



Using Algorithmic Tools in Regulatory Enforcement

Committee on Regulation

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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 specified inputs into outputs to make decisions
13 or support decision making,” and includes the use of AI technologies.⁶ Many agencies engage in
14 regulatory enforcement—that is, detecting, investigating, and prosecuting potential violations of

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).

⁶ 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.”⁷ As agencies seek to identify ways to make regulatory compliance “more effective
18 and less costly,”⁸ 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.”⁹

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.¹⁰ The Conference has previously identified possible
32 risks associated with agencies’ use of algorithmic tools, including insufficient transparency,

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); 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;¹¹ the potential to unintentionally create or
34 exacerbate “harmful biases” by encoding and deploying them at scale;¹² and the possibility that
35 agency personnel will devolve too much decisional authority to AI systems.¹³ 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.¹⁴

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.¹⁵ 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.¹⁶ 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.¹⁷ OMB Memorandum M-24-10, *Advancing Governance, Innovation, and*

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 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).

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

¹⁷ 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.¹⁸ 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.¹⁹ 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.”²⁰ 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.”²¹

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;

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. 14110, *supra* note 17.

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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- 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.