

COMMENTS OF THE ELECTRONIC PRIVACY INFORMATION CENTER

to the

OFFICE OF MANAGEMENT AND BUDGET

Request for Comments on a Draft Memorandum to the Heads of Executive Departments and Agencies, “Guidance for Regulation of Artificial Intelligence Applications”

85 FR 1825

March 13, 2020

By notice published January 13, 2020, the Office of Management and Budget (“OMB”) requests comments on a Draft Memorandum to the Heads of Executive Departments and Agencies, “Guidance for Regulation of Artificial Intelligence Applications.”¹ EPIC submits these comments to encourage OMB to (1) require transparent reporting from the agencies regarding their AI regulation to increase accountability, (2) include prohibitions on Secret Profiling and Social Scoring, (3) apply the principles to government agencies, and (4) recommend enacting the principles set forth into binding regulation.

EPIC is a public interest research center in Washington, D.C. that was established in 1994 to focus public attention on emerging privacy and related human rights issues, and to protect privacy, the First Amendment, and constitutional values.² EPIC has a long history of promoting transparency and accountability for information technology.³

EPIC has a particular interest in promoting algorithmic transparency and has consistently advocated for the release of reports, validation studies, and use of the Universal Guidelines for AI to

¹ Management and Budget Office, Request for Comments on a Draft Memorandum to the Heads of Executive Departments and Agencies, “Guidance for Regulation of Artificial Intelligence Applications,” 85 Fed. Reg. 1825 (Jan. 13, 2020), <https://www.federalregister.gov/documents/2020/01/13/2020-00261/request-for-comments-on-a-draft-memorandum-to-the-heads-of-executive-departments-and-agencies>.

² EPIC, *About EPIC* (2019), <https://epic.org/epic/about.html>.

³ EPIC, *Algorithmic Transparency* (2018), <https://www.epic.org/algorithmic-transparency/>; EPIC, *Algorithms in the Criminal Justice System* (2018), <https://www.epic.org/algorithmic-transparency/crim-justice/>; Comments of EPIC, *Consumer Welfare Implications Associated with the Use of Algorithmic Decision Tools, Artificial Intelligence, and Predictive Analytics*, Federal Trade Commission (Aug. 20, 2018), <https://epic.org/apa/comments/EPIC-FTC-Algorithmic-Transparency-Aug-20-2018.pdf>; Comments of EPIC, *Developing UNESCO’s Internet Universality Indicators: Help UNESCO Assess and Improve the Internet*, United Nations Educational, Scientific and Cultural Organization (“UNESCO”) (Mar. 15, 2018), 5-6, [https://epic.org/internetuniversality/EPIC_UNESCO_Internet_Universality_Comment%20\(3\).pdf](https://epic.org/internetuniversality/EPIC_UNESCO_Internet_Universality_Comment%20(3).pdf).

guide requirements for trustworthy algorithms.⁴ As EPIC President Marc Rotenberg has explained, "Algorithmic accountability is a complex topic, but the impact cuts broadly across life in America, from jobs and credit to housing and criminal justice."⁵ EPIC has litigated cases against the Department of Justice to compel production of documents regarding "evidence-based risk assessment tools"⁶ and the Department of Homeland Security to produce documents about a program to assess the probability that an individual commits a crime.⁷ In 2018, EPIC and leading scientific societies petitioned OSTP to solicit public input on U.S. Artificial Intelligence Policy.⁸ EPIC submitted comments urging the National Science Foundation to adopt the UGAI, and to promote and enforce the UGAI across funding, research, and deployment of US AI systems.⁹

In an effort to establish necessary safeguards for American consumers, EPIC recently filed FTC complaints against HireVue,¹⁰ an employment screening company, and AirBnB,¹¹ the rental service that claims to assess risk in potential renters based on an opaque algorithm. EPIC has also filed a petition with the FTC for a rulemaking for AI in Commerce.¹² EPIC has also recently published the *AI Policy Sourcebook*, the first reference book on AI policy.¹³

EPIC applauds OMB's efforts to provide guidance to inform the development of regulatory and non-regulatory approaches to artificial intelligence, as required by Executive Order 13859.¹⁴ The

