ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Using Algorithmic Tools in Regulatory Enforcement

Committee on Regulation

Draft Recommendation for Committee | October 4, 2024

The use of artificial intelligence (AI) and other algorithmic tools is changing how government agencies do their work. As the Administrative Conference has recognized, these tools "hold out the promise of lowering the cost of completing government tasks and improving the quality, consistency, and predictability of agencies' decisions." At the same time, these tools "raise concerns about the full or partial displacement of human decision making and discretion."[1] The Conference adopted a general statement on agency AI use in 2020 to help agencies consider when and how to use algorithmic tools appropriately.[2] More recently, it adopted specific recommendations addressing the use of algorithmic tools to review regulations,[3] manage public comments,[4] and provide guidance to the public.[5]

In this Recommendation, the Conference turns to the use of algorithmic tools in regulatory enforcement. An algorithmic tool is a computer-based process that "uses a series of rules or inferences drawn from data to transport specified inputs into outputs to make decisions or support decision making," and includes the use of AI technologies.[6] Many agencies engage in

[1] Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6,616 (Jan. 22, 2021).

[2] *Id.*

[3] Admin. Conf. of the U.S., Recommendation 2023-3, *Using Algorithmic Tools in Retrospective Review of Agency Rules*, 88 Fed. Reg. 42,681 (July 3, 2023).

[4] Admin. Conf. of the U.S., Recommendation 2021-1, *Managing Mass, Computer-Generated, and Falsely Attributed Comments*, 86 Fed. Reg. 36,075 (July 8, 2021).

[5] Admin. Conf. of the U.S., Recommendation 2022-3, *Automated Legal Guidance at Federal Agencies*, 87 Fed. Reg. 39,798 (July 5, 2022).

[6] Statement #20, *supra* note 1.

regulatory enforcement—that is, detecting, investigating, and prosecuting potential violations of the laws they administer. These agencies are often "faced with assuring the compliance of an increasing number of entities and products without a corresponding growth in agency resources."[7] As agencies seek to identify ways to make regulatory compliance "more effective and less costly,"[8] many are considering how they can use algorithmic tools to perform regulatory enforcement tasks such as monitoring compliance; detecting potential noncompliance; identifying potential subjects for investigation, inspection, or audit; and gathering evidence to determine whether corrective action against a regulated person is warranted. Indeed, a report to the Conference analyzing the use of AI in federal administrative agencies found that "AI has made some of its most substantial inroads in the context of agency enforcement activities."[9]

The use of algorithmic tools in regulatory enforcement present additional unique opportunities for agencies. When used appropriately, such tools may also enable agencies to perform enforcement tasks even more efficiently, accurately, and consistently. Algorithmic tools may be particularly useful in performing many of the most time- and resource-intensive tasks associated with regulatory enforcement, such as synthesizing voluminous records, determining patterns in complex filings, and identifying activities that might require additional review by a human.

At the same time, significant challenges and concerns arise in agencies' use of algorithmic tools in regulatory enforcement.[10] The Conference has previously identified possible

[7] *See, e.g.*, Admin. Conf. of the U.S., Recommendation 2012-7, *Agency Use of Third-Party Programs to Assess Regulatory Compliance*, 78 Fed. Reg. 2941, 2941 (Jan. 15, 2013).

[8] *Id.* at 2941. In Recommendation 2012-7, the Conference noted that agencies "may leverage private resources and expertise in ways that make regulation more effective and less costly." *Id.* at 2942.

[9] David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey & Mariano-Florentino Cuéllar, Government by Algorithm in Federal Administrative Agencies (Feb. 2020) (report to the Admin. Conf. of the U.S.), available at https://www.acus.gov/document/government-algorithm-artificial-intelligence-federal-administrative-agencies; Cary Coglianese, A Framework for Governmental Use of Machine Learning (Dec. 8, 2020) (report to the Admin. Conf. of the U.S.) available at https://www.acus.gov/document/framework-governmental-use-machine-learning-final-report.

[10] Michael Karanicolas, Artificial Intelligence and Regulatory Enforcement (Sept. 27, 2024) (draft report to the Admin. Conf. of the U.S.); *see also* Recommendation 2023-3, *supra* note 3; Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022);

risks associated with agencies' use of algorithmic tools, including limited transparency, internal and external oversight, and explainability;[11] the potential to "unintentionally create or exacerbate [harmful] biases by encoding and deploying them at scale"; and the possibility that agency personnel will devolve too much decisional authority to AI systems.[12] Such risks are heightened when, as in the regulatory enforcement context, agencies use algorithmic tools to make decisions or take actions that impact a person's civil rights, civil liberties, privacy, equal opportunities, or access to critical government resources or services.[13]

Since the Conference issued Statement #20, Congress enacted the AI in Government Act, which directs the Director of the Office of Management and Budget (OMB) to provide agencies with guidance on removing barriers to agency AI use "while protecting civil liberties, civil rights, and economic and national security" and on best practices for identifying, assessing, and mitigating harmful bias.[14] Executive Order 13960, *Promoting the Trustworthy Intelligence in the Federal Government*, identifies principles for agencies when designing, developing, acquiring, and using AI and directs agencies to inventory their uses of AI and make them publicly available.[15] Executive Order 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, requires agencies to designate Chief AI Officers, who have primary responsibility for overseeing their agencies' AI use and coordinating with other agencies, and establishes the Chief AI Officer Council to coordinate the development and use of AI across

Recommendation 2021-1, *supra* note 4; Statement #20, *supra* note 1; Admin. Conf. of the U.S., Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*, 83 Fed. Reg. 30,686 (June 29, 2018).

