



March 6, 2023

Alan Davidson
Assistant Secretary of Commerce for Communications and Information
National Telecommunications and Information Administration
U.S. Department of Commerce
1401 Constitution Avenue NW, Room 4725
Washington, DC 20230
Submitted electronically via www.regulations.gov

Re: Privacy, Equity, and Civil Rights Request for Comment - NTIA–2023–0001

Dear Assistant Secretary Davidson,

BSA | The Software Alliance appreciates the opportunity to submit this letter in response to the request for comments on privacy, equity, and civil rights (RFC) by the National Telecommunications and Information Administration (NTIA).

BSA is the leading advocate for the global software industry before governments and in the international marketplace.¹ Our members create the technology products and services that power other businesses. They offer tools including cloud storage services, customer relationship management software, human resources management programs, identity management services, and collaboration software. Businesses entrust some of their most sensitive data — including personal data — with BSA members. Our companies work hard to keep that trust. As a result, privacy and security protections are fundamental parts of BSA members' operations, and BSA members' business models do not depend on monetizing users' personal information.

Our comments focus on two key issues raised by the RFC:

- *First*, the United States needs a strong, comprehensive national privacy law. BSA has urged Congress to pass a privacy law that requires consumers' data to be handled responsibly. A federal privacy law will create important protections for all consumers, nationwide.
- *Second*, the Administration should ensure that existing anti-discrimination laws remain fit for purpose in the digital age. We strongly urge the Administration to conduct a comprehensive review of existing civil rights laws enforced by federal agencies to identify gaps in existing law that should be addressed.

¹ BSA's members include: Adobe, Alteryx, Atlassian, Autodesk, Bentley Systems, Box, Cisco, CNC/Mastercam, Databricks, DocuSign, Dropbox, Graphisoft, IBM, Informatca, Juniper Networks, Kyndryl, MathWorks, Microsoft, Okta, Oracle, Prokon, PTC, Rubrik, Salesforce, SAP, ServiceNow, Shopify Inc., Siemens Industry Software Inc., Splunk, Trend Micro, Trimble Solutions Corporation, TriNet, Twilio, Unity Technologies, Inc., Workday, Zendesk, and Zoom Video Communications, Inc.

More broadly, we also encourage the Administration to recognize the benefits of impact assessments in helping companies identify and mitigate risks associated with AI. BSA supports requiring impact assessments for high-risk uses of AI, which can help companies identify and mitigate risks in AI systems, including risks of unintended bias.

I. The United States Needs a Strong, Comprehensive National Privacy Law

Question 4 of the RFC asks how existing laws and regulations address privacy harms experienced by underserved or marginalized groups. In our view, existing privacy laws at the state and federal level are not the best structure to address those harms; the US should have a comprehensive national consumer privacy law.

Consumers deserve to know their personal data is being used responsibly. Today's consumers share their personal data with countless businesses in the course of using everyday products and services, both online and offline. That data should be protected by a comprehensive nationwide privacy law, which would reduce privacy harms for all consumers. We appreciate NTIA's prior work in support of federal privacy legislation, and we encourage the Administration to prioritize the creation of a strong and comprehensive privacy law that protects consumers nationwide.

BSA has urged Congress to enact a comprehensive federal privacy law that provides confidence to consumers that their data will be used responsibly — and ensures that companies that violate their obligations are subject to strong enforcement. We believe federal privacy legislation should achieve three goals: (1) establish consumers' rights in their personal data, including the rights to access, correct, delete, and port that data; (2) impose strong obligations on companies to safeguard consumers' personal data and prevent misuse; and (3) provide strong, consistent enforcement.² In each of these areas, a federal privacy law can — and should — build on the protections and obligations that states have advanced and enacted.³

BSA members have extensive experience with protecting personal data in compliance with data protection and privacy laws across the globe. Establishing a strong, comprehensive federal privacy law is a top priority for BSA. At the state level, we have also supported new consumer privacy laws in a range of states, including those enacted in Colorado, Connecticut, and Virginia.

Enacting a federal privacy law would meaningfully contribute to US leadership on privacy issues globally and bring consistency to existing protections. More importantly, it would also create broad and long-lasting protections for consumers nationwide. Congress has made significant progress in advancing privacy legislation, including in the House of Representatives, where last year the Committee on Energy & Commerce passed the American Data Privacy and Protection Act (ADPPA) by an overwhelming vote. BSA has commended ADPPA's sponsors for their dedication to moving bipartisan privacy legislation through Congress, and we have urged lawmakers to continue working with stakeholders so that Congress can pass a comprehensive privacy bill into law.

