



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Using Algorithmic Tools in Regulatory Enforcement

Committee on Regulation

Proposed Recommendation for Plenary | December 12, 2024

Proposed Amendments

This document displays manager’s amendments (with no marginal notes) and an additional amendment from the Council (with source shown in the margin).

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.”¹
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.² More recently, it
8 adopted specific recommendations addressing the use of algorithmic tools to review regulations,³
9 manage public comments,⁴ and provide guidance to the public.⁵

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-transform~~ specified inputs into outputs to make

¹ Admin. Conf. of the U.S., Statement #20, *Agency Use of Artificial Intelligence*, 86 Fed. Reg. 6616 (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).

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13 decisions or support decision making,” and includes the use of AI technologies.⁶ Many agencies
14 engage in regulatory enforcement—that is, detecting, investigating, and prosecuting potential
15 violations of the laws they administer. These agencies are often “faced with assuring the
16 compliance of an increasing number of entities and products without a corresponding growth in
17 agency resources.”⁷ As agencies seek ~~to identify~~ ways to make regulatory compliance “more
18 effective and less costly,”⁸ many are considering how they can use algorithmic tools to perform
19 regulatory 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.”⁹

24 The use of algorithmic tools in regulatory enforcement presents ~~additional unique~~ special
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
30 human ~~being~~.

⁶ ~~Statement #20~~ Recommendation 2023-3, *supra* note 13.

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>.



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31 At the same time, significant challenges and concerns arise in agencies' use of
32 algorithmic tools in regulatory enforcement.¹⁰ The Conference has previously identified possible
33 risks associated with agencies' use of algorithmic tools, including insufficient transparency,
34 internal and external oversight, and explainability;¹¹ the potential to unintentionally create or
35 exacerbate "harmful biases" by encoding and deploying them at scale;¹² and the possibility that
36 agency personnel will devolve too much decisional authority to AI systems.¹³ Such risks are
37 heightened when, as in the regulatory enforcement context, agencies use algorithmic tools to
38 make decisions or take actions that **impact-affect** a person's rights, civil liberties, privacy, safety,
39 equal opportunities, or access to government resources or services.¹⁴

40 Since the Conference issued Statement #20, Congress enacted the AI in Government Act,
41 which directs the Director of the Office of Management and Budget (OMB) to provide agencies
42 with guidance on removing barriers to agency AI use "while protecting civil liberties, civil
43 rights, and economic and national security" and on best practices for identifying, assessing, and
44 mitigating harmful bias.¹⁵ Executive Order 13,960, *Promoting the Use of Trustworthy Artificial*
45 *Intelligence in the Federal Government*, identifies principles for agencies when designing,
46 developing, acquiring, and using AI and directs agencies to inventory their uses of AI and make

¹⁰ Michael Karanicolas, Artificial Intelligence and Regulatory Enforcement (**Sept-Dec. 279**, 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).

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-effects** and purposes of an AI system. NAT'L INST. OF STANDARDS & TECH., ARTIFICIAL INTELLIGENCE RISK MANAGEMENT FRAMEWORK (AI RMF 1.0) **16** (2023).

¹² Statement #20, *supra* note 1, at 3.

¹³ *See id.*, at 3-4.

¹⁴ *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].

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



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47 ~~them~~ those inventories publicly available.¹⁶ Executive Order 14,110, *Safe, Secure, and*
48 *Trustworthy Development and Use of Artificial Intelligence*, requires agencies to designate Chief
49 AI Officers, who have primary responsibility for overseeing their agencies' AI use and
50 coordinating with other agencies, and establishes the Chief AI Officer Council to coordinate the
51 development and use of AI across agencies.¹⁷ OMB Memorandum M-24-10, *Advancing*
52 *Governance, Innovation, and Risk Management for Agency Use of Artificial Intelligence*, which
53 implements the AI in Government Act and Executive Order 14,110, provides guidance to
54 agencies on strengthening the effective and appropriate use of AI, advancing innovation, and
55 managing risks, particularly those related to rights-impacting uses of AI.¹⁸ Memorandum M-24-
56 10 further provides risk-management practices for agency uses of AI that ~~impact~~ affect people's
57 rights, which are derived from the Office of Science and Technology Policy's Blueprint for an
58 AI Bill of Rights and the National Institute of Standards and Technology's AI Risk Management
59 Framework.¹⁹ Those practices include "conducting public consultation; assessing data quality;
60 assessing and mitigating disparate impacts and algorithmic discrimination; providing notice of
61 the use of AI; continuously monitoring and evaluating deployed AI; and granting human
62 consideration and remedies for adverse decisions made using AI."²⁰ Additionally, OMB issued
63 Memorandum M-24-18, *Advancing the Responsible Acquisition of Artificial Intelligence in*

¹⁶ See Exec. Order No. 13960, *Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government*, 85 Fed. Reg. 78,939 (Dec. 3, 2020).

