



Consumer Data Industry Association  
1090 Vermont Ave., NW, Suite 200  
Washington, D.C. 20005-4905

P 202 371 0910

Writer's direct dial: +1 (202) 408-7407

[CDIAONLINE.ORG](http://CDIAONLINE.ORG)

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March 13, 2020

Alexander Hunt  
Office of Management and Budget  
Office of Information and Regulatory Affairs  
725 17th St., NW  
Washington, D.C. 20503

Re: Guidance for Regulation of Artificial Intelligence Applications

Dear Mr. Hunt:

On behalf of the Consumer Data Industry Association ("CDIA"), we submit the following comments regarding the Request for Comments on a Draft Memorandum to the Heads of Executive Departments and Agencies, "Guidance for Regulation of Artificial Intelligence Applications" issued by the Executive Office of the President, Office of Management and Budget<sup>1</sup> ("OMB") ("the Draft Memorandum"). As explained below, CDIA is supportive of the Draft Memorandum which provides principles and guidance for federal agencies ("Agencies") to consider when determining whether new Artificial Intelligence ("AI")-related regulation is warranted. In particular, CDIA agrees that forbearance from new regulation may be appropriate in order to foster innovation and growth, and that the decision to implement new regulations should be reached only after careful consideration. Further, CDIA believes that Agencies should encourage non-regulatory approaches to managing AI including voluntary consensus standards.

**I. Introduction**

The Consumer Data Industry Association is the voice of the consumer reporting industry, representing consumer reporting agencies including the nationwide credit bureaus, regional and specialized credit bureaus, background check and residential screening companies, and others. Founded in 1906, CDIA promotes the responsible use of consumer data to help consumers achieve their financial goals, and to help businesses, governments and volunteer organizations avoid fraud and manage risk. Through data and analytics, CDIA members empower economic opportunity, helping ensure fair and safe transactions for consumers, facilitating competition and expanding consumers' access to financial and other products suited to their unique needs.

**II. Scope of the Memorandum**

The Draft Memorandum is largely directed at federal agencies, but it also indicates that policy considerations should guide, to the extent permitted by law, "regulatory and non-regulatory oversight

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<sup>1</sup> See 85 F.R. 1825, January 13, 2020.

of AI applications developed and deployed outside of the Federal government.”<sup>2</sup> It “focuses on ‘narrow’ (also known as ‘weak’) AI, which goes beyond advanced conventional computing to learn and perform domain-specific or specialized tasks by extracting information.”<sup>3</sup> It recognizes that Federal agencies must “avoid regulatory or non-regulatory actions that needlessly hamper AI innovation and growth, and “should assess the effect of the potential regulation on AI innovation and growth.”<sup>4</sup> The Draft Memorandum advises that “[a]gencies must avoid a precautionary approach that holds AI systems to such an impossibly high standard that society cannot enjoy their benefits.”<sup>5</sup> Because of the stated and potential overlap in scope between federal and private sector AI policy, CDIA members encourage and support non-regulatory approaches to AI policy management through the use of voluntary consensus standards that honor the Principles described in the Draft Memorandum.

### III. Principles of Stewardship of AI Applications

The Draft Memorandum identifies ten principles (“Principles”) Agencies should consider when formulating regulatory and non-regulatory approaches to the design, development, deployment and operation of AI applications: public trust in AI, public participation, scientific integrity and information quality, risk assessment and management, benefits and costs, flexibility, fairness and non-discrimination, disclosure and transparency, safety and security, and interagency coordination. CDIA agrees that these principles are important to consider when evaluating the need for new regulation. That said, there are a few areas where more clarity may be appropriate.

Both public trust and public participation are important factors in establishing best practices for the enabling AI growth and innovation. CDIA believes that it is important that all stakeholders have a seat at the table and the opportunity to inform the Agencies’ considerations of potential new regulation. Without public trust, AI may never be able to provide the consumer benefits and economic efficiencies it promises.

CDIA believes scientific integrity and information quality are key elements of any consideration of new regulation, but particularly in the case of AI. It is crucial that any decision-making process regarding potential new regulation be based on accurate and empirically-derived data and the most rigorous scientific standards available. While anecdotal information can be interesting and somewhat informative, it cannot serve as the basis for regulatory action or inaction.