² See Testimony of Victoria Espinel, President and CEO of BSA | The Software Alliance, before the Senate Committee on Commerce, Science and Transportation, at Hearing on Policy Principles for a Federal Data Privacy Framework in the United States (Feb. 27, 2019), *available at* <https://www.commerce.senate.gov/services/files/1DECD81B-5947-4FEB-B3E1-E9DF65866321>.

³ See BSA, Comprehensive Federal Privacy Legislation Can Build on State Privacy Law (identifying how a federal law can add to protections created by state privacy laws in California, Colorado, Connecticut, Utah, and Virginia), *available at* <https://www.bsa.org/files/policy-filings/05052021fedprivacylegislationsum.pdf>, and BSA, Models of State Privacy Legislation (contrasting the five state privacy laws), *available at* <https://www.bsa.org/files/policy-filings/09212022stateprivlawmodels.pdf>.

II. Ensuring Civil Rights Protections Remain Fit for Purpose in the Digital Age

Question 4 of the RFC also focuses on the effective enforcement of existing civil rights laws. BSA members are firmly committed to ensuring that their technologies enhance fairness and mitigate the potential for discrimination. The growing ubiquity of AI has the potential to improve the delivery of services that will impact almost every facet of our daily lives. As AI is integrated into processes that have consequential impacts on people — such as their ability to obtain access to credit or housing — it is imperative to ensure that existing legal protections continue to apply, regardless of whether the relevant decisions are made by people or by people assisted by an AI system.⁴

We want to emphasize two points:

- *First, existing anti-discrimination laws should continue to protect individuals.* As a matter of principle, the public must be confident that existing anti-discrimination laws will continue to afford the same level of protection to individuals regardless of whether lending, housing, or other decisions covered by those laws were made by a person or by a person assisted by a machine. Simply put, existing laws should apply to the use of new technologies. When a decision made by a person today is illegal under existing civil rights laws, that decision should not fall outside civil rights laws merely when it is made with an AI system.
- *Second, agencies that enforce existing anti-discrimination laws should have the tools and resources they need.* It is critical that federal agencies have the resources and authorities they need to robustly enforce existing anti-discrimination laws. Just last month, President Biden issued an Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, which addresses the need to enforce existing civil rights laws, including as those laws apply to AI. The EO directs agencies to comprehensively use their civil rights authorities and offices to prevent and address discrimination and advance equity for all.⁵

Going forward, we strongly recommend the Administration conduct a comprehensive review of existing civil rights laws, to ensure they remain fit for purpose in the digital age. That review should focus on identifying gaps in existing civil rights laws and authorities, so that the Administration can then take steps to address those gaps.

An Administration-wide approach to identifying gaps in existing civil rights laws will have significant benefits. Because the enforcement of civil rights laws is dispersed among multiple executive and independent agencies, Administration leadership is needed to coordinate an all-of-government approach to analyzing the current state of the law. For instance, the Administration could begin this review by directing all agencies responsible for enforcing civil rights protections to audit their existing legal and enforcement authorities to evaluate whether there are updates needed to account for changes in technology. This could include coordinated reviews by agencies such as the Department of Justice, the Equal Employment Opportunity Commission, the Department of Housing and Urban Development, the Federal Trade Commission, and the Consumer Financial Protection Bureau, which enforce important anti-discrimination laws governing housing, employment, and credit, among other

⁴ See, e.g., BSA Comments to Department of Housing and Urban Development on HUD's Consideration of the Fair Housing Act's Disparate Impact Standard (Oct. 18, 2019) (recognizing it is critical that HUD have the resources and authorities needed to robustly enforce the Fair Housing Act's prohibitions on discrimination, regardless of whether a lending or housing decision was made by a person, or a person assisted by a machine), *available at* <https://www.bsa.org/files/policy-filings/10182019rehuddisparateimpact.pdf>.

