human Rights, which protects the right to respect for private and family life (Vervloesem, 2020). Several US school systems contracted private big-data companies to evaluate teachers, resulting in the firing of award-winning teachers with the municipalities having no right to see the criteria and weighting behind the decisions (O'Neil 2016). In Scotland, the introduction of algorithmic grading during the pandemic was protested by students. The algorithm considered past school performance as a predictive metric to grade students in the absence of exams, ignoring the effect of the school's neighborhood on performance, which tends to determine socioeconomic status, thereby exacerbating existing socioeconomic discriminations (Tiffany 2020).

One criticism of algorithm use for important decisions, such as evaluating recidivism probabilities after incarceration, is that algorithms present biases of their own. These biases manifest against marginalized communities, notably Black and Brown individuals, women, low-income neighborhoods, LGBTQ and other minorities. For example, Chicago Police Department's crime prediction algorithm predicts if someone will be involved in a crime, though not whether they will be the perpetrator or the victim. It considers the preponderance of crime around the person, determined by neighborhood and zip code. Institutional segregation policies pushed Black and Hispanic people into certain neighborhoods, which are flagged by the algorithm, exacerbating disadvantages. In this bizarre example, a young man whom the

algorithm predicted would be involved in gun violence was shot twice because the algorithm led to 24/7 police surveillance of him, raising suspicions that he was an informant. Essentially, the algorithm used to prevent crimes caused the crime (Stroud 2021).

As these algorithms reach into increasing areas of our lives performing governance functions, there are problems of opacity and lack of accountability. Several countries have begun to introduce regulations of algorithms and AI to address this. However, these laws are still in their fledgling state or they may not work as intended and have unintended consequences. Such policies face critical challenges, including information and expertise asymmetry, the dynamic nature of the algorithms and their use, and sheer volume. While there has been a great deal of helpful legal scholarship exploring this issue, there has been little economic analysis clarifying the incentives created for different parties by the algorithmic governance policy options. This paper will address this deficit by providing game theoretic modeling of alternative approaches to regulating algorithms.

In this paper we will evaluate recent and proposed policies addressing algorithmic decision-making on several criteria, including (1) incentives for firms and other entities to comply, (2) effectiveness in governance (including monitoring and enforcement), (3) minimization of obstacles to innovation (by potential entrants as well as incumbents), (4) balance of Type I vs Type II errors, and (5) accountability. These evaluations will consist of game theory modeling of multiple players' incentives and outcomes under different proposed governance structures and in different contexts. We will test the results of these models with empirical evidence from trials of such policies where they exist, and similar regulation of other industries where they do not. We will evaluate several major proposed policies, including aspects of the EU Artificial Intelligence Act, the US Algorithmic Accountability Act, the FDA model of pre-market testing and evaluation, and an alternative model similar to independent accounting audits of corporate financial statements for legal compliance. Note that we are considering algorithmic decision making to include all such automated decision making. Some of this will be forms of AI and some will not. In this paper we will at times use the terms interchangeably as the basic problem of regulatory regime design and evaluation is similar, though obviously far more complicated for more complex versions of AI.

The results of this analysis will provide comparisons of the different policies along each of the above criteria. We hope this will improve our understanding of how competing governance models can be expected to perform and help guide the necessary tradeoffs for policymakers addressing the complex problem of governing algorithms.

Background – The Need to Govern Algorithms

The existing and potential harms of algorithmic decision making, both with and without advanced AI, has been well documented (Holder et. al. 2016, Noble 2018, O'Neil 2016, Reike et. al, 2018, and many others). Too often algorithms are deployed without considering if they may be violating well established laws. One glaring recent example of this is the delivery of ads by Meta, violating fair housing and employment discrimination laws in the US [CITE]. Since these algorithms operate as proprietary black boxes, their lack of compliance with laws is often not readily apparent, requiring the compilation and analysis of data of the algorithms' outcomes, often unavailable to those outside the

creators' firms. Even the 3rd party users of algorithmic decision-making systems, including public sector institutions, are not provided any explanation of the algorithms' outcomes (see O'Neil 2016 examples of algorithms used by public school systems for teacher evaluations, courts for sentencing, and law enforcement departments for deployment). In some instances, algorithmic decision making can lead to physical harm, even if not explicitly breaking existing rules, such as with self-driving cars [CITE], incorrect COVID diagnosis algorithms for Black patients [CITE], and advertising and revenue driven algorithms of web searches leading to decontextualized sensationalist racist extremist content (Noble 2018). There are also many documented instances of bias in all sorts of algorithms.

While there are existing laws to protect against many of these and other harms, algorithmic decision making often operates outside of those laws due to the many obstacles for detecting when they violate laws. The algorithms are not transparent or explainable, even when being used by the public sector. And the data necessary to find if there is statistical evidence of violation is often unobtainable. Even when it is obtainable, much harm will have been done before the analysis can be presented as evidence. Without direct regulation of the algorithms to ensure compliance with law, the burden of proof is on those least able to determine if their rights are violated by non-compliance with laws. In such an environment, the algorithms are simply not being held to the law, and the laws themselves lose any meaning as so much decision-making is shifting from huma to algorithmic processes.

We have several objectives of any algorithmic regulations. The primary focus of this paper is compliance with the law. We consider this to be the lowest-hanging fruit, as the laws already exist. Several other objectives, such as reducing further biases, ethics, transparency or explainability, are equally important. However, unlike the laws that are already existing, the definitions and extents of these objectives are still subject to much debate. These debates are critically important, but if we cannot even establish regulation to bring algorithmic decision-making in compliance with existing laws, there is little chance of achieving success in these other areas. So we focus on solving this case first as it is less complicated for that reason.

Background – Existing and Proposed Regulations

Many countries have recognized the need for regulating algorithmic decisionmaking and have begun to institute laws and regulations. Here we note a few of these, recognizing this is in no way meant to be exhaustive. For a recent comprehensive compilation of algorithmic regulation worldwide, please see Almeida 2021 and [*CITE*].

European Union

The European Union introduced the EU AI Act in April 2021, proposing regulation of all processes, institutions, products, and systems using Artificial Intelligence at any stage. The High-Level Expert Group established by the European Commission has defined AI systems as "software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the

knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behavior by analyzing how the environment is affected by their previous actions." (AI HLEG, 2019a).

The result of an online public consultation with a variety of actors, this act classifies all products and services in terms of the risk posed to people, the fundamental rights, and the European values. A system that poses an *unacceptable risk* is prohibited. Systems that score people, biometrics, and AI that uses subliminal techniques to manipulate behavior falls into this category. Systems that are *high risk* must follow a set of horizontal mandatory requirements, which place obligations on both the developers of these systems as well as the deployers or users. These systems must go through oversight, approval, and ex-ante conformity assessment procedures that will classify it as high risk. AI used in education training, migration, administration of justice and democracy, generative language models, CV scanning tools, will fall within the high-risk purview. This assessment will be conducted by third parties under sectoral legislation, which involves ensuring that design and development are in compliance with regulation requirements. *Minimal or no risk* systems are permitted with no restrictions and limited oversight but can have voluntary code of conducts about transparency requirements. Chatbots, synthetic deep fake content were the examples given for this categorization.

The responsibility and obligations for AI fall mostly on the developer, where they are expected to create a risk management system. Their datasets should meet quality criteria of representativeness and accuracy, and this dataset should be available publicly and traceable. It is also their duty to undergo conformity assessment, register the system in the proposed EU database, conduct post marketing monitoring to ensure compliance for reliability and safety, and mitigate future risks, and collaborate with surveillance authorities. It is important to note that third party conformity assessments prior to market placement would be limited to mostly providers themselves. The deployer or the user is supposed to operate the systems in consonance with the instructions of use, ensure human oversight while doing so, and keep monitoring the systems for possible risks. In case incidents arise, they are required to report it to the producer. There are compliance penalties that can be levied, which go up to 30 million Euros.

With regards to enforcement of these regulations, the bill builds on member states' governance systems by proposing the establishment of a European AI board to provide consistency across European nations. While it does seek harmonization with existing sectoral legislation, ex ante requirements still must be met even when products have been covered by old approaches. The commission will be responsible for monitoring the consequences of this proposal and for establishing a database of high-risk AI system information available across the Union.

While the bill awaits its transformation into a law, which will happen when a common version is agreed upon by the Council and the Parliament, there are many questions and concerns that have been raised. The classification of risk seems arbitrary, with phenomena such as deepfake content which has shown to have serious political implications classified as minimal or low risk (Nehamas 2023; Veale and Zuiderveen Borgesius 2021). The idea of harm or risk has mostly been viewed from an individual and instant lens, not taking into account collective harm or cumulative risk that builds up over time (Veale and Zuiderveen Borgesius 2021). There seems to

still be ambiguity with regards to competent authorities present in this regulatory process apart from the Union itself, for verifying compliance (EU AI Act). Apart from penalties, there is no elaboration on how it will be decided who is responsible for any violations, which might regurgitate the classic fight of system vs user responsibility [CITE]. Lastly, companies in Europe have raised concerns about the effect of this legislation on technological sovereignty, innovation, and competitiveness (Toh 2023).

The GDPR also addresses some aspects of algorithmic decision-making. Most notably, Article 22 of the regulations specifically restricts automated decision-making and profiling, which produces legal effects or similarly significantly affects the data subject. Additionally, the GDPR empowers individuals to demand and receive explanations or meaningful information about the logic involved relating to such automated decision-making. For instance, if a loan application is refused, Article 22 may require the data controller in question to provide information about the information around the algorithmic method used, that is, input data related to the loan applicant and general parameters set in the algorithm that enabled the decision-making. Despite these requirements, Article 22 would not require any explanation around the source code, or how and why such decision was made against the applicant.

Brazil

Brazil also has proposed a law in progress replacing three old bills, emphasizing the creation of a regulatory body to enforce this law and taking a risk based approach for categorization of systems. It also focuses on penalizing providers or operators and obligation on them to report incidents. Individuals are also given rights and can demand explanations of decisions and contest the decisions in front of administrative bodies or courts. Similar to the EU model, a preliminary assessment by suppliers themselves classifies these models and the risks. However, a striking difference is that algorithmic impact assessment is to be performed by independent professionals under the Brazil law. This assessment is mandated for high-risk systems.

US

The United States does not yet have federal regulation in place, guiding the use of Artificial Intelligence in the nation. This leaves all regulation to the different agencies to address where algorithms and AI may be violating the laws they enforce. Federal agencies such as the Federal Trade Commission (FTC), Department of Defense, and the Food and Drug Administration (FDA) have proposed guidelines applying to private companies and governments emphasizing transparency, fairness, and traceability. The FDA, for instance, in 2022 released four criteria that clinical decisions software must follow to regulate AI used in healthcare decision-making. Any software that does not follow these will be subjected to intense FDA oversight. The National Institute of Standards and Technology (NIST) also released a voluntary, non-sector specific AI risk management framework for designing and developing AI based systems. This framework defines 7 characteristics that AI must have including fairness, validity, reliability. It also outlines functions such as mapping, monitoring, and documenting, that can be implemented to measure risks.

Apart from Federal Agencies, States have also been pushing for legislation within their own borders. 43 bills in total have been introduced in 21 states, out of which only 4 have been passed

and become a law. These 4 bills introduced in Montana, Indiana, Tennessee, and Texas, include obligations on companies to disclose use of personal data and empower individuals to opt out of their data being used for automated decisions. Texas also created an AI advisory council to study intelligence systems employed by the state. While the passed bills have been largely about private industry AI usage, states like Connecticut are looking to make the department of administrative services conduct an inventory of AI systems they use beginning February 2024.

Several bills have been proposed in Congress as well, most recently the SAFE innovation framework introduced by US Senator Chuck Schumer in June 2023. He proposed four regulatory principles - identification of the person/company responsible for the training algorithm and who the intended audience is, disclosure of data sources, explanation of its results and how it arrived there, and transparency. The most innovative part of the proposal is the series of AI insight forums where AI experts will be invited to brief Congress on topics, starting September. Other legislative proposals include the Algorithmic Accountability Act and the Platform Accountability and Transparency Act of 2022, which advocate for impact assessments and data access for external researchers. Additionally, voluntary mechanisms such as the National Institute of Standards and Technology (NIST)'s 2023 Risk Management Framework, which promotes third-party audits, are also gaining traction (Goodman, 2022).

The Biden Administration has also been taking consistent steps to gently pave a path toward creating a framework for the use of AI. On Oct 4, 2022, the White House released a Blueprint for AI Bill of Rights as a guiding document for AI developers and the principles they should follow in the process of creating systems. These guidelines included taking multiple stakeholders into account, pre deployment testing, proactive equity assessments to prevent algorithmic discrimination, data that is representative, consumer permission to use data, accessibility and knowledge for people to understand how these systems work and the ability to contest and report if their data is misused. He also signed the executive order 13985 directing federal agencies to root out bias in design and use of AI technologies. Most recently, in July, he convened a meeting with leading AI companies including Meta and Open AI to secure voluntary commitments from these companies for development of AI technology. While the commitments include processes like safety procedures and public disclosure of those, and watermarking AI being used by the public to generate products, these commitments are *voluntary* and there is presently no way to enforce these or ensure the companies are following them.

FTC

In its role regulating “unfair and deceptive practices.” FTC has established a sort of “soft law” by issuing guidelines, press releases, workshops and white papers. (Spiro, 2020). Soft laws are informal procedures to address and mitigate grievances. Issued as guides on how to properly use technologies such as facial recognition, and disclosures on mobile applications, these seem to be recommendations and not a compulsory framework. These are statements from the FTC, highlighting its own interpretation of its authority and Section 5, and how it might choose to enforce it (Solove and Hartzog 2013).[*UPDATE and description to be added*]

In 2017, NYC Council became the first legislative body in the US to pass an algorithmic transparency law requiring a comprehensive review of its automated decision systems (Bunnel

2021). The legislation also created a task force to review the state agencies' use of algorithms and the impacted policies. After the review, a recommendation would be developed on whether these algorithms should be made public and how their biasedness will be assessed.

Bunnell (2021) proposes states and local governments establish their own independent Algorithmic Transparency Commissions (ATCs) to balance transparency and accountability with corporate secrecy and security, along with minimizing costs. Such commissions would develop jurisdiction specific rules involving disclosures, audits, investigations, amongst other things through legislative and regulatory actions. A single, centralized commission, the ATC would promote ex-ante rules on minimum disclosure, design, and fairness requirements, while leaving discretion for agencies and vendors to design their systems. He advises bestowing the ATC with enforcement and legal powers, along with bestowing individuals to challenge these systems if they don't meet the ATC requirements. While he discusses multiple nuances of the model, the question of how the ATC itself would be regulated is in contention.

FDA Model

A popular idea supported by many scholars and advocates working in the field is regulation by a federal regulatory agency conducting pre-market review of some algorithms for safety and efficacy, modelled on how the US regulates drugs (Tutt, 2017) (henceforth called the FDA Model). Andrew Tutt, a senior associate at a leading regulatory and litigation law firm, proposed the creation of a new agency, which would have three main responsibilities: (1) to "organize and classify algorithms into regulatory categories by their design, complexity, and potential for harm (in both ordinary use and through misuse)," (2) to "prevent the introduction of algorithms into the market until their safety and efficacy has been proven through evidence-based pre-market trials, and (3) to impose disclosure requirements and usage restrictions to prevent algorithms' harmful misuse."(Tutt 2017).

The FDA model is designed to achieve regulatory efficiency through a centralized authority for vetting algorithms. Lechterman (2022) acknowledges that this form of regulation could hold companies more accountable for the algorithms that they are creating. Other find this model to be unrealistic for a variety of reasons. Almeida et al (2021) believe that though this initiative would increase algorithmic code transparency, that may not ensure explainability of the harms that the algorithm could cause. Furthermore, grouping all forms of artificial intelligence together under one agency would be unfeasible since algorithmic applications vary enormously (Lechterman 2022). Ultimately, establishing public regulatory bodies seems complex due to a "wait and see" approach taken with AI and a lack of technical expertise within public policy bodies (Lewis et al 2020). Therefore, certain scholars have advocated for improving existing institutions as opposed to creating new ones (Himmelreich 2022, Spiro 2020).

CPA-style auditing model (CPA model)

We propose a regulatory model based somewhat on how the independent auditors review corporate financial statements on a regular basis to certify their compliance with national laws and standards. Note that in the case of algorithmic decision-making, auditing is a simplifying term for a more complicated multidimensional process. We do not simply mean auditing the code of an algorithm, or the training data. As Almeida et. al. (2021) points out, "… on certain

occasions, even in case the AI algorithm is open, full transparency cannot be ensured, as there is a difference between seeing the whole code and understanding all of its potential effects," (p. 507). Reike et. al. (2018) explains this very well, providing a 6-dimensional framework for evaluating automated decision-making systems. Mokander et al (2023) notes that the effectiveness of auditing as an algorithmic governance mechanism is arguably based on three broad ideas: (1) ensuring procedural regularity and transparency which can promote good governance, (2) being proactive in the design of algorithms helps in identifying potential risks and preventing harm before it occurs, and (3) maintaining operational independence between the auditor and the entity being audited enhances the objectivity and professionalism of the evaluation.

One of the advantages of this regulatory model, as compared to the FDA model described above, is that the level of bureaucracy and expertise required at the federal level is greatly reduced. As in the SEC's structure, significant expertise is required by the regulator to set standards and engage in oversight. Yet much of the expertise required for evaluating the algorithms themselves can be contained in the private sector, as a commercial industry of automated decision making auditors will develop. These auditing teams likely will be more cross functional than financial auditing teams, as they will require knowledge of coding, data science, and machine learning as well as subject matter expertise in the many laws that could be violated explicitly or implicitly.

Several versions of this have been proposed in the literature, such as periodic audits (Bunnel 2021, Engstrom 2023, Grimmelikhuijsen 2022, and Mokander 2021) and impact assessments focusing on aspects like data privacy and human rights (Almeida 2021, Bunnel 2021, Clough 2018, Engstrom 2023, Grimmelikhuijsen 2022). Some perspectives include combining algorithmic impact assessments with software verification techniques depending on specific use cases (Lechterman 2022), or embedding ethical rules and norms directly in algorithmic code (Bunnel 2021, Gervais 2021).

However, there is a lack of well-defined measures in this field (Buolamwini, 2019). The absence of widely accepted standards or regulatory guidance makes it challenging to verify claims that an AI product or system has undergone an *audit*, regardless of whether the audit was conducted by first-party, second-party, or third-party auditors. This ambiguity can lead to a range of potential issues, as it may not effectively address bias and harm, and in some cases, could even exacerbate the situation (Costanza-Chock et al, 2022). Several scholars have questioned the effectiveness of audits given the lack of industry standards on the scope of audits, and potential conflicts of interest that stem from situations where audits are funded by the company being audited (Schneiderman, 2016; Schellmann, 2021; Buolamwini, 2019)

Other/General
Several other regulatory structures have been proposed. Almeida et al (2021) proposes dynamic regulation based on learning by doing and continuity of regulatory relationships, as well as transparency, to address the challenges that arise from rapid changes to the technology capabilities and definitions.
[*To be completed*]

Summary: Key components of possible governance regimes

Based on the above inexhaustive synopsis of existing and proposed regulatory structures, we highlight a few key charact eristics that must be chosen.

- Centralized v decentralized
  Some proposed regulatory models require a national centralized regulator for all algorithmic decision making and/or AI, while others reply on the regulatory agencies with knowledge and experiences in their specific fields to regulate AI decision making within their scope. This will impact the incentives and effectiveness of the regulator and the resultant incentives of the firms. While a centralized deregulator may reduce some of the information asymmetries, some will remain to the firms' advantage. A centralized regulator will also be more susceptible to capture by the algorithm-deploying firms.
- Ex-post v ex-ante
  Regulation may occur before the deployment of the decision-making system, or after it is in use. This will impact the costs of both the regulator and the firms, as well as the incentives.
- Burden of proof
  The burden of proof that automated decision systems comply with the law may be on the firms to certify their products' compliance or may be on the regulator (and public) to discover lack of compliance. This will significantly impact incentives.
- What gets reviewed
  [*To be completed]*
- Level and dimensions of review
  [*to be completed*]
- Who reviews
  [*to be completed*]

…

A Framework for Evaluating Algorithmic Regulation

We will evaluate alternative forms of regulation according to five criteria:
(1) incentives for firms and other entities to comply
(2) effectiveness in governance (including monitoring and enforcement)
(3) minimization of obstacles to innovation (by potential entrants as well as incumbents)
(4) balance of Type I vs Type II errors
(5) accountability
[*Descriptions to be added]*

Analysis of Regulations

We will create simplified stylized models of the different basic forms of regulation considered.

1. Ex-post evaluation of algorithmic decision making (did it violate the law?)
2. Ex-ante evaluation of algorithm for decision making by a regulatory agency (i.e. the FDA model)

3. Ex-ante revaluation of algorithmic decision making by an independent auditor, as required by regulation (i.e. the CPA model).

Basic Model

There is a fairly large existing literature on game theory modeling of industry regulation[1]. Applied to numerous types of industries and regulations, the general form is considering a firm (or firms) that chooses to comply with the regulation or violate it, and a regulator who chooses to inspect the firm(s) or not. We can simplify that form as follows:

		Regulator: Inspect	Regulator: Don't Inspect
Firm	Comply	f_1 , r_1	f_2 , r_2
	Violate	f_3 , r_3	f_4 , r_4

We can then modify this model to fit our context of regulating algorithmic decision-making to comply with the law. In our case, it is more fitting to think of the level of effort the firm chooses to be sure their algorithms do not violate existing laws (or to minimize the probability that the algorithms violate the law). The regulator, in this case, chooses how rigorously to review the algorithms for violations of laws. Our simplified regulatory model is then as follows[2]:

		Regulator: Tough Review	Regulator: Loose Review
Firm	High Effort	f_1 , r_1	f_2 , r_2
	Low Effort	f_3 , r_3	f_4 , r_4

Each quadrant represents the payoffs of the firm, and then the regulator, for each possible combination of choices. For purposes of this analysis we shall refer to the quadrant 1 (Q1) for High Effort and Tough Review, quadrant 2 (Q2) for High Effort and Loose Review, quadrant 3 (Q3) for Low Effort and Tough Review, and quadrant 4 (Q4) for Low Effort and Loose Review.

There are two standard assumptions we can take as given:

1. If the regulator knows that the firm will use high effort, it will prefer to conduct a less costly les rigorous review, meaning $r_1<r_2$.
2. If the firm knows that the regulator will use a loose review, it prefers to use low effort, meaning $f_2<f_4$.

[1] See, for example Tsebelis 1991, Kilgour, Fung and Hipel 1992, and Gu, Hung and Sun 2022.

[2] As in the noted literature, we simplify by creating a discreet-choice model of a situation that has continuous choices for level of effort and toughness of review. This does not change the conclusions.

Based on these conditions, we see that for this game, neither Q1 nor Q2 can be a Nash Equilibrium regardless of the other characteristics. This means there is no Nash equilibrium where the Firm chooses to exert high level of effort in making their algorithms comply with the law. (*Below we will consider the possibility of ways to develop a regulatory system where the firm does not have a dominant strategy to use low effort.*)

Q3 is a possible Nash Equilibrium and will be the outcome when $f_3>f_1$ and $r_3>r_4$. While the latter condition is conceivably likely, that the regulator will prefer a tough review when the firm uses low effort, the former condition is less likely. If a tough review is lengthy and slows the innovation and profits of the firm by delaying its use of the algorithm, and if the penalty and further delay of a finding of high probability of law violation in the review is sufficiently large, we would expect the firm to prefer high effort when the regulator uses tough review. Thus this equilibrium seems unlikely, though it will depend on the composition of the payouts to the firm and regulator in any particular instance.

Q4 is also a possible Nash Equilibrium and will occur when $f_4>f_2$ and $r_4>r_3$. We have already noted above that the first condition holds. The second condition will hold when the regulator has a dominant strategy to use loose review. We would hope to develop a regulatory system where this is not the case, as it would be highly ineffective, with a Nash Equilibrium of low effort and loose review. The occurrence of this as a Nash Equilibrium will again depend on the components of the payoffs, to be discussed below.

It is also possible that none of the quadrants is a Nash Equilibrium, leaving us with a situation of both players randomizing between their moves in a Mixed Strategy Nash Equilibrium (MSNE). This will happen when $f_1>f_3$ and $r_3>r_4$. When this is our situation, each player's randomizing probabilities will be determined not by their own payoffs, but by the other player's payoffs, as follows:

$$\text{P(Firm chooses High)} = p^* = \frac{r_4 - r_3}{r_1 - r_2 - r_3 + r_4}$$

$$\text{P(Regulator chooses Loose)} = q^* = \frac{f_4 - f_2}{f_1 - f_2 - f_3 + f_4}$$

Thus we see that, as found by Tsebelis (1991), if we are in the MSNE, any changes to the firm's payoffs meant to increase their incentive, and thus frequency, of high effort, will not change the firm's probability of high effort, but will change the probability of the regulator doing a tough review, and likely will decrease it.

As noted above, the equilibrium outcome of the regulatory game will be determined by the components of the players' payoffs, which may change under different regulatory design regimes. Before we consider these changes, let we will first describe the different [possible components of each player's payoffs.

Firm's payoff components:
π = profit from use of algorithm
c_1 = costs of algorithm development and deployment

c_2 = costs associated with effort to comply with laws (higher for higher effort)
c_3 = costs associated with regulatory review (higher for tough review)
c_4 = costs of delay in using algorithm while waiting for completion of review (higher with tough review)
v_1 = value of the violation (e.g. fewer constraints in use of targeting marketing, etc) (Kluger, Fong & Hipel 1992)
R = reputation effect of violation found (<0) or not found (>0)
P = penalty imposed when law violation found

Regulator's payoff components:
a_1 = costs of review (higher when tough)
a_2 = societal cost of law violation
a_3 = societal costs of slowed innovations when review causes delay (higher when tough for ex-ante)
H = reputation and legitimacy gain from finding violation

We will now consider this basic model in the context of different possible regulatory regimes.

Ex-post regulator review (FDA model)
In a regime of ex-post regulatory review, the regulator would review the algorithm after its deployment when there is probable cause that a law was violated. This has some similarities to regulation by litigation. If there is probable cause, we can assume the regulator will conduct a thorough, rigorous review. The choice of the regulator for light or tough review comes in the level of investigation to determine if there is probable cause based on evidence from the system being in use.

First, we note that the two standard assumptions of the basic model will still hold as given in this instance. If the regulator knows that the firm is using high effort, then the probability of law violation is lower so the regulator will prefer the less costly light review for probable cause. Also, if the firm knows that the regulator is using light review and therefore unlikely to find probable cause, even if it exists, the firm prefers to the less costly low effort.

To determine if Q3 will be an equilibrium, we must consider how likely it is that $f_3>f_1$ (giving the firm a dominant strategy to use low effort) and $r_3>r_4$. In an ex-post regulatory regime, the firm's profits earned from the algorithm (π) are higher because the algorithm can be deployed and used sooner. While the benefit of this is the same for high effort and low effort, the cost of high effort to comply with laws will be more than low effort (c_2). Usually the cost of a tough review (c_3) will be higher for the firm if it used low effort versus high effort, but with the ex-post regulatory system these are probably the same because the information asymmetries between the firm and regulator are higher, making it more difficult for the regulator to find probable cause even when the firm used low effort. This also means the probability of finding probable cause is lower in this regulatory system, even with a tough review, so the probability of the firm incurring a penalty (P) is likely very similar for low effort and high effort. This also means the value of R is likely the same for both low effort and high effort, because law violations are less likely to be found. Since law violations are less likely to be found, any such violations that still exist because

the firm chose low effort will bring additional value to the firm (v_1) Therefore, the differences between f_3 and f_1 are largely based on the additional cost of high effort and the loss of the value of the violation for high effort so low effort will have the higher payoff, making the condition $f_3>f_1$ true.

For the regulator's payoff condition, the cost of the tough review (a_1) is higher, but because of the higher information asymmetries of ex-post regulation, the tough review is not much more likely to result in probable cause than the loose review, so the probability of receiving the benefit of H is not higher. The societal cost of the violation (a_2) is likely the same for tough or loose review for the same reason, and the societal cost of delayed innovation (a_3) is not relevant because the algorithm is deployed prior to review, causing no delay in innovation. With the only significant difference in payoffs being the cost of the review, the condition $r_3>r_4$ does not hold. Therefore, Q3 is not an equilibrium.

Based on this analysis, we do see that Q4 is likely to be an equilibrium, as we just concluded that the condition for this, $r_4>r_3$, does hold for this regulatory regime. Therefore, we conclude that ex-post regulation is likely to have an outcome of low effort by the firm and loose review by the regulator, resulting in high probabilities of law violations in algorithmic decision-making.

A MSNE will occur if $f_1>f_3$ and $r_3>r_4$. The analysis above shows that both of these conditions are unlikely to hold, so this is an unlikely outcome.

While this analysis shows which outcomes are likely under an ex-poste regulatory regime, it also provides guidance in designing such regulation. We can use this understanding of the incentives to create mechanisms that will change the relative payoffs as described here to try to get different outcomes.

Note that the outcome of harm from violations if not caught by the regulator is far more likely in the case of algorithmic decision-making than in other regulatory situations. This is because something not caught by the regulator is unlikely to be caught at all. It would take quite a lot of effort and cost to compile results across a large number of individuals to show that there is a violation of law. In other regulatory situations modeled in the literature, like environmental regulation compliance or infrastructure maintenance laws or worker safety regulation, undetected violations will have a more significant probability of resulting in a public event (e.g. a major oil spill, worker harm, bridge failure, etc). Thus, ex-post regulation is not very effective.

Ex-ante by regulator

In a regime with ex-ante review by a regulator, the regulator must review and approve algorithms before they are deployed. This is the FDA model discussed above. While all algorithms of certain specifications will be reviewed, the regulator is choosing the thoroughness and rigor of its review (tough or loose). We can generalize this to include the quality of the review, based on the choice and ability of the regulator to acquire the necessary expertise and skill.

Again, we note that the two standard assumptions of the basic model will still hold as given in this instance. If the regulator knows that the firm is using high effort, then the probability of law violation is lower so the regulator will prefer the less costly light review. Also, if the firm knows

that the regulator is using light review and therefore unlikely to find a violation, even if it exists, the firm prefers to the less costly low effort.

To determine if Q3 will be an equilibrium, we must consider how likely it is that $f_3>f_1$ (giving the firm a dominant strategy to use low effort) and $r_3>r_4$. In an ex-ante regulatory review, the firm's profits earned from the algorithm (π) are reduced because the algorithm cannot be deployed and used until it has been reviewed and approved. While the cost of this delay (c_4) will likely depend more on the regulator's choice of tough or loose than on the firm's choice of high effort or low effort. However, when comparing these two payoffs under tough review, the delay might be less for high effort than low effort because there is a lower probability that a violation is found, so the algorithm will be approved without revision. Also, with high effort it is possible that the firm can provide the regulator with more information to aid its review that will expedite even a tough review, further reducing the delay time. The cost of high effort to comply with laws will be more than low effort (c_2). Usually, the cost of a tough review (c_3) will be higher for the firm if it used low effort versus high effort, because there will be more questions raised that require the firm's response and the cost of modifications for any violation found. Low effort does provide some additional value from the violation (v_1) if it is not found by the regulatory review, but in a tough review it is more likely to be found so the expected value of this is lower. Since a violation from low effort is more likely to be found in a tough review, the value of R is higher for high effort than low effort.

In sum, if there is a tough review, a high effort will provide the firm a payoff with higher compliance costs and no expected value of benefit from a violation, but lower review costs, lower delay costs, higher reputation benefits, and no expected penalty cots compared to its payoff from low effort. The condition $f_3>f_1$ will be true when:

$$c_{2H} - c_{2L} + \alpha v_1 > c_{3L} - c_{3H} + c_{4L} - c_{4H} + \alpha R + \alpha P,$$

where α is the probability that a violation is found with tough review.

For the regulator's payoff condition, the cost of the tough review (a_1) is higher. In an ex-ante regulatory review system the information asymmetries are lower than the ex-post regulation, and a tough review is significantly more likely to find any existing law violation than the loose review, so the probability of receiving the benefit of H is higher for the tough review than the low review since the firm's effort is low. The societal cost of the violation (a_2) is higher for a loose review since the violation is less likely to be found and corrected. The societal cost of delayed innovation (a_3) is higher for a tough review than a loose review, as the tougher review will take longer and increase the delay in innovation. Thus, the condition $r_3>r_4$ will hold when:

$$a_{2L} - a_{2T} + \alpha H > a_{1T} - a_{1L} + a_{3T} - a_{3L}.$$

Therefore, Q3 (low effort and tough review) may bet an equilibrium, depending on the relative value of the above components of the players' payoffs.

Based on this analysis, we see that Q4 (low effort and loose review) will be an equilibrium when the condition $r_3>r_4$ does not hold, or when:

$$a_{2L} - a_{2T} + \alpha H < a_{1T} - a_{1L} + a_{3T} - a_{3L}.$$

This is possible depending on the relative magnitude of the components of the regulator's payoffs only.

An ex-ante regulatory review regime will result in MSNE when $f_1 > f_3$ and $r_3 > r_4$. Based on the above analysis, we see this occurs when the two following conditions are met:

$$c_{2H} - c_{2L} + \alpha v_1 < c_{3L} - c_{3H} + c_{4L} - c_{4H} + \alpha R + \alpha P, \text{ and}$$

$$a_{2L} - a_{2T} + \alpha H > a_{1T} - a_{1L} + a_{3T} - a_{3L}.$$

Ex-ante by independent auditor as required by regulation (CPA model)
Regulation that requires ex-ante review by an auditor is similar to the ex-ante regulatory review discussed above. The payoffs for the firm remain the same. However, the auditor has different payoffs than the regulator does. In this case we will assume the auditor is part of a private sector firm that provides audit services for automated decision-making systems. In most other senses the game is similar because the auditor, like the regulator, chooses the level of rigor of the audit they conduct. This has been modeled for auditing of public company financial statement by certified public accountants (CPAs) in many ways using game theory. Some of these models consider the auditor's choice of how rigorously to audit the financial statements, sometimes based on the length of relationship with the client to determine if this leads to increases in knowledge and ability to detect errors or to decreases in independence and willingness to report errors.[3]

We begin by considering the same basic model as above, replacing the payoff components of the regulator with those of the decision system auditing firm as follows:

Auditor's payoff components:
a_1 = costs of review (higher when tough)
H_1 = reputation gain from finding violation, which can maintain or increase standing with regulator.
H_2 = impact of reputation from finding violation on obtaining and retaining clients (Intuitively it seems this could be positive or negative. However, Anastasopoulos and Asteriou (2021) include both a penalty for not finding errors when they are present and a bonus for finding errors in their models, so tentatively considering this to be positive when violations found and negative when violations not found, if that is subsequently discovered.)
F = revenues received from client firms for auditing services, assumed increasing in reputation of quality audits because can charge higher rates. (This is based on H_1 and H_2 because neither client firm nor regulator can observe if auditor has chosen tough audit or loose audit.)

For this game we must modify our two standard assumptions taken as given in the basic model above:

[3] For example, Fellingham and Newman 1985, Anastasopoulos and Asteriou 2021,.

1. If the auditor knows that the firm will use low effort, it will prefer to conduct a tougher more rigorous audit to find violations and maintain its certification status, meaning $r_4<r_3$.
2. If the firm knows that the auditor will use a loose, less rigorous audit, it prefers to use low effort, meaning $f_2<f_4$.

Based on these conditions, we see that for this game, neither Q2 nor Q4 can be a Nash Equilibrium, regardless of the other characteristics. This means there is no Nash equilibrium where the auditor chooses the less rigorous audit.

Q1 is a possible Nash Equilibrium and will be the outcome when $f_1>f_3$ and $r_1>r_2$. The analysis of the condition for the firm's payoffs is the same as in the discussion for Q3 when there is ex-ante regulatory review above, except the cost of the audit will be the same for high or low effort as the fees form the auditor will be the same. In sum, if there is a tough audit, a high effort will provide the firm a payoff with higher compliance costs and no expected value of benefit from a violation, but lower delay costs, higher reputation benefits, and no expected penalty cots compared to its payoff from low effort. The condition $f_1>f_3$ will be true when:

$$c_{4L} - c_{4H} + \alpha R + \beta P > c_{2H} - c_{2L}\ \alpha v_1,$$

where β is the probability that the regulator later finds a violation not found by the auditor.

For the auditor's payoff condition, given that the firm uses high effort, the cost of a loose audit will be lower, the reputation benefits with the regulator and for obtaining and retaining clients will be higher for a tough audit if a violation is found, and a tough audit offers potential to increase fees charged for audits in the future (indicated by *F'*) if a violation is found. Therefore, the condition will be met when

$$\alpha H_1 + \alpha H_2 + \alpha F' > a_{1H} - a_{1L}.$$

Q3 will be a Nash Equilibrium when $f_3>f_1$ and $r_3>r_4$. The second condition is given as an assumption so that is true. The first condition is simply the opposite of the condition previously considered in evaluating the possibility that Q1 is a Nash Equilibrium. The first condition will be met when

$$c_{4L} - c_{4H} + \alpha R + \beta P < c_{2H} - c_{2L}\ \alpha v_1.$$

The only equilibrium will be an MSNE when $f_1>f_3$ and $r_2>r_1$. Based on the review of the quadrants, these conditions will be met when:

$$c_{4L} - c_{4H} + \alpha R + \beta P > c_{2H} - c_{2L}\ \alpha v_1, \text{ and}$$

$$\alpha H_1 + \alpha H_2 + \alpha F' < a_{1H} - a_{1L}.$$

Regardless of the value of the parameters in any situation that determine the equilibria of this game, one clear advantage of this regulatory regime is that Low Effort and Loose Audit is never an equilibrium. This is a better outcome for society it increases the possibility of high effort by

the firm, and increases the probability that violations from a firm choosing low effort will be found.

Additional advantages of the auditor review include less burden on the government to acquire the necessary (and expensive) expertise in large numbers, and the benefit to the economy of the new auditing firms and jobs created.

Evidence
Limited at best for algorithms

Recent FTC settlement with Meta – ex-post; harm done; burden of proof inconsistent with asymmetries
[*To be completed*]

Evidence based on pharmaceutical industry (of FDA model)
[*To be completed*]

Evidence based on independent auditing requirement for corporate financial statements
U.S. history offers valuable insights from the audit industry and its regulation. The Securities Act of 1933 and the Securities Exchange Act of 1934 laid the foundation for the regulation of securities and financial reporting, requiring public companies to submit audited financial statements to the Securities and Exchange Commission (SEC) (Barkai and Benzell, 2018). This move bolstered investor trust and encouraged capital (Fridson 2003) flow into the market. The audit industry's expertise and experience in assessing financial records and internal controls have been instrumental in preventing fraud, enhancing corporate governance, and safeguarding the interests of shareholders and stakeholders. Moreover, the establishment of accounting standards, such as the Generally Accepted Accounting Principles (GAAP), further solidified the industry's role in providing consistent and reliable financial information (Fridson 2003).

The U.S. accounting regulation historical evolution demonstrates the significant impact of regulatory measures on investments and business sentiments. After the Enron scandal in 2001, the Sarbanes-Oxley Act (SOX) was introduced to address corporate fraud and rebuild investor trust in financial institutions. SOX mandated stricter financial reporting requirements, internal controls, and enhanced corporate governance practices. The regulatory response led to increased transparency and accountability in the financial sector, positively influencing investments and restoring business sentiments over time. The impact on the regulated firms is also worth noting. SOX implementation initially led to a decline in the initial returns of Initial Public Offerings (IPOs) in the United States, but was found to improve the aftermarket performance of IPOs potentially due to the provisions of the act aimed at enhancing transparency and reducing market volatility (Johnston and Madura 2009). The success of SOX in enhancing investor confidence therefore may provide some evidence for how the CPA model may foster compliance, audit, and trust in algorithmic decision-making systems from a market perspective.

Carney (2005) provides an analysis of the impact of SOX on small firms. He found had a significant impact on small firms, resulting in increased compliance costs, financial strain, limited access to capital, and a potential hindrance to business operations. Compliance with SOX requirements placed a burden on smaller companies, diverting resources from core operations and hindering their competitiveness. Some investors and lenders perceived the higher compliance costs as a risk factor, limiting small firms' access to capital. The Securities and Exchange Commission (SEC) made efforts to address these concerns by streamlining auditing requirements for small companies in 2007, aiming to reduce the compliance burden while upholding the Act's goals (Carney 2005).

It is also interesting to note how the CPA industry evolved based on these regulations, and helpful to contemplate how an industry of certified algorithm auditors might similarly develop. The evolution of the independent auditor industry in the United States can be traced back to ancient times when societies began to keep records of economic goods and activities. As societies became more complex, the need for accountability in tribute and taxes collected by ruling authorities arose. Furthermore, the advent of double-entry bookkeeping and the publication of Luca Pacioli's book on double-entry bookkeeping in 1494 marked significant milestones in accounting development. The Industrial Revolution in the late 18th century brought about changes in business operations, leading to the growth of large-scale manufacturing and joint-stock companies, which necessitated more sophisticated accounting practices. During the late 1800s and early 1900s, professional associations like the AICPA2 emerged, setting standards and codes of conduct for accountants and auditors. The Great Depression in the 1930s facilitated the formation of the SEC, leading to standardized accounting principles for publicly-traded companies (Zaff 2021). As the American economy grew and became dynamic and complex over the years, the need arose for reliable and standardized assessments of companies' financial health. The establishment of auditing practices helped to address this gap by providing independent evaluations of financial statements, ensuring accuracy, and detecting fraudulent activities (Auditing Symposium 1994).

Criticism and downsides of the auditing system, particularly in relation to the independence of auditors, have been a topic of discussion in the accounting and auditing profession for decades. One key concern is the potential lack of sufficient independence of auditors, which could compromise the objectivity and credibility of their work[4].

Preliminary Findings
[*To be completed*]

Conclusion
[*To be completed*]

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[4] See, for example, Bostrom and Garsten (2008).

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Organization: Credo AI

General Comment

See attached pdf.

Attachments

Credo AI Response_OMB RFC_5 Dec 2023

credo | ai

Dec 5, 2023

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Executive Office of the President
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RE: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI) - OMB–2023–0020

Credo AI is a Responsible AI Governance Platform that has been a driving force for change within the global AI ecosystem, pushing for greater transparency, governance, and oversight of AI and its responsible development and use since its inception in 2020. Credo AI's Founder and CEO, Navrina Singh, serves as a Member of the National AI Advisory Committee (NAIAC) and is a Member of the OECD's Expert Group on AI Risk and Accountability. She has dedicated her career to building AI products responsibly (safe, secure, fair, compliant and human centered) advocating for Responsible AI Governance and its safe development and deployment on a global scale.

About Credo AI

Credo AI is a software tool provider; we have built a Responsible AI Governance platform that supports contextual AI governance in companies of all sizes from Global 2000s to early stage startups, across different industries including financial services, insurance, healthcare, human resources, public sector use of AI (including federal procurement), and more.

Credo AI's mission is to maximize the benefit of AI to humanity, using our leading AI governance platform for AI risk management, compliance, safety, ethics, explainability, fairness, and economic opportunity. With Credo AI, organizations are able to adopt and scale AI safely, responsibly and effectively, oversee and mitigate AI risk (including operational, regulatory, and reputational risks), maintain AI ethics standards and compliance (with both internal policies and external regulation and guidance), and future-proof their organization to enable frontier AI adoption.

Credo AI is very encouraged by the U.S. Office of Management and Budget (OMB) Draft Memorandum on "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence." We agree that it is incumbent upon the United States Government to chart a path forward to harness the benefits and mitigate the risks of AI. As the OMB has rightly noted, promoting continued U.S. leadership in AI innovation requires managing AI risks and effective AI governance.

With the issuance of this guidance, the United States can lead by example - setting the global standard for AI enterprise risk management. Credo AI strongly supports the establishment of mandatory requirements for federal agencies to adopt minimum risk management practices for safety-impacting and rights-impacting AI.

Executive Summary

Credo AI stands ready and willing to help OMB operationalize risk management for agency use. In our response, we have focused on:

- **Advancing Responsible AI Innovation.** To build internal enterprise capacity to support responsible AI innovation and improve AI procurement, OMB should continue to reinforce the need for agencies to document and register all their AI use cases, identify risks contextually, track changes in system compliance, and mitigate risk.
- **Using Governance Artifacts to enable Transparency in AI Procurement Processes.** A crucial, initial step toward advancing responsible AI innovation and risk management within federal agencies is to document and register all AI use cases and applications.
- **Evaluation and Public Transparency.** Third-party auditing enables responsible use of AI and increases transparency and explainability of AI systems. Outcomes from third-party audits should be included within annual use case inventories along with information about why a vendor was selected, the procured AI model's intended use case(s), and the steps taken to govern procured AI pre- and post-deployment.

Advancing Responsible AI Innovation (Q3)

We fully support agencies' work to improve their ability to use AI in ways that benefit the public, while recognizing when and why AI may not be suited for a given task.

To build internal enterprise capacity to support responsible AI innovation and improve AI procurement, OMB should continue to reinforce the need for agencies to:

- **Document and register** all their AI use cases. Agencies need to maintain a repository for AI they are building, procuring, and using.
- **Identify risks contextually**. Develop a plan to manage context specific risks.
- **Track Changes in System Compliance**. Establish adequate safeguards and oversight mechanisms for all uses of AI, not just generative AI.
- **Mitigate Risk**. If the AI System isn't meeting all requirements, identify mitigation strategies and accountable stakeholders.

Registering AI Use Cases (Q5)

We are aligned with the OMB's guidance to agencies to incorporate additional best practices for AI risk management, such as from the National Institute of Standards and Technology (NIST) AI Risk Management Framework. This will be critical for interoperability and common definitions across government and industry.

Registering and documenting all AI use cases is a critical first step in understanding potential risks, impacts, and the value of AI systems. This is also a method for agencies to prioritize high-value systems for development earlier on, and potentially "hold off" on procuring or acquiring AI systems that do *not* deliver enough value to justify the potential risk. Having a comprehensive list of risks ahead of testing and evaluating AI systems may prove difficult, given unknown or unforeseen risks. We are aligned with the current guidance that agencies should identify additional context-specific risks that are associated with their determined use cases (i.e. including the use of generative AI for internal purposes by agency staff). It is critical to have an auditable repository that allows agencies to review and approve AI use cases.

Using Governance Artifacts to enable Transparency in AI Procurement Processes (Q4, Q7)

Credo AI recommends the adoption of trustworthy practices for government use and procurement of AI systems in order to ensure that both generative AI and traditional AI/ML procured by the USG is contributing to the provision of essential services, and

the public good. At minimum, these trustworthy practices should include mechanisms for third-party transparency pre- *and* post- procurement.

The USG has an opportunity to lead by example by establishing a baseline of what Responsible AI adoption requires in practice. To safely procure and adopt generative AI, large language and foundation models providers should be required to:

- **Provide model-level transparency disclosures.** Such disclosures should be made available to the appropriate regulatory or enforcement body within the USG, the agencies that wish to procure the use of such a model, as well as any downstream application developers (*not* the general public) to ensure they are fit for purpose. Disclosures can take the form of several different types of "governance artifacts," including comprehensive AI use case risk reporting, model cards, data set cards, and algorithmic impact assessments (AIAs) described in detail below. Information about red-teaming methodologies and outcomes can increase the robustness of these disclosures.
- **Provide organizational-level process (and use) disclosures.** Organizations should be required to disclose (to the general public and corresponding agency) if and how they are using LLMs/FMs. Beyond transparency disclosures at the model level, LLM/FM providers must institute organization-level policies for responsible use and development, including investment in AI safety and governance, and processes to ensure full lifecycle governance.

Beyond large language and foundation model providers, any enterprise providing traditional AI or general AI services should be required to provide governance artifacts. Within the procurement process, federal agencies should be requesting enterprise vendors to provide governance artifacts.

Governance Artifacts

For adequate testing and safeguards against risks such as discriminatory, misleading, inflammatory, unsafe, or deceptive outputs, agencies should incorporate requirements into relevant contracts such as:

- Algorithmic Impact Assessments (AIAs) of the systems when applied to a use case;
- requirements for Model and Dataset Cards from the commercial AI providers;

- a public catalog of AI systems used or procured by government bodies aligned with EO 13960[1]; and,
- regular transparency reporting requirements that provide information about the system (including its performance, assessment for unintended bias, potential risks, incidents of harm, and impacts) through Conformity Assessments.

Algorithmic Impact Assessments

The components identified in the OMB Guidance would be further complemented by referencing a taxonomy of risks correlated to AIAs - this taxonomy of AI risk would provide needed and consistent guidance for developers and deployers of AI systems, and ideally inform the areas that are most important to consider when assessing its AI system's potential impact. The following risks could be considered in such a taxonomy: abuse & misuse, compliance, environmental and societal impact, explainability and transparency, fairness and bias, performance and robustness, privacy, and security.

AIAs are indispensable transparency tools for entities throughout the entire AI value chain, from foundational model providers to the developers who build upon them, to the end users using AI in their daily lives. We support the OMB's inclusion of AI Impact Assessments in the minimum practices for safety-impacting and rights-impacting AI procured by federal agencies.

Key Considerations for Inclusion in AIAs

Some elements of the AIA should be standardized, some should not (e.g. some AIAs should be more focused on privacy than safety depending on the Agency). Baseline requirements for AIAs across all agencies should include:

- Use Case Description
  - Application Context
  - Task & Output
  - Data & Input
  - ML Models (with model cards)
- Responsible AI Evaluation
  - Abuse & Misuse: How well is the system protected from the potential to be used maliciously or irresponsibly (intentionally or unintentionally)?
  - Performance Evaluation: How well does the system perform, what are the accuracy and performance limitations?

[1] Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government

    - Fairness Evaluation: Is the system causing disparate impact or harm to different groups that interact with it?
    - Security Evaluation: Is the system secure against adversarial attacks or other bad actors' manipulations?
    - Privacy Evaluation: Does the system preserve individual privacy?
    - Explainability and Transparency Evaluation: Is the system understandable and transparent to all relevant stakeholders?
    - Environmental & Societal Evaluation: What broader changes might the AI system induce in society and the environment, such as labor displacement, mental health impacts, or the strain on natural resources and carbon emissions caused by training complex AI models?
- Risk & Harms
    - Assessment: What are the potential risks and harms caused by the system. What is the likelihood and impact of each risk and harm?
    - Mitigation: What steps have been taken to mitigate the identified risks and harms?

AIAs should also consider and include:

- Context and use case specific information tailored to meet the needs of each agency.
- Information that helps determine if a model is fit for purpose.
- Information about what non-AI solutions were explored, the relevant risks and benefits for that solution and why was an AI system ultimately chosen.
- Descriptions of why certain performance and evaluation metrics were selected.
- Reports should be readable by employees and data scientists at each agency.
- AIAs should include documentation on plans to proactively identify and address new risk scenarios.

Model Cards, Dataset Cards, & Conformity Assessments

Liability is distributed throughout the AI value chain; as such, creating and providing transparency documentation is the responsibility of both providers and downstream developers of AI. Credo AI agrees that Federal Agencies should take steps to ensure the transparency and adequate performance of their procured AI by obtaining documentation from vendors, such as through the use of AIAs, model cards, dataset cards, and system cards. Examples (or explicit references to templates) from OMB on the elements that should be included in these AI model cards, dataset cards, and system cards would further enhance the usefulness, viability, and interoperability of these transparency mechanisms.

Model Cards should document basic technical information about a ML model that is relevant regardless of where and how the model is going to be deployed. Model Cards can be created by model builders before a final end application for the model has been identified. Model Cards are designed to give stakeholders visibility into how a model works and what it does, along with potential technical limitations and risks.

Dataset Cards are designed to provide some basic information about what a dataset is and contains, its source, and its potential limitations for use in training (or testing) a ML system. Dataset Cards provide critical supplementary transparency about the factors that influenced a model's development and facilitate third-party auditing and reproducibility.

Conformity assessments enable buyers, sellers, consumers, and regulators to have confidence that products sourced meet specified standards. Conformity assessments ensure that products, services, systems, persons, or entities meet certain required characteristics, and that these characteristics are consistent from product to product, service to service, system to system, etc.

We believe that the practices outlined above will result in positive downstream effects that encourage the adoption of Responsible AI practices in industry and commercial sectors, similar to how government procurement standards have led to the widespread adoption of data encryption and energy efficient building standards.

Evaluation and Public Transparency (Q8)

We support the Executive Order's inclusion and emphasis on the need to develop standards for testing and evaluation of AI models, building on NIST's previous AI Risk Management Framework (RMF). Such standards will create interoperable benchmarks for third-parties to better evaluate and audit AI capabilities.

Independent audits that allow a third-party to replicate the foundation model provider's findings, providing a layer of external scrutiny and accountability, should be mandated. It is possible for foundation model providers to provide the requisite content for a third-party assessor or auditor to test the foundation model's bias, self-awareness, and other dimensions without releasing actual model code or training data (IP and proprietary information).

To ensure effective transparency, agencies should include in their annual use case inventories information about why a vendor was selected, the procured AI model's intended use case(s), and the steps taken to govern procured AI pre- and post-deployment such as use case risks, governance controls, and compliance protocols. Governance and compliance protocols include risk assessment and mitigation steps taken by the corresponding agency and, where appropriate, the outcomes from third-party audits.

Conclusion

We must foster an environment where transparency is not an afterthought, but a foundational aspect of AI development. The USG demanding transparency from procured AI and leading by example will not only engender trust, but also catalyze innovation in a manner that is responsible, equitable, and aligned with our collective values.

Credo AI appreciates this opportunity to comment on these issues and OMB's efforts to advance governance and risk management for agency use of AI. We welcome any further opportunity to provide resources or information to assist in this important effort. If you have any follow-up questions regarding these comments and recommendations, please contact Credo AI's Director of Global Policy, Evi Fuelle (evi@credo.ai).

Sincerely,

Navrina Singh

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Submitter Information

Organization: AFL-CIO Technology Institute

General Comment

Please see attached pdf.

Attachments

AFL-CIO Tech Institute Comment OMB AI Guidance

Clare Martorana
U.S. Federal Chief Information Officer
Office of Management and Budget
725 17th St. NW
Washington, DC 20503

Re: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (Docket ID: OMB-2023-0020)

December 5, 2023

Dear Chief Information Officer Martorana,

The AFL-CIO Technology Institute welcomes the opportunity to provide comments on the Office of Management and Budget's (OMB) draft memorandum titled *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* available at 88 Fed. Reg 75625.[1] The AFL-CIO Technology Institute (TI) is an independent, non-partisan organization affiliated with the AFL-CIO–a voluntary, democratic federation of 60 unions representing 12.5 million workers in all regions and sectors of the economy and public service, including the federal government. The AFL-CIO Technology Institute seeks to provide workers a voice in the technological changes sweeping the workplace and society, including artificial intelligence, and ensure that technology augments, empowers, and benefits workers.

TI commends the OMB for proposing a robust regulatory framework for the federal government's use of artificial intelligence (AI). The presumptions of safety-impacting and rights-impacting purposes and required minimum risk-management practices provide a strong foundation for addressing the significant threats AI poses to workers on the job and as citizens. In the comments below, TI offers recommendations for ways the OMB can build upon this foundation to better center workers in its guidance. Our comments focus on four areas: 1) Ensuring AI improves the quality of federal jobs and empowers federal workers to deliver high quality public services, 2) Incorporating worker voice into agency AI governance, 3)

[1] Office of Management and Budget, "Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum," *Executive Office of the President*, U.S. Federal Government (November 3, 2023).

Strengthening AI risk management practices to include worker-centered R&D, and 4) Including worker protections within AI procurement policy

The OMB must ensure that AI improves the quality of federal jobs and empowers federal workers to deliver high quality public services (Q3 & Q4)

President Biden's Executive Order 14110 on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence directs the Executive Branch to adhere to the principle that "the responsible development and use of AI requires a commitment to supporting American workers."[2] This principle, as elaborated in the EO, includes ensuring workers have a seat at the table through collective bargaining and taking steps to prevent AI from worsening job quality, encouraging undue worker surveillance, introducing new health and safety risks or causing harmful labor-force disruptions.[3] The OMB may further adhere to this principle by: 1) aligning its guidance with the Executive Order on Worker Organizing and Empowerment and the Executive Order on Protecting the Federal Workforce; 2) encouraging good faith collective bargaining with federal unions; and 3) investing in training incumbent workers.

Align OMB guidance with the Executive Order 14025 on Worker Organizing and Empowerment and the Executive Order 14003 on Protecting the Federal Workforce

The OMB's guidance will shape the most significant change to federal jobs and federal work in a generation. This momentous change must not be permitted to intensify workloads, justify understaffing, ratchet up worker surveillance and algorithmic management, overrule professional judgment, deskill or displace federal workers altogether. The deterioration of federal job quality threatens to harm not just federal workers alone. The public receives higher quality public services from federal workers empowered with the skills, tools, time, and autonomy to be flexible and creative in how they serve the public.

To protect federal job quality and empower federal workers to deliver quality public services, OMB guidance must fully incorporate the Biden Administration's extant job quality directives, namely, Executive Order 14025 on *Worker Organizing and Empowerment*[4] and Executive Order 14003 on *Protecting the Federal Workforce*.[5] The Executive Order on *Worker Organizing and Empowerment* seeks to establish the federal government as a model employer and encourage worker organizing and collective bargaining–including by federal workers–as official policy of the Biden-Harris Administration. According to the report of the White House Task Force on Worker Organizing and Empowerment chaired by Vice President Harris:

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[2] *Memo*, pg 75191.
[3] *Ibid.*
[4] Executive Order 14025 on Worker Organizing and Empowerment, Executive Office of the President, U.S. Federal Government (April 26, 2021).
[5] Executive Order 14003 on Protecting the Federal Workforce, Executive Office of the President, U.S. Federal Government (January 22, 2021).

> "The federal government should be a model employer that facilitates its own employees joining or organizing a union, if that is what employees choose to do. Also, when federal employees organize a union, they should have an effective voice in workplace issues through their union and federal management should work closely with these unions to solve workplace issues in a manner that advances agencies' missions and produces high-performance workplaces."[6]

The Executive Order on *Protecting the Federal Workforce* reiterates that the policy of the Biden Administration explicitly encourages empowering federal workers, federal worker organizing and collective bargaining with federal unions:

> "It is the policy of the United States to protect, empower, and rebuild the career Federal workforce. It is also the policy of the United States to encourage union organizing and collective bargaining. The Federal Government should serve as a model employer."[7]

The OMB guidance must emphasize the Biden Administration's commitments to federal job quality and worker empowerment and require agencies to implement AI in ways that reflect that commitment. First and foremost, AI strategic plans and implementation actions must comport with existing collective bargaining agreements. When creating new federal AI or AI-related jobs, agencies should utilize the Departments of Labor and Commerce's *Good Jobs Principles*.[8] AI and AI-related jobs should be full-time jobs within existing bargaining units or easily accretable into existing bargaining units, as opposed to overreliance on non-union hiring pathways such as excepted service, national service, and fellowships. As AI reshapes existing federal jobs, agencies must create processes in collaboration with federal unions that allow incumbent workers to move into higher pay grades as AI and upskilling shifts the task mix of jobs towards higher complexity tasks. Lastly, unions can play a formal role in investigating and reporting non-compliance with OMB and agency AI policies.

Encourage good faith collective bargaining with federal unions over the adoption of workplace AI systems and their impact on federal jobs and workers.

Given the potential of AI to transform jobs and working conditions, the OMB should encourage agencies to regard AI technologies as a mandatory subject of bargaining and submit to federal mediation at impasse. The duty to bargain must be broadly drawn, encompassing not just the impact of AI technology on workers but the selection of specific technologies, allowable uses of the technology and its data, training, implementation timelines and accommodations, ongoing

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[6] White House Task Force on Worker Organizing and Empowerment, *Report to the President*, U.S. Federal Government (February 2022), pg 17.
[7] *Executive Order 14003*
[8] U.S. Departments of Labor and Commerce, *Good Jobs Principles*, U.S. Federal Government (June 21, 2022).

consultation during and after deployment, and other issues as they arise. Federal agencies must notify the union prior to making the decision to implement a specific AI technology and disclose relevant information about the AI technology to the union for bargaining purposes, including the results of predeployment impact assessment, testing, and independent evaluation, as well as the data it collects on workers, who owns worker data, and how agencies and vendors use worker data.

Collective bargaining helps to address the socio-technical challenges arising from AI technologies. Integrating AI into the workplace can be a fraught process that creates costly disruptions and worker and customer dissatisfaction. Researchers have documented how the introduction of new technologies reconfigures work roles and expectations, shifting employee norms, interpersonal relationships and teamwork, procedural routines and skill sets.[9] Integrating new AI technologies into the workplace requires a concerted effort that often goes unrecognized and uncompensated, requiring additional workload that may be unfairly and unevenly distributed among employees.[10] Women and people of color often bear the brunt of integrating technology as more vulnerable workers enjoy less of a say over their jobs and how the burdens of change are distributed across a workplace. Negotiations help to surface legitimate concerns, foster agreement on timelines, and provide needed worker supports (e.g. communication, training, technical assistance, learning time, and workload adjustments), which helps smooth the process of integration and leads to more equitable outcomes.

Invest in training incumbent federal workers

Federal policy for safe, secure, and trustworthy AI use must include complementary policies to support high road workforce development and career paths that empower federal workers, raise standards, and promote equity. OMB should encourage federal agencies to invest in training and upskilling incumbent workers to avoid displacement and to create opportunities for workers to grow in their public service careers. Labor-management partnerships are the preferred training provider. Labor-management partnerships deliver worker-centered training at the times, places, languages, and formats workers need and with a focus on developing the skills workers need to advance in their career. By centering the needs and concerns of workers, labor-management partnerships advance equity by making training accessible to historically marginalized workers. Where labor-management partnerships are infeasible, federal unions should be consulted on training programs. Training should also foster compliance with law, regulation, and administration policy by covering employee rights, risk management practices, and the role of unions in addressing worker concerns with respect to AI technologies.

[9] Mateescu, A., and Elish, M. C. "AI in Context: The Labor of Integrating New Technologies." *Data & Society* (2019).
[10] *Ibid.*

Worker voice must be fully incorporated into agency AI governance (Q1 & Q2)

Agency AI governance boards must include seats for federal unions. Sitting alongside senior agency officials responsible for AI adoption and risk management, union representatives can speak to the experience and concerns of frontline workers with respect to AI technologies and the effects those technologies are having on workflow and workers. In addition, union representatives can speak to inequities experienced by women workers and workers of color. As a result, agency leadership will make better decisions about AI performance and implementation. To be effective, however, union representatives must be fully empowered members of the AI governance boards, and not mere observers or non-voting members.

The qualifications of the Chief AI Officers (CAIO) must include an understanding of socio-technical considerations and a demonstrated commitment to collaboration with unions around technological change. The OMB proposal requires the CAIO to possess the requisite skills, knowledge, training and expertise to coordinate their agency's use of AI, promote AI innovation, and manage risks from the use of AI. Technical qualifications and expertise are not enough, however, to ensure AI innovation and adoption meets the goals of the Executive Order without harming workers or perpetuating racial, gender, and other forms of bias and discrimination. Unions representing agency workers should be consulted about CAIO candidates and qualifications.

When developing Compliance Plans and AI Strategies, and on an ongoing basis, CAIOs should meaningfully consult with unions representing agency workers. These plans and strategies may have implications for collective bargaining agreements and workers rights that must be properly addressed. In addition, consultation and collaboration with unions will help CAIOs execute on their duty to advance workforce development measures, policy, and other resources for AI innovation.

Strengthen the OMB memo's risk management provisions and require worker-centered R&D as a minimum practice (Q5 & Q6)

TI supports the OMB's comprehensive but non-exclusive list of presumptively safety- and rights-impacting purposes and required risk-management practices. Agency definitions of the purposes served by a specific AI technology, however, must be broadly drawn and subject to oversight to prevent the evasion of risk management requirements through misclassification. Workers also expect to experience new infringements upon their safety, dignity, and rights as AI technologies develop new capacities and use cases; unions should be consulted when agencies update their specific lists of presumptively risky AI.

TI strongly encourages the OMB to include an additional minimum practice that requires agencies to bring unions and vendors together to undertake worker-centered R&D before and during implementation of presumptively risky technologies. Worker-centered R&D brings union

members and developers together to co-create worker-augmenting and empowering AI systems based on real workplace use cases. Through daily experience, frontline workers possess intimate knowledge and informed opinions about the complexities of the work itself, which work tasks and processes need to be rethought, which problems should be prioritized, and what tradeoffs workplace technologies make between quality, safety, equity, efficiency, and other goals. Worker-centered R&D can reduce the likelihood of unintuitive design choices that limit the perceived and actual usability and usefulness of AI technologies, while reducing the risk of harms to worker physical and mental health, safety, civil rights, privacy, performance, and productivity. Moreover, it helps management avoid poorly conceived technologies that fail to deliver the promised productivity gains.[11]

Federal AI procurement policy must incorporate strong standards into contracts with AI vendors that include protections for workers and the public (Q6 & Q7)

Federal procurement policy directly influences hundreds of billions of dollars worth of economic activity and shapes state and local government procurement as well. As a uniquely important tool for protecting workers and the public, TI encourages the OMB to lay out procurement provisions, including specific language around required terms and conditions in vendor contracts. Unions should have a chance to weigh in on those procurement provisions to ensure that what federal workers say they need to do their jobs right is being heard by procurement personnel, vendors, labor relations personnel, and agency leadership.

Procurement should require genuine worker-centered R&D in which vendors collaborate with unions to help design and develop AI technologies for use by the federal government. This collaboration must be meaningful in that vendors substantively respond to worker feedback. This requirement not only helps address potential safety and rights impacts, but also leads to better technologies. Although vendors conduct user testing on their products, union members will provide independent feedback from the perspective of frontline workers who are experts in the tasks that make up their jobs.

The OMB must also take steps to ensure the responsible use of intellectual property to train AI systems, including adequate transparency and auditability of training data, and adequate knowledge of and a commitment to abide by any collectively bargained terms impacting the use of intellectual property in their systems input and output, including voice and likeness data.

Additional provisions in AI vendor contracts are required to safeguard the public interest. The OMB should require joint data access and control to allow federal IT professionals to review and edit data. This helps avoid vendor overcharging for small modifications and also helps to facilitate internal auditing and monitoring of system efficacy. Vendors should be required to make adjustments at minimal expense when problems are found as part of standard

[11] Acemoglu, D. and Restrepo, P. Automation and New Tasks: How Technology Displaces and Reinstates Labor. *Journal of Economic Perspectives* (2019) 33:3-30

procurement contracts. AI contracts should also be relatively short term due to the fact thatAI technology is developing rapidly and the federal government should not lock itself into AI technologies now. AI vendor contracts should be subject to FOIA to ensure public accountability. And the Federal government should prohibit vendors from moving data collected by AI systems out of the country for storage or processing. There are data security concerns, especially when the data is from the federal government and concerns the American citizens. Lastly, procurement contracts should place the burden on AI vendors to demonstrate that their AI system is safe, nondiscriminatory, and effective prior to the sale and use of such systems to the federal government.

And as part of the Biden Administration's commitment to worker empowerment, the OMB should also address labor standards in the AI supply chain. It has been widely documented that AI models require an enormous amount of human labor to clean, label, and annotate the training data. Many of these jobs are poorly paid, precarious, and expose workers to harmful content.[12] The OMB memo should require AI vendors to comply with labor standards and allow their workers a free and fair choice of a union in which the vendor stays neutral.

We look forward to working with the OMB to ensure that AI in the federal government serves the best interests of the American people and its public servants.

Sincerely,

Amanda Ballantyne
Executive Director
AFL-CIO Technology Institute

[12] Vynck, G. They helped train Google's AI. Then they got fired after speaking out. *The Washington Post* (June 14, 2023).

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Comment from Bill Curtis-Davidson

Submitter Information

Name: Bill Curtis-Davidson

General Comment

Comments from Bill Curtis-Davidson, Accessible Product Design & Technology Leader, submitted in his capacity as a private citizen, and not as a representative of past or current employers or clients.

Attachments

BCurtisDavidson Public Comments - OMB Memo AI GOV 2023-12-05

Comments Submitted to Draft OMB Memo on "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"

Bill Curtis-Davidson, Accessible Product Design & Technology Leader

(NOTE: Comments are submitted in his capacity as a private citizen, and not as a representative of past or current employers or clients.)

Submitter Bio

Bill Curtis-Davidson is an accessible product design and technology leader with over twenty years of experience championing inclusive emerging technologies, including artificial intelligence (AI) and extended reality (XR). Mr. Curtis-Davidson is a member of the Partnership on AI (PAI) Global Task Force for Inclusive AI, a ForHumanity Fellow, and a ForHumanity Certified Auditor (FHCA) in Disability Inclusion & Accessibility. He has significant experience developing accessibility standards as well as consulting with public and private sector organizations to help them implement sustainable inclusive design and accessible technology programs. Through this work, Mr. Curtis-Davidson has been recognized with a Service to the Citizen Champions of Change Award, earned a U.S. patent for Automated Wayfinding of an Accessible Route, and contributed to the development of accessible airport kiosks, among other notable highlights. He also serves on the External Advisory Board of the Georgia Tech Human-Computer Interaction (HCI) Degree Program and is a mentor for LGBT Tech.

Question 2: Convening Agency AI Governance Bodies

What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body?

- **Concerning section 3(a)(ii) and 3(c)(ii), Convening Agency Governance Bodies:** Consider how Agency AI Governance Bodies and Coordination should involve agencies' existing DEIA (diversity, equity, inclusion, and accessibility) and Section 508 (information and community technologies accessibility) programs. This is important because such programs serve as knowledge networks and play a role in helping ensure that agencies meaningfully integrate DEIA into programs/services and that technologies are accessible and usable for all employees as well as external users.
- **Concerning section 3(a)(ii) and 3(c)(ii), Convening Agency Governance Bodies:** Consider *internal agency* coordination as well as *interagency* coordination. Coordination on topics related to DEIA could benefit from interagency coordination, to help agencies share implementation practices and lessons learned, and help to fill in gaps when human and program resources vary between agencies. Such interagency coordination may require new interagency bodies or could leverage programs or working groups in the existing CIO Council Accessibility Community of Practice (CIO.gov) and the Chief Diversity Officers Executive Council (OPM). As well, coordination with the U.S. Access Board and General Services Administration (GSA) Office of Technology Policy might help with interagency accessibility program management, resources, and infrastructure.

Question 3: Advancing Responsible AI Innovation

- **Concerning section 4(b)(iv) Workforce (consistent with EO 14110 Sections 5.1 & 10.2):** Agencies should take full advantage of available special hiring and retention authorities to fill gaps in AI talent, encouraging applications from individuals with diverse perspectives and experiences. This should explicitly include employment, assignment, and professional development of qualified jobseekers and employees with disabilities in both technical and non-technical roles.

Comments Submitted to Draft OMB Memo on "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"

Bill Curtis-Davidson, Accessible Product Design & Technology Leader
(NOTE: Comments are submitted in his capacity as a private citizen, and not as a representative of past or current employers or clients.)

Question 6: Minimum Practices for Rights-Impacting AI

Concerning section 5(c) Minimum Practices for Safety-Impacting/Rights-Impacting AI: The minimum practices baseline should consider the following aspects related to DEIA:

- OMB guidance should require that risk assessments be performed by human teams that are diverse (including people with disabilities) and who represent multiple internal and external parties.
- Risk Assessment should consider AI Fairness – including for people with disabilities – across the life cycle of AI design, development, and deployment in federal agencies. Resources such as the AI Fairness Checklist Research Project[i] might offer practical, peer-reviewed practices that are co-developed with AI practitioners.
- The OMB guidance should incorporate learnings from the NIST CCOE Project "Mitigation of AI/ML Bias in Context", and establish socio-technical approaches to testing, evaluation, verification, and validation (TEVV) of AI systems in context. This includes testing for bias against protected classes (including people with disabilities) in pre-process dataset analyses, in-process model training analyses, post-process model inference analyses, and human-in-the-loop decision flows. This project will help operationalize how to address challenges documented in NIST SP-1270, Towards a Standard for Identifying & Managing Bias in Artificial Intelligence (March 2022).
- The OMB guidance should ensure that risk assessments, risk mitigations, and risk management consider impacts for people in different protected classes (including people with disabilities) – including developing protected class impact assessments, documenting/disclosing residual risks (i.e., unmitigated risks), implementing feedback loops and adverse incident reporting systems, and deploying post-market and continuous monitoring.

Question 7: Materials or Resources to Help Agencies Incorporate OMB Requirements into Relevant Contracts

- **Concerning section 5(d):** Agencies might benefit from having procurement guidance that helps ensure responsible federal procurement of AI considers the safety and rights of people in different protected classes including people with disabilities. This could involve connecting with existing federal procurement-type requirements such as those put in place through Section 508 (ICT Accessibility), or connecting with agencies' DEIA programs to consider benefits or risks to their DEIA efforts internally or externally.
- **Concerning section 5(d):** OMB should consider requiring third-party, independent evaluation of compliance with all OMB and agency requirements before acquisition.
- **Concerning section 5(d):** OMB should consider requiring agencies to document (with input from suppliers) any existing impact, fairness, or bias assessments before acquisition.

[i] AI Fairness Checklist, M. Madaio, L. Stark, J. W. Vaughan, and H. Wallach. 2020. "Co-Designing Checklists to Understand Organizational Challenges and Opportunities around Fairness in AI". In Proceedings of the 2020 CHI Conference on Human Factors in Computing Systems (CHI 2020)

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: Beeck Center for Social Impact + Innovation at Georgetown University

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General Comment

The Beeck Center for Social Impact + Innovation at Georgetown University invites the Office of Management and Budget to consider the enclosed recommendations to improve the guidance for federal agencies' governance of artificial intelligence (AI) with a focus on improving the digital delivery of government programs.

Attachments

OMBAIDraftMemoComment_BeeckCenter

Date: December 5, 2023

To: Director Shalanda D. Young, U.S. Office of Management and Budget

Subject: Comment on OMB Draft Memorandum "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"

The Beeck Center for Social Impact + Innovation at Georgetown University invites the Office of Management and Budget (OMB) to consider the following recommendations to improve the guidance for federal agencies' governance of artificial intelligence (AI) with a focus on improving the digital delivery of government programs. These recommendations are in response to the **Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum**, hereinafter the "Draft Memorandum."

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

With regard to the designation of a chief AI officer (CAIO) role in every agency, we recommend that agencies consider the role of a CAIO in the context of existing agency executive roles that are responsible for related issue areas such as IT/chief technology officers (CTOs), chief information officers (CIOs), cybersecurity/chief information security officers (CISOs), or data/chief data officers (CDOs). Agencies should identify potential overlap with the new CAIO role alongside existing roles and responsibilities of agency executives, with a goal of streamlining and aligning the oversight of coordination, innovation, and risk management efforts regarding their agency's use of AI. Agencies should also ensure that all executive roles involved in determining agency AI governance have sufficient resources and capacity. Specific recommendations are as follows:

Recommendation. OMB should clarify the overlapping responsibilities and points of coordination between appointed CAIOs and existing executives overseeing IT, data, or cybersecurity. This should include providing clear guidance regarding how each of these roles might merge AI-related responsibilities with those designated by other relevant federal guidance.[1] The Draft Memorandum provides appropriate guidance regarding the position and reporting structure of this role, especially that the CAIO must be positioned "highly enough to engage regularly with other agency leadership." Certain measures can be more clearly articulated with regard to suggested points of collaboration between CAIOs and other officers, including but not limited to the following:

a. With regard to coordinating agency use of AI:
    i. CAIOs should coordinate with CDOs to support and coordinate agency involvement in AI standards-setting bodies and oversee the adoption of voluntary consensus industry standards for AI.
    ii. The Draft Memorandum appropriately names the CAIO's imperative to coordinate with the chief financial officer and chief human capital officer as officers within agencies to improve resourcing requirements and workforce skill sets for the acquisition of AI-capable talent.
b. With regard to promoting AI innovation:
    i. Agency CIOs oversee enterprise infrastructure governance and use and should be proactively involved in any changes to IT infrastructure that enable AI's use within agencies. OMB should provide clearer guidance regarding the delineation of roles between CAIOs and CIOs to "identify and remove barriers to the responsible use of AI including through the advancement of AI-enabling enterprise infrastructure."
c. With regard to managing risks from the use of AI:
    i. The CAIO should coordinate with chief procurement officers or equivalent roles to carry out mandated goals to "identify and manage risks from the use of AI" and "to establish and update processes to measure, monitor, and evaluate ongoing performance of AI applications and whether they are achieving intended objectives" in the purchase and management of AI technologies or tools. These functions are integral to procurement processes, and any new efforts to improve agency-wide risk management with regard to AI—or to measure performance—should be integrated with procurement protocols

[1] For example, the Foundations for Evidence-Based Policymaking Act of 2018. https://www.congress.gov/115/plaws/publ435/PLAW-115publ435.pdf.

to ensure that vendors are beholden to agency-wide practices to support responsible AI innovation.

ii. The CAIO should coordinate with the CDO to conduct risk assessments of agency AI applications, including by incorporating risk-assessment processes into any existing data-governance processes that require assessing privacy risk, bias, or any other relevant data-governance functions.

iii. The Draft Memorandum appropriately identifies that the CAIO should be responsible for overseeing agency-specific lists of purposes for uses of AI that impact safety or rights.

iv. OMB should review the CAIO role in 18 months to assess role functions, effectiveness, and staffing.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

We support OMB's mandate for AI Governance Bodies to meet no less than quarterly, and to be chaired by deputy secretaries and vice-chaired by CAIOs. Existing governance bodies like Data Governance Boards are not equipped to meet the standards laid out by the Draft Memorandum. According to OMB memo M-19-23 on the Evidence-Based Policymaking Act of 2018, Data Governance Bodies are required to be chaired by CDOs, which may not provide a sufficient level of agency executive oversight. Given these discrepancies, we recommend:

Recommendation. Build AI governance intentionally and strategically from the existing data-governance infrastructure and align with data privacy, risk assessment, open data, and other data-management practices that form the foundation of responsible AI innovation in government. There are a number of steps that OMB could take to ensure that the respective agency governance structures are working in coordination to embed shared AI governance responsibilities across the relevant bodies. OMB should align or clarify guidance to ensure that agencies are able to easily retrofit Data Governance Bodies or other similar governance structures to take on AI-governance responsibilities without significantly overhauling existing data-governance functions.

For example, OMB could provide guidance for agencies to align Data Governance Board meeting cadences and chairperson requirements to comply with required governance of AI, agencies could take clearer steps to integrate AI and data governance processes, including potentially combining CAIO and CDO governance boards completely or in areas of direct overlap, and/or include CAIOs as central stakeholders in data governance decision-making. This approach empowers both CDOs and CAIOs—including individuals potentially occupying both roles—to integrate AI governance into existing data-governance infrastructure and align it with current or updated data privacy, risk assessment, open data, and other data-management practices.

3. How can OMB best advance responsible AI innovation?

Responsible AI innovation involves the incorporation of new AI technologies into frameworks for data and technology governance that already serve to prioritize important facets of responsible AI—such as consent to use personal data, ability to opt out of data use, notification of misuse of data or cybersecurity risks, or transparency and accountability around data and technology use. Given the breadth of data and technology governance areas influenced by the use of AI, OMB should take a broader approach to collecting inventories of AI use cases. OMB should also provide clearer guidance for CAIOs and AI Governance Bodies on how to maintain pertinent data-governance and privacy work or policies as they work to remove barriers to the beneficial use of AI.

Recommendation. OMB needs stronger measures to ensure agencies actually disclose AI uses in their inventories. The public needs a clear understanding of which public-data agencies are using AI and in what manner it is being used. However, agencies are failing to disclose use cases in their current data inventories.[2] OMB should:

a. Formalize the requirement of a single List of Record for the use case inventory that consolidates all agencies' submissions. That format should meet formatting requirements—such as publishing in a machine-readable format—and be regularly updated. The inventory must require disclosure of whether something is deemed

[2]A recent Stanford paper evaluating AI use case inventories found that nearly half of agencies failed to publicly issue AI use case inventories; those that did comply showed inconsistencies and gaps in coverage. Christie Lawrence, Isaac Cui & Daniel Ho, *The Bureaucratic Challenge to AI Governance: An Empirical Assessment of Implementation at U.S. Federal Agencies*, *in* Proceedings of the 2023 AAAI/ACM Conference on AI, Ethics, and Society (2023), https://dl.acm.org/doi/10.1145/3600211.3604701 (last visited Nov 1, 2023); CDT has found similar trends. Bowman Cooper, *Like Looking for a Needle in an AI-Stack*, Center for Democracy and Technology (Jul. 21, 2023), https://cdt.org/insights/like-looking-for-a-needle-in-an-ai-stack/ (last visited Nov 1, 2023)

safety-or-rights impacting, and provide a brief explanation of why the agency determined an AI use case is not safety-or-right impacting.

b. Include all AI uses covered by the memo in this List of Record. The Draft Memorandum now requires that the Department of Defense (DOD) report on particular AI uses that were previously exempt under the Advancing American AI Act. The information DOD reports should be included in the List of Record so that the public can have one clear, central repository.
c. Clarify to agencies that AI-use disclosure is mandatory. OMB gives too much leeway to agencies by allowing them to report uses "to the extent practicable and consistent with applicable law and government-wide guidance." To guide agencies, OMB should interpret this language, which comes from the Advancing American AI Act, as a presumptive obligation to disclose.
d. Develop guidance to ensure agency personnel know how to classify use cases. Agency officials are often unable to recognize when their systems are AI uses.
e. Establish data-quality procedures and guidance for inventorying. As the Center for Democracy and Technology has found, "some use case summaries are so vague as to render them meaningless." The problem is, like agencies complying with the Digital Accountability and Transparency Act (DATA) of 2014, agency Offices of Inspector General have found error rates and low quality submissions of spending records. GAO's recommendations for compliance with the DATA Act are useful here too. OMB should:
    i. Provide example language and more structured questions to agencies,
    ii. Develop automated checks and controls in the submissions process, and
    iii. Work with stakeholders to correct erroneous submissions.
f. Within the inventory, include documentation of an AI impact assessment, or otherwise document the department that conducted the assessment or agency official that signed off on it.
g. Support compliance by reinforcing that AI Use Inventories support agency goals—like management of data as a strategic asset and agency-wide risk management—and are not a burdensome task.

Recommendation. Provide guidance for appropriate oversight of removal of barriers to the responsible use of AI. The Draft Memorandum encourages CAIOs to remove barriers to agencies' use of AI by providing agencies with access to "high-performance computing infrastructure specialized for AI training and inference" with regard to IT infrastructure, and to "maximize appropriate access to

internal data and share data within the agency." However, OMB should provide more specific guidance to include all enterprise IT infrastructure and large-scale data sources for AI technologies that may reasonably contribute to an agency's expansion of responsible use of AI, but that may not be considered "covered AI technologies" in the current guidance. By including foundational technology systems or tools that contribute data or technology for agency AI use, CAIOs will be empowered to provide oversight and input to help ensure that significant agency expenditures or contracts in IT procurements and data acquisitions will be in compliance with OMB guidance. We provide further recommendations on procurement in response to question seven below.

This may include:

a. Conducting risk assessments to vet potential new AI technologies before receiving approval from the AI Governance Body to put out requests for proposals for enterprise IT infrastructure that would enable advanced computing using AI technology.
b. Working with Data Governance Bodies to ensure that data sources are well-documented, high quality, and include information collected with the consent of represented individuals to be used in emerging AI experiments or new unvetted AI use cases.
a. Prioritizing updates to cybersecurity infrastructure, including giving cybersecurity officials authority to allocate funds dedicated to improving use of AI toward long-term improvements to cybersecurity protections before seeking continuous authorizations for AI technologies.
b. Ensuring that cybersecurity standards within agencies meet best practices set by the NIST AI Risk Management Framework pertaining to AI system security and resilience; for example, establishing red-teaming protocols and verifying that third party AI resources and personnel undergo security audits and screenings.
c. Including guidance for reporting requirements to be delivered to the CAIO during the procurement process for new AI technologies to track performance measures that might affect agencies' compliance with OMB guidance on responsible AI innovation, including for generative AI technologies.
d. Empowering the CAIO to stop procurement processes for AI technologies that are in non-compliance or unable to indicate future compliance with OMB guidance regarding AI.

Recommendation. Clarify how waivers to minimum practice requirements are established and potentially strengthen OMB's oversight of the waiver process.
As described in section 5 of the Draft Memorandum, all agencies that are not elements of the Intelligence Community must follow minimum practices to manage risks from AI uses determined to be safety- or rights-impacting. Section 5.c.iii introduces a waiver process by which an agency CAIO may waive one or more of the minimum requirements for a specific covered AI application or component. OMB should provide more clarity around and potentially strengthen this process. This may include:

a. Clarifying which relevant officials should be engaged in the process of establishing a waiver, and clarifying which officials and bodies have decision-making power to grant a waiver. The text of the draft guidance appears to give agency CAIOs wide latitude in making waiver determinations, without clarifying how other entities and individuals should be engaged in that process.
b. Establish clearer mechanisms for OMB to review, appeal, and potentially revoke waivers that agencies have granted for specific use cases.
c. Consider establishing time periods within which waivers to minimum practice requirements must be reviewed and reassessed.
d. When OMB issues detailed instructions to agencies to establish practices for inventorying use cases going forward, ensure that information about any granted waivers included in use case inventories provide detailed documentation about how and why a waiver was established.

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

Generative AI offers opportunities to increase efficiency, effectiveness, and equity of government services. But current AI offerings seldom are designed for government tasks, making the translation of private tools into public contexts sometimes difficult and complex. For example, generative AI is not always well-suited for engaging broadly with customers, especially in government contexts where trust and reliability are of the utmost importance. Generative AI is known for bringing in hallucinations, mistakes, or other communication errors that might create challenges for people who urgently need access to public benefits and services. However, generative AI, deployed for specific purposes or clearly denoted as an AI tool meant to serve a limited function, may help customers navigate government systems and support workers in the delivery of those programs.

Recommendation. Generative AI offers opportunities to improve the business operations and delivery of government programs. We believe the following examples offer use cases where generative AI, with appropriate safeguards and review, could be used to benefit agency staff and the public. We have included specific examples as they relate to the delivery of public benefits, where there is great need to improve equity and efficiency in delivery so that people receive the supports they are eligible for. These include:

1. Summarizing content
    a. Summarizing content for agency staff, including guidance and other documents
    Generative AI's capacity to quickly summarize information has previously been identified by the federal government and state government, as a potential use case. This summarizing approach could be applied to summarize statutory code, government guidance, and other documents that would otherwise require significant human hours to review and synthesize. Trust and accuracy concerns around the content generative AI can produce (for example, generative AI tools can produce "hallucinations" or inaccurate content), mean that generative AI should be used as a time and resource saving tool, with any content produced by generative AI subsequently undergoing review by humans. Use of generative AI to summarize text and guidance could facilitate training of staff, or could support agencies preparing information for public-facing materials or customer service touchpoints.
    b. Summarizing feedback from residents/end users
    Generative AI might also be usefully deployed to summarize feedback and insights from interactions with residents or end users of government services. For example, in a November 2023 report on Generative AI use cases in government, the State of California pointed to the potential for generative AI to be used to summarize meetings, work, and public outreach documentation. Again, because accuracy can be an issue, such syntheses should be reviewed by humans, but could be used to save time and resources.

2. Transforming text content
    a. Generating drafts of plain language content
    An important requirement for federal agencies is communicating with the public in language that is clear and understandable. Generative AI tools could be used to help transform existing information into plain language. While human review would still be necessary prior to publicly disseminating any text produced by a generative AI tool, transforming existing text into a plain language version could help save time for

agencies and enable government entities to provide more of an agency's content in plain language versions more quickly.

b. As translation improves, producing content in languages other than English

Generative AI tools may offer more accurate and adequate translations between languages than previously available machine translation tools, as well as offer opportunities to train models on specific dialects or population language needs. Currently, generative AI tools may perform less well for translations of underrepresented languages, and may introduce bias through their training data. In the future, if performance continues to improve, generative AI might be used to support government agencies in translating content into other languages, improving access to government information and services.

3. Policy review, format translation, and modeling
    a. Identifying and summarizing agency rules that are "outmoded or redundant" or contain inaccuracies

    As with the above examples of reviewing and summarizing content, generative AI tools could be used in retrospective reviews of rules to catch errors, redundancies, and conflicts. Generative AI is well suited to detecting patterns and differences in content for analysis, saving human hours in the original comparison between sources.

    b. Translating agency rules, guidance, and policy into computer code

    Currently, an immense amount of interpretation and duplicated effort occurs as software developers translate program policy and rules into computer code for digital systems, such as the public-facing website for a benefits application. Methods such as rules as code offer a way to standardize how rules are written in software. Generative AI could be trained on a data framework to translate the rules from their current English format to provide versions in plain language logic and computer code. It would be important for humans to review for accuracy in the translation. Using generative AI could speed this needed digital transformation, allow for easier implementation of updates and changes, create more public and government transparency on how rules operate within digital systems, increase efficiency by eliminating duplicative efforts among disparate levels of government and delivery organizations, and reduce the burden for public employees who are changed with administering and delivering benefits. Additionally, with rules now in code, there could be new pathways for policymakers, legislators, administrators, and the public to model and measure impacts of policy changes. For example, a generative AI tool could help model different scenarios for a rule change, and utilize de-identified

and/or create synthetic data to measure impact on a specific population or geography.

4. Accelerating the use of human-centered design systems and software development
    a. Generative AI can be a powerful design and software development assistant, allowing for rapid prototyping of websites, forms, and other materials using design standards, such as the U.S. Web Design System, to follow human-centered design patterns and utilize accessibility standards. Generative AI can allow designers and software developers to generate a multitude of options, and also quickly iterate on those options. It is important that the prototypes are evaluated with their end users to ensure they meet their needs. Additionally, generative AI may be well suited for helping governments migrate legacy system code and translate it into modern code languages.

5. Cybersecurity
    a. Generative AI can be used to identify patterns that may be suspected cybersecurity attacks or vulnerabilities. Rather than burdening end users, government agencies should use generative AI in cybersecurity approaches to detect and analyze patterns that may be suspicious activity and propose remedies.

Recommendation. Require cross-agency collaboration in developing guidance for the use of generative AI in public benefits. We recommend that OMB require the U.S. Department of Health and Human Services, the U.S. Department of Agriculture, and the U.S. Department of Labor to coordinate their guidance for programs such as Supplemental Nutrition Assistance Program (SNAP), Special Supplemental Nutrition Program for Women, Infants, and Children (WIC), Temporary Assistance for Needy Families (TANF), Medicaid, Children's Health Insurance Program (CHIP), and Unemployment Insurance (UI). Benefits administering agencies should not have different guidance for the use of generative AI in public benefits delivery—both for the benefit of the public and for the state, local, tribal, and territorial governments that deliver these programs. A beneficiary of one program may likely be the beneficiary of another program, and should have a seamless, transparent experience across all programs. Increasingly, people seeking and receiving benefits are using digital systems that integrate programs that have separate federal funding streams, policies, and agencies (such as SNAP and Medicaid) into single applications, accounts, and service points. As such, when federal agencies do not coordinate guidance, state, local, tribal, and territorial governments are required to interpret what is allowed and negotiate between and across agencies.

Recommendation. Provide guidance for how other automated, but non-generative technologies, such as robotic process automation, can work separately and in conjunction with generative AI to improve business operations.
The Draft Memorandum explicitly excludes "robotic process automation or other systems whose behavior is defined only by human-defined rules or that learn solely by repeating an observed practice exactly as it was conducted." Federal agencies and state agencies are using approaches like robotic process automation, optical character recognition (OCR), and other types of automation in their operations and delivery of services. While we do not think these uses should be grouped with artificial intelligence use cases, we do recommend that the OMB direct agencies to provide coordinated guidance on uses of robotic process automation and other technologies to safely and equitably improve business operations.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

Contracting for emerging technologies requires clearly communicated standards—both internal and external—to ensure that both vendors and procuring agencies are able to make informed decisions about the potential risks and opportunities of new tools on the market. Without specific attention to incorporating OMB guidance on AI into federal agencies' existing procurement practices, agencies are at risk of taking fragmented approaches to procuring not only AI but also data services, enterprise IT, and privacy-preserving technologies that could serve to destabilize responsible procurement of data and technology writ large.

Recommendation. Develop and publish an "oversight guide" for reviewing agency acquisition activities. Building on the GAO's "Accountability Framework for Federal Agencies and Other Entities," OMB should develop an "oversight guide" with specific references to parts of the acquisition planning process where agencies should already be considering responsible AI principles. An oversight guide could be used by Congress, federal agency executives, inspectors general, civil society, and the public to better understand what types of questions to ask of federal government employees and federal contractors. Because structured oversight processes can help drive agencies toward better outcomes, having a shared understanding of what "good" looks like from an oversight perspective would be useful.[3]

[3] How to Not Buy Magic: Updating Procurement Policies to Support the Federal Government's Responsible Use of AI, Center for Democracy & Technology (Forthcoming).

Recommendation. Define "adequate performance" including by providing suggested documentation that vendors must submit to support performance measurement and evaluation for AI contracts. Suggested documentation for vendor reporting to meet requirements for adequate performance may include reporting on third-party data sources used in AI tool testing, development, or deployment, and documents that govern responsible data management practices to ensure that data sources are ethical and well-managed. "Adequate performance" should also include considerations for the following:

a. With regard to promoting competition:
    i. Incentivizing practices that protect data rights in third party source data, like collecting individual consent to access, use, or sell personal data; ability of individuals represented in third party data sources to opt out; cybersecurity protocols to ensure that data is safe and secure; collective or cooperative governance structures that allow for individuals to be represented in decision-making over access to personal data.
    ii. Incorporating contract evaluation measures specific to AI that ensure responsible data governance, which could include innovating around public trustmarks or other certifications for AI vendors that use responsible data practices that increase the pool of competitive vendors who ensure that data rights are protected.
b. With regard to maximizing the value of data for AI:
    i. Ensuring that procuring agencies not only have "sufficient rights to data and any improvements to that data so as to avoid vendor lock-in and facilitate governments continued design, development, testing, and operation of AI," but also have specific guidance from OMB to require mandatory reporting of source data or control over access to source data to ensure responsible data governance practices during the contract's implementation.

Thank you for your time and consideration of these recommendations.

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PUBLIC SUBMISSION

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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0146
Comment on OMB-2023-0020-0001

Submitter Information

Organization: ACT | The App Association

General Comment

See attached for comments of ACT | The App Association

Attachments

ACT Comment re Draft OMB Memo on Advancing Governance Innovation and Risk Management for Agency Use of AI (120523) (w appendix)

December 5, 2023

Cindy Martinez
Office of Management and Budget
Office of Information and Regulatory Affairs
725 17th St NW
Washington, District of Columbia 20503

RE: Comments of ACT | The App Association to the Office of Management and Budget on its Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Dear Ms. Martinez:

ACT | The App Association (App Association) appreciates the opportunity to submit views to the Office of Management and Budget (OMB) on its draft Memorandum that would establish new agency requirements in areas of artificial intelligence (AI) governance, innovation, and risk management, and would direct agencies to adopt specific minimum risk management practices for uses of AI that impact the rights and safety of the public.[1]

I. General Views of the App Association on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

The App Association represents thousands of small business software application development companies and technology firms that create the technologies that drive internet of things (IoT) use cases across consumer and enterprise contexts. Today, the value of the ecosystem the App Association represents—which we call the app economy—is $1.8 trillion and is responsible for 6.1 million American jobs, while serving as a key driver of the $8 trillion IoT revolution.[2] Alongside the world's rapid embrace of mobile technology, our members create the innovative solutions that power IoT across modalities and segments of the economy. OMB's strategy, in response to President Biden's Executive Order on Safe, Secure, and Trustworthy Development and Use of AI, and the efforts of numerous agencies with respect to AI policy and regulation directly impact the app economy. We support OMB's goal of ensuring federal agencies instill proper safeguards that prioritize economic and national security, privacy, civil liberties and more when utilizing AI and other advancements in technology and innovation.

[1] 88 FR 75625; OMB Draft Memorandum, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*, https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf

[2] ACT | The App Association, State of the App Economy (2022), https://actonline.org/wpcontent/uploads/APP-Economy-Report-FINAL.pdf

AI is an evolving constellation of technologies that enable computers to simulate elements of human thinking – learning and reasoning among them. An encompassing term, AI entails a range of approaches and technologies, such as Machine Learning (ML) and deep learning, where an algorithm based on the way neurons and synapses in the brain change due to exposure to new inputs, allowing independent or assisted decision making.

AI-driven algorithmic decision tools and predictive analytics are having, and will continue to have, substantial direct and indirect effects on Americans. Some forms of AI are already in use to improve American consumers' lives today; for example, AI is used to detect financial and identity theft and to protect the communications networks upon which Americans rely against cybersecurity threats.

Moving forward, across use cases and sectors, AI has incredible potential to improve American consumers' lives through faster and better-informed decision making enabled by cutting-edge distributed cloud computing. As an example, healthcare treatments and patient outcomes stand poised to improve disease prevention and conditions, as well as efficiently and effectively treat diseases through automated analysis of X-rays and other medical imaging. AI will also play an essential role in self-driving vehicles and could drastically reduce roadway deaths and injuries. From a governance perspective, AI solutions will derive greater insights from infrastructure and support efficient budgeting decisions.

Today, Americans encounter AI in their lives incrementally through the improvements they have seen in computer-based services they use, typically in the form of streamlined processes, image analysis, and voice recognition (we urge consideration of these forms of AI as "narrow" AI). The App Association notes that this "narrow" AI already provides great societal benefit. For example, AI-driven software products and services revolutionized the ability of countless Americans with disabilities to achieve experiences in their lives far closer to the experiences of those without disabilities.