[11] "Explainability" allows those using or overseeing AI systems to "gain deeper insights into the functionality and trustworthiness of the system, including its outputs," and helps users understand the potential impacts and purposes of an AI system. NAT. INST. OF STANDARDS & TECH., ARTIFICIAL INTELLIGENCE RISK MANAGEMENT FRAMEWORK (AI RMF 1.0) (2023).

[12] *See* Statement #20, *supra* note 1.

[13] OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-24-10, ADVANCING GOVERNANCE, INNOVATION, AND RISK MANAGEMENT FOR AGENCY USE OF ARTIFICIAL INTELLIGENCE 29 (2024) (providing a comprehensive definition of "rights-impacting" uses of AI) [hereinafter OMB MEMO].

[14] Pub. L. No. 116-260, div. U, title 1, § 104 (2020) (codified at 40 U.S.C. § 11301 note).

[15] *See* Exec. Order No. 13960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, 85 Fed. Reg. 78939 (Dec. 3, 2020).

agencies.[16] OMB Memorandum M-24-10, *Advancing Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*, which implements the AI in Government Act and Executive Order 14110, provides guidance to agencies on strengthening the effective and appropriate use of AI, advancing innovation, and managing risks, particularly those related to rights-impacting uses of AI.[17] Memorandum M-24-10 further provides risk-management practices for agency uses of AI that impact people's rights which are derived from the Office of Science and Technology Policy's Blueprint for an AI Bill of Rights and the National Institute of Standards and Technology's AI Risk Management Framework.[18] Those practices include "conducting public consultation; assessing data quality; assessing and mitigating disparate impacts and algorithmic discrimination; providing notice of the use of AI; continuously monitoring and evaluating deployed AI; and granting human consideration and remedies for adverse decisions made using AI."[19]

Consistent with these authorities, this Recommendation provides a framework for using algorithmic tools in regulatory enforcement in ways that promote the efficient, accurate, and consistent administration of the law while also safeguarding individuals' and entities' civil rights, civil liberties, privacy, equal opportunities, and access to critical government resources and services.

RECOMMENDATION

1. When considering possible uses of algorithmic tools, including artificial intelligence (AI), in regulatory enforcement, agencies should consider whether and to what extent these tools will:
    a. Promote efficiency, accuracy, and consistency;

[16] Exec. Order No. 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, 88 Fed. Reg. 75191 (Oct. 30, 2023); OMB MEMO, *supra* note 13.

[17] *See* OMB MEMO, *supra* note 13, at 29.

[18] *Id.*; *see* OFF. OF SCI. & TECH., EXEC. OFF. OF THE PRESIDENT, BLUEPRINT FOR AN AI BILL OF RIGHTS (2022); AI RMF 1.0, *supra* note 11.

[19] Exec. Order No. 14110, *supra* note 16.

b. Create or exacerbate harmful biases;
c. Devolve too much decisional authority to automated systems;
d. Adversely affect regulated persons' civil rights, civil liberties, privacy, equal opportunities, and access to critical government resources or services; and
e. Impact the public's perception of the agency and how fairly it administers regulatory programs.

2. When agencies use algorithmic tools to perform regulatory enforcement tasks, they should assess the risks associated with using such tools, including those in Paragraph 1, and put in place oversight mechanisms and data quality assurance practices to mitigate such risks. In assessing those risks, agencies should take into account, among other things:
    a. The tendency of such tools to produce unexpected outcomes that could go beyond their intended uses or have the potential for biased or harmful outcomes;
    b. The explainability of outcomes generated by a tool or system;
    c. Oversight mechanisms available to the agency to ensure responsible use of such tools;
    d. The ability to customize tools and systems to the agency's ongoing needs and to specific use cases;
    e. Training and testing methodologies used in developing and maintaining such tools; and
    f. Quality assurance practices available for data collection and use.
3. When agencies use algorithmic tools to perform regulatory enforcement tasks, agencies should ensure that any officials who use such tools or rely on their outputs to make enforcement decisions receive adequate training on the capabilities and risks of such tools and understand how to carefully assess their outputs before relying on them.
4. When agencies provide notice to regulated persons of an action taken during an investigation, inspection, audit, or prosecution, they should specify if an algorithmic

tool provided a significant basis for taking that action unless doing so would enable persons to circumvent the law or impede other compelling objectives.

5. Agencies should notify the public on their websites of any algorithmic tools they use, including AI tools, to investigate, inspect, audit, or gather evidence to discover non-compliance by regulated entities, unless doing so would enable persons to circumvent the law or impede other compelling objectives.
6. Agencies that use or are considering using algorithmic tools in regulatory enforcement should engage with persons interested in or affected by the use of such tools to identify possible benefits and harms associated with their use.
7. Agencies that use algorithmic tools to perform regulatory enforcement tasks should provide an effective process—for example through an ombuds office or civil rights office—whereby individuals and entities can voice concerns or file complaints regarding the use of such tools.
8. The Chief AI Officer Council should facilitate collaboration and the exchange of information among agencies that use or are considering using algorithmic tools in regulatory enforcement.