



## Using Algorithmic Tools in Regulatory Enforcement

### Committee on Regulation

#### Proposed Recommendation from Committee | October 18, 2024

1           The use of artificial intelligence (AI) and other algorithmic tools is changing how  
2 government agencies do their work. As the Administrative Conference has recognized, these  
3 tools “hold out the promise of lowering the cost of completing government tasks and improving  
4 the quality, consistency, and predictability of agencies’ decisions.” At the same time, these tools  
5 “raise concerns about the full or partial displacement of human decision making and discretion.”<sup>1</sup>  
6 The Conference adopted Statement #20, *Agency Use of Artificial Intelligence*, in 2020 to help  
7 agencies consider when and how to use algorithmic tools appropriately.<sup>2</sup> More recently, it  
8 adopted specific recommendations addressing the use of algorithmic tools to review regulations,<sup>3</sup>  
9 manage public comments,<sup>4</sup> and provide guidance to the public.<sup>5</sup>

10           In this Recommendation, the Conference turns to the use of algorithmic tools in  
11 regulatory enforcement. An algorithmic tool is a computer-based process that “uses a series of  
12 rules or inferences drawn from data to transport specified inputs into outputs to make decisions  
13 or support decision making,” and includes the use of AI technologies.<sup>6</sup> Many agencies engage in  
14 regulatory enforcement—that is, detecting, investigating, and prosecuting potential violations of

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<sup>1</sup> Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (Jan. 22, 2021).

<sup>2</sup> *Id.*

<sup>3</sup> 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).

<sup>4</sup> 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).

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

<sup>6</sup> Statement #20, *supra* note 1.



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

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

30 At the same time, significant challenges and concerns arise in agencies’ use of  
31 algorithmic tools in regulatory enforcement.<sup>10</sup> The Conference has previously identified possible  
32 risks associated with agencies’ use of algorithmic tools, including insufficient transparency,

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<sup>7</sup> 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).

<sup>8</sup> *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.

<sup>9</sup> 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>.

<sup>10</sup> 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); 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).



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33 internal and external oversight, and explainability;<sup>11</sup> the potential to unintentionally create or  
34 exacerbate “harmful biases” by encoding and deploying them at scale;<sup>12</sup> and the possibility that  
35 agency personnel will devolve too much decisional authority to AI systems.<sup>13</sup> Such risks are  
36 heightened when, as in the regulatory enforcement context, agencies use algorithmic tools to  
37 make decisions or take actions that impact a person’s rights, civil liberties, privacy, safety, equal  
38 opportunities, or access to government resources or services.<sup>14</sup>

39         Since the Conference issued Statement #20, Congress enacted the AI in Government Act,  
40 which directs the Director of the Office of Management and Budget (OMB) to provide agencies  
41 with guidance on removing barriers to agency AI use “while protecting civil liberties, civil  
42 rights, and economic and national security” and on best practices for identifying, assessing, and  
43 mitigating harmful bias.<sup>15</sup> Executive Order 13960, *Promoting the Use of Trustworthy Artificial*  
44 *Intelligence in the Federal Government*, identifies principles for agencies when designing,  
45 developing, acquiring, and using AI and directs agencies to inventory their uses of AI and make  
46 them publicly available.<sup>16</sup> Executive Order 14110, *Safe, Secure, and Trustworthy Development*  
47 *and Use of Artificial Intelligence*, requires agencies to designate Chief AI Officers, who have  
48 primary responsibility for overseeing their agencies’ AI use and coordinating with other  
49 agencies, and establishes the Chief AI Officer Council to coordinate the development and use of  
50 AI across agencies.<sup>17</sup> OMB Memorandum M-24-10, *Advancing Governance, Innovation, and*

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<sup>11</sup> “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).

<sup>12</sup> Statement #20, *supra* note 1, at 3.

<sup>13</sup> *See id.*, at 3–4.

<sup>14</sup> *See* 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].

<sup>15</sup> Pub. L. No. 116-260, div. U, title 1, § 104 (2020) (codified at 40 U.S.C. § 11301 note).

<sup>16</sup> *See* Exec. Order No. 13960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, 85 Fed. Reg. 78939 (Dec. 3, 2020).

<sup>17</sup> 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 14.