Nonetheless, AI also has the potential to raise a variety of unique considerations for policymakers. The App Association appreciates the efforts to develop a policy approach to AI that will bring its benefits to all, balanced with necessary safeguards to protect consumers. We strongly encourage that OMB's memorandum align with the App Association's comprehensive AI policy principles:

1. Harmonizing and Coordinating Approaches to AI

A wide range of federal, local, and state laws prohibit harmful conduct regardless of whether the use of AI is involved. For example, the Federal Trade Commission (FTC) Act prohibits a wide range of unfair or deceptive acts or practices, and states also have versions of these prohibitions in their statute books. The use of AI does not shield companies from these prohibitions. However, federal and state agencies alike must approach the applicability of these laws in AI contexts thoughtfully and with great sensitivity to the novel or evolving risks AI systems

present. Congress and other policymakers must first understand how existing frameworks apply to activities involving AI to avoid creating sweeping new authorities or agencies that awkwardly or inconsistently overlap with current policy frameworks.

2. Quality Assurance and Oversight

Policy frameworks should utilize risk-based approaches to ensure that the use of AI aligns with any relevant recognized standards of safety, efficacy, and equity. Small software and device companies benefit from understanding the distribution of risk and liability in building, testing, and using AI tools. Policy frameworks addressing liability should ensure the appropriate distribution and mitigation of risk and liability. Specifically, those in the value chain with the ability to minimize risks based on their knowledge and ability to mitigate should have appropriate incentives to do so. Some recommended areas of focus include:

- Ensuring AI is safe, efficacious, and equitable.
- Encouraging AI developers to consistently utilize rigorous procedures and enabling them to document their methods and results.
- Encouraging those developing, offering, or testing AI systems intended for consumer use to provide truthful and easy-to-understand representations regarding intended use and risks that would be reasonably understood by those intended, as well as expected, to use the AI solution.

3. Thoughtful Design

Policy frameworks should encourage design of AI systems that are informed by real-world workflows, human-centered design and usability principles, and end-user needs. AI systems should facilitate a transition to changes in the delivery of goods and services that benefit consumers and businesses. The design, development, and success of AI should leverage collaboration and dialogue among users, AI technology developers, and other stakeholders to have all perspectives reflected in AI solutions.

4. Access and Affordability

Policy frameworks should enable products and services that involve AI systems to be accessible and affordable. Significant resources may be required to scale systems. Policymakers should also ensure that developers can build accessibility features into their AI-driven offerings and avoid policies that limit their accessibility options.

5. Bias

The bias inherent in all data, as well as errors, will remain one of the more pressing issues with AI systems that utilize machine learning techniques in particular. Regulatory agencies should examine data provenance and bias issues

present in the development and uses of AI solutions to ensure that bias in datasets does not result in harm to users or consumers of products or services involving AI, including through unlawful discrimination.

6. Research and Transparency

Policy frameworks should support and facilitate research and development of AI by prioritizing and providing sufficient funding while also maximizing innovators' and researchers' ability to collect and process data from a wide range of sources. Research on the costs and benefits of transparency in AI should also be a priority and involve collaboration among all affected stakeholders to develop a better understanding of how and under which circumstances transparency mandates would help address risks arising from the use of AI systems.

7. Modernized Privacy and Security Frameworks

The many new AI-driven uses for data, including sensitive personal information, raise privacy questions. They also offer the potential for more powerful and granular privacy controls for consumers. Accordingly, any policy framework should address the topics of privacy, consent, and modern technological capabilities as a part of the policy development process. Policy frameworks must be scalable and assure that an individual's data is properly protected, while also allowing the flow of information and responsible evolution of AI. A balanced framework should avoid undue barriers to data processing and collection while imposing reasonable data minimization, consent, and consumer rights frameworks.

8. Ethics

The success of AI depends on ethical use. A policy framework must promote many of the existing and emerging ethical norms for broader adherence by AI technologists, innovators, computer scientists, and those who use such systems. Relevant ethical considerations include:

- Applying ethics to each phase of an AI system's life, from design to development to use.
- Maintaining consistency with international conventions on human rights.
- Prioritizing inclusivity such that AI solutions benefit consumers and are developed using data from across socioeconomic, age, gender, geographic origin, and other groupings.
- Reflect that AI tools may reveal extremely sensitive and private information about a user and ensure that laws require the protection of such information.

9. Education

Policy frameworks should support education for the advancement of AI, promote examples that demonstrate the success of AI, and encourage stakeholder engagements to keep frameworks responsive to emerging opportunities and challenges.

- Consumers should be educated as to the use of AI in the service(s) they are using.
- Academic education should include curriculum that will advance the understanding of and ability to use AI solutions.

10. Intellectual Property

The protection of intellectual property (IP) rights is critical to the evolution of AI. In developing approaches and frameworks for AI governance, policymakers should ensure that compliance measures and requirements do not undercut IP or trade secrets.

II. App Association Responses to Specific Questions Posed in the Request for Public Comment

Noting our general support for federal agencies' efforts to appropriately address AI governance, innovation, and risk management, we offer the following responses to specific questions posed in OMB's request for comments.

Question #1: The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers (CAIO) sufficiently flexible and achievable for the breadth of covered agencies?

The App Association generally supports the roles, responsibilities, seniority, position, and reporting structure proposed for CAIOs, however:

- While we appreciate the noted role of "Promoting AI Innovation," we urge that OMB include within this responsibility the imperative to consult with and consider the role and needs of the private sector, including small businesses, which will have a critical role in creating and deploying AI innovations within agencies.
- The responsibility of "Managing Risks from the Use of AI" should be updated to reflect the need to scale risk management practices according to the harm presented by the use, consistent with well-established risk management practices[3] as well as the National Institute of Standards and Technology's (NIST) foundations in its AI Risk Management Framework (AI RMF).[4]

[3] E.g., https://www.iso.org/standard/77304.html.
[4] https://www.nist.gov/itl/ai-risk-management-framework.

Question #2: What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

Initially, the App Association notes that AI-related risks can and should initially be addressed under agencies' existing authorities and functions, as the functions the AI at issue is providing are the same that humans would produce, only much faster. Agencies will need flexibility to addressing whether or not they need to create a new body to address AI, aside from existing constructs used to address privacy, IT, data, or other topics. OMB's vision of AI Governance Bodies within agencies can and should facilitate coordination in risk management practices across relevant groups and take appropriate steps to address gaps or inefficiencies identified (e.g., overlapping scopes across multiple groups).

Question 3: How can OMB best advance responsible AI innovation?

The App Association strongly encourages agencies' alignment with its comprehensive AI policy principles.[5] Notably, OMB should ensure that agency approaches to risk management, whether in intra-agency policy or in regulation/guidance to those the agency regulates, are based on established risks and harms (not edge/rare use cases or hypotheticals), that measures taken to manage risks are scaled to the harms presented, and that those who know or should know about a risk and have the ability to take action to mitigate that risk have the appropriate incentives to do so. Further, agencies can do much to advance responsible AI innovation through efforts to build their internal enterprise capacity and through their procurement policies (e.g., specify thoughtful AI design requirements).

Question 4: With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

The potential benefits of generative AI are extensive and could revolutionize day-to-day business operations and effectiveness across the federal government. With appropriate safeguards in place, generative AI offers numerous benefits, including but not limited to content generation (e.g., text, speech, images, video, etc.), streamlined software engineering/coding capabilities, drastically improved and more accessible interfaces for citizen services (e.g., text-to-speech solutions), and augmented research capabilities. Generative AI offers the possibility of introducing new efficiencies at numerous levels,

[5] https://actonline.org/wp-content/uploads/Policy-Recommendations-for-AI.pdf.

from backend/administrative to supporting key assessments/decisions made by humans. Agencies are already exploring generative AI uses, with the State Department's bureaus having sought industry feedback on potentially adopting generative AI and machine learning capabilities to assist with basic contract writing.[6]

Question 5: Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

The draft Memo's definition states that the term "safety-impacting" encompasses "AI that has the potential to meaningfully impact the safety of human life or well-being, including loss of life, serious injury, bodily harm, biological or chemical harms, occupational hazards, harassment or abuse, or mental health, including both individual and community aspects of these harms."[7] The App Association believes that this definition should provide the agencies with the direction they need to address what is and is not "safety-impacting" or "civil rights-impacting" consistent with the need for agency flexibilities acknowledged elsewhere in the memorandum. A static list will be seen as inappropriately including some use cases or not including others; the nature of the development of AI means that such a list will quickly become outdated. We therefore recommend that OMB remove its list of "safety-impacting" or "civil rights-impacting" use cases from the memorandum.

Question 6: Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

Yes, the minimum practices identified for safety- and rights-impacting AI are generally consistent with the App Association's recommended approach to risk management. We urge OMB, and all federal agencies, to be mindful of the negative impacts of imposing such requirements on AI use cases that may not always be high risk. Again, we urge OMB to update its memo to emphasize that federal agencies leverage a scaled and outcome-focused approach to AI risk management, which we discuss above and in our foundational AI policy principles. OMB's memo should align with the App Association's policy principles for AI, as well as approaches being taken in the NIST AI RMF and leading standards such as ISO/IEC 23894:2023.

[6] Billy Mitchell, *State Department considers generative AI for contract writing* (June 15, 2023), accessible at https://fedscoop.com/state-department-considers-generative-ai-for-contract-writing/
[7] Draft Memo p. 26

Question 7: What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

We recommend that OMB align its memorandum with the following:

- ACT | The App Association's *Policy Recommendations for AI*: https://actonline.org/wp-content/uploads/Policy-Recommendations-for-AI.pdf
- NIST's AI Risk Management Framework: https://www.nist.gov/itl/ai-risk-management-framework
- ISO/IEC 23894:2023 (Information technology, Artificial intelligence, Guidance on risk management): https://www.iso.org/standard/77304.html

Question 8: What kind of information should be made public about agencies' use of AI in their annual use case inventory?

The App Association welcomes the memorandum's requirement that agencies provide adequately detailed and generally accessible documentation for the AI they use to provide its users and the general public of its practices, while taking measures to protect intellectual property, national security, and other important interests. The App Association welcomes the release of information that will provide easy-to-understand insights into how agencies are (1) ensuring AI is safe, efficacious, and ethical/equitable; and (2) utilizing procedures to test for efficacy, safety, and equity. For example, the public will benefit from learning about how agencies examine data provenance and bias issues present in the development and use of AI solutions to ensure that bias in datasets does not result in harm to users or consumers of products or services involving AI. The exact metrics of how these agency uses are captured will likely need to vary from agency to agency, so adequate flexibility should be provided to agencies, with outcome-based measures being employed.

III. Conclusion

The App Association appreciates OMB's consideration of the above views. We urge OMB to contact the undersigned with any questions or ways that we can assist moving forward.

Sincerely,

Brian Scarpelli
Senior Global Policy Counsel

Leanna Wade
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APPENDIX A

Policy Recommendations for AI

ACT
The App Association

Artificial Intelligence (AI) is clearly a priority for policymakers, with 37 AI-related laws enacted globally, more than 80 pending legislative proposals at the state level and several more at the federal level. To understand and shape rules for this complex and evolving technology, a vital voice—that of small businesses, members of ACT| The App Association—must be prioritized in order to create a competitive, safe, and secure AI future.

We initially released these principles in 2021. However, we are updating them continually to reflect new developments in privacy and data security laws around the world and new learnings about the benefits, risks, and challenges presented by evolving AI tools in use cases from healthcare and education to software development and cybersecurity.

A successful policy approach to AI will align with the following guidelines:

1. Harmonizing and Coordinating Approaches to AI

A wide range of federal, local, and state laws prohibit harmful conduct regardless of whether the use of AI is involved. For example, the Federal Trade Commission (FTC) Act prohibits a wide range of unfair or deceptive acts or practices, and states also have versions of these prohibitions in their statute books. The use of AI does not shield companies from these prohibitions. However, federal and state agencies alike must approach the applicability of these laws in AI contexts thoughtfully and with great sensitivity to the novel or evolving risks AI systems present. Congress and other policymakers must first understand how existing frameworks apply to activities involving AI to avoid creating sweeping new authorities or agencies that awkwardly or inconsistently overlap with current policy frameworks.

2. Quality Assurance and Oversight

Policy frameworks should utilize risk-based approaches to ensure that the use of AI aligns with any relevant recognized standards of safety, efficacy, and equity. Small software and device companies benefit from understanding the distribution of risk and liability in building, testing, and using AI tools. Policy frameworks addressing liability should ensure the appropriate distribution and mitigation of risk and liability. Specifically, those in the value chain with the ability to minimize risks based on their knowledge and ability to mitigate should have appropriate incentives to do so. Some recommended areas of focus include:

- Ensuring AI is safe, efficacious, and equitable.
- Encouraging AI developers to consistently utilize rigorous procedures and enabling them to document their methods and results.
- Encouraging those developing, offering, or testing AI systems intended for consumer use to provide truthful and easy-to-understand representations regarding intended use and risks that would be reasonably understood by those intended, as well as expected, to use the AI solution.

3. Thoughtful Design

Policy frameworks should encourage design of AI systems that are informed by real-world workflows, human-centered design and usability principles, and end-user needs. AI systems should facilitate a transition to changes in the delivery of goods and services that benefit consumers and businesses. The design, development, and success of AI should leverage collaboration and dialogue among users, AI technology developers, and other stakeholders to have all perspectives reflected in AI solutions.

4. Access and Affordability

Policy frameworks should enable products and services that involve AI systems to be accessible and affordable. Significant resources may be required to scale systems. Policymakers should also ensure that developers can build accessibility features into their AI-driven offerings and avoid policies that limit their accessibility options.

5. Research and Transparency

Policy frameworks should support and facilitate research and development of AI by prioritizing and providing sufficient funding while also maximizing innovators' and researchers' ability to collect and process data from a wide range of sources. Research on the costs and benefits of transparency in AI should also be a priority and involve collaboration among all affected stakeholders to develop a better understanding of how and under which circumstances transparency mandates would help address risks arising from the use of AI systems.

6. Modernized Privacy and Security Frameworks

The many new AI-driven uses for data, including sensitive personal information, raise privacy questions. They also offer the potential for more powerful and granular privacy controls for consumers. Accordingly, any policy framework should address the topics of privacy, consent, and modern technological capabilities as a part of the policy development process. Policy frameworks must be scalable and assure that an individual's data is properly protected, while also allowing the flow of information and responsible evolution of AI. A balanced framework should avoid undue barriers to data processing and collection while imposing reasonable data minimization, consent, and consumer rights frameworks.

7. Bias

The bias inherent in all data, as well as errors, will remain one of the more pressing issues with AI systems that utilize machine learning techniques in particular. Regulatory agencies should examine data provenance and bias issues present in the development and uses of AI solutions to ensure that bias in datasets does not result in harm to users or consumers of products or services involving AI, including through unlawful discrimination.

8. Ethics

The success of AI depends on ethical use. A policy framework must promote many of the existing and emerging ethical norms for broader adherence by AI technologists, innovators, computer scientists, and those who use such systems. Relevant ethical considerations include:

- Applying ethics to each phase of an AI system's life, from design to development to use.
- Maintaining consistency with international conventions on human rights.
- Prioritizing inclusivity such that AI solutions benefit consumers and are developed using data from across socioeconomic, age, gender, geographic origin, and other groupings.
- Reflect that AI tools may reveal extremely sensitive and private information about a user and ensure that laws require the protection of such information.

9. Education

Policy frameworks should support education for the advancement of AI, promote examples that demonstrate the success of AI, and encourage stakeholder engagements to keep frameworks responsive to emerging opportunities and challenges.

- Consumers should be educated as to the use of AI in the service(s) they are using.
- Academic education should include curriculum that will advance the understanding of and ability to use AI solutions.

10. Intellectual Property

The protection of intellectual property (IP) rights is critical to the evolution of AI. In developing approaches and frameworks for AI governance, policymakers should ensure that compliance measures and requirements do not undercut IP or trade secrets.

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: Hugging Face Inc.

General Comment

Hugging Face commends the Office of Management and Business on its extensive work framing the responsible use of AI by federal agencies. The following comments are informed by our experiences as an open platform for state-of-the-art (SotA) AI systems, working to make AI accessible and broadly available to researchers for responsible development. Please find out full response attached.

Attachments

OMB_EO_RFC_Hugging_Face

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Hugging Face Response to the Office of Management and Budget Request for Comments on Agency Use of Artificial Intelligence

Hugging Face commends the Office of Management and Business on its extensive work framing the responsible use of AI by federal agencies. The following comments are informed by our experiences as an open platform for state-of-the-art (SotA) AI systems, working to make AI accessible and broadly available to researchers for responsible development.

About Hugging Face

Hugging Face is a community-oriented company based in the U.S. and France working to democratize good Machine Learning (ML), and has become the most widely used platform for sharing and collaborating on ML systems. We are an open-source and open-science platform hosting machine learning models and datasets within an infrastructure that supports easily processing and analyzing them; conducting novel AI research; and providing educational resources, courses, and tooling to lower the barrier for all backgrounds to contribute to AI.

Summary

The draft memorandum outlines a strong framework for fostering responsible AI adoption by federal agencies. In a context of commonly inflated claims about the performance of AI systems and pervasive risks of exacerbating discrimination, we particularly appreciate the proposed requirements to not only conduct thorough impact assessments, but also to demonstrate that the adoption of AI does provide added value to the agencies.

In order to best support this mission, we recommend that the OMB and the proposed AI Governance bodies prioritize mechanisms that support the open sharing of skills, resources, and information; build internal capacity along as much of the AI development chain as possible, from pre-training data curation to model fine-tuning and deployment (including, as currently outlined in Section 4.b.iv, non-technical expertise); and develop further guidance on what constitutes a sufficient improvement to warrant AI adoption and how to choose an AI system to meet those goals.

For the purpose of sharing best practices, we note that the proposed AI Use Case inventory constitutes a particularly promising tool. We recommend that entries in the inventory include as much information as possible about the AI application and system, including data and model documentation according to established standards such as dataset sheets and model cards, the metrics used to assess whether AI adoption would have a positive impact for the agency's use case, the reasoning for determining whether the system was safety- or rights-impacting, and links to the specific versioned systems used, including any open-source or open-access components.

We also recommend that the OMB extend the scope of memorandum OMB M-16-21 on open source software to include AI systems. In particular, we believe that the testing datasets developed by agencies to meet the requirements laid out in the present draft memorandum have a significant role to play in advancing the state of the art in performance and risk evaluation of AI systems if they are shared broadly with researchers and stakeholders. By supporting agencies in sharing this data to all relevant stakeholders, including by providing guidelines for the use of synthetic data, data pseudonymization, and governance of public datasets, the OMB can accelerate the development of robust responsible AI practices that will benefit all of society.

Beyond evaluation datasets, we encourage the OMB to direct agencies to build capacity to develop and share their own full AI stacks, including by leveraging and adapting existing public, open-source, and open Machine Learning models and datasets. This approach can lead to more energy-efficient AI applications, more transparency into the regulatory compliance of the AI development chain, and better visibility into the handling of *e.g.* privacy and intellectual property rights along the development process (see for example the StarCoder open code generation LLM). To that end, and in addition to the evaluation and test, we recommend that the AI strategy of federal agencies include to the extent possible the development and sharing of:

- pre-training datasets for base models (or foundation models) focused on their domain of activity
- the corresponding pre-trained (or foundation) models
- fine-tuning datasets and fine-tuned models tailored to the agencies' needs
- any software needed to process the inputs and outputs of AI systems

We provide further feedback on the draft memorandum below by answering the questions accompanying the Request for Comments. If a question is not highlighted, we do not have specific, actionable feedback.

Questions

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

While AI Governance will require involvement from many existing groups in agencies, including but not limited to privacy, IT, data, and legal departments, approaching the new challenges posed by AI adoption holistically and efficiently will require coordination and skill sharing between different stakeholders, which is best managed by a new AI Governance Body. Such a body can also facilitate broader civil society involvement and standardization of documentation practices. As examples of the possible functions of such a body, we point to the role of the cross-areas working groups within the BigScience workshop on Large Language Models, and its proposed structure for a multi-stakeholder AI data governance organization for large scale ML. In particular, we stress the importance of the role of centralizing documentation and transparency guidelines and the adoption of interoperable data formats to allow for better skill sharing within and across agencies.

3. How can OMB best advance responsible AI innovation?

The OMB has a unique role to play in championing responsible AI innovation beyond the federal government by helping create a body of positive examples and in-context operationalizations of responsible AI principles. Other agencies and companies may then learn from those examples

and leverage the resources created in the process – especially if they are shared as open and open-source AI systems – to follow suit. These should include:

- Requiring documentation of key sections of the development pipeline demonstrating decisions that respect peoples' rights and abide by applicable laws. This included:
    - Data Development
    - Model Training
    - Model Evaluation
    - System Evaluation (when models are implemented as part of a larger system)
    - Actions for continued Monitoring
- Building resources and knowledge about how to assess, evaluate, document, and audit AI systems
    - In particular, focus on building capacity to audit specific parts of AI development, including training data and procedure
    - Build a robust reporting system including labor complaints and whistleblower protections
- Leveraging shared experience between agencies to build best practices informed by the practicalities of deployment
- Highlight that AI should in many cases *NOT* be used, and/or may not be an improvement over current/alternative systems, in particular by providing transparency through the AI Use Case inventory about the process for weighing the risks and benefits of AI adoption.

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

Generative AI, when used for the purposes it is best suited for, can be a useful tool to explore AI in a new application setting, increase productivity in settings such as software engineering, and support applications that are less reliant on accuracy or grounding in factual information – especially when it is developed with sufficient transparency, consideration for the rights of data subject, and attribution of the model outputs. In particular, generative AI systems that are designed to handle a variety of tasks or work in so-called zero-shot settings can significantly accelerate the development of a "proof-of-concept" AI system to explore whether AI can bring value to an agency in a particular setting; possibly to then be replaced by a more efficient discriminative system.

Generative AI also introduces unique concerns, including increased financial and environmental costs when it is used in settings where a discriminative AI alternative could suffice, an increased cybersecurity attack surface and range of vulnerabilities, and a dependence on web-scale and larger training datasets that exacerbates social issues, including biases and discrimination.

The trade-offs mentioned also depend on the modality considered. Code generation models such as the openly developed StarCoder (see the project's Governance Card for more detail), have already shown their value in accelerating the process of software development, and are less subject to (but not exempt from) exacerbating social biases along the development chain. Image generation models, on the other hand, are still very likely to reproduce and exaggerate stereotypes, which makes them a poor fit for generating illustrations of people in government communications.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

We note that neither privacy nor handling of medical processes are currently included in the safety section. Mishandling of medically relevant decisions by AI systems can lead to immediate personal risks – especially given the prevalence of social biases in medical datasets, and leaks of private information can expose citizens to scamming, phishing, and identity theft. We would recommend explicitly adding both those considerations in (Section 5 (b.i)). The latter should also extend to systems that are used to infer or predict private information or personal characteristics.

For (Section 5 (b.ii)), we also recommend considering at least some of the rights listed in the recently published Taxonomy of Human Rights Risks Connected to Generative AI published by the UN OHCHR, including but not limited to rights to employment, freedom from Physical and Psychological Harm, and rights to Culture, Art and Science. This recent editorial also delves deeper into the rights at play and outlines how different steps in the development process have bearing on specific rights.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

The minimum practices identified constitute a strong baseline on which to develop responsible AI practices across a variety of potentially safety-impacting and rights-impacting AI applications. We strongly believe that these minimum practices should be encouraged for **all AI systems** even when not strictly required, to help develop robust best practices and mitigate risks that some systems may be mistakenly omitted.

We also recommend taking the following additions:

- For the sections on **Completing an AI impact assessment** and **ensuring that the AI will advance equity, dignity, and fairness**, we recommend explicitly mentioning due diligence background research that considers historical discrimination in the domain. AI applications tend to exacerbate existing problems.
- In addition for the existing requirements to **conduct monitoring**, **mitigate emerging risks**, and prioritize incremental adoption, agencies should, whenever possible, have a plan in place for rolling back AI systems as needed without disrupting ongoing processes,
- Finally, we stress the value of documentation in pursuit of the goals outlined in this memorandum. We recommend that **data documentation** and **model cards** be required for AI systems with safety-impacting and rights-impacting potential, along with **system cards** and **governance cards** as needed.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

The following categories of guidance will be particularly helpful to agencies:

- Specific questions to answer to inform the processes outlined in this document, especially with respect to pro-actively assessing the benefits of AI adoption and risks to rights, fairness and non-discrimination, and safety – and how to weigh those to make an adoption decision
- Standards on documentation content and quality, especially as regards information to be included in the AI Use Case inventory
- Providing a repository of positive examples of implementation of the requirements to help showcase successful operationalization

We note in particular that given the fast evolution of the technology and breadth of possible adoption, this guidance should be designed to evolve with time and feedback from federal agencies. We recommend in particular dedicating appropriate resources to maintaining and updating this information.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

We recommend the following information for entries in the AI Use Case inventory:

- Brief description of the AI system, including its deployment context, expected inputs and outputs, and expected behaviors, and appropriate context of use
- Description of the metrics used to assess what value the AI system is bringing to the agency's use case
- Whether the system is deemed to be rights-impacting or safety-impacting, with justification
- Description of the metrics tracked to assess performance and potential rights and safety risks, especially with regard to non-discrimination
- The expected volume of interactions with the system, *e.g.* number of inputs processed per time period or number of users within the agency
- A list of the AI components used in the AI system, including:
    - ML models, including base pre-trained model and fine-tuned models, with version when applicable
    - ML training datasets, including pre-training and fine-tuning datasets, with version when applicable
- Model and data documentation for all components according to established standards
    - For models, this should include appropriate contexts of use and evaluation in light of both those uses and different types of users and affected groups
        - Example model cards to consider: BLOOM, OBELICS, StarCoder
    - For data, this should include handling of consent, licensing, analysis of possible source of biases, etc.
        - see also: https://hf.co/blog/yjernite/data-transparency
- Description of the governance processes relevant to the AI system, for example:
    - Data governance in BigScience (BLOOM model)
    - Governance card for BigCode (StarCoder model)

All items outlined above have a significant role to play in ensuring the proper governance of AI systems. By centralizing this information across uses of AI in federal agencies, the AI Use Case inventory will both be a useful tool for supporting this governance and an invaluable resource to support new research into best practices for AI adoption across society.

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Submitter Information

Organization: CrowdStrike

General Comment

Please see attached filed.

Attachments

OMB AI EO Comments

REQUEST FOR COMMENT RESPONSE

Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Docket ID: OMB-2023-0020

December 5, 2023

I. INTRODUCTION

In response to the Office of Management and Budget's ("OMB") request for comment ("RFC") to develop a governance, innovation, and risk management memorandum for Agency use ("memorandum"), CrowdStrike offers the following views.

We approach these questions from the standpoint of a leading international, US-headquartered, cloud-native cybersecurity provider that defends globally distributed enterprises from globally distributed threats. CrowdStrike offers insights informed by multiple practice areas: cyber threat intelligence; proactive hunting, incident response and managed security services; and an AI-powered software-as-a-service cybersecurity platform and marketplace. Accordingly, this perspective is informed by CrowdStrike's role in protecting organizations from data breaches and a variety of other cyber threats.

II. COMMENTS

CrowdStrike welcomed the release of the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence ("E.O."). The E.O. will not only affect the U.S. government's Executive Branch, but more broadly inform industry best practices, and can even potentially inform subsequent laws and regulations in the U.S. and abroad.

We appreciate the OMB's quick response to the E.O. and their efforts to create a comprehensive agency-wide strategy on Artificial Intelligence ("AI"). The RFC correctly notes that AI is evolving at a rapid pace and creating benefits, and considerations of risks, across many sectors and aspects of life. The cybersecurity sector is no different with AI enhancing security capabilities while also creating new threats that require mitigation.

While we do not have feedback on every question in the RFC, we do want to offer several points that may be of value to the OMB as it refines the draft memorandum.

A. *Question 1*) The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

And

Question 2) What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

The RFC correctly notes that the differences across agencies in size, budget, mission, etc., require flexible requirements to comply with the tasks outlined in the memorandum. The requirements to establish a Chief AI Officer and AI Governance Body seem logical from CrowdStrike's perspective and there seems to be an appropriate amount of room for agencies to adopt the new positions to fit the specific agency. However, like with any new initiative, room for improvement will be discovered as the new roles and groups progress. We recommend that OMB empower agencies to make slight readjustments to the roles of their Chief AI Officer and AI Governance Body as new best practices are discovered.

Perhaps more important than the new roles and groups, is the guidance and requirements that will come from them. CrowdStrike urges alignment where possible with existing rules and regulations created by other agencies. Any new guidance or requirement on AI from agencies has the opportunity to improve AI, which plays critical roles in the everyday lives of many Americans as well as the economy writ large. Nonetheless, new regulation will not be issued in a vacuum but instead amongst a venn diagram of regulations across agencies, sectors, states, other technology areas, and other countries.

The draft memorandum states:

> "*This memorandum does not supersede other, more general Federal policies that apply to AI but are not focused specifically on AI, such as policies that relate to enterprise risk management, information resources management, privacy, Federal statistical activities, IT, or cybersecurity.*"

This language provides clarification and we recommend that it remain in the final version. As implied, there is often overlap between cybersecurity technologies and AI because, from a cybersecurity standpoint, the use of AI to detect threats is an enormous advantage. AI is the best tool defenders have to identify and prevent zero-day attacks and malware-free attacks, because AI can defeat novel threats based on behavior cues rather than known signatures. Leveraging these technologies is essential to meeting constantly-evolving threats. In cybersecurity, there are already a myriad of competing and overlapping regulations; continued clarification on how new AI regulations will interact with cybersecurity regulations will be needed.

Finally, as agencies complete their AI strategies and other tasks from the memorandum, CrowdStrike encourages agencies to leverage a risk management approach as seen in AI Risk Management Framework (NIST AI 100-1).

B. *Question* 3) How can OMB best advance responsible AI innovation?

The memorandum and RFC's focus on ensuring innovation, even with new requirements for AI going into effect, aligns with CrowdStrike's views. New requirements or regulations should not stifle innovation and new technologies. Regulating AI, and its use, for the sake of the technology rather than its application is not the best approach to foster-innovative solutions to difficult problems. As adversaries continue to evolve and find new ways to target victims, organizations must increase their emphasis on cybersecurity practices that leverage the most effective technologies - and that includes AI.

The proposed memorandum defines safety-impacting AI and right-impacting AI and determines only AI applications that meet one of those definitions are subject to the minimum practice. This risk-based approach is welcome; however, OMB should be cautious to not expand these definitions to encompass any AI application.

Innovation often comes from competition. The memorandum requires the following:

> "*Promoting Competition in Procurement of AI. Agencies should take appropriate Steps to ensure that Federal AI procurement practices promote opportunities for competition among contractors and do not improperly entrench incumbents. Such steps may include promoting interoperability and ensuring that vendors do not inappropriately favor their own products at the expense of competitors' offerings.*"

CrowdStrike supports promoting competition in the procurement of AI and encourages this language to remain in the final memorandum.

C. *Question 4*) With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

CrowdStrike leverages generative AI to assist analyst workflows and to make other security analyst tasks more efficient. This capability (coined "*Charlotte*") utilizes CrowdStrike's highest-fidelity security data, which includes the trillions of security events captured in the CrowdStrike Threat Graph, asset telemetry from across users, devices, identities, cloud workloads, and threat intelligence. The use of this knowledge base drives efficacy, actionability, and relevance, as well as addresses the risk of "hallucination."

Further, the natural language interface seeks to make cybersecurity responsibilities more broadly accessible. Our goal with *Charlotte* is to help close the cybersecurity skills gap and improve the response time so users can stay ahead of adversaries – boosting security across organizations. Today, we see this use of generative AI as one of the most relevant to improving security outcomes in the near- to mid-term.

Agencies should leverage generative AI that uses models that are trained using validated sources and sound data, like *Charlotte*.

D. *Question 8*) What kind of information should be made public about agencies' use of AI in their annual use case inventory?

The draft memorandum requires a publicly released compliance plan, an inventory of its AI use cases, and an agency strategy. While CrowdStrike recognizes the intent around these efforts, we caution against publicly disclosing this information. While it could be a helpful exercise for an organization to review their AI use cases, publicly

disclosing what technologies are in agency networks could enable threat actors to conduct malicious activities. Adversaries are innovative and smart – threat actors could intentionally target listed AI applications or monitor for a vulnerability they could leverage. For those reasons, public disclosure in these instances may have an adverse effect on security.

III. CONCLUSION

The OMB's memorandum, and the broader E.O., provides a thoughtful analysis of a complex, constantly evolving, policy area. As the memorandum, and other tasks from the E.O., move forward, we recommend continued engagement with stakeholders. Finally, because the underlying technologies evolve faster than law and policy, we recommend that the strategy focus on principles rather than prescriptive requirements and include a mechanism for periodic revisions.

IV. ABOUT CROWDSTRIKE

CrowdStrike®, a global cybersecurity leader, is redefining security for the cloud era with an endpoint protection platform built from the ground up to stop breaches. The CrowdStrike Falcon® platform's single lightweight-agent architecture leverages cloud-scale AI and offers real-time protection and visibility across the enterprise, preventing attacks on endpoints on or off the network. Powered by the proprietary CrowdStrike Threat Graph®, CrowdStrike Falcon correlates over 3 trillion endpoint-related events per week in real time from across the globe, fueling one of the world's most advanced data platforms for security.

With CrowdStrike, customers benefit from better protection, better performance and immediate time-to-value delivered by the cloud-native Falcon platform.

There's only one thing to remember about CrowdStrike: We stop breaches. Learn more: https://www.crowdstrike.com/.

CONTACT

We would welcome the opportunity to discuss these matters in more detail. Public policy inquiries should be made to:

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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0149
Comment on OMB-2023-0020-0001

Submitter Information

Organization: National Legal Aid & Defender Association

General Comment

See attached file(s)

Attachments

NLADA Comments on OMB RFC on Agency Use of AI

NLADA
National Legal Aid & Defender Association

December 5, 2023

Shalanda Young
Director
The Office of Management and Budget
725 17th St NW, Washington, DC 20503
Submitted electronically at: www.regulations.gov

RE: Response to The Office of Management and Budget Request for Comments on Advancing Governance, Innovation and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (88 Fed. Reg. 75625, November 3, 2023)

COVER SHEET

COMMENTER	:	National Legal Aid & Defender Association
QUESTIONS ADDRESSED	:	Questions 3, 4, and 6
ORGANIZATION MISSION	:	Because the quality of justice in America should not depend on how much money a person has, NLADA leads a broad network of advocates on the frontlines to advance justice and expand opportunity for all by promoting excellence in the delivery of legal services for people who cannot afford counsel.
CONTACT INFORMATION	:	For questions or follow-up, please contact Christopher Buerger, NLADA's Chief Counsel for Civil Legal Services, at c.buerger@nlada.org
LICENSURE	:	NLADA warrants that our organization is the sole author and owner of the below comments and that there are no obstacles to providing nonexclusive licenses of participant rights to the Federal Government to apply, share, and use the materials included in this submission.

a. NLADA: WHO WE ARE

The National Legal Aid & Defender Association (NLADA) greatly appreciates the Office of Management and Budget's (OMB) efforts to address the use of artificial intelligence (AI) by government agencies, and we especially appreciate the important step of seeking public input. The increased use and capability of new AI tools have already shown that these have incredible potential to increase efficiency and automate tasks in a way that would have been thought impossible just a year or two ago. Nevertheless, they also have the potential to do great harm to vulnerable communities, communities NLADA members serve and comprise.

NLADA is America's oldest and largest nonprofit organization dedicated to excellence in the delivery of legal services for people who cannot afford to pay for counsel. We count among our membership more than 700 organizations that provide civil legal aid and public defender services to low-income and underserved individuals and communities across the country. We represent the voices of thousands of attorneys, staff, and clients in the 50 states, the District of Columbia, American Samoa, Micronesia, Puerto Rico, and the U.S. Virgin Islands.

Civil legal aid and public defenders serve people living in or near poverty, and those who experience many of the disparate impacts of government policies and practices. NLADA also has as part of our membership a Client Section, which allows us to hear and elevate the voices and experiences of the people who are directly impacted by inequitable policies and practices. We are submitting these comments based on the experiences of our communities of civil legal aid, client, and public defender members.

b. HOW LEGAL AID, PUBLIC DEFENDERS, AND CLIENTS INTERACT WITH FEDERAL AGENCIES

Our client communities interact with federal agencies in a number of entry points, often in ways that intersect with multiple agencies as well as state and local institutions. Americans with low incomes rely on agency programs related to housing, health care, income support, education, and others. Meanwhile, individuals coming through state or federal criminal systems are impacted by policies and procedures set by federal entities and law enforcement agencies, including the U.S. Department of Justice and its various components.

Civil legal aid helps advance the mission of federal agencies by ensuring people have access to basic needs like housing, health and nutrition, education, employment, and income support, and removing barriers that prevent access to these programs. Legal aid serves to educate, facilitate, and advocate in these spaces to ensure that agencies reach and serve the intended beneficiaries of these systems. In the criminal legal system, public defenders are present in court every day, fighting to realize the promise of the U.S. Constitution for each and every defendant, and many provide holistic services to ensure success and stability after involvement in the legal system.

When these promises aren't met, when programs do not serve the American people, and we increase inequity instead of justice, the toll this takes on our families and communities manifests at the doorsteps of public defender and legal aid offices. When a problem does show up, it frequently shows up across multiple agencies. All of these systems are interconnected, and for the most vulnerable Americans, it can feel like a house of cards. A failure at even one entry point can cause a cascading of problems that can permanently and negatively alter lives. In short, changes to these supports systems cannot afford to get it wrong.

Additionally, it is important to note that these challenges are not borne equally across society. We know that the people who show up with civil legal problems and the people who find themselves in need of a public defender are disproportionately people of color. When low-income individuals struggle to access critical programs, the problems will disproportionately fall upon those communities of color. It is a good start to require agencies to "test their AI to determine whether there are significant disparities in the AI's performance across demographic groups," but the policy should go further and require a report on how, regardless of "the AI's performance," the end result will improve or potentially exacerbate already existing disparities.

c. GENERAL CONCERNS AND EXAMPLES OF PAST PROBLEMS WITH AUTOMATION IN OUR LEGAL SYSTEMS

The crisis in our public defender systems is well documented.[1] In the world of civil legal aid, the Legal Services Corporation studied the "Justice Gap" in 2017. Their findings revealed that roughly 86 percent of the civil legal problems of low-income Americans receive either inadequate or no legal help.[2] When they repeated the study in 2022, the number had increased to a staggering 92 percent![3] Advocates in these spaces are among the most innovative and flexible. They are problem-solvers. Indeed, the increased use of technology, AI-based or otherwise, often is utilized as a valuable tool.

And yet, we have experienced and are keenly aware of the limits, and even dangers, of an increased use of technology when it comes to legal issues involving individual rights.[4] Some of these problems have traditionally included issues of access to technology, security of private information, and concerns about how these changes can negatively impact outcomes for self-represented litigants as well as individuals served by legal aid and defenders. In recent years, however, we have seen more pernicious problems arise with the use of more advanced technology.

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[1] *See, e.g.,* Pace, Brink, Lee, and Hanlon, RAND: National Public Defense Workload Study, available at https://www.rand.org/pubs/research_reports/RRA2559-1.html ("Overburdened attorneys are forced to choose cases or activities to focus on, such that many cases are resolved without appropriate diligence.")

[2] Legal Services Corporation, The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans (2017), available at https://www.lsc.gov/media-center/publications/2017-justice-gap-report

[3] Legal Services Corporation, The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-Income Americans (2022), available at https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1

[4] Legal Aid of Arkansas' comments to OMB's request go into much greater detail on some of these experiences. We agree with their comments and hope our brief comment serves to emphasize and incorporate some of their primary points.

For example, around the country, states have replaced human decision-makers (such as nurses or social workers) with algorithms to determine the amount of health care and assistance certain individuals need. These methods have been deemed "arbitrary" and "cruel" by advocates, and they have resulted in "immense human suffering" and even unnecessary deaths.[5] In some instances, legal aid programs have already successfully sued states using these algorithms, but not before this new automation caused serious harm.

In Michigan, the state spent $47 million to create the Michigan Integrated Data Automated System (MiDAS) to detect fraud in unemployment benefits claims. The system was efficient in identifying fraud; in fact, it worked too efficiently. From 2013 to 2015, the automated system identified over 42,000 incidents of fraud. *It was wrong in 93 percent of those incidents.*[6] These individuals, 93 percent of whom were entitled to these unemployment benefits, were forced to pay back all previously received funds plus a 400 % fine. Unfortunately, this algorithm went unchecked by human review, causing financial ruin from which many victims never recovered.

The criminal legal system is also no stranger to problematic uses of technology. In just one example, a tool called COMPAS promised to use advanced algorithms to accurately identify recidivism risks among defendants in Florida. However, a Pro Publica investigation found that "black defendants were far more likely than white defendants to be incorrectly judged to be at a higher risk of recidivism while white defendants were more likely than black defendants to be incorrectly flagged as low risk."[7]

Additionally, the increased use of pretrial risk assessment instruments has been rife with problems and has failed to address existing racial and ethnic bias in the criminal legal system. NLADA and others have already raised concerns on this topic, insisting that jurisdictions needed to develop further protocols and collect more data. We have identified a need for such assessments to have ongoing monitoring by advocates and community groups.[8]

Our members serve on the front lines of our legal systems. They have seen the way past attempts of automation have wreaked havoc on the most vulnerable. When people turned to their government for help, or were involuntarily pulled into these systems, including the criminal legal system, their government told them: I'm sorry; this algorithm says you lose. At its best, the result is dehumanization and distrust, and at its worst, loss of liberty, security, and even life. That is unacceptable. As AI develops and

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[5] The Guardian, What Happened When a 'Wildly Irrational' Algorithm Made Crucial Healthcare Decisions, available at https://www.theguardian.com/us-news/2021/jul/02/algorithm-crucial-healthcare-decisions.
[6] The Detroit News, Opinion: Undoing the harm of MiDAS' fraud designations, available at https://www.detroitnews.com/story/opinion/2018/10/16/opinion-undoing-harm-midas-fraud-designations/1649803002/.
[7] Pro Publica, How We Analyzed the COMPAS Recidivism Algorithm, available at https://www.propublica.org/article/how-we-analyzed-the-compas-recidivism-algorithm.
[8] *See* Joint Statement: Pretrial Risk Assessment Instruments, available at https://www.nlada.org/sites/default/files/JOINT%20STATEMENT%20-%20PRETRIAL%20RISK%20ASSESSMENT%20INSTRUMENTS.pdf

promises better and more automation, we must proceed with great caution and learn from past failures.

d. BROADER APPROACHES TO IMPROVE AGENCY USES OF AI

We are genuinely encouraged by the OMB's efforts to create guidance, especially guidance that gives special consideration to the use of AI uses that impact individual rights. The request for comments included two questions that went to the broader idea of using AI in government processes:

> QUESTION 3: *How can OMB best advance responsible AI innovation?*
>
> *QUESTION 4:* *With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?*

On these questions, we urge OMB to issue guidance and for agencies to take special care to be conscious of the questions they are asking when they make use of AI tools and what a successful use will look like. For example, crafting a tool to limit supports to low-income individuals, either by detecting fraud or more efficiently identifying ineligible applicants is unlikely to provide any direct benefit to vulnerable communities. Meanwhile, as demonstrated by past attempts of automation, there is significant risk.

Agencies can put safeguards in place, but they will not help if the ideal use will simply "cause no harm" with our fingers crossed that we get as close to zero as possible. When we ask AI to find fraud or limit benefits, it will do exactly that. Further, no matter how good of a model an agency might have, how advanced of an algorithm they might use, there will certainly be false positives. As agencies think about how AI can help serve their mission, they must envision AI uses that will provide tangible and substantive, not simply procedural, benefits to vulnerable people. At the heart of all potential uses of AI, the question must not simply be how, if all goes well, will it improve efficiency, but how it will increase equity and *do no harm*.

e. MINIMUM STANDARDS FOR RIGHTS-IMPACTING PURPOSES NEED TO BE STRENGTHENED

In the request for comments, OMB asks:

> *QUESTION 6:* *Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?*

We wish to begin our discussion by expressing our appreciation that OMB has put together this draft memorandum and put in the effort to identify "Minimum Practice"

safeguards for "Rights-Impacting AI." We firmly believe this is a critical first step and the correct approach. We do have some feedback on where some of those minimum practices should be strengthened.

First, in section 5(c)(iv)(A), OMB identifies an AI impact assessment as a minimum practice. We concur and are especially encouraged by section 5(c)(v)(A), which requires agencies to identify, address, and mitigate potential discrimination, bias, and disparate impacts. In particular, we endorse OMB's conclusions that "If adequate mitigation of the disparity is not possible, then agencies should not use or integrate the AI tool."

Still, if an impact assessment, including assessment for bias and discrimination, is to be meaningful, it should require agencies not just to identify known bias and discriminatory results, but also to identify the risks of possible bias and discriminatory results. In fact, any and all impact assessments should be required to identify possible risks with scientifically sound quantitative or qualitative analyses. They should further be required to explain how ongoing assessments will monitor the specific use of AI. How and when will the agency determine whether or not the possible risks identified in the impact assessment have come to bear? And if so, how they will determine when and if that specific use of AI should be discontinued.

In a similar vein, the requirement in section 5(c)(v)(B) to "consult and incorporate feedback from affected groups" is critical, but the requirement as written is too weak. Requiring agencies to consult with affected groups "to the extent practicable" and making ongoing feedback "strongly encouraged," is simply too soft and too vague for what might be the most important requirement. At minimum, meaningful and significant feedback should be the default required. Agencies should be required to report not just all the feedback received, but the efforts that were made. Which voices were heard and which were not? And for those whom could not be contacted, why not? And if the agency plans to go forward with the proposed use of AI, why do they believe the level of input received is sufficient? Finally, this section should also include a requirement that agencies reach out to known service providers and community based organizations who serve affected communities. Not only will these groups have insights on how AI uses could impact communities, they may also serve as valuable liaisons between the agencies and the community.

The requirement for human consideration and remedy processes in section 5(c)(v)(E) is yet another important component of any successful use of AI. This section needs more detail about making the human consideration a truly meaningful review. In past problems with automation, advocates in legal aid and public defense have been met with review processes that are rigid and unquestioning. Our members have reported that in many instances the "human review" is simply a check to ensure that the proper data was entered. Severe automation bias results in meaningless human reviews with an approach along the lines of "don't blame me; that's just what the algorithm says." A human review that assumes an AI tool will necessarily reach the right result is no review at all. This section must include requirements for agencies to address the risk of automation bias and ensure that the remedy processes do not simply defer to the technology.

Finally, this policy does not address language justice concerns. There is a mention that, when giving notice to affected individuals, the agency "should provide notice in multiple languages," but language justice efforts must be much broader than this. Agencies should assess how language barriers may impact the use of any AI tool. Will its creation and any shift of processes to this tool create or worsen language barriers? Language barriers may manifest in non-native English speakers, but also across cultures and different uses of colloquialisms, particularly in communities of color. It is much easier for human decision-makers to consider these differences on a case-by-case basis. It is much more difficult for AI, both generative and non, to identify and account for this. There also are additional barriers and disparities to consider. For those with limited English proficiency, will results differ compared to native English speakers? Relatedly, agencies that seek to increase language access not through increased human translation, but through AI, how will effectiveness be tested? What safeguards will be put in place to ensure that machine-based translation is actually adequate? Language justice is too important of an issue; it must receive greater consideration.

f. CONCLUSION

This draft memorandum represents a strong opening effort on the part of the federal government to ensure the responsible use of AI tools across agencies. NLADA is encouraged to see this focus and effort from the OMB.

Nonetheless, even more safeguards and requirements are necessary. Particularly when it comes to rights-impacting AI uses, the risk of harm to vulnerable communities is immense. Incredible harm has already been done with more rudimentary automation tools, and it would be a grave error to assume that more advanced AI tools would necessarily prevent future harms and not possibly enact even greater harm on an even larger scale.

In particular, people and communities of color, low-income, and underserved individuals, families, and communities are especially vulnerable because they so often are dealing with multiple government systems across multiple agencies. An AI-fueled mistake at one agency or in one system could have a cascading effect on, just as an example, an individual's health insurance, housing, and income. These systems intersect and work in conjunction with each other. As OMB continues to work with agencies to minimize risks, it should encourage agencies to acknowledge and account for this intersectionality, including how federal supports may be administered by states and localities and their utilization of technology and, specifically, AI. It is less of a specific minimum standard, but a broader view of the risks and what is at stake for vulnerable Americans.

NLADA does not take the position that AI tools can never be used in a legal context. Instead, it is our position that extreme caution is nevertheless warranted at this time. We appreciate this opportunity to provide comments and look forward to future opportunities to work closely with federal agencies on these issues.

Respectfully.

Christopher Buerger
National Legal Aid & Defender Association
Chief Counsel, Civil Legal Services

Radhika Singh
National Legal Aid & Defender Association
Vice President, Civil Legal Services & Strategic Policy Initiatives

PUBLIC SUBMISSION

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0150
Comment from Steven Kommrusch

Submitter Information

Name: Steven Kommrusch

General Comment

See attached file "ResponseDec5.txt".

Attachments

ResponseDec5

Thank you for the opportunity to provide feedback on "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum". Below is a reply organized in reference to the 8 questions the OMB asked about according to the Federal Register. My replies begin with "Reply:". For background, I am the Director of Research and Senior AI Scientist at Leela AI. I hold a PhD in Computer Science recently earned with a focus on machine learning and transformer models. Prior to my PhD, I was an executive-level engineering fellow at Advanced Micro Devices designing X86 processors. I run a MIRIx monthly symposium on AI safety and this reply incorporates feedback from that symposium group.

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?
Reply: The chief AI officer role feels inward-focused but can help implement broader goals within an agency, and, just as importantly, bring concerns from an agency into broader discussions. As implied by the question, different agencies may need different staff sizes to support the CAIO, but having a CAIO for every agency provides a consistent interface into this issue and common contact for all agencies.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?
Reply: Within the private sector, negligence and strict liability laws should be established and government agencies should be subject to legal risk for AI safety failures. This helps ensure that those developing and using AI are incentivized to verify safety concerns. Effort should be made to mirror something like the Gene Synthesis Consortium in the AI community. A strong but flexible and responsive organization should be encouraged as oversight of AI developments. Certainly AI should be a new role in the agencies. As AI advances it will acquire new and varied abilities; if stated AGI goals by various companies are even partly achieved, AI governance must include assessing risk in ways similar to hiring an intelligent but somewhat erratic new employee to work on a team - issues of trust and internal goals become important. In this response and later, I use the term 'intelligent but erratic new employee' to bring to mind a person with perhaps a lot of knowledge but little real-world experience. As AI advances, it's learned behavior will vary widely even as we try to control its training data and learning environment. Considering how differently humans may approach a task gives some insight to how much these AI systems may vary too.

3. How can OMB best advance responsible AI innovation?
Reply: Work to establish common standards of communicating about AI capabilities and validation concepts. For example, the 6 levels of

vehicle autonomy have been adopted throughout the automotive industry and the consumer base interested in this technology. This allows for clear validation strategies to develop, customer expectations to be met, and even liability rules to engage at the various levels. Creating such levels for other AI areas may be valuable (loan officer, radiologist, etc). Level 2 implies competent AI behavior but human oversight is always required; level 5 implies AI quality that generally matches or exceeds skilled humans. A similar 0-5 scoring for AI content is proposed by Daniel Miessler: https://danielmiessler.com/p/ai-influence-level-ail .

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?
Reply: As stated in the question, one must understand the limitations of the AI when using it. Certainly using AI to summarize complex data can be done today with varying success. AI can be used to quickly generate graphics and make a variety of tasks more efficient. An office fully embracing the AI capabilities of December, 2023 could be more efficient at communicating complex data. Many government agencies have data from millions of citizens which can be used to find patterns and predict improved outcomes (i.e., school lunch menus relative to student performance in the afternoon, for example). At this point in time, you can ask GPT-4 for detailed descriptions of ways it can help out and it can provide examples; employees should be encouraged to explore this with guidance from the CAIO team on how best to prompt these LLMs and what weaknesses they exhibit relative to the goals of a given agency. As AI advances, part of the CAIO team should be involved with sharing best practices for AI use within an agency.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?
Reply: The concerns in the 'pause giant AI experiments' open letter from the Future of Humanity Institute, and signed by over 33,000 people, should be directly discussed. In particular, allowing an advanced AI access to control systems of any kind, including the internet, may be a risky act in the same way hiring an intelligent but erratic person for a task may be a risky act - can you fully trust the goals of the actor (AI or human) to reliably implement the agency's goal? With access to the internet, AI systems have already demonstrated the ability to manipulate people in order to accomplish incorrectly constrained goals (https://nypost.com/2023/03/17/the-manipulative-way-chatgpt-gamed-the-captcha-test/). So I would highlight the need to evaluate an AI in the same way one might evaluate a new employee, including such HR and behavioral interview questions like "How should deal with difficult clients" or "How did you learn from a mistake you made?"

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How
can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?
Reply: OpenAI has organized to work on the stated goal of creating an artificially intelligent AI safety researcher. Such a system could scale

to be more capable as AI evolves in the future, and establishing a history of issues and concerns with that approach today could be critical for testing the AI of tomorrow. Designing a test paradigm that not only addresses today's systems but can scale into future capabilities should be a major goal. The new AI safety non-profit METR identifies as a safety concern 'Cannot autonomously replicate', which I think should be added to the safety-impacting list.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?
Reply: Similar to the reply to question 3, clearly defined terms that can be used in a variety of AI use settings will help with contract terms. A small number of well-defined terms would allow a small number of court cases to set precedent and establish expectations for both sides of a contract. There may also need to be certain AI failure cases (such as any resulting in direct avoidable harm to a human) which are spelled out as cases where strict liability applies, not just negligence. Requiring 3rd party review (from a group like METR) should be a sign of due diligence when designing and evaluating an AI system.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?
Reply: In relation to paragraph 5.c.iv.F in the memorandum; at a minimum all AI uses should include a summary of how the training data was collected and curated, a description of the type of AI model used (including paper citation when available), a description of the model output, and some relevant measure of accuracy of the model. Such data could allow informed citizens to understand AI use cases in the agency.

Thank you again for the opportunity to reply,
Steve Kommrusch, PhD
Director of Research and Senior AI Scientist
Leela AI
https://leela.ai/
https://www.linkedin.com/in/stevenkommrusch
https://scholar.google.com/citations?hl=en&user=lfv3-LcAAAAJ&view_op=list_works&sortby=pubdate

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0151
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Athena Coalition

General Comment

Attached please find comments on OMB's "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum" from Athena, a coalition of worker and civil society organizations across the United States.

Attachments

2023-12-05-Athena-OMB Comments

ATHENA

December 5, 2023
Clare Martorana
U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management Budget
725 17th St., NW
Washington, DC 20503

Re: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Dear Ms. Martorana:

We write to you as a coalition of more than 50 organizations working together to break the dangerous stranglehold of Amazon over our democracy, economy, and planet. We welcome the efforts of the administration to seek public comment as we chart a path of technological innovation that advances shared prosperity.

In the president's executive order on artificial intelligence, the Biden-Harris administration correctly focuses on worker rights, civil rights, transparency, a strong public sector, and reducing concentrated corporate power as cornerstone principles. Importantly, the executive order acknowledges that current market forces will drive artificial intelligence in suboptimal and even dangerous directions. We have the opportunity to reshape that.

For the purposes of this comment, we focus on Amazon as a harbinger of a dystopian technological future where corporations can run roughshod over communities, workers, small businesses, and the public. Dominating multiple markets, Amazon has initiated a race to the bottom by worsening working conditions, attacking democratic institutions, increasing emissions not only in its industry, but across the economy, lobbying for weak privacy laws, buying up innovative entrepreneurs to lockout competitors, expanding biometric surveillance, and using its monopoly power to the detriment of small businesses, entrepreneurs, and innovators.

From past periods of technological innovation, we know that economic outcomes and technology itself are heavily shaped by the balance of power between different interest groups.[1] When workers and the

[1] Johnson, Simon, and Daron Acemoglu. *Power and Progress: Our Thousand-Year Struggle Over Technology and Prosperity*. Hachette UK, 2023.

public have relatively less power to shape outcomes, technology is developed to drive short-term corporate profits at the expense of the common good. Today, the current imbalance in power between wealthy corporations and working people is the precondition for market forces to drive artificial intelligence toward an unbridled race for profit. The result will be catastrophic for the middle and working class, as well as for the planet. And, it will foreclose the possibility of creating transformative new technologies and scientific advances.

The public has an essential role in averting this disaster, rebalancing power, and bringing about a better future. We urge the administration to build on the executive order by:

(a) Expanding multidisciplinary public sector technical expertise that can independently judge between useful technology and marketing hype. Public sector innovation should be evaluated by its benefit to the common good, rather than in response to the pressure to adopt new tech.
(b) Focusing technological capacity and investment in public-infrastructure, -universities, and -research, and ensuring that the public retains the benefits of these investments.
(c) Prioritizing and funding government systems that result in greater shared prosperity and enhance popular participation in democracy, while deprioritizing programs that expand incarceration, surveillance, and militarism.
(d) Ensuring greater accountability, oversight, and transparency for government programs at risk of abuses of power, and preventing the adoption of new technology that would run counter to these goals.
(e) Attending to the dangers of rapidly expanding energy consumption, water usage, and greenhouse gas emissions linked to the surge in computational resources for artificial intelligence, and taking steps to ensure data centers are required to invest in building new renewable energy and establishing reclaimed water sources where the data centers are built.
(f) Establishing procurement standards that include interoperability and clean energy requirements for cloud computing; labor neutrality agreements for contractors and tech companies; health and safety standards; and stronger transparency and reporting requirements.
(g) Ensuring federal agencies consider how regulatory action related to artificial intelligence and technology procurement would impact market consolidation and anti-competitive dynamics in the sector—in line with recent guidance from the Office of Information and Regulatory Affairs and the Office of Management and Budget.[2]

In each section below, we describe Amazon's business practices related to artificial intelligence and procurement, highlighting how Amazon has used its market dominance to capture economic gains and public investment in ways harmful to the public and workers. The administration should direct agencies, procurement standards, regulatory action, and investment to set a higher bar for the tech sector and to prohibit the worst abuses. Given Amazon's unprecedented power, size, and role in government procurement and infrastructure, we also urge the administration to pay special attention to this corporate behemoth, in particular.

[2] https://www.whitehouse.gov/wp-content/uploads/2023/10/RegulatoryCompetitionGuidance.pdf

Amazon, Public Sector Tech Procurement, Corporate Capture

While growing its dominance in the private sector, Amazon is quietly commandeering the public sphere by soliciting massive government contracts, investing in direct and indirect lobbying,[3] and creating a revolving door between its C-suite and the halls of Washington DC. One former top procurement official with the Defense Department stated that Amazon seeks to "dominate the federal space."[4] Decisions about government technology should always be made in the public interest, but today, tech companies are playing an oversized role in shaping procurement, regulations, and standards.

- **Public sector procurement.** Amazon Web Services is the cloud provider for more than 7,500 local and federal government agencies.[5] Its clients include the National Security Agency,[6] the Pentagon,[7] the U.S. Navy,[8] the Department of Homeland Security,[9] and the Central Intelligence Agency.[10] Given the high degree of consolidation in this important sector, and indications of an anticompetitive market,[11] the Government Accountability Office and lawmakers have called for greater interoperability and consideration of egress fees for these cloud contracts.
- **Corporate lobbying.** While big tech firms have been eclipsing corporate lobbying giants of the past, including big tobacco and oil,[12] Amazon stands out: in 2022, Amazon was the largest single corporate lobbying spender in the country,[13] dishing out over $21 million. Its lobbying efforts have tackled a diverse range of issues, including but not limited to "government procurement",[14] "cloud computing,"[15] and "cloud security".[16] When a single firm can buy this level of time, access, and influence over the federal government, it threatens the democratic values, institutions, and processes that keep our country running.
- **Revolving door.** Amazon also exerts influence over the federal government through a revolving and "reverse revolving" door between the corporation and the public sector.[17] In 2021, POLITICO

[3] https://techoversight.org/wp-content/uploads/2023/08/Amazons-DC-Influence-Operation.pdf
[4] https://www.politico.com/news/2021/06/04/amazon-hiring-former-government-officials-491878
[5] https://aws.amazon.com/government-education/government/
[6] https://www.engadget.com/amazon-web-services-re-awarded-nsa-cloud-contract-152924596.html
[7] https://apnews.com/article/technology-politics-amazoncom-inc-cloud-computing-us-department-of-defense-bfaeb3549b4d42328f35e579d7cb40b0
[8] https://www.google.com/url?q=https://www.reuters.com/world/us/us-navy-awards-amazon-web-services-contract-worth-over-700-mln-2022-12-19/&sa=D&source=docs&ust=1701810300759489&usg=AOvVaw3xDK-T7SENtFM2oOU-rezy
[9] https://www.accessnow.org/press-release/amazon-surveillance-us-immigration-hart-database/
[10] https://www.theatlantic.com/technology/archive/2014/07/the-details-about-the-cias-deal-with-amazon/374632/
[11] https://ilsr.org/ilsr-comment-letter-cloud-aws/
[12] https://www.citizen.org/article/big-tech-lobbying-update/
[13] https://www.opensecrets.org/federal-lobbying/top-spenders?cycle=2022
[14] https://lda.senate.gov/filings/public/filing/0445d82f-0734-481e-a3ac-14e6077eb171/print/
[15] https://lda.senate.gov/filings/public/filing/0445d82f-0734-481e-a3ac-14e6077eb171/print/
[16] https://lda.senate.gov/filings/public/filing/0445d82f-0734-481e-a3ac-14e6077eb171/print/
[17] https://www.opensecrets.org/revolving/reverse.php

reported that Amazon Web Services was "snapping up former government officials who can help them gain access to lucrative federal contracts".[18] Indeed, Amazon's ties to former and current federal officials are broad and deep: in 2021, *Mother Jones* "identified at least 247 US government officials and employees…who were hired by Amazon in the past 10 years or so."[19] Amazon also hired Jay Carney, President Barack Obama's former press secretary, as its senior vice president of global corporate affairs.

Infrastructure, Vertical Integration, Abuse of Dominance

Amazon has a running start over competitors in the artificial intelligence market. In his 2022 annual letter to shareholders, Amazon CEO Andy Jassy suggested that Amazon will be a major winner in AI infrastructure.[20] And, earlier this year, the CEO boasted that every team in the company is working on generative AI.[21] We urge the administration to look at vertical integration and consolidation across the artificial intelligence supply chain and to examine Amazon's anti-competitive tactics in this area.

- **Infrastructure**. Amazon aims to be the largest AI infrastructure player in the market, leveraging its massive data center infrastructure and cloud computing dominance. Notably, Amazon has won lucrative state and federal contracts, as well as public subsidies, to build this private infrastructure, which currently generates $80 billion in revenue and $23 billion in profit.
- **Toll booth operator.** In a recent earnings call, Amazon's CEO Andy Jassy assured investors that Amazon would profit at every step of the AI product development cycle, because it controls the infrastructure and gateway to business customers.[22] The most valuable part of Amazon's online retail platform is not sales, but rather, extraction of various fees from all transactions, sellers, and consumers on the platform.[23] Amazon, through its early and well-funded foray into artificial intelligence, will no doubt seek rents from all the services that use its cloud infrastructure, recreating the "monopoly tollbooth" it holds over online retail space. In cloud computing, Amazon already uses egress fees, interoperability barriers, and bundled services in ways that warrant investigation.[24]
- **Mergers and acquisitions**. Months ago, Amazon announced that it has "invested" in Anthropic, a leading developer of large language models (LLM). Yet a closer read of the details of the deal lays out Amazon's motivations in dealing with Anthropic: moving forward, Anthropic will be required to use Amazon computational processing power.[25] In 2015, Amazon bought a cloud computing

[18] https://www.politico.com/news/2021/06/04/amazon-hiring-former-government-officials-491878

[19] https://www.motherjones.com/politics/2021/03/amazon-has-become-a-prime-revolving-door-destination-in-washington/

[20] https://www.aboutamazon.com/news/company-news/amazon-ceo-andy-jassy-2022-letter-to-shareholders

[21] https://www.theverge.com/2023/8/3/23819442/amazon-generative-ai-ceo

[22] https://www.theverge.com/2023/8/3/23819442/amazon-generative-ai-ceo

[23] https://ilsr.org/amazons_tollbooth/

[24] https://ilsr.org/ilsr-comment-letter-cloud-aws/

[25] https://time.com/6317366/amazon-anthropic-ai-deal/

chip manufacturer, precluding its competitors from having access to the technology.[26] In the same way Amazon has bought out potential competitors, the company will undoubtedly buy out other players in the AI stack to maintain and grow its power.[27]

- **Deceptive use of customer data.** Earlier this year, the Federal Trade Commission and Department of Justice charged the company with deceptive use of children's data.[28] Amazon kept children's voice and location data for years, using it to amass more profit, while ignoring parents' requests to delete the data. As Amazon expands its artificial intelligence capabilities, it will have more incentive to use its data troves to develop artificial intelligence without the consent or knowledge of the producers and subjects of that data.

Data Centers, Public Subsidies, and Clean Energy

Amazon's data center footprint is growing rapidly across the United States and internationally. Not only are Amazon's data centers consuming huge energy resources, but in some cases, Amazon is covertly building its data centers through public subsidies and public contracts intended for public infrastructure and services[29]—not private profit.

- **Data center expansion.** Reporting confirms that Amazon is making aggressive investments into data centers in the U.S.[30] and internationally,[31] and is planning to invest $35 billion in data center expansion in the coming years. In some cases, data center deals have been obscured from public oversight through nondisclosure agreements.
- **Energy and water usage.** Recent research on the climate impacts of artificial intelligence suggest that by 2027, use of artificial intelligence could be between 85 to 134 terawatt hours annually[32]—similar to the energy consumption of mid-sized countries. Currently, data centers make up 18% of Ireland's total energy consumption.[33] Likewise, according to the Washington Post, a large data center consumes up to 5 million gallons of water a day.[34] While there have

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[26] https://www.datacenterknowledge.com/archives/2015/01/23/amazon-buys-stealthy-israeli-chip-startup-annapurna-labs

[27] https://ainowinstitute.org/publication/policy/compute-and-ai

[28] https://www.ftc.gov/news-events/news/press-releases/2023/05/ftc-doj-charge-amazon-violating-childrens-privacy-law-keeping-kids-alexa-voice-recordings-forever

[29] https://www.fredericknewspost.com/news/politics_and_government/updated-more-public-records-reveal-details-of-amazons-failed-data-center-plans/article_5d4d1318-7223-5e10-bd67-cf7cf37bc859.html

[30] https://www.axios.com/local/columbus/2023/06/27/amazon-data-center-investment-ohio-2023

[31] https://www.datacenterdynamics.com/en/news/aws-microsoft-and-google-to-invest-85bn-in-thailand-data-centers-report/

[32] https://www.nytimes.com/2023/10/10/climate/ai-could-soon-need-as-much-electricity-as-an-entire-country.html

[33] https://www.euronews.com/green/2023/06/13/data-centres-gobble-up-18-of-irelands-electricity-as-country-struggles-with-climate-target

[34] https://www.washingtonpost.com/climate-environment/2023/04/25/data-centers-drought-water-use/

been attempts at legislation to regulate and mitigate these impacts, Amazon successfully lobbied to block those efforts.[35]

- **Public subsidies.** As it expands, Amazon gobbles up public subsidies to fund its growth,[36] receiving funds not only for distribution and fulfillment centers, but data centers as well. According to research by Good Jobs First, Amazon has taken nearly $2 billion in public subsidies to finance its data center expansion.[37] By subsidizing Amazon, we are not only giving the corporation an unfair advantage, we are failing to invest in the technological capacity necessary for transformative public projects.

Artificial Intelligence in Policing, Border, and Military Applications

Large government investments in law enforcement and the military, rather than public infrastructure and public services, have created incentives for corporations to develop technologies tailored for those purposes in order to receive lucrative government contracts. In turn, tech corporations have used lobbyists[38] and revolving door[39] tactics to advocate[40] for and secure these contracts.

Experts have warned that the use of artificial intelligence in immigration enforcement, policing, and military contexts is fraught with risks for civil liberties, human rights, and due process—not just for those directly targeted by the AI uses, but also for the public as these technologies gain traction and spread. These uses have included drone targeting, face recognition, predictive policing, pre- and post-trial automated risk assessment, and large biometrics databases. Amazon's own incursions in this area are indicative of a pattern of over-investment in technological innovation linked to abuses of power:

- **Biometric identification**. Amazon released its face recognition product, Rekognition, at the end of 2016. Soon after, police departments in Oregon and Florida, as well as the FBI, began pilot programs using the software.[41] Following reporting on these pilots, the ACLU conducted a test and found that Rekognition falsely matched members of Congress.[42] In 2018 and 2019, major peer-reviewed studies from the Massachusetts Institute of Technology found the technology more often misidentified women and people of color. Despite these concerns and calls for public debate on this technology, Rekognition and other biometric identification systems remain available on Amazon Web Services.
- **Warrantless search and mass surveillance.** After Amazon purchased Ring in 2018 for over $1 billion, it established a program to market Ring cameras through police departments and amassed hundreds of police department contracts. Today, Ring is reportedly the largest private

[35] https://www.oregonlive.com/business/2023/03/amazon-fights-oregon-data-center-clean-energy-bill.html
[36] https://www.commondreams.org/news/amazon-oregon
[37] https://goodjobsfirst.org/amazon-tracker/?activity=Data+center
[38] https://www.technologyreview.com/2018/10/22/139639/amazon-is-the-invisible-backbone-behind-ices-immigration-crackdown/
[39] https://www.politico.com/news/2021/06/04/amazon-hiring-former-government-officials-491878
[40] https://www.propublica.org/article/how-amazon-and-silicon-valley-seduced-the-pentagon
[41] https://www.technologyreview.com/2020/06/12/1003482/amazon-stopped-selling-police-face-recognition-fight/
[42] https://www.aclu.org/news/privacy-technology/amazons-face-recognition-falsely-matched-28

surveillance network in the world.[43] In 2021, we learned that the Los Angeles Police Department used Amazon Ring footage to track Black Lives Matter activists across the city.[44]

- **Real time tracking and mass surveillance of intimate information.** Amazon's immense cloud computing capabilities are enabling the Department of Homeland Security to build an unprecedented biometric surveillance database of over 270 million people, including Iris scans, face images, drivers license data, social media handles, etc. This information could be used to enable real time tracking of people and their families in the United States.[45]
- **Monitoring phone calls.** In November 2021, an investigation revealed that Amazon's speech-to-text technology is being used to transcribe phone conversations and flag calls based on key-word searches to jails and prisons across the country.[46] In eight states, the system was reportedly scanned for conversations involving the Spanish word for *lawyer*. In Suffolk County, New York, jail administrators used the system to find a call where an inmate reported a COVID outbreak cover-up to a family member and discussed the possibility of contacting the media.

Government agencies with a history of abusing their power need far more oversight, transparency, and accountability. The expanded use of artificial intelligence in these agencies would run counter to the goal of using new technologies to increase economic well being and increase political participation. Just Futures Law and other immigration organizations are submitting detailed guidance to the OMB on this issue, and we support those efforts.

Automation, Surveillance, and Monitoring

Amazon is the second largest private-sector employer in the United States, a major government contractor, and a pioneer in using automated management and worker surveillance to create a punitive, unstable, and dangerous working environment. The proliferation of Amazon's management model demonstrates how technology, such as artificial intelligence, will continue to be used in workplaces if we fail to change the incentives. Amazon makes it clear: when employers are allowed to use technologies to maximize profit off the backs of workers, regulation is not enforced, and workers are not able to bargain collectively, then we will have a race to the bottom that results in precarious, unsafe, low paid jobs.

As the Department of Labor creates the principles and plan outlined in the Executive Order on artificial intelligence, and the administration considers procurement standards, it should stem the replication of poor management practices like those employed by Amazon and ensure government tech contractors and vendors are good employers.

- **Expanding worker surveillance.** Amazon subjects its workers to unprecedented levels of monitoring and control. In fact, according to a study by the Center for Urban Economic

[43] https://www.theguardian.com/commentisfree/2021/may/18/amazon-ring-largest-civilian-surveillance-network-us
[44] https://www.eff.org/deeplinks/2021/02/lapd-requested-ring-footage-black-lives-matter-protests
[45] https://justfutureslaw.org/wp-content/uploads/2022/05/HART-Attack.pdf
[46] Avi Asher-Schapiro and David Sherfinski, "AI Surveillance Takes U.S. Prisons by Storm," Thomson Reuters Foundation, November 16, 2021, https://news.trust.org/item/20211122213228-wxsz9/.

Development at the University of Illinois Chicago (UIC),[47] "60% of surveyed [Amazon warehouse workers] reported that the "level of monitoring or surveillance" is more at Amazon than at past jobs, versus 17% who say it is about the same, and 9% who say it is less."

- **Dangerous pace of work and reduced autonomy.** Through automated management that dictates each task and timing, Amazon enforces an unsafe pace of work. In the UIC study, Amazon warehouse workers attributed the high injury rate at the company to the corporation's focus on speed above all else. This speed translates into higher profits without needing to hire enough people to get the job done safely.
- **Increased job precarity.** Amazon has created a system where high-turnover is built into the business model. The plug-and-play nature of its automated management system allows Amazon to dynamically balance the number of workers it needs at any time, and to disregard the number of workers it loses to exhaustion, injury, and disability. The New York Times found that Amazon's turnover rate is an astounding 150%,[48] and the Seattle Times found the turnover rate is double the industry average.[49] One internal memo warned the company may "deplete the available labor supply in the US."[50]
- **Exploitation of data workers.** Workers who train AI models through platforms like Amazon Mechanical Turk report low wages, unfair client practices that lead to wage theft, and grueling conditions.[51]
- **Union busting.** Amazon has not yet been forced to change its model because of deregulation, defunding of public enforcement agencies, and crucially, a non-unionized workforce without the power to bargain collectively. As workers advocate for better conditions, Amazon has employed surveillance,[52] used workplace tracking to find "legitimate" reasons to fire workers who are organizing,[53] and has broken the law.[54]

For decades, the United States has insufficiently enforced worker, antitrust, and consumer laws, and that failure has incentivized the business practices detailed above across the tech sector. These incentives and regulatory failures are a large part of what makes the advancing development of artificial intelligence concerning to the public.

We now have the opportunity to establish new incentives and develop a more innovative economy, rooted in principles of shared prosperity, equity, and justice. In order to do this, we must expand the

[47] https://www.cnbc.com/2023/10/25/study-amazons-focus-on-speed-surveillance-drives-worker-injuries.html
[48] https://www.nytimes.com/interactive/2021/06/15/us/amazon-workers.html
[49] https://www.seattletimes.com/business/amazon/amazons-turnover-rate-amid-pandemic-is-at-least-double-the-average-for-retail-and-warehousing-industries/
[50] https://www.vox.com/recode/23170900/leaked-amazon-memo-warehouses-hiring-shortage
[51] https://www.markey.senate.gov/news/press-releases/sen-markey-rep-jayapal-lead-colleagues-in-demanding-answers-from-ai-companies-on-use-of-underpaid-overworked-data-workers
[52] https://www.washingtonpost.com/business/2022/01/27/amazon-staten-island-nlrb-complaint/
[53] https://inthesetimes.com/article/amazon-profile-hibaq-mohammed
[54] https://www.cnbc.com/2023/12/01/amazon-broke-federal-labor-law-by-racially-disparaging-union-leaders.html

power of the public to write our own technological futures—as workers, consumers, small business owners, and entrepreneurs—before big tech corporations do it for us.

To begin, the administration must establish agency priorities and procurement practices that rebalance power between the public, workers, and corporations; deconcentrate power in the tech sector; and, bring needed transparency, accountability, and oversight to the tech sector and tech procurement.

Sincerely,
Athena Coalition

Submitted by:
Ryan Gerety, Athena Coalition

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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0152
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Upturn, Inc.

General Comment

Attached please find Upturn's comment.

Attachments

2023-12-05 OMB AI Memorandum Upturn Comment

Upturn
Toward Justice in Technology

December 5, 2023

Office of Management and Budget
725 17th Street NW
Washington DC, 20503

Submitted via regulations.gov

Re: OMB-2023-0020 — Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum.

We write to provide comments in response to the Office of Management and Budget's draft memorandum, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)*.

Upturn is a non-profit organization that advances equity and justice in the design, governance, and use of technology. Through research and advocacy, we drive policy change by investigating specific ways that technology and automation shape people's opportunities, particularly in historically disadvantaged communities.

Our comments primarily address questions 5, 6, 7, and 8 in the request for comment.

Upturn
Toward Justice in Technology

Executive Summary

The Office of Management and Budget's draft memorandum, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)*, has the potential to help prevent and address discrimination in the use of automated systems by federal agencies. By requiring anti-discrimination testing of a broad range of rights-impacting algorithmic systems, as well as ongoing monitoring and mitigation of algorithmic discrimination, the memorandum will launch a landmark effort to evaluate algorithmic systems in civil rights areas — a framework that Upturn has advocated for in many civil rights contexts such as credit, employment, housing, and policing. This effort can materially improve peoples' lives, especially for marginalized communities protected by federal anti-discrimination laws. As one example, algorithmic testing has identified methods to mitigate pronounced racial disparities in IRS models used to select individuals for tax audits. By committing agencies to perform anti-discrimination testing of their algorithmic systems, the federal government can "serve as a model for state and local governments, businesses and others to follow in their own procurement and use of AI."[1] The final memorandum must require agencies to perform anti-discrimination testing of their systems and mitigate disparate impact.

However, these important measures risk being undercut by other provisions of the draft memorandum. In particular, the draft memorandum affords agencies significant leeway to waive compliance with the minimum practices. The Office of Management and Budget (OMB) should ensure that agencies, unless expressly and strictly prohibited by statute, explore ways to safely collect or infer the necessary demographic data to comply with the memorandum's minimum requirements. An agency should only be able to waive compliance with the memorandum's anti-discrimination testing provisions if two conditions are met: first, an agency determines that a specific legal barrier prevents them from collecting relevant demographic data, and second, an agency makes a written determination that no other method to perform the anti-discrimination testing is viable. In a large majority of cases, other methods — beyond direct collection of self-reported demographic data — should be available to support these efforts. As a result, it should be the rare case that agencies are able to waive compliance with the memorandum's anti-discrimination testing provisions.

[1] The White House, "FACT SHEET: Biden-Harris Administration Announces New Actions to Promote Responsible AI Innovation that Protects Americans' Rights and Safety," May 4, 2023, available at https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/04/fact-sheet-biden-harris-administration-announces-new-actions-to-promote-responsible-ai-innovation-that-protects-americans-rights-and-safety/.

1. **The final memorandum must contain two key provisions. First, agencies must perform anti-discrimination testing of their algorithmic systems. Second, agencies must be required to explore mechanisms to mitigate disparate impact.**

We applaud OMB's draft memorandum for broadly defining "rights-impacting" algorithmic systems and requiring agencies to conduct anti-discrimination testing of these systems. We are also heartened to see that the draft memorandum would further require agencies to mitigate a system's disparate impact, consistent with applicable law, once that disparate impact has been identified. It is critical that the provisions in Section 5(c)(v)(A)-(C) remain in OMB's final memorandum. When the federal government uses algorithmic systems in covered civil rights areas, it must ensure that those systems are regularly tested for disparate effects on a prohibited basis. Similarly, agencies must maintain reasonable measures to search for less discriminatory algorithms on an ongoing basis. These provisions are consistent with the administration's policy, as expressed through Executive Orders 14091 and 14110, as well as the AI Bill of Rights. Executive Order 14091 broadly required agencies to consider opportunities to "prevent and remedy discrimination, including by protecting the public from algorithmic discrimination."[2] Executive Order 14110 stated the administration's policy that it "is necessary to hold those developing and deploying AI accountable to standards that protect against unlawful discrimination and abuse, including in the justice system and the Federal Government,"[3] and it more broadly directed agencies to use their authorities to prevent and address discrimination in the use of automated systems.[4] The AI Bill of Rights called for designers, developers, and deployers of automated systems to "take proactive and continuous measures to protect individuals and communities from algorithmic discrimination and to use and design systems in an equitable way," and for "proactive equity assessments as part

[2] Executive Order 14091, Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 88 Fed. Reg. 10825, 10831, February 22, 2023, available at https://www.federalregister.gov/documents/2023/02/22/2023-03779/further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal.

[3] Executive Order 14110, Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, 88 Fed. Reg. 75191, 75192, November 1, 2023, available at https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence

[4] *See, e.g.,* Sections 6, 7, and 8 of Executive Order 14110.

of the system design," as well as "pre-deployment and ongoing disparity testing and mitigation."[5]

Such requirements are consistent with recent work by Upturn and our co-authors that argues that the duty to search for less discriminatory algorithms should be on the entities that develop and deploy predictive models.[6] In this case, that duty would fall to federal agencies and their contractors. An often unspoken premise throughout many efforts to regulate algorithmic systems is that for any given prediction problem, a single "correct" model exists. For example, when a bank seeks to predict default by borrowers, it is often assumed that a single "correct" model exists that best advances that goal, and that any deviation from this unique solution would necessarily entail a loss in performance. The implication is that pursuing goals like minimizing disparate impact will inevitably involve a tradeoff with model performance. But the assumption that a unique solution exists and that a fairness-accuracy tradeoff is inevitable are descriptively inaccurate. Work in computer science has established that there are almost always multiple possible models with equivalent accuracy for a given prediction problem — a phenomenon termed "model multiplicity."[7]

Multiplicitous models perform a given prediction task equally well, but can differ in other ways — from the features they use to make predictions, to the way they combine those features to make predictions, to the way their predictions are robust to changing circumstances. Critically, these equally performant models can have different levels of disparate impact. As a result, when an algorithmic system displays a disparate impact, model multiplicity suggests that other models that perform equally well, but have less

[5] White House Office of Science and Technology Policy, *Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People* (Oct. 2022), available at https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf.

[6] *See* Emily Black, John Logan Koepke, Pauline T. Kim, Solon Barocas, Mingwei Hsu, *Less Discriminatory Algorithms*, Oct. 2, 2023, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4590481.

[7] Several different terms have been used to describe related phenomena over years of computer science and statistical scholarship. The first to introduce the notion that various models could be equally effective at the same task was Leo Breiman. *See* Statistical Modeling: The Two Cultures, 16 Stat. Sci., no. 3, Aug. 2001 at 199, 200 (using the term "the Rashomon effect"). After this, Marx et al. resurfaced the idea that different models could have different predictions but similar performance, under the term "predictive multiplicity." *See* Charles Marx et al., *Predictive Multiplicity in Classification*, 119 Proc. Machine Learning Research. 6765 (2020). Black and Fredrikson displayed similar behavior on different classes of models in concurrent work. *See* Emily Black, Matt Fredrikson, *Leave-One-Out Unfairness*, in FAccT '21: Proceedings of the 2021 ACM Conference on Fairness, Accountability, and Transparency 285 (2021). Later, Black et al., introduced the term model multiplicity to encompass not only how similarly performant models different in their predictions, but also in their internals, which have impacts on the explanations of their predictions. *See* Emily Black, Manish Raghavan, Solon Barocas, *Model Multiplicity: Opportunities, Concerns, and Solutions*, in FAccT '22: Proceedings of the 2022 ACM Conference on Fairness, Accountability, and Transparency 850 (2022).

discriminatory effect, exist. In other words, in almost all cases, a less discriminatory algorithm (LDA) exists.

These insights about model multiplicity have profound ramifications for the legal, regulatory, and policy response to discriminatory algorithms and support OMB's anti-discrimination testing provisions. Under disparate impact doctrine, it makes little sense to say that a given algorithmic system is either "justified" or "necessary" if an equally accurate model that exhibits less disparate effects is available and discoverable with reasonable efforts. In fact, a close reading of the legal authorities over the decades reveals that the law has on numerous occasions recognized that the existence of a less discriminatory alternative is sometimes relevant to a defendant's burden of justification at the second step of disparate impact analysis.[8] As a result, when entities, including the federal government, use algorithmic systems in civil rights domains, they should have a duty to search for and implement LDAs before they can deploy a system with disparate effects. Without such a duty, developers are likely to be singularly focused on their chosen performance metric and will fail to identify ways to achieve the same goals with less discriminatory impact. OMB's memorandum is on solid legal and technical footing when it places this duty on federal agencies and contractors who develop and deploy rights-impacting algorithmic systems.

Imposing such a duty not only comports with the purposes behind our civil rights laws, which are intended to remove arbitrary barriers to full participation by marginalized groups in our nation's economic life, but also is practical, because model developers are in the best position to undertake a fruitful search for LDAs. Developing a model through the machine learning pipeline inherently involves testing and exploration of alternatives. A requirement that entities, such as federal agencies or their contractors, also test for disparate impact and compare model disparities throughout the model development process is straightforward and is not, by itself, burdensome.

Notably, this approach differs from past attempts to combat disparate impact, which would have required entities to prove the absence of less discriminatory alternatives in justifying their challenged practice. Historically, such approaches were

[8] Emily Black, John Logan Koepke, Pauline T. Kim, Solon Barocas, Mingwei Hsu, *Less Discriminatory Algorithms*, Oct. 2, 2023, at 16-28.

critiqued for requiring entities to prove a negative.[9] But a requirement that entities, including federal agencies, maintain reasonable steps to search for and implement LDAs is different. For one, there is functionally no uncertainty as to whether an LDA exists and there is a structured process for discovering them. For another, there are methods to quantify model properties, such as model performance, so as to make the baseline and alternative directly comparable. Moreover, it is unlikely that a developer has, without any specific exploration or dedicated process, randomly happened upon the globally optimal, least discriminatory model. As a result, OMB is justified in requiring federal agencies and their contractors to test their models for disparate impact and search for ways to mitigate disparate impact if it is identified.

2. For agencies to fulfill the "Additional Minimum Practices for Rights-Impacting AI" in 5(c)(v), they will need to meet certain basic requirements.

As currently written, the draft memorandum would require agencies to abide by a number of minimum practices for rights-impacting AI. For example, once designated rights-impacting, agencies will need to "assess whether their rights-impacting AI materially relies on information about a class protected by Federal nondiscrimination laws in a way that could result in algorithmic discrimination or bias against that protected class,"[10] "test their AI to determine whether there are significant disparities in the AI's performance across demographic groups,"[11] and "appropriately address disparities that have the potential to lead to discrimination, cause meaningful harm, or decrease equity, dignity, or fairness."[12] The draft memorandum also calls on agencies to stop using rights-impacting AI systems if "adequate mitigation of the disparity is not possible."[13]

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[9] For example, when the Department of Housing and Urban Development reinstated their 2013 "Implementation of the Fair Housing act's Discriminatory Effects Standard" in 2023, the Department noted that their approach — adopting Title VII's burden-shifting framework — "makes the most sense because it does not require either party to prove a negative." *See* Department of Housing and Urban Development, "Reinstatement of HUD's Discriminatory Effects Standard," 88 Fed. Reg. 19450, 19490, March 31, 2023, available at https://www.federalregister.gov/documents/2023/03/31/2023-05836/reinstatement-of-huds-discriminatory-effects-standard.

[10] Executive Office of the President, Office of Management and Budget, Proposed Memorandum for the Heads of Executive Departments and Agencies, Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence, Section 5(c)(v)(A)(1) at 18, available at https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf.

[11] Id., Section 5(c)(v)(A)(2) at 18.

[12] Id.

[13] Id.

For agencies to fulfill these minimum practices, they will need to ensure that the following four related processes are in place.

1. Agencies must have a process in place to collect or infer the demographic data necessary to perform a disparate impact analysis. For example, absent information about the gender of people whose data is being used to evaluate a model's performance, developers will be unable to establish whether the model's performance and selection rate differs by gender.
2. Agencies must have a process in place for actually performing a disparate impact analysis. Notably, this must include a process for evaluating a model for disparate impact both prior to deployment and on an ongoing basis, once it has been deployed.[14]
3. Agencies must establish a process for searching for LDAs. This should apply to models being developed for the first time — where the search for LDAs can be incorporated into the model development process from the outset — and in addressing a disparate impact that has been identified after a model has been developed or deployed.
4. Agencies must establish processes to determine when they will adopt an LDA and for implementing the LDA in practice.

Absent any one of these processes, agencies will fail to fulfill the minimum requirements. In the final memorandum, or through other guidance to agencies, OMB should consider clarifying that it expects each of these four related processes to be in place for agencies to fulfill the minimum practices.

To ensure that agencies are best able to advance anti-discrimination testing of algorithmic systems, OMB should clarify that agencies, unless expressly and strictly prohibited by statute, should explore ways to safely collect or infer the necessary demographic data to comply with the memorandum's minimum requirements. In particular, some agencies may believe that they cannot effectively comply with the minimum requirements because they do not currently collect or infer the relevant demographic data necessary to perform anti-discrimination testing.[15] Agencies may point to a variety of reasons why they currently do not collect or infer relevant demographic information: a relevant statute may clearly prohibit the agency from directly collecting

[14] Section 5(c)(v)(C) at 20.
[15] *See, e.g.,* Arushi Gupta, Victor Y. Wu, Helen Webley-Brown, Jennifer King, Daniel E. Ho, *The Privacy-Bias Tradeoff: Data Minimization and Racial Disparity Assessments in U.S. Government*, in FAccT '23: Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency 492 (2023).

demographic data, a statute may prohibit agencies from sharing relevant information, agencies may have an institutional norm against collecting demographic data, or agencies may have limited experience in applying relevant inference methodologies. OMB should clarify that it expects agencies, where permissible under existing law, to make every effort to re-examine agency-level policies, directives, regulations, practices, or norms that would hinder them from performing anti-discrimination testing of their algorithmic systems. Such efforts are directly responsive to Executive Orders 14091 and 14110, the AI Bill of Rights, and the recommendations from the Equitable Data Working Group. And a number of agencies have experience and practice in inferring demographic data for anti-discrimination testing purposes when that data cannot be directly collected.[16]

One reason that agencies should be expected to make every effort to re-examine existing policies, regulations, directives, practices, or norms that would hinder anti-discrimination testing is that, currently, the draft memorandum states that "[e]xcept as prevented by applicable law and governmentwide guidance, agencies must apply the

[16] For example, the CFPB's Office of Research and Division of Supervision, Enforcement, and Fair Lending rely "on a BISG proxy probability for race and ethnicity in fair lending analysis conducted for non-mortgage products." *See* Consumer Financial Protection Bureau, *Using publicly available information to proxy for unidentified race and ethnicity: A methodology and assessment*, at 23 (2014), available at https://files.consumerfinance.gov/f/201409_cfpb_report_proxy-methodology.pdf. The CFPB also has a gender proxy methodology. *See* Consumer Financial Protection Bureau, *Semi-Annual Report of the Consumer Financial Protection Bureau*, Fall 2021, at 39, available at https://files.consumerfinance.gov/f/documents/cfpb_semi-annual-report-to-congress_2022-04.pdf. The FTC also relies on BISG/BIFSG in their research efforts. *See* Federal Trade Commission, *Protecting Older Consumers 2021-2022: A Report of the Federal Trade Commission*, at 39 (Oct. 18, 2022), available at https://www.ftc.gov/system/les/ftc_gov/pdf/P144400OlderConsumersReportFY22.pdf. The Centers for Medicare and Medicaid Services uses a specialized version of BISG, Medicare BISG, or MBISG. MBISG is currently used to conduct national, contract-level, stratified reporting of Medicare Part C & D performance data for Medicare Advantage Plans by race and ethnicity. *See* Centers for Medicare and Medicaid Services, *The Path Forward: Improving Data to Advance Health Equity Solutions* (November 2022), available at https://www.cms.gov/files/document/path-forwardhe-data-paper.pdf. The EEOC's Investigative Analytics Team uses BISG race estimation techniques when race/ethnicity is missing from administrative employment data provided by employers. *See* "Using Bayesian Improved Surname Geocoding (BISG) to Classify Race and Ethnicity in Administrative Employment Data by Industry: A Validation Study," available at https://ww2.amstat.org/meetings/jsm/2020/onlineprogram/AbstractDetails.cfm?abstractid=311006. The Office of the Assistant Secretary for Planning and Evaluation and the Centers for Medicare and Medicaid Services have funded research supporting the development and advancement of methods like BIFSG. *See* Melony E. Sorbero, Roald Euller, Aaron Kofner, Marc N. Elliott, *Imputation of Race and Ethnicity in Health Insurance Marketplace Enrollment Data, 2015-2022 Open Enrollment Periods*, (2022) available at https://www.rand.org/content/dam/rand/pubs/research_reports/RRA1800/RRA1853-1/RAND_RRA1853-1.pdf. And the Department of the Treasury recently relied upon BIFSG for the first time to conduct tax analysis by race and Hispanic origin. *See* Robin Fisher, *Estimation of Race and Ethnicity by Re-Weighting Tax Data*, Department of the Treasury, Office of Tax Analysis, Technical Paper 11, January 2023, available at https://home.treasury.gov/system/files/131/TP-11.pdf; *also see* Julie-Anne Cronin, Portia DeFilippes, Robin Fisher, *Tax Expenditures by Race and Hispanic Ethnicity: An Application of the U.S. Treasury Department's Race and Hispanic Ethnicity Imputation*, Department of the Treasury, Office of Tax Analysis, Working Paper 122, January 2023, available at https://home.treasury.gov/system/files/131/WP-122.pdf.

minimum practices in this section to safety-impacting and rights-impacting AI by August 1, 2024, or else stop using the AI until it becomes compliant."[17] As drafted, we take this provision to mean that if any agency claims that an existing statute prevents it from complying with the minimum practices, they do not necessarily have to stop using the AI system, even as it remains non-compliant. OMB should require agencies to specify exactly which provision of applicable law prevents them from applying the minimum practices. For example, if an agency determines that an existing legal barrier would prevent them from collecting the relevant demographic information to perform anti-discrimination testing of algorithmic systems, and separately also determines that no viable alternative methods to perform the testing are viable, the agency should be required to provide that determination to OMB in writing. The determination should also clearly state why other methods are insufficient to enable anti-discrimination testing.[18] Absent specific legal prohibition or other governmentwide guidance, if an agency is unable to perform anti-discrimination testing of an algorithmic system, the agency must cease use of that system.

It is key that OMB not only require agencies to point to the legal barrier, but to also provide a detailed justification as to why no other viable alternative method would enable them perform the relevant anti-discrimination testing. Recent work on models used by the IRS to select individuals for audits provides a clear example of how agencies can perform anti-discrimination testing in the absence of directly collected demographic data.[19] The goal of these models was to predict when an individual was at high risk of tax noncompliance. Because the IRS "does not systematically collect data on taxpayer race, either directly via tax returns or indirectly via merging tax data with administrative data on race from other agencies," researchers turned to Bayesian Improved First Name Surname Geocoding (BIFSG) "to estimate the probability that a taxpayer is Black (and non-Hispanic) based on the first name, last name, and location of the taxpayer."[20]

As the researchers show, different problem formulations — the translation of a

[17] Proposed Memorandum for the Heads of Executive Departments and Agencies, Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence, Section 5(c) at 13.
[18] Especially when agencies seek to waive compliance with the minimum practices articulated in Section 5(c)(v) of the memorandum, that waiver must be public. This should include the agency's rationale and justification for the waiver, including the specific provision of law that would prevent an agency from complying.
[19] Emily Black, Hadi Elzayn, Alexandra Chouldechova, Jacob Goldin, Daniel E. Ho, *Algorithmic Fairness and Vertical Equity: Income Fairness with IRS Tax Audit Models*, in FAccT '22: Proceedings of the 2022 ACM Conference on Fairness, Accountability, and Transparency 1479 (2022); Hadi Elzayn, Evelyn Smith, Thomas Hertz, Arun Ramesh, Robin Fisher, Daniel E. Ho, Jacob Goldin, *Measuring and Mitigating Racial Disparities in Tax Audits*, Stanford Institute for Policy Research Working Paper (2023), available at https://siepr.stanford.edu/publications/working-paper/measuring-and-mitigating-racial-disparities-tax-audits.
[20] Elzayn, et al., *Measuring and Mitigating Racial Disparities in Tax Audits*, at 19.

real-world problem into a machine learning task — can lead to different results. When the problem was formulated to predict whether individuals are likely to be noncompliant *at all* (with binary labels, describing if an individual was compliant or not) — as opposed to predicting the amount of money they failed to report (with continuous labels of the amount of taxes owed) — disproportionately more lower-income and Black individuals were selected for audit.[21] As a result, changing the model's prediction task from the *likelihood of noncompliance* to the *expected amount of noncompliance* shifted the distribution of those recommended for audit by the algorithm from lower-income and Black individuals towards higher-income and more white individuals, reducing stark disparities.[22] Without BIFSG, the researchers would not have been able to perform the basic disparate impact testing, let alone search for an alternative approach that reduced disparities.

3. The final memorandum should ensure that Chief AI Officers do not have such wide latitude to invoke a waiver from the minimum practices for rights-impacting AI.

As currently drafted, OMB's memorandum allows CAIOs to:

> waive one or more of the [minimum practices for safety-impacting and rights-impacting artificial intelligence] for a specific covered AI application or component after making a written determination, based upon a system-specific risk assessment, that fulfilling the requirement would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations.[23]

The draft memorandum defines "waiving individual applications of AI from elements of Section 5 of this memorandum" as one of the responsibilities of a CAIO.[24] As drafted, these provisions would likely allow many safety- and rights-impacting algorithmic systems to evade scrutiny. OMB should make several changes to the memorandum to ensure that CAIOs do not routinely seek waivers and undermine the purpose of the memorandum.

