



March 13, 2020

Mr. Russell T. Vought  
Office of Management and Budget  
725 17<sup>th</sup> St., NW  
Washington, DC 20503

VIA ELECTRONIC TRANSMISSION

**RE: Request for Comments on a Draft Memorandum to the Heads of Executive Departments and Agencies, “Guidance for Regulation of Artificial Intelligence Applications,” (Federal Register Doc. 2020-00261)**

Dear Mr. Vought:

BSA | The Software Alliance (BSA) appreciates the opportunity to provide comments on the Office of Management and Budget’s draft Guidance for the Regulation of Artificial Intelligence Applications. BSA is an association of the world’s leading enterprise software companies that provide businesses in every sector of the economy with tools to operate more competitively and innovate more responsibly.<sup>1</sup> As companies at the forefront of developing AI-enabled solutions, BSA members recognize that trust is essential to the public’s willingness to embrace these new technologies. Accordingly, BSA engages with governments around the world on the development of policies that both promote innovation and enhance confidence in the technologies that are driving economic growth.

Profound breakthroughs over the past decade have transformed AI from an emerging lab-based technology into a commercial reality that is now powering our smartphones, our homes, and our businesses. As AI is integrated into a staggering array of products, services, and business processes, policymakers around the world are beginning to explore whether they have the right policies in place to enhance the benefits of the technology and safeguard against its potential risks. OMB’s draft Guidance for the Regulation of AI (Draft Guidance) therefore arrives at a timely moment and can help establish global norms around the governance of AI.

We strongly support the vision in the Draft Guidance and agree that US leadership in AI “requires a regulatory approach that fosters innovation, growth, and...trust.” We are particularly encouraged that the Draft Guidance promotes an approach to AI governance that is informed by existing law and recognizes the need for risk-based and context-specific considerations of AI.

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<sup>1</sup> BSA’s members include: Adobe, Atlassian, Autodesk, Bentley Systems, Box, Cadence, CNC/Mastercam, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens Industry Software Inc., Sitecore, Slack, Splunk, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

- **Informed by Existing Law:** Recognizing that the “broader legal environment already applies to AI,”<sup>2</sup> the Draft Guidance directs agencies to evaluate the “adequacy of existing regulation at a Federal, State, [and] local level” as part of the process of determining whether new regulations are needed.<sup>3</sup> We agree that promoting trust will depend on ensuring that existing legal protections for consumers continue to apply to the use of AI. The public must be assured that decisions that would otherwise be unlawful should not avoid liability simply because they may now involve the use of an AI system.
- **Risk-Based:** The Draft Guidance acknowledges that public trust in AI will require regulatory and non-regulatory actions that are tailored to address risks that “present the possibility of unacceptable harm.”<sup>4</sup> We agree that a risk-based approach to AI governance is critical, because the technology can be used in a range of scenarios with vastly different risks. We support the Draft Guidance’s focus on developing policy approaches that are commensurate to address the “magnitude and nature” of the harms at issue.<sup>5</sup>
- **Context-Specific:** Importantly, the Draft Guidance directs agencies to focus policymaking activity on specific “applications” of AI. By focusing on specific uses of AI, the Draft Guidance ensures that regulatory efforts will be guided by context-specific considerations. That is critical because of the many contexts in which AI is already used – and will be used in the future. The Draft Guidance rightly notes, for instance, that an analysis of the appropriate approach for “disclosure and transparency” must be “context-specific” to allow for a holistic assessment of the “potential harms, the magnitude of those harms, the technical state of the art, and the potential benefits” associated with the specific application of AI that is being evaluated.<sup>6</sup>

The approach to AI governance set out in the Draft Guidance provides a solid foundation for a regulatory environment that will promote innovation and enhance public trust. To further advance these twin objectives, we offer the following recommendations for OMB’s consideration.

## 1. Emphasize the Linkage Between Regulatory Certainty, Trust and Innovation

The use of AI is subject to a broad array of existing regulations and consumer protections. Ensuring that these policies are sufficiently clear is important both for fostering public confidence in AI and for encouraging its adoption. As the Draft Guidance acknowledges, there are circumstances where a “lack of regulatory clarity may impede innovation.”<sup>7</sup> To provide clarity in such circumstances, the Draft Guidance directs agencies to focus on the development of non-regulatory approaches, such as the issuance of “policy statements,

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<sup>2</sup> Draft Guidance at pg. 4.

<sup>3</sup> Draft Guidance at pg. 11.

<sup>4</sup> Draft Guidance at pg. 4.

<sup>5</sup> Draft Guidance at pg. 4.

<sup>6</sup> Draft Guidance at pg. 6.

<sup>7</sup> Draft Guidance at pg. 7.

guidance, or testing and deployment frameworks.”<sup>8</sup> The Draft Guidance should also encourage agencies to update any existing regulations that may create uncertainty (e.g., regulations that are outdated or rendered ambiguous by technological innovations).

- **Recommendation 1:** We recommend that the “Technical Guidance on Rulemaking” (Appendix A) section clarify that a Regulatory Impact Analysis undertaken by an agency considering potential regulatory action should include an explanation of “whether the action is intended to address a market failure (e.g., asymmetric information), *clarify uncertainty related to existing regulations*, or address another factor, such as protecting privacy or civil liberties, preventing unlawful discrimination, or advancing the United States’ economic and national security.”<sup>9</sup>
- **Recommendation 2:** In addition, we recommend that the Draft Guidance require agencies to establish formal mechanisms for industry to seek guidance and/or request clarification about regulations that may be creating uncertainty around the use of AI. Such a mechanism should enable industry to request information about how an agency may interpret existing regulations and/or statutory authorities related to the use of AI.