⁴ See e.g. EPIC v. DOJ (D.C. Cir.) (18-5307), <https://epic.org/foia/doj/criminal-justice-algorithms/>; Comments of EPIC, *Intellectual Property Protection for Artificial Intelligence Innovation*, U.S. Patent and Trademark Office (Jan. 10, 2020), <https://epic.org/apa/comments/EPIC-USPTO-Jan2020.pdf>; Comments of EPIC, *HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*, Department of Housing and Urban Development (Oct. 18, 2019), <https://epic.org/apa/comments/EPIC-HUD-Oct2019.pdf>; Testimony of EPIC, Massachusetts Joint Committee on the Judiciary (Oct. 22, 2019), <https://epic.org/testimony/congress/EPIC-FacialRecognitionMoratorium-MA-Oct2019.pdf>; Statement of EPIC, *Industries of the Future*, U.S. Senate Committee on Commerce, Science & Transportation (Jan. 15, 2020), <https://epic.org/testimony/congress/EPIC-SCOM-AI-Jan2020.pdf>; Comments of EPIC, *Request for Information: Big Data and the Future of Privacy*, Office of Science and Technology Policy (Apr. 4, 2014) <https://epic.org/privacy/big-data/EPIC-OSTP-Big-Data.pdf>.

⁵ Marc Rotenberg, Editorial, *Bias by Computer*, N.Y. Times, Aug. 11, 2016, at A22, <https://www.nytimes.com/2016/08/11/opinion/bias-by-computer.html>.

⁶ EPIC, *EPIC v. DOJ (Criminal Justice Algorithms)* <https://epic.org/foia/doj/criminal-justice-algorithms/>.

⁷ See *Id.* and EPIC, *EPIC v. DHS (FAST Program)* <https://epic.org/foia/dhs/fast/>.

⁸ EPIC, Petition to OSTP for Request for Information on Artificial Intelligence Policy (July 4, 2018), <https://epic.org/privacy/ai/OSTP-AI-Petition.pdf>.

⁹ EPIC, Request for Information on Update to the 2016 National Artificial Intelligence Research and Development Strategic Plan, National Science Foundation, 83 FR 48655 (Oct. 26, 2018), <https://epic.org/apa/comments/EPIC-Comments-NSF-AI-Strategic-Plan-2018.pdf>.

¹⁰ Complaint and Request for Investigation, Injunction, and Other Relief, *In re HireVue* (Nov. 6, 2019), https://epic.org/privacy/ftc/hirevue/EPIC_FTC_HireVue_Complaint.pdf.

¹¹ Complaint and Request for Investigation, Injunction, and Other Relief, *In re Airbnb* (Feb. 27, 2019), https://epic.org/privacy/ftc/airbnb/EPIC_FTC_Airbnb_Complaint_Feb2020.pdf.

¹² *In re: Petition for Rulemaking Concerning Use of Artificial Intelligence in Commerce*, EPIC (Feb. 3, 2020) <https://epic.org/privacy/ftc/ai/EPIC-FTC-AI-Petition.pdf>.

¹³ *EPIC AI Policy Sourcebook 2020* (EPIC 2020), <https://epic.org/bookstore/ai2020/>.

¹⁴ Exec. Order No. 13,859, Maintaining American Leadership in Artificial Intelligence, 84 Fed. Reg. 3967 (Feb. 11, 2019), <https://www.whitehouse.gov/presidential-actions/executive-order-maintaining-american-leadership-artificial-intelligence/>.

draft memorandum sets out AI principles that are largely consistent with international frameworks for AI, including the Universal Guidelines on AI¹⁵ and the OECD AI Principles.¹⁶

I. The Guidance Set Forward by the OMB Should be Improved

The draft OMB guidance published on January 7, 2020, called on agencies, when considering regulations or policies related to AI applications, “to promote advancements in technology and innovation, while protecting American technology, economic and national security, privacy, civil liberties, and other American values.”¹⁷ The principles set forth in the draft regulation are:

1. Public Trust¹⁸
2. Public Participation¹⁹
3. Scientific Integrity and Information Quality²⁰
4. Risk Assessment and Management²¹
5. Benefits and Cost²²
6. Flexibility²³
7. Fairness and Non-discrimination²⁴
8. Disclosure and Transparency²⁵
9. Safety and Security²⁶
10. Interagency Coordination²⁷

There are many AI principles set forth by industry, academia, civil society and governments. EPIC supports the Universal Guidelines for Artificial Intelligence and the OECD AI Principles.