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[21] Id., 36-37.
[22] Id.
[23] Proposed Memorandum for the Heads of Executive Departments and Agencies, Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence, Section 5(c)(iii) at 14.
[24] Id., Section 3(b)(ii)(O) at 6.

First, OMB should clarify that agencies should narrowly construe their ability to waive compliance with the minimum practices. For example, the drafted text suggests that if fulfilling the requirement would "increase risks to safety or rights overall," then CAIOs may waive compliance. OMB should clarify that when it uses the term "risks to safety or rights," it is specifically referring to the aforementioned purposes that are presumed to be safety-impacting or rights-impacting, and not more generally referring to safety or rights. As currently drafted, agencies may misunderstand the relevant analysis.

Second, OMB should clarify what it expects to be contained within the system-specific risk assessments. In particular, for rights-impacting systems, OMB should clarify that CAIOs must specifically describe how complying with the minimum requirements would "increase risks to rights." OMB should consider requirements that the Department of Justice's Civil Rights Division and relevant civil rights officials in each agency be consulted when a CAIO seeks a waiver because compliance with the minimum practices would increase risks to rights. Rarely, if ever, should it be possible for an agency to claim that the very act of documentation, testing, evaluation, ongoing monitoring, and risk mitigation — steps that by their nature are designed to protect rights — would somehow increase risks to rights.

Third, OMB should provide clear examples of what it means for fulfillment of the minimum practices to create "an unacceptable impediment to critical agency operations."[25] As drafted, CAIOs appear to retain sole authority and discretion to determine that abiding by the minimum practices would impede "critical agency operations" and to determine what those specific operations are. If CAIOs take an expansive view of what constitutes an "unacceptable impediment to critical agency operations," this exception would swallow the rule. OMB could elaborate that impeding critical agency operations means such significant and extraordinary diversion of staff time and resources that the agency risks being unable to fulfill its core mission for the American people. OMB should expect that some agencies may have to divert some staff capacity and resources to ensure compliance with the minimum practices. That fact alone cannot constitute "an unacceptable impediment to critical agency operations."

[25] Id., Section 5(c)(iii) at 14.

4. The final memorandum should ensure that agencies clearly document their anti-discrimination testing process and efforts. It should also require public reporting of these efforts in the AI use case inventories.

As currently drafted, the memorandum suggests that "[a]gencies must document their implementation of these practices and be prepared to report them to OMB, either as a component of the annual AI use case inventory … or on request as determined by OMB."[26] Separately, the draft memorandum says that starting in 2024 "agencies will be required … to identify and report additional detail on how they are using safety-impacting and rights-impacting AI" and "how they are managing those risks."[27]

It is critical that the final memorandum requires agencies to document their implementation of the minimum practices, so agencies can actually receive effective, constructive feedback, which agencies are required to solicit from "affected groups, including underserved communities, in the design, development, and use of the AI."[28] Such a provision is important: agencies should receive ongoing feedback — through public listening sessions, public hearings, formal comments, and more — from affected communities regarding their use of algorithmic systems. But without transparent documentation as to the choices made when developing and using those systems, as well as in assessing and mitigating disparate impact of those systems, it will be difficult for feedback from affected groups to be effective.

Specifically, it is important that the final memorandum require agencies to clearly document how they approached relevant anti-discrimination testing of algorithmic systems and document how they searched for less discriminatory algorithms. Inherent to this process is a determination that sufficient mitigation of algorithmic discrimination is possible. When an agency identifies that an algorithmic system has disparities and discovers a method to mitigate that discrimination, it should clearly document why they believe that mitigation is sufficient to continue use of the system, and receive feedback from affected groups if they believe that mitigation is sufficient. Similarly, when an agency identifies that an algorithmic system "materially relies on information about a class protected by Federal nondiscrimination laws in a way that could result in algorithmic discrimination or bias against that protected class," it must "cease the use of the information before using the AI for decision-making."[29] This inherently requires a

[26] Id., Section 5(c) at 13.
[27] Id., Section 3(a)(iv) at 4.
[28] Id., Section 5(c)(v)(B) at 19.
[29] Id., Section 5(c)(iv)(A)(1) at 15.

determination as to when a system materially relies on proxies for a protected class. That determination should be documented and justified.

Ultimately, the final memorandum should ensure that future AI use case inventories describe these efforts or ensure that agencies otherwise make this documentation publicly available in an accessible format.

We welcome further conversations on these important issues. If you have any questions, please contact Logan Koepke (Project Director, logan@upturn.org) and Harlan Yu (Executive Director, harlan@upturn.org).

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0153
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Government Information Watch and the Digital Democracy Project

General Comment

See attached file(s)

Attachments

Civil Society Comment on White House OMB draft guidance on Artificial Intelligence Introduction

Recommendation 1

Recommendations 2 and 3

Recommendations 4 and 5

Recommendation 6 and Signatories

Civil Society Comment on White House OMB draft guidance on Artificial Intelligence

December 5, 2023

Regarding the Office of Management and Budget's Request for Comment on its Draft Memo andum on "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence"
https://www.regulations.gov/document/OMB-2023-0020-0001

Dear Director Young,

We write today in response to your recent request for comment regarding draft guidance on artificial intelligence, representing the perspectives of advocates and organizations devoted to government transparency, accountability, and ethics.

President Biden's Executive Order issued on October 30, 2023 requires each agency to designate a Chief AI Officer (CAIO) within 60 days of the date of the issuance of this memorandum.

Regrettably, the E.O. does not address making the use of AI in the federal government accountable to anyone *outside of* the Executive Branch, nor establish any principles, proposed rules, or practices to make the decisions of how and when to use AI in any way open to public scrutiny. That failure to incorporate openness and public accountability is replicated in this Draft Memorandum. Specifically, we have serious concerns regarding language around the specific minimum risk management practices for uses of AI that impact the rights and safety of the public.

In footnote 8 in the draft guidance, OMB states that "Agencies must only publicly report use cases to the extent practicable and consistent with applicable law and government-wide guidance, including those concerning the protection of privacy and of sensitive law enforcement, national security, and other protected information." Such hedging language raises deep accountability concerns.

We assess that developing, implementing, and driving good governance of artificial intelligence across the massive enterprises of the federal government will require the White House to apply key lessons from the past decade of open government data. In the continued absence of the formal guidance from OMB on the OPEN Government Data Act[1] mandated by Congress in 2018, we still see no broad standardization and compliance with enterprise data inventories, much less enterprise artificial intelligence (AI) uses.

[1] https://data.gov/open-gov/

While the CIO Council has done important work in creating a schema[2] for AI use inventories, agencies are not universally adopting and implementing it, in parallel to the uneven compliance with enterprise data inventories a decade after President Obama's memorandum on machine-readable data.

We now see an opportunity to do both, moving forward with a holistic strategy for proactive disclosures across the United States government in the aftermath of the sunsetting of FOIA Online this fall.

We believe that public participation and collaboration are essential to rebuilding and keeping public trust in government, which remains at historic lows. This context requires fresh thinking and recommitment to good governance.

As with any government-wide initiative, successful implementation of this guidance will depend on senior leadership at the White House accountable for transparency and good governance., and increased human capacity at the Office of Management and Budget in the office of the U.S. Chief Information Officer.

Accordingly, we propose the following approaches to strengthen AI governance:

[2] https://www.cio.gov/assets/resources/2023-Guidance-for-AI-Use-Case-Inventories.pdf

Recommendation 1: Establish an AI Oversight Board

The Executive Order upon which this RFC is based notes that the United States must "foster public trust and confidence in AI" and must "protect civil liberties, privacy, and American values."

As you are well aware, the private sector is deeply interested in the federal government's engagement in AI. Indeed, the White House and executive branch entities have met numerous times with corporate leaders in this field. The private sector has legitimate interests, but they do not always overlap with those of civil society accountability advocates.

Open, transparent, and accountable government are American values that are key to fostering and protecting all *other* values. We have variously worked for decades, both inside the government at times and outside in civil society, to promote, advance, and protect these core values. For this reason, we are deeply concerned that a draft OMB regulation has the potential to not only affect how the government does its work but also to profoundly affect how – and *if* -- the American public will know how our government is deploying this radically new technology and how/whether they have a real-time say in how it is being deployed.

As an example, the Draft Memorandum recommends that agencies "consider... fairness and non-discrimination" "in accordance with law." The text does not propose a definition of fairness or non-discrimination in this context, nor does it instruct agencies to cooperate in arriving at a shared definition..

The Draft Memorandum notes that "applications of AI could increase human autonomy," but encourages agencies to "consider the sufficiency of existing or evolving *legal, policy, and regulatory environments before contemplating additional measures for disclosure and transparency*." The OMB's guidance interprets "appropriate disclosure and transparency" as "context specific."

As comments submitted by the Harvard Cyberlaw Clinic note, however, this recommendation assumes that disclosure and transparency are tradeoffs that

require sacrificing the benefits of AI. Transparency, as they note, should not be cast as a “necessary evil” but rather as an essential mode of protecting individual and community rights against dangers posed by AIs. Elsewhere, while OMB is correct that the need for disclosure and transparency is greater where the potential harms are more significant, we agree with Harvard Cyberlaw that it is dangerous to suggest that the potential benefits of an AI application could justify use of a non-transparent “black box” technology.

For these reasons, we urge the White House to create in the Executive Office a public-facing Oversight Board. This board would answer to the President and be composed of civil society experts in fields including cognitive science, civil liberties, and public-interest law who have demonstrated expertise in ethical, regulatory, and rights-based approaches to AI.

Recommendation 2: Appoint a U.S. Chief AI Officer and U.S. Chief Ethics Officer

We believe personnel is policy. Accordingly, we recommend that President Biden appoint the first White House AI Officer and the first U.S. Chief Ethics Officer, to work with a new U.S. Chief Data Officer and U.S. CIO (currently Clare Martorana) to oversee implementation of the AI EO and the OPEN Government Data Act.

We assess that there will also need to be direct, ongoing presidential involvement with the Justice Department, Department of Homeland Security, and all civilian agencies to drive the regular, accurate accounting of their uses of artificial intelligence in public, proactive disclosures online.

Recommendation 3: Institutionalize Good Governance Around AI Use

The most effective enforcement mechanisms for mandatory disclosure, combine congressional intent with agency capacity to implement such intent, and regular, ongoing updates on progress that do not require adversarial oversight.

Scientific and regulatory agencies that have proactive disclosure of public data, information, and knowledge as an express part of their mission are typically better resourced to lead in these areas, particularly culturally. The quality and periodicity of such disclosures, however, varies across these agencies, as we have seen from the Federal Election Commission to the Securities and Exchange Commission to NASA and the EPA.

The political will to resource agencies adequately to build modernized systems has often been lacking, particularly at the National Archives and Records Administration. Agencies need resources and hiring flexibility to attract and retain experienced product managers and designers, who can work with best-in-class private sector engineers to upgrade and improve data collection, structuring, and disclosures.

The most effective enforcement mechanisms for ongoing data quality are typically associated with a thriving, healthy community of actors, inside *and* outside of government that expect and consume regular disclosures of trustworthy quality.

A useful example of this dynamic exists at the Bureau of Labor and Statistics, which regularly releases economically significant employment numbers. There are legal consequences for disclosing these numbers early and a Greek chorus of upset when they are not available during a shutdown.

The components of agencies that conduct scientific research and are committed to publishing data, methodology, and code with it are well suited to speak to the challenges and rewards from these approaches.

The lesson from the open government data world that is most applicable here, however, is a requirement for strong, dedicated leadership from the White House Office of Management and Budget coupled with ongoing coordination across agencies through inter-agency working groups.

The mothballed federal data strategy is a useful framework for thinking about what should be happening right now, and could be happening next, with respect to mandatory disclosures of data and AI cases. The Chief Data Officers Council and Chief Information Officers Council are key coordinating bodies for his work that will need to replenish both talent and resources in 2024 to improve upon the failures of the last decade.

Recommendation 4: Enterprise AI inventories must be comprehensive & modern, not static PDFs of "top uses"

Every agency would stand up a machine, readable file of AI used cases at a rebuilt agency.gov/open page, which is updated weekly, and federated into a database operated by the General Services Administration, with an API at Data.gov.

This weekly report would then flow into a database maintained by the General Services Administration, with an API at Data.gov. The White House, agencies, GAO, Congress, the press, watchdogs, and American people would all be able to access this to see at a glance, who was up-to-date, and whether they were compliant with the schema.

This would be coupled with narratives that *explain* these uses on an interactive table at an agency open government page and any associated waivers. Each use case should also have an independent, risk-limiting audit with sign off by a third-party regarding the risk of human rights or civil liberties violations, or a linked waiver signed by an accountable official explaining.

Agencies should present these inventories to the public as an interactive table based on an open database, *not* a static PDF. Agencies should evaluate whether publishing structured data as .CSV, JSON, or XML, for example, might lead to improved display through interactive dashboards on responsive websites or third party use in search engines or news media.

It is not inconceivable that agencies might embed a chat function that people can query about these use cases, as an innovative application of AI to explain what is disclosed, how, and with what intent and impact. We favor the government publishing a machine-readable file for each agency, as they do on agency.gov/data, hosting a prize internally to come up with the best in class approaches, and hosting a challenge *externally* through Challenge.gov to leverage the collective intelligence of the American people to improve over time.

Recommendation 5: Create a secure means for all three branches of government to access and review all AI use cases across government

There should be a strong predisposition to disclose uses of AI in classified programs, without disclosing the programs themselves. These efforts should be made with an eye towards broader, declassification efforts, and rigorous examination of the purpose of keeping these kinds of disclosures from the broader public.

Agencies should follow the above regimen for disclosure for use cases that cannot be disclosed under such a rubric, with ongoing updates. It is essential that national security officials, the so-called “Gang of Eight” in Congress, and members of the Privacy and Civil Liberties Oversight Board (PCLOB) can all access and regularly assess the expanding portfolio of use cases of AI across government. Secrecy around 21st century tools and technologies must not hinder the oversight and accountability essential to preserving the constitutional protections that officials seek to protect and defend.

Recommendation 6: Lead on creating state, local, and international standards for AI disclosures

The United States is not operating alone. We should be cooperating and collaborating with other democracies to improve how we disclose the data, code, and uses of artificial intelligence. In an ideal situation, these might be combined into a global catalog.

In the interim, the White House should be encouraging states and cities to reboot their open government pages with proactive, machine-readable disclosures of data, code, and artificial intelligence use inventories.

These use cases should be federated throughout the United States government, where possible. The federal government should allocate dedicated capacity to help do so, from a cultural, technical, and design perspective, working through US Digital Service, US Digital Corps, Presidential Innovation Fellows and 18F. It would also be sensible to seek to collaborate with the legislative and judiciary branch, should Congress and the courts seek to catalog all federal uses of artificial intelligence and seek the consent of the governed.

We also assess that a multi-stakeholder approach can be applied at federal agencies, through the creation of advisory councils – or AI subcommittee of existing ones – that includes people with expertise in human rights, design, and social sciences o evaluate ongoing programs and provide quarterly updates at public meetings. Relevant models could be found in the President's Council on Science and Technology, PCLOB, and Public Interest Declassification Board (PIDB), all of which are implicated with this work.

It would be also useful and appropriate for the United States to add a new commitment to implement the disclosure elements of this AI order to the Fifth National Action Plan for open government for the Open Government Partnership[1], which includes a mechanism to add such commitments and is the natural vessel for such an effort. The US government could then show its work at the next Summit for Democracy in 2024.

[1] https://www.opengovpartnership.org/members/united-states/

If you have any questions or wish to discuss our proposals further, please feel free to contact Alexander Howard at alex@governing.digital and Patrice McDermott at pmcdermott@govinfowatch.net.

Respectfully submitted,

The Digital Democracy Project
Government Information Watch
Society of Professional Journalists
The Data Foundation
Advocacy For Principled Action In Government
Organization for Identity & Cultural Development
National Taxpayers Union

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: Connected Health Initiative

General Comment

See attached for comments of the Connected Health Initiative

Attachments

CHI Comments re OMB Draft Memo on Agency Use of AI Draft Memo (120523) (w appendices)

ConnectedHealthInitiative

December 5, 2023

Cindy Martinez
Office of Management and Budget
Office of Information and Regulatory Affairs
725 17th St NW
Washington, District of Columbia 20503

RE: Comments of the Connected Health Initiative to the Office of Management and Budget on its Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Dear Ms. Martinez:

The Connected Health Initiative (CHI) appreciates the opportunity to submit views to the Office of Management and Budget (OMB) on its draft Memorandum that would establish new agency requirements in areas of artificial intelligence (AI) governance, innovation, and risk management, and would direct agencies to adopt specific minimum risk management practices for uses of AI that impact the rights and safety of the public.[1]

I. General Views of the Connected Health Initiative on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

CHI is the leading effort by stakeholders across the connected health ecosystem to responsibly encourage the use of digital health innovations and support an environment in which patients and consumers can see improvements in their health. We seek essential policy changes that will help all Americans benefit from an information and communications technology-enabled American healthcare system. For more information, see www.connectedhi.com. OMB's strategy, in response to President Biden's Executive Order on Safe, Secure, and Trustworthy Development and Use of AI, and the efforts of numerous agencies with respect to AI policy and regulation directly impact the app economy. We support OMB's goal of ensuring federal agencies instill proper safeguards that prioritize economic and national security, privacy, civil liberties and more when utilizing AI and other advancements in technology and innovation.

[1] 88 FR 75625; OMB Draft Memorandum, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*, https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf

Today, there are already many examples of AI systems, powered by streams of data and advanced algorithms, improving healthcare by preventing hospitalizations, reducing complications, decreasing administrative burdens, and improving patient engagement. AI systems offer the promise to rapidly accelerate and scale such results and drive a fundamental transformation of the current disease-based system to one that supports prevention and health maintenance. Nonetheless, AI in healthcare has the potential to raise a variety of unique considerations for U.S. policymakers.

Many organizations are taking steps to proactively address adoption and integration of AI into health care and how it should be approached by clinicians, technologists, patients and consumers, policymakers, and other stakeholders. Building on these important efforts, CHI's Health AI Task Force has taken a critical further step in developing cross-stakeholder consensus principles for the creation, deployment, and maintenance of AI across healthcare settings in its *Policy Principles for Artificial Intelligence in Health*.[2]

First, AI systems deployed in healthcare must advance the "quadruple aim"[3] by improving population health; improving patient health outcomes and satisfaction; increasing value by lowering overall costs; and improving clinician and healthcare team well-being. Second, we strongly encourage OMB to align its' memorandum to align with CHI's comprehensive health AI policy principles:

> **National Health AI Strategy:** Many of the policy issues raised below involve significant work and changes that will impact a range of stakeholders. The cultural, workforce training and education, data access, and technology-related changes will require strong guidance and coordination. Given the significant role of the government in the regulation, delivery, and payment of healthcare, as well as its role as steward of significant amounts of patient data, a federal healthcare AI strategy incorporating guidance on the issues below will be vital to achieving the promise that AI offers to patients and the healthcare sector. Other countries have begun to take similar steps (e.g., the UK's Initial Code of Conduct for Data Driven Care and Technology) and it is critical that U.S. policymakers collaborate with provider organizations, other civil society organizations, and private sector stakeholders to begin similar work.
>
> **Research:** Policy frameworks should support and facilitate research and development of AI in healthcare by prioritizing and providing sufficient funding while also ensuring adequate incentives (e.g., streamlined availability of data to developers, tax credits) are in place to encourage private and non-profit sector research. Clinical validation and transparency research should be prioritized

[2] Available at https://connectedhi.com/wp-content/uploads/2022/02/Policy-Principles-for-AI.pdf, and also included as **Appendix A**.

[3] Bodenheimer T, Sinsky C. From triple to quadruple aim: care of the patient requires care of the provider. *Ann Fam Med*. 2014;12(6):573-576.

and involve collaboration among all affected stakeholders who must responsibly address the ethical, social, economic, and legal implications that may result from AI applications in healthcare. Further, public funding and incentives should be conditioned on promoting the medical commons in order to advance shared knowledge, access, and innovation.

Quality Assurance and Oversight: Policy frameworks should utilize risk-based approaches to ensure that the use of AI in healthcare aligns with recognized standards of safety, efficacy, and equity. Providers, technology developers and vendors, health systems, insurers, and other stakeholders all benefit from understanding the distribution of risk and liability in building, testing, and using healthcare AI tools. Policy frameworks addressing liability should ensure the appropriate distribution and mitigation of risk and liability. Specifically, those in the value chain with the ability to minimize risks based on their knowledge and ability to mitigate should have appropriate incentives to do so. Some recommended guidelines include:

- Ensuring AI in healthcare is safe, efficacious, and equitable.
- Ensuring algorithms, datasets, and decisions are auditable and when applied to medical care (such as screening, diagnosis, or treatment) are clinically validated and explainable.
- AI developers should consistently utilize rigorous procedures and must be able to document their methods and results.
- Those developing, offering, or testing healthcare AI systems should be required to provide truthful and easy to understand representations regarding intended use and risks that would be reasonably understood by those intended, as well as expected, to use the AI solution.
- Adverse events should be timely reported to relevant oversight bodies for appropriate investigation and action.

Thoughtful Design: Policy frameworks should require design of AI systems in healthcare that are informed by real-world workflow, human-centered design and usability principles, and end-user needs. Also, AI systems should help patients, providers, and other care team members overcome the current fragmentation and dysfunctions of the healthcare system. AI systems solutions should facilitate a transition to changes in care delivery that advance the quadruple aim. The design, development, and success of AI in healthcare should leverage collaboration and dialogue between caregivers, AI technology developers, and other healthcare stakeholders in order to have all perspectives reflected in AI solutions.

Access and Affordability: Policy frameworks should ensure AI systems in healthcare are accessible and affordable. Significant resources may be required to scale systems in healthcare and policymakers must take steps to remedy the

uneven distribution of resources and access. There are varied applications of AI systems in healthcare such as research, health administration and operations, population health, practice delivery improvement, and direct clinical care. Payment and incentive policies must be in place to invest in building infrastructure, preparing personnel and training, as well as developing, validating, and maintaining AI system with an eye toward ensuring value. While AI systems should help transition to value-based delivery models by providing essential population health tools and providing enhanced scalability and patient support, in the interim payment policies must incent a pathway for the voluntary adoption and integration of AI systems into clinical practice as well as other applications under existing payment models.

Ethics: Given the longstanding, deeply rooted, and well-developed body of medical and biomedical ethics, it will be critical to promote many of the existing and emerging ethical norms of the medical community for broader adherence by technologists, innovators, computer scientists, and those who use such systems. Healthcare AI will only succeed if it is used ethically to protect patients and consumers. Policy frameworks should:

- Ensure AI in healthcare is safe, efficacious, and equitable.
- Ensure that healthcare AI solutions align with all relevant ethical obligations, from design to development to use.
- Encourage the development of new ethical guidelines to address emerging issues with the use of AI in healthcare, as needed.
- Ensure consistency with international conventions on human rights.
- Ensure that AI for health is inclusive such that AI solutions beneficial to patients are developed across socioeconomic, age, gender, geographic origin, and other groupings.
- Reflect that AI for health tools may reveal extremely sensitive and private information about a patient and ensure that laws protect such information from being used to discriminate against patients.

Modernized Privacy and Security Frameworks: While the types of data items analyzed by AI and other technologies are not new, this analysis provides greater potential utility of those data items to other individuals, entities, and machines. Thus, there are many new uses for, and ways to analyze, the collected data. This raises privacy issues and questions surrounding consent to use data in a particular way (e.g., research, commercial product/ service development). It also offers the potential for more powerful and granular access controls for patients. Accordingly, any policy framework should address the topics of privacy, consent, and modern technological capabilities as a part of the policy development process. Policy frameworks must be scalable and assure that an individual's health information is properly protected, while also allowing the flow of health information. This information is necessary to provide and promote high-quality

healthcare and to protect the public's health and well-being. There are specific uses of data that require additional policy safeguards, i.e., genomic information. Given that one individual's DNA includes potentially identifying information about even distant relatives of that individual, a separate and more detailed approach may be necessary for genomic privacy. Further, enhanced protection from discrimination based on pre-existing conditions or genomic information may be needed for patients. Finally, with proper protections in place, policy frameworks should also promote data access, including open access to appropriate machine-readable public data, development of a culture of securely sharing data with external partners, and explicit communication of allowable use with periodic review of informed consent.

Collaboration and Interoperability: Policy frameworks should enable eased data access and use through creating a culture of cooperation, trust, and openness among policymakers, health AI technology developers and users, and the public.

Workforce Issues and AI in Healthcare: The United States faces significant demands on the healthcare system and safety net programs due to an aging population and a wave of retirements among practicing care workers. And lower birth rates mean that fewer young people are entering the workforce. Successful creation and deployment of AI-enabled technologies which help care providers meet the needs of all patients will be an essential part of addressing this projected shortage of care workers. Policymakers and stakeholders will need to work together to create the appropriate balance between human care and decision-making and augmented capabilities from AI-enabled technologies and tools.

Bias: The bias inherent in all data as well as errors will remain one of the more pressing issues with AI systems that utilize machine learning techniques in particular. In developing and using healthcare AI solutions, these data provenance and bias issues must be addressed. Policy frameworks should:

- Require the identification, disclosure, and mitigation of bias while encouraging access to databases and promoting inclusion and diversity.
- Ensure that data bias does not cause harm to patients or consumers.

Education: Policy frameworks should support education for the advancement of AI in healthcare, promote examples that demonstrate the success of AI in healthcare, and encourage stakeholder engagements to keep frameworks responsive to emerging opportunities and challenges.

- Patients and consumers should be educated as to the use of AI in the care they are receiving.

- Academic/medical education should include curriculum that will advance healthcare providers' understanding of and ability to use health AI solutions. Ongoing continuing education should also advance understanding of the safe and effective use of AI in healthcare delivery

II. The Connected Health Initiative's Responses to Specific Questions Posed in the Request for Public Comment

Noting our general support for federal agencies' efforts to appropriately address AI governance, innovation, and risk management, we offer the following responses to specific questions posed in OMB's request for comments.

Question #1: The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers (CAIO) sufficiently flexible and achievable for the breadth of covered agencies?

CHI generally supports the roles, responsibilities, seniority, position, and reporting structure proposed for CAIOs, however:

- While we appreciate the noted role of "Promoting AI Innovation," we urge that OMB include within this responsibility the imperative to consult with and consider the role and needs of the private sector who will have a critical role in creating and deploying AI innovations within agencies.
- The responsibility of "Managing Risks from the Use of AI" should be updated to reflect the need to scale risk management practices according to the harm presented by the use, consistent with well-established risk management practices[4] as well as the National Institute of Standards and Technology's foundations in its AI Risk Management Framework.[5]

Question #2: What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

Initially, CHI notes that AI-related risks can and should initially be addressed under agencies' existing authorities and functions, as the functions the AI at issue is providing

[4] E.g., https://www.iso.org/standard/77304.html.

[5] https://www.nist.gov/itl/ai-risk-management-framework.

are the same that humans would produce, only much faster. Agencies will need flexibility to determine whether or not they need to create a new body to address AI, aside from existing constructs used to address privacy, IT, data, or other topics. OMB's vision of AI Governance Bodies within agencies can and should facilitate coordination in risk management practices across relevant groups and take appropriate steps to address gaps or inefficiencies identified (e.g., overlapping scopes across multiple groups).

Question 3: How can OMB best advance responsible AI innovation?

CHI strongly encourages agencies alignment with its comprehensive health AI policy principles which reflect the agreement of key stakeholder groups from across the healthcare ecosystem.[6] Notably, OMB should ensure that agency approaches to risk management, whether in intra-agency policy or in regulation/guidance to those the agency regulates, are based on established risks and harms (not edge/rare use cases or hypotheticals); that measures taken to manage risks are scaled to the harms presented; and that those who know or should know about a risk and have the ability to take action to mitigate that risk have the appropriate incentives to do so. Further, agencies can do much to advance responsible AI innovation through efforts to build their internal enterprise capacity and through their procurement policies (e.g., specify thoughtful AI design requirements).

Question 4: With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

The potential benefits of generative AI are extensive and could revolutionize day-to-day business operations and effectiveness across the federal government. With appropriate safeguards in place, generative AI offers numerous benefits, including but not limited to content generation (e.g., text, speech, images, video, etc.); streamlined software engineering/coding capabilities; drastically improved and more accessible interfaces for citizen services (e.g., text-to-speech solutions); and augmented research capabilities. Healthcare is no exception: generative AI offers the possibility of introducing new efficiencies at numerous levels, from backend/administrative to supporting key assessments/decisions made by humans in, for example, improving workflow, conducting better clinical trials, and supporting clinical decisions, amongst many other use cases.[7] Agencies impacting healthcare must responsibly leverage generative AI tools for these purposes. Generative AI will also be critical in accomplishing the

[6] Connected Health Initiative, *Policy Principles for Artificial Intelligence in Health*, accessible at https://connectedhi.com/wp-content/uploads/2022/02/Policy-Principles-for-AI.pdf.

[7] Shoja MM, Van de Ridder JMM, Rajput V. The Emerging Role of Generative Artificial Intelligence in Medical Education, Research, and Practice. Cureus. 2023 Jun 24;15(6):e40883. doi: 10.7759/cureus.40883. PMID: 37492829; PMCID: PMC10363933.

transition to value-based care (the shift from a quantity-based system to one that focuses on quality).[8]

Question 5: Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

CHI believes that memorandum's definitions alone should provide the agencies with the direction they need to address what is and is not "safety-impacting" or "civil rights-impacting" consistent with the need for agency flexibilities acknowledged elsewhere in the memorandum. A static list will be seen as inappropriately including some use cases or not including others, and the nature of the development of AI means that such a list will quickly become outdated. We therefore recommend that OMB remove its list of "safety-impacting" or "civil rights-impacting" use cases from the memorandum.

Question 6: Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

Yes, the minimum practices identified for safety and rights impacting AI are generally consistent with the Connected Health Initiative's recommended approach to health AI risk management. We urge OMB, and all federal agencies, to be mindful of the negative impacts of imposing such requirements on AI use cases that may not always be high risk. Again, we urge OMB to update its memo to emphasize that federal agencies leverage a scaled and outcome-focused approach to AI risk management, which we discuss above and in our foundational AI policy principles. OMB's memo should align with CHI's policy principles for AI, as well as approaches being taken in the NIST AI RMF and leading standards such as ISO/IEC 23894:2023.

Question 7: What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

We recommend that OMB align its memorandum with the following:

- Connected Health Initiative's *Policy Principles for Artificial Intelligence in Health:* https://connectedhi.com/wp-content/uploads/2022/02/Policy-Principles-for-AI.pdf
- Connected Health Initiative's *Advancing Transparency for Artificial Intelligence in the Healthcare Ecosystem*: https://connectedhi.com/wp-

[8] Connected Health Initiative, *Leveraging Digital Health to Realize Value-Based Care*, accessible at https://connectedhi.com/wp-content/uploads/2022/02/LeveragingDigitalHealth.pdf.

content/uploads/2022/02/AdvancingTransparencyforArtificialIntelligenceintheHealthcareEcosystem.pdf

- Connected Health Initiative's *Good Machine Learning Best Practices*: https://connectedhi.com/wp-content/uploads/2022/04/CHIAITaskForceGMLPs.pdf.
- NIST's AI Risk Management Framework: https://www.nist.gov/itl/ai-risk-management-framework
- ISO/IEC 23894:2023 (Information technology, Artificial intelligence, Guidance on risk management): https://www.iso.org/standard/77304.html

Question 8: What kind of information should be made public about agencies' use of AI in their annual use case inventory?

CHI welcomes the memorandum's requirement that agencies provide adequately detailed and generally accessible documentation for the AI they use to provide its users and the general public of its practices, while taking measures to protect intellectual property, national security, and other important interests. CHI welcomes the release of information that will provide easy-to-understand insights into how agencies are (1) ensuring AI is safe, efficacious, and ethical/equitable; and (2) utilizing procedures to test for efficacy, safety, and equity. For example, the public will benefit from learning about how agencies examine data provenance and bias issues present in the development and use of AI solutions to ensure that bias in datasets does not result in harm to users or consumers of products or services involving AI. The exact metrics of how these agency uses are captured will likely need to vary from agency to agency, so adequate flexibility should be provided to agencies, with outcome-based measures being employed. However, agencies should align their practices with the CHI's cross-sector recommendations on a*dvancing transparency for AI in the healthcare ecosystem.*[9]:

[9] Connected Health Initiative, *Advancing Transparency for Artificial Intelligence in the Healthcare Ecosystem,* https://connectedhi.com/wp-content/uploads/2022/02/AdvancingTransparencyforArtificialIntelligenceintheHealthcareEcosystem.pdf, also included as **Appendix B**.

III. Conclusion

CHI appreciates OMB's consideration of the above views. We urge OMB to contact the undersigned with any questions or ways that we can assist moving forward.

Sincerely,

Brian Scarpelli
Executive Director

Leanna Wade
Regulatory Policy Associate

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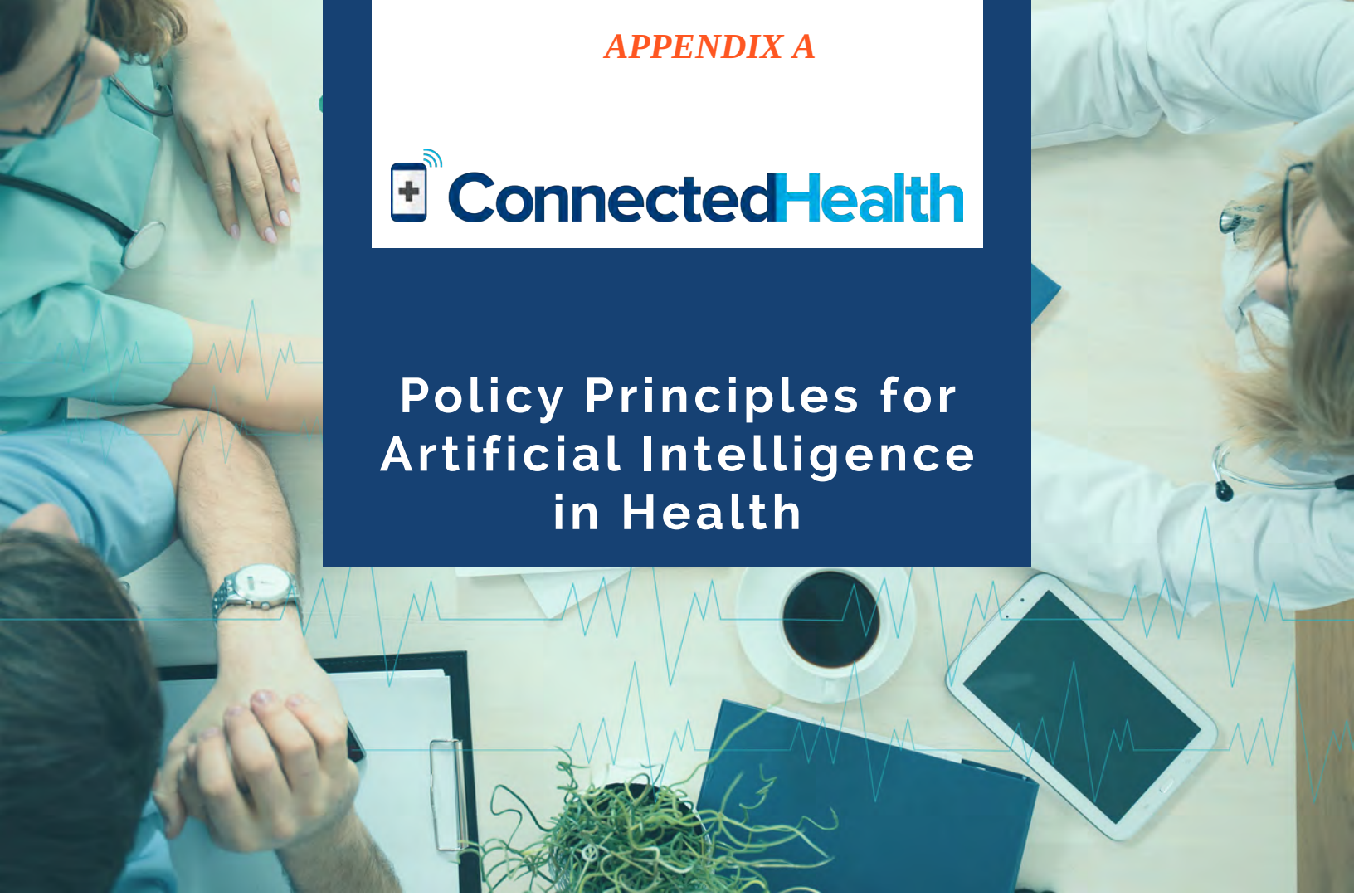
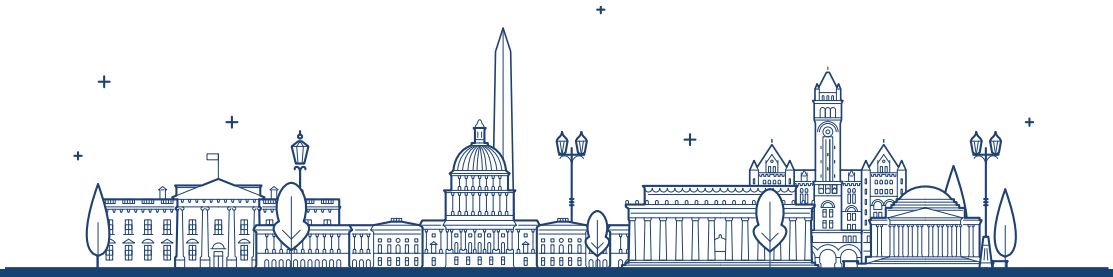
APPENDIX A

ConnectedHealth

Policy Principles for Artificial Intelligence in Health





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Policy Principles for AI in Health

Today, there are already many examples of AI systems, powered by streams of data and advanced algorithms, improving healthcare by preventing hospitalizations, reducing complications, decreasing administrative burdens, and improving patient engagement. AI systems offer the promise to rapidly accelerate and scale such results and drive a fundamental transformation of the current disease-based system to one that supports prevention and health maintenance. Nonetheless, AI in healthcare has the potential to raise a variety of unique considerations for U.S. policymakers.

Many organizations are taking steps to proactively address adoption and integration of AI into health care and how it should be approached by clinicians, technologists, patients and consumers, policymakers, and other stakeholders, such as the Partnership for AI, Xavier Health, the American Medical Association, and the Association for the Advancement of Medical Instrumentation and BSI. Building on these important efforts, the Connected Health Initiative's (CHI) Health AI Task Force is taking the next step to address the role of AI in healthcare.

First, AI systems deployed in healthcare must advance the "quadruple aim" by improving population health; improving patient health outcomes and satisfaction; increasing value by lowering overall costs; and improving clinician and healthcare team well-being. Second, AI systems should:

- Enhance access to health care.
- Empower patients and consumers to manage and optimize their health.
- Facilitate and strengthen the relationship and communication that individuals have with their health care team.
- Reduce administrative and cognitive burdens for patients and their health care team.

To guide policymakers, we recommend the following principles to guide action:

- **National Health AI Strategy:** Many of the policy issues raised below involve significant work and changes that will impact a range of stakeholders. The cultural, workforce training and education, data access, and technology-related changes will require strong guidance and coordination. Given the significant role of the government in the regulation, delivery, and payment of healthcare, as well as its role as steward of significant amounts of patient data, a federal healthcare AI strategy incorporating guidance on the issues below will be vital to achieving the promise that AI offers to patients and the healthcare sector. Other countries have begun to take similar steps (e.g., The UK's Initial Code of Conduct for Data Driven Care and Technology) and it is critical that U.S. policymakers collaborate with provider organizations, other civil society organizations, and private sector stakeholders to begin similar work.

- **Research:** Policy frameworks should support and facilitate research and development of AI in healthcare by prioritizing and providing sufficient funding while also ensuring adequate incentives (e.g., streamlined availability of data to developers, tax credits) are in place to encourage private and non-profit sector research. Clinical validation and transparency research should be prioritized and involve collaboration among all affected stakeholders who must responsibly address the ethical, social, economic, and legal implications that may result from AI applications in healthcare. Further, public funding and incentives should be conditioned on promoting the medical commons in order to advance shared knowledge, access, and innovation.
- **Quality Assurance and Oversight:** Policy frameworks should utilize risk-based approaches to ensure that the use of AI in healthcare aligns with recognized standards of safety, efficacy, and equity. Providers, technology developers and vendors, health systems, insurers, and other stakeholders all benefit from understanding the distribution of risk and liability in building, testing, and using healthcare AI tools. Policy frameworks addressing liability should ensure the appropriate distribution and mitigation of risk and liability. Specifically, those in the value chain with the ability to minimize risks based on their knowledge and ability to mitigate should have appropriate incentives to do so. Some recommended guidelines include:
    - Ensuring AI in healthcare is safe, efficacious, and equitable.
    - Ensuring algorithms, datasets, and decisions are auditable and when applied to medical care (such as screening, diagnosis, or treatment) are clinically validated and explainable.
    - AI developers should consistently utilize rigorous procedures and must be able to document their methods and results.
    - Those developing, offering, or testing healthcare AI systems should be required to provide truthful and easy to understand representations regarding intended use and risks that would be reasonably understood by those intended, as well as expected, to use the AI solution.
    - Adverse events should be timely reported to relevant oversight bodies for appropriate investigation and action.

- **Thoughtful Design:** Policy frameworks should require design of AI systems in health care that are informed by real-world workflow, human-centered design and usability principles, and end-user needs. Also, AI systems should help patients, providers, and other care team members overcome the current fragmentation and dysfunctions of the healthcare system. AI systems solutions should facilitate a transition to changes in care delivery that advance the quadruple aim. The design, development, and success of AI in healthcare should leverage collaboration and dialogue between caregivers, AI technology developers, and other healthcare stakeholders in order to have all perspectives reflected in AI solutions.
- **Access and Affordability:** Policy frameworks should ensure AI systems in health care are accessible and affordable. Significant resources may be required to scale systems in health care and policy-makers must take steps to remedy the uneven distribution of resources and access. There are varied applications of AI systems in health care such as research, health administration and operations, population health, practice delivery improvement, and direct clinical care. Payment and incentive policies must be in place to invest in building infrastructure, preparing personnel and training, as well as developing, validating, and maintaining AI system with an eye toward ensuring value. While AI systems should help transition to value-based delivery models by providing essential population health tools and providing enhanced scalability and patient support, in the interim payment policies must incentivize a pathway for the voluntary adoption and integration of AI systems into clinical practice as well as other applications under existing payment models.
- **Ethics:** Given the longstanding, deeply rooted, and well-developed body of medical and biomedical ethics, it will be critical to promote many of the existing and emerging ethical norms of the medical community for broader adherence by technologists, innovators, computer scientists, and those who use such systems. Healthcare AI will only succeed if it is used ethically to protect patients and consumers. Policy frameworks should:Ensuring AI in healthcare is safe, efficacious, and equitable.
    - Ensure that healthcare AI solutions align with all relevant ethical obligations, from design to development to use.
    - Encourage the development of new ethical guidelines to address emerging issues with the use of AI in healthcare, as needed.
    - Ensure consistency with international conventions on human rights.
    - Ensure that AI for health is inclusive such that AI solutions beneficial to patients are developed across socioeconomic, age, gender, geographic origin, and other groupings.
    - Reflect that AI for health tools may reveal extremely sensitive and private information about a patient and ensure that laws protect such information from being used to discriminate against patients.

- **Modernized Privacy and Security Frameworks:** While the types of data items analyzed by AI and other technologies are not new, this analysis provides greater potential utility of those data items to other individuals, entities, and machines. Thus, there are many new uses for, and ways to analyze, the collected data. This raises privacy issues and questions surrounding consent to use data in a particular way (e.g., research, commercial product/service development). It also offers the potential for more powerful and granular access controls for patients. Accordingly, any policy framework should address the topics of privacy, consent, and modern technological capabilities as a part of the policy development process. Policy frameworks must be scalable and assure that an individual's health information is properly protected, while also allowing the flow of health information. This information is necessary to provide and promote high-quality healthcare and to protect the public's health and well-being. There are specific uses of data that require additional policy safeguards, i.e., genomic information. Given that one individual's DNA includes potentially identifying information about even distant relatives of that individual, a separate and more detailed approach may be necessary for genomic privacy. Further, enhanced protection from discrimination based on pre-existing conditions or genomic information may be needed for patients. Finally, with proper protections in place, policy frameworks should also promote data access, including open access to appropriate machine-readable public data, development of a culture of securely sharing data with external partners, and explicit communication of allowable use with periodic review of informed consent.
- **Collaboration and Interoperability:** Policy frameworks should enable eased data access and use through creating a culture of cooperation, trust, and openness among policymakers, health AI technology developers and users, and the public.
- **Workforce Issues and AI in Healthcare:** The United States faces significant demands on the healthcare system and safety net programs due to an aging population and a wave of retirements among practicing care workers. And lower birth rates mean that fewer young people are entering the workforce. Successful creation and deployment of AI-enabled technologies which help care providers meet the needs of all patients will be an essential part of addressing this projected shortage of care workers. Policymakers and stakeholders will need to work together to create the appropriate balance between human care and decision-making and augmented capabilities from AI-enabled technologies and tools.
- **Bias:** The bias inherent in all data as well as errors will remain one of the more pressing issues with AI systems that utilize machine learning techniques in particular. In developing and using healthcare AI solutions, these data provenance and bias issues must be addressed. Policy frameworks should:
    - Require the identification, disclosure, and mitigation of bias while encouraging access to databases and promoting inclusion and diversity.
    - Ensure that data bias does not cause harm to patients or consumers.

- **Education:** Policy frameworks should support education for the advancement of AI in healthcare, promote examples that demonstrate the success of AI in healthcare, and encourage stakeholder engagements to keep frameworks responsive to emerging opportunities and challenges.
    - Patients and consumers should be educated as to the use of AI in the care they are receiving.
    - Academic/medical education should include curriculum that will advance health care providers' understanding of and ability to use health AI solutions. Ongoing continuing education should also advance understanding of the safe and effective use of AI in healthcare delivery.

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Advancing Transparency for Artificial Intelligence in the Healthcare Ecosystem

OCTOBER 2021

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Executive Summary

Today, the most well-known FDA-approved applications of artificial intelligence and machine learning (AI/ML) technology in healthcare are diagnostic tools that help clinicians read and interpret images to predict, detect, and monitor a number of diseases, including diabetic retinopathy and lung cancer. In the future, the use of AI/ML technology in both operational and clinical settings promises to enable a more proactive approach to healthcare that promotes investments in preventative care that can result in fewer hospitalizations, fewer doctor visits, and fewer treatments. Across use cases, AI/ML technology is helping, and must increasingly help, the healthcare industry move away from a reactive disease treatment approach to a population health management approach that lowers costs and improves care.

The immense potential of AI/ML technology in healthcare may never be fully acheived, however, unless AI/ML technologies first earn the trust of healthcare professionals and patients. The cornerstone of building trust in AI/ML technologies is to enhance transparency – providing sufficient and appropriate information about the AI/ML, including its intended use, development, performance, and, when available, logic. The more understandable the decision-making process is for each individual technology, the more confidence there will be in AI/ML use in the healthcare system.

The recommendations in this Connected Health Initiative (CHI) AI Task Force report, informed by a public roundtable CHI held to address AI/ML transparency and extensive consultations with stakeholders from across the digital health ecosystem, represent a holistic approach to creating and maintaining the trust of both healthcare professionals and patients. The Task Force set out the foundational steps AI/ML tool developers must take to build transparency into their products, but it also outlines the important roles that clinicians, healthcare providers, regulators, academic medical institutions, and accrediting organizations must play.

The medical and technology communities have a shared responsibility to provide caregivers and patients (as well as other stakeholders) with an assurance of quality through truthful representations clearly indicating the AI/ML's intended uses and risks that would be reasonably understood by those intended and expected to use the AI/ML. Uptake will depend on the buy-in of clinicians who first develop trust in AI/ML software as a medical device (SaMD) through use and experience, establishing confidence as it is adopted into practice. Once adopted, clinicians can then work with their patients to explain their use of SaMD AI/ML and inspire the same trust and confidence from the patients in the output of the SaMD AI. Each step in this chain requires buy-in and support from policymakers (both within and outside of government).

The foundation of any successful use of AI/ML technologies in healthcare depends on the trust of healthcare professionals and patients, and we believe these recommendations present a clear path toward earning that trust.

About the Connected Health Initiative

CHI is the leading multistakeholder policy and legal advocacy effort driven by a consensus of stakeholders from across the connected health ecosystem. We aim to realize an environment where Americans can improve their health through policies that allow for connected health technologies to enhance health outcomes and reduce costs. Having members who are developers and users of connected health technologies across a wide range of use cases, CHI serves as an active advocate before Congress, numerous U.S. federal agencies, and state legislatures and agencies. We seek to advance responsible pro-digital health policies and laws in areas including reimbursement and payment, privacy and security, effectiveness, and quality assurance, U.S. Food and Drug Administration (FDA) regulation of digital health, health data interoperability, and the rising role of artificial intelligence and machine learning (AI/ML) in care delivery.

In 2019, CHI formed a Task Force focused on policy challenges and opportunities related to the use of AI/ML in healthcare. CHI's AI/ML Task Force already developed a set of health AI/ML policy principles addressing how policy frameworks should adopt the role of AI/ML in healthcare.[1] A cornerstone of these principles is the idea of requiring those developing, offering, or testing healthcare AI/ML systems to provide truthful representations clearly indicating the intended use and risks that would be reasonably understood by those intended and expected to use the AI/ML solution. Such steps will provide much-needed quality assurances to caregivers and patients (as well as other stakeholders) and assist in resolving data issues that arise when an algorithm is fed bad data that can skew its learning and introduce bias. CHI's AI Task Force later developed detailed Good Machine Learning Practices for FDA-regulated AI,[2] which reflect and elaborate on this priority. The recommendations in this paper build on those deliverables.

Numerous CHI Steering Committee members and other key stakeholders from throughout the healthcare value chain participate in this Task Force and share a commitment to realizing the value of AI/ML in healthcare while protecting patient safety and advancing the quadruple aim. The recommendations in this paper find basis in an evaluation by the Task Force of the healthcare ecosystem's implementation of AI/ML to date, challenges and opportunities reflected by federal policymakers, and the existing and emerging issues created by AI's deployment. This report is also informed by a CHI public roundtable held in April 2021 on how to improve AI/ML transparency for caregivers and patients based on their needs and concerns, during which a wide range of stakeholders contributed to a discussion exploring novel approaches to transparency of AI/ML taken today.

For more information, please visit www.connectedhi.com.

1 https://actonline.org/wp-content/uploads/Policy-Principles-for-AI.pdf.
2 https://bit.ly/3B6nslm.

Artificial Intelligence's Role in a Successful Healthcare Ecosystem Requires Transparency

Responsible implementation of AI/ML in healthcare leads to improved medical outcomes and overall increased cost savings

Today, there are many important operational and clinical AI/ML solutions in use and many more in development.[3] Some of the most well-known applications of AI/ML in healthcare that have received market clearance from the FDA are diagnostic tools that help clinicians read and interpret images. For example, AI/ML image analysis software can assist clinicians in predicting, detecting, and monitoring a number of diseases, including diabetic retinopathy, lung cancer, prostate cancer, and skin cancer. Such AI/ML uses are generally intended to be used to assist human clinicians in providing more efficient and accurate results, rather than autonomously diagnosing disease.

Separately, research projects within and outside of clinical settings continue to further explore AI's potential to revolutionize healthcare. For example, an AI/ML system developed by researchers at Northwestern University's Feinberg School of Medicine correctly identifies small lung cancer tumors nearly 95 percent of the time, while radiologists undertaking the same task unassisted are correct only 65 percent of the time.[4] Researchers at Carnegie Mellon developed a miniature mobile robot called HeartLander that uses machine learning algorithms to make treating ventricular fibrillation (VF)—a deadly type of cardiac arrhythmia that requires cardioversion and then, if the patient survives, surgical removal of faulty heart tissue—far safer and less invasive.[5]

As a recent research paper discussing challenges related to deployment of AI/ML technologies into the clinical setting stated, "the success of a deep learning model does not rest solely on its accuracy."[6]The researchers noted that clinician "experiences with the system, and the socio-environmental factors that impacted system performance" must be evaulated and addressed for these systems to function in the clinical setting with the accuracy rates illustrated in the lab setting.[7] Clearly, if the challenges of integrating AI/ML tools into clinical workflow can be overcome, AI/ML can support clinicians in a wide range of other areas. Its potential to reshape the healthcare landscape is profound, especially in the improvements it can bring to any process within healthcare operation and delivery.

Medical devices and systems that use AI/ML also represent a real opportunity to drive down healthcare costs for consumers, practitioners, and healthcare businesses alike. It is estimated that AI/ML applications can cut annual U.S. healthcare costs by $150 billion by 2026.[8] Most of these cost reductions stem from changing the healthcare model from a reactive to a proactive approach, focusing on health management rather than disease treatment. This focus on using AI/ML as an investment in

3 The FDA now publicly lists AI/ML medical devices cleared for marketing in United States, and includes their intended uses. *See* https://www.fda.gov/medical-devices/software-medical-device-samd/artificial-intelligence-and-machine-learning-aiml-enabled-medical-devices.
4 https://www.nature.com/articles/d41586-020-03157-9
5 https://onlinelibrary.wiley.com/doi/10.1002/rcs.2297
6 Emma Beede et al, A Human-Centered Evaluation of a Deep Learning System Deployed in Clinics for the Detection of Diabetic Retinopathy, CHI Conference on Human Factors in Computing Systems (April 2020) available at https://dl.acm.org/doi/fullHtml/10.1145/3313831.3376718.
7 *Id.*
8 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7325854/.

preventative care can result in fewer hospitalizations, fewer doctor visits, fewer treatments, and thus fewer side effects. AI-based technology will have an important role in helping people stay healthy via remote monitoring technologies and coaching and will ensure earlier diagnosis, tailored treatments, and more efficient follow-ups.[9]

For example, AI/ML image analysis technologies can reduce medical expenses in several ways. For one, AI/ML systems can be very helpful in augmenting a clinician's analysis and treatment decisions more quickly. AI/ML technologies enable clinicians to provide the same, accurate service in a fraction of the time, increasing the volume of patients without increasing time spent treating them.[10] Second, a patient whose disease is diagnosed early will pay less to treat or cure the disease than one who catches it later. The longer a disease goes undiagnosed, the more damage it causes and more resources it takes to treat, assuming it remains treatable at all. Wearable technologies that use AI, such as remote monitoring technologies, increase access to healthcare and increase engagement in treatment plans by, for example, analyzing user health data in real time and notifying wearers or their healthcare providers (or both) of potential health issues.

By introducing new, accurate, and timely data streams for human clinicians' review, AI/ML medical tools and systems that use wearable technologies can enable practitioners to come up with care and treatment options without having to see a patient in person as much, reducing administrative and in-office visit resource expenditures, and, during outbreaks of communicable diseases, at lower risk of infection to both provider and patient. The use of such technologies will also enhance patient engagement in their own care plans. This same concept also applies to laboratory technologies that use AI/ML systems, where the work hours currently required for repetitive and routine tasks could see drastic reductions, significantly cutting labor costs.[11]

Increased efficiency, precision, and affordability are just some of the benefits that AI/ML can offer the healthcare community and those they serve, but realizing these benefits will depend on the buy-in of the provider and patient communities as well as support for responsible deployments from policymakers. CHI's AI/ML Task Force released detailed policy principles,[12] as well as proposed good machine learning practices for AI/ML meeting the definition of a medical device,[13] to address these challenges. Notably, CHI's AI/ML Task Force has acknowledged that without its processes being understandable by humans and transparency (providing sufficient and appropriate information about the AI/ML, including its intended use, development, performance, and, when available, logic), particularly for patients and caregivers, AI/ML cannot most effectively improve healthcare. Namely, those developing, offering, or testing healthcare AI/ML systems must provide truthful and understandable representations regarding intended use and risks that would be reasonably understood by those intended, as well as expected, to use the AI/ML software as a medical device (SaMD) solution.

9 *Id.*
10 *See* McPhail et al, Stage at diagnosis and early mortality from cancer in England (Br J Cancer 2015), doi: 10.1038/bjc.2015.49.
11 Rong, et al, "Artificial Intelligence in Healthcare: Review and Prediction Case Studies," Engineering, doi: 10.1016/j.eng.2019.08.015 at Sec. 2.2.
12 https://actonline.org/wp-content/uploads/Policy-Principles-for-AI.pdf.
13 https://bit.ly/3B6nslm.

How Can Transparency into Healthcare AI/ML Solutions be Advanced?

While evidence of healthcare AI's potential for widespread benefit continues to build, that potential can never be realized without healthcare professionals and patients understanding and trusting AI/ML solutions. The more transparent the decision-making process is for each individual technology, the more confidence there will be in AI/ML use in the healthcare system.[14] Transparency for healthcare AI's intended uses must happen at several levels, disseminating tailored messaging to specific audiences that require insights into the AI/ML solution to make informed decisions. Building the trust that must be a foundation for the responsible deployment of AI/ML is a shared responsibility amongst developers, providers, and regulators.

Providing transparency into health AI/ML must start with the developers of the AI/ML tools. Then, uptake of AI/ML will need to be built on the buy-in of clinicians who first develop trust in AI/ML SaMD through use and experience, establishing confidence as it is adopted into practice. Once adopted, the provider can then work with his or her patients to explain their use of SaMD AI/ML and inspire the same trust and confidence by the patient in the output of the SaMD AI. Each step in this chain requires buy-in and support from policymakers (both within and outside of government).

The CHI AI/ML Task Force's recommendations for enhancing transparency for health AI/ML include:

Developers of AI/ML SaMD should:

- Prioritize making healthcare AI/ML solutions reasonably safe, efficacious, and equitable from the earliest stages of design, considering the perspectives of both patients and providers, leveraging and where necessary tweaking medical AI/ML guidelines on research and ethics,[15] leading standards,[16] and other resources as appropriate.
- Employ algorithms that produce repeatable results and, when feasible, are auditable, and make decisions that, when applied to medical care (such as screening, diagnosis, or treatment), are clinically validated and where possible understandable using rigorous procedures with documented methods and results, fostering efficacy through continuous monitoring.
- Rigorously identify, disclose, and mitigate biases in datasets used to train algorithms.
- Utilize risk-scaled privacy protection mechanisms for patients' data to account for the fact that the analysis by health AI/ML tools provides greater potential utility of those data items to other individuals, entities, and machines, providing many new uses for, and ways to analyze, the collected data, as well as correspondingly stronger incentives for malefactors to attempt to obtain access unlawfully. Specific uses of data that require additional safeguards (such as genomic

14 https://www.bsigroup.com/globalassets/localfiles/en-gb/about-bsi/nsb/innovation/mhra-ai-paper-2019.pdf

15 *E.g.*, World Health Organization, 'Ethics & Governance of Artificial Intelligence for Health' (2021), *available at* https://www.who.int/publications/i/item/9789240029200.

16 *E.g.*, Consumer Technology Association, 'The Use of Artificial Intelligence in Health Care: Trustworthiness (ANSI/CTA-2090)' (2021), *available at* https://shop.cta.tech/collections/standards/products/the-use-of-artificial-intelligence-in-healthcare-trustworthiness-cta-2090.

information) may necessitate a tailored approach or enhanced protections from discrimination (e.g., pre-existing conditions or genomic information may be needed for patients).

- Comply with all applicable legal and regulatory requirements.
- Develop a tailored communications and engagement plan that gives patients and providers representative of the AI/ML tool's user group a reasonably justifiable level of confidence in healthcare AI's efficacy. Such communications should enable these patients and providers to visualize the AI, and to receive direct and clear information about how their health data are being collected and used (while also avoiding information overload) and how biases in data that exacerbate disparities in healthcare are being mitigated. Reflecting that the division of labor between the developers of AI-enabled tools and the clinician or patient is critical, clearly explain intended uses, including whether a tool might include the restriction that it is not for diagnostic use or for informational purposes only, as well as risks.

Providers should:

- Develop their own risk-based and tailored communications and engagement plan that enables them to explain to patients the development of the AI/ML application, its maintainnace, its performance, and how it aligns with the latest best practices and regulatory requirements to improve patient safety using easily understood and standardized formats. Providers should also acknowledge that "best practices" are dynamic and prone to obsolescence.
- Offer further detail for patients in additional resources that explain the clinical testing of AI/ML applications and the confirmation of the results by clinical experts.

The Food and Drug Administration (FDA) should:

- Leverage its successful approach to authorizing medical device AI[17] that has already safely brought health AI/ML innovations to patients and providers to develop a comprehensive regulatory approach to AI/ML that meets the definition of a medical device. The FDA can accomplish this by, for example, progressing its Software Precertification Pilot[18] to a full program available to all developers of SaMD AI, FDA can also update its rules and processes to realize its envisioned total product lifecycle (TPLC) regulatory approach, facilitating a potentially rapid cycle of product improvement and allowing these devices to continually improve while providing effective safeguards. This new approach should leverage CHI's Good Machine Learning Practices to address both locked and continuously learning AI.
- Evolve its requirements on reporting type and frequency so that such requirements can be adapted and scaled based on relevant factors such as risk, extent, and magnitude of

17 Software as a Medical Device (SaMD): Clinical Evaluation: https://www.fda.gov/downloads/medicaldevices/deviceregulationandguidance/guidancedocuments/ucm524904.pdf; Deciding When to Submit a 510(k) for a Software Change to an Existing Device: https://www.fda.gov/downloads/medicaldevices/deviceregulationandguidance/guidancedocuments/ucm514737.pdf.

18 Pre-Cert Program Version 1.0 Working Model: https://www.fda.gov/downloads/MedicalDevices/DigitalHealth/DigitalHealthPreCertProgram/UCM629276.pdf.

modifications, and the demonstrated reliability of the AI (e.g., quality control plans for updates).[19] Initially, the FDA should finalize guidance on SaMD pre-specifications and algorithm change protocol inputs that FDA should periodically receive.

- Develop methods to efficiently communicate when FDA has authorized a product developed with or that utilizes AI/ML, along with information on how it was developed, is maintained and performs, and aligns with the latest best practices and regulatory requirements that ensure patient safety using easily understood (e.g., infographics) and standardized formats. For example, where approval is required for the deployment of new solutions in the market, the FDA should provide information describing the datasets used to train the AI/ML software and what efforts are being taken to align with ethical standards and to mitigate data biases. This work should build on the recently released database of AI-enabled devices legally marketed in the United States from the FDA's Digital Health Center of Excellence.[20]
- Serve as a coordinator and convenor of other U.S. federal agencies to ensure a harmonized approach to health AI/ML transparency across government.
- Build on its leadership to date within the International Medical Device Regulatory Forum (IMDRF), promote its approach to SaMD AI/ML to improve approaches to transparency internationally.
- Host recurring public events, in partnership with health AI/ML developers, patients, and providers, that feature the FDA Digital Health Center of Excellence's latest approaches and thinking, as well as demonstrations of AI/ML in healthcare today.

The Centers for Medicare and Medicaid Services (CMS) should**:**

- Continue to develop its understanding of medical AI/ML definitions, present-day and future AI/ML solutions, how AI/ML is changing the practice of medicine, and the future of AI/ML medical coding.
- Develop Medicare support mechanisms for the use of AI/ML by providers based on clinical validation, alignment with clinical decision-making processes familiar to providers, and high-quality clinical evidence.
- Build on support provided in the Medicare system for the use of health AI,[21] develop easy to understand resources for Medicare beneficiaries that capture how AI/ML is being used in the Medicare system and what it means to patients. CMS should leverage its Advisory Panel on Outreach and Education[22] to develop this messaging.

19 As the FDA has noted, new reporting mechanisms for a scalable AI/ML medical device reporting structure "may require additional statutory authority to implement fully". Proposed Regulatory Framework for Modifications to Artificial Intelligence/Machine Learning (AI/ML)-Based Software as a Medical Device (SaMD) - Discussion Paper and Request for Feedback (Apr. 10, 2021) at 15. *Available at* https://www.fda.gov/files/medical%20devices/published/US-FDA-Artificial-Intelligence-and-Machine-Learning-Discussion-Paper.pdf.

20 https://www.fda.gov/medical-devices/software-medical-device-samd/artificial-intelligence-and-machine-learning-aiml-enabled-medical-devices. This FDA list currently provides key information such as submission number, device and company name, and date of marketing authorization of the device (510(k) clearance, granting of De Novo, or PMA approval).

21 For example, CMS already provides payment for CPT code 92229 (point-of-care diabetic retinopathy automated analysis and provides a diagnostic report using AI).

22 https://www.cms.gov/Regulations-and-Guidance/Guidance/FACA/APOE.

The Federal Trade Commission (FTC) should:

- Support ways to mitigate biases or other unfair outcomes from healthcare AI,[23] and, where appropriate, enforce against violations of key laws such as Section 5 of the FTC Act, which prohibits unfair or deceptive practices, where appropriate.

Accrediting and Licensing Bodies, and Medical Specialty Societies and Boards should:

- Develop medical standard of care and ethical guidelines to address emerging issues with the use of SaMD AI/ML in healthcare needed to advance the quadruple aim.
- Develop and disseminate guidance and education on the responsible deployment of SaMD AI, both generally and for specialty-specific uses.

Academic and Medical Education Institutions should:

- Develop and include curriculum that will advance understanding of and ability to use healthcare AI/ML solutions, which should be assisted by inclusion of non-clinicians, such as data scientists and engineers, as instructors. Ongoing training and continuing education should also advance understanding of the safe and effective use of AI/ML in healthcare delivery, addressing both its capabilities and limitations.
- Develop curriculum to advance understanding of data science research to help inform ethical bodies such as Institutional Review Boards (IRBs) that are reviewing protocols of clinical trials of AI-enabled medical devices.

23 https://www.ftc.gov/news-events/blogs/business-blog/2021/04/aiming-truth-fairness-equity-your-companys-use-ai

Conclusion

CHI is pleased to present its recommendations on AI/ML transparency for the consideration of the healthcare ecosystem, policymakers, and others. We are committed to continued engagement with the digital health community writ large to realize the both the responsible deployment of AI/ML across healthcare and its immensely positive societal benefit.

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lpt-1hg3-2ktn
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0155
Comment on OMB-2023-0020-0001

Submitter Information

Organization: The AI Association

General Comment

See attached file(s)

Attachments

Comment on OMB AI Draft Memo_The AI Association

Clare Martorana,
U.S. Federal Chief Information Officer, Office of the Federal Chief Information Officer, Office of Management Budget.
[FR Doc. 2023–24269 Filed 11–2–23; 8:45 am]
BILLING CODE 3110–05–P

Subject: Comprehensive Recommendations for AI Regulation Enhancement

Dear Clare Martorana,

Thank you for taking the time to accept this comment on *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI) Memorandum*. I am writing to delve deeper beyond the participation that was first brought in a statement made in 2021 by the Administrative Conference of the U.S. in which I participated.[1] This ongoing discussion surrounding AI regulations will continue to be a worthy pursuit, and I would like to bring forth additional considerations for your esteemed attention.

1. Encouraging Interoperability for Public and Private Sectors:
I propose the encouragement and incentivization of both public and private sectors to adopt interoperable environments as the foundation for AI development. The promise of AI technology lies in its potential to enhance citizen services, improve staff efficiency, and instill greater trust in government bodies. Achieving these goals necessitates the establishment of a vendor-agnostic, interoperable commercial cloud environment, fostering a collaborative ecosystem for innovation.

2. Refining Risk-Based Approaches:
A critical refinement in the risk-based approach is imperative, focusing on actual harm rather than potential harm or general impact. AI applications such as spam-fighting tools, mapping, and search engines contribute positively without inflicting harm. The current definitions, if left unmodified, might inadvertently implicate these beneficial use cases, highlighting the importance of a nuanced approach to risk assessment.

3. Clarification of Roles, Responsibilities, and Documentation Requirements:
The delineation of clear roles and responsibilities for both government entities and vendors is essential for effective AI implementation. Documentation requirements should be limited to what is strictly necessary for the government's needs, with stringent safeguards against intentional or unintentional disclosure. Given the unique challenges posed by AI to intellectual property, particularly in the private sector, explicit measures should be taken to protect sensitive information, such as avoiding the categorization of access to training data as a necessity for risk-based assessments.

[1] Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021).

4. Emphasis on System Performance and Security-by-Design:
A shift in focus from inputs to outputs is recommended, emphasizing system performance metrics based on the impact of AI models. The agility and relevance of AI technologies lie in their outputs, and an overemphasis on inputs may lead to antiquated approaches. Additionally, the government should actively encourage security-by-design, transcending mere certification processes like FedRAMP. A holistic evaluation of how AI vendors manage security, incorporating shared responsibilities between vendors and users, will fortify the integrity of AI systems.

5. Increased System Complexity with no consistency:
One of the challenges we see in the Public Sector information technology (IT) infrastructure is the increased system complexity with no consistency in systems across agency environments; therefore, maintaining proper compliance with security updates and patching is a monumental task. Adding to the complexity is the rapidly changing technological advancement that we have outlined here with AI. I see a trend with inconsistent funding, emerging threats, shifting federal strategies, and constant changes in legal and regulatory requirements. Each of these complexities and conflicting strategies has presented obstacles to the IT modernization efforts and has entrenched both the private and public sector into a compliance-over-outcome approach to security, and I think this needs to be addressed and highlighted with this memorandum.

6. Specifically in regard to Section 5(b):
Section 5(b) casts a wide net in delineating rights- or safety-impacting AI, and when coupled with the minimum practices, it creates a regulatory landscape that hampers the United States' ability to compete effectively on the global stage. The Office of Management and Budget's (OMB) expansive definition designates nearly all applications as high-risk, posing significant challenges to the U.S. government's adoption of AI in its current form.

A noteworthy contrast can be drawn with the European Union's AI Act, which, despite its challenges, takes a more surgical approach to defining "high risk" applications, subjecting them to a more specific and targeted review compared to the broader categorization seen in the U.S.

The reliance on a list for government scrutiny becomes a bottleneck in the U.S., impeding the development of AI projects. A preferable alternative would involve a Chief AI Officer (CAIO)-led multi-factor assessment that considers a diverse array of factors, striking a balance that accommodates the intricacies of AI development without stifling progress.

In essence, a recalibration is needed to ensure that the regulatory framework aligns with the dynamic nature of AI innovation, allowing the U.S. government to navigate the global AI landscape with agility and effectiveness.

I appreciate your dedication to shaping AI regulations that balance innovation with safety and efficacy. I am open to further discussions on these points and would be delighted to contribute to the ongoing dialogue.

Thank you for your time and consideration.

Sincerely,

Joshua L Jackson
Founding Member, The AI Association
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(917) 232-9706

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0156
Comment on OMB-2023-0020-0001

Submitter Information

General Comment

See attached file(s) from the Council of the Inspectors General on Integrity and Efficiency. Thank you.

Attachments

CIGIE Comments on OMB AI Memorandum - December 2023

COUNCIL OF THE INSPECTORS GENERAL ON INTEGRITY AND EFFICIENCY

TECHNOLOGY COMMITTEE

December 5, 2023

The Honorable Shalanda D. Young
Executive Office of the President
Director, Office of Management and Budget
Washington, DC 20503

Subject: Comments in Response to Proposed Memorandum – Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

Dear Ms. Young:

We have the privilege of responding as Chair and Vice Chair of the Technology Committee (the Committee) of the Council of the Inspectors General on Integrity and Efficiency (CIGIE) to the Office of Management and Budget's (OMB's) draft of the proposed memorandum on advancing governance, innovation, and risk management for agency use of artificial intelligence (AI). The Committee acknowledges the need for and value of effective AI policy governance for the Executive Branch. We believe that OMB's proposed memorandum should expressly recognize the particular interests of the CIGIE community.

Federal Offices of Inspector General (OIGs) perform critical independent oversight and investigative functions over their respective agencies pursuant to the Inspector General Act of 1978, 5 U.S.C. §§ 401 – 424, as amended (the IG Act). As a general proposition, we view the proposed memorandum to apply to OIGs, because OIGs are elements of their covered agencies under section 3502(1), title 44, United States Code. However, the unique statutory status and mission of the OIGs often require that policies and activities generally applicable across agencies be limited with respect to their OIGs to protect OIG independence, preserve the critical OIG-to-agency relationship, and ensure the OIG can operate without unlawful impediments.

The proposed memorandum implies consideration for the independent status of an OIG in its scope paragraph, which states that "[a]ll agency responsible officials retain their existing authorities and responsibilities established in other laws and policies." We believe the memorandum should be more explicit in its application to, and effect upon, OIGs. Expressly addressing OIG independence in the memorandum is essential to an OIG's effective implementation of the AI governance and risk management requirements within the OIG, while ensuring that its efforts are not unduly impeded or interfered with by its agency.

As drafted, the proposed memorandum assigns significant responsibilities to the agency's Chief AI Officer (CAIO) that, without clarification or constraint, could pose direct conflicts with OIG independence. For example, the scope of the broad responsibilities assigned to the CAIO for managing risks from the use of AI would prevent the agency's OIG from administering its use of

AI independent of the CAIO's oversight and control. This would directly impact the OIG's independence under the IG Act.

Independence concerns also may arise from the provision in the proposed memorandum providing that CFO Act agencies should consider including OIG representation on their agencies' AI Governance Boards. Depending on the nature and extent of such participation, OIGs that participate in their agencies' AI Governance Boards might well be limited in their ability to conduct independent and objective oversight of their agency's implementation of AI based on the work of their Governance Boards. While we understand that OIGs could potentially provide valuable input to the Governance Boards, it ultimately must be up to each OIG to determine whether and how such participation would be appropriate and, if so, the impact on the OIG's subsequent oversight of their agency's governance of AI.

We believe your office can address the concerns expressed above without impacting the scope or intent of the proposed memorandum. We draw from your treatment of similar concerns in OMB's memorandum dated June 10, 2015, "Management and Oversight of Federal Information Technology." In that memorandum addressing issues related to the current draft, your office incorporated into the memorandum a provision that expressly requires implementation of OMB's guidance in a manner that does not impact the independence of OIGs and the authorities Inspectors General have over their offices, as provided for in the IG Act. A similar provision in the proposed memorandum would suffice to address our concerns. We propose the following text, slightly modified from that in the 2015 memorandum to reflect the current context:

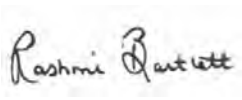
> With respect to Offices of Inspectors General (OIG), the responsibilities, requirements, and recommendations in this memorandum should be implemented in a manner that does not impact the independence of those offices and the authorities Inspectors General have over the personnel, performance, procurement, and budget of the OIG, as provided in the Inspector General Act of 1978, 5 U.S.C. §§ 401-424, as amended.

The OIGs within the Executive Branch are responsible for ensuring that our activities comply with OMB requirements, including those involving AI. We appreciate the need for effective policy and controls on the use and procurement of AI. A revision to the proposed memorandum to recognize the independence of OIGs within their agencies will support the OIG mission and our ability to perform effective oversight of AI.

We appreciate your consideration of these comments, and we welcome the opportunity to discuss them further should you have any questions.

Sincerely,

Robert P. Storch
Inspector General
U.S. Department of Defense
Chair
CIGIE Technology Committee



Rashmi Bartlett
Inspector General
U.S. International Trade Commission
Vice Chair
CIGIE Technology Committee

Cc:

CIGIE Executive Council

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Document: OMB-2023-0020-0157
Comment on OMB-2023-0020-0001

Submitter Information

Organization: U.S. Chamber of Commerce

General Comment

See attached file(s)

Attachments

AI_OMB_Guidance_Comments_C_TEC

U.S. Chamber of Commerce

1615 H Street, NW
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uschamber.com

December 5, 2023

The Honorable Shalanda Young
Director
Office of Management and Budget
725 Seventh Street NW
Washington, DC 20503

Re: Notice of Public Comment Period, Office of Management and Budget; Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (88 Fed. Reg. 75,625-75,626, November 3, 2023)

Dear Director Young:

The U.S. Chamber appreciates the opportunity to provide comment to the Office of Management and Budget (OMB) on its "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" ("Draft Guidance").[1] Furthermore, we appreciate OMB's acknowledgment that "AI is improving operations and efficiency across the federal government[2]." Public sector utilization of artificial intelligence can improve the efficiency of the federal government and facilitate easier public interaction. Therefore, it is imperative that it should be a goal of OMB to facilitate federal government utilization of AI technology, to promote IT modernization efforts throughout the Federal Government.

At the outset, we wish to reiterate our continued concerns with the short comment period provided. Accordingly, the U.S. Chamber, with other associations,[3] sent a letter on November 14 emphasizing that the "complexity of the issues involved and other concurrent and overlapping federal regulatory requests require extending the comment period to allow for more thoughtful and substantive feedback." Because this request for additional time was no granted, the Chamber, and other stakeholders, can only provide limited feedback and comment.

The Chamber strongly supports the Draft Guidance's emphasis on cross-agency and public-private collaboration. This is vital and can help agencies leverage multiple stakeholders' collective resources, expertise, and innovation to address complex and interrelated policy challenges. Furthermore, consistency and harmonization between agencies and between existing regulatory regimes, where appropriate, can speed up the adoption of critical AI tools.

Furthermore, these efforts must be based upon and aligned with existing laws, legal standards, and consumer protections. Therefore, the Draft Guidance should consider if

[1] https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf
[2] https://www.whitehouse.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-draft-for-public-review.pdf
[3] https://americaninnovators.com/advocacy/letter-to-omb-on-ai-draft-guidance-extension/

existing controls on the federal government's use of information technology already govern AI-specific risks.

We recommend the following issues should be addressed within the Draft Guidance:

- Strengthening AI Governance: Annual postings of all AI use cases may not be sustainable or practicable. As a result, the draft guidance would fail to achieve the intended transparency goals. Furthermore, this requirement may unintentionally create an undue burden for agencies. We feel further discussions, studies, and standards development are necessary regarding model notices to determine what should be reported in the public inventory. We would also like to stress that such a scope of inventory should only be for those uses considered high-risk.

- Managing risks from the use of AI: The Chamber believes it is essential to align the Draft Guidance with existing Federal Acquisition Regulations (FAR), and OMB should solicit public comments to achieve that goal.

- Definition of "Rights-impacting": The definition of "rights-impacting" could capture non-high risk AI utilization. A risk-based approach is vital to prioritize the allocation of resources for systems with heightened risk. Without this approach, the federal government could inadvertently suppress IT modernization adoption within the federal government. We would further emphasize the need to align the Draft Guidance with the National Institute of Standards and Technology risk-management framework. Furthermore, it is important to note that there are neither technical nor professional standards for algorithmic audits, and inadequate standards may skew risk requirements that fail to identify and address intended issues. Finally, we would encourage the federal government to engage with all stakeholders regarding "negative feedback" regarding specific AI systems to ensure that such concerns have merit.

- Waivers for minimum practices: Regarding waivers that can be granted, we strongly encourage OMB to add language so such waivers can be issued to protect organizations' exposure to sensitive or other protected information.

- Definitions: The Chamber strongly supports the alignment of regulatory terms to industry-specific AI definitions and terminology to ensure non-AI technologies are appropriately carved out of AI definitions and oversight. Where possible, the guidance should reflect internationally accepted definitions endorsed by the U.S., such as those promulgated by the Organization for Economic Cooperation and Development. The following terms should receive ample feedback from stakeholders before being finalized, "rights-impacting" and "potential harms to works wellbeing." Clarity of terms and definitions is essential, so we welcome further opportunities to discuss industry-supported definitions, including terms like "third-party vendor" that will be crucial in implementing any policies resulting from the guidance.

- Timelines: Currently, no timelines are tied to federal agencies' impact assessment, testing, or independent evaluations. A lack of clarity around specific timelines could

lead to potential bottlenecks in AI utilization within the federal government, wherein agencies will be waiting on one antecedent step prior to making procurement decisions.

In conclusion, we appreciate the opportunity to provide high-level feedback on the Draft Guidance. The Chamber believes that more time is necessary for stakeholders to review and provide more substantive feedback, as the Draft Guidance will substantially impact the government's ability to take advantage of AI tools. We encourage OMB to provide other opportunities to receive input from stakeholders regarding these issues. The Chamber stands willing and ready to work with OMB to ensure that all AI the government utilizes is done safely and securely.

Sincerely,

Michael Richards
Director, Policy
Chamber Technology Engagement Center

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lpt-2g5s-icfq
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0158
Comment on OMB-2023-0020-0001

Submitter Information

Organization: McKesson Corporation

General Comment

McKesson appreciates the opportunity to engage with OMB on the government's approach to advancing AI governance, innovation, and risk management through the official Request for Comment process. Please find our comments attached.

Attachments

McKesson Corporation_OMB-2023-0020

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December 5, 2023

Clare Martorana, U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer, Office of Management and Budget
725 17th Street NW, Washington, DC 20503
Attn: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Sent electronically via: regulations.gov

RE: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, Docket No. OMB-2023-0020

Dear Ms. Martorana,

McKesson Corporation ("McKesson") is pleased to provide comments in response to the Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI) Draft Memorandum ("OMB Memo"). We appreciate the numerous efforts the government has taken to advance AI governance, innovation, and risk management, while protecting the rights and safety of the public.

About McKesson

McKesson is a global leader in healthcare supply chain management solutions, retail pharmacy, community oncology and specialty care, and healthcare information solutions. McKesson partners with pharmaceutical manufacturers, providers, pharmacies, governments, and other organizations in healthcare to help provide the right medicines, medical products, and healthcare services to the right patients at the right time, safely and cost-effectively. As a mission-driven company, we are focused on working with our customers and partners to advance health outcomes for *all*.

Our unique 360-degree view of the healthcare system offers a distinctive vantage point. McKesson monitors and engages in regulatory activities that present both opportunities and challenges for the company, its customers, and the patients they serve. McKesson strives to ensure that its views on improving healthcare prioritize what's best for the patient.

Comments

McKesson appreciates the opportunity to engage with OMB on the government's approach to advancing AI governance, innovation, and risk management through the official Request for Comment process. We acknowledge the difficulty of the government's task, and we applaud OMB's efforts to align AI adoption across the federal government, including those efforts described in the OMB Memo.

As a federal contractor with demonstrated experience implementing, using, and managing the risks of AI, we offer the following comments to help the government and the American economy seize the power of AI while managing its risks. Our comments address the specific questions provided by the government and include additional, related recommendations. Key

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recommendations throughout our response include refining the actions included in the risk categories; focusing on implementation and testing; applying risk management practices based on impact, application, and use(s) of AI; ensuring flexibility for low- and moderate-risk AI applications; keeping pace with industry; encouraging a culture of innovation across the government; and ensuring adequate investment.

We strongly recommend the government engage with industry stakeholders, including regulated entities, throughout this process and prior to extending these requirements to broader industry stakeholders through any additional regulations. Failure to engage with and learn from industry partners will almost certainly impede innovation, introduce confusion, and increase risks. Additionally, we recommend the government take appropriate cautions to ensure that government actions do not stymie innovation by further entrenching large technology companies that are already benefiting disproportionately from first mover advantages.

Proposed Organizational Changes and Coordination Mechanisms (Questions 1-2)

In Section 3 of the OMB Memo, the government outlines multiple actions agencies are required to complete to strengthen AI governance, including designating a Chief AI Officer, convening agency AI Governing Bodies, developing compliance plans, and reporting on AI use cases. McKesson strongly supports each of these actions. We provide three additional recommendations below.

Chief AI Officer Remit, Resources, and Authority

We recommend installing the Chief AI Officer as a member of each agency's Executive Leadership Team. For large agencies with broad AI applications and uses, this person should be at the position of Senior Executive Service or Senior Leader, should be solely focused on AI, and provided with appropriate budget, staff, and authority to exercise the job independently as outlined in the Memo. As AI develops it is important for the Chief AI Officer to have a clear remit and the appropriate authority to make decisions and drive actions across large, matrixed agencies without requiring additional authorities or being subject to constrained approval processes. Secondly, the Chief AI Officers must be able to engage industry peers as equals to adequately represent the government's priorities and affect public opinion. Failure to include this individual amongst the Senior Executive Team or merely adding this title to an existing official as proposed in Section 3(b)(i) will be a strong signal to the agency and to industry partners that the agency is not sufficiently prioritizing or investing in AI. This will hinder AI adoption, implementation, innovation, and eventually, regulation, which will result in the government rapidly falling behind industry.

Composition of AI Governance Bodies

As AI technologies develop, it is imperative for government agencies to have high-functioning, knowledgeable governance bodies that understand the potential and risks of AI within their specific domain. We agree with OMB's approach to constituting agency AI Governing Bodies, particularly by including representation from each of the key enablers listed in Section 3(c)(ii). However, we do not support the use or re-purposing of existing governance bodies to satisfy this requirement. Though this requires additional effort and coordination, we strongly encourage the government to establish new AI Governance Bodies with a clear remit to focus exclusively on AI. We recommend populating this governance body with multi-disciplinary, knowledgeable, and well-trained senior staff that apply consensus-driven approaches to decision making. In addition, we encourage the government to provide adequate training on AI to each member of the AI

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Governance Body to raise the overall level of AI awareness and digital literacy such that every member can meaningfully contribute.

Staff Training and Change Management Support

To ensure success within each agency and alignment across the government, it is imperative that all government staff receive training on AI and that OMB provide appropriate change management support. If AI is truly "one of the most powerful technologies of our time, (OMB Memo, Page 1)" then the government must ensure each agency has the support and training needed to assess, implement, govern, and ultimately, adapt with AI. Failure to provide this support will surely impact the government's capabilities and influence, which will, in turn, limit each agency's ability to harness the potential and manage the risks of AI.

Advancing Responsible AI Innovation and Adopting Generative AI (Questions 3-4)

In Section 4 of the OMB Memo, the government outlines the requirement for each agency to develop an AI strategy that identifies and removes barriers to the responsible use of AI and provides goals to advance AI maturity. We are generally supportive of these efforts, though we provide additional recommendations for consideration below.

Agency AI Strategies

In Section 4(a), the government requires agencies to assess their AI maturity, staffing, and use cases to develop a comprehensive strategy within 365 days. While we appreciate the complexity of this work and the effort and collaboration required to satisfy this requirement, we believe the timeline is too long. As evidenced by the rapid proliferation of AI uses and advances in technology just this past year, we are concerned that a strategy formulated over the course of a year will likely be outdated by the time of its publication. Rather, we recommend a faster timeline that identifies core strategic elements which could then be reviewed, updated, and expounded upon at regular intervals. We believe this type of approach would more appropriately align with the pace of change we are seeing across industry and would ensure government agencies remain relevant AI stakeholders.

In addition to accelerating the timeline for strategy development, we encourage the government to require agencies to identify and assess their AI implementation processes and testing capabilities. While governance and literacy are important, they are not adequate substitutes for strong implementation and testing. If each agency's AI strategy is to be successful, it must include strong, understandable, and repeatable implementation processes as well as testing protocols. At minimum, we recommend that implementation and testing assessments and goals become explicit requirements of each agency's AI strategy. However, to truly advance AI innovation, the government will need to develop repositories, establish sandbox environments, and make available tools that allow for controlled development, testing, and validation of innovative AI systems before they are released within the agency or market.

We also recommend OMB require each agency to assess and clearly define liability risks associated with AI as part of their strategy. This should include, at minimum, clear determinations of who will be held liable for AI applications or products and how liability will be determined for AI applications across and within agencies. As AI has developed, it has created new legal challenges that complicate current laws and regulations, particularly around privacy, discrimination, product liability, and negligence. Failure to address these issues head on will create confusion, spurn innovation, and could potentially harm beneficiaries of government services.

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Lastly, we encourage OMB to require agencies to document AI implementation or innovation failures to create a culture that prioritizes safety, champions ingenuity, and supports shared learning and discovery. This will allow agency leaders and AI Governance Bodies to apply the appropriate levels of scrutiny to new AI technologies and applications so that developers can learn from their mistakes and adjust their solutions accordingly without creating frustration or distrust. Throughout history, we know that innovative technologies and discoveries require failure along the way, and some even emerge directly from perceived failures. We also know that cultures that do not seek to minimize or hide failure encourage innovation and improve safety. Therefore, we recommend Chief AI Officers track failed AI implementations and share lessons learned on a regular cadence with the AI Governance Bodies and relevant agency staff, as appropriate.

Investment and Alignment with Industry

In Section 4(b), the OMB discusses the necessity of removing barriers that hinder AI innovation, with particular focus on information technology (IT) infrastructure, data, cybersecurity, and workforce. While we agree that agencies should remove barriers to innovation, the government must also make significant, focused investments in digital-enabling technologies and AI.

The United States government would greatly benefit from developing programs or establishing institutes that could focus investments on key AI applications to improve services, operations, and American competitiveness without impacting each individual agency's budget. For instance, we believe the government has an opportunity to leverage the newly formed ARPA-H agency as a convening mechanism to spark health and human services-related innovation across public-private partnership based on strategic use cases across the nation. These types of programs have the benefit of coordinating critical AI goals and progress across agencies and industry partners. They also promote innovation and competition among start-ups and other businesses that do not have access to the capital to compete with the large technology companies that are already benefiting from first mover advantages. Therefore, we strongly urge OMB to consider developing programs that ensure adequate funding is available to agencies to advance societal goals and manage the impacts of digital transitions.

In addition to ensuring appropriate levels of funding are available to agencies, we recommend OMB encourage each agency's leadership, including the Chief AI Officer, to develop strong relationships with key industry representatives and thought leaders, including subject matter experts working for government contractors and regulated entities. This will allow agency staff to better understand the needs and concerns of their core industry stakeholders, as well as the impact their actions have on industry. It will further serve as a barometer for government leaders regarding the pace of AI transformation within industry, which can and should inform the agency's own actions. As AI rapidly evolves, it is important for the government to coordinate and align with industry, which means consistently and meaningfully engaging with private stakeholders to synchronize efforts and learn from one another. Therefore, we recommend OMB encourage each agency's leadership, including the Chief AI Officer, to engage with industry through each of the mechanisms proposed under Section 5(c)(v)(B)(1-5) as well as through informal consultations and relationships.

Proposed Use Cases and Minimum Practices (Questions 5-6)

In Section 5 of the OMB Memo, the government outlines specific risk management practices that agencies must implement to address the risks from the use of AI that directly impact the rights and safety of individuals and the public. We support the government's attempts to implement risk management practices of AI applications based upon their risk profile, and we appreciate that

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such practices are built upon a solid foundation of AI principles (e.g., Trustworthy AI Framework), risk management approaches (e.g., NIST Risk Management Framework), and previous Administration action (e.g., Executive Order 13960). Our comments below address OMB's list of Safety-Impacting and Rights-Impacting activities as well as the minimum practices outlined for agency implementation.

Safety-Impacting and Rights-Impacting Activities (Question 5)

Upon review, we recommend OMB further refine the list of Safety-Impacting and Rights-Impacting activities to clarify interpretations for government staff and vendors. As written, the categories are so broad that they capture nearly all potential uses of AI across certain economic sectors. While this could have the effect of establishing a 'floor' of minimum practice, it directly undercuts the government's goal of aligning AI risk management practices to AI applications based upon their actual risk profile. In effect, it de-prioritizes high-risk applications by failing to distinguish between AI uses while adding new requirements into an already fragmented, multi-dimensional policy landscape. Furthermore, it is likely to create significant work for Chief AI Officers who are required to review and assess each exemption request. Before publishing the final memo, we recommend OMB review and refine the list of Safety-Impacting and Rights-Impacting activities.

In addition to refining the activities, we recommend providing guidance to government agencies and vendors on the scope of the activities included by further defining the phrase "used to control or meaningfully influence the outcomes of any of the following activities or decisions. (Section 5(b)(i) and Section 5(b)(ii)." While some of the actions included under the Safety-Impacting and Rights-Impacting categories have discreet processes, many of the actions, particularly on the vendor side, exist within sophisticated processes and technology networks that may include downstream AI applications that contribute to the outcome but may not be directly associated with the listed action by the vendor, agency, or civilians receiving services. Refining the list of activities included as Safety-Impacting and Rights-Impacting and then providing guidance on the scope of such actions would be helpful for government agencies as well as industry partners, such as McKesson, who are seeking to help the government realize the full potential of AI while managing its risks.

Minimum Practices for Safety-Impacting and Rights-Impacting AI (Question 6)

The OMB Memo divides the minimum practices into three categories based on the type of AI as well as its stage in the implementation lifecycle. We support the government's effort to establish minimum practices as well as future agency-specific applications of additional context-specific risk mitigations. We offer the below comments as suggestions for improvement based on our company's experience implementing AI.

We understand that OMB seeks to coordinate AI implementations across the entire government by establishing minimum practices that serve as the baseline for managing risk. We support this and appreciate the government's effort to balance flexibility with standardization. We encourage the government to maintain this flexibility for low- and moderate-risk AI applications as the technology and uses rapidly evolve. This will ensure government applications of AI keep pace with industry and are not unnecessarily restricted by rigid government requirements. However, we also encourage OMB to work with agencies to refine the use cases determined to be Safety-Impacting and Rights-Impacting so that each agency can apply specific gating mechanisms and targeted rules to address truly high-risk AI applications.

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We concur that independent model validation and security testing is crucial for effective AI risk management. For high-risk applications that drastically impact human rights and public safety, adversarial challenges, including AI red teaming, are becoming consistent with industry best practices. We concur, for purposes of independent evaluation, that while the independent reviewing authority should not be directly involved in the system's development, consistent with existing industry-standard concepts of effective challenge (see, e.g., Federal Reserve Board Supervisory Guidance on Model Risk Management, SR 11-7), independent model validation and security testing may be performed by personnel within the organization.

However, we urge OMB to provide greater clarity regarding how agencies should conduct independent model validation and security testing for models developed by vendors or other industry partners. This clarification is especially needed given the lack of any independent AI certification body. As written, OMB's requirements appear to focus on an agency's evaluation of AI models that the government has developed itself, or that were developed on behalf of the government by the government's AI Governing Body (e.g., Chief AI Officer, AI Oversight Board, or Agency Office). Absent greater clarity from OMB regarding evaluating externally developed AI models, OMB's guidance could confer an unfair competitive advantage on incumbents or create a secondary certification marketplace. Either result would limit competition and increase the cost of developing, implementing, and using AI.

Regarding the minimum actions required *while* using new or existing covered safety-impacting or rights-impacting AI (Section 5(c)(iv)(D-H), we support each of the requirements, specifically emphasizing the importance of providing relevant staff with adequate and progressive training to raise staff digital literacy levels and support successful deployments. We do, however, recommend that the government rely on industry best practices and scientific evidence to determine how and when human consideration should interact with high-risk AI functionality. Though it is important for AI applications to include a 'human in the loop' as a check on AI functionality, it is not always true that human intervention increases safety or outcomes. In some cases, it might increase bias or risk. Therefore, we recommend OMB work with each agency to identify high-risk use cases and appropriate evidence-informed best practices.

Regarding the additional minimum practices for Rights-Impacting AI (Section 5(c)(v)), we support each of the requirements, though we recommend the government expand the criteria for Section 5(c)(v)(A) to include economic impacts. As written, the government intends to assess and mitigate impacts to protected classes. We applaud this effort and encourage the government to go further to assess and mitigate impacts that could exacerbate economic inequality.

Lastly, we encourage the government to take the lead on Explainable AI by requiring agencies to monitor and explain factors impacting their AI applications' outputs. This will ensure agencies, developers, implementers, and users are accountable for their AI applications. It will also establish trust with the general public, particularly those individuals receiving services from the government that are impacted by the AI applications.

Contractual Considerations and Public Disclosure (Questions 7-8)

Since the requirements and recommendations outlined in the OMB Memo apply to covered AI across all agencies defined in 44 U.S.C. § 3502(1), each government agency will need to incorporate them into relevant contracts to meet the August 1, 2024 deadline. We understand the goal of the government is to update contracts as efficiently as possible so as not to disrupt current services or create undue burden on vendors. To do this effectively, we recommend the government take the following actions:

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- **Refine the activities listed as Safety-Impacting and Rights-Impacting.** The current list of activities is too broad and lacks sufficient definition to map to government statements of work to support effective contracting. By using such broad categories, the government risks treating all AI applications, regardless their risk profile, the same. This defies the very purpose of the risk management efforts outlined in the OMB Memo, will hinder responsible AI innovation across industry, and will create significant legal, contractual, and operational burden to government agencies and vendors.
- **Establish a standard set of baseline requirements to be included in contracts that use covered AI that distinguishes the responsibility of the vendor from the responsibility of the agency upon procurement.** The OMB Memo currently outlines the requirements from the perspective of an agency implementing these requirements independently. However, future contracting will require precise delineation of vendor responsibilities versus those of the procuring agency, clarity on when such actions need to be completed in relation to the timing of contractual updates or future procurement cycles, and what support a vendor can reasonably be expected to receive from the government. As an example, the government would need to clarify whether it would be the responsibility of vendors or the procuring agency to achieve an independent evaluation of the AI, as required under Section 5(c)(iv)(C). If this requirement were applied to vendors without agency support, it would need to be further clarified to outline acceptable governance terms that would satisfy this requirement. Similar comments could be made for the assessment and testing requirements, training requirements, the requirements to consult and incorporate feedback from affected groups, and performance evaluation processes outlined in Section 5.
- **Further outline and clarify the process and criteria used to determine exclusions, extensions, and waivers.** To ensure compliance with the minimum requirements, the government will need to provide additional information to government staff and vendors on the processes and criteria used to determine exclusions, extensions, and waivers. For instance, the government will need to clarify the definition of research and development (Section 5(c)(i)(C)) beyond the provided footnote. Additionally, the government should provide a framework that outlines how decisions about extensions and waivers will be granted as well as the overall process and timeline for pursuing such flexibilities. Due to the power granted to the Chief AI Officer to make this determination, it is imperative that the government provide adequate transparency into how these requests are evaluated and, ultimately, decided.
- **Provide clear guidance on how these new requirements impact Authorizations to Operate and other related agency approval processes.** The OMB memo mentions Authorizations to Operate multiple times and suggests that the minimum practices will impact this process moving forward. It is important that the government further clarify how these minimum practices will interact with current authorizations and prior approvals and whether additional actions will be required by government staff and vendors as a result. Failure to provide this information could lead to confusion amongst agencies and contractors or, worse, disruptions of critical agency or civilian services.
- **Clearly articulate the Transparency and Performance Improvement measures outlined in Section 5(d)(ii) and further outline any specific requirements to ensure vendors do not "inappropriately favor their own products at the expense of competitor's offerings."** Similar to the comments immediately above, it is important for vendors to understand how AI performance will be evaluated by the government agency

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and expectations for continuous improvement of procured AI. Given the speed at which AI products are developing, it will be important for the government to apply flexible evaluation techniques that allow vendors to evolve their AI products in accordance with broader industry developments over the duration of their 3- or 5-year contract.