Risk assessment and management are key to building public trust in AI and to its overall success, and CDIA supports this principle. However, Agencies should take care to avoid protocols that too severely impede innovative use of AI. Risk assessment and management approaches should take costs and potential benefits into account in such a manner that, in appropriate circumstances, allows some AI regulation to be deferred until markets and innovations have time to further mature.

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<sup>2</sup> Russell T. Vought, Acting Dir. of the Office of Mgmt. & Budget, Exec. Office of the President, Draft Memorandum for the Heads of Executive Departments and Agencies: Guidance for Regulation of Artificial Intelligence Applications, at 1 (Jan. 7, 2019), *available at* <https://www.whitehouse.gov/wp-content/uploads/2020/01/Draft-OMB-Memo-on-Regulation-of-AI-1-7-19.pdf>.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

Flexibility is also important. Agencies should take care to ensure that new regulation is technology-neutral, allowing the marketplace to evolve with as little restraint as necessary. Agencies should frequently revisit regulatory determinations for ongoing benefit and validity and remove unnecessary impediments as they are identified. Conversely, Agencies should be ready to move forward with deferred rulemakings when it becomes clear it is necessary.

Anecdotal concerns about fairness and non-discriminatory operation of AI can erode public trust, and AI users should take reasonable steps to ensure their AI is non-discriminatory. Current laws applicable to CDIA members<sup>6</sup> require that data used by such members be accurate, and users of CDIA member data are subject to laws prohibiting discrimination.<sup>7</sup> AI developers should be careful to construct and test algorithms such that AI output is not improperly disfavoring a protected class. However, Agencies should avoid developing “one size fits all” discrimination assessments to avoid unnecessary impediments to innovation and growth. CDIA believes the current regulatory environment has ample tools for managing and enforcing federal non-discrimination laws.

Disclosure and transparency, and safety and security, also go to supporting public trust. Agencies should carefully consider any possible regulation in this area and avoid regulations that may require improper disclosure of intellectual property (“IP”). CDIA members have made significant investments in IP that is critical to their success, and members would be irreparably harmed if Agencies take disclosure and transparency too far. Rather, any potential disclosure and transparency regulation, as well as any potential safety and security regulation, should be designed to encourage public trust without endangering legitimate trade secrets.

Finally, CDIA members share concern about, and fully support the need for, interagency coordination. AI solutions are likely to touch on a cross-section of Agency jurisdictions and it is critical that Agencies be coordinated in their regulatory approach. This includes ensuring that Agencies are applying the foregoing principles in a coordinated and consistent manner. Such coordination may require balancing the concerns of multiple Agencies. Any interagency process should provide a robust means of weighing such concerns and reaching a prompt and workable compromise that continues to foster AI growth and innovation.

#### **IV. Non-Regulatory Approaches to AI**

CDIA members believe that because of the vast potential for AI use and the magnitude of its varying uses, the best initial approach to AI management is through voluntary consensus standards developed by private industry or through public-private partnerships. Those companies that deploy AI know best how it works, and a focus on non-regulatory approaches would give Agencies the necessary time to become educated and conversant in the nuances of AI development. The Principles provide a sound basis for the private sector and the Agencies to develop voluntary consensus standards that encourage public trust and AI growth and innovation. An Agency policy of regulatory forbearance – unless it is absolutely necessary to regulate or avoid a patchwork of inconsistent state regulation –

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<sup>6</sup> Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.*

<sup>7</sup> See Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e *et seq.* (prohibiting discrimination in employment); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.* (prohibiting discrimination in credit); Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* (prohibiting discrimination in housing).

combined with full participation in the development of voluntary consensus standards will ensure an orderly development of AI policy that works.

**V. Conclusion**

CDIA members support and applaud the efforts of OMB outlined in the Draft Memorandum and asks that OMB encourage and support non-regulatory approaches to AI policy management through the use of voluntary consensus standards that honor the Principles described in the Draft Memorandum.

Sincerely,



Eric J. Ellman