¹⁷ Exec. Order No. 14,110 § 10.1(b), *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, 88 Fed. Reg. 75,191, 75,218 (Oct. 30, 2023); OMB MEMO, *supra* note 14.

¹⁸ See OMB MEMO, *supra* note 14, at 29.

¹⁹ *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.

²⁰ Exec. Order No. 14,110, *supra* note 17.



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64 *Government*, which “integrat[es] these considerations for AI risk management into agency
65 acquisition planning.”²¹

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

RECOMMENDATION

- 70 1. When considering possible uses of algorithmic tools to perform regulatory
71 enforcement tasks, agencies should consider whether and to what extent ~~these such~~
72 tools will:
- 73 a. Promote efficiency, accuracy, and consistency;
 - 74 b. Create or exacerbate unlawful or harmful biases;
 - 75 c. Produce an output that agency decisionmakers can understand and explain;
 - 76 d. Devolve decisional authority to automated systems;
 - 77 e. Adversely affect rights, civil liberties, privacy, safety, equal opportunities, and
78 access to government resources or services;
 - 79 f. Use inappropriately or reveal publicly, directly or indirectly, confidential
80 business information or trade secrets; and
 - 81 g. ~~Impact Affect~~ the public’s perception of the agency and how fairly it
82 administers regulatory programs.
- 83 2. When agencies use algorithmic tools to perform regulatory enforcement tasks, they
84 should assess the risks associated with using such tools, including those in
85 Paragraph 1, and put in place oversight mechanisms and data quality assurance
86 practices to mitigate such risks. ~~In~~ ~~During a risk assessment process, agencies should~~
87 ~~consider, among other things, the a number of factors, including:~~

²¹ 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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- 88 a. ~~The ability to customize tools and systems to the agency's ongoing needs~~
89 ~~and to specific use cases;~~
- 90 ~~a.b. The tendency of such tools to produce unexpected outcomes that could go~~
91 ~~beyond their intended uses or have the potential for biased or harmful~~
92 ~~outcomes;~~
- 93 c. ~~Training and testing methodologies used in developing and maintaining such~~
94 ~~tools;~~
- 95 d. ~~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; and~~
- 98 ~~b.c. Oversight procedures available to the agency and the public to ensure~~
99 ~~responsible use of such tools;~~
- 100 ~~e.a. The ability to customize tools and systems to the agency's ongoing needs and~~
101 ~~to specific use cases;~~
- 102 ~~d.f. Training and testing methodologies used in developing and maintaining such~~
103 ~~tools; and~~
- 104 ~~e.g. Quality assurance practices available for data collection and use, including the~~
105 ~~dependency of such tools on the completeness and veracity of the underlying~~
106 ~~data on which they rely.~~
- 107 3. When agencies use algorithmic tools to perform regulatory enforcement tasks,
108 agencies should ensure that any agency personnel who use such tools or rely on their
109 outputs to make enforcement decisions receive adequate training on the **capabilities,**
110 **and risks, and limits** of such tools and understand how to appropriately assess their
111 outputs before relying on them.
- 112 4. When agencies provide notice to regulated persons of an action taken during an
113 investigation, inspection, audit, or prosecution, they should specify if an algorithmic
114 tool provided a **significant meaningful** basis for taking that action, consistent with
115 existing legal requirements.



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- 116 5. Consistent with legal requirements, Agencies agencies should notify the public on
117 their websites of any algorithmic tools they use to investigate, inspect, audit, or gather
118 evidence to discover non-compliance by regulated entities, consistent with existing
119 legal requirements along with information about the data used by such tools.
- 120 6. Agencies that use or are considering using algorithmic tools in regulatory
121 enforcement should engage with persons interested in or affected by the use of such
122 tools to identify possible benefits and harms associated with their use.
- 123 7. Agencies that use algorithmic tools to perform regulatory enforcement tasks should
124 provide effective processes whereby persons can voice concerns or file complaints
125 regarding the use or outcome resulting from the use of such tools so that agencies
126 may respond or take corrective action.
- 127 8. The Chief AI Officer Council should facilitate collaboration and the exchange of
128 information among agencies that use or are considering using algorithmic tools in
129 regulatory enforcement.

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