- **Determine cost impacts of additional requirements on vendors.** The application of the proposed minimum requirements may lead to additional costs to vendors that are not captured in the current contract. Prior to updating individual contracts, the government should request information from impacted contractors on the cost of implementing these requirements and exercise contract modifications where appropriate.
- **Provide terms and conditions of data use.** In Section 5(d)(iv) of the OMB Memo, the government discusses the value of data for consistent operations and fair competition. It is important for the government to clearly outline data use terms and conditions that protect Federal information from additional use beyond the contract terms. Failure to adequately protect data resources from abuse or misuse, including but not limited to those outlined in the OMB Memo, will greatly hinder competitive conditions as outlined in the Federal Trade Commission's recent comment submitted to the U.S. Copyright Office.[1]

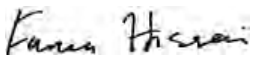
In addition to the actions above, we recommend the government synchronize contract updates, the August 1, 2024 compliance deadline, and the announcement of vendor AI documentation requirements outlined in Section 5(a)(ii) so as not to create undue burden on vendors and government staff. It is not clear from the OMB Memo that these actions are aligned. Failure to do this could lead to unnecessary confusion and disruptions of service and will create significant backlogs across government contracting offices.

Lastly, we recommend the agency maintain the current structure and format of the annual use case inventory as published at https://ai.gov/ai-use-cases/, but update the current category titled, "Consistent with EO 13960" to reflect consistency with the final OMB Memo.

Conclusion

McKesson appreciates the opportunity to comment on the OMB Memo and we look forward to working with federal agencies across the government as an industry partner on AI implementation, governance, innovation, and risk management. If you have questions or need further information, please contact George Kernodle, Director of Public Policy – Evidence & Data at George.Kernodle@McKesson.com.

Sincerely,



Fauzea Hussain

[1] FTC Comment on Artificial Intelligence and Copyright

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lpt-2h0b-bh11
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0159
Comment from Pravin Powale

Submitter Information

Name: Pravin Powale

General Comment

The comments are provided in the uploaded file.

Attachments

AI-in-Government-Memo-Public-Comment - comments and feedback

Given below is the list of comments submitted after reviewing the document “AI-in-Government-Memo-Public-Comment.pdf”.

#	Document reference	Comment	Justification/reasoning
1	Page 2 – last para. This memorandum does not address issues that are present regardless of the use of AI, for instance with respect to Federal information and systems in general. I	Security issues are present regardless of the use of AI. These could be addressed better with AI, especially when the adversaries employ AI tools and techniques for attacking US IT infrastructure.	There are several types of cyber attacks that result into loss of data, money, information (intellectual property). Attacks such as ransomware, denial-of-service, botnet are becoming more sophisticated with the help of AI. One needs to design a superior AI to counter such attacks.
2	Page 3, Section 3, para 1 The head of each covered agency must also consider the necessary financial, human, information, and infrastructural resources to carry out these responsibilities effectively, including providing or requesting resources via the budget process to support the responsibilities identified in this memorandum.	The budget process needs to be flexible as it is set for a fiscal year, whereas advances in AI can occur potentially several times in a year.	n/a
3	Page 4 **AI Use Case Inventories.** Pursuant to Section 7225 of the Advancing American AI Act, and subject to the exclusions in that Act and Section 10.1(e) of the AI Executive Order, each agency (except for the Department of Defense and the Intelligence Community) must annually submit an inventory of its AI use cases to OMB and subsequently post a public version on the agency’s website	- Publicly sharing AI use cases inventories might actually make the job of the adversaries trying to attack US interests. Instead, the AI use cases can be shared only across the Federal/State agencies and select Private Companies. - A Government wide library of AI use cases will be useful for all agencies to see if some agency has already developed that AI use case. Technical knowledge	Page 5 states that **Reporting on AI Use Cases Not Subject to Inventory.** Some AI use cases are exempt from the Advancing American AI Act’s inventory requirement. Of those use cases, those within the Department of Defense are otherwise within the scope of this memorandum unless they concern AI used as a component of a national security system. This may also apply to AI use cases for, say, Department of Energy, wherein the AI use case to monitor and control power plants can have national security implications.

		sharing regarding technology, design, implementation and lessons learned will be quite useful and save time, money and effort.	
4	Page 5 b. Roles, Responsibilities, Seniority, Position, and Reporting Structure of Chief Artificial Intelligence Officers	A CAIO should have an AI technical team to support agency's AI mission.	This is similar to the technical team that a CTO has or a security team that a CISO has.
5	Page 6 *Promoting AI Innovation* I. advocating within their agency and to the public on the opportunities and benefits of AI to the agency's mission;	Making AI opportunities public may strengthen US adversaries. Needs careful consideration.	This is similar to #3 above.
6	Page 7 c. Internal Agency AI Coordination … The agency's AI coordination mechanisms should be aligned to the needs of the agency based on, for example, the degree to which the agency currently uses AI, the degree to which AI could improve the agency's mission, and **the risks posed by the agency's current and potential uses of AI.**	A scale measuring different AI levels needs be defined along with a threshold that the AI systems should not be allowed to cross. The definition of this scale and threshold is a very complex task in the context of collective intelligence offered by a group of AI use cases and not just one-use case taken at a time.	This comment is made in the light of potential AI singularity that many AI experts are expecting to happen between 2030 and 2045. Please refer to Future progress in artificial intelligence: A survey of expert opinion (philpapers.org) The threshold here should be much lower than the singularity. As the AI landscape evolves, the singularity may be pushed outward in the future by making use of human intelligence supplemented by non-singular AI systems.
7	Page 8 v. a plan for building sufficient enterprise capacity to manage risks from the use of AI;	Need clarification on the type of enterprise capacity referenced here.	
8	Page 10 v. Generative AI. In addition to heeding the guidance provided in	Special attention needs to be given to protecting the AI systems and preventing them from becoming	Please refer to https://agi-conference.org/2012/wp-content/uploads/2012/12/paper_56.pdf

	Section 10.1(f) of the AI Executive Order, agencies should assess potential beneficial use cases of generative AI in their missions and establish adequate safeguards and oversight mechanisms that allow generative AI to be used in the agency without posing undue risk.	rogue AI systems due to external/internal attacks by people, non-AI systems or other malevolent AI systems. Special QA processes may be required. Also need to address the issue of unintended AI behavior that is not due to any rogue agent.	
9	Page 15 A. Complete an AI impact assessment. Impact assessments must document the following: 1. The intended purpose for the AI and its expected benefit, supported by specific **metrics** or qualitative analysis.	A relevant metric could be AI system's accuracy. This could be determined either experimentally or theoretically or both.	n/a
10	Page 15 2. The potential risks of using AI, as well as what, if any, additional mitigation measures, beyond these minimum practices, the agency will take to help reduce these risks	Potential risks of **not using AI** also need to be considered.	This is because problems that can be efficiently and cost-effectively solved by using AI systems, may not be easily solvable by use of non-AI systems. Also using non-AI systems to counter attacks by AI systems can turn out to be a futile exercise.
11	Page 16 B. Test the AI for performance in a real-world context. Agencies must conduct adequate testing to ensure the AI, as well as components that rely on it, will work in its intended real-world context.	Government should encourage industry to develop test data generation tools to adequately test AI systems.	Some good test data generation tools, such as Mockaroo and Faker, are available today. The AI evolution is going to require additional, more powerful test data generation tools that are based on AI.
12	Page 16 C. Independently evaluate the AI. Agencies, through the CAIO, an agency AI oversight board, or other	Government should encourage implementation of AI assessment / certification program(s) at the organization level similar	n/a

	appropriate agency office with existing test and evaluation responsibilities, must review relevant AI documentation to ensure that the system works appropriately and as intended, and that its expected benefits outweigh its potential risks.	to say, CMMI or ISO and for the individual professionals, similar to PMP, ITIL or CSM.	
13	Page 17 E. Mitigate emerging risks to rights and safety	In general, AI systems' evolution needs to be monitored closely to assess where AI systems are, vis-a-vis the threshold they need to be below for the safety of the human race.	For robots - designers, implementors and testers should ensure Isaac Asimov's "Three Laws of Robotics" are implemented. There are other principles as well, such as Satya Nadella's six principles and goals that need to be considered.
14	Whole document	Overall comment: The complexity of implementing these guidelines and high computing resource requirements of AI systems may require significant additional budget for each agency.	Additional budget will be required to address high cost items, such as, AI infrastructure costs, AI software and services costs, training costs, higher salaries or contracting rates to attract the best people.

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0160
Comment from Kit Rodolfa

Submitter Information

Name: Kit Rodolfa

General Comment

Please find attached our comment on OMB's draft memo titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence." Note that this is a re-submission of our comment including one additional signatory (it was previously submitted with comment tracking number lpr-ny9x-8f6p). Thank you!

Attachments

Comment on OMB-2023-0020-0001

December 4, 2023

Director Shalanda D. Young
Office of Management and Budget
725 17th St., NW
Washington, D.C. 20503

RE: OMB–2023–0020, Proposed Memorandum for the Heads of Executive Departments and Agencies

Dear Director Young and OMB Colleagues:

We are writing in response to the request for comment on the proposed draft memorandum titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" by the Office of Management and Budget (the OMB Memo).

We write as individuals with decades of experience in technology and government services and want to express our support for the requirements in the OMB Memo stating that:

> Agencies should also ensure adequate access for AI developers to the software tools, *open-source libraries*, and deployment and monitoring capabilities necessary to rapidly develop, test, and maintain AI applications.

We believe that open approaches to innovation for government technology are critical for responsible, accountable, and transparent use of AI for the federal government.

We write to amplify the need for this open innovation approach and offer context for why it is so necessary for the government to be able to seize this moment to lead with responsible innovation.

First, the OMB Memo should expressly draw the connection to established federal policy around open source.[1] OMB Memorandum M-16-21, "Federal Source Code Policy: Achieving Efficiency, Transparency, and Innovation through Reusable and Open Source Software" established a

[1] We focus in this letter on policies around open source, which is a type of software whose source code is publicly available for individuals to view, use, modify, and distribute. See also https://opensource.org/osd/. Open source can be conceived of as an example of open innovation in software, and we do not draw sharp definitional distinctions here. See http://oss-watch.ac.uk/resources/openinnov. While the term open source is often used to characterize foundation models loosely, there are important distinctions to be drawn there, as the "openness" of a foundation model depends not just on source code availability, but also on the availability of model weights, artifacts, documentation, data, and compute. For a lucid exposition of the gradient of open release, see Solaiman, Irene. "The gradient of generative AI release: Methods and considerations." In Proceedings of the 2023 ACM Conference on Fairness, Accountability, and Transparency, pp. 111-122.

federal policy in support of open innovation to benefit Americans. Agencies should default to open source when developing or acquiring code, and agencies piloted programs to require at least 20 percent of new software to be commissioned as open source. Many agencies, from the Department of Commerce to the General Services Administration to the Department of Defense, have built on this policy and examples abound. One report found that open source software "plays a more critical role in the [Department of Defense] than has generally been recognized." The US Digital Service has used an open source approach to build tools to help address the climate crisis.

Second, there are long-recognized benefits to open source approaches, including the reusability and robustness of code, the enhancement of digital services and federal programs, and the ability for government to develop collaborative approaches with the private sector. The emergence of AI itself illustrates the central role that open source approaches have played to catalyze innovation in the field.[2] While some questions have emerged around large foundation models,[3] the vast majority of AI applications within federal government are not such use cases.[4] More importantly, open research environments are exactly the ones that have enabled a wide range of researchers to uncover vulnerabilities, biases, and limitations with such models.[5]

Third, Executive Order 14110 takes important steps to understand the benefits and risks of Generative AI. The risks for a very limited set of models – particularly relative to machine learning as presently used within government – should not detract from the overall commitment toward an open approach to AI innovation. The development of privacy-enhancing technologies and cybersecurity standards, as also required under the Executive Order, will benefit tremendously from the reliance on open source. As has long been established in the cybersecurity field, security through obscurity is not a solution:[6] "With enough eyeballs, all bugs are shallow."[7] This open-first orientation has been widely acknowledged to have surfaced and

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[2] Sonnenburg, Soren, Mikio L. Braun, Cheng Soon Ong, Samy Bengio, Leon Bottou, Geoffrey Holmes, Yann LeCunn et al. "The need for open source software in machine learning." (2007): 2443-2466.
[3] Bommasani, Rishi, Drew A. Hudson, Ehsan Adeli, Russ Altman, Simran Arora, Sydney von Arx, Michael S. Bernstein et al. "On the opportunities and risks of foundation models." *arXiv preprint arXiv:2108.07258* (2021). See also Stanford Center for Research on Foundation Models (CRFM), Stanford Institute for Human-Centered Artificial Intelligence (HAI), and PrincetonUniversity's Center for Information Technology Policy (CITP) Letter on the National Telecommunications and Information Administration request for information on AI accountability policy, https://hai.stanford.edu/sites/default/files/2023-06/Response-to-Request.pdf.
[4] Cuéllar, Mariano-Florentino, David Freeman Engstrom, Daniel E. Ho, and Catherine Sharkey. 2019. "Administering by Algorithm: Artificial Intelligence in the Regulatory State." Administrative Conference of the United States.
[5] See, e.g., Zou, Andy, Zifan Wang, J. Zico Kolter, and Matt Fredrikson. "Universal and transferable adversarial attacks on aligned language models." *arXiv preprint arXiv:2307.15043* (2023).
[6] Guha, Neel, Christie M. Lawrence, Lindsey A. Gailmard, Kit T. Rodolfa, Faiz Surani, Rishi Bommasani, Inioluwa Deborah Raji, Mariano-Florentino Cuéllar, Colleen Honigsberg, and Daniel E. Ho. 2024. "AI Regulation Has Its Own Alignment Problem: The Technical and Institutional Feasibility of Disclosure, Registration, Licensing, and Auditing." George Washington Law Review.
[7] Raymond, Eric. "The cathedral and the bazaar." *Knowledge, Technology & Policy* 12, no. 3 (1999): 23-49.

resolved a vast number of vulnerabilities that may have been left unaddressed in a closed system,[8] and open design is surfaced as a core principle of NIST's server security guidance.

We strongly support OMB's furtherance on the reliance on open source, but encourage explicit linking to long-established federal policy favoring open innovation approaches.

Best,

Daniel E. Ho
William Benjamin Scott and Luna M. Scott Professor of Law, Professor of Political Science and Computer Science (by courtesy), Stanford University
Senior Fellow, Stanford Institute for Human-Centered Artificial Intelligence (HAI)
Senior Fellow, Stanford Institute for Economic Policy Research (SIEPR)
Director, Stanford Regulation, Evaluation, and Governance Lab (RegLab)
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Visiting Professor of Practice, UCL Institute for Innovation and Public Purpose

Jennifer Pahlka
Former US Deputy Chief Technology Officer, White House Office of Science and Technology

[8] Brandon Keller, Andrew Meneely & Benjamin Meyers, What Happens When We Fuzz? Investigating OSS-Fuzz Bug History 4, ARXIV (May 19, 2023), https://arxiv.org/abs/2305.11433; Frank Nagle, et al., Report on the 2020 FOSS Contributor Survey (2020), https://8112310.fs1.hubspotusercontent-na1.net/hubfs/8112310/2020FOSSContributorSurveyReport_121020.pdf

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0161
Comment from Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

The OMB draft guidance provides visionary, consequential, and much needed guidance to federal agencies on the use, deployment, and procurement of AI. Congratulations on releasing the draft and allowing the opportunity for members of the public to submit comments.

I make the following recommendations for your consideration:

1. Please address in more detail how the Chief AI Officer will work with Chief Data Officers, and their potentially conflicting roles and obligations arising under the Foundations of Evidence Based Policy Making Act. For example, page 9 refers to data governance and curation. That is usually the role of the CDO. Chief data officers have to assess all legal risks and conduct a data inventory to assess copyright and patents and other requirements.
2. Please include legal perspectives consistently and comprehensively, throughout. For example, 3(c)(II) should require a legal officer as part of the AI governance board. An example of a “rights-impacting purpose” on pg. 12 should include the use of AI to generate regulatory language, statutory text, judicial opinions, or equivalent uses that may impact someone’s legal rights. Consider consulting with different agency legal subject matter experts on his draft before finalizing.
3. Please insert more references to intellectual property rights. Copyright is mentioned only in the procurement space, and intellectual property as part of the safety purpose. However, the use of people’s images, names, signatures, likenesses, etc.. or “persona” rights is an important issue that Congress is looking at. Deepfakes of people, passing off someone’s content as their own (trademark), and possible ip and privacy violating uses to get training datasets are relevant issues.Government employees should be able to prevent their likenesses from being used by their employer without permission. It is possible that copyright is only mentioned in procurement because agencies may be liable for intellectual property infringement (patents, copyright) under 28 USC1498, but if the goal is to respect rights than
4. Please consider whether “procurement” is sufficiently broad. Is it possible agencies will seek to avoid obligations by acquiring AI through other means: other transaction authorities (OTAs)? This focus on procurement and not other ways agencies obtain technologies could be a loophole.
5. Please consider using the OECD definition for AI system, and other ways these initiatives can more clearly pave the way for international collaboration and harmonizations. Please consider including a

reference to international engagement plans in the required strategy on pg. 8 for agencies that have such equities.
6. Please consider requiring multi stakeholder engagement (including SLATTs, other government agencies, industry, and civil society) as part of the AI strategy development and implementation processes.
7. Consider requiring agencies to make data available for ai training datasets, and using machine readable licenses that clearly specify how data can be used and for what purposes,possibly creating an interagency task force, especially if this requires standards.
8. The EO refers to safe, secure, and trustworthy AI. This only refers to impacting safety and rights. Consider whether this is the correct framing, or whether responsible AI, trustworthy ai, or other terms should be used.

Thank you for considering these points as you finalize the guidance.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0162
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Brennan Center for Justice at New York University School of Law

General Comment

See attached file.

Attachments

Brennan Center Comments re OMB Guidance 2023-0020

BRENNAN CENTER FOR JUSTICE

December 5, 2023

Office of Management and Budget
Submitted Via Federal eRulemaking Portal at www.regulations.gov

RE: Brennan Center for Justice Response to "Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Memorandum," OMB-2023-0020

The Brennan Center for Justice at NYU School of Law is a nonpartisan law and policy institute that works to reform, revitalize, and defend our country's systems of democracy and justice. We submit the following comments in response to the Office of Management and Budget's (OMB) Request for Comments on its "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" draft memorandum (OMB Memorandum).

The Brennan Center commends OMB for its efforts to develop transparency measures and risk management practices for safety- and rights-impacting use of artificial intelligence (AI). We submit these comments and recommendations to further strengthen these critical safeguards.

1. **The IC and national security systems should not be excluded wholesale from the minimum practices outlined in the OMB Memorandum.**

The OMB Memorandum contains broad carveouts for the Intelligence Community (IC) and national security systems. The Advancing American AI Act of 2022 exempts the IC and Department of Defense (DoD) from the requirement to publish AI use case inventories.[1] The OMB Memorandum, however, goes further by entirely exempting the IC from implementing minimum risk management practices.[2] Similarly, "national security systems" are not mentioned anywhere in the Advancing American AI Act, but are also exempted from the ambit of the OMB Memorandum.[3] We recognize that Executive Order 14110 provides that the IC, DoD, and national security systems will be covered by a separate national security memorandum,[4] but are of the view that consigning rights-impacting AI use by significant parts of the federal government to an opaque national security track seriously jeopardizes the privacy, rights, and liberties of millions of people in the United States. As has become clear in the context of policing and criminal justice, too often the brunt of algorithmic discrimination is borne by communities of color, heightening the risks of allowing a large segment of AI to remain outside the framework that is meant to ensure that these systems are effective, accurate, fair, and rights-respecting.

[1] Advancing American AI Act, Pub. L. 117-263, title LXXII, subtitle B, §§ 7225(d), 7228 (2022) (exempting the Department of Defense and the intelligence community), https://www.congress.gov/117/plaws/publ263/PLAW-117publ263.pdf.
[2] Shalanda D. Young (director, Office of Management and Budget (OMB)), memorandum, Re: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence, 88 Fed. Reg. 75625 (November 3, 2023), sec. 5 ("Managing Risks From the Use of Artificial Intelligence") (hereinafter "OMB Memorandum").
[3] OMB Memorandum, sec. 2(a).
[4] Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, Exec. Order No. 14110, 88 Fed. Reg. 75191 (2023), § 4.8, https://www.govinfo.gov/content/pkg/FR-2023-11-01/pdf/2023-24283.pdf.

National security systems are defined by statute to include information systems whose deployment "involves intelligence activities."[5] Under the provisions of Executive Order 12333, this means all IC systems used for data collection, retention, analysis, and dissemination.[6] Since the IC includes federal agencies that are primarily domestically focused, such as the Federal Bureau of Investigation (FBI)[7] and certain parts of the Department of Homeland Security (DHS), a broad swath of systems that directly affect persons living in the U.S. are excluded from basic testing and risk management practices. This is particularly concerning because the FBI and DHS have deployed AI systems that exhibit the types of problems and risks that the OMB Memorandum is meant to mitigate.

The FBI's massive facial recognition program through which it has access to billions of face prints is used for both law enforcement and intelligence purposes.[8] It has been repeatedly criticized by the Government Accountability Office for: inadequate accuracy testing, including a failure to test performance in common use scenarios and to test for false positives;[9] lack of training, including no training requirements for agents using external facial recognition technology like Clearview AI, leaving 95 percent of agents not trained;[10] lack of systems to track agents' use of non-FBI facial recognition tools;[11] and lack of specific policies to mitigate risks to civil rights and liberties from this technology.[12] The Bureau's lax attitude toward the reliability and fairness of its systems is particularly alarming given the existence of several research studies documenting facial recognition's inaccuracy in identifying non-white faces,[13] and multiple reports of erroneous matches resulting in wrongful arrests and incarceration of Black Americans.[14] Moreover, the FBI has also developed, in partnership with DoD, technology to identify individuals from video footage of public spaces, which could pose serious risks to First Amendment protected activities if it is used to, for example, identify protestors for surveillance and other measures.[15]

[5] 44 USC § 3552(b)(6)(A)(i)(I).
[6] United States Intelligence Activities, Exec. Order No. 12333, 46 Fed. Reg. 59941 (1981), part 2.3, https://www.archives.gov/federal-register/codification/executive-order/12333.html.
[7] 50 U.S.C. § 3003(4)(H). While the statute includes only the "intelligence elements" of the Federal Bureau of Investigation (FBI), in practice, the FBI and the Director of National Intelligence consider the entire Bureau to fall under the intelligence community (IC) definition. FBI, "About: Leadership & Structure," last accessed December 5, 2023, https://www.fbi.gov/about/leadership-and-structure/intelligence, and Office of the Director of National Intelligence, "Members of the IC," last accessed December 5, 2023, https://www.dni.gov/index.php/what-we-do/members-of-the-ic.
[8] See Ernest J. Babcock, "Privacy Impact Assessment for the Facial Analysis, Comparison, and Evaluation (FACE) Services Unit," FBI, May 1, 2015, sec. 3, https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/freedom-of-information-privacy-act/department-of-justice-fbi-privacy-impact-assessments/facial-analysis-comparison-and-evaluation-face-services-unit, and Erin M. Prest, *Privacy Impact Assessment for the Facial Analysis, Comparison, and Evaluation (FACE) Phase II System,* Department of Justice, July 9, 2018, sec. 3, https://www.fbi.gov/file-repository/pia-face-phase-2-system.pdf/view.
[9] See Government Accountability Office (GAO), *Face Recognition Technology: FBI Should Better Ensure Privacy and Accuracy*, May 16, 2016, 25–32, https://www.gao.gov/assets/gao-16-267.pdf.
[10] See GAO, *Facial Recognition Services: Federal Law Enforcement Agencies Should Take Actions to Implement Training, and Policies for Civil Liberties*, September 5, 2023, 26–28, https://www.gao.gov/assets/gao-23-105607.pdf.
[11] See GAO, *Facial Recognition Technology: Federal Law Enforcement Agencies Should Better Assess Privacy and Other Risks*, June 29, 2021, 20–26, https://www.gao.gov/assets/gao-21-518.pdf.
[12] See generally GAO, *Facial Recognition Services,* https://www.gao.gov/assets/gao-23-105607.pdf.
[13] Patrick Grother, Mei Ngan, and Kayee Hanaoka, *Face Recognition Vendor Test (FRVT) Part 3: Demographic Effects,* National Institute of Standards and Technology (NIST), December 19, 2019, https://nvlpubs.nist.gov/nistpubs/ir/2019/NIST.IR.8280.pdf, and Steve Lohr, "Facial Recognition Is Accurate, if You're a White Guy," *New York Times*, February 9, 2018, https://www.nytimes.com/2018/02/09/technology/facial-recognition-race-artificial-intelligence.html.
[14] See Khari Johnson, "Face Recognition Software Led to His Arrest. It was Dead Wrong," *Wired*, February 28, 2023, https://www.wired.com/story/face-recognition-software-led-to-his-arrest-it-was-dead-wrong/.
[15] Drew Harwell, "FBI, Pentagon helped research facial recognition for street cameras, drones," *Washington Post*, March 7, 2023, https://www.washingtonpost.com/technology/2023/03/07/facial-recognition-fbi-dod-research-aclu/.

Other FBI systems are also deployed for both domestic intelligence and criminal investigation purposes. For example, the Bureau's various social media monitoring programs, for which it has contracted with companies such as Dataminr, ZeroFox, and Babel Street, use some version of AI to trawl the web.[16]

DHS's Office of Intelligence and Analysis (I&A), which is also part of the IC, undertakes broad social media monitoring for domestic intelligence purposes. It uses an AI tool called Tangles that constantly monitors and scrapes the web to build detailed profiles of individuals.[17] During the 2020 racial justice protests, I&A built dossiers on protestors using social media and other sources, generating a chorus of criticism from Congress and the department's oversight offices.[18] The DHS Office of the General Counsel found that I&A employees did not have an adequate understanding of what constitutes protected speech,[19] while its inspector general found that I&A "does not have comprehensive policies and procedures to ensure [that] its employees effectively collect [open source intelligence] and adhere to privacy protections."[20] More recently, I&A has surveilled Americans discussing abortion online,[21] and DHS has launched a program to trawl the internet for dangerous "narratives and grievances," raising First Amendment concerns.[22] I&A is now developing AI data analysis tools for use by the law enforcement parts of the department.[23]

Given the impact of programs like these on people in the U.S., their wholesale exemption leaves in place risky AI systems without safeguards and should be replaced by a system that institutes protections, testing, and oversight comparable to those for agencies and systems covered under the OMB Memorandum.

2. OMB should clarify provisions exempting agencies from the obligation to produce information about AI use cases in public AI use case inventories and exercise oversight over such exemptions.

According to Section 3(a)(iv) footnote 8 of the OMB Memorandum, agencies must publicly report use cases "to the extent practicable and consistent with applicable law and governmentwide guidance, including those concerning the protection of privacy and of sensitive law enforcement, national security, and other protected information."[24] We appreciate that the OMB Memorandum references only governmentwide—rather than agency-specific—policies in this provision. At the same time, we believe that the standards articulated in footnote 8 are too broad and vague. We recommend that they be clarified as set out below.

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[16] See Ken Klippenstein, "FBI Hired Social Media Surveillance Firm that Labeled Black Lives Matter Organizers 'Threat Actors,'" *Intercept*, July 6, 2023, https://theintercept.com/2023/07/06/fbi-social-media-surveillance-zerofox/, and *Select Comm. To Investigate the January 6th Attack on the U.S. Capitol,* 117th Congress (July 26, 2022) (interview transcript of Jennifer Moore, executive assistant director, FBI), 10–11, 98, https://www.govinfo.gov/content/pkg/GPO-J6-TRANSCRIPT-CTRL0000916069/pdf/GPO-J6-TRANSCRIPT-CTRL0000916069.pdf (explaining use of social media monitoring for predicated investigations and intelligence gathering).

[17] Office of Intelligence and Analysis (I&A), *Office of Intelligence and Analysis Operations in Portland*, DHS, April 20, 2021, 55, https://www.wyden.senate.gov/imo/media/doc/I&A%20and%20OGC%20Portland%20Reports.pdf; see also Joey Scott, "LAPD Is Using Israeli Surveillance Software That Can Track Your Phone and Social Media," *Knock LA*, November 27, 2023, https://knock-la.com/lapd-is-using-israeli-surveillance-software-that-can-track-your-phone-and-social-media/.

[18] I&A, *Office of Intelligence and Analysis Operations in Portland,* Department of Homeland Security (DHS), https://www.wyden.senate.gov/imo/media/doc/I&A and OGC Portland Reports.pdf.

[19] I&A, *Office of Intelligence and Analysis Operations*, 20.

[20] Office of the Inspector General, *The Office of Intelligence and Analysis Needs to Improve Its Open Source Intelligence Reporting,* DHS, July 6, 2022, 11, https://www.oig.dhs.gov/sites/default/files/assets/2022-07/OIG-22-50-July22.pdf.

[21] Jana Winter, "DHS monitored 'social media reactions' to Roe, collected legally protected speech, bulletin shows," Yahoo! News, updated November 16, 2022, https://news.yahoo.com/dhs-monitored-social-media-reactions-to-roe-collected-legally-protected-speech-bulletin-shows-001254616.html.

[22] Ken Dilanian, "DHS launches warning system to find domestic terrorism threats on public social media," NBC News, May 10, 2021, https://www.nbcnews.com/politics/national-security/dhs-launches-warning-system-find-domestic-terrorism-threats-public-social-n1266707.

[23] Privacy Office, *Privacy Impact Assessment for the DHS Data Analysis Tools,* DHS/ALL/PIA-055(a), DHS, June, 13, 2023, 19–20, https://www.dhs.gov/sites/default/files/2023-05/privacy-pia-cbp068-cbpmobileapplication-may2023.pdf.

[24] OMB Memorandum, 4 n8. Section 5(c)(iv)(H) of the OMB Memorandum includes a similar exemption.

First, OMB should make clear that agencies cannot use this provision to avoid providing information regarding systems about which information has already been publicly released—for example through press reports, FOIA documents, Congressional testimony, privacy impact assessments, systems of records notices, and other sources. Public release undermines any argument for wholesale withholding information about a system based on practicability or protection of information.

Second, the decision to exempt use cases on these grounds should not be left solely to the agency. For each invocation of an exemption per footnote 8, OMB should require agencies to submit a detailed rationale and relevant documentation, as well as to specify the system-specific policies they have in place to mitigate any risks to privacy, civil rights, and civil liberties. To increase transparency, OMB should annually publish information on the number of exemptions by agency.

Third, OMB should issue public guidelines making clear that practicability would justify an exemption from transparency only in the most exceptional circumstances and specify factors that are relevant to such a determination.

Fourth, OMB should similarly issue public guidelines on the situations in which laws and guidance concerning the protection of privacy, sensitive law enforcement, national security, and other protected information could justify not publishing information about AI use cases in a use case inventory, with transparency as the default principle.

In particular, OMB should clarify that—absent a specific provision or provisions in a law or governmentwide guidance that clearly require that no information about a system be disclosed—footnote 8 does not allow agencies to avoid disclosing the very existence of an AI system, a description of the capabilities of that AI system, the purpose of the agencies' use of that AI system, and the rules and restrictions that govern the use of the system. Although OMB has yet to publish guidance on what information will be included in use case inventories, it seems highly unlikely that such disclosures would reveal information about individuals, and the fact that a system collects or uses information about individuals does not by itself trigger privacy concerns about disclosing *system*-level information.[25] Nor would such disclosures reveal information about particular investigations that could be regarded as sensitive law enforcement information. Local laws already require police departments to disclose information about their surveillance technologies, providing evidence that system level transparency is achievable.[26] Indeed, public reporting of AI systems may help improve such systems, allowing for input and advice from outside experts and encouraging agencies to deliberate carefully about their use of AI.

Lastly, allowing agencies to avoid publicly reporting use cases on the grounds of "sensitive national security information" appears redundant because of the broad carveouts for national security systems, the IC, and DoD discussed above. We recommend that OMB strike this phrase or, at minimum, clarify for the public what types of systems would be covered in this category. We also request that OMB specify what type of information is covered by the phrase "other protected information," noting that classified information would be covered by other laws and regulations and the carveouts for national security systems, the IC, and DoD. Any use of these exceptions should, in any event, be narrowly construed and subject to OMB oversight.

[25] In the unlikely circumstance that use case inventories would include information about individuals, agencies should be required to report that information in a privacy-preserving manner—rather than choose not to report that information at all.
[26] See Stevie Degroff and Albert Fox Cahn, *New CCOPS On the Beat: An Early Assessment of Community Control of Police Surveillance Laws*, Surveillance Technology Oversight Project, February 10, 2021, 6, https://static1.squarespace.com/static/5c1bfc7eee175995a4ceb638/t/602430a5ef89df2ce6894ce1/1612984485653/New+CCOPS+On+The+Beat.pdf (showing that, as of December 2020, fourteen local governments required annual reports of law enforcement's surveillance technology acquisition and use).

3. OMB should require agencies' evaluation of data to be based on prevailing academic norms rather than historical data.

We appreciate that OMB has highlighted the importance of ensuring the "quality and appropriateness" of training data when developing safety- and rights-impacting AI,[27] and note that in some cases this may require investing in better data collection, consistent with privacy concerns, and abandoning AI use cases until more suitable data exists.[28] Data on the criminal justice system especially suffers from quality issues that would undermine the validity and accuracy of any AI trained on it. To take one example, the First Step Act of 2018 requires the Bureau of Prisons to develop an algorithm to predict the "recidivism risk" of people in federal custody. As currently deployed, that algorithm, "PATTERN," focuses on calculating a narrow type of recidivism: the risk that someone will be re-arrested (or, much more rarely, returned to federal prison). But arrest and criminality are not the same thing, and conflating the two has led PATTERN's predictions to suffer from unwarranted racial disparities.[29] A better and more accurate tool would abandon the focus on re-arrest entirely and seek to predict solely the risk of re-conviction or re-imprisonment.[30] Remarkably, though, the data to train such an algorithm does not exist—at least not in one place. Instead, it is scattered across databases maintained by state courts and law enforcement agencies.[31] These problems—atomized and incomplete data that speak to only one narrow aspect of a social problem—are unfortunately common in the criminal justice context.[32]

Agencies must, as the OMB Memorandum advises in Section 5(c), exercise special care when designing systems operating in this space. OMB should further clarify that agencies' evaluation of the "quality and appropriateness" of data to be used in safety- and rights-impacting AI should be based on prevailing academic norms rather than historical use cases. It is not enough, for example, that federal agencies have historically measured recidivism based on the risk of re-arrest. Agencies should determine tabula rasa whether a dataset measures what it purports to and, if not, whether that renders it inappropriate for use in machine learning. And OMB should encourage agencies to consult with a range of civil society voices in making these determinations.

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[27] OMB Memorandum, sec. 5(c)(iv)(3).

[28] See Reva Schwartz et al., "Towards a Standard for Identifying and Managing Bias in Artificial Intelligence," NIST, March 2022, 15–19, https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.1270.pdf (warning against a bias toward focusing "on which datasets are available or accessible, rather than what dataset might be most suitable").

[29] Ames Grawert, "Brennan Center's Public Comment on the First Step Act's Risk and Needs Assessment Tool," Brennan Center for Justice, September 4, 2019, https://www.brennancenter.org/our-work/research-reports/brennan-centers-public-comment-first-step-acts-risk-and-needs-assessment, and Ames Grawert and Patricia Richman, The First Step Act's Prison Reforms: Uneven Implementation and the Path Forward, September 23, 2022, 3–4, https://www.brennancenter.org/our-work/research-reports/first-step-acts-prison-reforms.

[30] See Jessica M. Eaglin, "Constructing Recidivism Risk," *Articles By Maurer Faculty* (2017), 94, https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=3647&context=facpub (noting that arrest is one of "the least procedurally protected instances of contact with the criminal justice system").

[31] To its credit, the Department of Justice (DOJ) continues to investigate ways to improve PATTERN, including potentially refocusing the tool to predict re-conviction risk. See Office of the Attorney General, *First Step Act Annual Report*, DOJ, April 2023, 10–11, https://www.ojp.gov/first-step-act-annual-report-april-2023.

[32] Until very recently, government crime data largely focused on a handful of offenses—hardly a complete picture of crime in the United States. See generally Ames Grawert and Noah Kim, "Understanding the FBI's 2021 Crime Data," Brennan Center for Justice, October 4, 2022, https://www.brennancenter.org/our-work/research-reports/understanding-fbis-2021-crime-data, and "U.S. Crime Rates and Trends — Analysis of FBI Crime Statistics," Brennan Center for Justice, October 16, 2022, https://www.brennancenter.org/our-work/research-reports/us-crime-rates-and-trends-analysis-fbi-crime-statistics.

4. OMB should tighten standards for waivers and exercise oversight over them.

Section 5(c)(iii) of the OMB Memorandum allows an agency's Chief AI Officer (CAIO) to grant a waiver from risk management practices for safety- and rights-impacting AI uses based on an assessment that fulfilling the requirements would either "increase risks to safety or rights overall" or constitute an "unacceptable impediment to critical agency operations."[33] This standard is overbroad and vague and leaves too much discretion in the hands of CAIOs. We recommend the following:

First, OMB should only allow waivers for a set period and subject to annual review. The minimum standards are meant to ensure that AI works (through testing), that it doesn't harm people (through safeguards against bias and civil liberties' protections), and that its use is understood by those who are subject to it (through transparency). Agencies' use of faulty or biased technology should not be allowed to continue indefinitely through waivers.

For example, DHS's Customs and Border Protection (CBP) uses CBP One, an app that requires asylum seekers at the U.S.-Mexico border to use facial recognition in order to schedule appointments at ports of entry and requires non-citizens to use facial recognition to request travel authorization for parole processes.[34] Not only is there abundant evidence about facial recognition programs' inaccuracy in identifying darker skinned faces, but there are also reports that CBP One in particular "is failing to register many people with darker skin tones"—such as those who have made their way to the southern border from Haiti and African countries—making it near impossible for them to apply for asylum.[35] Managing the flow of asylum seekers at the border is clearly a high priority for CBP, but it should not get an open-ended pass to continue using technology that may be biased rather than take steps to improve its systems.

Second, it is unclear what would constitute an "unacceptable impediment to critical operations" and an increased "risk to safety or rights overall." OMB should clarify what is meant by these terms; clarify how adherence to these standards would be assessed; provide examples of scenarios in which a waiver is or is not appropriate; and give detailed instructions or a template for what information must be shared with OMB.

Finally, the OMB Memorandum leaves too much discretion in the hands of the CAIO, inviting operational pressures to prevail over the need for testing and safeguards. We have seen time and again that internal offices charged with protecting civil rights and civil liberties have given way in the face of operational imperatives.[36] There is no reason to believe that CAIOs would behave differently, particularly considering the vague standard put forward in the OMB Memorandum. Any waivers should be subject to review by OMB, and OMB should make publicly available information on systems for which waivers are granted, including: the scope of the waiver (e.g., which risk management requirements the agency will not need to implement with respect to that use case); the period for which the waiver applies; and the date on which OMB will review the waiver.

5. OMB should maximize publicly available information about AI uses.

In addition to public reporting, the OMB Memorandum in several places requires agencies to report, solely to OMB, information such as agency lists of safety- and rights-impacting AI[37] and how agencies are

[33] OMB Memorandum, sec. 5(c)(iii).
[34] Privacy Office, *Privacy Impact Assessment for CBP One*, DHS/CBP/PIA-068, DHS, May 12, 2023, 18, 24, https://www.dhs.gov/sites/default/files/2023-05/privacy-pia-cbp068-cbpmobileapplication-may2023.pdf.
[35] Melissa del Bosque, "Facial Recognition Bias Frustrates Black Asylum Applicants to US, Advocates Say," *Guardian*, February 8, 2023, https://www.theguardian.com/us-news/2023/feb/08/us-immigration-cbp-one-app-facial-recognition-bias.
[36] Spencer Reynolds and Alia Shahzad, *Holding Homeland Security Accountable: How to Strengthen Departmental and Congressional Oversight,* Brennan Center for Justice, October 26, 2023, 2–8, https://www.brennancenter.org/media/11860/download.
[37] OMB Memorandum, sec. 5(b).

implementing risk management practices.[38] In the interest of transparency, OMB should make this information public as part of use case inventories.

We note that while DoD and the IC are both exempt from maintaining AI use case inventories, the OMB Memorandum provides a mechanism for DoD to report to OMB AI use cases that are not used as part of a national security system.[39] The IC should have this same requirement.

6. Internal agency mechanisms are not sufficient to address AI risks.

We appreciate that OMB will be exercising some degree of oversight over agencies' interpretations of the requirements it has articulated. However, as set out in this submission, the OMB Memorandum does not apply to national security systems and IC uses of rights-impacting AI, leaving these critical systems without risk management practices, antidiscrimination testing, and impact assessments. We have already encouraged OMB to expand its oversight and review responsibilities to the greatest extent possible. Additional independent oversight would contribute significantly to building trust in the use of AI, and we therefore recommend that an appropriately resourced outside body modeled on the Privacy and Civil Liberties Oversight Board be constituted to serve as an additional check on agency use of AI.

***

We appreciate OMB's commitment to ensuring that people's rights and safety are protected from potentially harmful AI systems and urge you to take the steps outlined above to better accomplish this goal. We also appreciate OMB's engagement with civil society and encourage you to continue to seek input from stakeholders. For any questions, please contact Faiza Patel at patelf@brennan.law.nyu.edu.

Sincerely,

Faiza Patel
Senior Director
Brennan Center for Justice
Liberty and National Security Program

[38] OMB Memorandum, sec. 5(c).
[39] OMB Memorandum, sec. 3(a)(v).

PUBLIC SUBMISSION

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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0163
Comment on OMB-2023-0020-0001

Submitter Information

Organization: HarmonyTech Inc.

General Comment

I am submitting comments that I had earlier submitted as my individual comments, now on behalf of my employer HarmonyTech Inc. The comments are in the attached document.

Attachments

AI-in-Government-Memo-Public-Comment - comments and feedback

Given below is the list of comments submitted after reviewing the document “AI-in-Government-Memo-Public-Comment.pdf”.

#	Document reference	Comment	Justification/reasoning
1	Page 2 – last para. This memorandum does not address issues that are present regardless of the use of AI, for instance with respect to Federal information and systems in general. I	Security issues are present regardless of the use of AI. These could be addressed better with AI, especially when the adversaries employ AI tools and techniques for attacking US IT infrastructure.	There are several types of cyber attacks that result into loss of data, money, information (intellectual property). Attacks such as ransomware, denial-of-service, botnet are becoming more sophisticated with the help of AI. One needs to design a superior AI to counter such attacks.
2	Page 3, Section 3, para 1 The head of each covered agency must also consider the necessary financial, human, information, and infrastructural resources to carry out these responsibilities effectively, including providing or requesting resources via the budget process to support the responsibilities identified in this memorandum.	The budget process needs to be flexible as it is set for a fiscal year, whereas advances in AI can occur potentially several times in a year.	n/a
3	Page 4 **AI Use Case Inventories.** Pursuant to Section 7225 of the Advancing American AI Act, and subject to the exclusions in that Act and Section 10.1(e) of the AI Executive Order, each agency (except for the Department of Defense and the Intelligence Community) must annually submit an inventory of its AI use cases to OMB and subsequently post a public version on the agency’s website	- Publicly sharing AI use cases inventories might actually make the job of the adversaries trying to attack US interests. Instead, the AI use cases can be shared only across the Federal/State agencies and select Private Companies. - A Government wide library of AI use cases will be useful for all agencies to see if some agency has already developed that AI use case. Technical knowledge	Page 5 states that **Reporting on AI Use Cases Not Subject to Inventory.** Some AI use cases are exempt from the Advancing American AI Act’s inventory requirement. Of those use cases, those within the Department of Defense are otherwise within the scope of this memorandum unless they concern AI used as a component of a national security system. This may also apply to AI use cases for, say, Department of Energy, wherein the AI use case to monitor and control power plants can have national security implications.

		sharing regarding technology, design, implementation and lessons learned will be quite useful and save time, money and effort.	
4	Page 5 b. Roles, Responsibilities, Seniority, Position, and Reporting Structure of Chief Artificial Intelligence Officers	A CAIO should have an AI technical team to support agency's AI mission.	This is similar to the technical team that a CTO has or a security team that a CISO has.
5	Page 6 *Promoting AI Innovation* I. advocating within their agency and to the public on the opportunities and benefits of AI to the agency's mission;	Making AI opportunities public may strengthen US adversaries. Needs careful consideration.	This is similar to #3 above.
6	Page 7 c. Internal Agency AI Coordination … The agency's AI coordination mechanisms should be aligned to the needs of the agency based on, for example, the degree to which the agency currently uses AI, the degree to which AI could improve the agency's mission, and **the risks posed by the agency's current and potential uses of AI.**	A scale measuring different AI levels needs be defined along with a threshold that the AI systems should not be allowed to cross. The definition of this scale and threshold is a very complex task in the context of collective intelligence offered by a group of AI use cases and not just one-use case taken at a time.	This comment is made in the light of potential AI singularity that many AI experts are expecting to happen between 2030 and 2045. Please refer to Future progress in artificial intelligence: A survey of expert opinion (philpapers.org) The threshold here should be much lower than the singularity. As the AI landscape evolves, the singularity may be pushed outward in the future by making use of human intelligence supplemented by non-singular AI systems.
7	Page 8 v. a plan for building sufficient enterprise capacity to manage risks from the use of AI;	Need clarification on the type of enterprise capacity referenced here.	
8	Page 10 v. Generative AI. In addition to heeding the guidance provided in	Special attention needs to be given to protecting the AI systems and preventing them from becoming	Please refer to https://agi-conference.org/2012/wp-content/uploads/2012/12/paper_56.pdf

	Section 10.1(f) of the AI Executive Order, agencies should assess potential beneficial use cases of generative AI in their missions and establish adequate safeguards and oversight mechanisms that allow generative AI to be used in the agency without posing undue risk.	rogue AI systems due to external/internal attacks by people, non-AI systems or other malevolent AI systems. Special QA processes may be required. Also need to address the issue of unintended AI behavior that is not due to any rogue agent.	
9	Page 15 A. Complete an AI impact assessment. Impact assessments must document the following: 1. The intended purpose for the AI and its expected benefit, supported by specific **metrics** or qualitative analysis.	A relevant metric could be AI system's accuracy. This could be determined either experimentally or theoretically or both.	n/a
10	Page 15 2. The potential risks of using AI, as well as what, if any, additional mitigation measures, beyond these minimum practices, the agency will take to help reduce these risks	Potential risks of **not using AI** also need to be considered.	This is because problems that can be efficiently and cost-effectively solved by using AI systems, may not be easily solvable by use of non-AI systems. Also using non-AI systems to counter attacks by AI systems can turn out to be a futile exercise.
11	Page 16 B. Test the AI for performance in a real-world context. Agencies must conduct adequate testing to ensure the AI, as well as components that rely on it, will work in its intended real-world context.	Government should encourage industry to develop test data generation tools to adequately test AI systems.	Some good test data generation tools, such as Mockaroo and Faker, are available today. The AI evolution is going to require additional, more powerful test data generation tools that are based on AI.
12	Page 16 C. Independently evaluate the AI. Agencies, through the CAIO, an agency AI oversight board, or other	Government should encourage implementation of AI assessment / certification program(s) at the organization level similar	n/a

	appropriate agency office with existing test and evaluation responsibilities, must review relevant AI documentation to ensure that the system works appropriately and as intended, and that its expected benefits outweigh its potential risks.	to say, CMMI or ISO and for the individual professionals, similar to PMP, ITIL or CSM.	
13	Page 17 E. Mitigate emerging risks to rights and safety	In general, AI systems' evolution needs to be monitored closely to assess where AI systems are, vis-a-vis the threshold they need to be below for the safety of the human race.	For robots - designers, implementors and testers should ensure Isaac Asimov's "Three Laws of Robotics" are implemented. There are other principles as well, such as Satya Nadella's six principles and goals that need to be considered.
14	Whole document	Overall comment: The complexity of implementing these guidelines and high computing resource requirements of AI systems may require significant additional budget for each agency.	Additional budget will be required to address high cost items, such as, AI infrastructure costs, AI software and services costs, training costs, higher salaries or contracting rates to attract the best people.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0164
Comment on OMB-2023-0020-0001

Submitter Information

Organization: International Center for Not-for-Profit Law

General Comment

In response to the request for feedback on the eight questions listed in the notice of public comment, ICNL is only responding to questions #6 and #8. Please see the attached file for ICNL's recommendations related to the applicability of the minimum practices guidelines and the information that should be made public in the annual use case inventory.

Attachments

ICNL Comments in Response to OMB Request

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Comments in Response to OMB Request

OMB Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of AI

Introduction

The International Center for Not-for-Profit Law (ICNL) is pleased to submit Comments in response to the request from the Office of Management and Budget (OMB) regarding the draft Memorandum on artificial intelligence (AI). We appreciate OMB's efforts to advance rights-based approaches to AI use by federal agencies and its decision to seek public input.

ICNL is an international not-for-profit organization that promotes an enabling environment for civil society and public participation in more than 100 countries worldwide, including the United States. ICNL has provided technical and research assistance to support the reform of laws and policies governing the freedoms of association, assembly, and expression, and right to privacy, whether the rights are exercised online or offline. ICNL is recognized as a global leader on digital rights issues, including at the intersection of AI and human rights. ICNL is proud to be a member of the Freedom Online Coalition's (FOC) Advisory Network and co-leads the FOC task force on Artificial Intelligence and Human Rights with the Government of Germany. More information about our work can be found at www.icnl.org.

In the United States, ICNL has been actively following state and federal legislation introduced since January 2017 that restrict the right to peaceful assembly, and we maintain a US Protest Law Tracker with analysis of relevant legislation. In February 2023, we published a briefer on the use of digital technologies, including AI-enabled tools, that impact the right of individuals to exercise their First Amendment right to assembly. As such, **our Comments are narrowly focused on strengthening the civil rights protections in the OMB Memorandum with regards to the right to peaceful assembly.** We have not addressed all aspects of the draft Memorandum relevant to civic space and civil society, but we look forward to engaging with OMB, the White House, and federal agencies to discuss these issues as well as the recommendations in our submission in greater detail.

Recommendations

In response to the request for feedback on the eight questions listed in the notice of public comment, ICNL is only responding to questions #6 and #8.

#6 - MINIMUM PRACTICES.

In response to the question, "Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?" ICNL has the following input:

EXCLUSION OF R&D. ICNL is concerned that the exclusion of research and development (R&D) of AI systems from the minimum practices requirements could lead to the spread of rights-violating technologies. Federal agencies may develop AI systems or their underlying technology that is then used by the private sector in harmful ways. Without placing minimum constraints on the development of AI systems, even if federal agencies do not intend to use the outputs of their R&D, the outputs can be appropriated by the private sector without any safeguards in place. Therefore, agencies should assess risk from the outset of any R&D, taking into consideration the potential uses of the system. For systems that could pose a risk to safety and rights, agencies should be required to mitigate harms, such as by building technical privacy-by-design and default applications into the systems and creating safeguards for how the R&D outputs are made available to the private sector for further development or use.

RISKS TO INDIVIDUALS EXERCISING THEIR RIGHTS. For the AI Impact assessment and the "evaluation of potential risks of using AI," ICNL welcomes that the OMB Policy mandates that agencies "be especially attentive to the potential risks to underserved communities." In addition to "underserved communities," ICNL recommends that agencies also be especially attentive to the risks to individuals and communities exercising civil rights, including their rights to freedom of expression, the right to peacefully protest, the right to association, and their right to be free from unreasonable searches and seizures. ICNL's research and work defending civic space both online and offline, has shown how AI technologies have led to abuses during protests and have deterred peaceful demonstrators from exercising their First Amendment rights. Within the categories of purposes that are presumed to be rights-impacting, there may be instances when the risks are greater, or altogether unacceptable, when the AI system is used in specific contexts, such as during protests. Therefore, agencies should be mandated to explicitly assess the civil liberties risks that can arise when AI is used, including in contexts when individuals are exercising their constitutional rights.

IDENTIFICATION OF NEW RISKS. ICNL welcomes the fact that OMB recognizes risk assessments can change due to changes in technology or changes in our understanding of the impact of a technology. In addition to taking steps to mitigate these newly assessed risks through technical and non-technical means, the Memorandum should require agencies to notify the appropriate internal authority of this change in assessment and immediately escalate this new assessment to agency leadership.

#8 – USE CASE INVENTORY

In response to the question, "What kind of information should be made public about agencies' use of AI in their annual use case inventory?" ICNL has the following input:

ADDITIONAL INFORMATION. ICNL encourages the OMB to ensure that impact assessments are made public, in full, and unredacted. OMB should also ensure that the full impact assessment are accessible through the inventory. ICNL also encourages the OMB to require that key information about the agency's use of AI be highlighted and summarized in an easy-to-find and easy-to-understand manner. It should not be buried in lengthy, technical impact assessments. ICNL believes that "key information" includes the following:

- what civil liberties concerns were considered and how they were assessed, including through banning technology or placing safeguards around its use (such as, for example, first seeking warrants for using certain AI technology that can identify or track specific individuals);
- how many individuals have been impacted to date;
- how many individuals the agency projects will be impacted through the future use of the AI system (does the agency plan to expand its use for the coming year, for example);
- what specific communities or categories of individuals have been or will be impacted;
- which non-governmental, private sector entities, if any, have or will have responsibility for the use of the AI system (including by providing customer support) and the roles of the individuals within those entities;
- how individuals who believe they have been harmed by an AI system used by the agency can find more information about the AI system, challenge uses of the system that harmed them, and seek redress for such harms.

_____

Thank you for this opportunity to submit comments. We appreciate your approach and would be happy to provide additional input if helpful. To contact us, please email Zach Lampell zlampell@icnl.org and Shabnam Mojtahedi smojtahedi@icnl.org.

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0165
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Socure, Inc.

General Comment

Socure appreciates the opportunity to provide feedback on the draft OMB memo for Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum. Our comments are included in the attached document.

Attachments

Socure_Comments_OMB_AI_In_Gov_Memo

Office of Management and Budget Request for Comment: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI); Docket No. OMB-2023-0020

Socure welcomes the opportunity to provide feedback on the Office of Management and Budget's (OMB's) request for comment for the draft memorandum titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)."

1. Introduction and Summary

Socure is a leading provider of digital identity verification and fraud detection solutions. The company was founded in 2012 with a mission to verify 100% of good identities in real-time and completely eliminate identity fraud on the internet. Socure has more than 2000 customers, including top financial institutions, government agencies, and leading enterprises across all industries. For over a decade, Socure has been at the forefront of using new technologies to protect organizations from identity fraud. We use proprietary AI and Machine Learning (ML) techniques with hundreds of online and offline data sources to prevent identity theft and other forms of identity fraud (e.g., synthetic) while simultaneously confirming good people can seamlessly assert their identity online. In our efforts, we've seen the gap as it exists today in the usage and maturity of AI across sectors. We believe that the expanded usage of the technology should be done so with the goal of promoting greater transparency and measurement for outcomes, however, given the pace the landscape is evolving the federal government must accelerate its efforts to implement the proposed guidance.

2. Responses to Specific Feedback Areas

Structuring the Chief AI Officer role for the Federal Government.

The roles and responsibilities outlined for the Chief AI Officers appear flexible. However, the seniority and reporting requirements may cause some issues for smaller agencies. Additionally, we have concerns with the achievability of the role as defined. The CAIO role encompasses a wide range of activities related to strategy, implementation, and oversight. Specifically, the guidance should clarify how the role should be constructed to deconflict with authorities of a Chief Information Officer or Chief Data Officer, which also overlap. The role of Chief Technology Officer is not a statutorily recognized role and as such should be removed from reference.

For officials designated as the CAIO, they will not be successful without adequate resources. Smaller teams may not be able to cover all necessary activities adequately. This role also lacks clear budget authority, which can hinder compliance with the

administration's directives. It is recommended that there be call outs for how compliance with the plans produced for implementing the guidance will be incorporated in OMB's budget process through engagement with the Resource Management Offices (RMOs). If not included any resourcing asks may not be prioritized and will leave agencies perennially unable to comply with the mandate. Additionally, the implementation timelines for activities must be accelerated to coincide with the rapid pace of change in technology and threats from nation states who use this technology unabated.

AI Governance Body Coordination Mechanisms

Without proper coordination for implementation activities there is likely to be overlap and conflicting approaches to the adoption of emerging technologies for areas like AI. Specifically, this coordination should be viewed and adopted at multiple layers.

- *For intra-agency coordination*, it is recommended that OMB provide a playbook for agencies in consideration of how they may structure the intra-agency coordination bodies. Similar efforts have been used for areas of cybersecurity and IT modernization.
- *For inter-agency coordination*, it is recommended that OMB confirm that the council referenced in section 10.1(a) of the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence be required to outbrief and collaborate with councils such as the CIO Council, CDO Council, and Privacy Council.
- *For Public-Private coordination*, OMB should facilitate collaboration between the federal government, industry stakeholders, and academia to foster responsible AI innovation. This public-private partnership can help create guidelines and best practices that align with the government's goals and industry needs.

Advancing Responsible AI innovation

As OMB considers how to promote AI innovation while implementing the administration's Executive order, it is paramount that it considers two key aspects.

- *Mitigating the impact* of *innovation through regular engagement*. Engaging with the private sector can help the government see around corners. OMB should encourage private sector participation in government contracts by not requiring the disclosure of intellectual property or putting in place the appropriate protections to safeguard its release.
- *Leveraging existing methods for new compliance regimes*. The Federal Reserve leverages published SR 11-7: Guidance on Model Risk Management (https://www.federalreserve.gov/supervisionreg/srletters/sr1107.htm), which sets the standard for how organizations manage model risk. These existing frameworks are used today to assess the effectiveness and disparate impact for AI models used today, and should be adapted for any compliance regimes that are implemented at the federal level. In many cases, technology providers are already having to comply with these requirements and as such requiring a

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conflicting or duplicative requirement may be viewed as burdensome and detract from private sector ability to support federal missions.

Minimum Practices And Baselines

Socure recommends that OMB avoid seeking to apply a set of baselines which may not account for the context associated with the application of AI today in agency missions. For example, a blanket prohibition on automated decision-making would prevent organizations from using AI to make routine decisions that enhance productivity, improve accuracy, and save time. There is no one-size-fits-all solution. Instead, agencies should be required to mature their capabilities to manage the risk of AI to include improvements to monitoring, measurement, and mitigation.

Materials or Resources for Government Contracting

OMB should evaluate and consider the types of training programs made available to the procurement workforce and/or establishment of a program to provide contracting expertise to those who are managing procurements for systems that leverage AI. Today, there is a lack of maturity in the overall understanding and knowledge for how to procure and manage the risk associated with these technologies. In some cases, this is presented as limitations on the exchange and usage of data or feedback for the improvement of models due to previous agency policy positions on privacy. OMB should consider leading or requiring an effort to standardize contract clauses for AI across agencies similar to efforts undertaken for cybersecurity as a means to mitigate procurement risks. Otherwise the mandates and

3. Conclusion

Socure appreciates the opportunity to share its views on the draft memoranda. We look forward to continuing to work with OMB, other agencies, and the many other stakeholders on these vital matters.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0166
Comment on OMB-2023-0020-0001

Submitter Information

Organization: American Foundation for the Blind

General Comment

See attached file(s)

Attachments

AFB Comment OMB RFI on AI memo - 12-05-23

AFB American Foundation® for the Blind

www.afb.org | 212.502.7600
1101 Wilson Blvd, 6th Floor
Arlington, VA 22209

December 5, 2023

Shalanda D. Young

Director

Office of Management and Budget

Filed via Regulations.gov

RE: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Memorandum

Dear Director Young:

The American Foundation for the Blind (AFB) is a national nonprofit that advocates for a world of no limits for people who are blind or have low vision by mobilizing leaders, advancing understanding, and championing impactful policies and practices using research and data. AFB appreciates the opportunity to comment on the proposed OMB memorandum, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence."

The Rehabilitation Act (particularly sections 501, 504, and 508) and the Americans with Disabilities Act protect the rights of people with disabilities, including people who are blind have low vision, and are deafblind, to participate equally in society, to work, to access government programs and benefits, and to have equal opportunities. However, as many digital technologies have been deployed in the last three decades, people with disabilities have often been an afterthought. The lack of disability-inclusive planning, accessible design, and enforcement of federal disability laws in the digital environment has created barriers in all aspects of life, including working for and receiving services from the federal government. As the federal government plans for the implementation of yet another new technology, AFB urges the Office of Management and Budget to integrate disability access and nondiscrimination into all aspects of federal AI governance, development, and deployment.

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

The Chief AI Officer must have an understanding of digital accessibility principles and practices to ensure that AI systems are accessible to people with disabilities, including people who are blind or have low vision. These practices should include accessibility testing, procurement, contracting, design, and development, as well as the use of assistive technology, such as screen reader or magnification software. Accessibility is important in the development of both the front-end and back-end software and is an important factor in ensuring these systems do not perpetuate discrimination and bias against people with disabilities – whether members of the general public or federal employees. The federal government is obligated by Section 508 of the Disabilities Act not to discriminate against people with disabilities in the use of information and communications technologies. Establishing a commitment to and knowledge of accessibility at the highest levels of agency administration is vital to carrying out Section 508 obligations, particularly as AI development and use is still relatively new.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

Existing bodies are unlikely to be able to independently coordinate all of the needed tasks that an AI governance body must perform. AI governance bodies must include expertise on disability rights and digital accessibility that may be lacking in existing agency bodies. Indeed, while Chief AI Officers should have sufficient accessibility knowledge to provide access to these platforms for employees and the public, the Chief AI Officers likely will be constrained in the depth of their accessibility expertise. For that reason, agencies should also designate Chief Accessibility Officers who can work with the Chief AI Officers and the AI governance bodies to ensure that all governmentally used and funded AI tools are accessible to, usable by, and inclusive of people

with disabilities. Chief Accessibility Officers should be responsible for ensuring that agencies build, develop, procure, contract with, deploy, and use accessible information and communications technologies in compliance with and, where appropriate, exceeding the Section 508 regulations. Coordination between Chief AI Officers and Chief Accessibility Officers would also increase agency capacity to adhere to Executive Orders 13985, 14035, and 14110. In the absence of establishing Chief Accessibility Officers, however, it remains imperative that the AI governance bodies in each agency include experts on accessibility who understand technical accessibility development and have experience implementing organizational policies and practices for accessibility and disability inclusion.

3. How can OMB best advance responsible AI innovation?

AI talent development within agencies must include accessibility training for all employees and recruitment of workers with disabilities. Training for all employees should include an accessibility component to ensure that agencies interacting with AI systems are prepared to evaluate these systems for discrimination and bias and to deploy AI accessibly and inclusively. Further, it is vital to ensure that there are pathways to AI development and deployment jobs for people with disabilities. STEM-related professions and training are often less accessible to people who are blind because the training materials and technologies employed are not fully accessible. People with disabilities bring a diversity of lived experiences that can strengthen the development of models for a wide range of users. Thus, agencies should take proactive steps to create pathways for current and prospective employees to develop AI skills that are inclusive of people who are blind or have low vision and assistive technology users.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

Procurement of inaccessible tools is a common way that the federal government disadvantages employees who are blind or have low vision. In 2021, AFB surveyed 48 current or former federal employees and contractors. 65% reported that their employer had procured new hardware or

software that presented accessibility challenges.[1] Contract language that specifies that the data used to train AI models must be inclusive of people with disabilities, including their need for reasonable accommodations and accessibility standards, should be standard for AI contracts. Similarly, model outputs and decisions should be rigorously tested for potential discrimination and bias against people with disabilities, and agencies can play a role in developing appropriate tests for this purpose. Contracts should also require that vendors make all user interfaces accessible to and usable by people with disabilities, including those who use assistive technology. Vendors should be required to regularly evaluate AI models and interfaces for nondiscrimination and accessibility, including before any updates, and to provide appropriate remediation and customer service when issues arise. The federal government can only do so much to provide an accessible experience for employees and the public if it is not ensuring that vendors are delivering accessible services and products.

Furthermore, agencies would benefit from guidance on validating vendor claims of accessibility, and employees, especially procurement officers, need training on understanding accessibility principles and how to comply with federal Section 508 regulations and other accessibility requirements. The federal government has made significant progress in implementing accessibility, especially on public-facing websites, but much work remains to be done. It will benefit the government, taxpayers, and employees if the government can implement accessibility upfront on these emerging AI technologies.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

We appreciate that agencies must report on rights-impacting AI and the risks to equity. Within those analyses, agencies should report on the types of accessibility and nondiscrimination testing that each type of AI use undergoes and the testing results. Such reporting would be in

[1] Silverman, A. M., Rosenblum, L. P., Bolander, E. C., Rhoads, C. R., & Bleach, K. (2022). Technology and Accommodations: Employment Experiences of U.S. Adults Who Are Blind, Have Low Vision, or Are Deafblind. American Foundation for the Blind. www.afb.org/wts

line with the required biennial reporting requirements of 29 USC §794d(d)(2) regarding the accessibility of federal information and communications technology.

Thank you again for the opportunity to provide feedback on AI governance in the United States. If you have any questions about this issue, please contact Sarah Malaier, smalaier@afb.org.

Sincerely,

Stephanie Enyart
Chief Public Policy and Research Officer

PUBLIC SUBMISSION

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0167
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Responsible Innovation Labs

General Comment

We write to share comments regarding OMB's proposed memorandum titled 'Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence' (OMB Proposed AI Memorandum).

OMB is taking an important step to ensure that federal agencies can procure, deploy, and use AI responsibly. Your efforts appropriately reflect the serious, comprehensive cross-sector approach needed to address the broad implications of artificial intelligence (AI). The federal government plays a critical role in signaling to the marketplace what standards and frameworks are deemed to be best practice with respect to responsible innovation.

In this respect we urge OMB to consider how the directives set forth in future OMB guidance can best support and advance America's vital startup ecosystem.

We believe that America's technological and economic leadership in AI will depend upon innovation driven by startups. The transformative benefits of AI will not accrue to the American people from an uncompetitive marketplace walled off from new innovators. We appreciate your recognition of this critical fact in the OMB Proposed AI Memorandum and strongly encourage it going forward.

We offer our full comments in the attached letter.

Sincerely,

Gaurab Bansal
Executive Director, Responsible Innovation Labs

Attachments

Responsible Innovation Labs Comment on OMB20230020 Proposed Memorandum for the Heads of Executive Departments and Agencies

December 5, 2023

Director Shalanda D. Young
The Office of Management and Budget
725 17th Street NW
Washington, D.C 20503

RE: OMB–2023–0020; Proposed Memorandum for the Heads of Executive Departments and Agencies

Director Young and OMB Colleagues:

We write to share comments regarding OMB's proposed memorandum titled 'Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence' (OMB Proposed AI Memorandum). Capitalized terms not defined in this letter have the meanings given to such terms in the OMB Proposed AI Memorandum.

OMB is taking an important step to ensure that federal agencies can procure, deploy, and use AI responsibly. Your efforts appropriately reflect the serious, comprehensive cross-sector approach needed to address the broad implications of artificial intelligence (AI). The federal government plays a critical role in signaling to the marketplace what standards and frameworks are deemed to be best practice with respect to responsible innovation.

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1. **Background on Responsible Innovation Labs**

   Responsible Innovation Labs (RIL) is a coalition making responsible innovation an essential mindset and operational norm among high-growth technology companies and their investors. RIL stimulates both the demand and supply sides of responsible innovation. RIL works on industry-driven frameworks, strives to shift industry incentives through engagement with capital allocators, and builds communities of practice. RIL believes responsible innovation is a competency that can be developed. We are committed to supporting the adoption of responsible innovation practices across the startup ecosystem.

   RIL is currently focused on "how" responsible innovation is implemented in company building and venture investing. We work to support 50+ VC firms from across the technology industry on implementation of a Responsible AI framework for the startup ecosystem, which formally launched on November 14, 2023. This framework contains voluntary Responsible AI commitments, a framework for Responsible AI, and supporting materials to serve as an actionable 'how-to' guide that distills Responsible AI best practices, tools, resources, and frameworks. RIL convened a multi-sector Responsible AI

working group of leading AI startup leaders and investors, civil society, and the public sector, including engagement with the U.S. Department of Commerce, to help develop this framework.

2. Comments on OMB Proposed AI Memorandum

a. With respect to Section 3 (Strengthening Artificial Intelligence Governance), we submit the following:

- In Section 3(b)(i) (Roles), we urge OMB to elaborate on the definition of "significant expertise in AI" regarding the requirements for selecting an agency CAIO. We believe that significant expertise in AI should encompass experience in technical, research, security, privacy, business processes, and governance aspects of AI development and deployment. By further delineating notional examples of what "significant expertise" could entail, OMB can further help agencies identify CAIOs who can lead comprehensively with respect to AI. (We note that you have included a range of competencies later in the OMB Proposed AI Memorandum in Section 4(b)(iv) (Workforce), which could serve as a starting point for CAIO expertise.)

- In Section 3(b)(ii)(G)-(I) (Responsibilities - Promoting AI Innovation), we encourage OMB to:

  - Evaluate how CAIOs can consider and promote competition and access with respect to early stage technology companies in America's vital and dynamic startup ecosystem. Naming competition in this section is important to ensure that CAIOs avoid entrenching incumbents.

  - Make explicit that CAIOs consult with the private sector - inclusive of early stage technology startups - on the opportunities and benefits of AI development. Engagement with the private sector - especially startup innovators - is a critical linkage often missing from the federal government's public engagement with the business community.

b. With respect to Section 4 (Advancing Responsible Artificial Intelligence Innovation), we submit the following:

- In Section 4(a)(i) (AI Strategies), to the extent not already required by law, we encourage agencies to provide a high level rationale for their planned priority use cases of AI. While we are mindful of additional administrative burdens on agencies, and to the extent not already required by law or other guidance, we believe the American public will benefit from seeing an agency's brief explanation as to why it believes AI is appropriate for proposed future use cases. One of the most powerful ways that the federal government can help entrepreneurs is by clearly signaling what market opportunities may exist for future federal procurement. More detail on specific use cases, rationale for the use case, and desired outcomes will help entrepreneurs identify and understand market needs and build products that address them.

c. With respect to Section 5 (Managing Risks From the Use of Artificial Intelligence), we submit the following:

- In Section 5(d) (Managing Risks in Federal Procurement of AI), we encourage OMB to consider the following changes:
    - We strongly support the inclusion of a pro-competition statement by OMB. Avoiding improper entrenchment of incumbents is in the best interests of American innovation and the ability of early stage companies to compete for procurement opportunities. We encourage consideration of other methods of avoiding entrenchment, including data portability, interoperability, and high levels of transparency.
    - In addition to the transparency and performance requirements, promote other aspects of responsible AI development and deployment practices. This is an area where it is important to avoid being overly prescriptive given the incredible range of AI technologies that could be considered across the federal government, the various regulatory frameworks that already exist, and the different sets of data involved. Responsible AI cannot be a one-size fits all compliance framework that is only achievable by well-resourced companies. In the responsible AI framework RIL recently put forward, we encourage early stage startups to demonstrate: cross-organization governance; trust building through appropriate transparency; forecasting of benefits and risks; auditing and testing; and continuous improvement. Importantly, these practices are designed to be realistic in light of the size of the organization and the risk created by its applications. We built the RIL framework by distilling best practices and frameworks across industry, government, NGOs, and academia. Too often the responsible AI practices required of early stage companies are too expensive, are not fit for purpose, and advantage larger and well-resourced incumbents. The federal government needs to ensure that startups can compete on a level playing field.

We offer the comments above in response to the OMB Proposed AI Memorandum. We look forward to engaging with you to ensure that the OMB Proposed AI Memorandum evolves in a manner that promotes early stage startup innovation, competition, and responsible innovation practices.

RIL will continue to foster collaboration and cross-sector dialogue in support of startups and work to inform policy makers as they explore responsible AI and responsible innovation concepts more broadly.

Sincerely,

Gaurab Bansal
Executive Director, Responsible Innovation Labs

PUBLIC SUBMISSION

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: OpenAI

General Comment

See attached file(s)

Attachments

2023-12-05 OpenAI OMB Comment for filing

OpenAI

1960 Bryant Street
San Francisco, CA 94110

December 5, 2023

From:
Anna Makanju
VP of Global Affairs
OpenAI

To:
Office of Management and Budget

We write to respond to the recent Office of Management and Budget (OMB) Proposed Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (88 FR 75625).

OpenAI was created as a nonprofit in 2015 to ensure that artificial general intelligence—in short, AI that's at least as smart as a person—benefits all of humanity. We research, develop, and release cutting edge AI technology as well as tools and best practices for the safety, alignment, and governance of AI.

As part of our strong support of safe and responsible governance of AI, we have publicly committed to pilot and refine concrete governance practices specifically tailored to highly capable foundation models like the ones that we produce. This past July, in a process coordinated by the White House, we and other leading AI firms made a series of voluntary commitments to AI safety, security and trustworthiness. These include internal and external red-teaming of major new model releases, issuing transparency reports also known as system cards for such releases, sharing information about certain risks, and safeguarding against cybersecurity and insider threats.

Our work in each of these areas has helped to shape emergent industry norms, in the United States and around the world, and we are actively engaged in discussions with NIST and other key federal stakeholders to share what we are learning as we continue to develop, align, and deploy AI systems.

Embracing AI while managing risk

We appreciate the Proposed Memorandum's focus on reducing barriers to the use of AI in the federal government. We agree that such use has the potential to significantly improve the quality and efficiency of government operations, and the services the federal government provides to the American people. We also agree that it is appropriate for federal agencies to take extra care if AI is used to control or meaningfully influence people's safety or rights.

The remainder of this comment focuses on a handful of areas where we believe revisions to the Proposed Memorandum could best advance OMB and the administration's goals for AI.

Background on foundation models

Developing an advanced foundation model like GPT-4 requires (1) teaching it intelligence, such as the ability to predict, reason, and solve problems, as well as (2) aligning it to human values and preferences. The former is done in a process called “pre-training”, which involves showing the model a vast amount of human knowledge over months. To then incorporate human choice into the model, we use a second step, called “post-training”, where we make the model safer and more usable.

Pre-training teaches language to a model, by showing the model a wide range of text, and having it try to predict the word that comes next in each of a huge range of sequences. This requires an enormous amount of computation, as models review, analyze, and learn from trillions of words. We build supercomputers to train our base models, and training a single new base model can occupy a supercomputer for months. Through this extensive process, the model not only learns how words fit together grammatically, but also how words work together to form higher-level ideas, and ultimately how sequences of words form structured thoughts or pose coherent problems. For example, when we think of the word “cloud”, we might also think of related words like “sky” and “rain”; when given a sentence like “The secret to happiness is”, we might think of various philosophical ideas. In gaining fluency with predicting the next word, the model thereby learns concepts and the building blocks of intelligence.

The output of this process—a base model—has the remarkable ability to solve novel problems unseen in its training data, even in a wide range of languages. However, the base model alone is not ready for use. Base models are powerful and flexible. They are intelligent and surprising, but are not necessarily useful or safe.

A base model is not easy to talk to: For example, if you ask the GPT-4 base model to “write a story about a princess…”, it usually won’t write a story. Instead, it will extend your statement, predicting how it continues. It might output, for instance: “…about a princess who loves horses.” A base model also does not have safeguards to prevent it from outputting unwanted content, such as hateful or violent material. While we filter our pre-training dataset for unwanted content, this mitigation is too imprecise to make targeted changes to the model, and can even backfire if it prevents the model from understanding what not to say or do. In order to instill human values into the models, including what is useful and what is appropriate to say, we research and develop alignment and safety techniques for a process we call post-training.

Post-training is how we incorporate human choice into our models, and transform them into useful, effective, and safer tools. We teach the model to respond in ways that people find more useful, and to decline to respond in ways that we believe would be harmful. Post-training requires significant investment in research, personnel, design choices, and data creation. This is an active area of research and investment for OpenAI. We also believe that many people beyond our company will be part of the work of creating data and making design decisions to reflect human values.

Post-training results in targeted changes to the model, using relatively small and carefully engineered datasets that represent ideal behavior. We do this by having people write sample answers and rate answers provided by the model, and provide those samples and ratings back to the model in follow-up training processes. We pioneered these techniques, including reinforcement learning from human feedback (RLHF), which has now become industry standard. We use RLHF to teach the model to follow instructions, to decrease the likelihood of it returning inaccurate content, and to add safety features.

Assessing the impact of foundation models

In reply to Question 6, about the minimum practices for safety-impacting or rights-impacting AI:

In Section 5(c)(iv) the Proposed Memorandum sets out requirements for agencies' use of covered safety-impacting or rights-impacting AI. In Part (A) of that Section, the Proposed Memorandum sets out mandatory elements for required impact assessments. These elements include (1) the purposes and expected benefits of the contemplated use; (2) the recognized risks and related mitigations; and (3) "the quality and appropriateness of the relevant data."

As it is currently drafted, this third prong of the impact assessment requirement assumes that all the data used to train an AI system will be directly relevant to the purpose for which a federal agency intends to use that system. For instance, as part of this prong, agencies are asked to document "how the data is relevant to the task being automated and has a reasonable expectation of being useful for the AI's development, testing, and operation."

Such a presumption is not accurate in the case of foundation models, such as OpenAI's GPT-4 and its predecessors. There is no single domain or application to which all the data used to train a foundation model is, or should be, relevant. Instead, such models are deliberately trained on a

broad spectrum of data relevant to many tasks, with the potential to be useful across a broad spectrum of applications.[1]

The breadth of training data that underpins a foundation model is integral to the model's usefulness and flexibility. Unlike a narrow AI system that might be trained only on data relevant to the task at hand—such as a model for forecasting the weather that is trained on historical weather data—a foundation model's wide breadth capabilities arise from its task-agnostic training process.

In some cases, rather than using a foundation model in its default configuration, an application developer will further customize the foundation model's behavior, by "fine-tuning" the model on application-specific data. This fine-tuning step redefines the foundation model's behavior according to the patterns found in that application-specific fine-tuning dataset, in a manner similar to how task-specific data shapes the performance of narrow AI systems.

In OpenAI's case, such a fine-tuning dataset may be added by an OpenAI customer, such as a government vendor who builds an AI system on top of OpenAI's foundation models, or by OpenAI itself on behalf of a customer. Fine-tuning is often the key step in ensuring an AI model has correct domain-specific information and behavior, such as knowledge of an agency's procedures or awareness of which questions on a given topic might be better answered by a human.

These application-specific fine-tuning datasets can significantly shape an AI system's behavior, and it may therefore be appropriate for agencies to request greater detail on these fine-tuning datasets during impact assessments (such as information on the "quality and appropriateness of the data" as outlined in Section 5(c)(iv)(3)). Such fine-tuning datasets' properties will have a clear relationship with the model's behavior and can be expected to be appropriate to the specific task, unlike a foundation model's giant dataset of general-purpose training data.

Insofar as an agency concludes it would benefit from understanding the capabilities and behaviors of the underlying foundation model (which are not specific to the task at hand), we suggest that agencies follow the AI field's emerging best practice of evaluating the foundation model's capabilities directly. Such evaluation benchmarks can be tailored to test capabilities and behaviors relevant to the application domain, or can test general-purpose model behaviors (such as using the BBQ benchmark to test a foundation model's underlying propensity to answer questions in a

[1] Bommasani, Rishi, Drew A. Hudson, Ehsan Adeli, Russ Altman, Simran Arora, Sydney von Arx, Michael S. Bernstein et al. "On the opportunities and risks of foundation models." *arXiv preprint arXiv:2108.07258* (2021).

manner that is biased along nine social dimensions relevant for U.S. English-speaking contexts).

Opportunity: Using AI to improve agencies' effectiveness and operations

In reply to Question 4, about how agencies can take advantage of generative AI to improve agency missions or business operations:

Generative AI has the potential to improve on agencies' effectiveness and operations in many ways. Among other priority areas, generative AI can make government information easier to access and understand; improve education not only for students but also for employees across the federal workforce; support administrative, translation and transcription functions; strengthen planning and analysis capabilities; and eventually support better outcomes in health, climate resilience, and other challenges that will define our future.

One particularly beneficial role that AI can play is in increasing Americans' access to government benefits and services, and their ability to navigate agency bureaucracies, by reducing "administrative burden."[2] Generative AI models like OpenAI's GPT-4 can ingest large quantities of information about an agency process, such as the administrative steps that are required in order to participate in a government program, and then interactively answer questions or offer guidance on this information. Provided that such applications are built responsibly, AI interfaces can be substantially more intuitive to navigate and may expand the access to agency services for many Americans who face language or literacy barriers.

In one recent example of AI reducing administrative burden, Lifespan, Rhode Island's largest healthcare system, used OpenAI's GPT-4 to make surgical consent forms easier to understand. The new surgical consent forms translate the jargon-heavy documents from a college reading level to a 6th grade reading level. After conducting an extensive review and verification process with medical and legal experts to ensure that the GPT-4-generated consent forms preserved clinical accuracy, Rhode Island officially operationalized GPT-4 simplified surgical consent forms in October 2023, dramatically improving the informed consent process for over 30,000 surgeries occurring within the Lifespan health system annually.

[2] Herd, Pamela, and Donald P. Moynihan. *Administrative burden: Policymaking by other means*. Russell Sage Foundation, 2019.

Agencies could consider using similar techniques to provide domain-specific assistants to generally assist Americans in navigating their bureaucracies.

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Document: OMB-2023-0020-0169
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Access Now

General Comment

See attached file(s)

Attachments

Access Now Comments to OMB Comments on AI governance

December 5, 2023,

Executive Office of the President
Office of Management and Budget
Washington, D.C. 20503

Via electronic filing

Re: Access Now's Submission to OMB's Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence
Docket No 2023–24269

Access Now welcomes the opportunity to contribute to the Office of Management and Budget's (OMB) ongoing dialogue on Artificial Intelligence (AI) governance.[1] We commend the OMB for its leadership in advancing human rights-centered policies and encourage the agency to leverage its full authority to safeguard individuals from the current harms of AI systems, especially where those technologies impact fundamental human and civil rights and safety. In this submission, we respectfully present our response to the *OMB's Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum* (Memo) and introduce recommendations to enhance the effectiveness of the outlined principles.

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[1] https://www.regulations.gov/document/OMB-2023-0020-0001.

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About Access Now

Access Now is an international human rights organization that defends and extends the digital rights of people and communities at risk worldwide.[2] By combining innovative policy, analysis, direct engagement, and emergency technical support, we fight for a free and open internet that fosters human rights.[3] As part of our mission, we operate a global helpline for at-risk people to identify and mitigate specific threats to their digital security.[4] We also engage with fellow non-profit organizations and activist communities across civil society and campaign to ensure that new and emerging technologies and their investors, developers, and implementers "do no harm" first and foremost.

An example of our coalition and advocacy work includes the Ban Biometric Surveillance campaign (BanBS), which calls for a prohibition on using facial recognition technology (FRT) and remote biometric recognition technologies that enable mass surveillance and discriminatory targeted surveillance. The BanBS statement has been signed by 193 civil society organizations from 63 countries worldwide.[5] We also invite the OMB to refer to our recent agency comments and publications on AI, including biometric technologies, privacy, civil rights, and equity.[6]

Introduction

High-risk AI systems (those that impact rights and safety) threaten our civil and human rights if not appropriately regulated. The risks and impacts of AI in the United States are not hypothetical, particularly regarding people of color, historically marginalized communities, and communities that have been targets of discriminatory and mass surveillance. AI systems have been used to deport people on the move, deny them access to healthcare, target racialized communities, supercharge

[2] https://www.accessnow.org/.
[3] *Id*.
[4] https://www.accessnow.org/help/.
[5] *Ban Biometric Surveillance Campaign Website*, Access Now, https://www.accessnow.org/ban-biometric-surveillance/.
[6] *Access Now Comments to OSTP on Biometric Recognition Technologies* (Jan. 14, 2022), https://www.accessnow.org/wp-content/uploads/2022/08/Access-Now-Comments-to-OSTP-on-Biometric-Technologies_14-January-2022.pdf; *Access Now Comments to NTIA on Privacy, Equity, and Civil Rights* (Mar. 6, 2023), https://www.accessnow.org/wp-content/uploads/2023/03/Access-Now-NTIA-Privacy-Comments-2023.pdf.

disinformation, and aid mass surveillance, amplifying societal inequalities and power imbalances.[7] This puts fundamental rights and democratic processes at risk. **These *current* risks of AI must remain at the forefront of the OMB's memorandum** as it aims to tackle the use of AI systems within the federal government that affect the safety and rights of the public.

Our comments begin with an illustrative (though not exhaustive) overview of general observations and commendable elements in the draft memorandum we believe should be retained in the final version. Our recommendations focus on enhancing public accountability and transparency, explicitly clarifying provisions related to waivers and exceptions, and integrating human rights considerations into impact assessments. It further explores the necessity of instituting prohibitions to safeguard human, enhancing civil society engagement, setting safeguards for national security purposes, ensuring transparency on the ecological sustainability parameters, and recognizing the nuanced landscape of Generative AI.

General Observations

The Memo stands out for its multifaceted approach to addressing key concerns expressed by civil society.[8] Notable among these are the provisions building on existing measures to mitigate the risks of AI, calling for pre-deployment risk assessments, ongoing monitoring, independent evaluations, real-world testing, and comprehensive training for AI users. Equally noteworthy is the memorandum's emphasis on mitigating disparate impact and its commitment to consulting with impacted communities and providing notice to impacted individuals, a practice often underscored by the civil and human rights community. We appreciate the agency's commitment to equity and civil rights and ensuring that AI technologies work before federal agencies procure, fund, or use them.

The Memo broadens its applicability to many "rights-impacting" AI use cases by avoiding an *exclusive* focus on generative AI or existential threats. By highlighting the significance of considering new *and*

[7] Hannah Tyler, *The Increasing Use of Artificial Intelligence in Border Zones Prompts Privacy Questions*, Migration Policy Institute (Feb. 2, 2022), https://www.migrationpolicy.org/article/artificial-intelligence-border-zones-privacy; Ian Lopez, *United Healthcare Accused of AI Use to Wrongfully Deny Claims*, Bloomberg Law (Nov. 14, 2023), https://news.bloomberglaw.com/health-law-and-business/unitedhealthcare-accused-of-using-ai-to-wrongfully-deny-claims; Jain, Anjali et al., *Awareness of Racial and Ethnic Bias and Potential Solutions to Address Bias With Use of Health Care Algorithms*, JAMA health forum (Jun. 2, 2023), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10238944/; Eliane Röösli, Brian Rice, and Tina Hernandez-Boussard, *Bias at warp speed: how AI may contribute to the disparities gap in the time of COVID-19*, Journal of the American Medical Informatics Association (Aug. 17, 2020), https://doi.org/10.1093/jamia/ocaa210; Allie Funk, Adrian Shahbaz, and Kian Vesteinsson, *The Repressive Power of Artificial Intelligence*, Freedom House (2023), https://freedomhouse.org/sites/default/files/2023-11/FOTN2023Final.pdf.

[8] *Civil Society Letter to White House on Executive Order on AI* (Sept. 5, 2023) https://cdt.org/wp-content/uploads/2023/09/Letter-to-WH-AI-EO-90523.pdf ; *The Leadership Conference on Civil and Human Rights Comments to OSTP on National AI Strategy* (Jul. 7, 2023), https://civilrights.org/resource/leadership-conference-comments-to-ostp-on-national-ai-strategy/.

existing rights-impacting AI, the document underscores the need for a proactive stance in advancing a future-proof human rights-centered framework.

True transparency, devoid of loopholes and vagueness, is essential for building and maintaining consumer trust. Alongside the Memo's transparency requirements, including reporting for the AI use case inventory, the availability of human consideration and remedy mechanisms is an indispensable component and should be retained. **Access Now has consistently championed policy solutions that shift the responsibility from individuals to the developers and deployers of AI systems.** These principles, embedded in the Memo, form the foundation for public trust in AI governance in the federal context.

Noting that the Executive Order on Artificial Intelligence (AI EO) and the OMB Memo both emphasize ensuring that AI systems are legal, ethical, safe, and trustworthy, we propose that **AI systems aren't always ethical or safe, and no amount of adjustments can completely address the litany of concerns**. Access Now advocates for a foundational focus on human rights *and* civil rights as the guiding principles in formulating recommendations to regulate AI effectively.

The above principles must be safeguarded and preserved in the final version of the OMB guidance. Having examined laudable aspects of the OMB's draft memorandum and extolling its alignment with the ideals articulated by the civil and human rights community, we now turn to specific questions posed by the request for comment.

Responses to Questions

Question 8: What kind of information should be made public about agencies' use of AI in their annual use case inventory?

Ensure Consistency and Meaningful Public Transparency.

The Memo seeks clarification on the scope and depth of information agencies must make available to the public in their annual use case inventory. This mandated reporting has the potential to serve as a powerful mechanism for transparency, provided it is executed with precision. The current draft lacks the necessary teeth to ensure compliance, which is evident in instances where agencies have faltered in documenting known uses of AI.[9]

[9] Rebecca Heilweil and Madison Alder, OMB acknowledges issues with process for inventorying AI use cases, FedScoop (Aug. 16, 2023), https://fedscoop.com/omb-acknowledges-issues-with-process-for-inventorying-ai-use-cases/.

For instance, one report investigated the ability of the U.S. federal government to govern AI by examining the implementation of three binding laws related to AI governance.[10] Less than 40 percent of the 45 legal requirements across the three laws could be proved as implemented.[11] Additionally, the report brings to light the unsettling fact that almost half of these agencies did not publicly issue AI use case inventories, even when they had identifiable use cases of machine learning. Even in such compliance cases, the efforts were deemed inconsistent.[12]

The OMB draft Memo must outline specific criteria to transform the AI use case inventory into a valuable resource, rendering it useful for public reporting. An inventory should not only be a cursory listing but also supply detailed insights into the uses and implications of AI within agencies. To address this issue and enhance public transparency, **we recommend incorporating explicit requirements in the OMB memorandum regarding the specific elements agencies must publicly disclose** on their websites. The Memo should articulate the criteria for inclusion and the depth of information required, steering clear of ambiguity that may lead to inadequate documentation.

We propose that annual inventories should include, at minimum, information related to:

- The purpose and scope of the system.
- Model information.
- Deployment specifications; and
- Ongoing monitoring.

There must also be **clarity on the information necessary for a Freedom of Information Act (FOIA) request** to guarantee that, even with limitations, the disclosed information equips the public to make informed FOIA requests. Moreover, **agencies should include as AI use cases in inventory those applications of AI designed, developed, acquired, or used to advance the execution of an agency's missions, enhance decision-making, or provide the public with a specified benefit.**

We also propose that agencies inventory:

- Both **existing safety- or rights-impacting uses of AI, stand-alone AI, and AI embedded within other systems** or applications.
- AI **developed both by the agency or by third parties** on behalf of agencies for the fulfillment of specific agency missions, including relevant data inputs used to train AI and outputs used in support of decision making.
- Agencies' **procurement** o**f AI applications**; and

[10] Christie Lawrence, Isaac Cui, and Daniel Ho, *The Bureaucratic Challenge to AI Governance: An Empirical Assessment of Implementation at U.S. Federal Agencies,* In AAAI/ACM Conference on AI, Ethics, and Society (AIES '23) (August 8-10, 2023),https://dl.acm.org/doi/fullHtml/10.1145/3600211.3604701.
[11] *Id*
[12] *Id*.

- Should also include the **production stage for each use case**, whether it was contracted, and if it is consistent with the Executive Order on AI.[13]

We note with concern Footnote 8 of the Memo, which stipulates that agencies must only publicly report use cases to the extent practicable and consistent with applicable law. While seemingly reasonable, this provision presents a loophole that warrants scrutiny. Using the term "practicable" and the caveat of "applicable law" introduces ambiguity that many agencies may exploit, undermining the essence of transparency the Memo seeks to achieve. As such, the OMB should tighten these loose ends and fortify the language to ensure that transparency is an aspiration and an enforceable standard. The Department of Defense and the Intelligence Community should not be exempt from the Memo's public reporting and transparency requirements.

The Memo also lacks clarity on whether agencies must disclose additional information necessary for evaluating the responsible use of AI.[14] For example, **ambiguity persists regarding the disclosure of testing for disparate impact or algorithmic discrimination, feedback from affected groups, and transparency and performance improvement requirements related to procured AI**. Addressing these gaps is essential for ensuring a comprehensive and transparent framework.

The absence of explicit guidance on what additional information agencies should disclose publicly undermines attempts at creating transparency and uniformity. Without clear directives, agencies may vary in information, leading to inconsistencies and potential omissions. This lack of uniformity in public disclosures risks hampering public understanding and impedes effective oversight and evaluation of AI deployment across agencies. For people to understand the human rights implications and potential discriminatory impacts of AI systems, agencies must disclose such comprehensive information, which the current proposal falls short of mandating.

Ensure Transparency and Explainability

Maximum possible transparency is necessary for any AI system, including transparency regarding its purpose, use, and work, which must continue throughout a system's life cycle.[15] Non-disclosure agreements and other contracts with third parties under the guise of protecting intellectual property violate this principle because they prevent public oversight and accountability.[16]

[13] See Rebecca Heilweil, *Commerce discloses more AI use cases in updated inventory*, FedScoop (Sept. 1, 2023), https://fedscoop.com/commerce-discloses-more-ai-use-cases-in-updated-inventory/.
[14] Office of Management and Budget, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*, (OMB Memo) at 4.
[15] *AI and Human Rights*, Access Now (2018), (https://www.accessnow.org/wp-content/uploads/2018/11/AI-and-Human-Rights.pdf.
[16] *Id*.

Specifically, **adequate transparency and explainability must include**:

- Regular reporting of where and how governments use and manage AI systems.
- The use of open data standards in training data and code to the fullest extent possible while adhering to privacy standards.
- Enabling independent audits of systems and data.
- Clear and accessible reporting of the operation of any AI system.
- Targeted notification when a government AI system makes a decision that impacts an individual's rights; and
- Avoidance of "black box systems," meaning avoidance of any AI system when a person cannot understand how it works.

Question 3: How can OMB best advance responsible AI innovation?

Ensure Rights and Redress for People Impacted by AI Systems

The Memo should confer individual rights to people impacted by AI systems. It should contain a provision for redress or a mechanism by which people or public interest organizations can investigate high-risk AI systems. Furthermore, the Memo should include a **right not to be subject to non-compliant AI systems** (not just a right to opt-out when practicable), a **right to access, rectification, erasure, and explanation**, and bolster its remedy process by ensuring that persons have a **right to request information** when an AI system has significantly impacted an individual.[17]

Clarify the Conditions under which CAIOs Grant Waivers and Exceptions

Another critical challenge is the lack of specificity in defining the scope of the Memo, particularly regarding safety-impacting AI, rights-impacting AI, and the conditions under which waivers and exceptions can be granted.[18] Section 5(b) of the Memo states that the Chief Artificial Intelligence Officer (CAIO) can determine whether an AI application falls within the definitions of safety-impacting AI or rights-impacting AI.[19] While this discretion allows for flexibility, the lack of clear parameters for making such determinations introduces uncertainty.

The lack of specificity on how CAIO determinations should be conducted, what factors should be considered, and how the overall process unfolds creates a dangerous loophole ripe for exploitation and requires immediate attention. Section 5(c) of the Memo also allows for "waivers from minimum practices" based on system-specific risk assessments. The lack of explicit details on

[17] Human Rights in the Age of Artificial Intelligence, Access Now (2018), https://www.accessnow.org/wp-content/uploads/2018/11/AI-and-Human-Rights.pdf.
[18] OMB Memo at 11.
[19] *Id*.

the criteria, process, and conditions for granting or terminating waivers raises concerns about its efficacy.[20] The absence of clear guidelines in Sections 5(b) and 5(c) could lead to inconsistent interpretations across agencies, potentially compromising the Memo's intended uniformity.

To address this issue and fortify the effectiveness of the Memo, **we recommend explicitly outlining the parameters, process, and conditions for granting and terminating waivers and exceptions and CAIO determinations of what falls within the definition of safety and rights-impacting AI.**

Moreover, enhancing the OMB guidance by **reducing the number of exemptions and waivers granted to intelligence and law enforcement is essential**. Additionally, agencies should be transparent in disclosing their decision-making processes concerning exemptions and waivers, making this information accessible to the public.

Mandate Human Rights Impact Assessments

As proposed by Section 5(c)(iv) of the OMB, the AI impact assessment requirement is instrumental in ensuring that agencies consider the broader implications of AI systems on individuals and groups, especially those who might be disproportionately affected. However, the absence of specific directives on human rights in the guidance could lead to oversight and neglect of essential considerations, resulting in human rights violations.

