Comments Regarding AI Accountability Policy

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I appreciate the opportunity to provide comments related to the National Telecommunications and Information Administration (NTIA)'s questions on Artificial Intelligence (AI) Accountability Policy.[1] This comment does not represent the views of any particular party or special interest group but is intended to assist regulators in considering the impact of broad regulation on such a general-purpose technology, while exploring the availability of flexible tools and existing law to resolve some of the most pressing concerns.

Current regulatory efforts often lean toward preemptive regulation, implying potential harm until proven otherwise, an approach which could inhibit the development of non-harmful AI applications. The swift evolution of AI exacerbates the challenge of regulating AI technology as regulations may become obsolete before they're even implemented. With general-purpose technology that has both significantly promising as well as potentially harmful applications, policymakers and regulators should narrowly focus any additional regulations on specific harms rather than on a technology more generally.

Additionally, before engaging in new regulations, agencies must have proper authority granted through Congressional delegation and policymakers should consider if existing regulation already addresses these concerns. As with the internet, a single body would not only

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be inadequate in regulating AI's vast applications but could also gain unwarranted power to influence the industries. Given the general-purpose and malleable qualities of AI technology, this comment proposes adopting a "soft law" approach, favoring it over rigid regulations furthered by a single regulator.

The Difficulties of AI Regulation

The first challenge to any conversation about AI is reaching a shared definition of what AI is. While there have been recent advancements in generative AI, many industries and individuals have already been using forms of AI without realizing it.

At its most general description, AI is any machine that is able to complete a task that requires human intelligence. As a result, many have already encountered AI in chatbots that assist with customer service, real-time directional tools based on traffic updates, and improvements in the way we search for information. This broad definition makes it difficult for regulators to even define what they may be attempting to regulate without wrongly demonizing algorithms or automation more generally. A broad definition of AI could easily be used to regulate many forms of algorithms and machine learning that underpin a wide array of technology and allow a significant increase in government intervention in technology companies.

Any regulation of AI should not apply to the technology generally but should seek to define particular harms for which it will provide redress and/or specific applications of the technology that are deemed to raise catastrophic, irreversible, irreparable risks that are likely to occur. Many recent proposals around licensing or other highly permissioned regulatory regimes would presume applications harmful until proven safe rather than reserving regulation only for

those applications most likely to be harmful.[2] We are still early in the development of applications for AI and proposals such as licensing regimes risk favoring incumbent firms and the current model in ways that could be detrimental to the economy and consumers. Licensing regimes that would prevent new businesses from entering an industry do not necessarily translate into improved safety or other benefits for consumers.[3]

As AI is a technology best understood by its applications rather than as a single general purpose, regulatory agencies should look both for ways to embrace it as improvement in their covered industries as well as any particular risks. The potential for AI to improve a wide range of industries as well as agency actions themselves was previously highlighted by the Trump administration in its position around AI.[4] Just as a single agency does not regulate the internet and to do so would have hampered its positive impact and beneficial uses, a single agency would be ill-equipped to regulate and govern the broad applications of AI and to do so would provide it with significant power to intervene in any number of industries.[5]

Soft Law Tools for AI Governance

The rapid pace of innovation in artificial intelligence has created a sense of unease for many consumers and policymakers, posing challenges when it comes to appropriate tools for any regulation. This is commonly known as the "pacing problem." In many cases, the pace of

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[2] John O. McGinnis, *AI's Future: Liberty or License*, Law & Liberty, Jun. 1, 2023, https://lawliberty.org/ais-future-liberty-or-license/

[3] Susan E. Dudley, *Let's Not Forget George Stigler's Lessons about Regulatory Capture*, George Washington University Regulatory Studies Center, May 21, 2021, https://regulatorystudies.columbian.gwu.edu/lets-not-forget-george-stiglers-lessons-about-regulatory-capture

[4] *See* Jennifer Huddleston, *Comments regarding "Guidance for Regulation of Artificial Intelligence Applications*, American Action Forum, Mar. 9, 2020, https://www.americanactionforum.org/comments-for-record/comments-regarding-guidance-for-regulation-of-artificial-intelligence-applications/

[5] *See* Neil Chilson, *Does Big Tech Need Its Own Regulator*, The Global Antitrust Institute Report on the Digital Economy 21, Nov. 19, 2020, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3733726

technology, such as AI, moves so quickly that a regulation may be outdated by the time it is passed. This can be a benefit in some cases; however, in other cases, the lack of regulatory certainty or the fear that a product might be deemed non-compliant can also stifle innovation.[6] Instead of rigid regulations that may quickly become outdated and hamper innovation, a soft law approach may help balance the legitimate concerns about harms from AI while still promoting an approach that provides opportunities for innovation free from government intervention in beneficial cases. In this way, soft law tools may be helpful in providing appropriate guidance and certainty around key issues of concern for innovators and consumers.