⁵ Executive Order on Further Advancing Racial Equity and Support for Underserved Communities Through The Federal Government (Feb. 16, 2023), *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government>.

areas.⁶ That review should focus on identifying gaps in current laws, but may also consider any resource constraints that impede enforcement agencies from diligently pursuing violations. Such a review would build on the recent Executive Order, by identifying specific ways in which federal agencies may coordinate to prevent and remedy discrimination. BSA has strongly encouraged the Administration to conduct such a review, including in our comments last year to the Office of Science and Technology Policy as it sought input on the AI Bill of Rights initiative.⁷

Although stakeholder input provided in response to NTIA's RFC will be an important source of information on how civil rights laws function today, a broader systemic review by the federal agencies responsible for enforcing civil rights protections can provide concrete information about the gaps in existing authorities that should be addressed to ensure civil rights laws remain fit for purpose in the digital age. To the extent gaps are identified, the Administration could then seek to fill those gaps through appropriate resource allocations, providing additional regulatory guidance, and where necessary working with Congress to update the underlying legislative frameworks to ensure that civil rights protections remain both technologically neutral and robustly enforceable in the digital age.

III. Recognize Benefits of AI Impact Assessments

RFC Question 6 asks about other actions that could be taken in response to issues outlined in the RFC, including design choices, industry-developed codes of conduct, and third-party audits.

We want to highlight the importance of an activity not mentioned in the RFC: impact assessments. When AI is used in ways that could adversely impact civil rights or access to important life opportunities, the public should be assured that such systems have been thoroughly vetted and will be continuously monitored to account for the risks associated with unintended bias by the companies that develop and/or deploy those systems. Conducting impact assessments of high-risk AI systems helps companies identify and mitigate risks, including risks of unintended bias.

In 2021, BSA released a framework designed to contain real, credible, and actionable steps to guard against the potential of AI systems producing unintended disparate impacts. *Confronting Bias: BSA's Framework to Build Trust in AI* is built on a vast body of research and informed by the experience of leading AI developers.⁸ BSA has been pleased to testify about the Framework before the US Congress and the European Parliament, and BSA presented about the Framework as part of the National Institute of Standards and Technology's AI Risk Management Framework workshop.⁹

The BSA Framework is ultimately a playbook that organizations can use to enhance trust in their AI systems through risk management processes that promote fairness, transparency, and accountability including through impact assessments. Similarly, the National Institute of Standards and Technology (NIST) recently developed an AI Risk Management Framework (RMF) as a voluntary tool for organizations to use to incorporate trustworthiness considerations into the design, development, use,

⁶ See, e.g., 42 U.S.C. §§ 3601 – 3619 (Fair Housing Act); 42 U.S.C. § 2000e *et seq* (Title VII, Civil Rights Act of 1964); 15 U.S.C. § 1691 *et seq* (Equal Credit Opportunity Act).

⁷ See BSA, Submission Regarding OSTP AI Bill of Rights Initiative (Jan. 13, 2022), *available at* <https://www.bsa.org/files/policy-filings/01132022ostpai.pdf>.

⁸ See BSA, *Confronting Bias: BSA's Framework to Build Trust in AI* (June 2021), *available at* <https://www.bsa.org/reports/confronting-bias-bsas-framework-to-build-trust-in-ai>.

⁹ See BSA Testimony before the House Committee on Financial Services Task Force on Artificial Intelligence on Beyond I, Robot: Ethics, Artificial Intelligence, and the Digital Age; (Oct. 13, 2021), *available at* <https://www.bsa.org/files/policy-filings/10312021aitaskforce.pdf>; AIDA hearing on AI and Bias, AIDA Committee of European Parliament (Nov. 30, 2021), *available at* https://www.europarl.europa.eu/cmsdata/242833/Draft_Programme_AI%20and%20Bias_V25112021.pdf; NIST, *Building the NIST AI Risk Management Framework: Workshop #2* (March 29-31, 2022), *available at* <https://www.bsa.org/news-events/events/virtual-event-building-the-nist-ai-risk-management-framework-workshop-2>.

and evaluation of AI products.¹⁰ NIST released the AI RMF in January, and it contains many of the best practice recommendations contained in BSA's Framework. We encourage NTIA to support these types of tools, which help organizations craft effective and workable impact assessments that can address a broad range of AI uses.

BSA supports strong privacy protections for consumers, and we appreciate the opportunity to provide these comments. We welcome the opportunity to further engage with NTIA on these important issues.

Sincerely,

A handwritten signature in blue ink that reads "Kate Goodloe". The signature is written in a cursive style with a large initial "K".

Kate Goodloe
Managing Director, Policy
BSA | The Software Alliance

¹⁰ See NIST, AI Risk Management Framework, *available at* <https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf>.