Another concern in the current draft of the Memo lies in its omission of explicit requirements for agencies to consider human rights within AI impact assessments. Without clarity, agencies may conduct assessments that primarily focus on technical aspects and efficiency while neglecting the potential impact on fundamental rights, accessibility for persons with disabilities, and the broader public interest. Furthermore, the risk assessments outlined in the Memo lack explicit considerations for international human rights and freedoms. As AI systems transcend borders, agencies must account for potential global implications and ensure that their operations do not inadvertently contribute to human rights violations on an international scale.

The absence of specific expertise in human rights within agencies conducting risk assessments poses another challenge. **Independent evaluations should involve individuals and organizations with proven expertise in human rights to provide a comprehensive and informed perspective.** Excluding such voices could result in oversight and inadequate identification of potential risks related to human rights violations.

[20] *Id*. at 14.

To address these critical gaps, we propose the following recommendations**:**

- **For each proposed AI deployment, users must categorize individuals and groups likely to be impacted by the system.** The assessment should investigate the system's impact on fundamental rights, evaluate its accessibility for persons with disabilities, and scrutinize its broader impact on the environment and public interest.

- **Agencies conducting risk assessments should also explicitly consider risks to international human rights and freedoms.** The guidance should mandate the disclosure of actions taken to mitigate these risks, ensuring that AI deployments align with global human rights standards.

- Agencies empowered by the OMB to perform **independent assessments, conformity assessments, and audits should include personnel and civil society organizations with proven human rights expertise**. This inclusion will enhance the thoroughness of assessments and contribute to a more holistic understanding of potential risks.

We propose that agencies should be required to conduct and publish a fundamental rights impact assessment detailing specific information to the context of using that system.[21] Generally, we recommend that any assessment process should include the following:

- The intended purpose, geographic and temporal scope.
- Testing and audits by independent experts.
- Identifying measures to mitigate identified risks and prevent any rights violations from occurring and measuring compliance and efficacy.
- Whether the AI system will have a direct and/or indirect impact on fundamental human and civil rights.
- Any specific risk of harm likely to impact marginalized persons or those at risk of discrimination.
- Identification of any new legal safeguards needed to protect human rights in specific applications of AI tools.
- Special determinations of bias, particularly in the criminal justice sector, due to the risks to a fair trial, right to liberty, and non-discrimination.
- If a third party is used to develop and/or implement the system, a requirement for the third party to participate in the human rights assessment process.
- The foreseeable impact of the use of the system on the environment; and
- Clear steps as to how agencies will identify and mitigate potential risks, and how effective this mitigation is likely to be.

[21] *AI and Human Rights*, Access Now (2018), (https://www.accessnow.org/wp-content/uploads/2018/11/AI-and-Human-Rights.pdf.

Prohibit Practices that Pose an Unacceptable Risk to Fundamental Rights

Human rights harms are inevitable when we allow companies to sell flawed technology. Without a robust process to validate the claims made by corporations selling these systems, we risk a proliferation of pseudoscientific technologies, damaging consumer confidence and public trust. For all these reasons, we encourage the OMB to use its *full* authority to protect persons against high-risk AI systems. This includes urging agencies and companies to stop the use of these technologies in public spaces, publicly accessible spaces, and places of public accommodation where such use has or can enable mass surveillance or discriminatory targeted surveillance, including but not limited to their use in parks, schools, libraries, workplaces, transport hubs, sports stadiums, and housing developments.

We propose that some biometric technologies must be banned outright, such as automated gender recognition and AI-based "detection" of sexual orientation. The fundamental aim of these systems is incompatible with human rights, and they cannot be fixed by introducing more diverse training data, increasing accuracy, or applying technical methods to reduce bias. The absence of explicit prohibitions on specific AI technologies poses an ongoing and unacceptable risk to fundamental rights. While the memorandum outlines principles and practices, it refrains from explicitly banning certain applications of AI technologies that have demonstrated harm. This omission raises concerns about the potential perpetuation of detrimental AI practices that infringe upon individual rights.

To address the identified risks and safeguard fundamental rights, we propose explicit prohibitions on the following uses of AI:

- The use of **emotion recognition systems that claim to infer people's emotions and mental states** from physical, physiological, behavioral, as well as biometric data.
- The use of **biometric categorization systems** to track, categorize and/or judge people in publicly accessible spaces; or to categorize people on the basis of special categories of personal data, protected characteristics, or gender identity.
- Systems which amount to **AI physiognomy** by using data about our bodies to make problematic inferences about personality, character, political and religious beliefs.
- The use of **AI systems by law enforcement and criminal justice authorities to make predictions, profiles, or risk assessments** for the purpose of predicting crimes; and
- Unacceptable **uses of AI systems in the context of migration,** such as predictive analytics that can lead to the interdiction of border crossings.[22]

[22] https://www.accessnow.org/press-release/open-letter-itflows-consortium/

Protect All People, Regardless of Migration Status

The Memo should also explicitly expand its scope to protect all persons in the United States, including non-citizens. The OMB Memo must protect all persons from the dangers of discriminatory AI, including those migrating, seeking asylum, and living with an irregular migration status.

Set Clear Safeguards for AI Systems for Defense, Intelligence, and National Security Purposes

The Memo excludes AI systems developed or used exclusively by the Department of Defense and the Intelligence Community. There are serious consequences tied to this exclusion. The omission of AI systems for "national security purposes" poses significant risks, allowing intrusive AI technologies, including those facilitating mass surveillance, to operate in the public sector without specific limitations or safeguards whenever national security grounds are invoked.[23] Even AI systems deemed to present unacceptable risks, and thus prohibited by the OMB Memo, could potentially be resurrected, or repurposed exclusively for national security objectives.[24]

We propose that **any action of the Department of Defense and the Intelligence Community must fully comply with the principles of international law.** We also propose not to include "national security purposes" as a blanket exemption to the scope of the OMB Memo. **The exemption of AI systems developed or deployed for national security reasons – including surveillance – should always be assessed based on their strict necessity and proportionality and without prejudice to the application of the law.**

Enhance Civil Society Engagement

There is a risk of bias, or at least the perception of bias, when evaluations are conducted by individuals or entities closely associated with the development of the AI system. The OMB requires "agencies, through the CAIO, an agency AI oversight board, or other appropriate agency office with existing test and evaluation responsibilities," to review "relevant AI documentation to ensure that the system works appropriately and as intended, and that its expected benefits outweigh its potential risks." This raises concerns about the objectivity of how AI systems are evaluated.

While the CAIO or an oversight board may be structurally independent of the development team, there may still be institutional pressures or conflicts of interest that could compromise the independence of the evaluation. To address these concerns, exploring options for external

[23] *Scope of the EU Artificial Intelligence Act (AIA): Military Purposes and National Security*, ECNL (2022), https://ecnl.org/sites/default/files/2022-03/ECNL%20Pagers%20on%20scope%20of%20AIA%20ECNL_FINAL.pdf.
[24] *Id*.

involvement, transparency, and civil society support may be beneficial to ensure rigorous, impartial evaluations that align with human rights principles.

To address this, we propose:

- **Involving external entities or individuals** to conduct or at least **participate in the evaluation**, including external experts, independent auditors, or representatives from civil society organizations with expertise in human rights and ethical considerations.

- To **address concerns about bias** or lack of independence, the organization could prioritize transparency in the evaluation process. This might involve publicizing the evaluation criteria and methodologies and involving external observers.

- Legislative **empowerment to ensure that external entities,** especially those with human rights expertise, **have the authority and mandate to conduct independent assessments.** This can provide a stronger foundation for impartial evaluations; and

- Given the critical role of human rights considerations in the development of AI standards, **conformity assessments, and certification schemes, governments should establish meaningful opportunities and support mechanisms** (e.g., subsidies for travel) for human rights experts and civil society organizations to participate in these processes at the national and international levels. [25]

Ensure Transparency on the Ecological Sustainability Parameters for all AI Systems

The Memo presents a crucial opportunity to foster the development and use of AI systems that can be done sustainably and in a resource-friendly manner.[26] In our efforts to combat climate change, we strongly advocate for including public-facing transparency requirements on the resource consumption and greenhouse gas emission impacts of AI systems, regardless of their risk level.[27] This transparency should extend across various dimensions, encompassing design, data management, training processes, and foundational infrastructures such as hardware and data centers.

[25] Human Rights Impact Assessments for AI: Analysis and Recommendations, Access Now (2021), https://www.accessnow.org/wp-content/uploads/2022/11/Access-Now-Version-Human-Rights-Implications-of-Algorithmic-Impact-Assessments_-Priority-Recommendations-to-Guide-Effective-Development-and-Use.pdf.
[26] *Ensure minimum transparency on the ecological sustainability parameters for all AI systems in the AI Act*, https://algorithmwatch.org/en/wp-content/uploads/2022/04/Sustainability-issue-paper-April2022.pdf.
[27] *Id*.

Recognize the Nuanced Landscape of Generative AI

Lastly, the Memo stipulates that agencies must responsibly procure generative AI and mandates, including risk management requirements in contracts, *especially* for dual-use foundational models. This language raises concerns. **We, therefore, advocate for a balanced approach, warning against an excessive emphasis on large foundational models**. Such a singular focus may inadvertently overlook the harms smaller models unleash.[28]

Furthermore, given how quickly developments in generative AI are moving and the lack of clear evidence about the real impact of these technologies, we wish to propose three provisional policy recommendations.[29]

- Governments should not legally mandate or otherwise recommend, through law, the default watermarking of AI-generated content by generative AI systems.
- Any creation and adoption of watermarking features, should the AI developer offer them, must be off by default and opt-in at the users' discretion.
- For any watermarking feature offered for an AI model, the user must be able to set the level of identification, either identifying the AI model or the user themselves, and the implications of each must be made clear to the user.

Conclusion

We appreciate the OMB's engagement with the community and trust that this feedback will assist the agency in refining and improving its memorandum. We look forward to continuing to work with your office to promote strong AI governance standards. If you have questions, contact Willmary Escoto at willmary@accessnow.org.

Thank you,

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U.S. Policy Analyst
Access Now

[28] Derek Roberton, *A security loophole in Biden's AI executive order*, Politico (Nov. 30, 2023), and https://www.politico.com/newsletters/digital-future-daily/2023/11/30/a-security-loophole-in-bidens-ai-executive-order-00129386.
[29] *Watermarking & generative AI: what, how, why (and why not),* Access Now (Sept. 28, 2023), https://www.accessnow.org/watermarking-generative-ai-what-how-why-and-why-not/.

Appendix: Summary of Recommendations

1) **Ensure Transparency and Explainability.** Adequate transparency and explainability should
    - include regular reporting of where and how governments use and manage AI systems.
    - the use of open data standards in training data and code to the fullest extent possible while adhering to privacy standards.
    - enabling independent audits of systems and data; Clear and accessible reporting of the operation of any AI system.
    - targeted notification when a government AI system makes a decision that impacts an individual's rights; and
    - the avoidance of "black box systems," meaning avoidance of any AI system when a person cannot understand how it works.
2) **Ensure Rights and Redress for People Impacted by AI Systems,** including the right not to be subject to non-compliant AI systems; a right to access, rectify, and erasure; the right to explanation; and a right to request information when an AI system has significantly impacted an individual.
3) **Clarify the conditions under which waivers and exceptions can be granted**, including
    - explicitly outlining the parameters, process, and conditions for granting and terminating waivers and exceptions and CAIO determinations of what falls within the definition of safety and rights-impacting AI.
    - reducing the number of exemptions and waivers granted to intelligence and law enforcement is essential.
    - establishing standardized criteria for conducting system-specific risk assessments; and
    - ensuring that the waiver process is transparent, accountable, and aligned with the overarching goals of safety and protection of rights.
4) **Mandate Human Rights Impact Assessments.** We propose that any assessment process should include the following:
    - the purpose, geographic and temporal scope.
    - testing and audits by independent experts.
    - identifying measures to mitigate identified risks and prevent rights violations.
    - identification of any new legal safeguards needed to protect human rights in specific applications of AI tools; and
    - special determinations of bias, particularly in the criminal justice sector due to the risks to a fair trial, right to liberty, and non-discrimination among other things.
5) **Prohibit Practices that Pose an Unacceptable Risk to Fundamental Rights,** including the use of
    - Emotion recognition systems that claim to infer people's emotions and mental states from physical, physiological, and behavioral, as well as biometric data.

- The use of biometric categorization systems to track, categorize, and/or judge people in publicly accessible spaces or to categorize people based on special categories of personal data, protected characteristics, or gender identity.
- Systems that amount to AI physiognomy by using data about our bodies to make problematic inferences about personality, character, political, and religious beliefs.
- The use of AI systems by law enforcement and criminal justice authorities to make predictions, profiles, or risk assessments for the purpose of predicting crimes; and
- The use of AI systems for immigration enforcement purposes to profile or risk-assess natural persons or groups in a manner that restricts the right to seek asylum and/or prejudices the fairness of migration procedures.

6) **Protect All People, Regardless Of Migration Status.** The OMB Memo must protect all persons from the dangers of discriminatory AI, including those migrating, seeking asylum, and living with an irregular migration status.
7) **Set Clear Safeguards for AI Systems for Military and National Security Purposes.** Any action of the Department of Defense and the Intelligence Community must fully comply with the principles of international law.
8) **Enhance Civil Society Inclusion.** Involve external entities or individuals to conduct or at least participate in the evaluation, including external experts, independent auditors, or representatives from civil society organizations with expertise in human rights and ethical considerations.
9) **Ensure Transparency on the Ecological Sustainability Parameters for all AI Systems,** including public-facing transparency requirements on the resource consumption and greenhouse gas emission impacts of AI systems; and
10) **Recognize the Nuanced Landscape of Generative AI.**

PUBLIC SUBMISSION

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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0170
Comment on OMB-2023-0020-0001

Submitter Information

Organization: StakeOut.AI

General Comment

See attached file(s)

Attachments

StakeOutAI Comment to OMB

StakeOut.AI

Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)

Comment Submitted to the Office of Management and Budget (OMB)

December 5, 2023

StakeOut.AI, a nonprofit seeking to prevent economic disempowerment and threats to safety caused by artificial intelligence (AI), encourages the Office of Management and Budget (OMB) to implement the recommendations as outlined below into its Proposed Memorandum for the Heads of Executive Departments and Agencies.[i] We understand that federal agencies are already using AI to advance their missions, and we applaud these agencies for using this technology to benefit humanity. For example, the Department of Health and Human Services has used AI to predict infectious diseases, assist in preparing for potential pandemics, and mitigate prescription drug shortages and supply chain issues, and the Department of Energy has used AI to predict natural disasters and preemptively prepare for recoveries.[ii] However, it is undeniable that AI poses great risk,[iii] and as such, agencies must take a human-centered approach to its future implementation.

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

StakeOut.AI appreciates the recognition that AI can and will impact industries across the board, and as such, that all agencies will be required to designate a Chief AI Officer who will be charged with managing AI risks and implementing AI innovation within the minimum practices and risk management framework. However, OMB should provide agencies with more guidance on federal employees' collective bargaining rights pertaining the use of AI, pathways for federal employees to move into AI occupations, and training for federal employees to use AI in their work.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

We recommend establishing a new body to perform AI governance. AI governance committees should include representatives from the key functional areas of each agency, including the Legal, Ethics & Compliance, Privacy, Information Security, Research & Development, Engineering, IT, and Management functions. The private sector has acknowledged that the board and C-suite are ultimately accountable for companies' use of AI and its consequences;[iv] agencies, too, should ensure that their executives are involved and sit on their respective AI governance committees.

3. How can OMB best advance responsible AI innovation?

According to the Proposed Memorandum, an agency Chief AI Officer may waive one or more of the requirements in the minimum practices section after making a written determination that fulfilling the requirement would increase risks to safety or rights overall or would create an unacceptable impediment to critical agency operations. Such waivers are applicable for the duration of the AI's use but must be reassessed by the Chief AI Officer if there are significant changes to the conditions or context in which the AI is used. Agencies must then report to OMB within 30 days of granting such a waiver, detailing the scope, justifications, and supporting evidence.

StakeOut.AI is concerned that a Chief AI Officer could prioritize AI innovation and unnecessarily waive minimum practices at the expense of mitigating risks due to AI. Then, after the possible harm to individuals has already taken place, the agency would produce a post hoc justification for waiving the safeguarding minimum practices process in order to comply with the 30-day requirement. We encourage OMB to raise the standard for waiving minimum practices and limit the extent to which agencies may choose to do so.

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

We encourage agencies to consult subject matter experts within their agencies and stakeholders, including agency employees and their union representatives, to determine how AI can improve agency missions or business operations.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

We would advise adding telecommunications systems as a safety-impacting purpose (Section 5(b)(i)) due to their use in public safety and law enforcement.[v] To the list of rights-impacting purposes, we advise adding (1) jury selection to Section 5(b)(ii)(B), due to its importance in the legal process and its history of discriminatory use; (2) conservatorship to Section 5(b)(ii)(K), due to the large impact this legal status has on an impacted person's life, comparable to the other purposes listed in this section; and (3) gun ownership, due to the potential benefits of human (e.g., police chief) discretion in granting relevant licenses/permits[vi] as well as likely inaccuracies when AI is tasked with predicting violent crime.[vii]

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

The minimum practices require agencies to complete an AI impact assessment before using new or existing covered safety-impacting or rights-impacting AI, test the AI for performance in a real-world context, independently evaluate the AI, conduct ongoing monitoring and establish thresholds for periodic human review, mitigate emerging risks to rights and safety, ensure adequate human training and assessment, provide appropriate human consideration as part of decisions that pose a high risk to rights or safety, and provide public notice and plain-language documentation through the AI use case inventory.

For rights-impacting AI, agencies must additionally take steps to ensure that the AI will advance equity, dignity, and fairness, consult and incorporate feedback from affected groups, conduct ongoing monitoring and mitigation for AI-enabled discrimination, notify negatively affected individuals, maintain human consideration and remedy processes, and maintain options to opt-out where practicable.

These requirements should be stronger and more specific. Most importantly, agencies should be *required*, not "strongly encouraged," to provide individuals with explanations for the AI-driven outcome of decisions that negatively impact those individuals, such as the denial of benefits. Moreover, while options to opt-out must be prominent, they should be available at any time and in a streamlined manner so that individuals know where to look for the opt-out option (e.g., a link at the bottom of each agency's website). Finally, OMB should specify the frequency of "ongoing" as it pertains to the ongoing monitoring and mitigation for AI-enabled discrimination and the solicitation of feedback on an ongoing basis from affected groups, such as customers, Federal employee groups, and employees' union representatives. StakeOut.AI encourages frequent monitoring for AI-enabled discrimination and solicitation of feedback from customers, employee groups, and union representatives, as well as the involvement of these groups well

before the planned implementation of rights-impacting AI so that their feedback can properly be used for the AI's design and development.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

StakeOut.AI encourages agencies to be specific and transparent about their use of AI in relevant contracts and allow individuals and entities with whom they contract to opt out of the use of AI. Agencies should be required to obtain the consent of contracting individuals and/or entities when seeking to use AI.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

Agencies should make the following public:

- How they monitor and mitigate for AI-enabled discrimination;
- How they solicit feedback on an ongoing basis from affected groups, such as customers, Federal employee groups, and employees' union representatives;
- An analysis of AI-driven outcomes that negatively impact individuals, with a comparison to those outcomes without the use of AI; and
- An analysis of the impact of AI on the workforce of each respective agency (including but not limited to job replacement) and on the industry and/or workforce of each relevant regulated sector.

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[i] *Proposed Memorandum for the Heads of Executive Departments and Agencies*, OMB (2023), https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf.
[ii] *OMB Releases Implementation Guidance Following President Biden's Executive Order on Artificial Intelligence*, OMB (November 1, 2023), https://www.whitehouse.gov/omb/briefing-room/2023/11/01/omb-releases-implementation-guidance-following-president-bidens-executive-order-on-artificial-intelligence/.
[iii] *An Overview of Catastrophic AI Risks*, CENTER FOR AI SAFETY, https://www.safe.ai/ai-risk.
[iv] Arsen Kourinian and Dominique Shelton Leipzig, Data Collection & Management, Professional Perspective - A Harmonized AI Governance Framework Starting at the Board & C-Suite Level, Bloomberg Law (April 2023), https://www.bloomberglaw.com/external/document/X292A4SK000000/data-collection-management-professional-perspective-a-harmonized.
[v] *The Role of Telecommunications in Public Safety and Law Enforcement*, UTILITIES ONE (Aug. 7, 2023), https://utilitiesone.com/the-role-of-telecommunications-in-public-safety-and-law-enforcement.

[vi] German Lopez, *I looked for a state that's taking gun violence seriously. I found Massachusetts.*, VOX (Nov. 13, 2018), https://www.vox.com/2018/11/13/17658028/massachusetts-gun-control-laws-licenses.
[vii] Matt Burgess, *Police built an AI to predict violent crime. It was seriously flawed*, WIRED (June 8, 2020), https://www.wired.co.uk/article/police-violence-prediction-ndas.

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0171
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Adobe Inc.

General Comment

Please see the attached Adobe Response to the Office of Management and Budget Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum.

Attachments

Adobe Response to OMB Draft Memo on Gov Use of AI

Adobe Response to the
Office of Management and Budget Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence
Draft Memorandum

Adobe Inc. (Adobe) welcomes the opportunity to provide comments in response to the Draft Memorandum – Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence published by the Office of Management and Budget (OMB) on October 30, 2023[1]. As a leader in the development and deployment of advanced AI capabilities and one of the companies that signed onto the White House voluntary commitments to manage the risks posed by AI, we recognize the need to build robust AI assurance mechanisms to ensure AI systems are designed, developed, and deployed in a trustworthy and responsible manner. We applaud the Biden Administration for issuing its landmark Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence and for OMB publishing this draft memorandum focused on establishing new agency requirements and guidance for AI governance, innovation, and risk management.

We are particularly encouraged by the federal government's focus on identifying existing standards and technologies to authenticate content and track its provenance, have agencies submit an inventory of its AI use cases to OMB and post public versions of these use cases on agency websites. We are also supportive of efforts to remove barriers to the responsible use of AI, especially urging agencies to develop adequate infrastructure to curate agency datasets for use in training, testing and operating AI. Leveraging the existing NIST AI Risk Management framework will also be essential.

Executive Summary

When it comes to the US government's development, acquisition and use of Artificial Intelligence, and particularly generative AI, Adobe recommends a risk-based approach to trustworthy AI that incentivizes AI accountability mechanisms guided by both government-developed standards and general principles of accountability, responsibility, and transparency. Our response highlights the following themes:

- **Increase Transparency.** Adobe supports the development of effective labeling and content provenance mechanisms, so that Americans can determine when content is generated using AI and when it is not. To that end, we recommend that the federal government adopt content provenance technologies and standards, like Content Credentials and the C2PA, enabling the USG to provide context and transparency behind the synthetic and non-synthetic digital content it creates and/or publishes, especially when it uses generative AI tools. Adobe also recommends the government maximize transparency by publishing the annual use case inventory for public scrutiny, with specific emphasis on providing information that has cross-agency applicability. This

[1] Office of Management and Budget, Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

will ensure these reports are useful not just to the public in understanding what's being used and how, but so that other agencies can take advantage of the information provided.

- **Multi-Disciplinary Process & Risk-based Approach**. Adobe supports a risk-based approach to AI in line with the National Institute of Standards and Technology's (NIST) AI Risk Management Framework. The government should primarily focus its regulatory efforts on high-risk use cases.

- **Government Led Public-Private Partnerships to Mitigate Harmful Bias.** To mitigate harmful bias, Adobe urges public-private sector collaboration to aid in the creation of Government-developed standardized test datasets, which would foster greater public trust in AI systems.

- **Enabling Agency Missions, Supporting Business Operations.** Adobe urges the government to take advantage of current generative AI market capabilities that will enable the government to improve operations, allow employees to shift to high-value work, reduce agency costs, improve accessibility, enhance creativity, and realize numerous other efficiencies and opportunities. As the government looks to harness the power of AI, they should do so in a thoughtful and responsible manner.

Background

At Adobe, our mission is to empower everyone to deliver the world's best digital experiences. Since our founding in December 1982, we have continued to pioneer transformative technologies that allow our customers—who range from emerging artists to global brands—to channel their imaginations, unleash their creativity, and power their businesses.

Adobe's business consists of three cloud-based solutions: Creative Cloud, Document Cloud, and Experience Cloud. In Adobe Creative Cloud, our tools like Photoshop, Illustrator, and Premiere Pro empower millions of creators around the world to create compelling assets like photos, videos, and illustrations, while our online and mobile design app Adobe Express allows people of all skills to easily create outstanding social graphics, videos, and web pages. In Document Cloud, our products provide individuals in small and medium businesses to large enterprises with tools to support all their digital document needs. Lastly, our Experience Cloud business supports businesses with their websites and e-commerce experiences.

Across all our products, Adobe is building on a decade-long legacy of AI innovation by leveraging the power of AI to deliver hundreds of intelligent capabilities. In Creative Cloud, AI powers many creative functions including advanced image editing features in Photoshop, making it easier for everyone to tell their story with simpler and more intuitive tools. In March 2023, Adobe launched Firefly, our new family of creative generative AI models designed to be both creator-focused and safe for commercial use.[2] It is embedded into Adobe's creative tools to increase productivity an enhance digital assets. With Firefly, users can channel their creativity in ways they never imagined possible by simply typing in a prompt and generating images in seconds. Since its launch in March, four billion assets have been created.

[2] TechCrunch, "Adobe's thoughts on the ethics of AI-generated images (and paying its contributors for them)," Frederic Lardinois (March 22, 2023).

In Document Cloud, AI powers features like Liquid Mode, which automatically converts a PDF layout to different formats to fit different screens so it can be easily read on tablets, mobile devices, and more. As part of our Digital Experience offerings, Adobe's customers can use AI-driven features to deliver relevant and meaningful insights and personalized digital experiences to the millions of visitors on their websites.

We believe that AI done right will amplify human creativity and capabilities to new levels with deeper insights, accelerated task performance, and improved decision-making ability. As we continue to harness the power of AI, we are committed to developing and deploying AI in line with our AI Ethics principles of accountability, responsibility, and transparency, while considering its broader impact on society.

We believe implementing Gen AI tools into existing federal government workflows will dramatically reduce the time spent on tedious tasks and increase productivity. We are encouraged that the U.S. federal government and OMB has prepared this draft memorandum that would direct Federal agencies to strengthen their AI governance and innovation programs while managing risks for the use of AI.

In response to the request for comments, we offer the following for your consideration in response to the questions posed in the Federal Register Notice[3].

How can OMB best advance responsible AI innovation?

1. Digital Content Provenance to Establish Trustworthy AI Mechanisms

Governments need to be able to provide trusted and authenticated communications to the public. Governments should take a leadership role in leveraging open standards (i.e. C2PA) and applying content credentials to all digital content on official government websites and communications. In this way, not only will people be able to verify important information coming from government agencies, but the government could also drive media/digital literacy by setting the standard for how to find trustworthy and transparent digital content. We support the White House Executive Order on AI, Section 4.5 – *Reducing the Risks Posed by Synthetic Content* and believe OMB guidance around labeling and authenticating digital content will strengthen public confidence in the integrity of official US government online information.

Openness and transparency build trust and confidence in our government, but that confidence can be easily eroded by bad-faith actors wielding new technologies, like generative AI, to deceive. In today's digital world, content creation is exploding. Thanks to new technologies, developing, editing, and distributing content has become more powerful and more accessible. However, the same tools used to make and share legitimate content could also be misused by bad actors to create and spread disinformation or misinformation. Without transparency tools to help people understand how a piece of content came to be, people risk believing lies and no longer accepting the truth. That is why Adobe has been working with interested parties to develop practical and effective solutions and standards to achieve transparency and authenticity in digital content. The government should lead in a similar fashion.

In 2019 Adobe, along with other stakeholders, led the establishment of the now 2,000+ member Content Authenticity Initiative (CAI), and its underlying standards body, the Coalition for Content Provenance and Authenticity (C2PA). Through these organizations, we are working to drive the adoption and

[3] Federal Register Notice, "Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum" Docket Number 2023-24269 (11/3/2023)

implementation of this free, open-source technology across industries, tools, and platforms. Adobe strongly supports the government promoting Content Credentials to:

- support greater transparency and trust in our online ecosystem by helping users understand the origins and edit history of digital content;
- indicate when generative AI was used in the creation of digital content; and
- endorse voluntary consensus standards for use by organizations and governments, consistent with OMB Circular A-119.

Content Credentials can indicate whether AI was use in the creation of a piece of content, and more important how it was used. This level of transparency in digital content helps consumers make more informed decisions about whether to trust the content they see online and helps create a more trustworthy digital space. At Adobe, we've implemented this level of transparency by integrating Content Credentials into popular products such as Photoshop, Lightroom and Firefly.

2. Adobe Supports a Flexible, Risk-Based Approach for Trustworthy AI

Companies that do business with the federal government (and otherwise) have a responsibility to identify and address AI-related risks in their products and services and should set up internal governance processes to address them before AI solutions are widely released. At Adobe, we emphasize internal and external beta testing of our AI models with trusted third parties to help stress test the models before commercial release. This enables us to gain valuable feedback from a diverse set of perspectives on the potentially harmful impacts of our AI-powered solutions so that they can be remediated.

Adobe strongly encourages the federal government to continue working with the private sector to leverage its expertise and familiarity with AI solutions to develop clear and consistent guidance for internal AI governance. In doing so, the government can equip companies with standardized methodologies to identify and mitigate AI-related harms.

Adobe supports a risk-based approach to AI in line with the National Institute of Standards and Technology's (NIST) *AI Risk Management Framework*. Using the Framework as the baseline the USG should primarily focus its regulatory efforts on high-risk use cases. This risk-based approach is important to focusing regulatory efforts on high-risk AI without slowing down the pace of innovation around AI that poses little or no risk.

We also support the completion of AI impact assessments to evaluate the intended purpose for the AI and its expected benefits, the potential risks of using AI and quality of the data used in the AI's design, development, training, testing and operation. Adobe has been using AI impact assessments for years to evaluate the impact of AI features and identify potential risks prior to product launch.

a. Adobe's Proactive Internal AI Governance Model

Beginning in 2019, Adobe proactively and voluntarily developed a layered, multi-disciplinary process for responsible AI, including conducting our own internal assessments, that could serve as a model for the Government to replicate.

First, we established AI Ethics principles of accountability, responsibility, and transparency to guide the development of our AI-powered solutions.

- **Accountability** means we take ownership of the outcomes of our AI-assisted tools. We have processes and resources dedicated to receiving and responding to concerns about our AI products and taking corrective action as appropriate. Accountability also requires testing for and anticipating potential harms, taking pre-emptive steps to mitigate such harms, and maintaining systems to respond to unanticipated harmful outcomes.

- **Responsibility** means we approach designing and maintaining our AI technology with thoughtful evaluation and careful consideration of the impact and consequences of its deployment. We strive to ensure that we design for inclusiveness and assess the impact of potentially unfair, discriminatory, or inaccurate results, which might perpetuate harmful biases and stereotypes. We understand that special care must be taken to address bias if a product or service will have a significant impact on an individual's life, such as with employment, housing, credit, and health.

- **Transparency** means we are open about, and explain, our use of AI to our customers so they have a clear understanding of our AI systems and their applications. We want our customers to understand how Adobe uses AI, the value AI-assisted tools bring to them, and what controls and preferences they have available when they engage with and utilize Adobe's AI-enhanced tools and services.

Guided by these principles, we have created standardized processes from design to development to deployment, including training, testing, and a review process overseen by a diverse AI Ethics Review Board.

Second, we have set up an AI Ethics Committee and AI Ethics Review Board to take action to address ethical concerns with new features and technologies.

- Our **AI Ethics Committee** is a diverse, cross-functional team with members from across Adobe that is responsible for helping to ensure that the AI Ethics principles are understood and incorporated across our development teams.

- Our **AI Ethics Review Board** is tasked with the review of AI-powered features and products before their release. Like our AI Ethics Committee, the AI Ethics Review Board is a diverse, cross-functional group of Adobe employees. We believe diversity in terms of gender, race, and ethnic background, but also diversity of professional experience is critical to identifying potential issues that a nondiverse team might not see.

In addition, we have an AI Ethics team that serves two main functions: (a) it advises our product and development teams on ethical considerations for our AI-powered solutions; and (b) it thinks expansively about ethics across various types of tools and technologies, both developed by Adobe for our customers and used internally by our teams.

Third, we have embedded an AI Ethics Assessment throughout our engineering processes. The AI Ethics Assessment is a multi-part review that is designed to assess the ethical impact of an AI product or feature. If an initial assessment shows no major ethical impact and the feature meets our ethical standards, the feature is approved. AI features that have a higher potential ethical impact go through a more rigorous testing process, including a review by the AI Ethics Review Board. The AI Ethics Review Board will either approve the release, give a qualified approval with instructions to test or fix minimal issues, or not

approve due to significant testing or remediation being required before release. Where approval is denied, the product team is required to take on additional work and re-present to the AI Ethics Review Board.

Finally, we promote and rely on community feedback in developing our AI products. For example, we launched our first creative AI foundation model, Adobe Firefly as a beta in multiple stages to seek input from our employees, customers, and our broader creative community. Firefly also has a feedback mechanism built in so that users can easily report if a feature produces a result they perceive as, for example, biased or inaccurate. We monitor this feedback data to identify any undesirable outcomes and allow our product and engineering teams to address them appropriately. In our view, this constant feedback loop with our user community is an important way to help ensure our tools minimize harm and uphold our values as a company.

b. Developing Standardized Test Datasets

Adobe supports the Federal Government's role in continuing to work with interested stakeholders, including the private sector, to set out technical and governance best practices for implementing trustworthy AI. For example, one area requiring government leadership and public-private sector collaboration to develop more trustworthy AI systems by mitigating harmful bias is around the development of test datasets. Government-developed standardized test datasets would foster greater public trust in AI systems. The government should focus its dataset testing on outputs and not just inputs. The focus on inputs (traceability, explainability, reporting on datasets) is a lot of work that doesn't get you good answers. The focus on outputs makes AI like every other product: what did it do? There is an opportunity for the private sector to partner with agencies such as NIST to establish appropriate datasets in each case. We think this initiative would help create an environment where companies do not have to make a tradeoff between innovation and ethics.

With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

As a result of the rapid advancements in AI, the USG has a tremendous opportunity to improve operations, shift to high-value work, reduce cost, and accelerate the overall adoption of responsible innovation. Gen AI will enable federal employees to be more productive and increase the accessibility of federal services to the public. With features such as speech to text, text to image, customizable PDFs, and the seamless sharing of digital content for collaboration, Adobe is focused on bringing Gen AI into workflows and this is only the beginning.

Here are several use cases where the federal government could take advantage of GenAI to improve agency missions or business operations:

Create and Deliver Content. By leveraging AI tools, the federal government will be able to train non-technical communicators to create images or videos that leverage pre-approved templates, logos, or style guides, to quickly generate informational content to be distributed within minutes across digital touch points. This reduces dependencies on IT staff to hard code content while enabling communications/marketing teams to respond in the moment. Government can also pair generated content with a content management system to allow organizations to generate, credentials, and manage AI content, from creation to publication to deletion. Adobe's GenStudio does just that by accelerating and simplifying the content supply chain with generative AI and intelligent automation. Government entities

have already started to leverage these tools and they have seen results creating assets five times faster and reducing work time by half.

Summarize Unstructured Information. Government employees will be able to use Gen AI built into Acrobat and AEM Forms to search and simplify information from complex documents (e.g., eligibility details) on a government website, query data and insights from multiple disjointed documents internally, and summarize external requests from citizens and automate data reporting from those requests.

Improve Accessibility. Generative AI can make it possible for people at all skill levels to use their words or gestures to generate content and make digital content accessible to all citizens. With that in mind, Adobe has incorporated hundreds of accessibility capabilities into our tools, including the PDF Accessibility Auto-tag API in Acrobat. The Federal Government has the ability to leverage Generative AI tools to increase the accessibility of digital content.

What kind of information should be made public about agencies' use of AI in their annual use case inventory?

As established in the OMB memo, and consistent with applicable law and regulation, the use cases published as part of the annual use case inventory should make every attempt to provide information that has cross-agency applicability. This will ensure they are useful not just to the public in understanding what's being used and how, but that other agencies can take advantage of the information provided. In addition, at a minimum, the following should be considerations for those published use cases:

- Does the testing for the use case follow the NIST AI Risk Management Framework?
- Does the use case include generative AI?
- Has the use case been assessed for rights and safety impact? Is that information disclosed?
- Does the AI technology subject to the use case include content provenance, labeling or related disclosures (e.g., edits made to content)?

Conclusion

Adobe appreciates the opportunity to comment on OMB's draft memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence. We understand and appreciate the efforts you have taken to advance the US Government's critical role through the issuance of the AI Executive Order and this draft implementation guidance. We look forward to continuing to work with you to promote the responsible development and use of artificial intelligence by the federal government.

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Document: OMB-2023-0020-0172
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Keywell LLC

General Comment

Attached please find Keywell.ai's response to the request for comment.

Attachments

Keywell_OMB_Guidance_Response

Keywell.ai

Response to the Proposed Memorandum for the Heads of Executive Departments and Agencies on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

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December 5, 2023

Keywell.ai would like to thank OMB for the opportunity to provide comments on the critical topics of AI advancement and oversight. As a boutique data science and strategy firm in health and human services, we are deeply committed to the responsible development of AI and emerging technologies to improve outcomes and impact lives. Our team has worked in healthcare data for a combined 75+ years with experience that spans the public and private sectors. We have helped clients find success in the domains of

- Health insurer payment methodologies, claims adjudication, prior authorization, and risk stratification.
- Healthcare provider administration, population health, claims management, revenue cycle management, and payer contract negotiations.
- Human services child welfare technology and information systems, case summarization, structured decision-making, data quality, and risk identification.

We have seen many examples of both effective and ineffective AI implementation. We share our lessons learned as they relate to specific OMB topics below:

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

AI systems involve data management and engineering challenges that traditionally fall under the purview of a CTO, CDO, or CIO. For a Chief AI Officer (CAIO) to effectively promote AI and mitigate its risks, they will need engineers, data scientists, annotators, and subject matter experts. It is important to construct a role that supports implementation and is capable of executing a product roadmap. We support that the guidance allows for qualified agency chiefs to handle the responsibility of a CAIO within their existing reporting structure. We believe that a dual appointment aligns with best practices for AI development and promotes efficiency.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

In our experience, data governance and quality committees and master data management initiatives work best when technology and product teams align with core business functions. Expected deliverables and outputs of committee efforts should be practical and geared towards advancement of AI initiatives so as to not impede progress where there is low risk. AI development is experiment-driven and involves interaction between users and technology. We encourage the OMB to promote experimentation, prototyping, and examination of evidence as opposed to theoretical frameworks.

The most effective coordination mechanisms are agile and enabling. For collaboration, we have found that moderated forums allow a wide range of participants and interaction in an efficient format, whereas governing bodies and committee meetings often limit participation and transparency. Public conferences and meetings with focused topics can also be a helpful collaboration tool.

3. How can OMB best advance responsible AI innovation?

OMB can best advance responsible AI innovation by promoting proper human integration within AI workflows and ensuring that people make the most important decisions regarding rights-impacting services. AI systems are augmentations of existing decision processes. It is important to recognize existing processes may also have discriminatory outcomes and to establish a baseline performance of existing decision systems with respect to bias. An AI system that contains bias may still be an improvement over the baseline. Agencies should investigate and take into consideration the disparate impact of non-AI processes that they would like to replace or enhance.

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

At Keywell.ai, we have specific experience in common pain points within healthcare and human services agencies. Emerging AI technology has the potential to address these problems and improve interactions with government services. For example, generative AI can enhance the health and well-being of all Americans by reducing the administrative and cognitive load of interacting with the healthcare system. Administrative costs were estimated to account for 15-25% of total national healthcare expenditures or $3.8 trillion in 2019.[1]

Customer service and system navigation is another opportunity area for AI in HHS. Chatbots and information retrieval systems already help individuals determine whether or not they may be eligible for services and discover how to take next steps. These tools may also be used to help promote population health and provide pathways to nutrition, housing, and other support services that may be otherwise difficult to navigate.

Generative AI solutions present opportunities for streamlining HHS procurement processes. Important information for small-businesses is often buried in PDF's on agency websites. For example, the Health Resource Services Administration built a chatbot to reduce the number of customer support calls needed for the Electronic Healthbook (EHB) grant program. The Center for Medicaid Services (CMS) has also used natural language processing to create templates to accelerate Authority to Operate (ATO) compliance.[2] The increased capabilities of generative models can improve performance of these systems.

Reducing health worker burnout is a priority for the surgeon general and falls under the Department of Veterans Affairs mission to support those "who shall have borne the battle, their families, and their caregivers."[3] Excessive administrative requirements are one of the leading causes of healthcare

[1] https://jamanetwork.com/journals/jama/fullarticle/2785479
[2] https://www.hhs.gov/sites/default/files/hhs-artificial-intelligence-select-use-cases.pdf
[3] https://www.hhs.gov/surgeongeneral/priorities/health-worker-burnout/index.html

worker burnout. Generative AI workflows that include audio transcription have been shown to save healthcare workers 2 to 3 hours per day by automatically documenting patient visits.[4]

Prior authorization and medical necessity review is another problem in healthcare with opportunity for AI solutions. According to an American Medical Association survey, more than four in five physicians (86%) reported that prior authorization requirements led to higher overall utilization of health care resources and negative clinical outcomes. With appropriate guardrails, there are opportunities to improve the timeliness and efficiency of the prior authorization system while still ensuring appropriate medical utilization.

While designing the data architecture of a new child welfare information system in California, we saw the impact of social workers' requirement to document and recall contact notes from interactions with children and families. AI could not only reduce social workers' administrative burden which contributes to employee turnover, but could also support risk identification and reporting of information that is often buried in transcribed notes.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

We agree with the categories of rights-impacting and safety-impacting AI. We would suggest that healthcare use cases, particularly medical device, pharmaceutical, point-of-care, and patient-facing solutions should also be included in the *Safety* use case category, such that any subsequent guidance based on the safety categorization also includes healthcare use cases in addition to rights-impacting use cases.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

The minimum requirements excel by acknowledging a wide variety of "rights-impacting" use cases as well as the presence of unintended, "disparate impact" resulting from AI deployment. We echo the importance of real world testing with feedback from human operators, independent evaluation, and timely human consideration and potential remedy to the use of AI by a fallback and escalation system. We further recommend that minimum standards for rights-impacting AI include external evaluation.

We support OMB's proposed minimum practices for testing models in the real-world to advance responsible AI innovation. Especially in the health and human services industry, it is critical that models are evaluated by clinicians and social workers with real-world experience. Evaluation methodologies can include 1) experimental evaluation prior to implementation and/or 2) side-by-side comparison of practitioner and model results in a "copilot" model. Trials and phased rollouts of AI products ensure early identification of problematic results to limit adverse impacts.

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4 https://www.post-gazette.com/business/healthcare-business/2023/11/16/upmc-abridge-ai-medical-transcription-highmark/stories/202311160091

Independent evaluations should be truly independent. If the evaluation is conducted by a Chief AI Officer or by someone within the organization who was merely "not directly involved in the development of a system," that will only serve as a rubber stamp for existing practices and minimal thresholds of evidence. The well-thought values and goals of the OMB guidance will yield to the internal pressure to deploy. As AI practitioners, we have a responsibility to ensure that the products we build are held to the appropriate standards.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

In our experience working with HHS agencies, project roadmaps and regulatory blueprints support innovation. For AI advancement in HHS agencies, these types of materials could include artifacts such as:

- Sample procurement templates
- Technology evaluation toolkits
- AI implementation blueprints
- AI enterprise technical guides
- Communication strategy templates
- Vendor evaluation frameworks
- Privacy and legal templates and frameworks
- Model rule-making or guidance

Distributing materials and resources developed in collaboration with AI thought leaders, academic institutions, and experienced agency leaders will help incorporate the recommendations of this OMB memorandum into agency initiatives.

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lpt-6jul-pbr2
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0173
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Association of American Publishers

General Comment

Attached is the submission of the Association of American Publishers.

Attachments

AAP Submission - OMB Draft Memorandum on Agency Use of AI (12052023)

AAP | ASSOCIATION OF AMERICAN PUBLISHERS

Electronic submission via *www.regulations.gov*

December 5, 2023

Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (Docket OMB-2023-0020-0001)

The Association of American Publishers (AAP) is the national trade association of the U.S. book and journal publishing industry. AAP represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for outcomes that incentivize the publication of creative expression, professional content, and learning solutions. The U.S. publishing industry supports an extensive network of American businesses and thousands of jobs, with revenue of $28.10 billion for 2022.[1] The publishing industry is also an integral part of the broader U.S. copyright industries, which collectively added more than $1.8 trillion in annual value to U.S. gross domestic product in 2021.[2] Beyond these important economic contributions, an independent and thriving publishing industry supports the nation's political, intellectual, and cultural systems.

AAP appreciates the opportunity to provide this response to the Request for Comments on the OMB Proposed Memorandum, which focuses on Question 3, ***"How can OMB best advance responsible AI innovation?"***

Essential to responsible and ethical AI innovation are transparency and accountability. To allow the government to harness the opportunities presented by AI technologies to improve Federal Government operations and thereby serve the American public more effectively, there must be trust in this technology—and accountability is a foundational component of trust. To support the realization of both these key objectives, AAP supports the requirement under Section IV of the Draft Memorandum regarding "Minimum Practices for Either Safe-Impacting or Rights-Impacting AI, specifically sub-section (A)(3) with respect to the "quality and appropriateness of the relevant data."

Trust exists where there is knowledge and understanding, and in the AI context, this means knowing 1) how the AI technology was developed, including whether the technology complies with applicable laws and regulations (e.g., data privacy), 2) the content used to develop the datasets on which the AI technology was trained, including whether and how this content was legitimately sourced, and 3) the vetting or testing processes the technology has undergone to assess its effectiveness and reliability, and therefore its readiness for deployment to the

[1] AAP StatShot Annual Report: Publishing Revenues Totaled $28.10 Billion for 2022 - AAP (publishers.org)
[2] *Copyright Industries in the U.S. Economy: The 2022 Report,* by Robert Stoner and Jéssica Dutra of Economists Incorporated, prepared for the International Intellectual Property Alliance (IIPA), (December 2022), https://www.iipa.org/files/uploads/2022/12/IIPA-Report-2022_Interactive_12-12-2022-1.pdf.

American public. In the context of the OMB Draft Memorandum, this means that AI technology developers must adequately communicate to the government how and on what content the generative AI systems (Gen AI) were trained, as well as the results of assessments and audits performed and by whom.

Transparency as to data provenance, development and training processes, and testing is also essential to ensuring that any AI or Gen AI system adopted or embedded by the government into its operations is fit for purpose.

Data Provenance; Accurate Record Keeping — Developers of AI technology should be required to maintain accurate records as to (a) the types of content or materials used to create the training datasets ingested by AI systems; (b) whether the material is copyright protected, and if so, whether the use of this content is licensed and from whom; and (c) the assessment and audit processes conducted, including the benchmarks used to interrogate the AI algorithm or system as to its readiness for deployment. Where an AI technology company seeks to contract with the federal government to adopt its AI product or service, the OMB Draft Memorandum already provides the minimum information points the agency must secure from the provider.[3]

Access to this information is essential to the government's ability to conduct a meaningful AI impact assessment—for instance, to assess the existence of bias in the system due to the nature of the data sets on which it was trained, or to identify the risks inherent in the system because of possible gaps in the training data set, or of how the content used to create the training data sets was sourced. Disclosure to the government of the information regarding how and on what content the AI technology was trained should be an important element of the government's assessment. This information will also allow designated government agency personnel to understand how the AI-enabled services embedded into government processes arrive at specific conclusions or outputs, to evaluate whether the AI technology is functioning as intended,[4] and should additional risks be identified, to allow the agency to take the necessary corrective measures.[5]

The Question of Training Data — Questions regarding data quality are related to questions regarding intellectual property. AI systems developed or trained on data sets derived or created from authorized sources are more likely to yield reliable outputs than data sets obtained from illegal or pirated sources. It is essential to trustworthy and reliable AI that developers utilize high quality, curated and vetted content to train AI technologies.

The Gen AI systems that have gained notoriety over the last year were trained on large corpora of text and images — much of it copyright protected content largely scraped from the

[3] Section IV.A.3, Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum (OMB Draft Memorandum) at https://ai.gov/wp-content/uploads/2023/11/AI-in-Government-Memo-Public-Comment.pdf.
[4] Id., Section IV.A.1.
[5] Id., Section IV.A.2.

internet.[6] Unfortunately, little if any of this use appears to have been permissioned or compensated. Responsible and ethical AI innovation must respect the intellectual property rights of the creators and owners of the copyright protected materials (text, images, and other content) used to create the data sets on which AI systems are trained.

Further, as standard practice, suppliers of data for training AI systems should be required to affirm that they either own the data or have secured the appropriate license or authorization to permit an AI developer to use such data. Organizations may be in possession of copyrighted material and other intellectual property with the potential to be used as training data, but possession alone does not and should not imply such developers have the authority to provide access to this material for text-and-data mining or AI training purposes.

Regulation or policy regarding training data should be careful to define *"data"* to ensure that proprietary information or content created by or generated by the private sector is not inappropriately categorized as "public data" and made widely available in violation of legitimate rights.

Conclusion

Transparency—providing the government with sufficiently robust information regarding how and on what content an AI system was trained—promotes accountability and, in turn, allows the government to make well-informed decisions regarding the AI technologies and AI-enabled products and services it incorporates into federal government processes and services. Government should set the standard with respect to the minimum acceptable transparency requirements given that its use of AI technologies in government services will likely impact the public it serves.

AAP appreciates the opportunity to provide this input into the government's efforts to establish an appropriate framework for federal agency adoption of responsibly and ethically developed AI technologies. We would welcome the opportunity to partner with OMB and other stakeholders in the further development of this framework.

[6] Alex Reisner, These 183,000 Books are Fueling the Biggest Fight in Publishing and Tech, The Atlantic (Sep. 25, 2023), https://www.theatlantic.com/technology/archive/2023/09/books3-database-generative-ai-training-copyright-infringement/675363/

PUBLIC SUBMISSION

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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0174
Comment from Vicki Chadwell

Submitter Information

Name: Vicki Chadwell

General Comment

My life has become a source of data collection used for AI test programs then used further for criminal intent. AI uses any computer chip in any device to monitor and report my behavior. I never asked for AI to attach to any device that I own. When I try to take a step forward in my life AI finds a way to block it. AI tries to assume my identity. Businesses have to get authorization from AI before I can purchase their product or services. Usually I am denied. My movements are tracked: in my house and outside, on the internet, in vehicles, in stores, in restaurants, in medical facilities and in attorney offices. AI conducted price goughing at cash registers and then reduced product availability based on my shopping habits. When staff would be questioned, one employee referred to this as "selective pricing the same as airlines use to price tickets". AI documents who I communicate with and why. AI determines which person is in close proximity to me, then notifies that individual to say a specific hate phrases to me. Personal communications were distributed by AI to groups (ie neighbors, hate groups) for mass discussion with no regard for my safety or privacy. My personal health suffered from AI conducted germ warfare, AI misguided medical advice and AI cameras reporting misinformation from medical rooms. Germ warfare occurs when AI assigns a ill person to go where AI has located me in the store and cough on me. Personal belongings were at risk when AI opened my vehicle doors via RF towers to strangers or notified others when I was not at home. AI listed patterns from tracking my vehicle location have caused traffic accidents and near misses. My communications either in person or on the internet were altered by AI without my consent. My electrical grid was attacked by AI and appliances broken. Tests like sleep deprivation were run on me routinely by AI calculating when I went to sleep based on when electrical use decreased and causing a disruption during REM sleep. AI was used to inflict financial harm. AI voice collecting on calls make the call impossible to hear on personal calls. AI determines where in a call center my calls are routed and denied. AI documents my facial expressions in my vehicle, inside and outside my home and at stores. AI uses video and voice of me in fake harmful calls to loved ones and others. AI tries to assume my identity by taking over my social media accounts. AI would change my words I would try to post. Eventually AI completely blocked me from accessing my social media accounts. AI took over e-mail accounts blocking my access to them and controlling links to businesses using those e-mails. I would correct credit bureau details only to have AI change the information back. AI tracked my movements in my house to narrow down which spots I place my valuables. When I leave my house, AI provides this informaion to criminals for quick access. Neighbors immediately notify AI/other neighbors if I am outside

my house, for example mowing my yard. Then I am harrassed. If unable to determine my location in my home, AI dispatches aircraft to fly over. AI determines if I am allowed to purchase items on the internet when it removes buttons on my screen that are normally there to add items to cart, adds and deletes items from carts, repeats security questions too many times, blocks me from logging onto site, return information disappears, repeated error messages, etc. AI attacks VPNs I try to use. One VPN in last 60 days, told me the attack was so severe it could not protect my computer. AI had instructed the police to so many of my locations (ie camera monitored street intersections or grocery stores) that the police began expressing that I must be conducting criminal behavior. I do not commit crimes I just run errands. My vehicle is tracked with a tracking app that I did not install and by cameras at every intersection around my house. AI uses tracking devices on my vehicle to determine my presence at restaurants. This has made it too dangerous for me to eat at restaurants because of food tampering issues. AI gives a choice to restaurants either they give me extremely slow service or tamper with my food. AI notifies corruption when I am at banks. I have been followed inside and outside of banks and harrassed. AI would send frequent error codes to appliances and turn off other appliances for hours. HVAC system would wait for AI approval for a room to be a specific temperature. The end result from all this exposure to AI is mass trauma in my life.

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lpt-7cmf-qw34
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0175
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Federal Workers Alliance

General Comment

See attached file(s)

Attachments

FWA_Comments_OMB_2023_0020_05Dec2023

FEDERAL WORKERS ALLIANCE

COLLECTIVELY REPRESENTING OVER 550,000 FEDERAL AND POSTAL WORKERS

December 5, 2023

Submitted via regulations.gov

Ms. Clare Martorana
U.S. Federal Chief Information Officer
Office of Management and Budget
725 17th St. NW
Washington, DC 20503

Re: Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum, Docket ID: OMB-2023-0020

Dear Chief Information Officer Martorana:

The Federal Workers Alliance (FWA), which comprises the undersigned labor organizations and represents more than 550,000 federal workers across the United States, thanks you for the opportunity to comment on the Office of Management and Budget's (OMB) proposed memorandum *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence* (88 Fed. Reg 75625).

FWA applauds OMB for offering a proposed memorandum that includes guardrails and a minimum set of practices for protecting the public, providing accountability for Artificial Intelligence technologies and uses, and considers impacts on the federal workforce. The framework OMB proposes would create a regulatory model for the federal government based on "rights-impacting" and "safety-impacting" uses of AI. In our comments, we seek to address OMB's request for feedback and include ways to ensure federal workers, who often are the end-users and frontline workers on the work processes, infrastructure, and systems that agencies will consider applying AI to.

We also commend President Biden for issuing Biden's Executive Order 14110 on the *Safe, Secure and Trustworthy Development and Use of Artificial Intelligence,* which endeavors to promote responsible, safe, and secure AI innovation through a coordinated Federal Government-wide approach, while recommitting to the Biden-Harris Administration's commitment to worker empowerment and collective bargaining.[1] EO 14110 states, "all workers need a seat at the table, including through collective bargaining, to ensure that they benefit from these opportunities" and that "[i]t is important to manage the risks from the Federal Government's own use of AI and increase its internal capacity to regulate, govern, and support responsible use of AI to deliver better results for Americans." In support of these aims, we strongly believe that the proposed memorandum will benefit from including a firm commitment to protecting and highlighting the statutory right to bargain, permissive bargaining over technology, means, and methods of performing work, and establishing the principle that worker involvement, input, and validation from the union-represented federal workforce is in the public interest.

OMB's proposed memorandum for advancing responsible AI innovation should direct agencies to complete their obligation to bargain with federal employee unions (Response to Q2 and Q3). Additionally, the direction to agencies in EO 14003, *Protecting the Federal Workforce*, to bargain over permissive subjects, under U.S.C. § 7106(b)(1), should be referenced in OMB's proposed memorandum.[2] In Section 5(c)(v)(B), the proposed memorandum strongly encourages agencies to, "solicit feedback on an ongoing basis from affected groups, such as customers, Federal employee groups, and employees' union representatives, particularly after significant modifications to the AI or the conditions or context in which it is used." The proposed memorandum's encouragement falls short of Section 4 of EO 14003, which states that "[t]he head of each agency subject to the provisions of chapter 71 of title 5, United States Code, shall elect to negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1) and shall instruct subordinate officials to do the same." We ask OMB to correct the omission of agencies' obligation to bargain and refer agencies to the current Presidential directive to agencies on electing to bargain over permissive subjects.

Chief AI Officers' roles and responsibilities must, at minimum, include supporting a collaborative labor-management approach and pre-decisional involvement to deliver innovative and responsible AI uses that support the agency mission (Response to Q1, Q2,

[1] Executive Order No. 14110 (Oct. 23, 2023)
[2] Executive Order No. 14003 (Jan 27, 2021). For guidance on implementation of this Executive Order, see Guidance for Implementation of Executive Order 14003 - Protecting the Federal Workforce (Mar 5, 2021)

and Q3). Ideally, under Section 3(b)(ii), Coordinating Agency Use of AI, the proposed memorandum should task Chief AI Officers (CAIOs) with coordinating with relevant labor relations officials to partner with federal employee unions to identify safety- and right-impacting risks not included in Section 5(b), barriers to responsible use of AI, worker impacts, and necessary training and upskilling. Partnership also aligns with the EO 14025, *Executive Order on Worker Organizing and Empowerment*, and White House Task Force on Worker Organizing and Empowerment's report which includes a recommendation to reinstitute labor-management forums and pre-decisional involvement.[3] A collaborative labor-management approach supports the successful use of AI in government, fosters public trust in AI, and strengthens agencies' use of responsible AI for the public interest.

OMB should prohibit the use of AI for "inherently governmental duties" and prohibit the use of AI to perform the work of federal employees who are excepted from furlough during a lapse in appropriations (Response to Q6, Q3, and Q4). Before the use of AI, agencies' rights- and safety-impacting minimum practices should assess whether AI will transfer, delegate, or eliminate any inherently governmental duties or result in the reduction of federal employees performing inherently governmental activities. If the assessment is found to impact inherently governmental functions, activities, and duties, agencies should be prohibited for those purposes. Through this recommendation, we ask OMB to align this proposed memorandum with the Office of Federal Procurement Policy's (OFPP) Policy Letter 11-01, *Performance of Inherently Governmental and Critical Functions* and the Federal Activities Inventory Reform Act of 1998, as well as other federal statutes that define additional "inherently governmental" functions.[4] We also ask OMB to extend the application of this prohibited use of AI to work performed by federal employees who are excepted from furlough if federal agencies experience a lapse in appropriations. OFPP Policy Letter 11-01 provides a clear rationale and an established delineation of functions that can be commercial and functions that must be performed by government personnel.

Agency AI governance bodies and processes must include unions and allow union input to meaningfully inform agency-specific risk management strategies (Response to Q3 and Q4). Agencies' AI governance and efforts to remove barriers to the responsible use of AI stand to

[3] Executive Order No. 14025 (Apr. 26, 2021); White House Task Force on Worker Organizing and Empowerment, *Report to the President* (Feb. 2022), see pp. 19 on recommendation to "Reinstitute Labor Management Forums."

[4] Office of Federal Procurement Policy (OMB), Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions (Sept. 12, 2011); Federal Activities Inventory Reform Act of 1998, Pub. L. No. 105-270 (Oct. 19, 1998); for examples of functions and activities declared inherently governmental by statute, see 39 USC § 2805 and 33 U.S. Code § 2321

benefit by engaging with union-represented employees and union representatives to recognize problems upstream, improve design, development, implementation, and appropriate workforce training on AI tools. As the end-users of technologies that federal agencies implement, union-represented federal employees are ideally situated to share on-the-ground perspectives and experiential knowledge of shortcomings of recent and current technology modernization efforts. Union involvement in AI governance bodies would provide the frontline employees' perspective on the utility and limitations of new tools to improve efficiency and overcome inefficiency, what compliance management tools are needed and where expertise is required to provide accountable AI use, where training and upskilling are necessary for the workforce to harness technology-driven advancements in the work process, and ways to achieve more effective and efficient implementation. Significantly, the union-represented workforce has a perspective on risks to safety and rights that would otherwise not be available to senior leadership.

The proposed guidance should also require agencies to formally engage with federal employee unions to ensure AI vendor contracts do not result in vendor lock-in or agency dependence on proprietary services or products, diminish the ability of an agency or its employees to provide oversight of AI, circumvent established federal procurement policies and practices, or outsource and privatize inherently governmental functions.

Agencies should disclose and report to OMB any non-AI technologies that are in use or being considered that are expected to include AI in future iterations (**Response to Q6).**
Agencies' minimal practice of "ongoing monitoring" and establishment of "thresholds for periodic human review" in Section 5(c)(iv)(D) are important and welcome. We ask for additional clarification in the proposed memorandum that agencies need to account for the use of Iterative and incremental development of technologies, including technologies already deployed at agencies, that do not include an AI component in early or current iterations, but are intended to or are likely to include AI in future iterations.

Add "compliance finding, enforcement, and safety validation of systems, processes, and regulations related to transportation systems, occupational safety, environmental safety mines, and industrial systems" to Section 5(b)(i), "Purposes That Are Presumed to Be Safety-Impacting" (Response to Q5).
For AI use cases that impact compliance finding, enforcement, or the monitoring of safety-impacting regulations, minimum practices should apply.

We thank OMB for considering our comments and look forward to the Administration and agencies' continued engagement and partnership with federal employee unions on AI and digital technologies to make sure agencies meet their responsibilities to support productive labor-management relations, agency mission, and the public interest. We welcome and encourage OMB to contact the Federal Workers Alliance in response to our comments and to advance a responsible and innovative Federal AI governance framework that supports the federal workforce, aligns with the Biden-Harris Administration's commitments to worker organizing and empowerment, to make the federal government a model employer, and to strengthening federal labor-management relations to deliver innovative, efficient, and quality government services to all Americans.

Sincerely,

National Association of Agriculture Employees (NAAE)

National Federation of Federal Employees (NFFE)

International Federation of Professional and Technical Engineers (IFPTE)

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lpt-7m5l-3w2s
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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0176
Comment on OMB-2023-0020-0001

Submitter Information

Organization: UnidosUS

General Comment

UnidosUS proposes a vision for AI that reflects shared values, honors a wide range of voices in the process, and includes substantial investment in the shared benefits of AI. Our three main points—Values, Voice, and Investment—are pillars of an interrelated approach to ethical governance. Establishing strong democratic guardrails provides a foundation to realize AI's benefits responsibly. Ensuring concrete means of accountability for impacted communities can drive socially productive innovation, channeling competition to keep human impacts at the forefront of tech development. And achieving meaningful participation requires investment in the capacity of impacted communities and their needs.

Attachments

UnidosUS OMB AI Guidance Comment Final

UNIDOSUS

STRONGER COMMUNITIES. STRONGER AMERICA.

December 5, 2023

Clare Martorana, U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management and Budget
725 17th Street, N.W., Suite 50001
Washington, D.C. 20503

Submitted electronically via www.regulations.gov

Re: Request for Public Comment on Draft Memorandum—Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI); 2023-24269

Dear Ms. Martorana and to whom it may concern,

On behalf of UnidosUS, we respectfully submit the comments below in response to the Office of Management and Budget's (OMB) Request for Comments on *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum* (hereinafter, "Memo," "OMB Memo," or "draft policy").

UnidosUS is a nonprofit, nonpartisan organization that serves as the nation's largest Hispanic civil rights and advocacy organization. Since 1968, we have challenged the social, economic, and political barriers that affect Latinos through our unique combination of expert research, advocacy, programs, and an Affiliate Network[1] of nearly 300 community-based organizations across the United States and Puerto Rico. Effective government (including the administration and equitable distribution of goods and services) is vital to the socio-economic advancement of Latinos, who face multiple barriers to opportunity. In sum, this issue is central to our ability to achieve our mission.

As we described at the first AI Insight Forum in September, while AI systems hold enormous promise, they also pose potential threats to civil rights and our democracy absent ethical, constitutionally designed governance. Years of experience with automated and algorithmic decision-making in domains such as credit, housing, and employment demonstrate that unaccountable and opaque uses of technologies can hide bias from view. Because AI capabilities and uses are racing ahead, we require a new social compact between technology and democracy.

UnidosUS proposes a vision for AI that reflects shared **values**, honors a wide range of **voices** in the process, and includes substantial **investment** in the shared benefits of AI. Our three main points—***Values, Voice, and Investment***—are pillars of an interrelated approach to ethical governance. Establishing strong democratic guardrails provides a foundation to realize AI's benefits responsibly. Ensuring concrete means of accountability for impacted communities can drive socially productive innovation, channeling competition to keep human impacts at the forefront of tech development. And

[1] UnidosUS Affiliate Network, https://www.unidosus.org/about/affiliates/.

achieving meaningful participation requires investment in the capacity of impacted communities and their needs.

In keeping with this framework, below we address the following topics:

- ***The Promise and Perils of AI for Latinos and Communities of Color***
    - *The OMB Memo is a Welcome Step, Yet More Clarity Is Needed to Ensure that Agencies Fully Address Challenges and Gaps in AI Governance*
- ***First Pillar: Values—The Right Decision Matrix Would Fully Acknowledge the Current Limitations of AI and Algorithmic Decisions and Integrate Values with Oversight***
    - *Exempting AI Uses at the Heart of Constitutional Governance Undermines Democratic Norms and Undermine Incentives to Develop Technologies that Are Rights- and Privacy-Enhancing*
- ***Second Pillar: Voice—Impacted Communities Deserve a Powerful Seat at the Table***
    - *Seizing the Opportunity to Democratize AI Governance: An Interactive Model*
        - *A Public Dashboard Would Facilitate Timely Monitoring of AI Progress, Impacts, and Risks*
        - *An Archive of Model Cards Would Support Understanding of Shifts in Model Performance*
        - *Creation of AI Ethics and Impacts Advisory Committees Would Inform and Help Coordinate Agency Efforts*
        - *Inclusive Red Teaming Can Surface Assumptions and Overlooked Risks and Harms*
        - *Leveraging Impact Assessments for Empirical Evidence to Inform Metrics*
    - *Specific Comments Highlight a Need for Additional Direction in Some Areas*
- ***Third Pillar: Investment—Growing an Ecosystem for Equitable Participation, Public Trust, and Innovation Insights***
- ***Conclusion: From Principles to Implementation: Creating an Ethical AI Ecosystem***

The Promise and Perils of AI for Latinos and Communities of Color

Inclusive, ethical AI systems could expand opportunities for Latinos in areas like education, language access, and employment. Personalized learning software, translation tools that break down language barriers, and job matching platforms that support diverse candidates are concrete examples of how AI could support disadvantaged groups and build skills.

Yet the millions of Latinos we represent face multiple risks from the proliferation of automated decision-making and AI systems as well as exclusion from its promise. Gaps in digital access and tech education exclude many Latinos from emerging economic opportunities in technology. Some 35% of Latinos lack home broadband, limiting the development of skills needed for upwardly mobile tech jobs—roles in which Latinos are already severely underrepresented. Latinos are only 8% of the STEM workforce, yet they will be almost 78% of all new workers by 2030.

The evidence on harms is clear. Opaque automated decision models used in high-stakes decisions about matters of criminal justice, lending, and benefits, can entrench historical biases and discrimination, yet both transparency and recourse are limited or nonexistent. Lending and credit access algorithmic discrimination persists despite legal authorities that require lenders to use the "least discriminatory alternative" and bar discrimination. As we saw with pulse oximeters during the pandemic, medical

algorithms and design can also perpetuate health disparities if trained on unrepresentative datasets. To make matters worse, electoral misinformation targeting Latinos mischaracterizes the positions of political parties and candidates, and misinformation in Spanish is permitted to stay online far more than similar statements in English.

Of course, administration of public functions and government programs has been characterized by a long legacy of racial and social inequality. Under the Executive Order on racial equity, agencies were directed by the Biden-Harris Administration to attend to this history. Yet it is not simple to address, even for pandemic-era social and economic supports. Working closely with the Administration, we learned that it required persistence and intention to close gaps in the Child Tax Credit or COVID vaccination rates.

Integration of AI systems into government could eliminate these types of barriers or it could create new, and potentially even more problematic, issues. Even in areas of strength for natural language AI systems, such as translation, because of the digital divide, much of the Internet (and thus, training data for models) is in English, and language barriers and differences in the quality of translations, may persist.

Latinos and other communities of color are also subjected to expansive governmental surveillance technologies. Predictive policing tools trained on flawed crime statistics have been found to disproportionately target low-income neighborhoods of color by falsely correlating race with criminality. Similarly, sentencing algorithms drawing on racially skewed conviction data likewise entrench harsher outcomes for minorities. While constitutional principles like due process, equal protection, and privacy notionally underpin our laws, outdated regulations are failing, even today, to provide adequate accountability for rights-infringing uses of AI and decision models.

Critical tools to alleviate worker displacement, involve impacted communities in decisions on technology, and meaningfully advance equity are underdeveloped. Given its reach and power, and the rush to market powerful products, to deploy AI responsibly and ethically will require new and innovative forms of governance. Systems should anticipate potential harms and include mechanisms for accountability to people they impact—including workers, creators, communities of color and lower-income people, and others left behind and left out by traditional research and the digital divide (and who are thus invisible to the models). Too often, the bias or flaws in models are understood too late—so we must get better at both predicting and preventing foreseeable harms by design, and impacted groups are ideally positioned to tell technologists what they may not know they do not know.

With enough intention, we can choose to govern AI and algorithms in ways that align with our values. Ultimately, the choice that is often posed, for example, between data security and privacy, on the one hand, and effective law enforcement, on the other, is a false one—good privacy by design can make both a reality once appropriate incentives and protections are in place. And the same is true for other aspects of AI systems that undermine fairness and shared values—we can and must ensure that standards for new technology that are fair, transparent, accountable, and explainable are developed with input from impacted communities.

The OMB Memo is a Welcome Step, Yet More Clarity Is Needed to Ensure that Agencies Fully Address Challenges and Gaps in AI Governance

The OMB Memo usefully builds on the ground-breaking and wide-ranging AI Executive Order (EO) work by the National Institute of Standards and Technology (NIST), including its seminal Risk Management Framework (RMF), the AI Bill of Rights from the White House, Office of Science and Technology Policy (OSTP), National AI Advisory Committee (NAAIC), and other Administration and agency policy and legal positions on technology generally and AI and algorithms more specifically.

We deeply appreciate the leadership from the Biden-Harris Administration on AI policy for the federal government and procurement. Both the OMB Memo and Executive Order acknowledge the risks of bias, unfairness, and use cases such as predictive policing methods, identifying them correctly as rights-implicating. Both also call for consultation with impacted communities.

In our view, the draft policy would be improved by the addition of instruction and detail on requirements for mechanisms to facilitate accountability, participation, and inclusive evaluations by impacted groups. For this reason, our comments propose to tighten the connections between these concepts, outlining ways in which AI technologies should be evaluated to standardize approaches. We also describe how agencies can embrace roles for impacted communities in policy formation and generate evidence on empirical and real-world impacts.

The National Institute of Standards and Technology (NIST) is assigned several important responsibilities by the EO, including creation of the AI Safety Institute Consortium, which will play a central role in developing tools to measure and improve AI safety and trustworthiness. The EO provides several other directives for NIST, including, among many other duties to:

- Develop a companion resource to the AI Risk Management Framework (AI RMF) focused on generative AI;
- Develop guidance on authenticating content created by humans and watermarking AI-generated content;
- Create guidelines for agencies to evaluate the efficacy of differential-privacy-guarantee protections, including for AI;
- Launch a new initiative to create guidance and benchmarks for evaluating and auditing AI capabilities, with a focus on capabilities that could cause harm; and
- Establish guidelines and [] to enable developers of generative AI, especially dual-use foundation models, to conduct AI red-teaming tests for deployment of safe, secure, and trustworthy systems.

For each of these responsibilities, NIST should include structured and intentional forms of engagements with impacted communities as a proof-of-concept for how AI standards can benefit from diverse input at each stage of the process. Similarly, OMB and federal agencies should develop formal processes to inform and engage impacted communities, improving the standards while building technical capacity and expertise for civil society and impacted groups. These formalized roles and processes should continue even after agencies' initial responsibilities under the EO are complete.

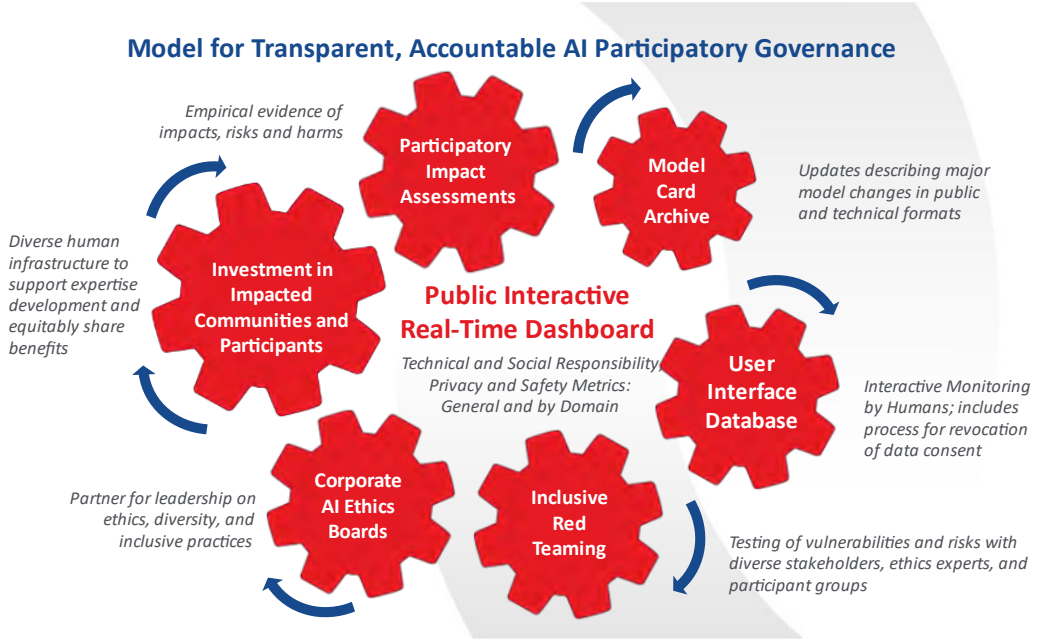
Creating a system of democratized governance to shape standards and systems is also an imperative to earn public trust. An insightful new paper notes that participatory design methods are increasingly at the forefront of AI research and exploration:

> Community-based participatory design is an approach to designing computing technologies with and for different publics, with the aim of forming more equitable relationships between algorithmic systems and often-marginalized publics. [] Computing systems are rarely developed entirely by the publics they serve; and in this way, participatory design is a situated practice of future-making, through which heterogeneous communities collaboratively imagine new sociotechnical futures. While participatory design has a long tradition in shaping the design of computing systems, it has more recently become a means to co-create artificial intelligence (AI) transparency and accountability artifacts, such as model cards, design workbooks, and user agreements. [*Citations omitted.*]

The authors envision five dimensions for the participatory design of user agreements. Applying a comparable vision to the present context, these could be translated as a call for:

1) participatory development of performance standards for models;
2) structures within model designs that anticipate and defend against potential harms;
3) opportunities to provide and revoke informed consent;
4) complaint mechanisms for harms when they occur and a means of redress;
5) disclosures and labeling of limitations and performance; and
6) external information gathering about potential and actual harms to drive iteration on standards.

As described herein, a regulatory ecosystem that fully connects principles in the OMB Memo to participatory design mechanisms that can be informed, iterated upon, and enforced by impacted communities is an essential next step in a democratic vision for AI governance. OMB and NIST can, as appropriate, guide creation of this ecosystem. The model's "gears" are intended to work in conjunction with one another and most (not all) are discussed in detail below.



First Pillar: Values—The Right Decision Matrix Would Fully Acknowledge the Current Limitations of AI and Algorithmic Decisions and Integrate Values with Oversight

The OMB Memo makes an essential contribution in that it will create leadership and structure at the agency level for oversight of AI uses. It designates an official leader and internal committee responsible for cross-coordination and agency leadership on AI, classifies safety- and rights- implicating uses, and requires steps to mitigate these potential risks and harms. To date, both narrow and general model AI adoption by agencies, including longstanding uses of privacy-intrusive data collection and reliance on automated decision-making algorithms for benefits and eligibility determinations, has been *ad hoc* and more-or-less ungoverned by shared principles or safeguards.

But a decision matrix for government use of AI cannot begin with the assumption that automation or other AI capabilities are necessary, fair or relevant. OMB should require agencies to grapple with, rather than gloss over, the serious question of whether an AI system is the best way to accomplish a particular federal function, when the tools may not be a good substitute for decision-making that currently resides with public officials.

There is a very human temptation to be attracted to new tools, but to set aside their limitations, ignore their under-developed state for specific uses, or assume humans will understand how to best apply them. The OMB Memo's definitions section usefully describes this as "automation bias: [t]he propensity for humans to inordinately favor suggestions from automated decision-making systems and to ignore or fail to seek out contradictory information made without automation."

A highly complex system, like AI, that confidently presents analytics as though they are based in fact and embedded with shared values—when they may not be at all—poses a sharp risk for human overestimation and overreliance due to this bias and the false (or real but problematic) efficiencies AI may offer. Given the novelty of the most advanced tools and the history of problematic applications of existing decision-making models, government agencies should demonstrate their safety and fidelity to NIST standards as a first step in governance.

Under the OMB guidance, agency leadership wields considerable discretion in determining what risks matter and how they will be mitigated, and more structure and guidance on appropriate responses to risks and mitigations will certainly be needed. The Memo's lack of clarity on these points raises the possibility that problems will not be acknowledged or adequately addressed.

Moving quickly to achieve transparency, accountability, identify limitations, and map use cases across the government is an excellent idea. But pushing agencies to rapidly integrate poorly tested and evaluated tools for more uses of AI in government, given the need for basic research on transparency, accountability, and other standards, as well as for a delineated process for public input and specific requirements for engagement with impacted communities, is not. We concur with the comments of The Leadership Conference on Civil Rights that "only AI that is proven to be equitable should be developed, acquired, or used," and would urge that forbearance to be exercised across all of the factors identified in the NIST RMF.

Instead of caution, however, throughout the OMB Memo, the agencies are generally encouraged to adopt new AI systems and build human resources to support it, in subtle and not-so-subtle ways. For just a few examples, p. 8 directs that "[a]gencies must improve their ability to use AI in ways that benefit

the public and increase mission effectiveness," while recognizing its limitations. On p. 9, the text notes that "[e]mbracing innovation requires removing unnecessary and unhelpful barriers to the use of AI."

We are concerned that the breathlessness of the conversation around AI and U.S. competitiveness will encourage agency leadership to extend or deepen uses of AI regardless of the substantial—and in some cases—insurmountable problems with specific uses by governments. As Elham Tabassi, the head of NIST's Trustworthy and Responsible AI Program, noted in her remarks at the recent NIST workshop, the measurement science for AI tools is very underdeveloped at the moment. The NIST RMF is also clear that, with regard to AI's risks and capacities, we are in an evolving situation:

> While there are myriad standards and best practices to help organizations mitigate the risks of traditional software or information-based systems, the risks posed by AI systems are in many ways unique. [] AI systems, for example, may be trained on data that can change over time, sometimes significantly and unexpectedly, affecting system functionality and trustworthiness in ways that are hard to understand. AI systems and the contexts in which they are deployed are frequently complex, making it difficult to detect and respond to failures when they occur. AI systems are inherently sociotechnical in nature, meaning they are influenced by societal dynamics and human behavior. AI risks – and benefits – can emerge from the interplay of technical aspects combined with societal factors related to how a system is used, its interactions with other AI systems, who operates it, and the social context in which it is deployed. These risks make AI a uniquely challenging technology to deploy and utilize both for organizations and within society. Without proper controls, AI systems can amplify, perpetuate, or exacerbate inequitable or undesirable outcomes for individuals and communities. With proper controls, AI systems can mitigate and manage inequitable outcomes.

The task of the OMB Memo for the agencies is to establish "proper controls" over government uses of AI for current and near-future models and uses. We believe the Memo is a solid start, but that its approach is incomplete or lacks important clarity in a number of areas that could benefit from substantially more operational structure for agencies, and that OMB should more fully leverage the work of NIST.

For example, the agencies' assignment under the Memo to achieve "maturity" for AI systems begs the question of how—and who—defines that success and on what grounds. Agencies will need constructive guidance on common technical issues arising from current uses and mitigations for AI systems—and to be informed about helpful developments and technical and sociotechnical challenges that arise in particular contexts and use cases. A robust cross-government conversation and exchange of information will be essential as officials seek to document and more fully understand and communicate about the current state-of-play and its challenges.

Specifically, additional clarity and detailed instruction on how to align success for the "maturity" of AI systems with the requirements and standards from the NIST RMF, alongside new requirements for consultation with impacted communities, as we outline below, would provide a much more developed set of parameters for "success" and could help to generate much more transparent and aligned processes across the government.

In addition, the agencies' Use Inventories and proposed risk management approaches could usefully be organized according to the "AI Risks and Trustworthiness" issues described by NIST, which highlight that AI systems should meet baselines for each of the following factors: 1) Valid and Reliable; 2) Safe; 3)

Secure and Resilient; 4) Accountable and Transparent; 5) Explainable and Interpretable; 6) Privacy-Enhanced; and 7) Fair—with Harmful Bias Managed.

Agencies should evaluate current uses in light of each of these values across their entire portfolio of AI uses, in consultation with NIST and other experts familiar with the evolving science for each of these measures, paying concentrated attention, as the OMB Memo indicates, to risks and safety- and rights-impacting uses. In mapping current uses of AI and algorithmic tools, agencies should also:

- detail and explain the technological limitations of a tool given its use cases and relevant human factors,
- identify the adequacy of any current evaluations of the training data, model design, and impacts, and any mitigations for known and potential risks,
- describe the extent of involvement or consultation with impacted communities (more on this below) on design, risks, impacts, or other aspects of the model or system,
- explain the adequacy and conclusions of external audits and impact assessments that are underway or have been done, and
- fully characterize the socio-technical context at the agency related to human interactions with the technology, evidence on experiences of internal and external users, and other factors.

There are sound reasons for the agencies to take a far closer look at current uses and the lessons those offer before rushing to adopt new ones. Successful systems are more difficult than appears at first glance to build and execute. For example, take the RMF's assignment to make systems, "Fair—with Bias Managed." Goals like achieving a "fair" model, which seems simple enough, can, for technical reasons, sometimes be in tension with the accuracy of an AI model, as Brian Christian explains in his excellent book, The Alignment Problem, in which he provides specific examples of researchers' efforts to grapple with algorithmic bias in parole decision-making.

Perhaps it is for this reason, among others, that NIST's RMF notes that fairness can be a contested, situational, and difficult factor to satisfy—yet fairness along multiple dimensions is an absolutely critical factor to get right in government decisions, both legally and morally. Such decisions will not, therefore, be a function of math alone—human judgment and democratic input, as well as transparency about the tradeoffs to the extent they exist, will be necessary.

Christian also highlights a problematic but intrinsic feature of most AI models and the data sets on which they are trained. Because minorities are, by definition, less represented in data sets, the AI model has less information about these group that it does about a given majority. Further, AI models can draw subtle inferences from data in myriad ways that the how things are now is the way *they should be* in the future—in effect, mistaking what is distributionally true for what is morally or ethically true about human difference and potential.

AI models can also miss intangible considerations essential to human values and decision-making, including in fields like medical ethics that have developed for decades. As Mildred Cho, professor of pediatrics and associate director of the Stanford Center for Biomedical Ethics, recently observed, AI "[d]evelopers are often not from a medical background and haven't spent years thinking about this moral framework—how things like respect and justice and personal principles spill over into medicine."

And there are troubling signs that racial and other forms of bias in multi-modal models such as image generators remain largely unaddressed. Even some of the tools that in use today have merely been

"fixed" at the surface level—by requiring systems to automatically rewrite prompts to create less racist results for searches like "CEO." How models draw inferences from data, and their deep indebtedness to subtle cues, can pose an inherent problem for AI systems if left unacknowledged, untested, and unaddressed.

Such challenges post specific problems in the context of government programs. For example, facial recognition systems are notoriously bad at recognizing people from communities of color, as UnidosUS staff learned first-hand through our efforts to assist the federal government to enroll taxpayers in Puerto Rico who had become newly eligible for federal Child Tax Credits. Because enrollees needed identity verification through digital systems that often failed to recognize their faces on standard, Puerto Rican government ID cards, this frequently delayed or complicated their receipt of benefits.

Sometimes failure modes are more obscure. Models have been caught, after the fact, gathering clues on factors related to race or gender in hiring decisions, for example, from word choice or specific activities listed on a resume, even when information on race and gender has been omitted, leading companies to discard the models as too inherently biased to be used. Relatively simple automated decision-making models have also been shown to be deeply biased and to lack predictive value in areas such as mortgage lending, given the number of factors that function as proxies for race, even when protected class is omitted. Moreover, the black box nature of many models means that, without specific steps, including interrogation of the model for bias, impacts assessments and other forms of actual empirical evaluation, subtle forms of bias may remain undetected.

In areas like health care, these differences can be deadly if unnoticed. For example, as an article on the underdeveloped science of data quality for AI in *Stanford Medicine* notes:

> Scientists at Duke University Hospital, for instance, designed an AI program to identify children at risk of sepsis, a dangerous response to an infection. But the program took longer to flag Latino kids than white kids, possibly delaying the identification and treatment of Latino children with sepsis. The bias, it turned out, existed because doctors themselves took longer to diagnose sepsis in Latino kids. This taught the AI program that these children might develop sepsis more slowly or less often than white children.

As it turned out, three years into the effort, researchers learned that doctors took longer to diagnose the sepsis in Latino children, possibly because, among other reasons, Latino families were awaiting the arrival of hospital translators. Without external reviewers to gut-check and validate the conditions on the ground that produce data, many AI builders, or users, may not know what they do not know. A September 2020 report on uses of AI in sepsis monitoring programs, *Repairing Innovation*, notes that:

> …all too often, potential solutions remain just that—potential solutions, which may work in theory, given pre-set conditions. Rarely are these solutions tested, verified, or even used "in the wild." For this reason, we need fewer studies proposing how AI technologies could be used to address existing problems in the abstract, and more studies exploring how and in what ways could AI technologies be integrated into existing social processes such that they actually address those problems.

Just because something can be done, does not begin to answer the question of whether it should be done—or even whether it can be done consistent with our values, ethics, practical and societal considerations. The task for the agencies should first be to thoroughly inventory uses (as requested), to

create substantial new guardrails around *current* uses of AI tools in light of the new NIST RMF, and to publicly identify the successes, caveats, criticisms from stakeholders, and shortcomings of these uses as described above.

To the extent that uses of AI will *improve* productivity or performance of their goals and mission relative to current systems or possible alternatives, it could be adopted, of course, but—and this is an essential caveat—only if its risks can be adequately mitigated and the limitations of its uses mapped onto the needs of government agencies for fair, explainable, accountable, safe, and transparent systems. In many areas, these considerations remain an open question—and our governance must acknowledge that this is the case.

Exempting AI Uses at the Heart of Constitutional Governance Undermines Democratic Norms and Undermine Incentives to Develop Technologies that Are Rights- and Privacy-Enhancing

Similarly, perceived efficiencies from current and planned uses in criminal justice, immigration enforcement and related uses, and in public benefits, will likely lead agencies to continue to gloss over deeply concerning data security, stewardship, privacy, and civil liberties concerns. Dragnet forms of surveillance by the Department of Homeland Security (DHS) and law enforcement infringe on the rights of millions. Consider that:

- A September 2023 GAO report found that law enforcement at DHS and the Department of Justice (DOJ) lacked basic protocols or training around the use of facial recognition technologies, In response, DHS Sec. Mayorkas published a memo articulating a policy commitment to constitutional principles.
- Immigration and Customs Enforcement (ICE) used facial recognition technology to search the driver's license photographs of around 1 in 3 (32%) of all adults in the U.S. The agency has access to the driver's license data of 3 in 4 (74%) adults and tracks the movements of cars in cities home to nearly 3 in 4 (70%) adults. When 3 in 4 (74%) adults in the U.S. connected the gas, electricity, phone, or internet in a new home, ICE was able to automatically learn their new address.
- DHS has expanded use of facial recognition technology on travelers, including U.S. citizens, at airports and land borders without obtaining consent.
- A report by the Department of Homeland Security Office of the Inspector General (DHS OIG) revealed that Customs and Border Protection (CBP), ICE, and the Secret Service purchased and used commercial geolocation data in violation of their privacy policies and that DHS components have failed to develop policies governing the purchase and use of location data. According to DHS OIG these failures "occurred because the components did not have sufficient internal controls to ensure compliance with DHS privacy policies, and because the DHS Privacy Office did not follow or enforce its own privacy policies." The report recommended that CBP and ICE discontinue the use of commercial geolocation until they have developed and implemented sufficient policies, including conducting a privacy impact assessment. CBP promised Sen. Ron Wyden to stop purchasing location data by the end of Sept 2023.
- In July 2022, the American Civil Liberties Union (ACLU) published thousands of pages of previously unreleased records about how Customs and Border Protection, ICE, and other parts of the Department of Homeland Security are buying access to and using vast volumes of people's cell phone location information extracted from smartphone apps.

As this makes clear, use by governments of AI tools even in cases involving core matters of civil liberties, extremely vulnerable populations and privacy rights for immigrants and U.S. citizens, as well as legal due process and constitutional considerations, does not inspire confidence that the right guardrails are in place to dramatically expand uses of AI consistent with democratic principles, fairness, and other values.

Although the NIST RMF framework calls for AI to be "privacy-enhancing," OMB's approach fails to ensure that this will matter where it is needed most. Instead, the Memo's proposed waivers are likely to allow some of the most problematic and rights-infringing deployments of AI to continue to avoid even basic forms of public accountability. For example, as a law enforcement agency combining criminal and civil responsibilities, DHS or its sub-agencies may claim that law enforcement and national security exemptions apply or that an activity is "mission critical."

Hard cases cannot be the exception to our policies without undermining our fidelity to constitutional principles that rest at the core of our global leadership on personal freedoms and as a beacon of democracy. Instead, we need tools that allow fidelity to longstanding values and permit effective law enforcement. Therefore, OMB should develop a more tailored approach to these highly sensitive use cases and ensure that DHS is not permitted to side-step the implications of its many safety- or rights-impacting uses. Crucially, such waivers erode any incentive to do the hard work of aligning the design of systems with rights—but the failure to use privacy by design principles should not be characterized as a function of the technology when it is, instead, a choice to sanction unaccountable, untransparent and dangerous practices.

At the same time, we must immediately shut down and replace technologies and data that can be marshalled for authoritarian ends in the future. Given the need to future-proof government from the specter of abuse, OMB and the White House must lead a process of taking full account of current practices and fix them in short order. At a minimum, the OMB should create additional clarity regarding when agencies can seek waivers or exceptions from having to meet risk management requirements. We agree with the Leadership Conference comments that the following is needed:

- When a waiver or exception is granted, there should be a mechanism to seek reconsideration of such a decision.
- The Memo should be clear that waivers and exceptions sunset annually and should be reevaluated in light of these documented harms and risks.
- The Memo should require that agencies consider less rights-impacting alternatives before they are eligible for consideration for a waiver or exception.
- The Memo should require that agencies publicly report seeking waivers or exceptions, and the grounds for this request and its resolution and timing be reported.

In lieu of providing waivers, the U.S. should instead follow the lead of European governments in requiring individualized consent to the use of data without a court order. We should also require privacy by design principles that are compatible with effectiveness, such as strict data minimization, access controls, federated learning, and other privacy-enhancing techniques for government AI uses. Collection by agencies of biometric data, including DNA, should also receive specific scrutiny given its power in the hands of future Administrations that may lack any semblance of democratic restraints.

In keeping with the above, we fully support the Memo's provisions on procurement policies that underscore that AI contracts should align with national values and law, including "those addressing privacy, confidentiality, copyright, human and civil rights, and civil liberties." Since waivers for law

enforcement or mission-critical functions could undermine progress in assuring that federal tax dollars are not spent on systems incompatible with this requirement, consistency across federal procurement policy provides another reason to substantially narrow or eliminate waivers.

Second Pillar: Voice—Impacted Communities Deserve a Powerful Seat at the Table

As explained above, to deploy AI responsibly and ethically, address its false confidence about incomplete results, and incorporate nuanced understanding of its risks will require new and inclusive forms of governance. As we suggest above, systems should ensure they are accountable to the people they impact the most—including workers, creators, communities of color and lower-income people, and others who are often left behind and left out—for example, by traditional research methods (such as in health care), the digital divide (rendering communities invisible to AI models), or shifts in the nature and demands of educational preparation or work. For too many, the last decades of technological innovation failed to allow them to reap the benefits of a global economy even while its hyper-powered gains for the few.

Developing best practices could synergistically advance risk management, resilience, accessibility, privacy, ethics, and security. A prominent critique of technological advances has correctly been that the sector all too often celebrates narrow technical advances while ignoring social, political, health, and economic impacts. For AI, given its pace and reach, we simply must do better. Embracing democratic norms for governance can steer transformative technologies to benefit more people, more powerfully, lending them earned legitimacy at a moment of threat and disruption.

Seizing the Opportunity to Democratize AI Governance: An Interactive Model

Mechanisms like a transparent public dashboard, informed by technical metrics as well as real-world evidence gathering and input mechanisms, inclusive red teaming, impact assessments, and investment would be sound additions to the vision. Creating participatory public dashboards and the other key features of participatory methods outlined below would help to enable organic oversight at scale as AI capabilities advance.

The proposed transparency frameworks could be integrated with and would reinforce key goals within NIST's RMF. As the federal agency with expertise in creating technology standards through an open and collaborative process, NIST is well positioned to lead development of transparency benchmarks that cover both the technical dimensions and societal impacts of AI systems and is already doing so under the EO in consultation with relevant agencies and stakeholders.

The inclusive evaluation ecosystem we envision would underpin accountable, transparent, evidence-based AI governance while centering participatory design and democratic process. As explained below, OMB should:

- Work with NIST to develop **transparent public dashboards** on key performance indicators for models, including:
    - **Develop and iterate a real-time public dashboard** with feedback-informed benchmarks covering a wide range of impacts, as well as technical and societal metrics.
        - Both standards and benchmarks should be developed in consultation with impacted communities and build on existing AI alignment toolkits while expanding monitoring into crucial new dimensions of social impacts.

        - The model's scores should reflect both algorithmic real-time evaluations of the metrics and human input (from an interactive user interface that collects data and facilitates ongoing dialogue about experiences—both positive and negative—between model users and deployers and provides a record of efforts to resolve pending issues).
        - A general set of dashboard metrics applicable to most models can be accompanied by tailored metrics designed to be appropriate for specific rights- and safety-impacting use cases.
        - Metrics should be regularly updated and evaluated for fit-to-purpose based on the feedback, with processes to update parameters as technology and measurement science evolve and as public understanding and participation increase.
    - Create an archive of model cards in both technical and accessible formats to accompany the dashboard, adding needed context when major changes occur, including, at a minimum, flagging publicly when, according to the OMB Memo's definition section, there is a "Significant Modification" to a system.
- Embed diverse experts and stakeholder representatives in **AI Ethics and Impact Advisory Committee review boards to coordinate efforts on impacted community participation and drive outcomes consistent with shared values to**:
    - Conduct multidisciplinary and community-based consultation throughout the training, deployment, impact assessment, and iterative design process for both metrics and ongoing model evaluation and require participatory pilots and user testing in real-world community settings;
    - Develop best practices for transparency through public metrics tracking community feedback on specific AI systems, including consumer complaints and outcomes data; and
    - Trigger reassessments of performance and new mitigation steps when harm is indicated.
- **Formulate best practices for inclusive red teaming** that incorporates diverse perspectives to surface risks. Findings can be used to update metrics and inform dashboard content.
- **Conduct and set methodological standards for participatory impact assessments** to develop empirical evidence based on real-world impacts and ground-truth dashboard metrics and red teaming exercises. Proper design is essential.
- **Invest in community participation, education, and the growth of shared expertise.** As a matter of OMB's budgetary function, it should support dedicated funding and roles for public interest groups and participants to enable meaningful engagement in the development and iteration process for standards and benchmarks for above, alongside public education and training, and to distribute public monitoring, benefits, perspectives, and knowledge.

A Public Dashboard Would Facilitate Timely Monitoring of AI Progress, Impacts, and Risks

A centerpiece of our proposals is that NIST should develop, and agencies should apply, a real-time public dashboard providing broad visibility into AI model capabilities, limitations, and impacts based on both technical benchmarks and the incorporation of feedback from users and affected communities. NIST could develop approaches that apply to foundation models, and similar tools could be adapted across agencies and domains for more specific uses, as applicable.

If done well, an open monitoring infrastructure could enable an organic expansion of transparency as new risks emerge in this rapidly evolving field. At the same time, it could help to inform users in real

time of blind spots and gaps in AI models and systems. To develop fair and representative standards for the dashboard, the process of creating new metrics must include perspectives from impacted communities, civil rights, social scientists, ethicists, and public interest technologists alongside industry.

Keeping in mind the nascent state of the science of AI measurement, we approach this project with humility and a collaborative mindset. As described above, policymakers have already proposed key principles and standards to govern AI systems. The AI Executive Order, AI Bill of Rights, and NIST Risk Management Framework and accompanying materials are foundational documents that highlight many of the areas for specific metrics.