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51 *Risk Management for Agency Use of Artificial Intelligence*, which implements the AI in  
52 Government Act and Executive Order 14110, provides guidance to agencies on strengthening the  
53 effective and appropriate use of AI, advancing innovation, and managing risks, particularly those  
54 related to rights-impacting uses of AI.<sup>18</sup> Memorandum M-24-10 further provides risk-  
55 management practices for agency uses of AI that impact people’s rights which are derived from  
56 the Office of Science and Technology Policy’s Blueprint for an AI Bill of Rights and the  
57 National Institute of Standards and Technology’s AI Risk Management Framework.<sup>19</sup> Those  
58 practices include “conducting public consultation; assessing data quality; assessing and  
59 mitigating disparate impacts and algorithmic discrimination; providing notice of the use of AI;  
60 continuously monitoring and evaluating deployed AI; and granting human consideration and  
61 remedies for adverse decisions made using AI.”<sup>20</sup> Additionally, OMB issued Memorandum M-  
62 24-18, *Advancing the Responsible Acquisition of Artificial Intelligence in Government*, which  
63 “integrat[es] these considerations for AI risk management into agency acquisition planning.”<sup>21</sup>

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

### RECOMMENDATION

- 68 1. When considering possible uses of algorithmic tools to perform regulatory  
69 enforcement tasks, agencies should consider whether and to what extent these tools  
70 will:  
71 a. Promote efficiency, accuracy, and consistency;

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<sup>18</sup> See OMB MEMO, *supra* note 14, at 29.

<sup>19</sup> *Id.*; see OFF. OF SCI. & TECH. POL’Y, EXEC. OFF. OF THE PRESIDENT, BLUEPRINT FOR AN AI BILL OF RIGHTS (2022); AI RMF 1.0, *supra* note 11.

<sup>20</sup> Exec. Order No. 14110, *supra* note 17.

<sup>21</sup> OFF. MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-24-18, ADVANCING THE RESPONSIBLE ACQUISITION OF ARTIFICIAL INTELLIGENCE IN GOVERNMENT (2024), at 1.



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- 72                   b. Create or exacerbate unlawful or harmful biases;
- 73                   c. Produce an output that agency decisionmakers can understand and explain;
- 74                   d. Devolve decisional authority to automated systems;
- 75                   e. Adversely affect rights, civil liberties, privacy, safety, equal opportunities, and
- 76                   access to government resources or services;
- 77                   f. Use inappropriately or reveal publicly, directly or indirectly, confidential
- 78                   business information or trade secrets; and
- 79                   g. Impact the public’s perception of the agency and how fairly it administers
- 80                   regulatory programs.
- 81           2. When agencies use algorithmic tools to perform regulatory enforcement tasks, they
- 82           should assess the risks associated with using such tools, including those in
- 83           Paragraph 1, and put in place oversight mechanisms and data quality assurance
- 84           practices to mitigate such risks. In a risk assessment process, agencies should
- 85           consider a number of factors, including:
- 86                   a. The tendency of such tools to produce unexpected outcomes that could go
- 87                   beyond their intended uses or have the potential for biased or harmful
- 88                   outcomes;
- 89                   b. Oversight procedures available to the agency and the public to ensure
- 90                   responsible use of such tools;
- 91                   c. The ability to customize tools and systems to the agency’s ongoing needs and
- 92                   to specific use cases;
- 93                   d. Training and testing methodologies used in developing and maintaining such
- 94                   tools; and
- 95                   e. Quality assurance practices available for data collection and use, including the
- 96                   dependency of such tools on the completeness and veracity of the underlying
- 97                   data on which they rely.
- 98           3. When agencies use algorithmic tools to perform regulatory enforcement tasks,
- 99           agencies should ensure that any agency personnel who use such tools or rely on their
- 100           outputs to make enforcement decisions receive adequate training on the capabilities



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- 101                   and risks of such tools and understand how to appropriately assess their outputs  
102                   before relying on them.
- 103           4. When agencies provide notice to regulated persons of an action taken during an  
104           investigation, inspection, audit, or prosecution, they should specify if an algorithmic  
105           tool provided a significant basis for taking that action, consistent with existing legal  
106           requirements.
- 107           5. Agencies should notify the public on their websites of any algorithmic tools they use  
108           to investigate, inspect, audit, or gather evidence to discover non-compliance by  
109           regulated entities, consistent with existing legal requirements.
- 110           6. Agencies that use or are considering using algorithmic tools in regulatory  
111           enforcement should engage with persons interested in or affected by the use of such  
112           tools to identify possible benefits and harms associated with their use.
- 113           7. Agencies that use algorithmic tools to perform regulatory enforcement tasks should  
114           provide effective processes whereby persons can voice concerns or file complaints  
115           regarding the use or outcome resulting from the use of such tools so that agencies  
116           may respond or take corrective action.
- 117           8. The Chief AI Officer Council should facilitate collaboration and the exchange of  
118           information among agencies that use or are considering using algorithmic tools in  
119           regulatory enforcement.