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U.S. Federal Chief Information Officer
Office of the Federal Chief Information Officer Office of Management and Budget
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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.

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. Below, we provide brief comments on each of these elements.

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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[1] 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/.

[2] 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); 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," The Leadership Conference on Civil and Human Rights, August 4, 2023, available at https://civilrights.org/resource/artificial-intelligence-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.americanprogress.org/wp-content/uploads/sites/2/2023/09/Letter-to-WH-on -AI-Exec-Order_9-6.pdf.

[3] 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.

[4] 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/.

[5] Center for American Progress and others, "Letter to the White House on Forthcoming AI Executive Order.

[6] The White House, "Blueprint for an AI Bill of Rights," and The White House, "Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government," January 21, 2021, available at 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/; and The White House, "Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government," February 16, 2023, available at 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/.

[7] The White House, "Notice and Explanation," available at https://www.whitehouse.gov/ostp/ai-bill-of-rights /notice-and-explanation/ (last accessed December 2023).

[8] The White House, "Data Privacy," available at https://www.whitehouse.gov/ostp/ai-bill-of-rights/ data-privacy-2/ (last accessed December 2023).

[9] Executive Office of the President, "Executive Order 14110 of October 30, 2023: Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence."

[10] 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; and 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.

[11] 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).