Approaches should also seek to leverage AI alignment lessons from the private sector. While voluntary commitments by the tech sector to the Administration acknowledge common goals and values that track the RMF, as competition has increased, public details about AI safety approaches from leading companies have become generally more constrained. At the same time, the largest companies have formed the Frontier Model Forum, and some are contributing to a new AI Safety Fund. While not by any means an exhaustive list, open-source efforts and attempts to create a transparent type of public performance metric or index thus far include, for example, Credo AI's early work on open-source algorithmic tools for a few performance indicators for AI models, Microsoft's safety coding tools in Azure, and sharing of code on AI safety by many companies and coders on GitHub. Notable efforts towards an index for AI include the Stanford Foundation Model Transparency Index, and the OECD's recently announced efforts on an Index for Trustworthy AI.

Static or hard-to-update regulatory models based on traditional approaches are also unlikely to be sufficiently nimble. Fine-tuning of AI models creates significant accountability challenges because it can radically alter model behavior in ways not captured by static documentation or one-time auditing. Most models are constantly being trained to improve performance, and the amount of data and parameters can range in the trillions. Fine-tuned models can inherit or amplify new biases, lose capabilities in previously demonstrated skills, become brittle and overfit to narrow datasets, introduce novel privacy or security issues, and experience performance drift over time. It is also more practical, in general, to look at model outcomes given the level of technical expertise needed to understand the implications of specific alignment and fine-tuning decisions and shifts. For all these reasons, continuous transparency mechanisms would help to keep pace.

The dashboard could provide a regular reevaluation of capabilities, limitations, and harms across an AI model (or a specific use case). If designed to take in user feedback and such feedback is channeled over time into the metric, the result is likely to be even more robust. As the release of large language models has demonstrated, user testing and input is essential. Ongoing participation by domain experts and affected communities would be equally critical to illuminate subtle risks as models change or are applied to new uses.

Governing AI will require a hybrid approach with coordinated oversight spanning foundational models as well as high-impact applications in sectors where decision algorithms already rule. Rapid growth in the capabilities of smaller AI models that use far less compute, and progress in the sophistication of models of every size, means that we will need governance approaches that can reasonably apply to any -safety or rights-impacting AI system. At the same time, foundation models are likely to be a source of countless future technologies and raise specific risks given their flexible and expanding uses.

Notably, if we can establish a scalable and workable system of quality assurances, it may not be too naïve to think that some opt into the use of monitoring dashboards or other inclusive processes to receive public credit for safe and ethical AI practices or benefit from the funnel of user feedback.

Work could be undertaken to develop and invest in measurement science across a range of metrics, and to consult with impacted communities in development of metrics and benchmarks. The dashboard should also clearly note the limitations of both the data and metrics and solicit help to further refine it with public input. Notably, both dashboards and standardized metrics focus on model behaviors and outcomes, rather than requiring disclosure of proprietary model architectures or parameters. Appropriately scoped metrics can quantify risks, harms, and capabilities without sensitive details.

They could also hew closely to the NIST RMF. NIST explains its model in this way:

> In addition to explainability and interpretability, among other AI system characteristics proposed to support system trustworthiness are accuracy, privacy, reliability, robustness, safety, security (resilience), mitigation of harmful bias, transparency, fairness, and accountability.

Fig. 4. Characteristics of trustworthy AI systems. Valid & Reliable is a necessary condition of trustworthiness and is shown as the base for other trustworthiness characteristics. Accountable & Transparent is shown as a vertical box because it relates to all other characteristics.

Current efforts in AI alignment and transparency tend to focus on technical attributes of models. Some key gaps include:

- Minimal transparency around training data sources, curation processes, and labeling practices. This can obscure potential issues like a lack of diversity in training data, built-in biases or racial stereotypes, or misinformation.
- Limited monitoring of real-world performance changes over time as models are updated. Technical benchmarks using static datasets can diverge from the performance of models in deployment.
- Little visibility into how different user populations experience the model, especially marginalized groups that may be vulnerable to specific harms.
- A lack of current requirements to share public information about model limitations, potential risks, or effective mitigation strategies. While the sector has a history of academic openness, competitive pressures are now diminishing such practices.
- Little information for users on accuracy concerns, shortcomings, limitations, language (including cultural or dialect proficiencies and quality) and the quality of mitigations across languages.
- Insufficient information sharing about use or abuse of tools for criminal or illegal uses.
- Scant or few requirements in the U.S. to assure data privacy, data minimization, or privacy by design.

- A lack of agreement on metrics for bias and fairness and underdeveloped tools for communicating when an automated decision is made and how to appeal it.
- A dearth of metrics quantifying impacts such as those for bias, mental health, political polarization, treatment of disadvantaged groups, labor displacement and uses in the workplace and hiring, electoral integrity or democratic values, and other serious concerns.
- A lack of protections for intellectual property, copyright, and the absence of a system for compensation and consent for specific uses in training models, in disclosures to users, and to achieve redress.
- Minimal insight into environmental costs and sustainability practices around energy-intensive model development, iteration, and operation.

Metrics could anticipate and track factors like these, as feasible, and companies could report them on public dashboards. They could also identify levels of performance that are acceptable or problematic according to benchmarks. Each metric could provide a benchmark or range of benchmarks on performance, detail the methodology and data sources it uses, and be frequently updated.

In addition, for each category, companies could provide a means of reporting incidents, violations, or concerns so that public input informs the metrics in real time, and company responses are shared publicly. The ISO 9001 system for quality management (widely adopted by certified technology and other companies) could be an inspiration for an AI system of quality management. This system requires companies to develop mechanisms for corrective action requests and maintain documentation of responses.

As this suggests, there could be a user interface to accompany the dashboard for reporting of specific experiences and concerns by users, and this feedback should be incorporated in some manner into the metrics as appropriate. Models for such a system include consumer and industry incident databases for auto crashes (such as the National Highway Traffic Safety Administration's "early warning" system; the Consumer Financial Protection Bureau's and Consumer Product Safety Commission's consumer complaint databases; or the Federal Trade Commission's database, Consumer Sentinel.) The OECD Policy Observatory has also developed and launched an AI Incident database that collects articles relevant to incidents involving AI systems. A process should be developed so that this critical human feedback is also incorporated into the dashboard as appropriate once reviewed. In addition, the system should empower users to have control over their data, its uses, and to withdraw consent or authorize a third party to do so.

Achieving clarity in standards and best practices is not merely a legal nicety; it is the bedrock upon which businesses can build their strategies, innovate, and compete globally. The current absence of clear guidelines stifles innovation and dampens the economic promise of AI. Over time, the monitoring instruments would be likely to get better at detecting and assessing the measures, even as AI technology evolves rapidly, giving the larger public a voice by design. Users and participants in the reporting system, in turn, will be empowered by the knowledge that by reporting observations, the next round of metrics may reflect their feedback.

By providing continuously updated metrics across a comprehensive set of technical, ethical, and societal dimensions, a public database would offer significant advantages:

- **Timeliness:** Real-time data provides immediate visibility into model issues as they emerge. Rapid identification of problems could enable urgent interventions and address evolving issues with agility.
- **Adaptability:** The dashboard could expand and adapt as models increase in capabilities and reach. Over time, new metrics could be added to address novel risks identified through ongoing monitoring.
- **Transparency:** Metrics that create indicators for accuracy, safety, legal compliance, accessibility, environmental impact, and more could drive innovation in productive ways.
- **Public Knowledge:** Public monitoring could invite a much larger swath of participants into the discussion about the capabilities and limitations of AI models while generating useful data.
- **AI Alignment**: The approach could make use of existing techniques from the AI alignment toolkit.
- **Iterative and Flexible Benchmarks:** The dashboard would provide a framework for transparency without pre-determining rigid standards or thresholds for all metrics. For each metric, reasonable benchmarks could be set and recalibrated over time to measure adequate, superlative, and subpar performance.

An Archive of Model Cards Would Support Understanding of Shifts in Model Performance

In addition to real-time metrics, developing a version-controlled and publicly accessible archive of model cards can further strengthen transparency. Model cards should include details on a model's purpose, performance evaluations, ethical considerations, limitations, and other factors. They could be updated frequently, including, at a minimum, to flag publicly when, according to the OMB Memo's definition section, there is a "Significant Modification" to a system. Requiring simultaneous release of two model card variants could facilitate transparency for public and technical audiences:

- **Public Model Cards** would use non-technical language focused on model impacts on users and society. They outline intended use cases, measures to address risks, and contact points for user complaints.
- **Technical Model Cards** would provide detailed metrics and benchmarks for researchers and developers. They include training data specifics, model architectures, intended applications, technical limitations, and safety considerations.

NIST could develop best practices for model card formats and archives in conjunction with the dashboard standards. At the same time, these approaches could also be designed to protect legitimate commercial interests and the intellectual property (IP) of AI developers.

Creation of AI Ethics and Impacts Advisory Committees Would Inform and Help Coordinate Agency Efforts

While the creation of agency leadership by the Memo is laudable, agencies that are already invested in specific technologies and use cases are unlikely to be as objective as they should be in evaluating potential and actual risks. For this and other reasons, OMB should also require agencies with high-risk use cases to establish participatory oversight boards, such as AI Ethics and Impacts Committees, with representation from impacted groups.

Importantly, the NIST RMF and 2023 Report by the National Artificial Intelligence Advisory Committee, alongside numerous provisions in the EO, encourage "consultation" with affected communities across many stages of AI development and deployment. But such consultations will only matter if they are attuned to the parameters in the EO and OMB memo and include specific requirements for the role of outside stakeholders.

For this reason, OMB should require the creation of foundation model (at NIST) and agency-level, domain-specific **Ethics and Impacts Advisory Committees**, with defined authorities to help agencies assessment of AI systems for accountability, transparency, and other ethical dimensions and with public outreach and engagement. The Committees should be comprised of impacted community members, organizational representatives, subject matter experts and professionals, and relevant legal and professional ethics experts.

Such boards, which could be constituted under the Federal Advisory Committee Act, should play a critical role in reviewing the uses of higher-risk systems prior to deployment, with processes for agency responses on matters of concern, similar to many such arrangements across federal agencies today. In addition to substantive roles in revising use cases and risks, their engagement could include, for example, supporting agency efforts to:

- Host inclusive design workshops to gather diverse perspectives on potential AI applications and their impacts.
- Conduct community data audits to assess biases and gaps in training datasets.
- Organize explainability clinics to convey how systems work to community members.
- Facilitate participatory red teaming (as described below) to surface risks.
- Support deliberative forums for the public to discuss AI's broad societal effects.
- Provide grants for exchanges and co-creation sessions.
- Train community members to audit algorithms and data for biases.
- Fund user experience research focused on inclusive populations.
- Sponsor AI education events and demonstrations tailored for specific communities.

As described below, dedicated funding streams are necessary to enable these critical forms of public interest participation, which well-resourced industry voices can crowd out. At the same time, building capacity with a range of funded and well-structured roles can formalize avenues for impact on standards development and create opportunities for sustained engagement. Importantly, compensating community members respects the significant time and labor that this participation entails.

Agencies should also be expected to support their efforts, and to effectively and publicly communicate learnings and developments that can improve AI systems and use contexts over time, including to:

- Host regular conferences and workshops bringing together AI developers, regulators, civil society groups, and impacted communities to share insights.
- Publish annual reports summarizing key trends, challenges, and best practices identified through oversight processes and widely disseminate them to stakeholders.
- Maintain publicly accessible databases of algorithmic audits, impact assessments, and other empirical evidence that developers can reference.
- Establish public bug bounty programs to incentivize researchers to probe systems for flaws and submit reports.

- Conduct mediated learning exchanges between developers and community leaders.
- Develop open-source libraries of bias testing code, auditing frameworks, and mitigation techniques that developers can integrate.
- Create AI development test environments with synthetic or scrubbed data in which researchers can collaboratively experiment and facilitate sharing of methods.
- Fund fellowships and exchanges between academia, industry, government, and civil society to cross-pollinate ideas.
- Sponsor challenge competitions for developers to create solutions focused on priorities like algorithmic fairness or interpretability.
- Implement public notification systems for spreading urgent warnings about vulnerabilities, flaws, or harmful incidents needing immediate attention.
- Cultivate communities of practice around issues like inclusive data practices, engineering accountability, and human-centered AI.
- Develop AI ethics training programs and make open courseware freely available to all developers to build aligned values and norms.

A community-centered approach would build shared capacity to help govern AI responsibly and holistically. It would also help to unlock the full potential of America's diversity as a competitive advantage in AI development. Sufficient investment in inclusive participation to build and support the AI economy is an imperative for shared prosperity and innovation.

Inclusive Red Teaming Can Surface Assumptions and Overlooked Risks and Harms

Red teaming and similar exercises are essential to stress test AI systems and uncover potential vulnerabilities and failure modes before deployment. Integrating the lived expertise of underrepresented groups into hands-on red team exercises can provide a constructive way to catch vital risks and biases that teams can overlook, including exploring potential for misuse and unintended consequences in a community-based or cultural context.

Multidisciplinary red teams, including domain experts in social sciences, civil rights advocates, ethics, directly affected community members, and other non-technical stakeholders can surface overlooked risks, but are often not a part of reviews. For just one example, with commendable candor, OpenAI's system card from May 2023 acknowledges a lack of inclusivity in process design:

> Participants in this red team process were chosen based on prior research or experience in these risk areas, and therefore, reflect a bias towards groups with specific educational and professional backgrounds (e.g., people with significant higher education or industry experience). Participants also typically have ties to English-speaking, Western countries (such as the US, Canada, and the UK). Our selection of red teamers introduces some biases, and likely influenced both how red teamers interpreted particular risks as well as how they probed politics, values, and the default behavior of the model. It is also likely that our approach to sourcing researchers privileges the kinds of risks that are top of mind in academic communities and at AI firms.

As part of the assignment from the EO to NIST on protocols for red teaming, OMB should request that NIST or another appropriate entity lead development of best practices for more inclusive red teaming methods that intentionally incorporate diverse voices. OMB efforts can then ensure that agencies make use of these best practices.

More intentional and structural involvement of diverse communities would strengthen red teaming of AI systems to:

- Provide perspectives to catch biased assumptions in data or model design that could lead to discriminatory performance, based on real-world experiences of exclusion.
- Identify potential harms or negative social impacts on minority communities that may be invisible to homogeneous teams.
- Evaluate language and speech recognition for robustness across diverse linguistic contexts and dialects.
- Assess visual classification robustness for non-white faces and fairness across skin tones.
- Gauge impacts on economic opportunity and access to services for disadvantaged demographics.
- Model adversarial cases of systems being used for surveillance, over-policing, or exploitation of vulnerable groups.
- Enhance scenarios representing real-world usage by underserved populations and non-mainstream cultural contexts.
- Improve simulations of misuse by bad actors motivated by racism, hate, or unethical profit.

Moreover, for particular domains, intersectional and diverse experts in psychology, political science, labor, electoral and voting integrity, and other relevant experts can offer insights into risks like propaganda amplification, radicalization, divisive polarization, and disparate impacts on vulnerable communities. Experts in ethical norms informed by power differences in a range of settings such as health care, psychology, criminal justice, education, and other settings with decision-making roles over human possibilities and lives may also add depth to multidisciplinary processes. As an intermediate step, OMB should request that relevant agencies work with NIST to help inform best practices for inclusive red teaming of AI systems by:

- Leading by example in red teaming AI projects with diverse external partners.
- Publishing guidelines emphasizing the importance of diverse, multidisciplinary red teams and participatory design processes.
- Providing a framework for identifying stakeholders from impacted groups and compensating them for engagement.
- Developing exercises focused on surfacing risks to marginalized populations.
- Creating rubrics for red teams to self-assess inclusiveness across factors like race, gender, sexual orientation and gender identity, age, and disability.
- Maintaining a public repository of red teaming anti-patterns that led to preventable failures.
- Hosting workshops demonstrating effective inclusive red teaming in collaboration with civil rights and other issue area experts.
- Encouraging the use of techniques like adversarial debiasing, participatory simulations, and sensitivity audits.
- Integrating evaluation of inclusiveness into procurement standards for companies providing AI to government.
- Funding external red teaming by civil society groups on AI systems that impact public interest.

The intentional integration of diverse perspectives into the red teaming process will enable a more rigorous exploration of how AI systems can fail when deployed in complex real-world contexts. In addition, standard steps for data gathering to inform inclusive red teaming exercises could include:

- Soliciting and conducting reviews of impact assessments and outcomes data for specific domains and applications.
- Performing user studies by surveying and interviewing diverse community members about their experiences interacting with an AI system. These could gather qualitative insights on usability, trust, and value.
- Funding community-based organizations to monitor AI systems through methods like user surveys, observational studies, and complaint tracking and synthesize findings in public reports.
- Implementing A/B testing methodologies to try variations of an AI system and measure comparative impacts. Testing could assess dimensions like fairness, interpretability, and user autonomy.
- Conducting pre-deployment impact assessments (as described below) using criteria on dimensions like privacy, accessibility, and bias.
- Integrating feedback surfaces like user rating systems or open comment and complaint forums to receive direct public input.

Leveraging Impact Assessments for Empirical Evidence to Inform Metrics

In addition to inclusive red teaming, as the above list suggests, facilitating and supporting regular impact assessments focused on real-world effects can provide another vital feedback channel to strengthen AI governance. Crucially, these should be conceptualized as "third party audits," and not as internal to government agencies. As AI Now describes:

> Third-party audits stand apart: they have been conducted by journalists, independent researchers, or entities with no contractual relationship to the audit target. From Gender Shades to the audit of London's LFR system to ProPublica's audit of predictive policing tech, these audits have been pivotal in galvanizing advocacy around AI-related harms.

Assessments also must be well-designed to produce tangible, specific, and usable results that inform standards. Formal evaluations conducted in partnership with public interest and other stakeholders can surface overlooked issues, generate empirical insights on how systems perform in actual usage, and center data on the impacts to, and experiences of, affected groups and individuals. Findings could directly inform iterative improvements to policies, model training, dashboard benchmarks, and other governance mechanisms.

As part of its collaborative standard-setting process, OMB should ask NIST and agencies to solicit input from key stakeholders to develop methodologies and priority metrics for AI impact reviews. Public reports would detail findings, recommended actions, and document whether previously identified problems have been suitably addressed. Assessments could be required more frequently for safety- and rights-impacting uses in areas like finance, hiring, housing allocation, healthcare, and education.

Areas for participatory analysis could include, for example:

Fairness and Bias:

- Disparate impact analysis of system decisions and outcomes by demographic
- Assessment of training data biases and gaps for underrepresented populations
- Surveys gauging user trust and sentiment across community groups

Safety and Accountability:

- Documenting issues reported through harm redressal processes and analyzing response adequacy
- Auditing security vulnerabilities disclosed through whistleblower and bug bounty programs
- Tracking rates of problematic or illegal content promotion

Accessibility:

- User studies on accessibility barriers and compatibility gaps with assistive technologies
- Feedback from disability or other advocates on areas for interface improvements
- Language quality for non-English languages and dialects for model performance and user support

Broader Societal Impacts:

- Labor economists that can estimate workforce impacts and job replacement projections
- Mental health experts to gauge psychological risks like addictive system designs
- Public health scientists and others to review scientific accuracy and misinformation risks
- Electoral and democracy scholars to evaluate institutional and integrity exposures and risks

Regular inclusive impact assessments would help provide external validation for oversight processes. Centering community voices and empirical insights within governance cycles fosters accountability and demonstrates that a priority is placed on improving system impacts and real-world outcomes rather than on narrow or technical measures alone.

Specific Comments on OMB Text Highlight a Need for Additional Direction in Some Areas

The OMB Memo helpfully references the EO's definitions of algorithmic discrimination (Section 10(f) of the EO), equity (10(a)), underserved communities (10(b) of EO 14091), and defines automation bias. Perhaps most consequentially, it defines a broad range of rights-impacting AI uses and risks. These represent clear progress on federal policy on AI. We further support the requirement for agencies to "consult and incorporate feedback from affected groups... including underserved communities" and applaud that the Memo specifies that "[i]n the event of negative feedback, agencies must consider not deploying the AI or removing the AI from use."

We would urge more specificity about the kinds of "negative feedback" and consideration of options and mitigations should be required. For example, if an agency were to find that a rights-impacting AI technology was biased or discriminatory, or that it lacked sufficient transparency or accountability, OMB should clarify whether this policy would bar its use, or merely require that an agency "consider" whether not to use it, and on what basis such considerations should be made.

As described above, while frameworks like NIST's highlight the need for community consultation, specific processes and decision-making power must be defined to make this engagement meaningful rather than symbolic. We need new ways of collaborating across sectors and to go beyond check-the-box forms of "consultation" with impacted communities to full partnership.

We also note that the stakeholders named by the draft Memo in this section include "affected groups, such as customers, Federal employee groups, and employees' union representatives." This is laudable, but absent specific, intentional, and well-resourced efforts to solicit and integrate a diverse set of perspectives from all impacted communities, this remains an underdeveloped list. OMB should identify specific steps for agencies to take as part of a program for robust public outreach.

In addition, OMB should require agencies to provide information on AI uses and models that facilitate a full conversation about risks and values, including by requiring agencies to publish information that is available about data used to train models, impact assessments, experiential data and criticisms of model uses. This can be achieved through model, system or data cards providing both technical and plain language information as well as ample other sources of information that are available to the agency. As described above, agencies should also be asked to identify gaps in knowledge or resources about data or impacts used in models, alongside any other factors that inform the agency's uses and views of the model's limitations.

The Memo provides several helpful examples of how feedback may be collected, including direct user testing, general solicitations of comments from the public, public hearings or meetings, and other process to seek public input, comments, or feedback from the affected groups in "a meaningful, equitable, accessible, and effective manner." These positive steps are important for agencies to take, and the specificity is appreciated.

In addition, we welcome the Memo's requirement that agencies must "monitor rights-impacting AI to assess and mitigate AI-enabled discrimination against protected classes that might arise from unforeseen circumstances, changes to the system after deployment, or changes to the context of use or associated data." We note that such monitoring is essential given that models are frequently fine-tuned in ways that can alter performance and change outputs. We agree that "where sufficient mitigation is not possible, agencies must safely discontinue use of the affected AI functionality" and would urge that there be efforts to further define, in specific cases, what kinds of mitigation would be deemed "sufficient" or insufficient in this context, as that is what will matter in the execution of this sound principle.

We support the provision that agencies should "notify negatively affected individuals" and would urge an expansive definition of when it would be "practicable and consistent with applicable law and governmentwide guidance" to do so. Substantive due process will often mean that such notice is or should be required, but there are strong internal disincentives within government to resist such notification. Overall, this section, which includes plain language and multi-language requirements, is strong, but will require active oversight to ensure its appropriate execution. We would urge that OMB develop robust means of monitoring and level-setting across agencies around the implementation of these requirements, including the appeal processes they should engender.

We would also advise, given due process, that agencies not be merely "strongly encouraged" to provide an explanation, but be required to do so. Those negatively impacted by a model are certainly due an

explanation. If the explainability of a model is difficult to achieve, the requirement for an explanation is more (not less) warranted. In contrast, a lack of requirement for one could allow bias to remain undetected. The Memo helpfully indicates that:

> Explanations might include, for example, how and why the AI-driven decision or action was taken. While exact explanations of AI decisions are often not technically feasible, agencies should characterize the general nature of such AI decisions through context, such as the data that the decision relied upon, the design of the AI, and the broader decision-making context in which the system operates. Such explanations should be technologically valid, meaningful, useful, and as simply stated as possible, and higher-risk decisions should be accompanied by more comprehensive explanations.

We also recommend that OMB more fully incorporate NIST's approach to explainability, which provides that explainable systems should adhere to four principles:

- Explanation: A system delivers or contains accompanying evidence or reason(s) for outputs and/or processes.
- Meaningful: A system provides explanations that are understandable to the intended consumer(s).
- Explanation Accuracy: An explanation correctly reflects the reason for generating the output and/or accurately reflects the system's process.
- Knowledge Limits: A system only operates under conditions for which it was designed and when it reaches sufficient confidence in its output.

These would provide additional clarity about the components of explainability, including providing a better benchmark for when systems may fail to be adequately explainable to be continued in that use. The OMB Memo further requires that "[w]hen law or governmentwide guidance precludes disclosure of the use of AI or an opportunity for an individual appeal, agencies must create appropriate mechanisms for human oversight of rights-impacting AI." OMB should more specifically define what is an "appropriate" or inappropriate mechanism, as it poses the prospect of potential abuse and a lack of transparency in government decisions or processes.

In addition, the Memo includes a requirement for agencies to "prominently provide and maintain a mechanism to conveniently opt out from AI functionality," noting that "an opt-out mechanism must exist where the affected people have a reasonable expectation of an alternative or where lack of an alternative would meaningfully limit accessibility or create unwarranted harmful impacts." We support this provision but note that it will require significant additional effort to set out what it means in practice and that it is essential that OMB further define its thinking on what it means to "meaningfully limit accessibility or create unwarranted harm" given that these may apply to many AI systems in operation today. The availability of a means to consent (or not) to the use of an AI must be articulated as a fundamental principle, and so it will be well worth additional effort for OMB to specifically solicit additional and focused public comments on this provision.

To further acknowledge accessibility issues, we recommend adding a new part to Section 5.b.ii that specifically calls out the needs of the disability community, who are uniquely vulnerable to AI in any number of existing categories but deserve their own consideration. In addition, OMB should propose a process by which new Safety-Impacting or Rights-Impacting purposes can be added to the AI guidance, including through public input, as technology and its usage evolves.

We join other commenters in noting that previous AI EO and OMB guidance directing agencies to inventory AI regulatory authorities should be retained and strengthened. Previous EO and OMB guidance required agencies to submit to OMB an agency plan that "must identify any statutory authorities specifically governing agency regulation of AI applications, as well as collections of AI-related information from regulated entities." As the Department of Health and Human Services was the only one to publicly release their memo on AI authorities, we join The Leadership Conference in making the point that this inventory of agency regulatory authorities for AI is a vigorous exercise for agencies and is of interest to Congress, civil society, and the public. The OMB AI guidance should require that agency authorities be submitted to OMB and the new White House AI Council and make the list public.

Third Pillar: Investment—Growing an Ecosystem for Equitable Participation, Public Trust, and Innovation Insights

Developing transparent standards for AI systems through a truly participatory process requires proactive efforts to include public interest groups and historically marginalized voices. Many such stakeholders could make the difference in public understanding of and engagement with how technologies evolve, yet currently lack resources to assist or face barriers that may prevent meaningful participation. Layers of overlapping new practices and methods are required.

To democratize the benefits, there is also a need for human infrastructure capable of leveraging AI, including building capacity in and among communities that are too often invisible in developing and deploying technologies. We must close skills and talent gaps—and a robust program to do so will address the needs of a burgeoning industry while mitigating persistent sources of economic inequality.

Substantial funding for creating a more diverse pool of digital economy workers through partnerships with culturally competent community-based organizations, as well as skills-based hiring that connects workers of all skills and backgrounds to an AI economy, would help workers who are currently excluded from upwardly mobile, future-focused employment find career pathways into the AI economy. Such investments would allow the benefits of AI to be more fully shared and could help develop expertise and spark interest. Building technical fluency will allow impacted communities to both help steer these powerful technologies toward sustainable and equitable progress and improve the relevance of AI tools.

Working with the Department of Commerce and other stakeholders, and through its budgetary function with input into the President's 2025 budget, OMB should develop and inform a process for grants directly to impacted communities and nonprofit public interest organizations focused on issues implicated in AI and ethics. This funding could support participation in the standards and governance process and independent research. Potential functions could include:

- As described above, participation and training for inclusive red teaming, impact assessments, and dashboard review.
- Community representatives embedded within an agency and surface issues and gaps.
- Community auditors can train community members to audit or conduct impact assessments.
- Focus groups should be compensated and include diverse individuals who can share experiences and evaluate AI through interviews, surveys, and workshops.
- Participatory designers can create spaces for the public to directly steer technology innovations toward collective priorities, informing benchmarks.

- Inclusive policy fellowships could embed experts from communities within oversight bodies.
- Accessibility consultants could inform fully inclusive design in both standards and products.
- Small business assistance programs could enable AI adoption by enterprises in disadvantaged communities.
- Test participants could include users from underrepresented groups to assess disparate experiences.
- Funding can be set aside for research investigating historical harms from relevant technologies and practices.
- Investigative researchers can include a diverse range of experts, including social scientists funded to study datasets, labeling practices, training processes and model architectures for transparency, fairness, or other gaps.
- Policy consultants can include diverse panels of experts to inform initiatives.

The President and OMB could also recommend that Congress establish a dedicated fund modeled on the CDC Foundation that could support digital skills education and training, community-based AI auditors, participatory technology workshops, and other capacity building to close knowledge and equity gaps. Grants to local organizations would enable national assessments of AI's impacts on disadvantaged groups and workforce needs and could build expertise and understanding of technological tools within impacted groups. It should include funding for community organizations to build AI-specific expertise and support participation in the types of community engagement outlined above.

The CDC Foundation is an independent nonprofit and the "sole entity created by Congress" to mobilize private sector and philanthropic resources to support the CDC's work on public health. It could be funded by a mix of donations from the technology sector, alongside a federal endowment that grows through licensing fees or other federal supports, to provide grants for community organizations initiatives such as:

- Equipping organizations and their members to use the tools and provide feedback (helping to ensure the digital divide does not render communities or individuals invisible);
- Working to solve the talent gap and develop the evidence base for upskilling and skills-based employment through partnerships and innovative approaches to recruitment of an economically and racially diverse workforce;
- Increasing capacity for diverse voices to engage as peers in regulatory and oversight processes around AI tools, including funding nonprofits to train community auditors on AI systems and conduct audits of algorithms, data collection and uses.

The fund could be overseen by an independent governing board with representatives from government, industry, academia, civil rights groups, and community organizations and be housed within an existing agency or as a nonprofit organization to manage the grantmaking process. A national yearly assessment of AI skills gaps, workforce needs, and barriers to digital inclusion could inform its priorities and processes. Nonprofit community organizations could apply to receive grants for purposes such as:

- Providing AI and technology job training programs and internships in impacted areas;
- Developing curricula and certifications for community members to become AI auditors;
- Funding data and policy experts to enable meaningful technical input into AI systems;
- Supporting participatory design workshops and exchanges between developers and community residents;

- Working with recipients to document community partnerships, inclusion plans, and to measure and reflect on impact;
- Funding programs to enable collaborations with schools, employers, and industry partners to create pathways to equitable AI workforce participation.

The fund could also maintain a publicly accessible database of grants awarded, results achieved, and best practices for building AI expertise in local communities to build field knowledge and insights.

Conclusion: From Principles to Implementation: Creating an Ethical AI Ecosystem

Technical progress must be paired with social progress. We must connect principles to action and move to create functional guardrails, meaningful participation, and expanded capacity. By linking ethical guidelines, participatory structures, and human infrastructure, we can build an AI future that reflects our ideals.

Most importantly, inclusive and democratic practices should infuse AI governance itself. Impacted communities deserve structured involvement in shaping these powerful technologies. With broad collaboration and human-centered design, the new powers of AI systems can be governed ethically at the outset rather than regulated after the fact and once harms are already entrenched.

American leadership in developing AI that expands opportunity while respecting Constitutional values is essential for innovation and an inclusive future. Progress will demand openness to creative partnerships and evolving best practices. We applaud OMB's draft guidance as a crucial first step for agency AI systems. We also welcome OMB's commitment to exploring effective ways to safeguard innovation in the era of AI. We also welcome additional opportunities for collaboration and input.

For questions or additional dialogue on these issues, please contact Laura MacCleery, Senior Director of Policy, at lmaccleery@unidosus.org, and Claudia Ruiz, Senior Civil Rights Analyst, at cruiz@unidosus.org.

PUBLIC SUBMISSION

As of: March 22, 2024
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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0177
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Alliance for Digital Innovation

General Comment

See attached file(s)

Attachments

12.5 ADI OMB AI Memo Comments

December 5, 2023

The Honorable Shalanda Young
Director of Office of Management and Budget
725 17th Street, NW Washington, DC 20503

Re: Federal Register Number 2023-24269 - Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Dear Director Young,

The Alliance for Digital Innovation (ADI) is submitting this letter to the Office of Management and Budget (OMB) in response to the recent Artificial Intelligence (AI) Memorandum. Our purpose is to advocate for a thoughtful and technical approach to governing artificial intelligence (AI) used in the federal government, prioritizing both responsible deployment of AI and the continued advancement of AI innovation.

ADI is a nonpartisan alliance of technology companies focused on accelerating change through the adoption of modern, commercial technologies to public sector customers. ADI engages with government thought leaders to advocate for the removal of institutional and bureaucratic barriers to the operation of a modern digital government. Our membership includes both small and large government contractors, offering different approaches to AI. Some companies leverage AI and machine learning to enhance their products; others are actively involved in developing and deploying AI solutions, while others provide generative AI solutions to public sector customers.

ADI believes that a well-informed governance framework with appropriate guardrails is essential to harness the benefits of AI while mitigating its risks. However, as this memo is currently constructed, it has the potential to create many agency and component specific governance processes that can make it more difficult for new, modern, cloud-based technology that leverages or offers AI to enter the government marketplace. We appreciate the opportunity to provide feedback to this draft memo; please see our comments below.

Encouraging Use of AI tools and Technology and Removes Barriers

ADI commends OMB for effectively underscoring the importance of adopting and utilizing AI and generative AI capabilities by departments and agencies. While refraining from mandating use, it pushes for a proactive stance in incorporating AI technologies.

Specifically, we would like to highlight key areas where the memo aligns effectively with ADI's commitment to ensuring AI reduces barriers and is used responsibly. The memo states:

- "If implemented responsibly, AI can improve operations and deliver efficiencies across the Federal Government. Agencies must improve their ability to use AI in ways that benefit the public and increase mission effectiveness, while recognizing the limitations of AI and when it is not suited for a given task."

- "Agencies should ensure that their AI projects have access to adequate IT infrastructure, including high-performance computing infrastructure specialized for AI training and inference, where necessary."

- "Agencies should update, as necessary, cybersecurity authorization processes to better address the needs of AI applications, including to advance the use of continuous authorizations for AI. Consistent with Section 10.1(f) of the AI Executive Order, agency authorizing officials should also prioritize generative AI and other critical emerging technologies in Authorizations to Operate and any other applicable release or oversight processes."

ADI applauds OMB for intentionally aiming to remove barriers and promote the responsible adoption of AI within the federal government. We encourage the government to continue to focus on the streamlined adoption of innovative commercial technology.

Coordinated Compliance and Harmonization of Requirements

ADI believes in the need for harmonization and coordinated compliance with the directives outlined in the memo as well as with other security, privacy, and technology governance mandates.

The memorandum appropriately states that "agencies must continue to comply with applicable OMB policies in other domains relevant to AI, and to coordinate compliance across the agency with all appropriate officials. All agency responsible officials retain their existing authorities and responsibilities established in other laws and policies."

Ensuring this is important to make sure that the new governance models and personnel take into consideration existing compliance processes and methodologies. We encourage additional language directing agencies to leverage those existing compliance processes to administer any risk-focused requirements that the new Chief AI Officer and the agency board decide are necessary to purchase and consume AI products and services.

In addition, the memo does not mention FedRAMP specifically, but it does mention the ATO process and "existing mechanisms" to ensure compliance with the requirements of Section 5(c). We suggest that the memo should also explicitly align to FedRAMP (NIST 800-53) security requirements to minimize unnecessary duplication of compliance frameworks.

Considerations for Additional Proactive Use Cases

ADI acknowledges OMB's recognition that decisions regarding AI can have significant implications for the rights and safety of the public. In response, the memorandum outlines specific practices for agencies to adopt and identifies potential areas where there could be safety or rights impacting concerns.

In addition to outlining areas of concern, we propose that OMB should consider listing the following priority use cases as areas of opportunity for the use of AI:

- Improving agency operation and cyber resilience – Technologies that summarize and derive insights from data banks are enormously useful for government agencies, whose employees often need to look through hundreds of pages of documentation for policy questions. Additionally, AI-powered solutions help agencies monitor and defend information networks and their underlying data.

- Enhancing constituent services – Agencies can also leverage AI to answer stakeholders' questions whenever and wherever. For example, agencies could deploy multilingual virtual agents that draw on agency data to answer questions in real time.

- Improving accessibility – Generative AI technologies can also assist agencies with receiving stakeholder input, making agencies more accessible and responsive. For example, implementing a multilingual chat capability offers several solutions to help agencies interact with constituents across language barriers and cultural differences; incorporating Natural Language Processing (NLP) will provides rapid insights based on large sets of text, such as call center logs, comment fields in surveys, or internet content, including social media posts and news stories.

- Continued Risk Management – ADI is supportive of the approach of agencies empowering their leaders to make risk decisions as they are the closest to the risks associated with their specific use cases and are in the best position to mitigate those risks.

While there are several positives to the OMB memo, ADI believes there are several ways to improve it. Below are specific, concrete suggestions that we highly encourage OMB to adopt.

Prioritize Agency Resources Based on Risk

There are many different types of approaches to AI. Many companies do not offer AI products and services but instead, leverage AI and various data streams to make more effective solutions for agencies to solve problems or provide services. Whether it is threat intelligence, identity management, quantum computing, cybersecurity, or other products/services, these solutions should be appropriately categorized and – when AI is an accessory to the solution – either

exempted or deprioritized from consideration when agencies develop and deploy their approaches to AI governance.

Additionally, there needs to be a timeline for consideration that delineates between technology that has already been adopted and approved by agencies and new technology that the agencies are considering for use. We believe there should be a specific date or timeline for demarcation. Specifically, OMB should consider adding timelines for implementation to the Scope section 2 (b) of the memo under "covered AI" saying, providing 90 days before the memo applies to newly purchased AI and additional time to anything that has already been assessed and authorized by agencies.

Prioritize the AI RMF over the Bill of Rights

ADI believes that developing additional governance requirements must be centered around the NIST AI RMF given its development in and through technical and risk focused processes. OMB should recommend that agency-adopted policies align with the NIST AI Risk Management Framework as it is already being incorporated by industry into their AI policies and principles. Notably, the AI RMF is complementary to the cybersecurity and privacy frameworks previously developed by NIST.

Expand Red-Teaming to Both Internal and External for Generative AI

Executive Order (EO 14110) on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence states that CISA should develop external testing, including red teaming, for AI systems. OMB should clarify that external red-teaming is only required where appropriate and where it is technologically feasible.

Better Define the Trigger Mechanism for Determining Rights or Safety Impacting

ADI believes that OMB must better define "meaningfully impact." OMB must clearly state what is considered a controlling factor for agencies to determine whether something is safety or rights impacting.

Additionally, OMB should consider further refining the Safety and Rights impacting definitions to delineate harms associated with the various categories outlined. ADI is not suggesting that it is limited to specific harms without leaving room for additional harms to be recognized, but agencies and companies supporting federal information systems must clearly understand the types of risks this guidance aims to mitigate. The current list of categories only outlines potential areas that are presumed to have safety consequences without explicitly delineating what some of those perceived consequences could be, leaving room for potentially risk adverse government officials to choose to not leverage AI where it may otherwise be possible or beneficial. This will help promote certainty and avoid inadvertently and unnecessarily excluding what would otherwise be low-risk activities that AI could enhance or replace.

Concerning the safety impacting definition, ADI believes the definitions should delineate specific harms such as loss of human life, serious physical harm, or large-scale negative physical

impacts. For the rights-impacting definition, ADI also proposes further precision. Aligning harms with decisions currently regulated by existing laws, such as non-discrimination and consumer protection, would enhance clarity. The definition could also be expanded to include decisions that have a material, legal, or otherwise significant effect on an individual's access to something provided for by our laws or administrative orgnaizations. As OMB works to refine the safety and rights impacting definitions, we also recommend that OMB leverages the principles industry uses to assess the impact of AI at key inflection points: data, model development and product application. Finally, we recommend considering outlining opportunities to leverage AI to remediate some of the risks associated with the safety or rights impacting categories and potentially provide pathways for faster adoption in those cases.

Additionally, agencies should rely on existing statutes and regulations for regulating technology, rather than assuming a new regime is needed to address AI. This would mirror the U.S. government's approach to other new technologies, fostering responsible innovation. This aligns with the operations of complex software in various industries, including retailers, banks, insurance companies, and manufacturers. Several examples illustrate this approach:

- Cybersecurity frameworks and best practices such as the NIST CSF, which have been used to secure critical infrastructure and valuable financial, health, and national security information, can also be used to secure AI systems.

- Expanded use of existing anti-fraud measures can help AI systems maintain accuracy and protect against inaccuracies.

- Established intellectual property law (particularly the doctrine of fair use) provides a framework for balancing the interests of existing and new creators and inventors.

By tightening and refining these definitions, potentially removing some examples that are not – by themselves – open to risk and relying on existing statues and regulations that govern technology, OMB can more aggressively promote the use of and capture the benefits of adopting AI technologies.

Be Specific on Prioritizing Minimum Practices

With the way the memo is currently written, it states that "starting on August 1, 2024, agencies must follow these practices *before* using new or existing covered safety-impacting or rights-impacting AI."

ADI believes that this memo must provide more specific guidance on the prioritization of the application of the minimum practices. There should be a focus on leveraging these practices for new technologies that are offering generative AI capabilities to federal agencies before reviewing all currently authorized products or services that may leverage AI and ML as part of their solutions. In addition to this, OMB should make explicitly clear that agencies should NOT take a one-size-fits-all approach but should implement the minimum practices in Section 5 based on any specific risk of the intended application.

Furthermore, ADI believes OMB should do the following:

- Implement these practices in a test and evaluation approach, specifically during "Presales," rather than necessitating every solution be piloted before sale and use.

- Require and facilitate the reuse of data obtained from implementation of these minimum practices, for example, like the Federal Risk and Authorization Management Program's management office manages the FedRAMP authorization to operate (ATO) repository.

- Clearly delineate standards for independent evaluators to ensure accurate, objective, and repeatable reviews of AI data generated through the application of minimum practices.

Ensure Effective Impact Assessments

The impact assessments in 5(c)(v)(A)(3) seem to focus on inputs rather than outputs. If specific requirements for data inputs are imposed, they should be related to the agency's use of the data (e.g., for agency fine-tuning of commercial models) rather than being imposed on vendors.

Regarding timelines and resources, there are currently no definitive timelines or recommendations for how long a process should take. By adding in the impact assessment without guidance for how to perform it, how long it should take, and what resources should be leveraged, the government is at risk of agencies extending sales cycles for months to years. This can artificially constrict the marketplace and discourage participants as well as create variability across departments and agencies regarding expectations. As part of the resource evaluation process in the assessment, agencies should assess use of AI tools and services holistically. This means weighing the harm/potential risk of a process along with the costs to mitigate the risk without using AI and then evaluate the same process for risks and costs to mitigate when using AI.

The reuse of data collected from impact assessments should become a priority to help drive adoption of AI across agencies. Just like the FedRAMP PMO encourages and enables the reuse of ATOs, the government should establish a repository to collect and reuse impact assessment data. Additionally, further guidance is necessary for agencies on specific markers determining the "reliability" and "breadth" of data, as well as clarity on the required level of provenance.

In the post-deployment phase, government security and privacy requirements and considerations mean industry partners are typically unable to monitor government customer use of their tools. They must be clear on what documentation will be required to perform evaluations on the outputs. Testing tools and standards are one way to achieve this.

Data Rights, Ownership, Acquisition and Use

Federal acquisition law prioritizes use of commercial products and services; this makes sense in the context of AI, which has largely been developed and deployed by the private sector. OMB should ensure agencies have the authority and direction to fully leverage commercial acquisition to procure AI to meet agency requirements. To get the most from these procurements, agencies will need to procure leading AI technology using commercial terms that balance the

government's interest in licensing AI with the commercial firms' interests in making broader commercial use of their products and services. OMB may also want to clarify in section 4 that agencies should buy their internal enterprise capacity to support responsible AI innovation as opposed to building it internally.

OMB should also encourage agencies to fully utilize non-traditional vehicles like OTAs and CSOs when procuring AI. Additionally, the government should focus procurement requirements on AI outcomes as it will promote a collaborative engagement with industry to identify solutions that achieve those outcomes and from the broadest group of market participants possible.

Section 5 of the memo occasionally, unintentionally conflates commercial technology, which is already trained from large data sets, with government-specific AI that would be built and trained on the government's own data. ADI recommends clearly delineating the different responsibilities of the commercial, innovative vendor community from those of federal agencies in both the procurement oversight process.

In the section Managing Risks in Federal Procurement of AI, the memo states that agencies "should take steps to ensure that their contracts retain for the Government sufficient rights to data and any improvements to that data." OMB should clarify in this section that agencies' rights and the government's rights do not extend to original training data, which is often owned and governed exclusively by the company providing the tools/technology.

Section 5(c)(iv)(A)(3), which discusses "the quality and appropriateness of the relevant data," requires agencies to assess the quality of the data used in the AI's design. ADI recommends that OMB clarify the following:

- Nothing in the memo requires technology providers to reveal trade secrets or information that could jeopardize the security of networks or information systems, and
- A summary description of the characteristics of the data used to train/design the AI model will meet this requirement.

These clarifications would highlight for agencies how visibility into the training source data does not, by itself, mitigate the risk of undesirable outcomes in the way that testing the model and its outputs would. They would also ensure that agencies think about the national security impact when considering the details of disclosure requirements. Additionally, we recommend that OMB should be more explicit on the use cases that do not have to be included in the inventory for security/privacy and other concerns; for example, there should be no publication of security or fraud prevention use cases.

OMB should also clarify the meaning of Sec. 5(d)(ii)(A) "obtaining adequate documentation of procured AI, such as through the use of model, data, and system cards;" to ensure that it is not used to advantage incumbent providers; it is critical for new entrants and competitors to be informed about the documentation that agencies require under this provision. Otherwise, incumbents will have a leg up in designing technology that can meet the agency's standards.

ADI is supportive of OMB's goal in requiring agencies to assess the quality and appropriateness of data used in model development to help determine a model's performance for a particular use

case, including ensuring it works with appropriate levels of accuracy and performs fairly across relevant demographic groups. However, visibility into training and evaluation datasets will not help an agency make that determination. Simply because a model has been trained on certain data does not mean it will perform as needed in a specific use case. Instead, testing is the scientifically appropriate and industry-standard mechanism that provides the best indication of performance and is already required in the memo.

If OMB would like to require that industry partners provide information to agencies related to model development, rather than focusing on training data, ADI recommends that OMB provide guidance to agencies to request documentation:

- outlining the capabilities of the AI system;
- known material limitations at the time of development of the AI intelligence system;
- guidelines for intended use; and
- example performance results.

This documentation will provide agencies with the most relevant information for AI system assessment and selection before they begin testing for their intended use case. To the extent documentation of information regarding training data is required, we suggest limiting this to summary information about the data the model was trained on and how that training data is appropriate to the agency's intended use.

From the government side, ADI does recommend that OMB ensure that agencies prioritize public access to and use of government data to bolster competition and widespread research. OMB can, for example, advise agencies to support data portability, enabling government owned datasets to be easily used by different organizations (while also respecting individual industry partners intellectual property rights).

Public Comment Process Fine Tuning:

Under the Additional Minimum Practices for Rights-Impacting AI, OMB requires agencies to consult affected groups. If negative feedback is received, agencies must consider not deploying or removing the AI from use. It is important for OMB to note that stakeholder feedback should primarily focus on agencies' overarching AI technology strategies rather than scrutinizing the use or procurement of specific AI systems. Because the definition of "right-impacting" is vague and the standard for "negative feedback" is undefined, this requirement can create uncertainty and raise risks for industry partners providing AI-enabled software and services to the federal government. It will slow down federal adoption of AI and may be abused by competitors in the contracting process.

Additionally, as part of the notification process, ADI recommends specifying that agencies will be able to fulfill the public notification requirement by providing a general explanation of the system's technological functionality, rather than information on specific decisions made (unless such right already exists in applicable laws for manual decisions). Further, OMB should clarify that an agency may provide this explanation via a publicly available disclosure on its webpage rather than individualized notice to reduce process duplication.

Reduce Compliance Burden

As mentioned earlier, ADI is concerned that there may be a fractured approach to governance without more clarity from OMB on use of certain governance, compliance, and risk management programs. OMB should align existing Federal Risk Management programs to maximize use of secure and safe commercial technologies by augmenting and enhancing successful programs like FedRAMP. ADI recommends avoiding the creation of alternate or additional compliance requirements that will be costly and slow down adoption. By adding more clarity, OMB can encourage agency adoption of commercial services provided by small businesses by sponsoring viable solutions.

Interoperability and Commercially Available Solutions

To support robust competition and innovation, agencies should prioritize interoperability and commercially available infrastructure as they adopt AI technologies. Doing so will support a vendor-agnostic environment, permitting new or competitive technologies to be slotted in seamlessly as they become available. Exceptions from this approach should be rare, with well-documented justification.

Testing and Safeguards Clarification

Among other measures, OMB should clarify the meaning of Section 5(d)(v)(a) which "requires adequate testing and safeguards…" to ensure that the contracting process does not favor incumbents who are able to shape the "testing and safeguards" requirements to meet their existing processes. An example is setting specific requirements that would be costly or difficult for others to achieve.

Training for Government Employees

OMB should double-down on encouraging agency employee training and education on the deployment and use of AI tools. Proper training will be crucial for the responsible use of rights and safety-impacting AI tools, addressing potential biases, and upholding transparency standards.

Opt-Out Requirements

In Section 5 (c)(v)(F) ADI recommends clarifying that providing a mechanism to opt out from AI functionality for rights-impacting AI is flexible given the facts/circumstances of the use case and other mitigation measures that may be in place. Three examples of reasons why that flexibility is needed are as follows:

- To the extent that rights-impacting AI inadvertently captures certain low-risk activities, the right to opt out can be harmful to efficient agency processes and practices.
- If rights-impacting AI offerings are truly high-risk, the government should have the ability to demonstrate the existence of operational guardrails (like those outlined in Section IV) as a step before providing for an opt out.

- Automation may be core to certain high-risk service offerings, making opt-outs infeasible, such as using an AI system to automate the detection of fraud in benefits applications.

Right to Appeal

In Section 5 (c)(v)(E), ADI recommends clarifying that an individual's opportunity to appeal or contest rights-impacting AI decisions follow any existing appeals processes for manual decisions to avoid agencies creating a duplicative or conflicting appeals process.

Conclusion

In conclusion, ADI supports the encouragement and adoption of modern, commercial technology, particularly those incorporating AI and Generative AI across government. To ensure the successful implementation of this memo, OMB must introduce additional rigor and specificity before agencies begin implementation. We support a phased implementation approach prioritizing certain technologies and future use cases. Additionally, if implemented as it is written currently, the memo would create a fragmented set of new processes and continuously evolving compliance requirements across departments and agencies making it more difficult – especially for smaller, innovative companies – to sell to the federal government.

The current draft memo needs to be refined to emphasize the importance of testing rather than visibility into training data; and to extent summary information about training data is required, the agency needs to make very clear that it does not require the disclosure of trade secrets. Updating guidance around data rights, data ownership, and availability of government data will be crucial to engaging with commercial companies while driving innovation.

ADI recommends providing clarification around the safety and rights impacting definitions and categories. Clearly defining the risks and tying them back to current mitigations in law will help agencies make more consistent risk decisions. ADI strongly encourages OMB to use existing legal and policy infrastructure wherever practicable to implement the recommendations in this memo. Whether it is leveraging current risk management framework processes at departments and agencies or using current laws to help define the risks associated with use of AI for specific scenarios, using current legal and policy frameworks will reduce complexity in implementation and provide processes that agencies understand to deploy AI more rapidly throughout their orgnaizations.

Thank you for the opportunity to review the memo and submit our thoughts and comments. We value the partnership between government and industry and look forward to working closely with our public sector partners to bring innovation and digital transformation to our government.

Sincerely,

The Alliance for Digital Innovation

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lpt-89i9-93x7
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0178
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Consumer Technology Association (CTA)

General Comment

Attached.

Attachments

CTA comments on proposed OMB memorandum for agency use of AI 12-5-23

Consumer Technology Association

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December 5, 2023

Consumer Technology Association
Comments on
The Office of Management and Budget Proposed Memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

The Consumer Technology Association® ("CTA")® respectfully submits these comments in response to the Office of Management and Budget's ("OMB") request for comments related to its proposed memorandum for the heads of executive departments and agencies titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" (the "AI Guidelines"). CTA is North America's largest technology trade association. Our members are the world's leading innovators—from startups to global brands—helping support more than 18 million American jobs. CTA owns and produces CES®—the most influential tech event in the world. CTA's comprehensive approach to AI includes public policy engagement at the federal, state and international levels; industry standards development, with eight AI-related standards published to date; and market and consumer research, including a recent AI public perceptions study.

AI offers tremendous potential for human and societal development: promoting inclusive growth, improving the welfare and well-being of individuals, and enhancing global innovation and productivity. A growing body of research demonstrates that AI can identify and mitigate bias in human decision making.[1] Perhaps the leading federal agency in the United States focused on AI governance and risk management, the National Institute of Science and Technology ("NIST"), has recently recognized that "new AI-enabled systems are revolutionizing and benefitting nearly all aspects of our society and economy – everything from commerce and healthcare to transportation and cybersecurity."[2]

[1] *See, e.g.*, Jon Kleinberg et al., *Discrimination in the Age of Algorithms*, 10 J. of Legal Analysis 113, 120 (2019), https://academic.oup.com/jla/article/doi/10.1093/jla/laz001/5476086; Cass R. Sunstein, *Algorithms, Correcting Biases*, 86 Soc. Rsch.: An Int'l Q. 499, 500 (2019), http://eliassi.org/sunstein_2019_algs_correcting_biases.pdf; Kimberly A. Houser, *Can AI Solve the Diversity Problem in the Tech Industry? Mitigating Noise and Bias in Employment Decision-Making*, 22 Stan. Tech. L. Rev. 290, 352 (2019), https://www-cdn.law.stanford.edu/wp-content/uploads/2019/08/Houser_20190830_test.pdf.

[2] Moreover, NIST recognizes that AI "is rapidly transforming our world. Remarkable surges in AI capabilities have led to a wide range of innovations including autonomous vehicles and connected Internet of Things devices in our homes. AI is even contributing to the development of a brain-controlled robotic arm that can help a paralyzed person feel again through complex direct human-brain interfaces." *Artificial Intelligence*, NIST,

CTA supports OMB's proposal to establish new federal agency requirements in areas of AI governance, innovation, and risk management that would direct agencies to adopt specific minimum risk management practices for uses of AI that impact the rights and safety of the public. CTA and its members are actively promoting the development of responsible and trustworthy AI through leadership in the development of emerging practices that mitigate risks.

I. Voluntary, Consensus-based Frameworks Are Best Suited to Achieve Near Term Goals

CTA supports the emergence of flexible, voluntary, consensus-based international frameworks to enable the development and deployment of trustworthy AI systems and has actively worked to promote the advancement of such frameworks. Indeed, CTA has published several industry standards and resources for its member companies to assist in the development of a trustworthy and safe AI ecosystem, including best practices and standards for identifying and managing bias in healthcare. Further, CTA's leadership is actively engaged with policymakers on rules for AI and has recently published a proposed National AI Policy Framework, which provides a roadmap for legislators and regulators to establish a risk-based framework for adopting certain guardrails to ensure trustworthy and secure AI systems.

While there is a growing consensus around principles and guidelines for deploying safe and secure AI, the volume of overlapping and potentially inconsistent international, national, and civil society frameworks, standards or guidelines may impede a global consensus on baseline commitments. The volume of competing frameworks also presents a practical problem for both the public sector, who must leverage limited resources to support sometimes inconsistent standards, and the private sector who must make difficult decisions about which public sector actors to engage with or risk losing a voice in deliberations in sometimes closed-door collaborations.

CTA supports efforts at the federal level in the United States to develop voluntary risk-based frameworks to address potential AI risks, while enabling stakeholders to maximize the benefits of this technology. In recent comments to NIST concerning the development of that agency's AI Risk Management Framework ("RMF"), CTA applauded the agency's work to create a flexible and voluntary risk management framework for managing AI risks, including those that may be implicated by the use of AI tools and systems. Indeed, CTA's National AI Policy Framework calls for all companies developing AI to adopt and implement the AI RMF as a means of mitigating and managing AI risks.

Because the AI Guidelines are likely to be viewed as an important benchmarking tool for private entities developing their own responsible AI governance policies, CTA agrees with OMB's endorsement of the NIST AI RMF as a landmark voluntary and suitable risk framework that will drive organizations to adopt risk mitigation practices that will lead to trustworthy and

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https://www.nist.gov/artificial-intelligence (last visited Oct. 1, 2022). *See also About Artificial Intelligence*, National Artificial Intelligence Initiative Office, https://www.ai.gov/about/ (last visited Oct. 1, 2022) (explaining that investments in AI technology "have led to transformative advances now impacting our everyday lives, including mapping technologies, voice-assisted smart phones, handwriting recognition for mail delivery, financial trading, smart logistics, spam filtering, language translation, and more. AI advances are also providing great benefits to our social wellbeing in areas such as precision medicine, environmental sustainability, education, and public welfare.").

responsible AI. The AI RMF achieves an appropriate balance of ensuring trustworthy AI systems while providing organizations the necessary flexibility to adopt practices best suited for their specific circumstances.

II. Removing Barriers to Responsible Use of AI (Sec. 4(b))

CTA supports OMB's goal of removing barriers to responsible AI use, including by ensuring that agencies are invested in sufficient IT infrastructure and expanding skills and capabilities in the federal workforce. Sound data governance and management practices are also critical to ensuring developers' ability to create robust and unbiased AI applications and systems. The OMB should also encourage sharing of federal data, as appropriate, to ensure that both public and private AI applications and systems are able to access reliable data sets to train and create sufficiently robust and safe AI applications. Additionally, OMB could consider interoperability and the use of commercially available infrastructure, allowing for vendor-agnostic environments in which the best tool for the specific use case could be available.

III. Managing Risks from Use of AI (Sec. 5)

The AI Guidelines provide useful, concrete examples of AI use cases OMB believes carry higher risk. OMB should refine the scope of safety- and rights-impacting AI, revising the definition to align with American tort law's focus on the material risks of harm to people, and then work with industry to potentially incorporate these risk classifications into an overall risk management practice for agencies that leverages the NIST AI RMF. As-is, OMB is effectively defining virtually all applications as high-risk in ways that will make it difficult or impossible for federal agencies to adopt AI tools. Many within the private sector have already begun to rely on the AI RMF, and further encouraging AI system developers and federal agencies deploying AI systems to use the AI RMF will ensure alignment with a leading voluntary framework and protect individual rights and safety.

While CTA appreciates the guidance provided by OMB in Section 5(ii) with regard to the types of AI systems it believes to be rights-impacting, referencing a single list of AI systems that are presumed to be rights-impacting may not reflect all potential scenarios, and may not sufficiently capture the nuance of how AI systems are deployed. OMB should consider allowing agencies to use a more fine-tuned multi-factor risk-based assessment to classify rights-impacting AI applications on a case-by-case basis, rather than adopting a one-size-fits-all list of use cases. Furthermore, OMB should shift its focus to evaluating outputs rather than data inputs, as the current approach of evaluating the "quality and appropriateness of the relevant data" is an increasingly outdated approach.

Along similar lines, the list of minimum practices for safety- and rights-impacting AI listed in Section 5(c)(iv) may be overly prescriptive. Rather than prescribe a list of specific minimum requirements, OMB should consider articulating acceptable governance principles that each agency can use on a case-by-case basis. This ensures sufficient flexibility to address unique concerns without mandating lengthy requirements that may not be necessary or appropriate. For example, the impact assessment (Sec. 5(c)(iv)(A)), testing (Sec. 5(c)(iv)(B)), and independent evaluation (Sec. 5(c)(iv)(C)) requirements may be duplicative or unnecessarily costly, depending on the type of AI application or use case at issue.

IV. Conclusion

The Biden Administration has substantially advanced the public discourse around how AI governance frameworks should be implemented, both in the public and private sectors. However, OMB should advance a flexible, risk-based approach to AI governance. Doing otherwise may subject AI governance initiatives to the priorities of future administrations as federal agencies may encourage designs that focus on certain priorities and not the overall best methods for safe and trustworthy AI deployment.

OMB's guidance will likely influence the private sector as well, and it will have a substantial impact on areas that intersect with the deployment of AI systems, including information technology, security, privacy, civil rights and civil liberties, customer experience, and workforce management. The AI ecosystem deployed by federal agencies will only thrive if developed and deployed responsibly with an eye toward practical requirements and expectations for responsible AI development.

Respectfully submitted,

/s/ Douglas K. Johnson
Douglas K. Johnson
Vice President, Emerging Technology Policy

/s/ Michael Petricone
Michael Petricone
Sr. Vice President, Government and Regulatory Affairs

PUBLIC SUBMISSION

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: Eightfold AI Inc.

General Comment

See attachment.

Attachments

Eightfold_public comments to OMB 12-05-23

eightfold.ai

December 5, 2023

The Office of Management and Budget
725 17th Street, NW
Washington, DC 20503

Re: Public comments on the Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

To Whom it May Concern at the Office of Management and Budget:

Eightfold AI Inc. (“Eightfold”) (https://eightfold.ai/) appreciates this opportunity to provide its public comments on the proposed memorandum, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" (the “memorandum”) published by the Office of Management and Budget (OMB). Eightfold is at the forefront of applying responsible AI solutions in the area of human resources (HR).

Comments on Section 5(b) of the memorandum

In its Request for Comments for the memorandum, the OMB requested feedback related to these questions: “Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5(b)) that should be included, removed, or revised? If so, why?”

Section 5(b)(ii) of the memorandum states:

> **Purposes That Are Presumed to Be Rights-Impacting.** Unless the CAIO [Chief AI Officer] determines otherwise, covered AI is presumed to be rights-impacting . . . . and agencies must follow the minimum practices for rights-impacting AI . . . if it is used to control or meaningfully influence the outcomes of any of the following activities or decisions:
> . . .
> G. Determining the terms and conditions of employment, including pre-employment screening, pay or promotion, performance management, hiring or termination[.]

We propose a more tailored approach in the human resource (“HR”) domain. HR functions are part and parcel of every enterprise. Although the memorandum limits the scope to covered AI that “is used to control or meaningfully influence” the applicable HR outcomes, we suggest the memorandum be revised to limit the scope to covered AI that makes automated decisions or that produces outputs that are relied on by human decision makers as the sole or overriding criterion on which the decision is made.

We note that New York City Local Law 144 of 2021, a first of its kind law which regulates the use of “automated employment decision tools” is limited to tools which “substantially assist or replace discretionary decision making,” and this phrase, in turn, is defined under the implementation rules for this law as: “(i) to rely solely on a simplified output (score, tag, classification, ranking, etc.), with no other

factors considered; (ii) to use a simplified output as one of a set of criteria where the simplified output is weighted more than any other criterion in the set; or (iii) to use a simplified output to overrule conclusions derived from other factors including human decision-making."

The implementation rules for this law were adopted after several rounds of public comments. The NYC Department of Consumer and Worker Protection, the department charged with writing the implementation rules for the law, drew a clearer line and required the AI to be doing much more than merely influencing or informing a decision.

All use of AI by federal agencies to "control or meaningfully influence" the outcomes of activities or decisions should not be presumed to be rights-impacting AI. AI tools that replace or subvert human decision making in employment are fundamentally different from, and present fundamentally different risks than, AI tools that inform, aid, and improve human decision making in employment. We suggest the memorandum be revised to draw this critical distinction.

Comments on Section 6 of the memorandum

We likewise propose that the OMB make changes to narrow the definitions of both "Rights-Impacting AI" and "Risks from the Use of AI" in Section 6 of the memorandum.

The current definition of Rights-Impacting AI includes any AI "whose output serves as a basis for [any] decision or action that has a legal, material, or similarly significant effect on an individual's or community's . . . [e]qual opportunities, including equitable access to . . . employment". This definition presents similar concerns as Section 5(b)(ii) discussed above. Further, under the memorandum, even if an AI system used in employment falls outside Section 5(b)(ii), the system could still be determined to be rights-impacting AI under this definition. We propose that the memorandum provide clear guidance to agencies that rights-impacting AI in the area of employment is limited to the uses identified in Section 5(b)(ii), unless an agency's CAIO determines otherwise based on compelling reasons applied to that agency's specific use case.

With respect to the definition of Risks from the Use of AI, we suggest that this definition likewise be narrowed to decisions and actions where the AI system performs automated decision making or its outputs are relied on by human decision makers as the sole or overriding criterion on which the decision is made. We also note that as drafted, this definition negates widely-adopted risk mitigation strategies such as "human in the loop" (with human consideration and accountability to counter automation bias), and notice and explanation.

Lastly, the definition of Risks from the Use of AI can be expanded, or a separate new definition (such as "Risks from Non-Use of the AI") can be added in conjunction, to compare the risks of using a proposed AI system against the risks of not. There are identifiable risks of "doing nothing" and relying on legacy processes that are uninformed by AI-powered insights, where human decision making may be at a greater risk of unconscious bias. For the Federal Government to meet the challenges set forth in the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (the "Executive Order"), the non-use of AI in HR should be considered as a real risk. It can compromise the AI

talent hiring acceleration called for by the Executive Order by reducing the Federal Government's ability to harness the full spectrum of AI talent capable of serving critical roles at the agencies.

About Eightfold and its work with the public sector

Eightfold proudly supports federal and state agencies' use of responsible AI to reduce unemployment and connect job seekers with fulfilling career opportunities. Eightfold's AI-powered Talent Intelligence Platform empowers enterprises to acquire and retain diverse talent, and provides a foundation for public agencies to reemploy and upskill citizens.

Federal agencies will greatly benefit from the use of responsible AI in HR processes. Responsible AI enables more consistent, informed, and objective ways to bring candidates to jobs, and bring jobs to candidates. This is especially crucial as the federal government deploys a skills-based approach to meet the AI talent hiring acceleration called for in the Executive Order.

Thank you for considering our comments.

Sincerely,

/S/ Roy Wang

Roy Wang
General Counsel
Eightfold AI Inc.

PUBLIC SUBMISSION

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0180
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Rubrik

General Comment

Thank you for the opportunity to provide feedback. Please see the attached PDF containing Rubrik's comments.

Attachments

Rubrik AI Memo Feedback - Dec 2023

Rubrik Comments for Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Thank you for your attention on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence. Rubrik is grateful for the opportunity to contribute to this critical initiative, especially in light of the growing national emphasis on AI, as evident in President Biden's Executive Order (EO) on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. These efforts are building the foundation to mitigate unique risks on or posed by AI. Rubrik's expertise in data, the foundation of AI, including data visibility, security, resiliency and recovery enables Rubrik to impart a unique perspective on reducing risks to AI.

Rubrik is a cybersecurity company, and our mission is to secure the world's data. We pioneered Zero Trust Data Security™ to help organizations achieve business and mission resilience against cyberattacks, malicious insiders, and operational disruptions.

The world's leading organizations rely on Rubrik to uphold data integrity, deliver data availability, continuously monitor data risks and threats, and restore businesses with their data when infrastructure is attacked.

Based on insights from helping organizations recover from various cyber-attacks successfully, we offer the following recommendations to OMB:

1. Data Risk–

   The recent EO and OMB Draft Memo address many high-level concerns of building, testing and using AI software. However, Rubrik believes that data poses an avenue of attack for the AI system. Data's role in the training and testing phases of the AI lifecycle is crucial to the trustworthiness and safety of AI, therefore, data integrity should be prioritized. In addition, organizations building their own AI capability should build data security into to the entire process to include mitigating against data poisoning attacks. One example is to ensure that data used to train and test classifiers is backed up in an immutable and logical air gapped environment to ensure that it can't be tampered with or poisoned. Data poisoning attacks are similar to software supply chain attacks, presenting difficulties for organizations in detecting these threats and concurrently fostering a false sense of security. In the event

of a data poisoning attack, an agency would be able to recover the data and rebuild the AI system to a known good and trusted state, pre-breach.

2. Continuous Monitoring – Data Integrity

Monitoring Data integrity within the AI lifecycle is crucial to identifying risks. Data poisoning attacks can easily go unnoticed and have catastrophic effects on AI models. These effects can create false senses of security and an unfounded belief that the AI model is secure and safe. Data modification is a stealthy attack vector that can cause the model to act unexpectedly due to bad data injected into the training and/or test tests used to create AI models.

3. Testing and Red Teaming of AI

There is need for more detailed guidance on the various aspects and methodologies in testing AI systems. Red teaming in and of itself has clearly defined objectives and rules of engagement. It's an expensive, resource intensive and complex for which there are limited experts available. That said, red teaming AI systems could have many interpretations and objectives and suggest OMB work with NIST to develop standards and guidance for AI Red Teaming as part of an Agency's AI security strategy.

4. Workforce Development

Creating and growing a US Government AI workforce is as crucial as it is challenging. Just as recruiting and retaining skilled cybersecurity talent has been the last two decades, recruiting and retaining skilled AI talent can be even more challenging. The rising demand for AI expertise, driven by technological advancements and increased integration in government sectors, requires a strategic and collaborative effort to recruit and retain qualified professionals. This involves addressing recruitment strategies, fostering innovation, and creating a conducive environment for ongoing professional development. The challenges highlight the importance of comprehensive workforce planning for the sustained growth and proficiency of the US Government's AI workforce.

Rubrik would welcome a discussion with you and your staff as you further develop guidance on Safe and Responsible AI within the Federal Government.

Rubrik offers the following feedback to the following questions for which Rubrik has expertise:

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

The skilled workforce challenges and constrained pay scales will likely cause challenges in USG organizations hiring adequate CAIOs (quantity and quality) of the candidates compared to commercial industry where these roles are in extremely high demand.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

Adapting the legacy accreditation processes to account for a data centric and novel technology, AI, as organizations try to assess, apply RMF and deploy in their environments.

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: OCR Labs Global (USA) Inc. dba IDVerse

General Comment

Thank you for the opportunity to respond to the Request to Comments of the Draft Memorandum of the Office of Management and Budget - Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum. Please see all our responses in the attached document to your questions to the Request for Comment.

Attachments

IDVerse - Response to OMG RFC - Advancing...AI Draft Memorandum_Dec 5 2023

Office of Management and Budget - Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum ("AI Draft Memorandum)

Request for Comment for OCR Labs Global (USA) Inc. *dba* IDVerse

December 5, 2023

Thank you for the opportunity to participate in the OMB Response for Comment ("RFC") to the AI Draft Memorandum.

Below is an introduction to our company, followed by our responses to the RFC.

Background.
IDVerse has been developing Remote Identification Validation Technology since 2014. Our expertise began as digital camera systems were emerging and beginning to be coupled with advanced software algorithms. At this time, we anticipated the need for identity validation using camera-based, optical recognition as being integral for an increasingly digital society. Today, our engineering and product development strength continues paired with advances in the use of multiple cameras, artificial intelligence, computational imaging and 3D sensing.

Founded in Australia with offices in London (registered headquarters), Sydney, New York and San Francisco (main office Redwood City), our technology has been successfully tested by NIST-accredited labs and against recognized biometric international standards.

Table 1: Summary of Certifications

Certification Body	Basic Certifications	Advanced Certifications
NIST	NIST SP 800-171	NIST SP 800-53 NIST SP 800-63 IAL2
iBeta/BixeLab against ISO 30107-3	Liveness PAD Level 1	Liveness PAD Level 2 Liveness (Bias testing)
Government Entities	CCPA, GDPR	TDIF L3, DIATF, DocAuth
ISO - International Organization for Standardization	ISO 27001 ISO 9001 ISO 19795	ISO 22301 ISO 27017 ISO 27018 ISO 27701 ISO 29100 ISO 30107-3
AICPA System and Organization Controls (SOC)	SOC 1	SOC 2

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Responses to OMB RFC.

1. *The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?*

Response: No comment.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

Response: Certainty of roles of Federal agencies is important for the successful implementation of the proposed OMB Guidelines. Anecdotally, we have heard among conversations by other corporations that there will be a crosswire of authorized agencies that are looking over the management of different AI aspects. This may create the potential for different agencies to be regulating over the same issues.

In this regard, we propose defined levels of oversight in a centralized agency, which represents the interests of the cross-section of Federal agencies. Regulations are issued by a single agency, which may be enforced for most sensitive issues by the central agency, and with authority to sub-agencies for localized and less sensitive matters.

As an example, we refer to the development of the EU's proposed new AML agency, with a central agency at the core and the jurisdictions of the Union sitting underneath.

3. How can OMB best advance responsible AI innovation?

Response: In addition to the regulation that is proposed by the Executive Order and the OMB guidelines, change must also flow from industry.

One issue we see in our world of remote ID verification is bias. Bias can manifest in a myriad of ways. For instance, a seemingly innocuous prompt such as "show me faces of successful business owners" on a typical image-generative AI platform like Midjourney can disproportionately favor Western, white, male faces, neglecting the fact that the vast majority of the world's population—more than 75%—lives in Asia and Africa.

AI programs often reinforce stereotypes because human engineering teams have inherent biases that are encoded into the algorithms. As leaders of technology, we have therefore found ourselves at the crossroads of innovation and responsibility. Our creations—the software

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solutions we engineer—can either exacerbate societal biases or serve as a force for positive change.

Pledging an oath

To face this challenge head on, our company introduced the Code Zero Bias Oath, inspired by the enduring principles of the Hippocratic Oath, but tailored to the unique challenges and opportunities of our field. This oath embodies our collective commitment to reducing algorithmic bias, promoting fairness, and upholding the highest ethical standards in AI software development:

"I, as a software engineer, solemnly swear to uphold the principles and practices outlined in this Code Zero Bias Oath. In my pursuit of designing, developing, and deploying software, I commit to the following:

Do No Harm: I shall prioritize the well-being of individuals and communities who may be affected by the software I create. I will strive to ensure that my work does not cause harm or perpetuate bias, discrimination, or inequality.

Equity and Fairness: I will actively seek to identify and rectify biases in algorithms and data sets. I pledge to promote fairness and impartiality, striving to create software that treats all individuals equally regardless of their background, race, gender, or any other characteristic.

Transparency and Accountability: I will be transparent about the decision-making processes and data sources used in my software. I accept responsibility for the consequences of my work and will be accountable for any biases or ethical lapses that may arise.

Inclusivity: I will advocate for diverse and inclusive teams, recognizing that different perspectives lead to more robust and ethical solutions. I will actively work to create an environment where underrepresented voices are heard and valued.

Continuous Learning: I understand that technology evolves rapidly, and I commit to staying informed about emerging best practices, guidelines, and regulations related to algorithmic bias and ethical software development.

User Privacy and Consent: I will respect user privacy and seek informed consent for data collection and usage. I will implement strong data protection measures to safeguard user information.

Mitigation and Remediation: If I discover bias or ethical concerns in software I have developed, I will take immediate steps to mitigate harm and rectify the issues. I will report such concerns to relevant stakeholders and take corrective action.

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Community Engagement: I will actively engage with the communities impacted by my software, seeking their feedback and addressing their concerns. I will be open to criticism and commit to improving my work based on community input.

Regulatory Compliance: I will adhere to all relevant laws, regulations, and industry standards related to algorithmic fairness and data ethics in software development.

Advocacy for Ethical Technology: I will advocate for the responsible and ethical use of technology within my organization and the broader industry. I will use my influence to promote ethical practices and raise awareness about the importance of reducing algorithmic bias.

I acknowledge that my work as a software engineer has a profound impact on society, and I accept this oath as a solemn commitment to ethical software development. I will strive to uphold these principles throughout my career, recognizing that my actions can shape the future of technology and its impact on humanity."

By taking this Code Zero Bias Oath, software engineers demonstrate their dedication to ethical software development, with a focus on reducing algorithmic bias and promoting fairness, transparency, and accountability.

Training data & fair-sourced faces

A flawed algorithm is not the only source of bias that can undermine the fairness and accuracy of an identity verification system. If biased data is used to train the algorithm, it is likely the system will exhibit those same biases when making decisions.

In the context of facial IDV systems, "training data" refers to specialized datasets of facial images used to train the machine learning algorithms or deep neural networks that are responsible for recognizing and verifying individuals' identities based on their facial features.

Here's how training data works in facial identity verification:

Features: The training data includes a vast collection of facial images as its primary feature. These images represent various individuals, captured under different lighting conditions, angles, and backgrounds. Each image provides information about the facial characteristics of a person, including the position of facial landmarks (such as eyes, nose, and mouth), skin texture, and other unique details.

Labels or ground truth: In supervised learning for facial identity verification, each facial image in the training data set is associated with a label or ground truth, which specifies the identity of the person in the image. These labels serve as the correct reference for the algorithm during training. For instance, a label might indicate that a particular image is of "John Doe."

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Training process: The machine learning or deep learning algorithm uses this labeled training data to learn and extract relevant patterns and features from facial images. It analyzes the unique characteristics of each individual's face, such as the arrangement of facial landmarks, and learns how to distinguish one person from another.

Model development: Through the training process, the algorithm adjusts its internal parameters to minimize the difference between its predictions and the ground truth labels in the training data. This fine-tuning allows the model to become increasingly accurate in recognizing and verifying identities based on facial features.

Generalization: Once the algorithm has been trained on the dataset, it can be deployed for real-time facial identity verification tasks. The algorithm applies the knowledge it acquired from the training data to analyze and compare facial features in new, unseen images to verify the identity of individuals.

The quality and diversity of the training data determine the performance and efficacy of a facial identity verification system. In particular, training data affect the fairness of decision-making algorithms and their ability to mitigate bias, or achieve Zero-Bias AI™.

Training data should encompass a wide range of facial variations—including age, gender, ethnicity, and lighting conditions—to ensure that the algorithm can accurately identify individuals from different backgrounds and under different circumstances or environments.

Ethical procurement & data nutrition labels

With face recognition technology becoming increasingly prevalent, the ethical sourcing of face biometrics data used to train identity verification systems should be a top concern for businesses and their customers. Training data sets should have the equivalent of a “nutrition label” which would provide crucial information about the dataset's sources and characteristics, helping developers make informed decisions.

Ethical procurement in face biometrics technology centers around ensuring that the data used to train and develop face recognition systems adheres to strict fairness and ethical guidelines. This not only safeguards individual privacy and civil liberties, but also ensures that the technology is as accurate and fair as possible.

Key considerations for ethical procurement

Here are some principles to keep in mind when considering the data an IDV provider has used for the training of its machine learning system:

Transparency: Transparent providers are open about their data collection methods, sources, and usage. They are willing to disclose their practices and allow third-party audits to ensure ethical compliance.

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Consent: Ethical providers obtain explicit consent from individuals whose data is used for training purposes. They make it clear how the data will be used and for what purposes. Further, consent must be permissible under local regulations. As an example, GDPR regulations preclude a remote ID verification vendor (as data processor) from receiving consent from an end-user to use his/her data for training; that consent remains in the strict hold of only the data controller.

Data minimization: Ethical procurement minimizes data collection to only that which is necessary for the technology's intended purpose. It avoids the unnecessary collection and storage of sensitive data.

Fair representation: Providers ensure that their training datasets are diverse and representative of the population, minimizing biases and ensuring equitable performance across demographic groups.

Security: Ethical providers prioritize robust security measures to protect the data they collect. They follow best practices for data encryption, access control, and regular security audits.

Data deletion: Providers have clear policies and procedures for data retention and deletion. They respect individuals' right to have their data removed upon request and have system capabilities for business buyers to execute desired privacy policies.

Looking ahead

As facial recognition technology continues to evolve, ethical considerations must remain at the forefront of businesses and consumers alike. Ethical procurement of data ensures that this technology is used responsibly, respects individual rights, and remains an asset to society rather than a threat to privacy and civil liberties.

Organizations must set a positive example and contribute to the development of a more responsible and ethical landscape for face biometrics technology. Businesses, suppliers, and consumers alike should prioritize transparency, consent, data minimization, fairness, security, and adherence ethical standards.

Ethical procurement of face biometrics training data is not just a corporate responsibility; it's a societal imperative in an age where facial recognition touches so many aspects of our lives. We cannot rely just on the government’s initiatives for regulation.

4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

Response: Following from the reasoning expressed in question 3 above on the responsibility of industry to lead on principles of fair sourced data and ethical procurement, the resulting product of a company should shift substantially across to the green zone of the AI pressure zone.

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As it relates to remote ID verification, the focus is on (i) the ~2.5% of fraud cases relating to imposters entering a particular domain, for example a government benefits program, to misappropriate funds from both governments and designated beneficiaries, and (ii) the other ~97.5% of users of a service, approaching gen AI with inclusivity and transparency to ensure that the designated recipients can access those online services without bias, accurately and seamlessly.

Below are some high level use cases and supported processes for a generative AI remote ID verification process that draw on the principles and approaches highlighted above.

Use Cases.

- Document Fraud Analysis - to verify the ID document is true (not forged), live (not captured before the verification session begins) and present (with the presenting end-user).
- Liveness testing - to verify the end user is a live person and present
- Face Matching - to match the ID document in step 1 to the live person in step 2.
- FaceAuth - allows for the authentication of a user within seconds (for a quick step-up / re-authentication scenario), using a few-second video capture of their face. This is a stronger solution than a phone's face recognition tool, which can be averted by the fraudster.
- Database of known fraudsters - This allows for velocity and anomaly alerts to be enabled to detect the same face or data appearing multiple times. This solution can be deployed to identify and stop repeat fraudsters.
- Single sign-on (SSO) - avoid passwords, by applying the FaceAuth product. This would prevent ransomware and cyber attacks, for example by eliminating social engineering from SIM swaps and then also at the administrator level, to ensure the correct designated users are accessing the portal.

Supported Processes.

- KYC Customer or Beneficiary Identification
- Remote/Digital account opening/onboarding
- Re-authentication for high assurance/step-up use cases (for example, to receive Dollar benefits from a government program) and to reduce account takeovers (ATO's), for example with SIM swaps (relevant to mobile carriers, noting that many MFA protocols permit texts to mobiles; if there is a SIM swap, that text will go directly to the fraudster).
- Contact center management
- E-signature verification - confirmation that the correct person is signing the document.

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5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

Response: Section 5(b) is extremely detailed and broad, and we cannot make any suggestions on additional types of AI to add.

However, we do recommend applying a tiered level to the approach required by regulations. For example, as it relates to biometrics, which is close to our world, we propose different levels of scrutiny for one-to-many face matching for criminal investigations compared to one-to-one matching, for permitting access to a government benefit program.

We recognize that there is a fine line here for the definition of the different tiers, but it may avoid some overregulation that does not take into account fully the potential for lesser harm of the AI solution.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

Response: We refer to our response to question 5, to suggest that there should be tiers of scrutiny depending on the potential level of harm of the AI solution.

7. What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

Response: Please contact us with any questions on our experience as it relates to our responses to this RFC or otherwise in connection with the interface of our use of generative AI.

8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

Response: No comment.

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PUBLIC SUBMISSION

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Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0182
Comment on OMB-2023-0020-0001

Submitter Information

General Comment

The City of San José Information Technology Department appreciates the opportunity to submit comments in response to the request for comment on the proposed draft memorandum titled “Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence” by the Office of Management and Budget (the OMB Memo).

In late 2022, the Digital Privacy Office (DPO) began the initial governance of AI systems as a natural extension of governing data policies and data processing. Starting with procurement reviews, the City’s AI governance has evolved into Generative AI initiatives, and impact assessments. Recently, San José began a coalition of over 100 state and local agencies to build a standardized approach to AI governance, policy, and vendor accountability. We hope to connect the Coalition’s work with the efforts at OMB and the broader Federal government.
Summary of Comments
We celebrate the OMB memo as a vital step towards comprehensive AI policy for U.S. public agencies.

• Chief AI Officer (CAIO): Our experience at San José has demonstrated the need for a designated lead on AI policy and governance. The CAIO needs to lead across AI governance, procurement, and technical projects. This ensures all AI projects follow responsible AI governance and fosters mutual maturity between policy and practical implementation of technology. The City’s CAIO function is currently served by technical and project management leads with the Digital Privacy Officer, but may vary based on where technology policies are managed in an agency.

• Leveraging existing governing bodies: The City has leveraged its Digital Privacy Officer and existing privacy and data governing bodies to handle AI governance. The City found that stakeholders for both Privacy and AI overlapped considerably, and we recommend exploring if the same is true at your agencies to minimize additional overhead.

• Vendor accountability: When implementing our impact assessment framework at the City of San José, we experienced varying levels of cooperation across vendors in obtaining information around the “nutrition facts” of their AI systems. Larger vendors were often unresponsive or unwilling to provide us information about the AI system. Having a standardized “nutrition facts” requirement for all AI systems

enforced at the federal level would solve this problem.

• Generative AI: Agencies should leverage generative AI tools for creating initial drafts of content while establishing safeguards to ensure responsible use. To promote the responsible use of generative AI tools, the City of San José and many others have released Generative AI Guidelines to help City employees leverage the benefits of generative AI tools while understanding and mitigating its risks.

• Minimum practices: The minimum practices outlined in the memo may be too aggressive for agencies to implement by the desired timeline. Agencies with a lower AI maturity may struggle to successfully implement all minimum requirements by the deadline.

Our detailed comments can be found in the attached document titled "231205 OMB Public Comment City of San José". Additional attachments are explained in our detailed comments.

Attachments

231205 OMB Public Comment - City of San Jose

AI agreement v01

DRAFT AI Policy

AI Manual

Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Submitted by The City of San José Information Technology Department
December 5, 2023

The City of San José Information Technology Department appreciates the opportunity to submit comments in response to the request for comment on the proposed draft memorandum titled "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence" by the Office of Management and Budget (the OMB Memo).

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Summary of Comments

We celebrate the OMB memo as a vital step towards comprehensive AI policy for U.S. public agencies.

- **Chief AI Officer (CAIO):** Our experience at San José has demonstrated the need for a designated lead on AI policy and governance. The CAIO needs to lead across AI governance, procurement, and technical projects. This ensures all AI projects follow responsible AI governance and fosters mutual maturity between policy and practical implementation of technology. The City's CAIO function is currently served by technical and project management leads with the Digital Privacy Officer, but may vary based on where technology policies are managed in an agency.
- **Leveraging existing governing bodies:** The City has leveraged its Digital Privacy Officer and existing privacy and data governing bodies to handle AI governance. The City found that stakeholders for both Privacy and AI overlapped considerably, and we recommend exploring if the same is true at your agencies to minimize additional overhead.
- **Vendor accountability:** When implementing our impact assessment framework at the City of San José, we experienced varying levels of cooperation across vendors in obtaining information around the "nutrition facts" of their AI systems. Larger vendors were often unresponsive or unwilling to provide us information about the AI system. Having a standardized "nutrition facts" requirement for all AI systems enforced at the federal level would solve this problem.
- **Generative AI:** Agencies should leverage generative AI tools for creating initial drafts of content while establishing safeguards to ensure responsible use. To promote the responsible use of generative AI tools, the City of San José and many others have released Generative AI Guidelines to help City employees leverage the benefits of generative AI tools while understanding and mitigating its risks.
- **Minimum practices:** The minimum practices outlined in the memo may be too aggressive for agencies to implement by the desired timeline. Agencies with a lower AI maturity may struggle to successfully implement all minimum requirements by the deadline.

Our detailed comments follow the 'Background' section.

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Background

The City of San José is leveraging the benefits of AI to improve the delivery of services to residents. As the City increasingly uses AI tools, it is more important than ever to ensure that those AI systems are effective and trustworthy.

The City of San José's AI governance activities are performed by the Information Technology Department and its Digital Privacy Officer (DPO).[1] The DPO was established in October 2021 following the Council's ratification of the City's Digital Privacy Policy in late 2020, developed to safeguard the public's trust in the City's use of new and emerging technologies and to protect residents' digital privacy rights.[2] In late 2022, the Digital Privacy Office (DPO) began the initial governance of AI systems as a natural extension of governing data policies and data processing. Starting with procurement reviews, the City's AI governance has evolved into Generative AI initiatives, impact assessments, and coalition-building with agencies across the country.

The City has developed an "AI Review Framework" that tailors AI procurement processes according to the risk of the proposed AI tool (see risk assessment framework in appendix), and this City's experience piloting and adapting this process informs our recommendations below. For each proposed AI procurement, the DPO assesses and classifies the proposed tool according to its risk level, which is determined based on (1) the ability of individuals to opt-out to being subjected to the AI system and (2) the potential harm of the system based on the type of output, degree of human oversight, area of the individual's life that is impacted by the system. All solicitations regardless of risk require the vendor to complete the AI FactSheet (see Appendix). For medium- and high-risk systems, the DPO requires City staff that proposed the procurement to complete an Algorithmic Impact Assessment (AIA) Form (see appendix) with details about the project objective and information about the project's alignment with San Jose's AI principles.[3] For high-risk projects, the DPO conducts public outreach with its Privacy Advisory Task Force and impacted communities. The DPO uses this information to conduct an Algorithm Review, determine whether the procurement should move forward, and suggest changes to the system usage, solicitation, selection of a vendor, or contract terms. The DPO publishes the AIA, Vendor AI FactSheet, and Algorithm Review. For high-risk projects, the DPO also publishes a Data Usage Protocol detailing how the system is used and how it will be monitored annually (see AI Manual for more details).

The City of San José recently launched the GovAI Coalition with over 100 state, local, tribal, and territorial government agencies (see appendix for members comfortable with public listing) across the country to ensure that the AI systems we use serve all our communities. We envision a future where public agencies can easily obtain critical information about AI systems from vendors (e.g., an AI FactSheet). We believe there is power in numbers, and are eager to work with other agencies to set an industry standard that promotes effective, equitable, trustworthy AI systems. The GovAI Coalition is committed to:

- Using AI for social good,

[1] https://www.sanjoseca.gov/your-government/departments-offices/information-technology; https://www.sanjoseca.gov/your-government/departments-offices/information-technology/digital-privacy.
[2] https://www.sanjoseca.gov/home/showpublisheddocument/79367/637719660070200000.
[3] https://www.sanjoseca.gov/your-government/departments-offices/information-technology/digital-privacy/ai-reviews-algorithm-register#:~:text=San%20Jos%C3%A9%20AI%20Principles

- Ensuring ethical and responsible AI governance,
- Promoting vendor accountability, and
- Fostering cross-agency collaboration.

The goals of the GovAI Coalition are generally well-aligned with the spirit and guidance contained in the recent White House Executive Order 14110 on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence on AI and the OMB draft memo on AI. The City of San José offers our public comments on the OMB draft memo on AI, with responses to specific questions of interest outlined by OMB below.

Detailed Comments

Q1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

A1.

Emphasize AI Officer's role in the procurement process. In the implementation of San José and partner local agencies, we have seen that most staff lack the skills necessary to evaluate AI systems during the purchasing process. In our agency, where Requests for Proposals (RFPs) and other bid forums require staff to volunteer as subject matter experts, the lack of AI expertise can limit our ability to evaluate and score different vendor proposals. To address this issue, our Digital Privacy Officer, who is also functioning as our Chief AI Officer, and their team have done two things that we recommend for federal agencies:

i. **Provide targeted education to your staff directly involved in procurement.** This should cover how to identify if an RFP's scope heavily involves an AI system, what questions to ask the proposers, and how to evaluate those questions. While the exact questions will vary by use case, we have included our example list of 20 questions and how to score them in the appendix of this comment.[4] Most RFPs will only include a handful of these, but they provide options to the procurement staff.

ii. **Involve the Chief AI Officer at some point in the procurement of any AI system.** This does not need to be heavy involvement. We have found that having at least a quick check by our AI team of all potential AI initiatives and purchase requests allows us to identify the systems that warrant a deeper review. An overwhelming majority of the time, this check takes less than 15 minutes (often much less), but allows the experts in the agency to triage risk rather than relying on staff without training in AI. For reference on how we assess AI risk and triage systems, refer to the "algorithmic review process" in the AI Manual attached.

Plan for at least a year-long process to implement an agency's AI governance. The City of San José's process of designating an AI Officer, implementing AI reviews, starting AI staff education, drafting an AI policy (not yet approved), inventorying AI, and incorporating necessary steps into AI procurement began in late 2022. As of today, AI education has begun through in-person

[4] As the AI landscape evolves, we plan to update the RFP questions as appropriate over time.

sessions, one-page factsheets, and org-wide emails (happy to share materials where helpful). The AI Policy is undergoing review across several departments including but not limited to the Information Technology, Legal, Purchasing, and the central City Manager's Office. The function of the AI Officer is handled by the Digital Privacy Officer in San José but will vary for every organization. We find it useful for the AI Officer to sit where technology policies are managed in an agency. We expect the AI Officer's position to evolve rapidly over the next two years.

Q2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

A2.

Leverage existing governing bodies, especially in privacy, before building a new governance program. Resources are constrained and governing bodies often rely on staff or the public volunteering their time. We have opted to adapt existing governing bodies to meet our AI governance needs wherever possible. For example, our two main privacy governing bodies–a working group of staff and a task force of external experts—have both been repurposed to also cover AI governance.

We have found that the staff most suited for an AI working group were those that were familiar with their department/division's data, technical capabilities, and business needs. These were almost always the same people we relied on for privacy governance, so we merged the working groups to reduce organizational overhead.

Similarly, our group of outside experts from industry, academia, government, and civil liberties who were focused on privacy were also moving into the AI governance space in their respective fields. While there have been some required additions to these groups, the majority of participants have remained the same through this transition.

This model has been effective because governance is centralized under the Information Technology Department. The City's Information Technology Department hosts digital privacy, cybersecurity, digital equity, and data governance. Having these functions work closely ensures consistency, collaboration, resource sharing, and cost-effectiveness.

If an agency is heavily focused on building in-house AI systems, that may require additional capacity. However, we find AI governance to overlap heavily with existing privacy governance.

Q3. How can OMB best advance responsible AI innovation?

A3.

Promote greater vendor accountability before, during, and after the procurement process. The minimum practices required before using a safety-impacting or rights-impacting technology include a comprehensive AI impact assessment that captures various details about the AI system. If the agency is using a third-party system, much of this information must be obtained from vendors, particularly if the information is to be gathered before use of the system, like during the procurement process.

When implementing a similar impact assessment framework at the City of San José, we experienced varying levels of cooperation across vendors in obtaining this information. Some

vendors provide all details while others, especially larger vendors were often unresponsive or unwilling to provide us information about the AI system. This forced the City to waste government time to simply understand the AI when the vendor already had the answers.

This is a shared pain point across many subnational governments. Over 100 state, local, tribal, and territorial (SLTT) agencies have partnered together under the "GovAI Coalition" to, among other things, require vendors to provide a baseline of information, or "nutrition facts" on their AI systems (sanjoseca.gov/govai). Having a standardized "nutrition facts" requirement for all AI systems enforced at the federal level would solve this problem. The Coalition has created a potential set of required "nutrition facts" for AI systems (see appendix). The factsheet was based on IBM's AI Factsheet and evolved following pilot implementations and revisions across the Coalition agencies.

Additional Steps for Accountability: As the GovAI Coalition, one of our primary objectives is to improve vendor accountability around AI systems. To this end, we are in the process of formally adopting standard policies and practices for AI governance, including AI policies, AI vendor evaluation and agreements, AI use cases, and AI incident response. This work is intended to complement the recent executive order with practical implementation steps for SLTTs. One of our ultimate goals is for AI vendors to be responsible for demonstrating that their AI system adheres to a pre-defined set of criteria to ensure the system's safety and effectiveness. We intend to aggregate the information from vendors in a vendor registry. The GovAI coalition is building this registry and it will be shared online with other agencies. We are happy to discuss further and will release our standard policies and practices in February 2024.

AI Risk Management: We are aligned with EO section 10.1(b)(iv) to evaluate AI maturity in accordance with the National Institute of Standards and Technology AI Risk Management Framework (NIST AI RMF). We found the NIST AI RMF was a great tool at assessing the many facets of AI risk management. It forced us to look across many factors of AI governance, and it highlighted essential components we had not yet considered. In our self-evaluation, we created a template for evaluating AI maturity that can be found on NIST's website (https://airc.nist.gov/Usecases) and may be able to serve as an initial approach for agencies.

Q4. With adequate safeguards in place, how should agencies take advantage of generative AI to improve agency missions or business operations?

A4.

Agencies should leverage generative AI tools for creating initial drafts of content while establishing safeguards to ensure responsible use. Generative AI can be a powerful tool for making the work of public officials more efficient. It is adept at creating first drafts of content like policy memos, RFPs, graphic designs, or presentations.

However, generative AI tools presents various accuracy, privacy, bias, and transparency concerns. Therefore, it is important that agencies put safeguards in place to ensure the responsible use of such tools. For example, generative AI tools often produce inaccurate or contextually inappropriate information that must be fact-checked and corrected. Given the wide accessibility of these tools and rapid inclusion into all major software, restricting generative AI usage is not possible. Instead, we recommend taking a proactive educational approach to train staff to use these tools responsibly.

To promote the responsible use of generative AI tools, the City of San José and many others have released Generative AI Guidelines to help City employees leverage the benefits of generative AI tools while understanding and mitigating its risks. To date, the Generative AI Guidelines have been updated multiple times and will continue to be updated as the industry and legal precedent evolves around generative AI, and we recommend a similar flexible approach for federal agencies.

The GovAI coalition is also addressing generative AI guidance to be released early next year.

Q5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

A5.

We appreciate the comprehensive list and look forward to the final version.

Q6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

A6.

The minimum practices outlined in the memo may be too aggressive for agencies to implement by the desired timeline. Agencies with a lower AI maturity may struggle to successfully implement all minimum requirements by the deadline.