Soft law tools--such as multi-stakeholder working groups to develop best practices-- may help identify appropriate limits on certain applications while also providing continued flexibility during periods of rapid development.[7] These soft law tools also support the interactions of various interest groups and do not presume that a regulatory outcome is needed. In other cases, they may identify areas where deregulation is needed to remove outdated law or where hard law is needed to respond to harms or create legal certainty around practices. This also provides opportunities for innovators to learn of regulators and society's concerns and provide solutions that may alleviate the sense of unease while still encouraging beneficial and flexible uses of a technology.

Soft law tools and best practices can be formalized in a way that provides opportunities for transparency and information sharing. In creating voluntary standards, best practices and

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[6] *See* Adam Thierer, *The Pacing Problem, the Collingridge Dilemma & Technological Determinism*, The Technology Liberation Front, Aug. 16, 2018, https://techliberation.com/2018/08/16/the-pacing-problem-the-collingridge-dilemma-technological-determinism/
[7] Ryan Hagemann et al., *Soft Law for Hard Problems: The Governance of Emerging Technologies in an Uncertain Future,* Colorado Technology Law Journal, Vol. 17.1, https://ctlj.colorado.edu/wp-content/uploads/2019/03/3-Thierer_3.18.19.pdf

other soft law tools can also address areas where direct harm is less clear, but a variety of concerns exist. This can include issues such as concerns about algorithmic bias or balancing issues around privacy and the need for large data sets.

Rather than a rigid approach that is likely to become overly restrictive and quickly outdated, a soft law approach provides flexibility for both the regulator and the regulated industry as new concerns may arise. However, soft law should still only be used for such cases as where there are concerns about potential harms, not to create a presumption of a need for regulation in all aspects of a technology.

Is New Regulation Actually Needed to Address Harms?

Many of the concerns about potential harms from AI have existed before technology deployment or merely amplified by the reach of new technology. It is also important to distinguish between harm caused by the technology and malicious actors using it.

If there are concerns that malicious companies or individuals are using a technology to engage in harmful practices, the problem is the individual using the technology, not the technology itself. Just because a malleable technology can be used by bad people to do bad things does not mean that a technology or tool is automatically harmful. A hammer can be used to create many things, but it can also create damage if abused. We don't ban hammers because one could use them inappropriately to create harm. If there are existing loopholes in the law that do not apply to problematic decisions made through the use of data or algorithms, the response should be to clarify existing law around these issues not to regulate the use of neutral technology.

Technology is an imperfect tool that malicious actors can abuse to do things that would violate civil rights or engage in discriminatory practices and harms may occur as a result.

However, laws already exist to address many key concerns that could stem from discriminatory uses of data in areas such as lending, education, or hiring. For example, CFPB chair and former FTC commissioner Rohit Chopra has stated, "Companies are not absolved of their legal responsibilities when they let a black-box model make lending decisions."[8]

In addition to examining the potential of existing laws to handle harms or concerns about AI, agencies must consider if they have the appropriate authority to engage in AI-related regulation. An agency cannot *sua sponte* declare itself to have regulatory authority. Particularly in light of recent court actions around issues such as the major questions doctrine, an agency should be cautious about rushing to claim authority over Artificial Intelligence.[9] Instead, agencies are in a better position to examine if any of the current regulations might be deterring the application of AI in the field or if there are clarifications around the use of AI and existing regulations rather than rush to develop a new regulatory regime.

Conclusion

The concerns about AI should be properly considered as concerns about specific applications and not the technology in general. While there are risks, AI is such a general-purpose technology that broad regulation is likely to indiscriminately impact not only those harmful and risky applications but many general technologies like algorithms. Many of the harms may already be addressed by existing law or be better directed at the bad actors who undertake them than introducing new regulations on the technology itself. Restrictive regulations like licensing regimes may backfire by locking in existing incumbents and lacking the flexibility

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[8] *CFPB Acts to Protect the Public from Black-Box Credit Models Using Complex Algorithms*, Consumer Financial Protection Bureau, May 26, 2022, https://www.consumerfinance.gov/about-us/newsroom/cfpb-acts-to-protect-the-public-from-black-box-credit-models-using-complex-algorithms/
[9] *See A Trio of "Sleeper" Nondelegation Doctrine Challenges*, The Federalist Society, Dec. 14, 2022, https://fedsoc.org/commentary/fedsoc-blog/a-trio-of-sleeper-nondelegation-doctrine-challenges

to address new concerns as they arise. Instead, regulators should look to work with innovators and impacted industries in a soft law approach that can address concerns and provide certainty while still maintaining a flexible approach.