March 6, 2023

Via Electronic Mail

Herbert C. Hoover Building (HCHB)
U.S. Department of Commerce
National Telecommunications and Information Administration
1401 Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Stephanie Weiner and members of the National Telecommunications and Information Administration,

On behalf of the Future of Privacy Forum (FPF), we are pleased to submit comments in response to the National Telecommunications and Information Administration (NTIA) Request for Comment regarding data privacy, equity, and civil rights.[1] FPF is a global non-profit organization dedicated to advancing privacy leadership, scholarship, and principled data practices in support of emerging technologies.[2]

FPF urges NTIA to include these three recommendations in its forthcoming report to advance protections for data privacy, equity, and civil rights in the US:

1. Support for Congressional efforts to pass a comprehensive federal privacy law that includes limitations on data collection, heightened safeguards for sensitive data use, support for socially beneficial research, and protections for civil rights, including protections regarding automated decision-making that has legal or similarly significant effects.
2. Support the administration to promote a common approach to privacy, AI, and civil rights among executive agencies in the agencies' guidance to private entities and internally on the processing of personal information, and tech procurement processes.
3. Continue proactive engagement and meaningful consultation with marginalized groups in conversations regarding privacy and automated decision-making across the administration and federal agencies.

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[1] 88 Fed. Reg. 3714 (Jan. 20, 2023),
https://www.federalregister.gov/documents/2023/01/20/2023-01088/privacy-equity-and-civil-rights-request-for-comment.
[2] The opinions expressed herein do not necessarily reflect the views of FPF's supporters or Advisory Board.

NTIA's "Listening Sessions on Privacy, Equity, and Civil Rights," drew attention to the well-documented and ongoing history of data-driven discrimination in the digital economy.[3] When the digital economy functions properly, all individuals, regardless of race, gender, or other historically discriminated-against attributes, are able to equally access the benefits of technology, including better access to education and employment opportunities, while trusting that their personal data is protected from misuse. Individuals and communities can benefit from digital tools that provide important services regarding education, employment, housing, credit, insurance, and government benefits. In addition, society as a whole benefits from diverse individuals contributing different perspectives, ideas, and objectives without cause to fear discrimination or harm. But when the digital economy reinforces human bias rather than combats discrimination, individuals suffer concrete harms, including artificially limited educational opportunities, reduced access to jobs and financial services, and more. At the same time, misuse of personal information can contribute to biased outcomes, undermine trust in digital services, or both.

FPF urges NTIA to consider the below recommendations, which would advance more equitable data practices and effective privacy safeguards.

Recommendations

> 1. *NTIA should support Congressional efforts to pass a comprehensive federal privacy law that includes limitations on data collection, heightened safeguards for sensitive data use, support for socially beneficial research, and protections for civil rights, including for significant uses of automated decision-making.*

Comprehensive federal privacy safeguards that protect consumers and promote responsible data practices would provide individuals meaningful privacy rights and place clear, workable obligations on organizations that collect, use, and share personal data.[4] Automated decision-making and AI tools impact millions of people, and, when those systems facilitate discrimination, the harm is broadly felt. Comprehensive federal privacy legislation is necessary to close the gaps between existing sectoral laws and provide clear protections for individuals. Baseline federal privacy protections would benefit all Americans, including members of marginalized communities.[5]

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[3] NTIA Virtual Listening Sessions on Personal Data: Privacy, Equity, and Civil Rights (Jan. 03, 2022), https://ntia.gov/other-publication/ntia-virtual-listening-sessions-personal-data-privacy-equity-and-civil-rights.

[4] Protecting America's Consumers: Bipartisan Legislation to Strengthen Data Privacy and Security: Hearing Before Subcomm on Consumer Protection and Com. 117 Cong. 2 (2022) (Testimony and Statement of Bertram Lee Jr.).

[5] The NTIA RFC identifies specific marginalized groups, including: disabled people; Native or Indigenous people; people of color, including but not limited to Black people, Asian- Americans and Pacific Islanders,

In addition to core privacy protections, a federal law should codify national protections for civil rights in the context of automated decision-making systems. Civil rights laws provide important protections for marginalized groups and codify values that are crucial to a functioning democracy and society.[6] Yet traditional civil rights laws have struggled to keep pace with emerging technologies and business practices, too often leaving marginalized communities vulnerable or predisposed to discrimination when it comes to economic opportunity based on historical data.[7] Decisions about employment, housing, and provision of services, to name a few, are increasingly driven by collection and analysis of personal information. Codifying civil rights protections in comprehensive federal privacy legislation would mitigate risks of discriminatory outcomes that can result from high risk automated decision-making. Moreover, carefully crafted legislation can incentivize the proactive use of technical systems to identify and reduce human bias. Ensuring that AI systems, and the data that trains them, are accurate, representative, inclusive, and non-discriminatory benefits consumers, the government, and private organizations alike.

> 2. *NTIA should encourage the administration to promote a common approach to privacy, AI, and civil rights among executive agencies in the agencies' guidance to private entities and internally on the processing of personal information, and tech procurement processes.*

A common approach to data processing and the use of AI tools by executive agencies will ensure that current civil rights laws and principles are applied consistently to address potential harms caused by algorithms or automated decision-making. As the President's principal advisor on telecommunications and information policy issues, NTIA should urge a coordinated federal approach to align executive agencies' own use of personal information and the guidance they provide to private entities.[8] NTIA should also urge a coordinated federal approach to agencies' application of existing regulatory and enforcement authorities. Some federal agencies'
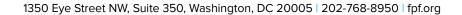
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and Hispanic or Latinx people; LGBTQ people; women; victims of domestic violence (including intimate partner violence, abuse by a caretaker, and other forms of domestic abuse); religious minorities; victims of online harassment; formerly incarcerated persons; immigrants and undocumented people; people whose primary language is not English; children and adolescents; students; low-income people; people who receive public benefits; unhoused people; sex workers, hourly workers, "gig" or contract workers, and other kinds of workers; or other individuals or communities who are vulnerable to exploitation, or have historically been subjected to discrimination.