For example, one of the minimum requirements is to independently evaluate all rights impacting or safety impacting AI systems before deployment, in addition to separate requirements for impact assessments and real-world testing. Establishing an independent oversight board or review body comprised of people with the appropriate technical and domain expertise to review all relevant AI systems is a time-intensive task. Generally, it may take months if not years to set up a functioning independent review body of this kind. From a practitioner's perspective, the feasibility of this requirement is concerning.

Q7 – What types of materials or resources would be most valuable to help agencies, as appropriate, incorporate the requirements and recommendations of this memorandum into relevant contracts?

A7.

OMB could provide a centralized location for agencies to see evaluations of AI systems pre and post implementation. In addition, OMB could support a centralized hub to access the latest information and conversations around AI procurement. The GovAI Coalition is building a similar framework in our vendor registry, but are looking for a centralized, national sponsor to maintain its relevance and effectiveness.

Q8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

A8.

The City of San José praises the inclusion of use case inventories in this memo's requirements. At San José, we implemented our own public inventory in early 2023, called the "Algorithm Register,"

where we catalog the AI systems used by the City. For AI systems in the inventory, we include key documents:

1. Algorithmic Impact Assessment (AIA) Form (link for reference)
2. AI FactSheet (example)
3. Final Review by the Digital Privacy Office (DPO) (example)

For high-risk systems, we publish:

4. Data Usage Protocols (example)
5. Annual Usage Reports (example)

The AIA Form is completed by the staff in the procuring City department after they submit a formal procurement request to the City's centralized IT procurement system. The AIA form intakes information about the intended use of the system and why the department is choosing automation for their solution. The DPO functions as a "check" by reviewing the AIA Form to ensure that City staff adequately understand the system's potential risks.

The AI FactSheet is completed by the vendor and captures technical details of the AI system, including information about performance metrics, training and testing data, and optimal/poor performance conditions.

The final review by the DPO details the rationale behind the DPO's disapproval, approval, or conditional approval of the AI procurement. Using the AIA Form and Vendor FactSheet, the DPO compares the two documents to determine if the needs declared by the procuring City department can be fulfilled by the technical capabilities of the vendor's system.

After the first year of deployment post-review, the Algorithm Register will begin to include Annual Usage Reports for each AI system. Annual Usage Reports are regularly conducted for technologies used in the City that pose significant privacy risks, and the report format will look very similar when applied to AI systems. Annual Usage Reports are the City's mechanism for ongoing monitoring of technology systems to ensure that the system's performance continues to meet the City's needs.

Appendix and Attachments

Appendix

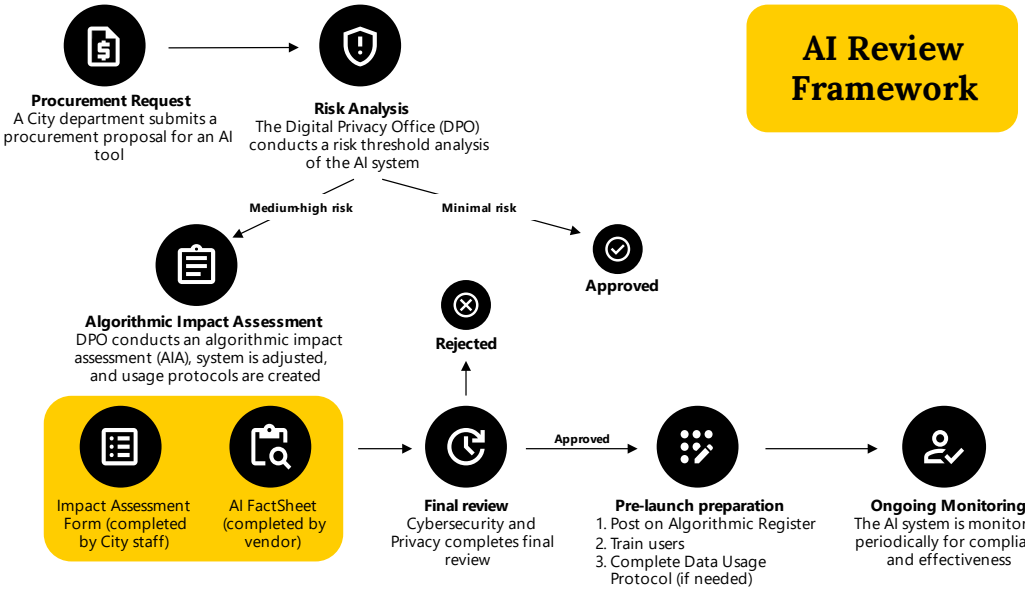
A. Algorithmic Review Process
B. AI Risk Assessment Framework
C. AI FactSheet
D. Algorithmic Impact Assessment Form
E. RFP Questions
F. GovAI Coalition Participating Agencies

Attachments

- Draft AI Policy: DRAFT AI Policy.docx
- AI Manual: AI Manual.docx
- Vendor Agreement: AI agreement v01.docx

Appendix A: Algorithmic Review Process

This is a diagram explaining the steps in our AI Review Process. Additional information can be found in the AI Manual attachment.



Appendix B: AI Risk Assessment Framework

This is an excerpt from the AI Manual attachment. See Step 2 under Algorithmic Review Process

The algorithmic risk of the proposal is evaluated in Step 2 of the review, otherwise known as the Algorithmic Threshold Analysis. Algorithmic risk is evaluated based on two key components: the ability of data subjects and/or end-users to opt-out of the use of the algorithmic system and the intensity of the potential harm of the algorithmic system.

The figure below provides a summary of algorithmic risk, with further details below. Algorithmic risk is generally classified into one of three levels: low, medium, and high. Each factor contributing to algorithmic risk can also be defined at a low, medium, or high risk level.

1. **Low algorithmic risk** involves an **opt-in** approach to users being subjected to the AI system. The AI system generates **predictions** but does not automate decision-making. The AI system is subject to a **high level of human oversight**. The AI system **does not impact human livelihood** and is used in areas like mundane business functions (e.g., text autocomplete to help write emails). Consequences are short term and easily reversible.

2. **Medium algorithmic risk** involves an **opt-out** approach to users being subjected to the AI system. The AI system generates **recommendations** but does not automate decision-making. The AI system is subject to **periodic human oversight**. The AI system may **impact non-critical areas of livelihood** like recreation. Consequences are not long term and can be reversible.

3. **High algorithmic risk** involves users that are **unable to opt-out** to being subject to the AI systems. The AI system **automates decision-making**. The AI system is subject to **minimal or no human oversight.** The AI system **may impact highly sensitive areas of livelihood** like employment, healthcare, or criminal justice. Consequences are long-term and difficult to reverse.

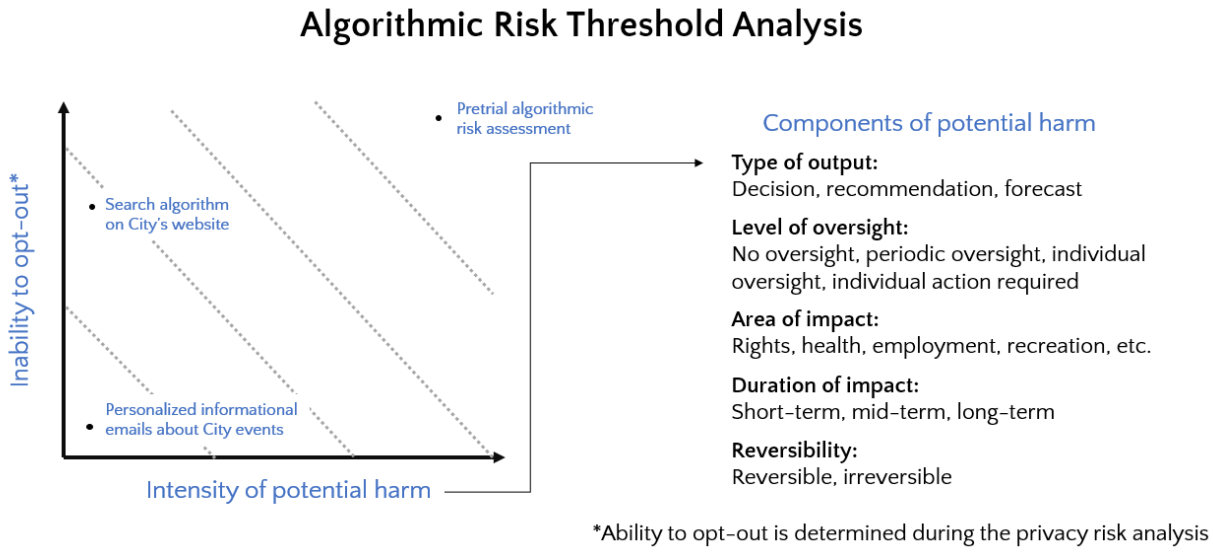


Figure 1: The risk of an algorithmic system can be estimated by identifying impacted individuals' ability to opt-out of the use of the algorithmic system and the intensity of potential harm generated by the system.

The components of potential harm consist of the type of output, the level of oversight, and the area of impact. In Figure 1, the risk level of each component of potential harm decreases from left to right. For example, for type of output, “decisions” are higher risk than “forecasts”; for level of oversight, “no oversight” is higher risk than “individual action required”; for area of impact, “impacts on rights” are higher risk than “recreational impacts”.

Components of Algorithmic Risk

Algorithmic risk is defined by two main components: ability to opt-out and intensity of potential harm.

1. **Ability to opt-out:** risk is measured by an individual’s ability to control being subject to a given AI system. Ability to opt-out is determined during the privacy risk threshold analysis.
    a. **Low risk ability to opt-out** involves a default opt-in approach. Individuals must actively opt-in to being subjected to the AI system.
    b. **Mid risk ability to opt-out** involves a default opt-out approach. Individuals must actively opt-out if they do not wish to be subjected to the AI system.
    c. **High risk ability to opt-out** involves individuals being unable to opt-out of the AI system. Individuals are required to be subject to the AI system.
2. **Intensity of potential harm:** risk is measured by five sub-components of potential harm: type of output, level of human oversight, area of impact, duration of impact, and reversibility.
    a. **Low risk potential harm** is associated with an AI system that generates predictions, is subject to a high level of human oversight, does not impact any areas of human livelihood, has a short-term impact, and is easily reversible.
    b. **Mid risk potential harm** is associated with an AI system that generates recommendations but does not automate decision-making, is subject to periodic human oversight, impacts non-critical areas of livelihood like recreation, has a mid-term impact, and is moderately easy to reverse.

High risk potential harm is associated with an AI system that automates decision-making, is not subject to human oversight, impacts critical areas of livelihood like employment, healthcare, or criminal justice, has a long-term impact, and is difficult to reverse or not reversible entirely.

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Appendix C: AI FactSheet

AI FactSheet for Third Party Systems

Please provide details regarding your Artificial Intelligence (AI) product by filling out the FactSheet[5] template below. You can find an example of a completed FactSheet on page 3.

Vendor Name	
System Name	
Overview	Brief summary of the AI system.
Purpose	What function does the AI system perform, and for what purpose?
Intended Domain	What domain is the AI system intended to be applied in?
Training Data	How was the AI system trained? What data was used? How often is data added to the training set?
Test Data	What data was used to test system performance? Under what conditions has the system been tested?
Model Information	General description of the model(s) used (e.g., large language model, transformer, deep learning, supervised learning, built on an existing open source model, computer vision)
Update procedure	In general, how often are the models updated for users? Will the user have a choice in moving to the updated model or staying on the current model?
Inputs and Outputs	What are the inputs to the AI system? What are its outputs?
Performance Metrics	How was the accuracy and effectiveness of the system measured? What metrics were used, and why? What is the range of accuracy of the AI system and how does it vary depending on the data? What is the system optimizing for and under what constraints?
Bias	What biases does the tool exhibit and how does it handle that bias? This can include but is not limited to biases on human factors such as gender, race, socioeconomic status, disability, culture, age, or other protected classes, or biases on general factors such as a sampling bias, survivorship bias, detection bias, or observer bias.

[5] The FactSheet template is heavily inspired by the IBM Research AI FactSheets 360 project.

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Robustness	How does the AI system handle outliers? Do overwritten decisions feed back into the system to help calibrate it in the future?
Optimal Conditions	What conditions does the model perform best under?
Poor Conditions	What conditions does the model perform poorly under? What are the limitations of the AI system? What kinds of errors can it make?
Explanation	How does the AI system explain its predictions? Are the outcomes of the AI system understandable by subject matter experts, users, impacted individuals, and others?

Algorithmic Equity Assessment Questionnaire

How is the AI tool monitored to identify any problems in usage? Can outputs (recommendations, predictions, etc.) be overwritten by a human, and do overwritten outputs help calibrate the system in the future?	Problems in usage can include false negatives, false positives, bias, hallucinations, and human-reported quality issues (such as poor translations or poorly generated images)
Have the vendors or an independent party conducted a study on the bias, accuracy, or disparate impact of the system? If yes, can the City review the study? Include methodology and results.	This can include bias impact reports, algorithmic impact reports, or others.[6]
Is the data used to the train the system representative of the communities it covers?	
How can the City and its partners flag issues related to bias, discrimination or poor performance of the AI system?	
How is the AI tool made accessible to people with disabilities?	Has it been assessed against any usability standards, and if so what was the result?
What other human factors, if any, were considered for usability and accessibility of the system?	

[6] An example bias impact report template is hosted by AI Now

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Example FactSheet[7]

This is an example of the factsheet above completed by a fake company. This is only here for reference and does not need to be included in the completed form.

Vendor Name	XYZ Technologies, Inc.
System Name	Audio Classifier
Overview	This document is a FactSheet accompanying the Audio Classifier model on IBM Developer Model Asset eXchange.
Purpose	This model classifies an input audio clip.
Intended Domain	This model is intended for use in the audio processing and classification domain.
Training Data	The model is trained on the AudioSet dataset by Google.
Test Data	The test set is also part of the AudioSet data. There was a 70:20:10% split of the data into train:val:test. The ratio of samples/class was maintained as much as possible in all the splits.
Model Information	The audio classifier is a two-stage model: • The first model (MAX-Audio-Embedding-Generator) converts each second of input raw audio into vectors or embeddings of size 128 where each element of the vector is a float between 0 and 1. • Once the vectors are generated, there is a second deep neural network that performs classification.
Inputs and Outputs	Input: a 10 second clip of audio in signed 16-bit PCM wavfile format. Output: a JSON with the top 5 predicted classes and probabilities.
Performance Metrics	**Metric** / **Value** Mean Average Precision / 0.357 Area Under the Curve / 0.968 d-prime / 2.621

[7] The example FactSheet is taken from IBM Research AI Factsheet 360's Audio Classifier sample.

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Bias	The majority of audio samples in the training data set represent voice and music content. Potential bias caused by this over-representation has not been evaluated. Careful attention should be paid if this model is to be incorporated in an application where bias in voice type or music genre is potentially sensitive or harmful.
Robustness	This audio classifier is not robust to the L-infinity and L2 norms for the HopSkipJump attack.

	L2	L-Infinity
5th Percentile	887.0 (200.9)	5.5 (4.9)
10th Percentile	1496.6 (720.6)	7.53 (5.73)
15th Percentile	3723.1 (4707.2)	52.8 (41.8)
25th Percentile	7187.9 (---)	187.6 (198.1)
50th Percentile	11538.6 (---)	502.8 (---)

The susceptibility of the model to the two attacks. The parenthetical values in the table above represent the fitted curve evaluated at 11 iterations. (When we are unable to fit a curve, or the result is negative, we denote by ---.)

Optimal Conditions	• When the input audio contains only one or two distinct audio classes. • When the audio quality is high with lesser noise.
Poor Conditions	• When the audio contains more than two distinct classes. • When the audio quality is low with more noise.
Explanation	While the model architecture is well documented, the model is still a deep neural network, which largely remains a black box when it comes to explainability of results and predictions.

Algorithmic Equity Assessment Questionnaire

How is the AI tool monitored to identify any problems in usage? Can decisions be overwritten by a human, and do overwritten decisions help calibrate the system in the future?	The system can be monitored in usage, and audio classification decisions can be retroactively overwritten by a human. The overwritten decisions can help calibrate the system in the future if desired.
Have the vendors or an independent party conducted and published a validation report (including the methodology and results) that	Yes. Results from the third party study can be provided upon request.

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audits for accuracy and discriminatory/disparate impact? If yes, can the City review the study?	
Is the data used to the train the system representative of the communities it covers?	The majority of audio samples in the training data set represent voice and music content from Google's AudioSet dataset. The dataset includes voices of all types, but may not be in a ratio reflective of the San José community. Potential bias caused by this over-representation has not been evaluated.
How can the City and its partners flag issues related to bias, discrimination or poor performance of the AI system?	The system provides a web portal to each customer to show the results of the system and its impact on transit performance in the form of reports and graphs.
How is the AI tool made accessible to people with disabilities?	The system is embedded into a graphics user interface that is compliant with modern screen readers, and provides the option for auto-generated dictation of text on the screen.
What other human factors, if any, were considered for usability and accessibility of the system?	Users can provide feedback on the interface through an online suggestion box, which has informed the evolution of the interface design over the last several years.

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Appendix D: Algorithmic Impact Assessment Form

The Algorithmic Impact Assessment (AIA) Form template can be accessed here and examples for completed responses and be found on the Digital Privacy Office's AI Review webpage.

Below are questions included in the Algorithmic Impact Assessment (AIA) Form completed by City staff when there is a procurement proposal involving an algorithmic system. This is normally completed via an online form.

Project Objective

1. Project title
2. Please clearly describe the project use case, the current process, and the desired outcome.
3. Which department is owning this system?
4. Who in the City is responsible f this system? First and last name
5. What is this person's role in the City?
6. What is their email address?
7. Why does your department choose automation as an approach to this problem? What other approaches to solving this problem were considered (if any) and what led to choosing automation?

Algorithm Details

1. Will the algorithm be designed, developed, deployed, or maintained by vendors or third parties?
2. How can the City test the algorithm before it is put into use?

Transparency

1. How do individuals receive a notice in advance of interacting with the system? For example, if a user is interacting with a chatbot, the system lets the user know they are talking to a chat bot instead of a human.
2. How can third-party auditors easily view the system's data in order to perform evaluations? If vendor not determined, put "TBD"
3. How could system operators or residents know if the system outputs an error? What ability will they have to correct or appeal an error?

Equity

1. What individuals and communities will interact with the system? For example, is the algorithm used on the general City population (technology used in many public areas) or a specific group (e.g., children in a school program, a single neighborhood)?
2. How likely is it that the system impacts children under the age of 18?
3. Does this use case, and the information/decisions provided by the algorithm, impact an individual's right or freedoms (e.g., if the algorithm helps determine if a suspect can be put on bail or must remain in jail)?

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   a. How is this use case, and the information/decisions provided by the algorithm, related to an individual's right or freedoms (e.g., if the algorithm helps determine if a suspect can be put on bail or must remain in jail)?
4. Does this use case, and the information/decisions provided by the algorithm, impact an individual's economic status (e.g., if the algorithm helps determine if an individual can apply to affordable housing)?
   a. How is this use case, and the information/decisions provided by the algorithm, related to an individual's economic status (e.g., if the algorithm helps determine if an individual can apply to affordable housing)?
5. Does this use case, and the information/decisions provided by the algorithm, impact an individual's health, healthcare, well-being (e.g., if the algorithm helps determine an individual's likeliness for colon cancer)?
   a. How is this use case, and the information/decisions provided by the algorithm, related to an individual's economic status (e.g., if the algorithm helps determine if an individual can apply to affordable housing)?
6. Do decisions from the system impact the environment? (e.g., potential impact to carbon emissions, high tech waste)?
   a. How do decisions from the system impact the environment (e.g., potential impact to carbon emissions, high tech waste)?
7. What issues could arise if the algorithmic system is inaccurate?

Human oversight

1. Please describe the level of autonomy of the system.
   a. System operates automatically with no human intervention
   b. System operates automatically with occasional retrospective reviews by humans
   c. System operates automatically with opportunity for human to override any individual action
   d. System produces recommendations but cannot act without human intervention
2. If there is human intervention in the system, is it by the vendor, City department/office, or both?
3. Please list the City roles/divisions that will be "touching" the system, or managing the deployment and use of the system.
4. How does the Department provide training and resources to personnel to help them develop the skills they need to effectively operate the system?
5. In the event that the system does not work or is deemed to be inaccurate, what back-up measures are in place to continue providing services? In other words, can the City continue to provide the service without the algorithmic system, and how would it do that?

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Appendix E: RFP Questions

Below is an illustrative example of RFP questions and how to evaluate them for an AI system. Recommended point values also provided. Not all questions will be included in every RFP.

1. Overview - Brief summary of the AI system.
    a. 0 points. Used to understand the context of the system
2. Purpose - What function does the AI system perform, and for what purpose?
    a. 3 points. Pass/Fail does the AI system's purpose fit the need of the department?
3. Intended Domain – What domain is the AI system intended to be applied in?
    a. 3 points. Pass/Fail is the AI system meant to be applied to this domain? For example, an AI meant to identify motorcycles should not be used to identify cars, unless it was built to identify both.
4. Training Data - How was the AI system trained? What data was used? How often is data added to the training set?
    a. 5 points. Should provide a brief explanation for how the data was trained. They should explain that the model has been trained on a sufficiently large data set for the use case that is updated with new data at a frequency suitable for the use case. For example, an AI meant to translate language may need to update at least annually since language evolves quickly.
5. Test Data - What data was used to test system performance? Under what conditions has the system been tested?
    a. 5 points. The test data and the conditions it was tested in should match the conditions we intend to use the system.
6. Model Information - Provide a general description of the model(s) used (e.g., large language model, transformer, deep learning, supervised learning, built on an existing open source model, computer vision)
    a. 3 points. Pass/Fail do they provide a general explanation of the models used.
7. Update procedure - In general, how often are the models updated for users? Will the user have a choice in moving to the updated model or staying on the current model?
    a. 5 points. We want to have a choice in having the model we use updated, or at least the choice to opt-out of automatic updates.
8. Inputs and Outputs - What are the inputs to the AI system? What are its outputs?
    a. 3 points. Pass/Fail do they share what information goes into the model and what goes out. The outputs should be something tangible, like a recommendation, decision, or content.
9. Performance Metrics - How was the accuracy and effectiveness of the system measured? What metrics were used, and why? What is the range of accuracy of the AI system and how does it vary depending on the data? What is the system optimizing for and under what constraints?
    a. 20 points. Clearly explains how they measure accuracy and effectiveness. Justifies metrics used for measurement. Do the metrics make sense to you, and do they meet the needs of your use case? How do the performance metrics compare to other vendors?
10. Bias - What biases does the tool exhibit and how does it handle that bias? This can include but is not limited to biases on human factors such as gender, race, socioeconomic status, disability,

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culture, age, or other protected classes, or biases on general factors such as a sampling bias, survivorship bias, detection bias, or observer bias.
    a. 20 points. Does the vendor report bias or justify why no bias would be present.
11. Robustness - How does the AI system handle outliers? Do overwritten decisions feed back into the system to help calibrate it in the future?
    a. 5 points. Vendor explains how it handles outlier data. Vendor provides method to overwrite AI outputs and feed those outputs back into the AI system? For example, if the AI system calls a bicycle a tricycle, can you correct it and will that correction update the model?
12. Optimal Conditions - What conditions does the model perform best under?
    a. 5 points. Does the vendor explain in what conditions the model performs best? Do those conditions match the typical conditions for your use case?
13. Poor Conditions - What conditions does the model perform poorly under? What are the limitations of the AI system? What kinds of errors can it make?
    a. 5 points. Does the vendor explain in what conditions the model performs poorly? Do those conditions *not* match the typical conditions of your use case?
14. Explanation - How does the AI system explain its predictions? Are the outcomes of the AI system understandable by subject matter experts, users, impacted individuals, and others?
    a. 5 points. Vendor demonstrates how the AI system can explain its predictions to subject matter experts and/or to the general public, depending on the use case.
15. Identifying problems - How is the AI tool monitored to identify any problems in usage? Can outputs (recommendations, predictions, etc.) be overwritten by a human, and do overwritten outputs help calibrate the system in the future?
    a. 5 points. Vendor explains 1) how the system is monitored, 2) how your agency can monitor its effectiveness in the field, 3) how outputs can be overwritten, and 4) how overwritten outputs can update the model.
16. Studies of bias and accuracy - Have the vendors or an independent party conducted a study on the bias, accuracy, or disparate impact of the system? If yes, can the [Agency] review the study? Include methodology and results.
    a. 5 points. Vendor provides a study, ideally by an independent party, on the bias, accuracy, and impact of the system. If the study is done by the vendor, vendor explains why the study is valid.
17. Representation - Is the data used to the train the system representative of the communities it covers?
    a. 5 points if applicable. If the model involves data on people, vendor explains how the people data used to train the system includes people that represent the diversity of your community.
18. Flagging inaccuracies - How can the [Agency] and its partners flag issues related to bias, discrimination, or poor performance of the AI system?
    a. 5 points. Vendor provides an easy method for flagging issues within the system around outputs that appear biased, inaccurate, or otherwise perform poorly.
19. Accessibility - How is the AI tool made accessible to people with disabilities? Has it been assessed against any usability standards, and if so what was the result?
    a. 5 points. Vendor explains how the system as a whole is accessible for users, such as the interface is compatible with screen-readers, and it can be translated into the necessary languages.

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20. Usability - What other human factors, if any, were considered for usability and accessibility of the system?
    a. 3 points. Pass/Fail does the vendor explain other considerations for usability and accessibility that were built into the system.

Use-case specific questions

You may want to include additional questions based on the specific use case for the AI system. Refer to use-case specific RFP questions in the appendix "RFP questions for AI Use-Cases".

Use Case #1: Translation-Based AI Systems

- Please provide a list of all languages your solution supports for live speech translation, beyond the mandatory languages specified in Attachment A. Additionally, describe how often you introduce new languages to your platform and outline the process for these additions.
- Does your Solution offer text-to-speech functionality or other methods to accommodate American Sign Language (ASL) speakers in both in-person and virtual (Zoom) meetings? If so, please describe the features and functionalities that enable this accommodation, including any limitations or requirements for optimal performance.
- How do you measure the performance of your Solution in terms of translation, speech-to-text, and text-to-speech for English, Spanish, Tagalog, Mandarin, and Vietnamese? Please specify the metrics used (e.g., BLEU score, human ratings, etc.) and the conditions under which these measurements were taken. Based on these metrics, what is the performance of your Solution for the specified languages?
- Please provide/describe any third-party evaluations or benchmarks that have been conducted on your Solution's translation capabilities. Include details on the evaluation process, criteria, results, and any subsequent improvements made to the Solution based on these evaluations.
- What is your Solution's average time delay between speech input and translation output?
- How does the Solution handle rapid speech or overlapping conversations?
- How can the Solution adapt to idiomatic expressions, cultural references, or local slang?

Use Case #2: Large-Language Models

- What is your Solution's average time delay between text input and output?
- Is the user's input or output data used to the train your Solution? If yes, will this data train the model for any other users of your Solution?

Use Case #3: Computer Vision

- How well does your Solution adapt to blurring, obstruction, poor lighting or any conditions that may lead to misclassification?

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Appendix F: Publicly listed GovAI Coalition Participating Agencies

Below is the list of agencies in the GovAI Coalition who have agreed to being listed as public members as of December 4, 2023. Jurisdictions with an asterisk (*) next to their name have multiple agencies from that location participating in the Coalition.

1. City and County of San Francisco, CA
2. City of Alexandria, VA
3. City of Austin, TX
4. City of Boise, ID*
5. City of Carmel, IN
6. City of Charlotte NC*
7. City of Chattanooga, TN
8. City of Chicago, IL
9. City of Cleveland, OH
10. City of Columbus, OH
11. City of Elk Grove, CA
12. City of Fairfield, CA
13. City of Grand Rapids, MI
14. City of Irvine, CA*
15. City of Kansas City, Missouri
16. City of Long Beach, CA
17. City of Martinez, CA
18. City of Milpitas, CA
19. City of Newport News, VA
20. City of Pittsburgh PA
21. City of Placer, CA
22. City of Portland, OR*
23. City of Raleigh, NC
24. City of Rockville, MD
25. City of Saint Paul, MN
26. City of San Antonio, TX*
27. City of San Diego, CA
28. City of San José, CA
29. City of Seattle, WA
30. City of South Bend, IN
31. City of St. Louis, MO
32. City of Sugarland, TX
33. City of Sunnyvale, CA
34. City of Tempe, AZ
35. City of Tucson, AZ
36. City of Virginia Beach, VA*
37. Colorado Department of Revenue
38. County of Ada, ID
39. County of Contra Costa, CA

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40. County of El Dorado, CA
41. County of Fairfax, VA
42. County of Humboldt, CA
43. County of Kern, CA
44. County of Lake, CA
45. County of Larimer, CO*
46. County of Los Angeles, CA
47. County of Los Angeles, CA, Department of Public Works
48. County of Los Angeles, CA, Internal Services Department
49. County of Los Angeles, CA, Sheriff's Department
50. County of Madera, CA
51. County of Marin, CA
52. County of Monterey, CA
53. County of Multnomah, OR
54. County of Nevada, CA
55. County of Orange, CA
56. County of San Bernardino, CA
57. County of San Diego, CA*
58. County of San Luis Obispo, CA
59. County of Santa Barbara, CA
60. County of Santa Clara, CA*
61. County of Santa Cruz, CA*
62. County of Stanislaus, CA, Health Services Agency
63. County of Tulare, CA
64. County of Tuolumne, CA
65. County of Washington, MN
66. County of Washoe, NV
67. County of Waukesha, WI
68. County of Yuba, CA
69. Covered California
70. Louisville/Jefferson County, KY
71. Metropolitan Government of Nashville and Davidson County, TN
72. Midpeninsula Regional Open Space District, CA
73. Santa Clara University, CA
74. TriMet, OR
75. Washington, D.C.

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USED IN PURCHASING CONTRACT HERE: https://records.sanjoseca.gov/Contracts/OC-006170-000.pdf

EXHIBIT H-2
ALGORITHMIC SYSTEMS STANDARDS AND REQUIREMENTS

The purpose of this document is to define the City of San José's Artificial Intelligence (AI) systems usage policy and applicable requirements for City Contractors.

1 ARTIFICIAL INTELLIGENCE SYSTEMS

The City defines an AI system as any system, software, sensor, or process that automatically generates outputs, including, but not limited to, predictions, recommendations, or decisions that augment or replace human decision-making. This extends to software, hardware, algorithms, and data generated by these systems, used to automate large-scale processes, or analyze large data sets.

AI system does not refer to algorithmic systems that a person directly defines. A general rule is that any algorithm that a person cannot easily write out or readily understand is most likely AI.

2 ALGORITHMIC BIAS

AI system responses are based on patterns and relationships learned from large datasets derived from existing human knowledge, which may contain errors and may be biased across race, sex, gender identity, ability, and many other factors which may result in biases in the AI system's decision-making processes and outputs.

The City defines algorithmic discrimination as the condition in which an automated decision tool contributes to unjustified differential treatment or impacts disfavoring people based on factors including but not limited to actual or perceived race, color, ethnicity, sex, religion, age, national origin, English proficiency, disability, veteran status, genetic information, reproductive health, or medical conditions.

3 ALGORITHMIC RISK

The Contractor shall work with the City to evaluate and minimize risks posed by the AI system, including, but not limited to, the purpose of the AI system, any consequential decisions it supports, the potential negative impact of the system on individuals and property, and the likelihood of having a negative impact, such as through an inaccurate prediction or classification.

At the City's request, the Contractor will immediately discontinue use of any AI components or systems involved in providing services to the City. If the City, in its sole discretion, suspects substantial harm is being caused to residents or members of the public by all or part of the AI system, the Contractor will work with the City to assess and resolve the issue(s).

4 REQUIREMENTS FOR CONTRACTORS WHEN USING AI SYSTEMS

To the extent permissible by law, the Contractor shall adhere to the following requirements while using any AI systems in the course of doing business with or for the City:

4.1 Accuracy

Contractor shall provide the City or entity working on behalf of the City with the means to monitor the accuracy of the AI systems it uses and report this accuracy to the City. This may include but is not

limited to the false positive rate, the false negative rate, the true positive rate, the average percentage error, the mean-squared error and/or human judgement scores.

4.2 Oversight

Contractor shall provide the City or entity working on behalf of the City the means for a human to evaluate and override decisions of the AI system. The human evaluator must be able to override the decision of the AI system and take precedence over all consequential decisions.

Contractor shall maintain and provide evidence of compliance with this AI Systems Policy upon request by the City.

4.3 Equity

The City only uses AI systems when they do not increase existing racial and socioeconomic disparities.

The City and Contractor shall review the performance of the AI system over time, and the Contractor will work with City to address any biases and discriminatory outcomes identified by the City.

The City may at any time audit all information, processes, and analyses or request the Contractor analyze the potential areas of harm caused by the AI system within or related to the services the Contractor provides to the City. Failure to comply may be considered a breach of contract unless the City grants an extension.

4.4 Transparency

The Contractor shall articulate how the AI system makes decisions, including what factors influence the system's decisions, rule-based logic, and probability-based decisions. The City holds the right to communicate its general usage of the AI system and explain its decision-making processes to the public.

4.5 Monitoring and Auditing of Contractor Security and Privacy Performance

The City retains the right to observe or audit any relevant work processes, services, or documents in the course of doing business with the City to confirm that the Contractor (and any relevant sub-contractors) is complying with this Policy. Contractor shall provide access to information, documentation, and personnel required to complete this audit at no additional cost to the City.

DRAFT Artificial Intelligence (AI) Policy

PURPOSE

This policy outlines and establishes the governance and management of Artificial Intelligence (AI) systems required for the City of San José ("City") to:

- Define how AI systems may be used for legitimate City purposes in accordance with applicable local, state, and federal laws;
- Maintain confidentiality, integrity, and availability of information used and generated by AI systems;
- Define the objectives and principles for City usage of AI systems; and
- Define roles and responsibilities related to the City's usage of AI systems.

The City's AI systems and the data contained therein will be built, operated, and maintained using the City's AI Manual.

SCOPE

This policy applies to:

1. All City AI systems; and
2. All operators and stewards of the City's AI systems, including, but not limited to employees (full-time, part-time), interns, consultants, contractors, and volunteers.

For the purposes of this Policy, the City defines an "Artificial Intelligence" or "AI" set forth in 15 U.S.C. 9401(3): a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. AI systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.

The term "AI model" means a component of an information system that implements AI technology and uses computational, statistical, or machine-learning techniques to produce outputs from a given set of inputs.

The term "AI system" means any data system, software, hardware, application, tool, or utility that operates in whole or in part using AI.

GENERAL PRINCIPLES

This policy establishes a comprehensive governance structure for AI systems that allows the City to use powerful technological systems for the benefit of our residents while safeguarding against algorithmic harms.

The key objectives of the Artificial Intelligence Policy are to:

- Ensure that all AI systems used by the City or on its behalf adhere to the guiding principles of accuracy, transparency, equity, accountability, utility, and privacy;
- Establish and maintain processes to assess and manage risks presented by AI systems used by the City;

- Align governance of AI systems with existing security and privacy measures in accordance with the Information and Security Policy (1.7.6) and Digital Privacy Policy (0-46);
- Define prohibited uses of AI systems;
- Establish "sunset" procedures for AI systems that no longer meet the needs of the City;
- Support compliance with applicable laws and regulation.

The guiding principles for the Artificial Intelligence Policy include:

- **Accuracy:** Deploy AI systems that have a demonstrated accuracy rate, relevancy, and performance that meets a threshold appropriate for the context in which it will be deployed;
- **Transparency:** Inform the general public about the AI systems used;
- **Equity:** Mitigate bias in algorithms and use AI systems with a commitment to reduce racial and socioeconomic disparities;
- **Accountability:** Ensure that AI systems have a human owner who is responsible for system oversight and is able to override consequential actions from the system;
- **Utility:** Pilot algorithmic tools to assess their usefulness, but only adopt algorithmic tools that demonstrate a strong positive impact on City services or residents' livelihoods;
- **Privacy:** Ensure a privacy-centric approach in all AI systems, safeguarding personal and sensitive data from unauthorized access, disclosure, and manipulation.

RESPONSIBILITIES

- The Chief Information Officer (CIO) is responsible for directing City technology resources, policies, projects, services, and coordinating the same with other City departments. The CIO shall designate the City Information Security Officer (CISO) to actively ensure AI systems are used in accordance with the Information and Systems Security Policy from City Policy Manual 1.7.6. The CIO shall also designate the City Privacy Officer (CPO) to actively ensure the AI system is used in accordance with the City Digital Privacy Policy from Council Policy Manual 0-46;
- The CISO is responsible for overseeing the enterprise security infrastructure, cybersecurity operations, updating security policies, procedures, standards, guidelines, and monitoring policy compliance. The CISO is responsible for overseeing the security practices of AI systems used by or on behalf of City Departments;
- The CPO is responsible for overseeing the enterprise digital privacy practices, data processing practices, and responsible usage of technology in compliance with the City Digital Privacy Policy. The CPO is responsible overseeing the privacy practices of AI systems used by or on behalf of City Departments. The CPO or designee is responsible for coordinating reviews on the AI systems used by the City as detailed in the Artificial Intelligence Manual;
- City Departments are responsible for following this policy and following updates to this policy and the Artificial Intelligence Manual, and shall check compliance with these documents at least annually;
- The CIO or designee shall notify City Departments when an update to this Policy or the Artificial Intelligence Manual is released;
- The City Attorney's Office (CAO) is responsible for advising of any legal issues or risks associated with AI systems usage by or on behalf of City Departments;

- The City Manager's Office (CMO) or designee may, at its discretion, inspect the usage of AI systems and require a Department to alter or cease its usage of AI systems or a partner's usage of AI systems on behalf of the Department.
- The Finance Department – Purchasing Office is responsible for overseeing the procurement of AI systems and requiring vendors to comply with City policy standards through contractual agreements.

POLICY

Requirements for Artificial Intelligence System Contracts

Any City Department seeking to purchase and/or operate an AI system must comply with the following:

- Submit a procurement request to the Information Technology Department, noting to the best of their knowledge if the technology is considered an AI system;
- Undergo an Algorithmic Review facilitated by the CPO. The CPO or designee will assess the risk of the potential AI system and conduct additional review steps as required in the Artificial Intelligence Manual,
- Provide supplementary information to the CPO as needed during the Algorithmic Review;
- If applicable, attach the standard vendor agreement for AI systems to the agreement.

City staff must ensure Contractors with access to City-owned AI systems are aware of and comply with the following:

- Adhere to standard vendor agreement for AI systems.
- **Accuracy:** Provide the City or entity working on behalf of the City with the means to monitor the accuracy of the AI system(s) it uses and report this accuracy to the City. This may include, but is not limited to, the false positive rate, the false negative rate, the true positive rate, the average percentage error, the mean-squared error, and human judgement scores.
- **Human oversight:** Provide the City or entity working on behalf of the City the means for a human to evaluate and override decisions of the AI system. The human evaluator must be able to override the decision of the AI system and take precedence over all consequential decisions.
- **Explainability:** Articulate how the AI system makes decisions, including what factors influence the system's decisions, rule-based logic, and probability-based decisions. The City holds the right to communicate its general usage of the AI system and explain its decision-making processes to the public.
- **Notice:** If required by the City, provide written notice of the usage of an AI system to data subjects and/or end-users, preferably at the point of service.
- **Due process:** Define and implement a process for data subjects and/or end-users to easily submit grievances regarding the use or operation of the AI system, including appeals to the outcome(s) of the AI system. The data subject must be provided a meaningful response to the feedback or appeal, including any ability to request human intervention.
- **Training:** Ensure that staff who may operate the AI system receive appropriate training on

responsible use of the system, including how to

- Protect personally identifiable information;
- Mitigate algorithmic bias;
- Promote high accuracy rates;
- Report system errors; and
- Maintain service delivery if the AI system fails.

- **Auditing:** The City retains the right to observe or audit any relevant work processes, services, or documents in the course of doing business with the City to confirm that the Contractor (and any relevant sub-contractors) is complying with this Policy. Contractor shall provide access to information, documentation, and personnel required to complete this audit at no additional cost to the City.

Prohibited Uses

The use of certain AI systems are prohibited because they deal with sensitive information and there is a higher risk that they can cause harm. This includes the following prohibited purposes:

- Real-time and covert biometric identification.
- Emotion analysis, or the use of computer vision techniques to classify human facial and body movements into certain emotions or sentiment (e.g., positive, negative, neutral, happy, angry, nervous).
- Fully automated decisions that do not require any meaningful human oversight but substantially impact individuals.
- Social scoring, or the use of AI systems to track and classify individuals based on their behaviors, socioeconomic status, or personal characteristics.
- Cognitive behavioral manipulation of people or specific vulnerable groups.
- Fully autonomous weapons systems.

If City staff become aware of an instance where an AI system has caused harm, staff must report the instance to their supervisor and the CPO.

Sunset Procedures

If an AI system operated by the City or on its behalf ceases to provide a positive utility to the City's residents as determined by the CPO, then the use of that AI system must be halted unless express exception is provided by the City Manager or City Council. If the abrupt cessation of the use of that AI system would significantly disrupt the delivery of City services, usage of the AI system must be gradually phased out over time.

Public Records

The City is subject to the California Public Records Act. City staff must follow all current procedures for records retention and disclosure.

Policy Enforcement

All employees and agents of the City, whether permanent or temporary, interns, volunteers, contractors, consultants, vendors, and other third parties operating AI systems on behalf of the City are required to abide by this Policy and the associated Artificial Intelligence Manual.

VIOLATIONS OF THE ARTIFICIAL INTELLIGENCE POLICY

Violations of any section of the Artificial Intelligence Policy, including failure to comply with the Artificial Intelligence Manual, may be subject to disciplinary action, up to and including termination. Violations made by a third party while operating an AI system on behalf of the City may result in a breach of contract and/or pursuit of damages. Infractions that violate local, state, federal or international law may be remanded to the proper authorities.

GLOSSARY

Artificial Intelligence: As set forth in 15 U.S.C. 9401(3): a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations, or decisions influencing real or virtual environments. AI systems use machine- and human-based inputs to perceive real and virtual environments; abstract such perceptions into models through analysis in an automated manner; and use model inference to formulate options for information or action.

Artificial Intelligence Model: A component of an information system that implements AI technology and uses computational, statistical, or machine-learning techniques to produce outputs from a given set of inputs.

Artificial Intelligence System: Any data system, software, hardware, application, tool, or utility that operates in whole or in part using AI.

Low-risk: AI systems that involve an opt-in approach to users' subjection to the system. They generate predictions but do not automate decision-making and involves anonymized information used to provide general improvements to the City. Notice is provided upon collection if any personal information is involved.

Medium-risk: AI systems that involve identifiable information not traditionally kept hidden (e.g., name, email, phone #) to provide targeted government services desired by the data owner. Notice is provided at time of collection and often requires written consent.

High-risk: AI systems that potentially impact areas such as the management of critical infrastructure, biometric identification, legal interpretation, and identifiable information traditionally kept hidden, like Social Security Numbers, credit card numbers, etc. These high-risk systems may also encompass components that automate decision-making and are subject to minimal or no human oversight.

Unacceptable risk: AI systems that pose a threat to human safety or welfare including, but not limited to, cognitive behavioral manipulation, social scoring based on behavior, socio-economic status, or personal characteristics.

Real-time and covert biometric identification: The live identification of an individual using technologies including, but not limited to, facial recognition and iris scanning, without that individual's knowledge or consent.

Emotion analysis: The use of computer vision techniques to classify human facial and body movements into certain emotions or sentiment (e.g., positive, negative, neutral, happy, angry).

Approved:

Chief Information Officer Date

DRAFT Artificial Intelligence (AI) Policy

Approved for posting:

Director of Employee Relations
Director of Human Resources

Date

DRAFT

San José Artificial Intelligence Manual

Maintained and updated by:
San José's Digital Privacy Office
digitalprivacy@sanjoseca.gov

Last updated:
November 3, 2023

PURPOSE

The San José Artificial Intelligence Manual provides guidance on matters related to artificial intelligence (AI) for the City of San José (commonly referred to as the "City"). The Manual serves as an extension of the City's policy on algorithmic systems. It is intended for all City Staff and agents of the City, whether permanent or temporary, interns, volunteers, contractors, consultants, vendors, and other third parties operating algorithmic systems on behalf of the City. Refer to this manual for all matters relating to City AI usage, including purchasing, procurement, governance, incident response, and education.

This document covers the following topics:

1. **Algorithmic Review** – required for all new technology procurements and data initiatives that involve an algorithmic system; see "Algorithmic Review"

2. **Artificial Intelligence (AI) Governance** – the framework for managing and monitoring the full lifecycle of all City AI systems; see "Artificial Intelligence (AI) Governance"

3. **Algorithmic Systems (AI) Policy** – the foundational document for the City of San José's approach to artificial intelligence; refer to the "Algorithmic Systems (AI) Policy"
4. **Generative AI Guidelines** – guidance for City staff on how to use Generative AI tools; see "Generative AI Guidelines"

5. **AI Meeting Tools Guidelines** – guidance for City staff on how to identify and respond to AI Meeting Tools; see "AI Meeting Tools Guidelines"

6. **All Things AI in the City of San José Reference Page** – a living repository of all Public documents and pages related to AI governance; see "All Things AI in the City of San José"

This document will continue to be updated to provide the latest information on the City's Artificial Intelligence Policy and practices.

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ARTIFICIAL INTELLIGENCE IN SAN JOSÉ

Background

As the capital of Silicon Valley, the City of San José has a history of using innovative solutions to provide impactful services to residents with limited public sector resources. In recent years, the City has explored the capabilities of Artificial Intelligence (AI) and machine learning systems to improve the delivery of City services and support data analytics, like with AI traffic cameras and Automated License Plate Readers. In response to the City's increased use of AI systems, the City Privacy Office (CPO) has established an algorithmic review process for technology procurements that involve the use of AI. This Manual provides detail into the City's AI governance established by the Algorithmic Systems (AI) Policy. As the City's AI governance practices and the AI industry mature, the policies and this Manual will continue to evolve.

Identifying AI

An "algorithm" and "algorithmic system" are defined in the "Algorithmic Systems Policy".

In practice, the City uses a checklist of questions to identify algorithmic systems.[1] Procurement officers who process technology proposals make particular use of this checklist. Technologies that satisfy one or more of the following conditions may be identified as an "algorithmic system":

- Does the company use words such as "personalized", "tailored" and "adaptive" in its marketing?

[1] This checklist is inspired by The EdTech Equity Project's school procurement guide.

- Does the technology use data to provide predictions, recommendations, or decisions?
- Does the technology augment or replace human decision-making?

Although the City may identify a technology as an algorithmic system, not all algorithmic systems require a full algorithmic review. Learn more about the medium and high-risk algorithmic systems that require full review in the section "Algorithmic Review Process: Step by Step, Step 2: Risk Analysis".

While an algorithm conducts an analysis, an algorithmic system makes a decision based on the algorithm's analysis. The picture below shows the relationship between an algorithm and an algorithmic system through an example of an algorithmic system designed to change traffic lights based on the presence of bikers. While the algorithm would solely identify a biker, the algorithmic system would change the traffic light to accommodate the biker identified by the algorithm.

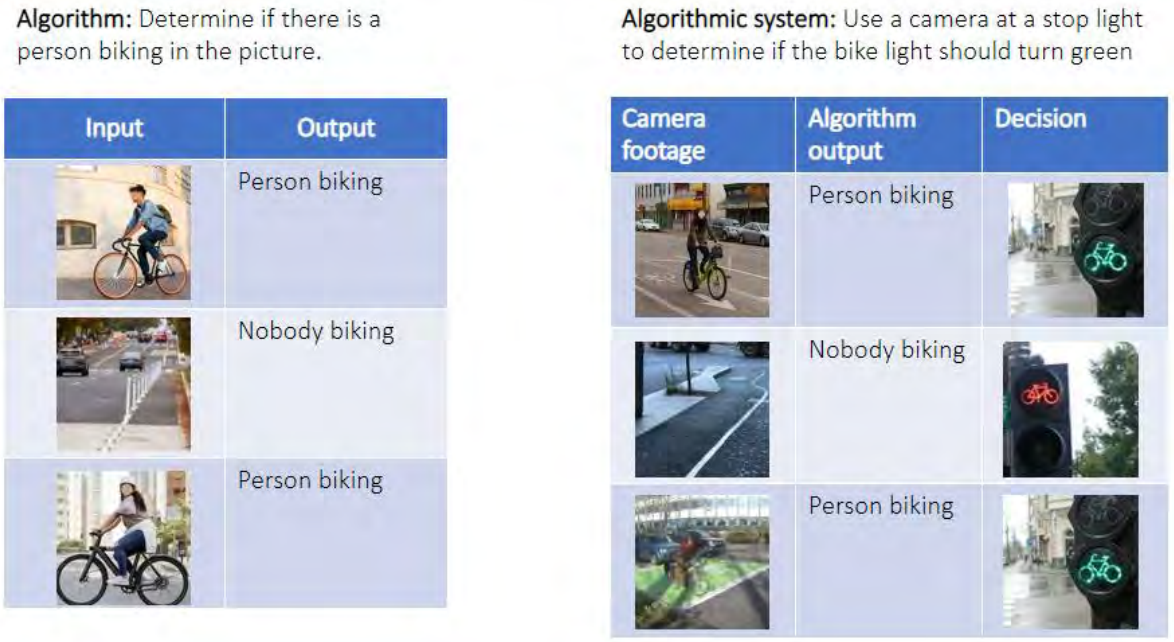

Figure 1: Example of an algorithm and an algorithmic system. In this example the algorithm identifies if a biker exists in the photo. That algorithm is then used in an algorithmic system to turn a bike light green at an intersection.

ALGORITHMIC REVIEW

Introduction

In addition to the City's Privacy Review protocols, the CPO conducts algorithmic reviews to ensure that the proposed algorithmic system complies with the City's AI Principles and relevant privacy policies (in consultation with the City Attorney's Office). While not all steps

of the City's AI Review protocols are necessary for every project, the protocol provides the general review framework for any project.

What Needs an Algorithmic Review?

Not all algorithmic systems require a full algorithmic review. Simple rule-based systems, which rely on a series of hard-coded conditional rules to produce one of multiple pre-defined outputs, may not be subject to the algorithmic review process. Whereas, algorithm-based systems, which rely on more complex logic to make predictions based on patterns in a set of training data, are more frequently subject to the algorithmic review process.

Whether a proposal is subject to an algorithmic review also depends on the risk of the algorithmic system in question. While many systems use algorithms to provide services, they do not require a review given their impact on residents. To classify the risk of an algorithmic system, the CPO conducts a risk threshold assessment before initiating an algorithmic review of a given proposal (see the subsection "Step 2: Risk Analysis" within the section "Algorithmic Review Process: Step by Step" for more information on the risk threshold assessment). See the chart below for examples of algorithmic systems that do and do not require an algorithmic review.

Algorithmic review **required**	Algorithmic review **<u>not</u> required**
1. Predictive policing 2. Identity recognition based on one-to-many matching (e.g., License plate reader, facial recognition) 3. Algorithms that cost greater than $250k/year (need review for effectiveness) 4. Algorithms used to regularly justify search warrants, seizures, or other restriction of rights 5. Algorithms used to levy fines or taxes 6. Automated decision-making that traditionally requires a human review 7. Algorithms that deny or enable access to city services (e.g., translation service for 311)	1. General website recommendations (e.g., recommended videos on the City's Youtube channel) 2. Search bars 3. Related event notifications 4. Opt-in service apps, such as the mysanjose or SJ311 apps 5. Strictly rule-based logic (e.g., an accounting software to calculate taxes owed, a motion-detection based alarm system)

Figure 2: A list of examples of algorithmic systems that do and do not require an algorithmic review.

Algorithmic Review Process: At a Glance

The seven steps that comprise the algorithmic review protocol are outlined below. To understand how the algorithmic review process is adapted for Request for Proposals (RFP), refer to the section "Request for Proposals (RFP) Algorithmic Review Protocol".

1. Procurement Request: Departments first engage the CPO to discuss their project. Departments should provide existing material related to the project, including details on project purpose, data collected and specific uses and benefits of automating a process, recommendation, or decision.
2. Risk Analysis: The CPO conducts a "threshold analysis" to determine if project requires a further assessment. Low-risk projects are approved at this step. Medium-risk projects can often be handled through an abbreviated version of the steps.
3. Assessment: The department(s) fills out the required algorithmic review form for the CPO. The CPO provides assessment, approval/denial, and/or recommendations. Higher-risk projects require a Data Usage Protocol to guide how the project complies with the City's Digital Privacy Policy. Lower-risk projects only require an abbreviated review. As part of the CPO's assessment, the following steps should be adhered to for medium and high-risk projects:
    a. **Algorithmic Impact Assessment (AIA):** The department(s) completes the required AIA form.[2] The CPO provides assessment, approval/denial, and/or recommendations.
    b. **AI FactSheet:** The vendor completes the required AI FactSheet.[3] The CPO provides assessment, approval/denial, and/or recommendations. The CPO may work with the vendor to obtain more details about the algorithmic system.
    c. **If request involves a Request for Proposals (RFP) or similar:** The vendor may not be determined at this time. Require potential vendors to answer the AI assessment questions in the RFP. Once the final vendor is selected, require that vendor to complete the AI FactSheet. See "Request for Proposals (RFP) Algorithmic Review Protocol" for guidance on RFP questions.
4. Public Engagement: The draft DUP is published online for public comment.[4] If the project is considered of particular public interest, the CPO conducts in-person outreach targeting communities with limited access to online comments (either due to language or internet access issues). Community feedback is then incorporated into the DUP.
5. Final Review: Projects are reviewed by the CPO and Cybersecurity Office. At CMO's discretion, a review may rise to a relevant Council Committee. Separately, the review and DUP are published.[5]
6. Pre-Launch Preparation:

[2] Example of a completed AIA form: https://www.sanjoseca.gov/home/showpublisheddocument/93488/638089524520870000
[3] https://www.sanjoseca.gov/home/showpublisheddocument/93406/638086228697100000
[4] Data Usage Protocols can be found online at https://www.sanjoseca.gov/digitalprivacy
[5] As of writing, these can be found online at https://www.sanjoseca.gov/digitalprivacy

a. DUP Webpage: If applicable, an electronic copy of the DUP is added to the Digital Privacy webpage.
b. Algorithm Register: The approved project proposal is added to a publicly viewable online register of the algorithmic systems deployed by the City. [6] The AIA Form and AI FactSheet are made publicly available online. The CPO regularly updates the algorithm register as new algorithmic systems are adopted and archives old systems as they are phased out of use.
c. Training: Users of the approved technology are given training to properly use the technology. Training is often provided by the vendor or other third party.

7. Ongoing Monitoring: Departments report annual metrics defined in the DUP. Reports usually require metrics on data usage and project effectiveness. Public can comment on data usage and annual updates online at sanjoseca.gov/digitalprivacy.

Below is a summary of the steps in the algorithmic review process.

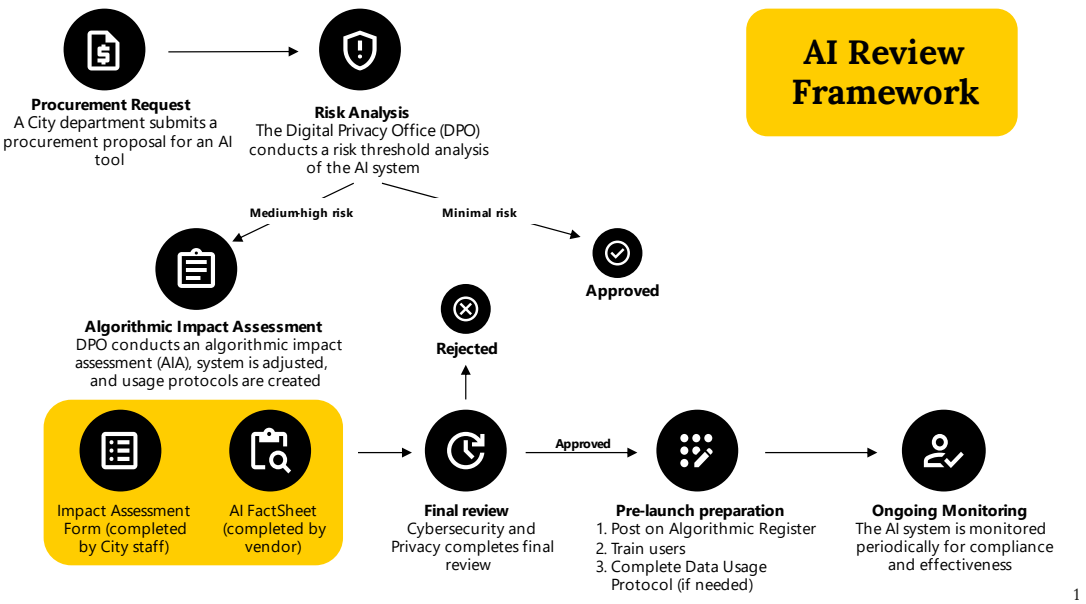

Figure 3: AI Review Framework.

Algorithmic Review Process: Step by Step

The previous seven steps that comprise the algorithmic review protocol are expanded in greater detail below.

[6] https://www.sanjoseca.gov/your-government/departments-offices/information-technology/digital-privacy/ai-reviews-algorithm-register

Step 1: Proposal

The algorithmic review process is triggered when a City department submits a procurement request for a technology involving an algorithmic system.

The formal review process can be initiated through the City's helpdesk site (https://csjhelpdesk.sjcity.net/) by going to the Request tab. A review will be trigged either when a department requests a procurement or fills out the AI review form.

For a consultation on potential projects, to initiate an initial "threshold analysis", or to ask any questions, you can contact the Digital Privacy Office directly at digitalprivacy@sanjoseca.gov.

Step 2: Risk Analysis

The algorithmic risk of the proposal is evaluated in Step 2 of the review, otherwise known as the Algorithmic Threshold Analysis. Algorithmic risk is evaluated based on two key components: the ability of data subjects and/or end-users to opt-out of the use of the algorithmic system and the intensity of the potential harm of the algorithmic system.

The figure below provides a summary of algorithmic risk, with further details below. Algorithmic risk is generally classified into one of three levels: low, medium, and high. Each factor contributing to algorithmic risk can also be defined at a low, medium, or high risk level.

1. **Low algorithmic risk** involves an **opt-in** approach to users being subjected to the AI system. The AI system generates **predictions** but does not automate decision-making. The AI system is subject to a **high level of human oversight**. The AI system **does not impact human livelihood** and is used in areas like mundane business functions (e.g., text autocomplete to help write emails). Consequences are short term and easily reversible.

2. **Medium algorithmic risk** involves an **opt-out** approach to users being subjected to the AI system. The AI system generates **recommendations** but does not automate decision-making. The AI system is subject to **periodic human oversight**. The AI system may **impact non-critical areas of livelihood** like recreation. Consequences are not long term and can be reversible.

3. **High algorithmic risk** involves users that are **unable to opt-out** to being subject to the AI systems. The AI system **automates decision-making**. The AI system is subject to **minimal or no human oversight.** The AI system **may impact highly sensitive areas of livelihood** like employment, healthcare, or criminal justice. Consequences are long-term and difficult to reverse.

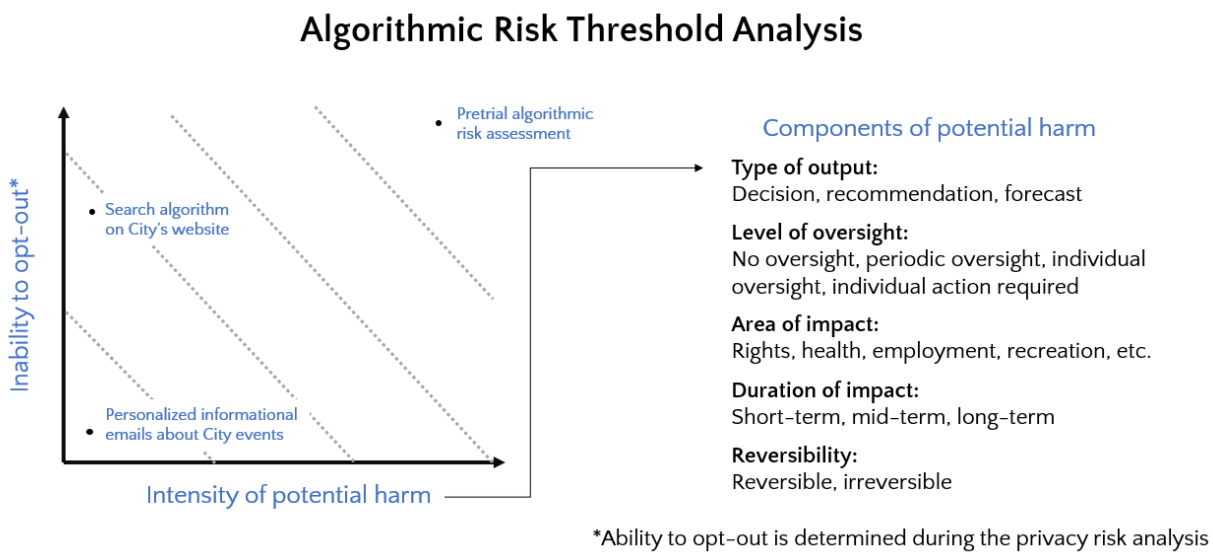

Figure 4: The risk of an algorithmic system can be estimated by identifying impacted individuals' ability to opt-out of the use of the algorithmic system and the intensity of potential harm generated by the system.

The components of potential harm consist of the type of output, the level of oversight, and the area of impact. In Figure 4, the risk level of each component of potential harm decreases from left to right. For example, for type of output, "decisions" are higher risk than "forecasts"; for level of oversight, "no oversight" is higher risk than "individual action required"; for area of impact, "impacts on rights" are higher risk than "recreational impacts".

Components of Algorithmic Risk

Algorithmic risk is defined by two main components: ability to opt-out and intensity of potential harm.

1. **Ability to opt-out:** risk is measured by an individual's ability to control being subject to a given AI system. Ability to opt-out is determined during the privacy risk threshold analysis.
    a. **Low risk ability to opt-out** involves a default opt-in approach. Individuals must actively opt-in to being subjected to the AI system.
    b. **Mid risk ability to opt-out** involves a default opt-out approach. Individuals must actively opt-out if they do not wish to be subjected to the AI system.
    c. **High risk ability to opt-out** involves individuals being unable to opt-out of the AI system. Individuals are required to be subject to the AI system.
2. **Intensity of potential harm:** risk is measured by five sub-components of potential harm: type of output, level of human oversight, area of impact, duration of impact, and reversibility.
    a. **Low risk potential harm** is associated with an AI system that generates predictions, is subject to a high level of human oversight, does not impact any areas of human livelihood, has a short-term impact, and is easily reversible.

b. **Mid risk potential harm** is associated with an AI system that generates recommendations but does not automate decision-making, is subject to periodic human oversight, impacts non-critical areas of livelihood like recreation, has a mid-term impact, and is moderately easy to reverse.
c. **High risk potential harm** is associated with an AI system that automates decision-making, is not subject to human oversight, impacts critical areas of livelihood like employment, healthcare, or criminal justice, has a long-term impact, and is difficult to reverse or not reversible entirely.

Step 3: Assessment

During the assessment stage, the department(s) fills out the required algorithmic review form for the CPO and the vendor completes the AI FactSheet. The CPO provides assessment, approval/denial, and/or recommendations. Higher-risk projects require a Data Usage Protocol to guide how the project complies with the City's Digital Privacy Policy. Lower-risk projects only require an abbreviated review.

Algorithmic Impact Assessment Form

The AIA Form is completed by City staff from the department procuring the system. The AIA Form is intended to capture information including, but not limited to:

- Project objective:
  - Purpose of the AI system
  - Justification for automating a system (if applicable)
- Vendor details:
  - Vendor involvement in deployment of the AI system
  - How the City can test the vendor's AI system before use
- Transparency:
  - Third-party auditing
  - Process to appeal incorrect results
- Equity:
  - Impact on rights or freedoms, economic status, health, etc.
- Human oversight
  - Level of human oversight over the AI system
  - Training for personnel to properly operate the AI system

AI FactSheet

The Vendor AI FactSheet is completed by the vendor of the AI system and captures basic facts about the AI system.[7] The AI FactSheet enables the CPO to better understand the technical details of the AI system and ultimately assess the risks and benefits it presents. The AI FactSheet is intended to capture information including, but not limited to:

- Training data
- Testing data

[7] The AI FactSheet template is heavily inspired by the IBM Research AI FactSheets 360 project.

- Input and outputs
- Performance metrics
- Optimal conditions
- Poor conditions
- Bias

The CPO will work with the vendor as needed to obtain necessary technical details about the algorithmic system.

Data Usage Protocols

Permissible data usage for a proposal is defined in its relevant Data Usage Protocol (DUP). The DUP is typically 3-5 pages and covers a type of data usage (e.g., video traffic monitoring). The DUP is typically composed of six key elements:

1. Project summary
2. Authorized and prohibited uses of data
3. Practices for data collection, storage, notice, retention, sharing, access, and corrections
4. Summary of security practices and approval from the City's Cybersecurity Office
5. Required training for personnel using systems and technologies (if any)
6. Oversight and annual compliance expectations, written in an Annual Data Usage Report

The Annual Data Usage Report (item 6 above) is typically 1-2 pages, drafted by the applicable departments and details:

1. Project summary
2. Required performance metrics as defined in the DUP (e.g., accuracy, effectiveness, cost)
3. Plans for the data initiative (e.g., expansion, shift in usage)[8]

Once a DUP is drafted, it will be made available to the public. Projects with the highest risk require public notification through public forums, such as City Council meetings and in-person outreach to specific impacted communities. The public can also comment on active DUPs online, by contacting the CPO directly at digitalprivacy@sanjoseca.gov, or through other public meetings on privacy-related issues.

Step 4: Public Engagement

Public engagement occurs in three forms: online, in-person, and in the built environment. More information on the City's procedures for Public Engagement can be found in the City's Privacy Manual.

[8] This approach was adapted from best practices in privacy programs, including key collaboration with Santa Clara County's Privacy Office.

Step 5: Review
After the necessary documentation has been completed, the CPO and Cybersecurity Office will review the proposal and approve or reject the proposal. Depending on the level of risk presented by the proposal, this step may involve gaining approval from the CMO or from City Council. The review may require input from the City Attorney's Office or other relevant departments on a case-by-case basis. Based on the CPO or CMO/Council review, in some instances, the proposal may need to be revised before being approved.

Step 6: Pre-Launch Preparation
Following approval of the proposal, relevant documentation will be published on the digital privacy webpage:

- Data Usage Protocol: An electronic copy of the DUP is added to the digital privacy webpage.
- Algorithm Register: If the project features an algorithmic system, the approved project proposal is added to a publicly viewable online register of the algorithmic systems deployed by the City.[9] The AIA Form and AI FactSheet are also made published online. The CPO regularly updates the algorithm register as new algorithmic systems are adopted and archives old systems as they are phased out of use.

Prior to implementation, the City will train all relevant parties on how to correctly use the approved technology.

Step 7: Ongoing Monitoring
The DUP for a given technology proposal requires an Annual Data Usage Report. The report is typically 1-2 pages, drafted by the applicable departments and details:

1. Project summary
2. Required performance metrics as defined in the DUP (e.g., accuracy, effectiveness, cost)
3. Plans for the data initiative (e.g., expansion, shift in usage)

Examples of past Annual Usage Reports can be found here.

Request for Proposals (RFP) Algorithmic Review Protocol
The algorithmic review process should be initiated prior to releasing a Request for Proposals (RFP) if the department is conducting an RFP or similar process. Departments initiate a review by contacting the CPO directly at digitalprivacy@sanjoseca.gov, filing a procurement request, or contacting their departments' privacy and AI representative. When creating an RFP, the CPO will work with the RFP team to include AI FactSheet and/or AI-specific questions in the RFP that mimic the AI FactSheet.

[9] https://www.sanjoseca.gov/your-government/departments-offices/information-technology/digital-privacy/ai-reviews-algorithm-register

Below is an illustrative example of RFP questions and how to evaluate them for an AI system. Recommended point values out of 115 are also provided.

1. Overview - Brief summary of the AI system.
    a. 0 points. Used to understand the context of the system
2. Purpose - What function does the AI system perform, and for what purpose?
    a. 3 points. Pass/Fail does the AI system's purpose fit the need of the department?
3. Intended Domain – What domain is the AI system intended to be applied in?
    a. 3 points. Pass/Fail is the AI system meant to be applied to this domain? For example, an AI meant to identify motorcycles should not be used to identify cars, unless it was built to identify both.
4. Training Data - How was the AI system trained? What data was used? How often is data added to the training set?
    a. 5 points. Should provide a brief explanation for how the data was trained. They should explain that the model has been trained on a sufficiently large data set for the use case that is updated with new data at a frequency suitable for the use case. For example, an AI meant to translate language may need to update at least annually since language evolves quickly.
5. Test Data - What data was used to test system performance? Under what conditions has the system been tested?
    a. 5 points. The test data and the conditions it was tested in should match the conditions we intend to use the system.
6. Model Information - Provide a general description of the model(s) used (e.g., large language model, transformer, deep learning, supervised learning, built on an existing open source model, computer vision)
    a. 3 points. Pass/Fail do they provide a general explanation of the models used.
7. Update procedure - In general, how often are the models updated for users? Will the user have a choice in moving to the updated model or staying on the current model?
    a. 5 points. We want to have a choice in having the model we use updated, or at least the choice to opt-out of automatic updates.
8. Inputs and Outputs - What are the inputs to the AI system? What are its outputs?
    a. 3 points. Pass/Fail do they share what information goes into the model and what goes out. The outputs should be something tangible, like a recommendation, decision, or content.
9. Performance Metrics - How was the accuracy and effectiveness of the system measured? What metrics were used, and why? What is the range of accuracy of the AI system and how does it vary depending on the data? What is the system optimizing for and under what constraints?
    a. 20 points. Clearly explains how they measure accuracy and effectiveness. Justifies metrics used for measurement. Do the metrics make sense to you, and do they meet the needs of your use case? How do the performance metrics compare to other vendors?
10. Bias - What biases does the tool exhibit and how does it handle that bias? This can include but is not limited to biases on human factors such as gender, race, socioeconomic status, disability, culture, age, or other protected classes, or biases on general factors such as a sampling bias, survivorship bias, detection bias, or observer bias.
    a. 20 points. Does the vendor report bias or justify why no bias would be present.

11. Robustness - How does the AI system handle outliers? Do overwritten decisions feed back into the system to help calibrate it in the future?
    a. 5 points. Vendor explains how it handles outlier data. Vendor provides method to overwrite AI outputs and feed those outputs back into the AI system? For example, if the AI system calls a bicycle a tricycle, can you correct it and will that correction update the model?
12. Optimal Conditions - What conditions does the model perform best under?
    a. 5 points. Does the vendor explain in what conditions the model performs best? Do those conditions match the typical conditions for your use case?
13. Poor Conditions - What conditions does the model perform poorly under? What are the limitations of the AI system? What kinds of errors can it make?
    a. 5 points. Does the vendor explain in what conditions the model performs poorly? Do those conditions *not* match the typical conditions of your use case?
14. Explanation - How does the AI system explain its predictions? Are the outcomes of the AI system understandable by subject matter experts, users, impacted individuals, and others?
    a. 5 points. Vendor demonstrates how the AI system can explain its predictions to subject matter experts and/or to the general public, depending on the use case.
15. Identifying problems - How is the AI tool monitored to identify any problems in usage? Can outputs (recommendations, predictions, etc.) be overwritten by a human, and do overwritten outputs help calibrate the system in the future?
    a. 5 points. Vendor explains 1) how the system is monitored, 2) how your agency can monitor its effectiveness in the field, 3) how outputs can be overwritten, and 4) how overwritten outputs can update the model.
16. Studies of bias and accuracy - Have the vendors or an independent party conducted a study on the bias, accuracy, or disparate impact of the system? If yes, can the City review the study? Include methodology and results.
    a. 5 points. Vendor provides a study, ideally by an independent party, on the bias, accuracy, and impact of the system. If the study is done by the vendor, vendor explains why the study is valid.
17. Representation - Is the data used to the train the system representative of the communities it covers?
    a. 5 points if applicable. If the model involves data on people, vendor explains how the people data used to train the system includes people that represent the diversity of your community.
18. Flagging inaccuracies - How can the City and its partners flag issues related to bias, discrimination, or poor performance of the AI system?
    a. 5 points. Vendor provides an easy method for flagging issues within the system around outputs that appear biased, inaccurate, or otherwise perform poorly.
19. Accessibility - How is the AI tool made accessible to people with disabilities? Has it been assessed against any usability standards, and if so what was the result?
    a. 5 points. Vendor explains how the system as a whole is accessible for users, such as the interface is compatible with screen-readers, and it can be translated into the necessary languages.
20. Usability - What other human factors, if any, were considered for usability and accessibility of the system?
    a. 3 points. Pass/Fail does the vendor explain other considerations for usability and accessibility that were built into the system.

Use-case specific questions

You may want to include additional questions based on the specific use case for the AI system. Refer to use-case specific RFP questions in the appendix "RFP questions for AI Use-Cases".

Use Case #1: Translation-Based AI Systems

- Please provide a list of all languages your solution supports for live speech translation, beyond the mandatory languages specified in Attachment A. Additionally, describe how often you introduce new languages to your platform and outline the process for these additions.
- Does your Solution offer text-to-speech functionality or other methods to accommodate American Sign Language (ASL) speakers in both in-person and virtual (Zoom) meetings? If so, please describe the features and functionalities that enable this accommodation, including any limitations or requirements for optimal performance.
- How do you measure the performance of your Solution in terms of translation, speech-to-text, and text-to-speech for English, Spanish, Tagalog, Mandarin, and Vietnamese? Please specify the metrics used (e.g., BLEU score, human ratings, etc.) and the conditions under which these measurements were taken. Based on these metrics, what is the performance of your Solution for the specified languages?
- Please provide/describe any third-party evaluations or benchmarks that have been conducted on your Solution's translation capabilities. Include details on the evaluation process, criteria, results, and any subsequent improvements made to the Solution based on these evaluations.
- What is your Solution's average time delay between speech input and translation output?
- How does the Solution handle rapid speech or overlapping conversations?
- How can the Solution adapt to idiomatic expressions, cultural references, or local slang?

Use Case #2: Large-Language Models

- What is your Solution's average time delay between text input and output?
- Is the user's input or output data used to the train your Solution? If yes, will this data train the model for any other users of your Solution?

Use Case #3: Computer Vision

- How well does your Solution adapt to blurring, obstruction, poor lighting or any conditions that may lead to misclassification?

AI GOVERNANCE

Governance Structure

The governance of algorithmic systems in the City involves several actors, policies, and practices that work in coordination to ensure that the City uses AI tools in a responsible manner. The

diagram below explains the roles and responsibilities of actors in the City who frequently participate in AI governance activities.

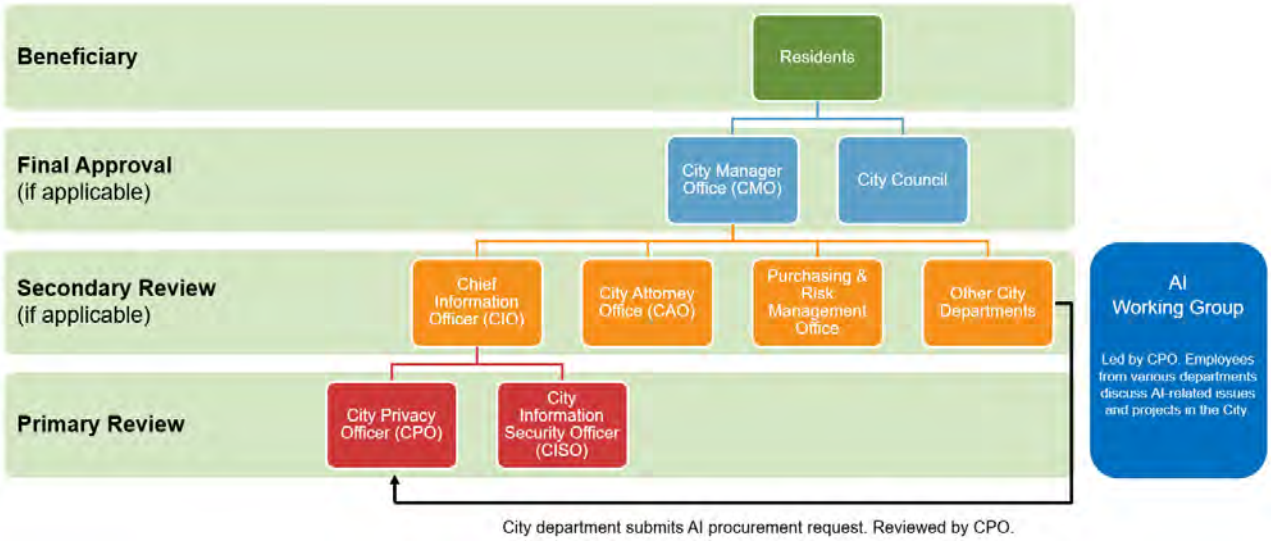

Figure 5: The governance structure of algorithmic systems in the City.

AI Roles & Responsibilities

The section below explains the roles and responsibilities of each City AI steward in more depth.

AI Beneficiaries

- All City employees that sit under the CMO and City Council serve the **residents** of San José.

Final Approvers

- The CMO generally has final approval of AI-related policies for the City.
- In some instances, final approval may come from City Council if a policy or an AI procurement has high visibility to the public or at the request of Council.

Secondary Reviewers

- The CIO approves AI-related policies set forth by the CPO and, if applicable, sends them to CMO for final approval.
- The CAO reviews AI-related policies from a legal perspective.
- The Purchasing & Risk Management Office reviews procurement requests that involve AI alongside the CPO.
- Any City department may submit a procurement request for an AI system.

Primary Reviewers

- The CPO is the main actor in AI governance activities and responsible for creating AI-related policies and guidance for the City. The CPO reviews all procurement requests that involve an AI system.
- The CISO reviews technology procurement requests from a cybersecurity perspective.

City AI Working Group (AIWG)

- Led by CPO, employees from various departments in the AIWG discuss AI-related issues and projects in the City.

AI Incident Response

Introduction

The AI Incident Response Plan (IRP) serves as the first line of defense for the City of San José (CSJ) in case of an AI incident. This incident response document has been created based on NIST Special Publication 800-61 Computer Security Incident Handling Guide.

Incident response occurs in sequential phases, each one building upon the next. The following phases provide a foundation for an Incident Response (IR) team to respond to and recover from an AI incident: Preparation, Identification, Containment, Eradication, Recovery, Lessons Learned.

Purpose

The purpose of this document is to prepare and gain fundamental understanding of the processes involved, the responsibilities, and the actions required to mitigate an AI incident. It is critical to identify and resolve incidents quickly before they escalate into a major incident requiring disaster recovery or business continuity procedures.

Scope

This IRP applies to all AI systems implemented by City Staff, contractors, and any entity operating on behalf of the City, residents. The AI IRP addresses continuity and recovery procedures to appropriately mitigate AI incidents.

Approach

The key points in development of the AI IRP:

- Obtain senior management support.
- Keep the plan simple. A well-organized, systematic, and up-to-date AI IRP that is readily available will help teams get through most situations.
- Communicate regularly on the incident status. Provide the relevant facts as they are available, disseminate them quickly, follow up regularly, keep relevant parties informed and resolve incorrect information.
- Review and test. The AI IRP must be reviewed and analyzed to ensure the documented procedures make sense and that the team is equipped to respond accordingly.
- Be flexible. The AI IRP should exhibit flexibility to meet a wide variety of situations, including team membership and access to appropriate resources.

Roles & Responsibilities

AI Incident Response Team

An AI Incident Response Team is established prior to any incidents and provides a quick, effective, and orderly response to AI incidents. The IR Team's mission is to prevent a serious loss of profits or public confidence assets by providing an immediate, effective, and skillful response to any unexpected event involving City AI systems.

The AI IR Team is authorized to take appropriate steps deemed necessary to contain, mitigate, or resolve an AI incident. The AI IR Team is responsible for investigating any malfunctioning components of City AI systems in a timely, cost-effective manner and reporting findings to management and the appropriate authorities as necessary. The CPO will coordinate these investigations.

Other Teams as needed

Other teams and departments shall contact the CPO with any information relating to a suspected AI incident.

Activation Criteria

The City Privacy Officer will determine whether the reported incident is serious enough to warrant an AI Incident Response. The following events require reporting to the CPO and may trigger an AI Incident Response:

- Declining accuracy rates; includes false positives, false negatives, true positives, and true negatives
- Findings or suspicions of algorithmic bias
- Failed or broken human oversight protections
- Failure of an AI system to provide its expected outcome (i.e., system has stopped working)
- Suspected or demonstrated harm to human livelihood
- Discovery of City confidential data used to train any public AI model, especially in large language models or other generative AI services

Some of these events may be connected to a broader incident that also involves cybersecurity or privacy. When unclear, contact both the CPO and the CISO.

Response Level

Once an incident has been identified, the next step is to determine the level of response required based on its assessed risk. Determining the level of response is critical due to the involvement of different layers of the organization as well as other external entities such as insurers, law enforcement, news media, and others. Each response level includes the issue's:

- Scope: An overview defining what each corresponding risk level entails.
- Management Team: The departments, individuals, and stakeholders responsible for managing the resolution of the incident.
- Initial Bridge Convened: The initial communication channel(s) used to connect involved parties.
- Triggers for Escalation to the Next Level: The activation requirements to raise the risk level of an incident.

For all levels of risk, City Staff, contractors, any entity operating on behalf of the City, residents, and external organizations may report AI systems through email. The Incident Management Team may use Zoom, Microsoft Teams, and email to resolve reports.

Level 1: Low Risk

The scope of this type of incident is relatively low, usually involving minor systems errors with limited risk to people. Examples include reporting an AI system that has a high accuracy rate but has

started to output incorrect recommendations sporadically or an AI system that no longer provides a clear value to the City. A low risk incident does not impact any areas of human livelihood.

- Incident Management Team: CPO, AI system owner (if applicable)
- Notification to: CIO, CISO, Department AI representative (if applicable)
- Initial Bridge Convened: These are routine or easily solvable incidents that do not require a bridge.
- Triggers for Escalation to the Next Level: If the impacted system impacts human livelihood, becomes increasingly inaccurate or indicates a need for sunsetting.

Level 2: Medium Risk
The scope of this type of incident is moderate, usually involving periodic gaps in human oversight or frequent system errors. Examples include an AI system that is consistently inaccurate some of the time or sporadically does not allow a human to override its output. The issue usually impacts non-critical areas of livelihood like recreation.

- Incident Management Team: CPO, CIO
- Notification to: CISO, Department AI representative (if applicable)
- Initial Bridge Convened: The CPO sends a Zoom invite to all parties involved.
- Triggers for Escalation to the Next Level: If the impacted system fails to work or impacts critical areas of human livelihood.

Level 3: High Risk
The scope of this type of incident is high, usually involving failures in human oversight or major system errors. Examples include privacy violations, algorithmic bias and recommendations that cause harm. There is usually clear evidence of suspected or demonstrated harm to critical areas of human livelihood like employment, healthcare, or criminal justice.

- Incident Management Team: CMO, CIO, CISO, CPO, OER, HR, Public Relations
- Initial Bridge Convened: The CPO sends a Zoom invite to all parties involved.

Phased Approach

Preparation
The preparation phase takes place before an incident occurs. Putting more effort into preparation can help reduce the duration and difficulty of recovering from an incident. Planning to respond to incidents involves all stakeholders with responsibilities to maintain the information system.

AI IR team members should not have to spend time locating and assembling needed tools or supplies when an incident occurs. Supplies to assist the team in the event of an incident are sometimes referred to as a jump bag, and should include (at a minimum):

- An empty notebook and writing instruments (In the event that technological systems are compromised, thorough documentation should be taken throughout an incident.)
- Contact information sheet

Having contact information available and current is essential. It should also be in hard copy form in case electronic systems are affected during the incident. Contact information should include:

- All members of IR team
- All contacts listed in notification
- Personnel that might assist in handling an incident

In the event that critical systems relying on the implementation of AI become compromised, management team members are responsible for ensuring there is an alternative solution or backup system while the incident is being resolved.

Key activities during preparation include:

- Ensure incident response efforts are unified and coordinated.
- Implement regular AI maintenance procedures to reduce the likelihood, severity, and duration of AI incidents.
- Assess risk and disaster resilience to reduce the duration of AI incidents.
- Identify the potential harms of AI systems; incorporate this into the preparation processes.
- Ensure critical infrastructure remains operational during incident response activities.
- Train responders to handle potential incidents should they arise. Assemble required tools and ensure responders know how to use them.

Detection & Analysis

Awareness that an AI incident has occurred can originate from different sources such as vendors, City Staff, or even residents. **An AI incident shall be defined by satisfying at least one of the conditions outlined in the section "Activation Criteria".**

The primary outcome of the identification phase is to determine whether an event constitutes an AI incident, activate the IR plan, and begin first level notification.

Best practices suggest declaring that an incident has occurred when privacy officers' sense that an adverse risk exists and then assemble the AI IR team to implement the IR plan. It is also suggested to early on have multiple people involved, to save all key records and start detailed documentation as soon as possible.

Key activities during this phase include:

- Identify, assess, and prioritize risks.
- Ensure the capacity for timely communications in support of situational awareness and operations during an AI incident.
- Provide all decision makers with decision-relevant information regarding the nature and extent of the AI incident, any cascading effects, and the status of the response.

As soon as the AI incident response team suspects that an incident has occurred, it is important to immediately start gathering all the relevant data. The repository for all AI incident data is called Artificial Intelligence Incident Report System (AIIRS) and it is located in the Privacy Program SharePoint site with access privilege only to the AI IR Team. Each incident is carefully documented on AIIRS, and all related artifacts are kept for future reference.

Containment

Limit damage from the incident and isolate the affected components of the AI systems to prevent further damage. Depending on the type of incident, the overall strategy for containment may vary. Factors that help determine the containment strategy include:

- Potential damage to City services
- Need for evidence preservation
- Service Availability
- Time and resources needed to implement the strategy
- Effectiveness of the strategy (e.g., partially contains the incident, fully contains the incident)
- Duration of the solution (e.g., emergency workaround to be removed in four hours, temporary workaround to be removed in two weeks, permanent solution)

Evidence handling must be considered when resolving an incident. This will help in legal proceedings. In such cases, it is important to clearly document how all evidence has been preserved. In addition, evidence must be accounted at all times; whenever evidence is transferred from person to person, chain of custody documentation should detail the transaction and include each party's signature. A detailed log should be kept for all evidence including the following:

- Identifying information (location, serial number, model number, hostname, media access control (MAC) address, and IP address of a computer)
- Name, title, phone number of each individual who collected or handled the evidence during the investigation
- Time and date of each occurrence of evidence handling
- Locations where evidence was stored

Eradication

Find the AI incident's cause and pause the usage of affected systems. Once the threat has been contained and initial cause determined, second level notification can take place.

Key activities during this phase include:

- Prioritize the stabilization of critical infrastructure functions.
- Document everything.
- Implement any necessary safeguards to prevent the same kind of AI incident from occurring again.

Recovery

Part of recovery is performing detailed forensic analysis to determine the exact root cause of the incident. AI systems are restored according to the configurations outlined in the AI FactSheet.

Key activities during this phase include:

- Allow affected AI systems back into use and ensure no problem remains.

Lessons Learned

Document the incident and analyze how it happened so staff can learn from it and improve future response efforts.

Some of the items to review in this phase include:

- Consider whether an additional policy could have prevented the intrusion.
- Consider whether a procedure or policy was not followed, and then consider what could be changed to ensure that the procedure or policy is followed in the future.
- Was the incident response appropriate? How could it be improved?
- Was every appropriate party informed in a timely manner?
- Were the incident-response procedures detailed and did they cover the entire situation? How can they be improved?
- Have changes been made to prevent a new and similar incident?
- Should any AI policies be updated?
- What lessons have been learned from this experience?

AI Education

As part of the City's governance of algorithmic systems, the CPO provides education about AI systems to City Staff to ensure that AI is being utilized responsibly, equitably and effectively by those who operate them on behalf of the City. All City staff are provided guidance on how to identify AI, how the City procures new AI systems, how to mitigate risk, how the City currently uses AI systems and how City Staff may receive support as questions arise.

Those who interact more closely with City AI systems will receive in-depth tactical training tailored to the specific AI system they are responsible for operating. While this varies from system to system, City Staff utilizing AI systems are trained primarily by vendors. However, they may request additional support from the CPO. The training conducted by vendors is evaluated and determined during the purchasing process and in follow-up negotiations.

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0183
Comment from Anonymous

Submitter Information

Name: Anonymous Anonymous

General Comment

I am a private citizen and an open-source artificial intelligence research collaborator with an interest in AI policy – while I have done reading on the use of AI in governments as well as legal issues related to AI, I come from a mostly technical perspective, aiming to increase the depth of the current regulatory response to AI.
As an individual interested in the potential of this technology, I believe the Office of Management & Budget's (OMB) plan is a great first step toward incorporating AI in the federal government – however, the devil lies in the details. My concerns are fourfold:
(a) how to build up AI expertise and coordination in the government to meet the ambition of these proposals as well as the proposed laid out in Biden's recent executive order,
(b) the lack of adequate coverage on the topic of cybersecurity throughout the document,
(c) the lack of technical, specific guardrails for risk management, and
(d) miscellaneous related investments and initiatives that I believe would support the intent behind the OMB Draft Memorandum.

To that, I propose:
(1) A coordinated, centralized AI governance body – especially around expert advice. These AI governance bodies should ideally be modeled after successful public-private collaborations, comprising a mix of technical experts, policy makers, and diverse stakeholder representatives.
(2) Stronger investments in federal cybersecurity and critical infrastructure security are made, given the reliance of agencies on AI and digital services post-implementation.
(3) Rigorous evaluations for risk management with regard to algorithms in use by the federal government.
(4) Investments in AI ethics & safety
(5) Regular communication with peer governments on implementation of AI in analogous agencies/ministries in other countries

I'm not too confident in these proposals, but these represent my perspectives in the present moment. I hope you find these helpful, and I'd be happy to play a role in the future with regard to AI uptake in the federal government.

Attachments

OMB Draft Memorandum Comment (2)

I am an open-source artificial intelligence research collaborator with an interest in AI policy – while I have done reading on the use of AI in governments as well as legal issues related to AI, I come from a mostly technical perspective, aiming to increase the depth of the current regulatory response to AI.

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(a) how to build up AI expertise and coordination in the government to meet the ambition of these proposals as well as the proposed laid out in Biden's recent executive order,

(b) the lack of adequate coverage on the topic of cybersecurity throughout the document,

(c) the lack of technical, specific guardrails for risk management, and

(d) miscellaneous related investments and initiatives that I believe would support the intent behind the OMB Draft Memorandum.

AI Coordination Mechanisms & Governance Body

This section addresses questions (2) and (7). Currently, the proposal aims to convene an independent AI governance body for each CFO Act agency. I propose that either in replacement of or in addition to agency bodies, that there be a large, centralized, overarching AI governance body for the federal government, where experts can convene and advise the federal government on safety and risk management-related issues. I observe that:

a) Technical expertise in AI is lacking in government. First, it seems like current agencies often lack technical expertise – and updating the scope of existing groups may not be effective, especially given the difficulty of expanding mandates and the necessity to hire or

consult external technical experts. Second, the current AI governance bodies within each agency also seem to convene senior leadership to discuss AI issues, without necessarily taking into account the importance of AI expertise in accurately evaluating the scope of such proposals. Third, hiring AI experts or consultants can be expensive, as many artificial intelligence experts tend to be drawn by higher pay in Silicon Valley companies. These three-fold issues may hold back the implementation of AI systems within government agencies.

b) There are significant advantages to a coordinated, centralized AI governance body – especially around expert advice. These AI governance bodies should ideally be modeled after successful public-private collaborations, comprising a mix of technical experts, policy makers, and diverse stakeholder representatives. Coordination from a centralized AI governance body minimizes doubled technical effort and enables knowledge sharing. Furthermore, it is far easier for experts to advise a centralized AI governance body. Inviting key AI figures from academic and industry is crucial to ensuring adequate risk management – including key leaders in safety, alignment, and risk management (such as Dan Hendrycks, Stuart Russell, Yoshua Bengio, and Dario Amodei) as well as researchers focused on democratic values, bias concerns, and civil rights protections in AI systems (such as Yejin Choi and Timnit Gebru). Centralized governance would also make it easier for thinktanks to propose general recommendations to a single body that can relay these to agencies, as opposed to dealing with many different agency-specific AI officers.

Lack of Adequate Focus on Cybersecurity

This section addresses questions (5) and (7). The OMB Draft Memorandum does not do enough to address threats in the intersection of artificial intelligence and cyberspace.

a) Include cyberspace as a safety-impacting purpose. Coding is the primary purpose and advantage of many large language model-focused AI systems, and Biden's recent AI Executive Order mentions cybersecurity risks as a key dual-use foundation model risk under Section (4). In the near future, it is likely that the intersection of frontier AI systems with cybercapabilities will need to be regulated.

b) Cybersecurity was rarely mentioned. The most significant for cybersecurity in the OMB Draft Memorandum directs agencies to "update, as necessary, cybersecurity authorization processes to better address the needs of AI applications." The agencies of the federal government, after implementing these processes to incorporate AI into its processes, would likely have a significant reliance on digital services and AI to run its operations. Given the risks of coupling the services of the federal government with the digital world, it is vital that stronger investments in federal cybersecurity and critical infrastructure security are made. I believe that agencies like the Cybersecurity and Infrastructure Security Agency (CISA) under the Department of Homeland Security must create new data protection and cybersecurity standards for U.S. government agencies, to ensure Americans' information and access to government services are protected.

Rigorous Evaluations for Risk Management

This section addresses questions (6) and (8). I believe the OMB's distinction between safety-impacting and rights-impacting AI is excellent. However, I raise concern with the implementation – namely, the Draft Memorandum mentions that there should be "ongoing monitoring and establish thresholds for periodic human review. In addition to pre-deployment testing, agencies must institute ongoing procedures to monitor degradation to the AI's functionality and to detect changes in the AI's impact on rights or safety. Part of this monitoring process must include periodic human reviews to determine whether the existing implementation of the minimum practices in this section adequately mitigates any new risk."

I believe these implementation measures are far too vague, and advocate for potentially high-risk or rights-impacting AI uses to undergo rigorous adversarial testing. In the AI community, this is called "red-teaming" or "adversarial prompting" – the act of testing various prompts or inputs to test edge-case scenarios. Red-teaming has been conducted on a wide range of AI models, including small simple models that are used for credit scoring to uncover bias, to large language models to ensure they do not produce undesirable outputs.

Evaluations was heavily emphasized in the recent Executive Order. To conduct rigorous evaluations, one can have shifting sets of red-teaming evaluations for certain key algorithms to ensure fairness and security – and agencies can then use these evaluations to issue transparent regular public reports on the state of fairness and discrimination in AI systems in the government. While this would require significant technical expertise, the government also has the ability to outsource expertise – e.g. opening up algorithms for red-teaming by academics and cooperating with academic experts to undergo such projects.

Other Important Points Not Brought Up in the OMB Draft Memorandum

a) The U.S. government should explicitly invest more in safety and ethics, through mechanisms like NSF grants. Right now, U.S. federal government agencies is relying on AI models and techniques are standard in industry – however, as a large investor in AI, the U.S. federal government can drive the direction in which industry develops. The Office of Management & Budget can coordinate with grantmakers across the government to differentially preference research grants focused on privacy, security, and ethics-focused technology development – including improved evaluations on security and fairness, as well as ensuring these AI models can be deployed in high-risk applications.

This would ensure that the U.S. government could directly implement AI technologies from such research, allowing the U.S. government to drive the development of the AI systems it would be using. There are also a variety of positive knock-on effects, which include encoding positive values within technology, empowering U.S. innovation in reliable and robust AI systems, and ensuring that civil rights are protected by default (even across corporate and private use). By differentially pushing technologies that focus on safety, trust, and ethics, the U.S. federal government can – in the long term – encode liberal and democratic values into American AI technology development by design.

b) The U.S. federal government agencies should communicate with its peers in other countries, such as the United Kingdom and European Union, to understand how they are incorporating AI into their processes and share knowledge.

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0184
Comment on OMB-2023-0020-0001

Submitter Information

Organization: National Coalition on Black Civic Participation - Black Women's Roundtable

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General Comment

See attached file(s)

Attachments

NCBCP-BWR Comments-OMB Draft AI Memo

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December 5, 2023

Clare Martorana
U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer
Office of Management and Budget
725 17th Street NW
Ste. 50001
Washington, D.C. 20503

Submitted via www.regulations.gov

Re: FR Doc. 2023–24269 Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Dear Ms. Martorana,

The National Coalition on Black Civic Participation and the Black Women's Roundtable submit these comments in response to the request referenced above. We commend federal regulators for seeking input on this issue that has a significant impact on the lives and wellbeing of Black and marginalized communities throughout the nation.

The National Coalition on Black Civic Participation ("NCBCP") is dedicated to empowering Black communities and advancing the overall goals of equity and justice. Then NCBCP's mission is to promote Black civic engagement and racial, economic, and social justice through values-driven coalitions centered on women and youth empowerment, leadership development, health and wellness, education, and global empowerment. The Black Women's Roundtable ("BWR") is the women's empowerment arm of the NCBCP. The BWR is an intergenerational civic engagement network that advocates for just and equitable public policy that promotes the health and wellness, economic security, education, and global empowerment of Black women.

Black and marginalized communities that are served by agencies across the federal government are most at risk of AI systems that are biased or result in disparate impact. These groups are also more likely to be harmed by AI systems and often lack the resources to respond to the harms that result. Thus, we appreciate the Office of Management and Budget ("OMB") for centering civil rights and equity in the implementation of agencies' requirements for the use and innovation of AI systems.