The requirement for agencies to develop “Agency Plans” outlining how they will comply with the Draft Guidance is a welcome addition. The Agency Plans are an opportunity for agencies to audit their statutory authorities and assess whether existing regulations pose a barrier to the adoption of AI. Although the Draft Guidance suggests that agencies may undertake “stakeholder engagements” as part of the audit process, there is no clear requirement to do so.

- **Recommendation 3:** The Draft Guidance should require agencies to undertake a public consultation in connection with the development of Agency Plans to identify processes, policies, or regulations that may be inhibiting AI adoption or otherwise undermining public trust.

## 2. Prioritize International Engagement to Promote US Competitiveness

US leadership in the development of AI will be possible only if US companies can access global markets. Ensuring that the US approach to AI regulation is interoperable with our trading partners will therefore be a critical priority in the years ahead. Such engagement has already yielded some important early successes. For instance, the Organization for Economic Cooperation and Development (OECD) Recommendation on AI represents an important first step toward establishing global norms around the governance of AI. Those norms are predicated on a risk management-based approach for enhancing the benefits of AI and safeguarding against unintended harms. Similarly, the European Commission’s recent White Paper on Artificial Intelligence sets out a regulatory vision that shares common conceptual foundations as the Draft Guidance. For instance, the White Paper seeks to establish a

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<sup>8</sup> Draft Guidance at pg. 7.

<sup>9</sup> See Draft Guidance at pg. 11.

regulatory framework that is informed by existing law,<sup>10</sup> risk-based,<sup>11</sup> and context-specific.<sup>12</sup> Global convergence around risk-based AI governance is an international trend that should be encouraged.

- **Recommendation 4:** The Draft Guidance can lend momentum to these positive developments by encouraging agencies to give consideration not only to the “international uses of AI”<sup>13</sup> but also to the international regulatory landscape relevant to such uses. To minimize the risk of international fragmentation, agencies should be directed to ensure regulations minimize conflicts with risk-based approaches implemented by key US trading partners and allies. Specifically, the Draft Guidance should require agencies to evaluate the international regulatory landscape as part of the “Regulatory Impact Analysis” outlined in Appendix A. For instance, in performing a cost-benefit analysis on potential regulatory approaches, a preference should be given to options that are interoperable with similar policies in foreign markets.

### **3. Ensure that Policies Target the Appropriate AI Stakeholders**

The Draft Guidance sets out a risk-management based approach to AI governance, directing agencies to ensure regulations are “appropriate to, and commensurate with, the degree of risk” posed by specific AI applications.<sup>14</sup> As noted above, the Draft Guidance’s focus on particular applications of AI will encourage the development of policies that are informed by context-specific risk assessments that target harms and outcomes as opposed to broad categories of technologies.

- **Recommendation 5:** The Draft Guidelines can build on this risk-management approach by directing agencies to ensure that regulatory efforts account for the unique roles and capabilities of the range actors that may be involved in an AI system’s supply chain. As a general principle, the Draft Guidelines should ensure that regulatory obligations (and associated liabilities) fall on the actor that is best positioned to both identify and efficiently mitigate the risk of harm that gave rise to the need for a regulation. In many circumstances, only the entity that has deployed an AI system will be in a position to monitor whether it is operating as intended and intervene when necessary to mitigate risk.

### **4. Support the Development of a Non-Regulatory Risk Management Framework**

We agree that non-regulatory policy approaches – including sector-specific frameworks and voluntary consensus standards – can play a critically important role in promoting reliable,

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<sup>10</sup> See, e.g., European Commission AI White Paper at pg. 10 (“[T]here is a need to examine whether current legislation is able to address the risks of AI and can be effectively enforced, whether adaptations of the legislation are needed, or whether new legislations is needed.”)

<sup>11</sup> Id. at pg. 17 (“As a matter of principle, the new regulatory framework for AI should be effective to achieve its objectives while not being excessively prescriptive so that it could create a disproportionate burden, especially for SMEs. To strike this balance, the Commission is of the view that it should follow a risk-based approach.”)

<sup>12</sup> Regulatory efforts will focus on “high-risk AI *applications*.”

<sup>13</sup> Draft Guidance at pg. 5.

<sup>14</sup> Draft Guidance at 13.

robust, and trustworthy AI applications. The National Institute of Science and Technology should play a leading role in the development of a voluntary framework for managing the risks to trustworthy AI, as it has in the context of cybersecurity and privacy. Such a process would bring together experts from government, industry, and academia to develop a framework for identifying and mitigating risks that can emerge as AI systems are designed, developed, and deployed. An AI risk management framework would be valuable not only for companies that are developing and using AI technologies with the potential to impact the public, but also for agencies as they are creating AI policy.

- Recommendation 6: The Draft Guidance should include “voluntary risk management frameworks” as an example in the “Non-Regulatory Approaches to AI” section.

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The Draft Guidance outlines a thoughtful approach to AI governance. We agree that the goal of AI governance should be to promote innovation and enhance public trust. Achieving these objectives will require a policy environment that provides clarity for businesses seeking to adopt AI and certainty for consumers that existing legal safeguards will continue to apply to their interactions with AI. We look forward to working with OMB and the agencies on the implementation of the Draft Guidance.

Sincerely,



Christian Troncoso  
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