The Universal Guidelines for Artificial Intelligence (“UGAI”), a framework for AI governance based on the protection of human rights, were set out at the 2018 Public Voice meeting in Brussels, Belgium.²⁸ The Universal Guidelines have been endorsed by more than 250 experts and 60 organizations in 40 countries.²⁹ The UGAI comprise twelve principles:

¹⁵ *Universal Guidelines for Artificial Intelligence*, The Public Voice (Oct. 23, 2018), <https://thepublicvoice.org/ai-universal-guidelines/>; thepublicvoice.org/events/brussels18, reprinted in MARC ROTENBERG, THE AI POLICY SOURCEBOOK 170-75 (EPIC 2020), <https://www.epic.org/bookstore/ai2020/>.

¹⁶ *Recommendation of the Council on Artificial Intelligence*, OECD (May 21, 2019), legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0449, reprinted in MARC ROTENBERG, THE AI POLICY SOURCEBOOK 111-21 (EPIC 2020), <https://www.epic.org/bookstore/ai2020/>.

¹⁷ *Draft Memorandum for the Heads of Executive Departments and Agencies*, Office of Management and Budget, January 7, 2020 <https://www.whitehouse.gov/wp-content/uploads/2020/01/Draft-OMB-Memo-on-Regulation-of-AI-1-7-19.pdf>

¹⁸ OMB Guideline 1

¹⁹ OMB Guideline 2

²⁰ OMB Guideline 3

²¹ OMB Guideline 4

²² OMB Guideline 5

²³ OMB Guideline 6

²⁴ OMB Guideline 7

²⁵ OMB Guideline 8

²⁶ OMB Guideline 9

²⁷ OMB Guideline 10

²⁸ *UGAI*, *supra* note 13.

²⁹ *Universal Guidelines for Artificial Intelligence: Endorsement*, The Public Voice (Oct. 23, 2019), <https://thepublicvoice.org/AI-universal-guidelines/endorsement/>.

1. Right to Transparency.
2. Right to Human Determination.
3. Identification Obligation.
4. Fairness Obligation.
5. Assessment and Accountability Obligation.
6. Accuracy, Reliability, and Validity Obligations.
7. Data Quality Obligation.
8. Public Safety Obligation.
9. Cybersecurity Obligation.
10. Prohibition on Secret Profiling.
11. Prohibition on Unitary Scoring.
12. Termination Obligation.³⁰

The OECD AI Principles³¹ were adopted in 2019 and endorsed by 42 countries—including the United States and the G20 nations.³² The OECD AI Principles establish international standards for AI use:

1. Inclusive growth, sustainable development and well-being.
2. Human-centered values and fairness.
3. Transparency and explainability.
4. Robustness, security and safety.
5. Accountability.³³

EPIC supports OMB’s principles, but urges OMB to strengthen the memorandum’s guidance. EPIC recommends the use of the Universal Guidelines for Artificial Intelligence as a baseline for federal AI policy. In order to achieve that goal, EPIC recommends that OMB include the principles as currently set forth, adding a prohibition on secret profiling and unitary scoring, as well as instituting the specific recommendations included below.

OMB Principle 1: Public Trust in AI³⁴

This principle recognizes the need for building trust in AI, which is an essential aspect of both the UGAI and the OECD principles. OMB should enact *requirements* that maximize the inherent trustworthiness of a given system. These actions, included below, build trustworthiness in addition to recognizing its value. EPIC recommends that this principle in relevant parts be amended to be included as an overarching principle, emphasized as equally as promoting innovation throughout the final version of this memorandum.

OMB Principle 2: Public participation³⁵

³⁰ UGAI, *supra* note 13.

³¹ OECD AI Principles, *supra* note 14.

³² U.S. Joins with OECD in Adopting Global AI Principles, NTIA (May 22, 2019), <https://www.ntia.doc.gov/blog/2019/us-joins-oecd-adopting-global-ai-principles>.

³³ OECD AI Principles, *supra* note 14.

³⁴ OMB Guideline 1

³⁵ OMB Guideline 2

This principle would strengthen public trust in AI, improve accountability and safety, and align with democratic, open-government ideals. However, EPIC recommends that the OMB change the operative words:

“Agencies **must** provide ample opportunities for the public to provide information and for the public to provide information and participate in all stages of the rulemaking process, **to the extent consistent with legal requirements and open government laws.**”

OMB Principle 3: Scientific Integrity and Information Quality³⁶ **and *OMB Principle 9: Safety and Security***³⁷

OMB Principles 3 and 9 are in direct alignment with several UGAI, which are coupled with other principles to increase effectiveness: the right to transparency, and **obligations** of fairness, accuracy, and data quality.