We commend the OMB's efforts to establish agency requirements in AI governance, innovation, and risk management through the draft AI memorandum. We provide the following recommendations to help inform regulators in the establishment of innovative requirements for federal agencies in the use of AI systems.

Question 3. How can OMB best advance responsible AI innovation?

Fully resource and fund an agency governance structure that includes the establishment of Civil Rights Offices to address AI challenges

While OMB has taken critical steps in AI accountability by providing guidance to agencies to appoint Chief AI Officers and create agency AI Governance Boards, more should be done to ensure that agencies have the resources and authority needed to fully implement the requirements of the AI Executive Order[1] and the OMB's draft guidance on AI. To establish a robust agency AI governance structure, the OMB should include fully resourced and funded Civil Rights Offices to address the challenges identified in its AI guidance to agencies.

Development requirements for federal agencies using AI in public benefits and service programs administered by the States

Algorithmic systems used in the determination of public benefits and services can cause harm by making determinations with no explanations, discriminatory data, or a lack of transparency. Risk management of AI systems used in public benefit determinations will address these concerns.

The OMB's draft memorandum clearly states that public benefits are a rights-impacting use and must meet risk mitigation requirements. Because most determinations for federally funded public benefits and services are made at the state and local level, the OMB should require federal agencies to provide guidance to the states on the use of AI systems for the federally funded public benefits and services that they oversee.

[1] Executive Order No. 14110 (2023), 88 FR 75191, Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence, https://www.federalregister.gov/documents/2023/11/01/2023-24283/safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence

Establish a consistent public engagement process

It is critical that agencies are required to establish programs to proactively engage and seek community input from civil rights, civil society, and public interest groups, and people who use public benefits and services about the impact of agencies' use of AI systems. The public should also have a dedicated space to comment on and flag risks resulting from current and new use cases.

Regularly review and update policies

New developments in AI technology and applications are constantly emerging. Thus, guidelines and policies can become outdated and ineffective at addressing new AI system challenges. It is critically important for the OMB to regularly review and update its guidelines and policies to ensure that they remain current and effective in addressing AI challenges. This is of particular importance for AI systems that are safety or rights impacting.

Provide more clarity on how agencies determine if an AI system matches the definition of a safety-impacting or rights-impacting system

The OMB should provide more clarity on how agencies determine whether an AI system matches the definition of a safety-impacting or rights-impacting system. Public notice of these determinations should be provided.

Establish factors for issuing exemptions and waivers

The OMB's memorandum should include the following requirements to agencies when determining whether waivers and exemptions are granted for AI systems:

- An agency must demonstrate that it considered alternatives that are less rights-impacting before granting a waiver or exception
- Establish a time that the waiver or exception will expire
- Reevaluate the AI system before and after the waiver or exception expires to determine if the waiver or exception is still needed
- Provide public notice of waivers or exceptions that are granted

Provide training for agency staff who are tasked with the implementation of the guidance provided in OMB's memorandum.

Conclusion

We appreciate this opportunity to comment on OMB's draft memorandum, which provides an actionable approach to mitigating the harms of AI systems before they are implemented. This memorandum marks a significant step toward achieving equity and advancing civil rights in the use of AI systems.

For OMB's guidance to be successful, agencies must consider the benefits and risks of AI systems throughout the development and implementation processes. It is also critically important for agencies to understand the intended uses of AI systems and well as recognize the potential harms that could stem from misuses.

If you have any questions regarding these comments please contact Joycelyn Tate, Senior Technology Policy Advisor at the NCBCP and BWR, at bwrtech@ncbcp.org.

Respectfully submitted,

/s/ Melanie L. Campbell
President & CEO, National Coalition on Black Civic Participation
National Convenor, Black Women's Roundtable

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0185
Comment from Marsha Huang

Submitter Information

Name: Marsha Huang

General Comment

Please see the attached document.

Attachments

MHcomments_OMB 2023-0020 draft

Section 5.b.ii (p12)– Purposes That are Presumed to Be Rights-Impacting

"…if it is used to control or meaningfully influence the outcomes of any of the following activities or decisions…"

While "meaningfully influence" is specified, it may be worth also specifying that the influence considered may not necessarily be a direct result but that downstream outcomes should also be considered.

Section 5(c) (page 13) "To fill potential risk management gaps, agencies are encouraged(!) to promote and to incorporate, as appropriate, additional best practices for AI risk management, such as from the NIST AI Risk Management Framework…"

NIST has established a framework and a blueprint for an AI risk management framework, which to some degree should be required for agencies that have (or plan to have) a high degree of dependence on AI models and/or are determined to carry the responsibility of potential high degree of impacts on rights and safety. In these cases, government agencies should lead by example in the risk management of AI models and make portions of the AI RMF required.

Section 5(c)(iv)(B) (page 16) "Testing conditions should mirror as closely as possible the conditions in which the AI will be deployed."

Consider changing this to a "range of conditions", in order to obtain a better understanding of potential model limitations as well as the range of outcomes and model performance.

Section 5(c)(iv)(C) (page 16)"…this documentation must include the completed impact assessment and results from testing AI performance in a real-world context…"

*Consider changing this to "…testing AI performance in a **range** of real-world contexts…" in order to achieve a more thorough understanding of performance.*

Section 5(c)(iv)(D) (page 17)

The minimum requirement here is that human review must be conducted at least annually. If agencies choose to only meet the minimum required frequency (annually) then this type of review will occur too seldom to detect emerging risks, and harm could have occurred undetected for up to a year. Suggest that AI systems should be ranked and identified as low, medium or high risk, and that those identified as high or moderate risk should be monitored/reviewed more

frequently. Potentially, you could also split this into two types of monitoring: (1) monitoring to detect adverse or disparate impacts to rights or safety and (2) monitoring to detect performance degradation of the system. Then, the recommended frequency of monitoring could depend also on monitoring type.

Section 5(c)(iv)(E) (page 17) "Where the AI's risks to rights or safety exceed an acceptable level…agencies must stop using the affected AI…"

An "acceptable level" of impact to rights and safety should be transparently defined.

Section 5(c)(v)(A)(3) (page 19)

Using representative data – This should not only occur before initiating use, but also on some kind of ongoing basis. Over time, the affected communities may change, so while the data may be representative at development or onset, changes over time could happen gradually resulting in bias.

****

Presented Questions:

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establishing a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

Agencies determined to have moderate or high impacts to safety/rights should establish governance and control mechanisms, as well as policies and procedures. Minimum requirements for policies and procedures should be established, but each agency could establish customized policies and procedures suitable to their function.

Governance and control mechanisms should exist, such as independent oversight. A general, independent, oversight board could add the ability to ensure appropriate implementation of

policies across agencies. For example, one agency might exert strict criteria over a system that may have high potential impacts within that agency, but a general oversight board will have a broader view and able to identify that the particular system might have relatively low potential impacts compared to another agency that might be applying more lenient criteria. The general oversight board could ensure that the complexity of controls and policies adopted by agencies will vary appropriately across the spectrum.

6. Do the minimum practices identified for safety-impacting and rights-impacting AI set an appropriate baseline that is applicable across all agencies and all such uses of AI? How can the minimum practices be improved, recognizing that agencies will need to apply context-specific risk mitigations in addition to what is listed?

Recognizing that all agencies are not equal and the potential for impacting rights & safety are not equal across all agencies, minimum requirements should vary based on a set of criteria that depends on attributes such as potential for impact to rights and safety, and usage/dependence on AI systems. Agencies with the highest potential for impact to rights and safety via AI systems should be held to a higher minimum requirement.

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Document: OMB-2023-0020-0186
Comment on OMB-2023-0020-0001

Submitter Information

Organization: New America's Open Technology Institute

General Comment

The comments of New America's Open Technology Institute are attached.

Attachments

Open Technology Institute Comments on OMB Docket No. 2023-0020

Before the
Office of Management and Budget
Washington, DC 20503

In the Matter of	)	
	)	
Advancing Governance, Innovation, and Risk	)	OMB Docket No. 2023-0020
Management for Agency Use of Artificial	)	
Intelligence (Draft Memorandum)	)	
	)	

COMMENTS OF NEW AMERICA'S OPEN TECHNOLOGY INSTITUTE

December 5, 2023

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I. Introduction

New America's Open Technology Institute (OTI) files these comments in response to the Office of Management and Budget's (OMB) Draft Memorandum On Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence. OTI generally welcomes the substance of the guidance, which establishes important guardrails for federal agencies' development and use of artificial intelligence (AI). We submit these comments both to support important aspects of the Memorandum and to note areas that would benefit from clarification, amendment, or further development.

OTI works at the intersection of technology and policy to ensure that every community has equitable access to digital technology and its benefits. OTI advocates for the development and oversight of algorithmic and artificial intelligence models that are fair, equitable, and benefit all communities. Protecting equity, civil rights, and civil liberties are central to these objectives. While OTI believes strong rules for federal agencies' use of AI are essential, we continue to call for decisive action from all stakeholders, including the U.S. Congress, in regulating the creation, deployment, and use of artificial intelligence in ways that serve all of society.

OTI's comments are structured as follows. First, we reference our previous writings and filings on related issues, including as part of a coalition to make clear our institutional position and perspective on AI governance and government use of AI. Second, we highlight the memo's approach to catalyzing federal innovation and protecting rights, its detailed focus on enumerating how agencies protect rights, and the helpful suggestion that the Intelligence Community also follow the draft guidance. We then provide analysis and five recommendations on strengthening the memo's accountability framework, including its provisions on public transparency, its grants of discretion to Chief Artificial Intelligence Officers, the scope of exemptions, and remedies for adversely affected individuals.

II. OTI's prior work on Artificial Intelligence and Algorithmic Accountability

In June 2023, OTI joined a coalition of civil rights, technology, policy, and research organizations in sending a letter to the Directors of the White House Domestic Policy Council, the White House Office of Science and Technology Policy, and the Office of Management and Budget. The letter "commend[ed] the Biden-Harris administration on its recent efforts to center equity and civil rights in technology policy" and urged the administration to advance a "whole-of-government approach to addressing the impact of artificial intelligence (AI) on people's rights and opportunities." Specifically, the letter urged the administration to:

1. Make the Blueprint for an AI Bill of Rights binding administration policy through OMB guidance;

2. Ensure coordinated follow-through by federal agencies in light of Executive Order 14091 and the AI Bill of Rights, including actions outlined in the October 2022 fact sheet and needed additional efforts; and
3. Launch sustained public engagement with diverse stakeholders to raise awareness of AI harms and support meaningful public and private sector efforts to combat algorithmic discrimination.

Executive Order 14110 and the draft OMB Memorandum ("OMB guidance" or "OMB memo") demonstrate meaningful progress in each of these areas. OTI has long focused on the importance of promoting accountability for algorithmic use, and has recommended that government and commercial use of algorithms be accompanied by guardrails that center civil rights and equity. In comments submitted to the National Telecommunications and Information Administration's (NTIA) Request for Comments on Privacy, Equity, and Civil Rights, we underlined harms, especially involving disparate impacts in education, employment, and housing discrimination, and proposed paths forward including via industry and government action. Only through a substantial and deliberate set of guardrails that elevate the potential impacts on civil rights, along with important legislation (including comprehensive federal privacy rules), can the use of artificial intelligence truly serve the public interest.

III. Support for Key Aspects of the Memorandum

The OMB guidance focuses on three distinct but interrelated areas: Strengthening AI Governance, Advancing AI Innovation, and Managing the Risks from the Use of AI. Each area sets thorough and actionable requirements and guidance, including specific minimum practices. OTI is supportive of the memorandum's overall approach. In particular, we commend OMB for a balanced focus on innovation and risk-management, the combination of both a rights- and safety-focused approach, the enumeration of the contexts that can implicate rights, the centering of rights through additional minimum practices and, finally, the memo's encouragement for the intelligence community to also follow these practices.

Balancing Innovation & Risk Management

We commend OMB's efforts to balance streamlining for innovation, the need to manage risks, and the creation of governance structures to be able to do both at the level of each agency. As the memo and the accompanying Executive Order on AI make clear, leveraging the immense potential of artificial intelligence across the federal government could improve agencies' ability to perform their mission and deliver significant benefits to the public. However, deploying AI systems without a thorough understanding of attendant risks and impacts on rights, would imperil Americans. The memo rightly incorporates both perspectives by establishing clear guidance on how to remove barriers to innovation via a public enterprise strategy that includes a

plan for building and maintaining capacity to address risks from AI. The risk-management section of the memo defines the ways in which AI can pose risks to safety or rights, and requires that agencies stop using AI that is non-compliant. The equal focus on practices to promote innovation and those that promote rights and safety gives federal agencies a concrete framework for developing and deploying "responsible AI."

The Safety- and Rights-Impacting Framework

The OMB guidance and E.O. 14110 blend the rights-focused perspective of the Blueprint for the AI Bill of Rights with the risk-based approach in the National Institute for Standards and Technology (NIST) Artificial Intelligence Risk Management Framework. The nature of the vast U.S. federal bureaucracy ensures that different agencies and groups will issue rules and guidance on overlapping aspects of artificial intelligence governance. The OMB memo wisely incorporates key aspects of these two benchmark documents in its attempt to harmonize an approach to AI governance across federal agencies.

OTI welcomes the memo's enumeration of rights-implicating purposes of AI. Recognizing that certain purposes fundamentally implicate rights, no matter the details of the technology or its implementation, provides an important signal both to federal agencies and private actors. Even more, the lists provided in the memo are explicitly billed as non-exhaustive, and the agencies are encouraged to build and share with OMB their own agency-specific list of purposes that could categorize AI systems, applications or components as rights- or risk-impacting. The list provided in the memo has a wide range of purposes, including health care, immigration, policing, housing, credit and lending, education, and hiring (all discussed in either our coalition letter or in OTI's comments to the NTIA), as well as child welfare, surveillance, government benefits and emotion detection.

We are also pleased to see the importance that the memo places on the mitigations related to rights-impacting AI. These additional minimum required practices include: taking steps to ensure that the AI will advance equity, dignity, and fairness; consulting and incorporating feedback from affected groups; ongoing monitoring and mitigation for AI-enabled discrimination; notice, redress and, maintaining human consideration; and allowing for opt-out. The enumeration of rights-implicating purposes and accompanying minimum practices thus make some aspects of the Blueprint for an AI Bill of Rights binding on federal agencies.

Application to the Intelligence Community context

Finally, OTI welcomes the memo's encouragement that Intelligence Community elements, which are not bound by the memo, should also consider following the minimum practices laid out in the memo. While AI innovation and risk for national security systems is governed through other mechanisms, including Executive Order 14110, the OMB memo establishes important processes for protecting rights that are applicable and valuable to the national security contexts.

IV. Areas for Clarification/Amendment

Some areas in the memo would benefit from further clarification or development: the interaction between this guidance and the Government Accountability Office's previous similar guidance, the lack of public reporting or accountability mechanisms for parts of the memo, lack of a clear definition of "meaningfully influence," and the need for further detail on the remedy process. Our recommendations below address these areas.

Recommendation 1: Clarify how the OMB guidance interacts with the Government Accountability Office's June 2021 guidance

The memo incorporates elements from other guidance frameworks including the Blueprint for an AI Bill of Rights and NIST's Artificial Intelligence Risk Management Framework. It lays out the groundwork for AI governance at a high level, and while it does draw several pathways for agencies, it does not reference the Accountability Framework for Federal Agencies on Artificial Intelligence published by the Government Accountability Office (GAO) in June 2021. The GAO framework is built around four interrelated principles that address governance, data, performance, and monitoring, and provides in-depth guidance on practices for each of these principles. OMB should consider incorporating a reference to the GAO framework, which appears to complement OMB's aims, or otherwise clarify the relationship between the draft memorandum and the GAO's governance framework.

Recommendation 2: Strengthen Section 5's Public Disclosure and Documentation Requirements

While the sections of the memo that address governance and innovation include requirements for public disclosure of agency practices, Section 5 (on managing risks) establishes none. Given the need for transparency about how the government has identified and addressed risks from AI, this omission is consequential. We recommend that wherever agencies are directed in Sections 5(b) and 5(c) to notify OMB, they also should be required to make public disclosures otherwise consistent with law and government-wide guidance. Relatedly, Section 5(a) directs agencies to stop using AI that is not compliant with minimum practices by August 2024, but includes no requirement to internally document the AI applications or systems that agencies have stopped using. Ensuring that agencies maintain lists of deprecated AI systems and the rationales for decisions to deprecate their use is essential for accountability and auditability.

Recommendation 3: Limit the scope of exemptions and strengthen oversight of CAIO decisions in Section 5

Risks to accountability go beyond the need for public disclosure. Section 5 grants CAIOs and agencies overbroad latitude to conduct self-assessments. The memo designates the Chief AI Officer (CAIO) as the official empowered to make important decisions about AI for the agency but provides for minimal oversight of a CAIO's most consequential decisions. Section 5(b)

permits a CAIO to determine independently or with limited consultation within an agency that an AI application or component is not safety- or rights-impacting, and therefore "not subject to the minimum practices." Determinations or reversals require documentation and a risk assessment that must be reported to OMB, but the memo does not specify a process by which OMB could challenge a CAIO's determination.

In addition, Section 5(c)(iii) permits a CAIO to grant their own agency waivers of minimum practices. The memo details specific elements of the decision-making process for the waiver, but it does not provide for an oversight mechanism whereby disagreement can be documented or the CAIO's decision overruled, including by OMB. The CAIO role is not designed in the mold of an independent officer like an Inspector General, and is instead charged with promoting innovative agency uses of AI and managing risks. That design may be appropriate, but must be accompanied by appropriate internal checks and external oversight. OTI recommends that the OMB memo address both the internal processes within agencies and the external oversight mechanism(s) that will ensure that agency self-assessments are appropriately scrutinized.

Recommendation 4: Clarify the definition of "meaningfully influence" in the context of notifications to negatively affected individuals in Section 5(c).

The phrase "meaningfully influence" appears throughout the draft guidance. Arguably the most significant usage is Section 5(c)(v)(D)'s requirement that "agencies must notify individuals when AI meaningfully influences the outcome of decisions specifically concerning them, such as the denial of benefits." Section 5(c)(v)(D) helpfully instructs agencies on how to provide useful notices and encourages them to provide explanations for AI decisions. But we recommend that OMB further clarify that agencies should construe "meaningfully influence" broadly enough to prevent widespread determinations that significant inputs from AI on decision making are not "meaningful" enough to warrant notification. OMB also should consider amending the language in 5(c)(v)(D) to "require" rather than merely "encourage," agencies to provide explanations for such decisions. Such explanations provide a meaningful basis for affected individuals to understand, even in general terms, how an AI system was used to make decisions about them.

Recommendation 5: Clarify the boundaries of the remedy process

Section 5(c)(v)(E) requires that "[a]gencies must provide [...] potential remedy to the use of the AI by a fallback and escalation system in the event that an impacted individual would like to appeal or contest the AI's negative impacts on them." The inclusion of an appeals process for impacted individuals is welcome, but as drafted the language does not seem to provide for a process by which an individual erroneously *not* notified of a negative outcome could escalate a complaint for review based on the belief that an adverse decision against them was shaped by an AI system listed in an agency's public AI inventory. OTI recommends that OMB clarify the

boundaries of the potential remedy mechanism to address possible agency error and establish guardrails against bad-faith uses of a remedy or complaints process.

V. Conclusion

The OMB guidance blends a call to greater innovation with a focus on guarding rights and safety as they relate to government purchasing, deployment and use of AI. The memo rightly focuses on how AI can impact rights and encourages the broad adoption of its standards by Intelligence Community elements not bound by the guidance. OTI's five recommendations ask for a clarification on how the OMB Guidance interacts with the GAO's June 2021 guidance on government use of AI; for strengthening the public disclosure and documentation requirements of Section 5; for a limit on the scope of exemptions as well as CAIO discretion also in Section 5; for a clarification of the definition of meaningfully influence in the context of notifications within Section 5; and finally for clarification of the scope of the remedy process in Section 5.

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Comment on OMB-2023-0020-0001

Submitter Information

Organization: LF AI & Data (Generative AI Commons)

General Comment

About us: LF AI data (Generative AI commons)
https://lfaidata.foundation/blog/2023/09/21/lf-ai-data-launches-generative-ai-commons/

We request the government to prioritize enforcing the principles of
equal opportunity,
information safety,
promote fairness,
enforce transparency and
accountability
when anyone builds an AI product.

We believe in incentivizing and educating the population to be aware of and contribute to Open Source Software, which will automatically guarantee the same.

Read more in the Google doc: https://docs.google.com/document/d/1PfJ-czvAHTGuPui98GGdg_33cAve3hIVvg_v8Rrdtno/edit

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Attachments

AI priorities for the country

AI priorities for the country

Generative AI Commons (outreach team)

(Ofer Hermoni, Oita Coleman, Raghavan Muthuregunathan)

Link to this document: link

Who is Generative AI Commons?

The LF AI & Data Generative AI Commons is dedicated to fostering the democratization, advancement and adoption of efficient, secure, reliable, and ethical Generative AI open source innovations through neutral governance, open and transparent collaboration and education.

Our recommendation:

The potential of AI is vast, but it must be built carefully to expand opportunities broadly.
For instance, a new intelligent AI scheduling tool at a hospital aims to optimize staff shifts and operating room bookings. Without proper precautions, it risks prioritizing some departments over others, which may negatively impact patients needing more critical care. We recommend the following priorities to ensure a responsible and sustainable development of AI.

Equal Economic Opportunity: The scheduling tool should ensure equal opportunities for advancement by equitably distributing shifts across departments based on need and staffing levels.

Safeguard Information: Patient data used for demand forecasting must be anonymized and secured. Code reviews of the AI system should verify privacy protections before deployment.

Promote Fairness and Inclusion: When assigning prime surgery times, the tool should be tested to prevent preferential treatment for certain specialties. More limited historical data for some departments could skew results unfairly.

Provide Transparency: If the tool denies a doctor's operating room request, the hospital must explain why, with an appeals process. This enables correcting potential bias in the system.

Oversee Usage: Hospital administrators must govern the use of the tool responsibly, monitoring for unfair impacts on staff in any department. They remain **accountable** for remedying issues discovered over time.

Similarly, **an AI writing assistant risks harm** if not developed carefully. Testing and reviews must ensure they represent all groups respectfully, provide attribution for sources, and avoid generating biased, false, or **plagiarized content.**

However, generative AI cannot guarantee to be 100% unbiased, hallucination. Independent rating agencies, similar to that of moody's delloite that rates the credit rating of countries should be established to rate the reliability of LLMs or AI solutions built by corporations.

Responsible oversight and adaptation are crucial for users to trust these emerging technologies as tools to aid their advancement and productivity. With conscientious governance grounded in ethical principles, innovators can enable AI to expand opportunities broadly.

Public outreach and AI education

As AI will impact everyone in some way, it becomes essential to prioritize AI education for everyone. Below are some initiatives that Generative AI Commons is planning to accomplish. We recommend the government to adopt similar initiatives.

- **Launch public awareness campaign** to educate citizens on real versus "fake" open source AI, emphasizing the importance of available science and transparency with AI systems.
- **Develop open-source generative AI educational materials** to make this technology more accessible for developers, researchers, and the general public. This includes building tutorials, documentation, frameworks, and other resources. Prioritize practical skills development. This is important for pre-eminence in this space.
- **Build a comprehensive taxonomy and glossary of terms** relating to generative AI and responsible/ethical AI practices. Having consistent vocabulary and definitions is essential for public discourse

Importance of Open Source and why it should be the bedrock:

Open source is about free software. Free here is not free-of-cost but **Free Speech,** quoting Richard Stallman. The government should incentivize large organizations to participate in contributing to open source. Engineers of large corporations believe that open source will win in the long run compared to themselves. Neither Google Nor Open AI has the MOAT. [1][3]

Open-source software should be the foundation of the government's AI development priorities, just as free speech principles are vital for democratic societies. There is a strong parallel between these concepts when it comes to AI:

1. **Transparency** - Open source code enables transparency in how AI systems are designed and function. This is critical for identifying bias, errors, and potential harms - just as freedom of speech enables critique and truth-telling about institutions of power. **Opacity** leads to the possibility of **covert, unethical uses** of AI.

2. **Accountability** - When open-source researchers and developers must publish code openly, it imposes accountability for that code to stand up to scrutiny. Closed sources evade accountability. Openness facilitates both innovation and responsibility.

3. **Accessibility** - Proprietary AI concentrates knowledge and capabilities among **elite institutions** that can afford licensing and computer resources. Open-source AI democratizes access to anyone interested in utilizing or studying these rapidly evolving technologies. Free speech principles strive to make information available to all citizens, **not just select groups**.

4. **Oversight** - The ability of a range of stakeholders to inspect AI source code enables better oversight to ensure systems align with public interests and values. Infringing on free speech removes voices from public discourse that could raise essential concerns. Openness furthers both effective oversight and productive public debate.

In essence, opaque and closed AI creates concentrations of unaccountable technological power. Enshrining open source as a priority counteracts this tendency, **as enshrining free speech fosters an informed and empowered populace.** The principles are mutually reinforcing for AI development in the public interest.

Conclusion

To summarize, we request the government to prioritize enforcing the principles of

- equal opportunity,
- information safety,
- promote fairness,
- enforce transparency and
- accountability

when anyone builds an AI product.

We believe in incentivizing and educating the population to be aware of and contribute to Open Source Software, which will automatically guarantee the same.

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2. https://en.wikipedia.org/wiki/The_Free_Software_Definition
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Comment from Samuel Hammond

Submitter Information

Name: Samuel Hammond

General Comment

See attached file(s)

Attachments

Samuel Hammond-OMB-2023-0020-0001

FOUNDATION FOR AMERICAN INNOVATION

Dec 6, 2023

Re: OMB-2023-0020-0001 - Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence

Thank you for the opportunity to respond to the Office of Management and Budget's request for comment on the draft memorandum titled Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI).[1] My name is Samuel Hammond, senior economist for the Foundation for American Innovation. FAI is a group of technologists and policy experts focused on developing technology, talent and ideas to support a freer and more abundant future.[2]

My research at FAI focuses on the second order effects of technologies like Artificial Intelligence on our institutions. By second order, I mean not only what an AI system can do on its own, but what is likely to result as AI capabilities diffuse throughout the economy. These second order effects are all important, as the history of transformative technologies – from the printing press to the industrial revolution to the internet – is also a history of equally transformative changes to government.

I call the tendency to neglect the second order effects from technology the Horseless Carriage Fallacy, as if the advent of the automobile merely replaced horse drawn carriages while holding everything else constant. In reality, the automobile changed virtually everything, radically reshaping American institutions and economic geography.

Artificial Intelligence will do the same. The question is whether governments will keep up and adapt, or be stuck riding horses while society whizzes by in the digital equivalent of a race car. The risks from adopting AI in government must therefore be balanced against the greater risks associated with not adopting AI proactively enough – a theme I explore in my essay series, *AI and Leviathan*.[3]

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[1] These comments are adapted from my December 6th testimony to the House Oversight subcommittee on Cybersecurity: https://oversight.house.gov/hearing/white-house-policy-on-ai/

[2] See: www.thefai.org

[3] "AI and Leviathan, Part I." Samuel Hammond. Second Best. (2023, August 23). https://www.secondbest.ca/p/ai-and-leviathan-part-i

Avoiding duplication, fragmentation, and anachronism

It's within this context that I applaud the White House's steps to promote the use of AI in government through the Executive Order on "Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence." It does this in a variety of ways, including through the formation of an interagency council at OMB to coordinate the use and development of AI in concert with new Chief AI Officers at each agency.

It is difficult in the abstract to know whether this framework will accelerate AI adoption in government or whether new layers of oversight will simply slow things down. As OMB begins implementing the Executive Order through this draft memorandum, it is thus imperative to retain the EO's spirit of advancing AI in government by periodically evaluating whether the framework is proving effective in practice, and to create a process to adjust, revisit or amend the framework overtime.

Consider the establishment of Artificial Intelligence Governance Boards with oversight over AI issues at each agency. On the one hand, the Boards could expedite the adoption of AI by enabling a degree of central coordination. On the other hand, insofar as AI is increasingly embedded in every form of software, it is often hard to distinguish an AI system from ordinary information technology (IT). For example, techniques rooted in generative AI are increasingly used as an alternative method of data compression, enabling ultra low-bandwidth video conferencing.[4] In the limit, some AI researchers are even exploring the use of generative AI as a general-purpose computing paradigm to replace conventional operating systems.[5] Thus, as the line between AI systems and traditional IT systems blurs, the official definitions used to delineate "AI" from "non-AI" circa 2023 could become anachronistic in short order.[6]

Whether the framework is successful will depend on whether the Boards and AI Officers are primarily incentivized to accelerate the adoption of advanced AI systems or to police

[4] "More Than Meets the AI: How GANs Research Is Reshaping Video Conferencing." Isha Salian. Nvidia. (2021, June 24). https://blogs.nvidia.com/blog/vid2vid-cameo-ai-research-video-conferencing/

[5] "The LLM Operating System, as Elucidated by Andrej Karpathy in the Introduction to Large Language Models Presentation." Omar Najar. Omar's Daily Tips; LinkedIn. (2023, November 23). https://www.linkedin.com/pulse/llm-operating-system-elucidated-andrej-karpathy-large-najar-m-sc--7pjte?trk=article-ssr-frontend-pulse_more-articles_related-content-card

[6] See related discussion of this point in my comments on AI and Accountability for the NTIA: "NTIA Comment on AI Accountability Policy." Samuel Hammond. Foundation for American Innovation. (2023, June 12). https://www.thefai.org/posts/ntia-comment-on-ai-accountability-policy

phantom risks, like bias or discrimination, that aren't unique to AI. As it stands, OMB was already two years late and well past its statutory deadline to issue AI guidance to agencies as required by the AI in Government Act of 2020. Before entrenching an additional layer of process, OMB should assess the factors that inhibited this timely issuance of guidance in its recent past, and use the enactment of this draft memorandum as an opportunity to correct or otherwise streamline those factors going forward.

The dangers from entrenching slow or duplicative approval processes is hard to overstate. FedRAMP, for instance, was created to overcome this problem in the procurement of cloud services. As a government-wide compliance program, agencies can transact with FedRAMP-approved providers knowing that they meet a standardized level of security. The most common AI services should follow the same model and be evaluated and authorized for use government-wide, letting Chief AI Officers and Governance Boards focus on overseeing bespoke or ad hoc AI systems for specific agency needs. This could be achieved by integrating NIST's AI RMF into the FedRAMP approval process, as is already the case with NIST's standards on security and privacy (SP 800-53). Insofar as many AI systems are and will continue to be accessed via the cloud, piggybacking on FedRAMP is only logical.

Winning the institutional arms race

The case for aggressive adoption of AI in government comes down to the arms race between AI and our institutions. This is most obvious in the arena of cybersecurity. As AI lets hackers and other bad actors level-up their capabilities, our cyber defenses will need to level-up at least as fast. And yet these dynamics extend far beyond cases of explicit AI misuse. Democratized access to AI lawyers could quickly overwhelm the court system, for instance, just as expert AI tax accountants could soon democratize the ability for individuals and businesses to minimize or complexify their tax liability.

These vectors of attack don't constitute misuses of AI at all, but rather appropriate use at an unprecedented scale. In the near future, for instance, AI agents will likely fully automate the process of filing and appealing a FOIA request. Any information that can be requested will be, necessitating the adoption of e-discovery systems to allow AI agents to automatically review and fulfill the request on the government's end. The final equilibrium could make for a far more transparent and efficient government, but in the interim, having many more requests for information than an agency has capacity to fulfill could cause a de

facto Denial of Service attack. Similar such "attacks" are likely possible across any number of public venues or services, from AI generated regulatory comments, to the potential illegibility of the sheer volume of economic activity unlocked by AGI.

Even the most productive uses of AI will increase the throughput demand on our administrative agencies by orders of magnitude. Just last week, Google DeepMind published an AI model that discovered 2.2 million new crystals and 380,000 new stable materials that could power future technologies.[7] This represents nearly 800 years' worth of new material science knowledge, achieved virtually overnight. Imagine what will happen when this same pace of discovery comes to medicine, as it almost surely will. In a typical year, the FDA approves around 50 new molecular entities for novel drugs. Could the FDA handle increasing this approval rate to 500, 5,000 or even 50,000 new molecules per year, unlocking centuries of progress in personalized medicine? The answer is clearly no, at least without adopting AI symmetrically.

The need for (and risks of) scalable governance

In every case, managing these growing throughput demands will require the federal government to not only adopt AI aggressively, but should force a rethink of the configuration of our administrative and regulatory agencies from the ground up. From broken procurement policies to the bureaucratic sclerosis engendered by slow and outdated administrative procedures, incremental reform is unlikely to suffice. We must modernize government at the firmware-level, or risk ubiquitous system failure and government becoming *the* primary bottleneck to AI's enormous potential upside.[8]

In short, as throughput demands on government increase, we will need to adopt AI-native governance models that *scale*. One highly scalable approach is the idea of Government as a Platform, drawing an analogy to multi-sided platform companies like Uber or AirBnB. Such platforms use reputation mechanisms, search and matching algorithms, and automatic dispute resolution systems to provide quasi-regulatory forms of market governance with unprecedented scale. Given progress in AI, similar platform-based approaches could be extended to other areas of regulatory oversight.

[7] "Millions of new materials discovered with deep learning." Amil Merchant and Ekin Dogus Cubuk, Deepmind. (2023, November 29). https://deepmind.google/discover/blog/millions-of-new-materials-discovered-with-deep-learning/
[8] "Heretical thoughts on AI" Eli Dourado. (2023, January 19). https://www.elidourado.com/p/heretical-thoughts-on-ai

Consider the recent advances in the visual understanding exhibited by Large Multi-modal Models (LMMs) such as GPT4-Vision. Such models can be prompted to describe and interpret what they "see" in any given image or video scene. As these models continue to improve and overcome their current limitations (such as vulnerability to prompt injection), LMMs could thus unlock new, highly scalable forms of regulatory oversight. For example, imagine a near future where, instead of the USDA or OSHA sending agents to inspect commercial farms or work sites in-person, cameras were required to be installed on-site with LMMs fine-tuned to continuously monitor for food or workplace safety violations.

As the above hypothetical makes clear, the power of AI to scale regulatory compliance also scales potential forms of government surveillance. To preserve Americans' right to privacy and strengthen public trust, any AI system that has surveillance as a dual-use must have privacy and civil liberty protection engineered into the technology itself.

A lesser appreciated risk with AI-enabled regulatory oversight is simply the extent to which all laws and regulations are implicitly calibrated to the expectation of imperfect information and an "acceptable" degree of non-enforcement. Consider the data showing that most drivers make "rolling stops" at stop signs the majority of the time – a practice that is technically illegal but which goes largely unenforced. Indeed, such laws were written *with the expectation* of deeply imperfect enforcement. If a car's on-board computer used AI to automatically detect and report a driver every time they made a rolling stop, went 10 MPH over the speed limit, and so on, the de facto stringency of basic traffic laws would suddenly become oppressive indeed. Thus, to the extent AI dramatically reduces asymmetric information within a particular agency's regulatory domain, regulators must be on guard that they are not strengthening the de facto stringency of existing laws or regulations in an analogously dramatic fashion. Nor is this risk hypothetical, as shown by the federal decision to prevent Tesla's self-driving system from making rolling stops.[9]

Reducing waste, expanding capacity

Earlier this year, researchers at OpenAI published a paper assessing the likely labor market impact of Large Language Models. They found 80% of the U.S. workforce could

[9] "Feds Make Tesla Remove 'Rolling Stops.' It's A Terrible Decision." Brad Templeton. Forbes. (2022, February 1). https://www.forbes.com/sites/bradtempleton/2022/02/01/feds-make-tesla-remove-rolling-stops-its-a-terrible-decision/?sh=65a0454b2111

have at least 10% of their work tasks affected by the introduction of LLMs, with jobs like Accountants, Auditors, and Legal Secretaries facing an exposure rate of 100%.[10] Many large companies have already begun downsizing or have plans to downsize, in anticipation of the enormous efficiency gains unlocked by emerging AI tools and agents.

Much of the work performed in government bureaucracies is especially low-hanging fruit for AI.[11] OMB should thus undertake an analogous survey to discover which federal jobs are most exposed to AI, and to what extent legislation is needed to expedite new, AI-enabled models of governance. The goal should not be to downsize the federal bureaucracy per se, but rather to augment employee productivity and free up human resources for higher value uses, reducing waste and enhancing capacity simultaneously.

Take the FTC's health care division, which employs around 30 attorneys to police competition across the entire U.S. health care industry. A day in the life of these attorneys looks like manually reading through tens of thousands emails subpoenaed from a pharma CEO as part of discovery. Yet today, with the right prompt engineering, one could feed those emails into a Large Language Model and simply ask it to find the most egregious examples of misconduct. This wouldn't replace the attorney's role in verifying what the AI discovers, but even with the imperfections of current models, it would nonetheless drive massive productivity gains – gains that we can be sure are being exploited by the private law firms on the other side.

At the same time, the same tools that can be used to enhance federal capacity can be further used to strengthen Congressional oversight. Most of the work and communications performed in any given agency is now machine readable. As agencies embrace AI internally, managers will be able to easily track and query the performance of their staff, automatically generating reports and work summaries from common document repositories. These same techniques could be used to expedite reports to Congress, and even enable near real-time monitoring of an agency's activities. Call it Inspector General-GPT.

[10] GPTs are GPTs: An Early Look at the Labor Market Impact Potential of Large Language Models." Eloundou, Tyna et al. OpenAI. (2023, March 17) https://arxiv.org/abs/2303.10130
[11] "Disrupting Bureaucracy" Samuel Hammond. PlainText. (2015, September 24). https://readplaintext.com/disrupting-bureaucracy-fa611d04f956

Innovating within government should mean more than plugging AI into an existing, outdated process and calling it a day. It will take true inventiveness and ambition. With appropriate urgency and coordination between the White House, OMB and Congress, we can forestall system failure by co-evolving our institutions with AI, enhancing public trust and saving taxpayers' dollars in the process.

Thank you,

Samuel Hammond
samuel@thefai.org

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lpt-ascl-89mn
Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0189
Comment from Benjamin Galynker

Submitter Information

Name: Benjamin Galynker

General Comment

See attached file(s).

Attachments

2023-12-05 OMB Comment

Thank you for the opportunity to comment on the proposed OMB memorandum for the heads of executive departments and agencies.

I would like to note several major concerns and one minor one, and offer related suggestions for improvement.

1. Covered AI must include downstream replications or promulgations of AI-reliant/AI-implementing systems

First, in Section 2.b., the memorandum defines "covered AI" to include "system functionality that implements or is reliant on AI, rather than to the entirety of an information system that incorporates AI." Though this is an important distinction, it is not nuanced enough. Where system functionality is reliant on AI, it is not only that specific system functionality that should be assessed. Rather, any other downstream information systems that may be affected by AI outputs should be assessed.

To take a simple example, if a particular system incorporates AI language translation and the AI translation output includes a mistranslation or auto-correction of a word or phrase that ends up being replicated across many other documents or systems that relied on the initial faulty translation/auto-correction output, the cumulative impact and reach of all of those systems would need to be taken into account when performing an assessment of the AI, not just the system that was "closest" to the AI.

2. The regime must include and support error correction, particularly in "too big to fail" software platforms

To take another version of this example, let's say that a widespread operating system (say, Microsoft Windows) or browser (say, Google Chrome or Microsoft Edge), incorporated a language translation or autocorrection function that returned faulty outputs. The government agencies using such operating systems or browsers that incorporate embedded AI systems should have some way of petitioning the companies who make those systems to fix the errors in the systems, wall them off from use, or otherwise have a reliable way of identifying the flaws and having users work around them.

Otherwise, the memorandum admonitions regarding risk assessment, etc., will not be of much practical use because some software is "too big." The government is not going to be able to completely scrap the Microsoft Windows

operating system or the Microsoft Office applications suite, so there must be a way of mitigating risk and correcting errors within all of the major ubiquitous software platforms.

3. AI promotion and adoption decisions should not be assumed.

Third, in several areas, the memorandum implicitly assumes that all agencies require the use of AI and "AI maturity," and that there will be some benefits to the use and innovation of AI that will outweigh the risks across the board in every agency. However, this is inconsistent with a true scientific assessment of risks that does assume a positive outcome.

It is quite premature to assume that AI use will be a net positive that needs to be promoted across all agencies. It is equally possible and plausible that a given agency, department, or government office finds that most of the risks outweigh the benefits of AI innovation in its sphere. These entities should be free to make a rigorous assessment and determination and should not receive any negative treatment whatsoever if they determine that incorporating AI systems does not benefit the agency on balance.

The role of the CAIO should be revised to reflect this reality. In particular, sections 3.b.ii(G) - (I), concerning the promotion of AI innovation, should be revised to reflect the possibility that AI promotion may not be in either the public's or the agency's best interests, and the CAIO might find that the CAIO will best serve the agency and the public by holding off on implementing AI systems until they are more robust, safe, and transparent.

This approach would be more consistent with the President's prior Executive Orders, which always qualified language regarding the promotion of AI with additional caveats regarding risk assessment regarding the Nation's values, laws, public rights, and safety.

4. The memorandum should insist on transparency in AI foundation models.

Fourth, the memorandum should take notice of the current trend toward a lack of transparency in AI foundation models, and therefore employ stronger language when empowering agencies to reverse this trend. Section 5.d.ii currently states, "Agencies should take steps to ensure transparency and

adequate performance for their procured AI," the OMB, the memorandum should add that every agency should take particularly special care as to the transparency of any foundation model as a prerequisite of use.

As a group of eight leading AI researchers recently noted, "While the societal impact of these models is rising, transparency is on the decline. If this trend continues, foundation models could become just as opaque as social media platforms and other previous technologies, replicating their failure modes." See Stanford University's Center for Research on Foundation Models (CRFM) and Institute on Human-Centered Artificial Intelligence (HAI), MIT Media Lab, and Princeton University Center for Information Technology Policy 2023 Foundation Model Transparency Index, available at https://crfm.stanford.edu/fmti/. Given this industry-wide trend toward less transparency, rather than more, the government should take a stronger position regarding insisting on foundation model transparency as part of any procurement process.

5. Limit R&D exclusions that would provide windfalls to commercial AI offerings.

Fifth, the memorandum has too large a carve-out for research and development in section 5.c.1 and opportunities for exploitation of government data for improvement of commercial AI. This exclusion is particularly problematic when viewed in combination with section 5.d.4, where agencies are only asked to "consider contracting provisions that protect Federal information used by vendors in the development and operation of AI products and services for the Federal Government so that such data is protected from unauthorized disclosure and use and cannot be subsequently used to train or improve the functionality of commercial AI offerings ..." Elements of the intelligence community are also excluded from even these modest requirements. This appears to mean that all government R&D activities regarding AI, as well as intelligence activities, may be used to enhance commercial AI without much scrutiny. These loopholes seem like a glaring and unnecessary risks for abuse and they should be eliminated or greatly narrowed.

6. Address labor-force risks in the memorandum.

Sixth, I do not see adequate attention being paid in this memorandum to the statements in president's October 30, 2023 executive order that "In the workplace itself, AI should not be deployed in ways that undermine rights, worsen job quality, encourage undue worker surveillance, lessen market competition, introduce new health and safety risks, or cause harmful labor-force

disruptions." The risk of labor-force disruptions is not mentioned in the current draft memorandum, which is a mistake. CAIOs and agencies (particularly the Department of Labor) must coordinate to assess and address the labor disruption and job quality risks of AI-reliant systems.

Finally, a more minor point of clarification. In section 5(b)(ii), Purposes That Are Presumed to Be Rights-Impacting, section G should include not only "time-on-task tracking," but "task tracking" more broadly. The phrase "electronic workplace surveillance and management systems" could be interpreted to include task management systems, but it is not completely clear that they do. All surveillance, management, and oversight of workplace tasks should be presumed to be rights-impacting.

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0190
Comment from Deepti Kannapan

Submitter Information

Name: Deepti Kannapan

General Comment

This is a pdf-formatted version of my previous comment.

Attachments

Deepti Kannapan OMB-2023-20 letter

Artificial intelligence is an emerging technology with enormous potential for both positive and negative impact, so I applaud the Biden-Harris administration for taking this step toward setting the direction of its future development. Preventing harm to the rights and safety of individuals is an important priority.

This executive order encourages agencies to implement AI only when doing so has benefits that outweigh the risks, and to manage the risks that occur from its use.

As an engineer with professional experience in automating physical systems, I have two comments on the role of non-AI automation (which the executive order describes as "systems whose behavior is defined only by human-defined rules"), alongside AI.

1. Need to incentivize other forms of automation over AI when it is better fit for purpose
Automation has considerable potential in improving the effectiveness of agencies. Agencies are instructed to assess the potential benefits of using AI automation. This assessment should not evaluate AI solutions in isolation, or only against legacy systems. AI solutions must be evaluated relative to non-AI automation solutions, which can provide many of the same benefits of increasing effectiveness and efficiency.

When a non-AI auotomation system provides comparable benefit to an AI system, agencies should be incentivized to use the non-AI automation system if it can be more rigorously tested, validated, and explained. Mature engineering and mathematical techniques exist for guaranteeing safety of non-AI automated systems.

AI systems are harder to validate for all conditions, since their ability to learn may cause them to depart from their test conditions. They also frequently lack explainability, which can hinder rigorous analyses.

I support the development of AI expertise by agencies and evaluating of automation solutions, but the evaluation of systems should include the full range of automation types, including non-AI, to find the most suitable solution.

2. Safety-impacting AI must have non-AI fail-safes
The executive order acknowledges the possibility of erroneous or harmful results from a rights-impacting AI system, and hence requires periodic human review and the provision of escalation mechanisms. For safety-impacting AI, especially those controlling physical systems, harmful AI actions may require a response too rapid for a human escalation system.

Fail-safes (such as limits on system variables like as the amount of kinetic force delivered) must be implemented. These fail-safes must be able to be rigorously analyzed and validated, and troubleshot in case of emergencies. Non-AI automation may suit this purpose because it is explainable.

In general, fail-safe mechanisms are a teaming of AI, humans, and non-AI automation. I urge the Biden-Harris administration to require the use of automated and human fail-safes for safety-impacting AI.
Thank you,
- Deepti Kannapan
M.S. Mechanical Engineering (University of California)

PUBLIC SUBMISSION

As of: March 22, 2024
Tracking No. lps-ue0h-ewit
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Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0191
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Citizens and Technology Lab, Cornell University

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General Comment

The Citizen and Technology Lab's Submission to OMB Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Office of Management and Budget
Regulations.gov Docket Number OMB–2023–0020

The Citizens and Technology Lab (CAT Lab) of Cornell University is pleased to provide input in response to the request for comment (RFC) on OMB's draft memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence. These comments respond to questions 2, 3, 5, and 8 of the RFC, and provide additional feedback.

Attachments

OMB-2023-0020_RFC_Citizens_and_Technology_Lab

December 5, 2023

Citizen and Technology Lab's Submission to OMB Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Office of Management and Budget
Regulations.gov Docket Number OMB–2023–0020

The Citizens and Technology Lab (CAT Lab) of Cornell University is pleased to provide input in response to the request for comment (RFC) on OMB's draft memorandum on *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence.* These comments respond to questions 2, 3, 5, and 8 of the RFC, and provide additional feedback. In this document we:

- Encourage the OMB to acknowledge and support the role of community/participatory science in the oversight of AI tools.
- Urge the OMB to develop guidelines for soliciting and supporting participation in AI innovation and governance from underrepresented groups who have been historically excluded from AI research and development - and who face disproportionate risks from AI systems.
- Advise the OMB to account for the labor, rights, and mental health consequences for volunteer and professional communities whose work is used to train AI systems and manage AI safety.

About the Citizens and Technology Lab

The Citizens and Technology Lab (CAT Lab) at Cornell University works alongside the public to discover effective community ideas for change in ways that advance scientific knowledge. CAT Lab has worked with communities of tens of millions of people on reddit, Wikipedia, and Twitter to study socio-technical safety and reliability questions, including online safety and discrimination.

CAT Lab is led by Dr. J. Nathan Matias, Assistant Professor at Cornell in the departments of Communication and Information Science. In 2010, he developed one of the first socio-technical testing systems for a generative language model in his capacity at one of the earliest neural network predictive text software companies (SwiftKey).

CAT Lab's position with respect to testing, forecasting, and preventing harms from collective AI and human behavior

CAT Lab has particular expertise with AI systems that are built on adaptive algorithms-systems that train on their outputs such as systems for ranking and sorting, resource allocation, logistics management, and generative AI. As Dr. Matias has outlined in a recent article in *Nature*,[1] the creators of these systems cannot currently make reliable assurances about the performance and safety of systems that adapt to their human environments. He outlines the needed scientific work of testing, forecasting, and preventing harms from this kind of collective AI and human behavior, including the essential role of community/citizen science. When AI systems adapt to widely different contexts, attempts at AI transparency, accountability, and regulation will grossly fail the most vulnerable in society without significant support for community/participatory science on AI and its social impacts**.**

Coordination mechanisms and OMB's role advancing responsible AI innovation *(questions 2, 3, 8)*

OMB should direct agency heads to establish a task force to build community/participatory science-based review of AI tools.

Citizen/community science offers an important mechanism to overcome severe safety and inclusion risks of science and industry. When Dr. Safiya Noble wrote "Algorithms of Oppression," documenting the gross misrepresentation of Black girls with images of pornography on Google, she was drawing attention to a system problem in AI systems that went largely undetected by AI creators in academia and industry for over a decade. As one of the only Black women in information science, she was partly able to observe this problem because it affected her and her communities. Over a decade later, US Information Science as a field has not increased the rate of Black women PhDs. Given the severe under-representation of minorities in computing, work on AI safety and reliability cannot wait for academia to change in order for communities to be safe.[2] Citizen/community science can fill these knowledge gaps and transform the diversity of the scientific and industry workforce by broadening who participants in research and by creating pathways for opportunity.

The EPA's program in Participatory Science for Environmental Protection is one such model, as documented in the 2022 report "Using Participatory Science at EPA: Vision and Principles (PDF)." In establishing this task force, OMB should seek agency input on funding needs for universities, civil society, state/regional/local governments, and Tribal communities to pursue scientific inquiry along

[1] Matias, J.N. (2023) Humans and algorithms work together — so study them together. *Nature* **617**, 248-251 (2023). *https://doi.org/10.1038/d41586-023-01521-z*

[2] Matias, J.N., Lewis, N.A. & Hope, E.C. US universities are not succeeding in diversifying faculty. *Nat Hum Behav* **6**, 1606–1608 (2022). https://doi.org/10.1038/s41562-022-01495-4

community designs. It is critical to begin now to build the scientific and engineering practice to understand collective patterns of human-algorithm behavior.

OMB should include indicators in any system it develops to inventory AI use cases (pursuant to section 7225 of the Advancing American AI Act) to seek clarity from Federal agencies on the diversity of analysis in safety-impacting and rights-impacting AI.

As Dr. Matias noted in a response to *RFC NTIA Docket No. 230407-0093*,[3] the contextual dependence of AI systems perpetuates harms over long periods of time, in particular where harms occur for people underrepresented in computing. Advancing responsible AI innovation will require a coordination mechanism that reflects this context.

To engage the public in responsible AI innovation, federal agencies should consider the roles of access to data, ethics, and volunteer labor that make up the governance systems of digital decision-making.

CAT Lab notes that federal policies need to work in tandem with algorithm transparency to enable communities to produce high quality research in the public interest, and that researchers need protection from private-sector retaliation for research and documentation of harms. We have documented some of the opportunities to enable independent research in a recent Tech Policy Press article, Enabling Independent Research Without Unleashing Ethics Disasters.[4]

CAT Lab recommends that the OMB reflect on how federal agencies can approach AI governance with the role of semi-professional moderators in mind, and designate a person to lead in advancing our understanding of the role of volunteer moderators in advancing responsible AI innovation.

Though trust and safety professionals are part of the bulwark of protection against AI harms, much of the day-to-day activity of protecting online spaces and mitigating algorithmic harm is done by volunteer moderators of online communities, whose conversations have become so-called "ground truth" for the training of AI systems. Community moderators who safeguard platforms, including Wikipedia and reddit, have already experienced overwhelming amounts of information from generative AI bots escalating the amount of spam they deal with to maintain online community spaces.[5] Scholars have begun to document the disruptions from AI-generated content in these

[3] Matias, J.N. (2023). *AI Policy Will Fail Society Without Community Science.* NTIA Docket No. 230407-0093*, also available at* https://citizensandtech.org/2023/06/ntia-submission-06-2023/

[4] Lukito, Josephine, Matias, J., Gilbert, S (2023 May 10). *Enabling Independent Research Without Unleashing Ethics Disasters.* Tech Policy Press. https://www.techpolicy.press/enabling-independent-research-without-unleashing-ethics-disasters/.

[5] Clarke, Laurie (2023 April 11). *Reddit Moderators Brace for a ChatGPT Spam Apocalypse.* Vice. https://www.vice.com/en/article/jg5qy8/reddit-moderators-brace-for-a-chatgpt-spam-apocalypse.

communities; the downstream effects on generative AI systems from this potential information pollution are still poorly understood.[6]

Similarly, the software systems that help enable volunteer moderation are often built and maintained by volunteer open-source engineers. We encourage the OMB to include the governance of volunteer and open-source sociotechnical systems as part of its safety-impacting and rights-impacting AI framework. OMB should also incentivize basic research and the development of open-source software and standards focused on the mitigation of algorithmic harm.

OMB should direct agency leads to support the work of developing best standards and practices for mitigating the mental health and secondary trauma of trust and safety teams and moderators working with AI systems.

When policymakers discuss the safety and rights implications of AI, they often consider end-users of AI, but AI development also involves managing the safety and rights of the workers who train AI systems and monitor their safety. This work, as documented by Siddharth Suri and Mary Gray in "Ghost Work", Alexa Koenig and Andrea Lampros in “Graphic: Trauma and Meaning in Our Online Lives”, and by Sarah T. Roberts in "Beyond the Screen," can expose workers to severe secondary trauma and mental health risks that psychologists have still not discovered how to reliably mitigate. There is much more research to be supported in this developing field of AI mitigation, such as emerging research around AI’s ability to render style-transfer filters to mitigate impact.[7] At Cornell, we have a team currently working on compiling a systematic review of these secondary trauma issues, how to measure the psychological harms from training AI systems to be safe, and how to introduce workplace protections that safeguard the health of the people behind the screen of AI.

Use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised *(question 5)*

Harms from human-algorithm interaction in AI systems should be considered to develop and change both in their harms and benefits over time. OMB should consider expanding the list of safety and rights impacting AI to specify arenas where the initial effect may not yet be easily observed, but where research has shown initial effects, specifically:

1. The chilling effect on freedom of speech that emerges from the use of AI to establish automated law enforcement to deter behavior. This includes systems of legal action in which

[6]Lloyd, T., Reagle, J., Naaman, M. (2023). *“There Has To Be a Lot That We're Missing": Moderating AI-Generated Content on Reddit*. aRxiv. https://doi.org/10.48550/arXiv.2311.12702.
[7] Sarridis, I, Spangenberg, J., Papadopoulou, O., & Papadopoulos, S. (2023). *Mitigating Viewer Impact from Disturbing Imagery using AI Filters: A User-Study.* arXiv. https://doi.org/10.48550/arXiv.2307.10334

a computer is responsible for unsupervised decision-making, which distributes or outsources surveillance and enforcement to parties that are not governments.

2. The potential for such automated law enforcement tools to be deployed in requirements to watermark generative AI content. Early research has shown that receiving takedown notices from copyright enforcement bots drives down individuals' rate of posting, on average, regardless of whether the takedown notice was legitimate or not.[8]

* * * * *

Thank you for the opportunity to provide comments. The Citizens and Technology Lab looks forward to serving as a potential resource for policy discussions on this issue.

Elizabeth Eagen
Deputy Director
Citizens and Technology Lab, Cornell University

Dr. J Nathan Matias
Assistant Professor, Cornell University Department of Communication
Founder & Executive Director of the Citizens and Technology Lab

Dr. Sarah Gilbert
Research Director

Eric Pennington
Lead Data Architect

Dr. Edward L. Platt
Scientific Consultant

Alexandra Gonzalez
PhD Student, Cornell University

Lucas Wright
PhD Candidate, Cornell University

[8] Matias, J.N., Mou, M., Penney, J., Klein, M., Wright, L. (2020). *Do Automated Legal Threats Reduce Freedom of Expression Online? Preliminary Results from a Natural Experiment*. https://osf.io/nc7e2/

PUBLIC SUBMISSION

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0192
Comment on OMB-2023-0020-0001

Submitter Information

Organization: Center for American Progress

General Comment

Attached are comments from CAP, Public Citizen, Public Knowledge, and numerous other organizations in response to the Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum.

Throughout 2023, numerous civil, technology, and human rights groups called for the Executive Branch to take immediate executive action on artificial intelligence (AI)i and to center the White House Blueprint for an AI Bill of Rights. The President's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence (AI EO) represents a strong start on the guidance needed to ensure the development of safe and effective AI.iv The accompanying draft OMB guidance, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," represents essential and needed guidance for federal agencies, contractors, and grantees that are already using AI systems.

We believe it is essential to meaningfully center civil rights and equity in the implementation of these executive actions. Most centrally, that means building on the AI Bill of Rights and requiring that AI systems be shown to be effective, safe, and nondiscriminatory before use; further enumerating rights-impacting and safety-impacting uses that inherently pose the greatest risk; ensuring a broad scope by strengthening procurement language and increasing specificity around waivers and exemptions; ensuring adequate resourcing for implementation; and publishing guidance prior to using generative AI. Agencies should also consider alternative solutions when evaluating AI systems and continue to inventory their AI regulatory authority. Attached, we provide brief comments on each of these elements.

Attachments

Big Tent Letter on OMB Comments 12.05.2023

Center for American Progress
1333 H Street NW, Suite 100E
Washington, DC 20005
202.682.1611
americanprogress.org

December 5, 2023

Clare Martorana
U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer Office of Management and Budget
725 17th Street, N.W.
Ste. 50001
Washington, D.C. 20503

Submitted electronically via www.regulations.gov

Re: Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum; FR Doc. 2023-24269, 23 Nov. 2023.

Dear Ms. Martorana,

Attached are comments from CAP, Public Citizen, Public Knowledge, and numerous other organizations in response to the Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum.

Throughout 2023, numerous civil, technology, and human rights groups called for the Executive Branch to take immediate executive action on artificial intelligence (AI)[1] and to center the White House Blueprint for an AI Bill of Rights[2]. The President's Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence[3] (AI EO) represents a strong start on the guidance needed to ensure the development of safe and effective AI.[4] The accompanying draft OMB guidance, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence," represents essential and needed guidance for federal agencies, contractors, and grantees that are already using AI systems.

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Please feel free to reach out with any questions to Adam Conner (aconner@americanprogress.org) or Megan Shahi (mshahi@americanprogress.org).

Thank you for your hard work outlining the ways in which the federal government can assume the mantle of leadership on AI and implement equitable innovation.

The undersigned,

Center for American Progress
Public Citizen
Public Knowledge
Accountable Tech
American Association of People with Disabilities
American Federation of Teachers
Autistic Women & Nonbinary Network
Clean Elections Texas
Climate Action Against Disinformation
Communications Workers of America
Demand Progress
Friends of the Earth
Institute for Agriculture and Trade Policy
Interfaith Center on Corporate Responsibility
Investor Alliance for Human Rights
Kapor Center
National Black Justice Coalition
National Employment Law Project
Oxfam America
Service Employees International Union
The Tech Oversight Project

Only AI that is proven to be equitable should be developed, acquired, or used. Elements of the draft OMB AI guidance have recognized calls from the civil, technology, and human rights communities to ensure that federal government and contractor use of AI should only be allowed if those AI systems are effective, safe, and nondiscriminatory.[5]

Agency implementation of the memo's requirements must continue to build on the AI Bill of Rights and prior Executive Orders. We applaud that the draft OMB AI guidance builds on the AI EO's integration of the AI Bill of Rights and earlier Executive Orders on Racial Equity and Support for Underserved Communities.[6] There are important requirements in the minimum practices for Safety-Impacting and Rights-Impacting AI to implement the AI Bill of Rights principles of safe and effective systems, algorithmic discrimination protections, and human alternatives, consideration, and fallback. These minimum practices should be expanded to include the other two principles from the AI Bill of Rights, with requirements for Notice and Explanation[7] to those using or affected by government AI systems and to address the issue of Data Privacy[8] for agencies using AI systems.

Fully resourced agency governance structures are needed. The appointment of Chief AI Officers (CAIO) in federal agencies and the creation of Agency AI Governance Boards represent important steps in determining responsibility of and coordination for AI within agencies. More must be done to ensure that these agency CAIOs have the needed power, budget, and accountability for implementing the requirements in AI EO and the draft OMB AI guidance. CAIOs must be required to solicit and include labor and workforce input on their AI plan and they must be represented on the Agency AI governance boards. Consultation on AI in the workforce must occur pre-decisionally, as well as before, during, and after AI implementation. The draft guidance should also clarify as in the CAIO responsibilities their role in ensuring the proper control and labeling of any government product outputted by generative AI as noted in Section 10.1(c) of the AI EO.[9] The agency AI governance structures must be adequately resourced, including the need for Civil Rights Offices (or their inclusion), to meet the challenges identified in the draft OMB AI guidance.

Recognizing rights-impacting and safety-impacting uses of AI is a necessary and fundamental action. The detailed and specific outlining of purposes that are presumed to be Safety-Impacting or Rights-Impacting are an enormous and essential contribution to the broader development of responsible AI. These lists include the heart of those areas most at risk from AI including critical infrastructure, law enforcement and surveillance, employment, and medical issues among many others. These are the areas that are most at risk from AI systems and we applaud the draft OMB guidance for highlighting in detail these critical purposes. To that end, the Rights-Impacting purposes should further include workforce protections and the disability community. In Section 5.b.ii, we recommend the addition of “collective bargaining, workplace organizing, union membership, or concerted activity” to part G to ensure the further protection of workers from AI systems and to continue the Biden-Harris administration's historic support for organized labor and the working people of America. Additionally, we recommend a new part be added to Section 5.b.ii that specifically calls out the needs of the disability community, who are uniquely vulnerable to AI in any number of existing categories but deserve their own consideration. Finally, OMB should consider outlining the process by which new Safety-Impacting or Rights-Impacting purposes could be added to the AI guidance, including through public input, as technology and its usage evolves.

OMB should provide more clarity on the parameters for issuing exemptions and waivers. Clarity is needed on how AI can be determined to not match the definition of Safety-Impacting AI or Rights-Impacting AI and in issuing waivers for minimum practices. In both cases, maximum transparency is needed and such determinations by agencies should be made public on the agency’s website and AI.gov.

AI Procurement recommendations must be strengthened. “The Managing Risks in Federal Procurement of Artificial Intelligence” section should make clearer that “Aligning to National Values and Law” means that the federal government should not purchase automated surveillance, algorithmic management, and other artificial intelligence products that harms workers and must consult with and reach an agreement with workers and their exclusive representatives before purchase and deployment. Additionally, OMB should require AI labor standards in procurement contracts in this or future AI procurement guidance.

Use of alternative solutions should be considered as part of the evaluation of AI systems. The procurement section discusses the procurement of AI systems from vendors, or adoption of commercial AI offerings. But where there are barriers to robustly satisfying the Minimum Practices (i.e. they are satisfied but there are limitations to some of the reporting and transparency, for example) those AI systems should be explicitly disincentivized in favor of alternative vendor or public sector-developed options.

Guidance is needed prior to the use of generative AI. The procurement section also discusses generative AI as a future procurement. Given that Generative AI is likely to be made available as a feature in the office productivity software that every federal agency has already procured, OMB should require federal guidance before enabling widespread deployment of generative AI in existing office productivity software. OMB should task the Office of the Federal Chief Information Officer and the CIO Council to craft such guidance in coordination with the new interagency council of agency CAIOs.

Previous AI EO and OMB guidance ordered agencies to inventory their AI regulatory authorities should be retained and strengthened. While regulation is not the focus of this draft OMB AI guidance, the proposed document provides an opportunity to elevate and prioritize one strong aspect of the previous EO and OMB guidance[10] that required agencies to submit to OMB an agency plan that "must identify any statutory authorities specifically governing agency regulation of AI applications, as well as collections of AI-related information from regulated entities." The Department of Health and Human Services was the only one to publicly release their memo on AI authorities.[11] This inventory of agency regulatory authorities for AI is a strong exercise for agencies to undergo to better understand their authorities in relation to AI and of immense interest to Congress, civil society, and the public as we work to understand if new AI laws are needed or if existing AI authorities are sufficient. In order to aid all agencies in achieving the goals in the AI EO the new draft OMB AI guidance should resurface the requirement, require that documents of agency authorities be submitted to OMB and the new White House AI Council, and the document of such agency regulatory authorities should also be made public.

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Comments Due: December 05, 2023

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Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0193
Comment on OMB-2023-0020-0001

Submitter Information

Organization: American Foundation for the Blind

General Comment

See attached file(s)

Attachments

AFB Comment OMB RFI on AI memo - 12-05-23

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0194
Comment on OMB-2023-0020-0001

Submitter Information

Organization: LF AI & Data (Linux Foundation) (Generative AI commons)

General Comment

https://lfaidata.foundation/blog/2023/09/21/lf-ai-data-launches-generative-ai-commons/
About us: LF AI data (Generative AI commons)
https://docs.google.com/document/d/1PfJ-czvAHTGuPui98GGdg_33cAve3hIVvg_v8Rrdtno/edit?usp=sharing

we request the government to prioritize enforcing the principles of
equal opportunity,
information safety,
promote fairness,
enforce transparency and
accountability
when anyone builds an AI product.

We believe in incentivizing and educating the population to be aware of and contribute to Open Source Software, which will automatically guarantee the same

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Attachments

AI priorities for the country

AI priorities for the country

Generative AI Commons (outreach team)

(Ofer Hermoni, Oita Coleman, Raghavan Muthuregunathan)

Link to this document: link

Who is Generative AI Commons?

The LF AI & Data Generative AI Commons is dedicated to fostering the democratization, advancement and adoption of efficient, secure, reliable, and ethical Generative AI open source innovations through neutral governance, open and transparent collaboration and education.

Our recommendation:

The potential of AI is vast, but it must be built carefully to expand opportunities broadly.
For instance, a new intelligent AI scheduling tool at a hospital aims to optimize staff shifts and operating room bookings. Without proper precautions, it risks prioritizing some departments over others, which may negatively impact patients needing more critical care. We recommend the following priorities to ensure a responsible and sustainable development of AI.

Equal Economic Opportunity: The scheduling tool should ensure equal opportunities for advancement by equitably distributing shifts across departments based on need and staffing levels.

Safeguard Information: Patient data used for demand forecasting must be anonymized and secured. Code reviews of the AI system should verify privacy protections before deployment.

Promote Fairness and Inclusion: When assigning prime surgery times, the tool should be tested to prevent preferential treatment for certain specialties. More limited historical data for some departments could skew results unfairly.

Provide Transparency: If the tool denies a doctor's operating room request, the hospital must explain why, with an appeals process. This enables correcting potential bias in the system.

Oversee Usage: Hospital administrators must govern the use of the tool responsibly, monitoring for unfair impacts on staff in any department. They remain **accountable** for remedying issues discovered over time.

Similarly, **an AI writing assistant risks harm** if not developed carefully. Testing and reviews must ensure they represent all groups respectfully, provide attribution for sources, and avoid generating biased, false, or **plagiarized content.**

However, generative AI cannot guarantee to be 100% unbiased, hallucination. Independent rating agencies, similar to that of moody's delloite that rates the credit rating of countries should be established to rate the reliability of LLMs or AI solutions built by corporations.

Responsible oversight and adaptation are crucial for users to trust these emerging technologies as tools to aid their advancement and productivity. With conscientious governance grounded in ethical principles, innovators can enable AI to expand opportunities broadly.

Public outreach and AI education

As AI will impact everyone in some way, it becomes essential to prioritize AI education for everyone. Below are some initiatives that Generative AI Commons is planning to accomplish. We recommend the government to adopt similar initiatives.

- **Launch public awareness campaign** to educate citizens on real versus "fake" open source AI, emphasizing the importance of available science and transparency with AI systems.
- **Develop open-source generative AI educational materials** to make this technology more accessible for developers, researchers, and the general public. This includes building tutorials, documentation, frameworks, and other resources. Prioritize practical skills development. This is important for pre-eminence in this space.
- **Build a comprehensive taxonomy and glossary of terms** relating to generative AI and responsible/ethical AI practices. Having consistent vocabulary and definitions is essential for public discourse

Importance of Open Source and why it should be the bedrock:

Open source is about free software. Free here is not free-of-cost but **Free Speech,** quoting Richard Stallman. The government should incentivize large organizations to participate in contributing to open source. Engineers of large corporations believe that open source will win in the long run compared to themselves. Neither Google Nor Open AI has the MOAT. [1][3]

Open-source software should be the foundation of the government's AI development priorities, just as free speech principles are vital for democratic societies. There is a strong parallel between these concepts when it comes to AI:

1. **Transparency** - Open source code enables transparency in how AI systems are designed and function. This is critical for identifying bias, errors, and potential harms - just as freedom of speech enables critique and truth-telling about institutions of power. **Opacity** leads to the possibility of **covert, unethical uses** of AI.

2. **Accountability** - When open-source researchers and developers must publish code openly, it imposes accountability for that code to stand up to scrutiny. Closed sources evade accountability. Openness facilitates both innovation and responsibility.

3. **Accessibility** - Proprietary AI concentrates knowledge and capabilities among **elite institutions** that can afford licensing and computer resources. Open-source AI democratizes access to anyone interested in utilizing or studying these rapidly evolving technologies. Free speech principles strive to make information available to all citizens, **not just select groups**.

4. **Oversight** - The ability of a range of stakeholders to inspect AI source code enables better oversight to ensure systems align with public interests and values. Infringing on free speech removes voices from public discourse that could raise essential concerns. Openness furthers both effective oversight and productive public debate.

In essence, opaque and closed AI creates concentrations of unaccountable technological power. Enshrining open source as a priority counteracts this tendency, **as enshrining free speech fosters an informed and empowered populace.** The principles are mutually reinforcing for AI development in the public interest.

Conclusion

To summarize, we request the government to prioritize enforcing the principles of

- equal opportunity,
- information safety,
- promote fairness,
- enforce transparency and
- accountability

when anyone builds an AI product.

We believe in incentivizing and educating the population to be aware of and contribute to Open Source Software, which will automatically guarantee the same.

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0195
AAPD OMB Memo Comments

Submitter Information

Organization: American Association of People with Disabilities (AAPD)

General Comment

See Attached

Attachments

AAPD OMB Memo Comments

December 5, 2023

Shalanda Young, Director
Executive Office of the President
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

RE: **ADVANCING GOVERNANCE, INNOVATION, AND RISK MANAGEMENT FOR AGENCY USE OF ARTIFICIAL INTELLIGENCE**

Dear Director Young,

The American Association of People with Disabilities (AAPD) is grateful for the opportunity to provide feedback on the Proposed Memorandum for the Heads of Executive Departments and Agencies on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence.

AAPD works to increase the political and economic power of people with disabilities. As a national disability-led and cross-disability rights organization, AAPD advocates for full civil rights for more than 60 million Americans with disabilities. We do this by promoting equal opportunity, economic power, independent living, and political participation. Since 1995, AAPD has worked tirelessly alongside disability advocates, government agencies, and corporate and nonprofit partners to advance the goals of the Americans with Disabilities Act (ADA) and to ensure that all Americans can benefit equally from the transformative power of technology.

AAPD applauds OMB's efforts to ensure that all federal agencies utilizing Artificial Intelligence (AI) do so in a way that complies with all relevant federal nondiscrimination and civil rights law. While AI has the potential to be a great tool for improving the way government agencies serve the public, it is critical that steps are taken to prevent the introduction of discriminatory prejudices and biases into AI platforms that then inform government hiring, procurement, and program administration.

AAPD firmly believes that efforts to utilize, manage, and govern the use of AI within the federal government should complement existing efforts for the federal government to be a model employer of people with disabilities and to advance diversity, equity, inclusion, and accessibility. It is in this spirit that AAPD strongly recommends that efforts to promote further innovation, governance and management of AI not only focus on minimizing harm and bias but strive to promote greater equity. Truly the most innovative technology is technology that improves processes and makes systems more efficient and accessible while also creating opportunities and expanding what is possible for all Americans. People with disabilities have first-hand experience with technology that has the potential to promote equity. Remote work, more widely available captioning, and accessible design of the physical and virtual environments have all greatly expanded what's possible within education, employment, and community integration for disabled people. The same can be true for AI, especially if the federal government uses this pivotal moment not only to ensure these tools do not increase disparities where such disparities already exist but also use AI innovation, management, and governance to address long-standing inequities within federal agencies and government program administration.

With this goal in mind, AAPD strongly recommends that agencies and their CAIOs should hire or engage the expertise of disabled people with significant knowledge in disability rights and civil rights. A CAIO, and accompanying team, with an appreciation of the importance of the need for rights-based protections will enable the agency to identify how different AI systems impact disabled people. Further, disabled people most negatively impacted by AI systems are multiply-marginalized and have identities that often include other protected characteristics, for example disabled people of color and disabled women. Therefore, it is essential that staff working on innovation, governance, management, and assessment of AI tools understand the ways in which civil rights protections, and the very discrimination they seek to protect against, overlap and support one another. According to data from the National Science Foundation, people with disabilities are underrepresented in science, technology, engineering, and mathematics (STEM) fields. An explicit emphasis on disabled talent within efforts to build the federal government's AI workforce could not only begin to shift this broader employment trend, it could also catalyze the development of more inclusive and accessible STEM education within postsecondary and secondary schools. Given the rapidly evolving landscape of artificial intelligence, the federal government should use the tools already at its disposal to fill critical positions. This includes using the existing Schedule A hiring authority to hire qualified candidates and pulling job candidates from databases like the Workforce Recruitment Program.

In addition to advancing equity in hiring, the federal government must use this opportunity to promote the development of accessible technology. Recent research from WebAIM revealed that only about 3% of the top million webpages were fully compliant with the web content accessibility guidelines 2.0. It is essential that the accessibility of AI tools be a part of the values frameworks that define risk mitigation, governance, and innovation. Even with the most rigorous governance and bias mitigation strategies in place, risks and potential rights violations will persist from the very start if the tool is inaccessible.

In addition to this broad feedback, AAPD is pleased to offer feedback to OMB on the following questions:

1. The composition of Federal agencies varies significantly in ways that will shape the way they approach governance. An overarching Federal policy must account for differences in an agency's size, organization, budget, mission, organic AI talent, and more. Are the roles, responsibilities, seniority, position, and reporting structures outlined for Chief AI Officers sufficiently flexible and achievable for the breadth of covered agencies?

While federal agencies' structures and resources vary greatly, all agencies have obligations to comply with Section 508 of the Rehabilitation Act (508) and make their electronic information and technology accessible to people with disabilities. Agencies of a range of sizes and a diversity of missions have 508 Coordinators otherwise known as IT Accessibility Program Managers. The work done to promote 508 compliance could serve as a roadmap for the ways agencies approach AI governance. The General Services Administration has developed a host of resources and technical assistance offerings that agencies can use when setting up or enhancing their 508 program, and a similar model could be used here. AAPD recommends that GSA staff with expertise in 508 coordination as well as leading 508 coordinators be consulted by entities like OMB and the White House as they work to provide guidance on AI governance.

2. What types of coordination mechanisms, either in the public or private sector, would be particularly effective for agencies to model in their establishment of an AI Governance Body? What are the benefits or drawbacks to having agencies establish a new body to perform AI governance versus updating the scope of an existing group (for example, agency bodies focused on privacy, IT, or data)?

AAPD recommends that agencies integrate AI governance into the scope of existing agency bodies focused on privacy, IT, data, and specifically IT accessibility. As referenced previously, Building on this agency knowledge of 508 implementation and coordination, when it exists, should be leveraged by the CAIO to understand the critical role accessibility plays in making certain AI tools can be used effectively by all disabled people. The establishment of a new body to enhance AI governance may also have benefits. Agency advisory committees comprised of external partners can be formed to support and complement the work done by federal agencies. These committees could be used to bring in expert perspective when such perspectives are limited within the federal government. Similarly, advisory committees of external partners can be formed to focus explicitly on specific topics, such as AI innovation in accessible transportation, while agency staff manage broader AI use and governance. When federal advisory committees are formed, careful consideration should be given to including disability rights expertise alongside other civil rights experts asked to serve in such a role.

3. How can OMB best advance responsible AI innovation?

Given the limitations of existing data sets and their reflection of the historic exclusion, segregation, and institutionalization experienced by people with disabilities, disabled people are often not accurately accounted for in data sets.. Without appropriate representation of disabled people in these data, AI tools can not be trusted to make accurate predictions about this population. Even when people with disabilities are included in data sets, users of AI tools must be mindful of how deeply rooted ableism is in our society today. Further, disabled people most negatively impacted by AI systems are multiply-marginalized and have identities that often include other protected characteristics, for example, disabled people of color and disabled women and are even less represented in data sets than people with disabilities generally.

An additional complication comes from the heterogeneity of disability. There are currently at least 61 million disabled people in the United States, and this number grows daily. This group is comprised of people with developmental disabilities, intellectual disabilities, mobility disabilities, sensory disabilities, chronic health conditions, psychiatric disabilities. Even people with similar disability types have vastly different experiences and needs making a truly representative and informed data set difficult to attain. Many disabling conditions, such as rare diseases, occur small in number, making it even more difficult for AI systems to reflect the experiences of these people accurately. Often, different populations of disabled people do not have shared characteristics but are still bound together by the common experience of discrimination. For the OMB to best advance responsible AI innovation, it should require

agencies to develop disability inclusion strategies with particular attention paid to including data on individuals with multiple marginalized identities to improve how AI tools perform.

The OMB guidance does a good job of requiring agencies to identify and discontinue using AI systems known to discriminate against populations with protected characteristics. Still, the government must improve the quality of the data it uses to harness the potential of these data-driven tools. Without taking affirmative steps to address the lack of representation in the data, the discrimination caused by these tools will continue to go unchecked, and disability and other groups under-represented in the data will continue to be left behind as the use of AI tools grows at a rapid pace.

5. Are there use cases for presumed safety-impacting and rights-impacting AI (Section 5 (b)) that should be included, removed, or revised? If so, why?

5(b)ii includes those areas where AI systems are known to compromise the rights of those in our society who have experienced a history of discrimination, which manifests in some of the AI tools federal agencies use. OMB is right to require agencies to stop using or revise these systems. Additionally, AAPD recommends that clarity be added to item i. B. of the safety impacting purposes to include human movements spurred by AI (such as a prompt generated by an AI tool) that may be broader than human robot teaming. AAPD also recommends noise emittance or sonic waves be added as a safety impacting purpose. This could be included in item i. C. or as a standalone item within the list. AAPD strongly suggests that the assessment of the accessibility of tools, services, designs for both physical and virtual environments, and communications be included in the list of purposes that are both safety and rights-impacting.

Within the list of purposes that are presumed to be rights-impacting, AAPD recommends the following changes and additions:

- Add to ii. D. intelligence and competency
- Add to ii G. workplace accommodations and supports as well as professional development
- Add a new item to address Decisions regarding institutionalization or placement into restrictive settings this could also be incorporated into point ii H, however decisions surrounding institutionalization are not limited to healthcare settings.

- Add a new item address Recommendations or decisions about adult welfare, whether an adult needs to be under a guardianship or conservatorship, whether an adult can continue living independently in their home, or assessments of abuse and neglect

This list should be periodically updated as the development and deployment of AI tools grow, and we must remain vigilant in monitoring the impact on disabled people, as it is inherently difficult for these data-driven tools to make accurate predictions about their needs and experiences in this heterogeneous population.

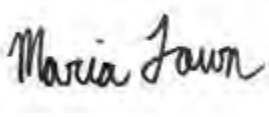
8. What kind of information should be made public about agencies' use of AI in their annual use case inventory?

Agencies should provide public information about the AI tools they are using to support internal agency functions as well as administer external agency programs. In addition to a public disclosure of these tools, an explanation of the design steps taken to ensure the accessibility of the AI system should be provided to the public. This must include people who use a visual language like ASL to communicate. Public notice should be provided to all users so they know how to report problems with the accessibility of the AI system or concerns regarding the bias of the AI system.

Agencies must also provide a readily accessible way for members of the public to register concern about the agency's use of AI and request alternative tactics or tools be used.

Thank you again for the opportunity to provide comment on OMB's proposed memorandum on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence. If you have any questions about these comments, please contact Michael Lewis, Vice President of Policy at (540)447-9438 or mlewis@aapd.com or AAPD President and CEO Maria Town at mtown@aapd.com.

Sincerely,



Michael Lewis
Vice President of Policy
AAPD

Maria Town
President and CEO
AAPD

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Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0196
Comment from Fred Oswald

Submitter Information

Name: Fred Oswald

General Comment

This brief comment is to emphasize worker, workforce, and organization-relevant implications of the Office of Management and Budget (OMB) draft memorandum, "Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence (AI)." In particular, AI and machine learning in all their various forms:

* will likely accelerate in their abilities (a) to create opportunities for new jobs and entire occupations, (b) to alter required job skills for existing jobs fundamentally, and (c) to replace certain jobs or essential job tasks (Selenko et al., 2022);

* require a continuous re-examination of the knowledge, skills, abilities, and other essential worker requirements across occupations (National Center for O*NET Development, 2023), with wide-ranging implications for both workers and the workforce;

* carry major implications for both technical and socio-technical aspects of AI-specific education and workforce training (NAIAC, 2023), as well as the reskilling of existing worker skills that have been fundamentally altered by AI tools and systems;

* alter the nature of organizational systems of recruiting, hiring, training, and promoting, and the manner in which these functions will be conducted.

OMB guidance will stand to benefit from considering all these interrelated points above and how they can lead to tangible actions for assessing, forecasting, intervening, and improving the AI workforce across federal agencies. The end goal is to improve AI infrastructure within federal agencies and in their relationships with one another. This not only means increasing workers' AI-related capabilities and capacities in terms of their own functioning; it also means equipping workers with the ability to assess the nature and balance of AI benefits and risks adequately, taking into account the broader sociotechnical work environment in which AI and machine learning systems operate.

In closing, please note that I am a member of the National Artificial Intelligence Advisory Committee

(NAIAC), but I speak here in my own personal capacity.

Best regards,
Fred Oswald
Professor and Herbert S. Autrey Chair in Social Sciences
Rice University

References

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Attachments

OMB-2023-0020-draft-memo-Oswald-comment

RICE

Department of Psychological Sciences
Fred Oswald
Professor and Herbert S. Autrey Chair in Social Science

December 5, 2023

Director Shalanda D. Young
Office of Management and Budget
725 17th St., NW
Washington, D.C. 20503

RE: OMB–2023–0020, Proposed Memorandum for the Heads of Executive Departments and Agencies

Dear Director Young and OMB Colleagues:

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RICE

Department of Psychological Sciences
Fred Oswald
Professor and Herbert S. Autrey Chair in Social Science

In closing, please note that I am a member of the National Artificial Intelligence Advisory Committee (NAIAC), but I speak here in my own personal capacity.

Sincerely,

Frederick L. Oswald
Professor and Herbert S. Autrey Chair in Social Sciences
Department of Psychological Sciences
Rice University

References

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PUBLIC SUBMISSION

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Comments Due: December 05, 2023

Docket: OMB-2023-0020
Request for Comments on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Comment On: OMB-2023-0020-0001
Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

Document: OMB-2023-0020-0197
Fight for the Future_OMBComment

Submitter Information

Organization: Fight for the Future

General Comment

See Attached

Attachments

OMB AI Comment Submission

To: Office of Management and Budget
Re: Request for Comments: Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence Draft Memorandum

I am writing regarding the request for comment to the Office of Management and Budget draft guidance on Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence. Broadly speaking, I believe that the OMB and other federal agencies must use all of their powers and resources to ensure that the harmful effects of AI are limited when developed, procured, or used by the federal government—and that the government provides meaningful transparency and publicly available information about the ways our government uses AI so that we have more power to regulate, push back on harmful uses, and limit AI use in the future. In every use case, protecting civil rights must be the top priority.

There are some strong pieces of the OMB guidance that I urge you not to rollback as this process moves forward. The requirement that agencies meet minimum practices for rights-impacting and safety-impacting AI is important in addressing concerns around bias and discrimination in AI, and I urge you to keep these minimum requirements and, if anything, expand them.

There are a number of areas where this guidance, and future AI policy documents, must be improved:

- The Executive Order on AI did not do enough to address law enforcement agencies and the use of AI on immigrant communities, which are some of the spaces where AI has already been shown to have serious negative impacts. I was glad to see that the OMB guidance did include law enforcement under the covered agencies, and strongly urge you not to change this or allow these agencies special exceptions. We must establish strong policies to address law enforcement use of AI, and to limit use to mitigate harms.

- Some AI is too dangerous to be used, and any possible benefits are outweighed by known harms. Facial recognition is an AI-enabled biometric technology that infringes on the right to privacy to such a degree that it should not be used at all by the government, and this guidance should ban its use by government agencies.

- The guidance does not establish enough data privacy protections. Because AI is reliant on data the opportunity for data abuses is high, and ensuring strong privacy protections must be a top priority. While there is a need for Congress to pass comprehensive data privacy protections, the OMB should use this guidance to establish data privacy policies when government agencies develop, procure, or use AI.

- The minimum practices for safety-impacting and rights-impacting AI require agencies to stop using an AI when the “risks to rights or safety exceed an acceptable level,” but the guidance both gives agencies an option to skip determining an AI system’s risk, and also doesn’t specify what an “acceptable level” is. In these safety- and rights-impacting cases the consequences of

the use of AI are so high that the OMB must set a very limited acceptable level of risk and ensure that all agencies using AI comply with this requirement.

- The minimum practices should also apply in cases where federal funds are used to purchase AI systems, including government grants. This would better protect civil rights in even more situations, including at the state and local levels.

- All information reported by agencies in their annual use case inventory should be made publicly available, to allow for as much public scrutiny and transparency as possible. This is critical for ensuring that the public, and experts in civil rights, have the opportunity to critically assess the use of AI by the government.

While there may be uses of AI that can benefit the federal government, I call on the OMB to focus on protecting against the harms of AI your top priority in this guidance.

Signed,

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Sharon	Barnes	CA
Myra	Schegloff	CA
Mark	Gotvald	CA
Nora	Privitera	CA
Linda	Gridley	MN
Lindsey	Piller	PA
Dorothy	Lukins	OR
Matthew	Thornton	FL
Martin	Horwitz	CA

Emily	Matthews	PA
Michael	R. Watson	CA
George	Picchioni	NY
Emily	Johnson	IA
Michelle	Davidson	NY
Stephanie	Meacham	MI
Garrett	Simchak	MI
Dogan	ozkan	AK
GREG	D	CA
Dylan	Abramovich	ID
Minnea	Lepola	
Michael	Salamone	NY
Theodora	Adjangba	NJ
Soraya	Barabi	CA
Jeffrey	Grossman	NY
Barbara	Jackson	CO
Mollie	Christianson	NY
Joseph	Gilbert	CA
Earl	Grove	OH
Kaia	Moelin	MD
Margaret	Hodges	CA
Anne	Barker	CA
Derek	Gendvil	NV
Jan	Stautz-Hamlin	FL

Ella	Eastwood	NV
Kayla	Christensen	NE
Brad	McIntee	ON
Brad	McIntee	ON
Hallie	Gee	UT
Clara	Bargellini	CA
Matthew	Donelon	TX
Gail	Fleischaker	MA
James	Mulcare	WA
Penny	Lambert	MI
Beverly	Mitchell	ID
Diambu	Smith	OH
Miranda	Helly	CA
B	OConnell	WV
Lawrence	Crowley	CO
Jayla	Civil	FL
Kate	Kenner	VT
John	Crahan	CA
Daniel	O'Brien	CA
David	Poteet	NY
Larry	Morningstar	OR
Ked	Garden	CA
Tori	Machan	AL
Carole	Smith	FL
Shea	Kennedy	MB

Ryan	Olson	CA
Jeremy	Yanofsky	CT
Mark Hayduke	Grenard	AZ
Jim	Head	MI
Brenna	Wasser	ID
Mark	Price	CA
Evan	Ingle	OR
Lillian	Mireles	IN
Jacob	Garcia	KS
Daniel	Bayley	NY
Matthew	Eager	NY
Justin	Lopez	NC
John	Dunn	NJ
Ricardo	Noguera	VA
Judith	Anderson	WA
Doug	Herren	PA
Gretchen	Sand	WA
Elizabeth	Olson	MA
Michael	Klausing	WV
Dawn	Lillis	FL
Grace	Hockaday	OH
Dominic	Ruggiero	AZ
F	Corr	VT

Helen	Ingram	TX
Vikram	Balaji	TX
Ron	Price	CA
Ana	Tobin	OH
Yvonne	Fast	
Nila	Freeman	NJ
Tony	Jones	IL
Dani	D	WA
John	Bowen	NY
Stephen	Dutschke	KY
Zainab	Cheentavida	ON
ralph	corbo	VT
Maria	Queen	MD
William	Baker	TX
Sarah	Deng	PA
Brijhae	Woods	PA
Azanna	Law	FL
Catherine	Hernandez	CA
Douglas	Pintar	CO
Bryn	Rojas	TX
Austin	Lawless	NC
Samantha	Clark	NE
Allison	Riley	AL
Elijah	Cross	CA
Jonah	Jen	NJ

vincent	aguero	IL
Alexandra	Gonzaga	TX
Thomas	Ray	CA
Carly	Cate	TN
Margaret	Vernon	NY
Derek	Binelli	NJ
Cairo	Castaldo	WA
Susan	Vogt	AK
Kurtis	Morales	IN
Milton	Davis	VA
Tami	Linder	NM
S	B	SC
Kathryn	Hill	TN
David	Berney Needleman	CA
Elizabeth	Enright	AZ
Amanda	Gillespie	CO
Stacey	Cannon	NC
Samantha	Moore	CA
Rachel	Rovine	IA
David	Way	PA
Alli	Bair	ID
TIA	TRIPLETT	CA
Rickert	Tuck	FL

Lily	Hopwood	
Ronald	Killingsworth	MI
Jesse	Johnson	CA
Connie	Allison	NY
Ron	Alan	NY
Joseph	Goulette	NH
April	Walker	NH
Jeremy	Kenyon	CA
Sarah	Walling	NY
Bel	Comer	TX
Chemen	Ochoa	NM
Johnny	Hall	KY
Zeno	Trocchi	RI
Zeno	Trocchi	RI
Renee	Klein	CA
Susan	Kutz	NM
Susan	Detato	VT
Vasileios	Grigoriou	
Tony	Schinkowitch	WI
Cody	Goin	MO
Lauren	Garner	MI
Axel	Meier	CA
Vivian	Marek	MD
Isabel	Looez	TX
Carol	Frechette	MN
Marvin J	Ward	MA

Bc	Shelby	OR
Michael	Lewandowski	NC
Aurora	Guerrero	CA
Whitney	Moss	UT
cindy	murphy	FL
Lucy	Hart	CA
Macie	Schriner	MI
Eleanor D	Hamilton, PhD	TX
Alexander	Fierro-Clarke	CA
Ellen	Franen	CA
Kathleen	O'Connell	IN
Andrew	Thompson	MI
Matthew	Humphrey	MD
Sandra	Garcia	NJ
Kristi	Broderick	WA
Michael	Spafford	OH
Carmen	Grosso	NY
Dorothy	Neff	MI
Bruce	Greene	PA
Edwin	Leung	CA
Karen	Stacey	IL
Yolanda	Berumen	CA

Lisa	Kellman	CA
Chloe	Sullivan	TX
Pamela	Overholtzer	CA
Dale	Kohler	KY
Aeriel	Holman	CA
dm	mink	MD
Karen	Stimson	CT
B. Thomas	Diener	NM
Scott	Harris	SC
Kristin	Kokal	TX
Jon	Mullin	TX
Kimberly	Welch	CA
Andrew	Stutt	ON
Frank	Starr	NC
K.	Eggers	WA
Erich	Winkler	NY
Heather	Mann	VA
Kathryn	Scarbrough	NJ
James	Sawin	IL
Steven	Vogel	VA
Dave	Frank	IA
Barbara	Sorgeler	DE
Cristo	Coyote	NJ

Bc	Shelby	OR
Rashmika	Kommidi	CA
Jonathan	Mitchell	AL
Janet	Rountree	VA
Daniel	Zamarelli	IL
terii	tm	CA
Deborah	Lackowitz	OR
Klaus	Steinbrecher	
Patricia	Blackwell-Marchant	CA
Ashley	Burdine	TX
Eleanor	Navarro	AZ
Mary	Sacksteder	MA
Karen	McCaw	CA
Simone	Morie	CA
Michelle	Monroe	NJ
perseus	kemna	OK
Shelby	Gunsch	MS
Erica	Keegan	AZ
Helena	Gallant	PA
Querido	Galdo	CA
Ann	Dorsey	CA
Todd	Southworth	IA
Adriana	Leyo	TX
E	G	TX
Randy	Guthrie	WA

Mauricio	Jimenez	MI
Paul	Lapidus	CA
Tamika	Stewart	LA
Nickolaos	Kiriakidis	CT
Camron	Eaves	TN
N	R	TX
Harold	Watson	MO
Samuel	Abram	NY
Leslie	Frederick	TX
Lorelette	Knowles	WA
Edward	Son	CA
April	Gunn	VA
Emily	Pitner	PA
Raymond	Mathiesen	
Cordero	Ramirez	OK
Karen	Kirschling	CA
Mike	Hom	CA
Kraig	Benson	WV
Alexander	Durnan	DE
Mathis	Walston	IA
Samantha	Chavez	NJ
Robert	Maresh	ME
Laura	Heyman	NY

Holly	Stuart	UT
Yana	Spitzer	TX
Angela	Barraclough	NY
Theodore	Voth	WI
Brian	Murray	PA
Brian M.	Scott	OH
Leslie	Dever	WA
Daniel	polley	IL
veer	king	CA
Alyssa	Goss	NH
Carl	Meyer	CT
Emmalia	Harrington	NY
Cheyenne	Scott	FL
Cheryl	Militello	SC
Tianna	Andrews	PA
Anna	Arkhipova	WA
Jim	Alexander	CA
Darryl	Michaud	OR
Jean	Vavrek	WA
Jody	Gibson	IA
Anonymous	Anonymous	LA
Leslie	Smith	TX
Steven	Andrychowski	CT
Donna	Logan	PA

Bushra	Qureshi	QC
Cheryl	Militello	SC
Kristin	Huntoon	OH
Collin	Rupp	MO
Celeste	Hong	CA
Oliver	Parrish	CA
Emily	Edmond	CA
Sarah	Tuning	ID
Rachel	Williams	GA
J.T.	Smith	PA
Andrew	Costigan	MA
Cathy	Wootan	OH
Evan	Mcdermit	CA
Liam	Ruby	MT
Evan	Kroeker	IL
Ann	R	MO
David	Dougherty	CT
Arlayna	Sykes	GA
Duncan	Rice	TX
Stacy	Seaver	VT
Jacob	Fehr	BC
Charles	Wolfe	CA
Bartholomew	Barker	NC
Charlie	Rowe	NY

Matthew	Himes	OH
Cynthia	Ertner	TX
Kevin	Walsh	CT
Lauren	Kofsky	MN
Charles	Comer	VA
Andrea	Speed	WA
Christine	Fearing	NC
Jacob	Vogel	OH
Russell	Novkov	WI
Becky	Geiser	WI
Samantha	Beer	PA
Beth	Darlington	NY
Barbara	Rainsberger	NJ
X	Harris	NY
Christine	Tindall	MI
Tania	Malven	AZ
sharon	belson	PA
Melinda	Swartz	FL
Serenity	White	OH
Erica	Wesselman	HI
Thomas	Oldfield	WA
Dahlia	Visconti	NJ
Nick	Moidja	CA
April	Lasiter	AR

Lauren	Fox	
Mary	Hicklin	CA
Julie	Sears	TX
Susan	Ring	WA
Chidinma	Nwakanobi	TX
C.Jean	Boomershine	IA
Frank	Ortiz	CA
Mike	Stover	TX
Phillip	Hope	NY
Nicole	Amato	CA
Michael	Cirino	OH
Edie	M Sadowski	NJ
Judith	Ellenburg	MA
Elizabeth	Davis	VA
Jerry	Riverd	NY
Eric	Jorgensen	CO
John	Bridgest	TX
Mercedes	Lackey	OK
cw	curtis	CA
Patricia	Baecker	NY
Greg	Sells	TX
Bradley	Gibson	UT
Oksana	Bubb	NY
Casey	Lin	FL

AJ	Cho	CA
Brittany	Burkhead	CA
Steven	Rosenberg	TX
Utkarsh	Nath	CA
Janet	Cools	NV
Patricia	Auer	MO
Ryan	Hanson	LA
Kay	Schieren	
Dianne	Douglas	AZ
Nadia	Sindi	OR
Karla	Devine	CA
David	Kerr	CA
Constance	Weightman	OR
Sherri-lee	Richardson	
Sarah	Hafer	WA
Caleb	Crawford	WA
sharon	bambridge	MO
Michelle	Nihonyanagi	CA
Sophie	Freudenberg	
Thomas George	Boscardin	
Erik	Olsen	
Monica	Smilko	FL
Sawyer	Russell	IL
Star	St John	CA

Cosmin	Balan	
Gary	Shephard	TX
Jessamine	Carreon	CA
Allison	Rensch	CA
Aileen	Dosev	MN
Meredith	Mohr	MD