OMB Should include prohibitions on Unitary Scoring and Secret Profiling, as well as a Termination Obligation

The **Prohibition on Secret Profiling** aims to avoid the information asymmetry that arises increasingly with AI systems and to ensure the possibility of independent accountability.³⁸

The **Prohibition on Unitary Scoring** speaks directly to the risk of a single, multi-purpose number assigned by a government to an individual. In data protection law, universal identifiers that enable the profiling of individuals across are disfavored. These identifiers are often regulated and in some instances prohibited. The concern with universal scoring, described here as “unitary scoring,” is even greater. A unitary score reflects not only a unitary profile but also a predetermined outcome across multiple domains of human activity. There is some risk that unitary scores will also emerge in the private sector. Conceivably, such systems could be subject to market competition and government regulations. But there is not even the possibility of counterbalance with unitary scores assigned by government, and therefore they should be prohibited.³⁹ Scoring is a particularly risky use of AI. Risk assessments and scores are used to purportedly measure attributes such as risk to be used in the Criminal Justice System, and the private sector similarly prepares persuasive yet opaque scores – such as Airbnb.⁴⁰

The **Termination Obligation** is the ultimate statement of accountability for an AI system. The obligation presumes that systems must remain within human control. If that is no longer possible, the system should be terminated.⁴¹

The OMB should include these three tenets in the guidance. Unitary Scoring and Secret Profiling directly violate the principles in the OECD guidelines, the UGAI, and chiefly the OMB

³⁶ OMB Guideline 3

³⁷ OMB Guideline 9

³⁸ UGAI 10

³⁹ UGAI 11

⁴⁰ *In re Airbnb*, supra note 10

⁴¹ UGAI 12

principles that prioritize “privacy, civil liberties, and other American values, including the principles of freedom, human rights, the rule of law, and respect for intellectual property.”⁴²

II. **OMB Should Translate these Principles into Meaningful Regulation**

a. **Apply Principles to Government Use of AI**

EPIC encourages OMB to include government use of AI in the final memorandum. Providing guidance to Federal agencies on how to conduct oversight of private sector use of AI, without providing guidance on how the agencies themselves should use AI, is an incomplete approach. As OMB acknowledges, “Federal agencies currently use AI in many ways to perform their missions.”⁴³ Many government uses do not rely on personally identifiable information—such as regulatory enforcement at the Securities and Exchange Commission⁴⁴ and informal adjudication at the U.S. Patent and Trademark Office⁴⁵—and therefore raise fewer ethical concerns. But some government uses of AI—such as law enforcement at Customs and Border Protection⁴⁶ and public engagement at the Federal Communications Commission⁴⁷—rely on personally identifiable information. Inappropriate government uses of AI will undermine public trust in AI. Oversight principles for government use of AI will help avoid such inappropriate applications of the technology, minimizing opacity in public decision-making about arbitrary government action.

The lines separating government and corporate uses of AI are becoming increasingly blurred, particularly for law enforcement applications. The memorandum does not address how the principles should apply to government contractors or affect procurement.

b. **Make the Principles Binding and Require More Agency Action**

There is broad consensus—in the U.S. and internationally—that uses of artificial intelligence should be regulated. Civil society, governments, inter-governmental organizations, and the private sector have all published principles for ethical and rights-based approaches to AI.⁴⁸ This consensus indicates widespread recognition of the need to regulate AI. Ethical principles lay a critical foundation, but it is time for the U.S. government to translate principles into binding regulation. OMB’s guidance should favor regulatory to non-regulatory oversight of AI applications.

⁴² *Draft Memorandum for the Heads of Executive Departments and Agencies*, *supra* note 15 at 1 <https://www.whitehouse.gov/wp-content/uploads/2020/01/Draft-OMB-Memo-on-Regulation-of-AI-1-7-19.pdf>

⁴³ *Id.*

⁴⁴ David Freeman Engstrom, Daniel E. Ho, Catherine M. Sharkey, and Mariano-Florentino Cuéllar, *Government by Algorithm: Artificial Intelligence in Federal Administrative Agencies*, Report Submitted to the Administrative Conference of the United States (Feb. 2020), at 25, <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/02/ACUS-AI-Report.pdf>.

⁴⁵ *Id.* at 46.

⁴⁶ *Id.* at 30.

⁴⁷ *Id.* at 59.

⁴⁸ *Rome Call for AI Ethics*, The Vatican (Feb. 28th, 2020) http://www.academyforlife.va/content/dam/pav/documenti%20pdf/2020/CALL%2028%20febbraio/AI%20Rome%20Call%20x%20firma_DEF_DEF_.pdf.

Respectfully Submitted,

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