[6] Nicol Turner Lee, Paul Resnick & Genie Barton, *Algorithmic bias detection and mitigation: Best practices and policies to reduce consumer harms* (May 22, 2019), https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/

[7] *Id.*

[8] 47 U.S.C. § 103(b)(2)(H).

rulemaking and enforcement activities are increasingly intersecting with automated decision-making in legally significant contexts, including employment, credit, and housing. While some agencies have analyzed and acted on issues regarding data-driven bias for years, Others are just beginning to develop relevant expertise.[9] A common federal approach could leverage the best existing work for the benefit of all agencies.

A common approach to addressing privacy, AI, and civil rights can incorporate leading guidance from federal agencies that have implemented their own frameworks to mitigate discriminatory conduct for their own data. For example, the EEOC recently held a public hearing surrounding the use of AI and ML technologies in the workplace.[10] Following the hearing, EEOC will perform a review of the technologies used in private companies hiring to determine whether the automated decision-making systems have produced discriminatory outcomes.[11] The National Institute of Technology Standards (NIST) published the AI Risk Management Framework to better manage risks to individuals, organizations, and society associated with AI.[12] The voluntary framework sets forth key components of responsible development and use of AI systems.[13] Agencies, using the framework, will also have the means by which to address both the procurement and use of AI systems for the agency and for private entities. Similarly, the White House Office of Science and Technology Policy introduced an AI Bill of Rights to offer guidance to all on AI technologies.[14]

As part of this approach, federal agencies that use personal data for significant automated decision-making, such as in housing, education, lending, or other government benefits, should ensure that such processes are rigorously evaluated, including through external auditing and testing where appropriate. External audits and testing have been important tools in civil rights enforcement to support the inclusion of marginalized communities and mitigate harms.[15] A

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[9] Press Release, Equal Employment Opportunity Commission, EEOC to Hold October 13 Commission Meeting on Use of Big Data in Employment (Oct. 11, 2016) (on file with author), https://www.eeoc.gov/newsroom/eeoc-hold-october-13-commission-meeting-use-big-data-employment#:~:text=WASHINGTON%20--%20The%20U.S.%20Equal%20Employment%20Opportunity%20Commission,EEOC%20headquarters%2C%20131%20M%20Street%2C%20N.E.%2C%20Washington%2C%20D.C.

[10] Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Hearing Explores Potential Benefits and Harms of Artificial Intelligence and other Automated Systems in Employment Decisions (Jan. 31, 2023), https://www.eeoc.gov/newsroom/eeoc-hearing-explores-potential-benefits-and-harms-artificial-intelligence-and-other.

[11] *Id.*

[12] National Institute of Standards and Technology, *Artificial Intelligence Risk Management Framework* (2023), https://doi.org/10.6028/NIST.AI.100-1.

[13] *Id.* at 1.

[14] Office of Science and Technology Policy, *Algorithmic Discrimination Protections*, https://www.whitehouse.gov/ostp/ai-bill-of-rights/algorithmic-discrimination-protections-2/.

[15] The United States Department of Justice, *Fair Housing Testing Program,* Civil Rights Division (1991), https://www.justice.gov/crt/fair-housing-testing-program-1.

framework that can be adopted broadly across federal executive agencies and sets clear and adoptable standards for agencies' and private entities processing of personal information and tech procurement processes.

> 3. *NTIA should continue to proactively engage and encourage meaningful consultation with marginalized groups in conversations around privacy and automated decision-making.*

Privacy has implications for all communities and NTIA should continue to include a diverse set of voices and individuals in the conversations about privacy and automated decision-making. It is necessary to engage and consult with groups that society recognizes have been subjected to a long history of harmful discrimination.[16] Economic opportunity and the digital economy should not be limited to a select few due to past discriminatory practices. In housing, employment, and even government benefits, historical practices and data sets can impact automated decision-making.[17]

For this consultation to be meaningful and adequate, communities should be invited into the process at an early stage and given the tools, including contextual grounding and any necessary accommodations, needed to be able to contribute. Representation of the communities most impacted is essential to ensuring the voices are represented.[18] NTIA should include in the final report guidelines for how agencies should consult and engage with those in marginalized communities to ensure them the benefits of the digital economy.

NTIA should be mindful that using sensitive data in automated decision-making can have harmful implications, but can also benefit marginalized communities. Sensitive data is still essential to a

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[16] Tatiana Rice, *Addressing The Intersection Of Civil Rights And Privacy: Federal Legislative Efforts,* Future of Privacy Forum (Jan. 24, 2022), https://fpf.org/blog/addressing-the-intersection-of-civil-rights-and-privacy-federal-legislative-efforts/.
[17] Valerie Schnieder, *Locked out by Big Data: How Big Data, Algorithms and Machine Learning May Undermine Housing Justice,* 52.1 Colum. L. Rev. 251, 274 (2020), https://hrlr.law.columbia.edu/files/2020/11/251_Schneider.pdf; Miranda Bogen & Aaron Rieke, *Help Wanted: An Examination of Hiring Algorithms, Equity, and Bias,* Upturn 1, 8 (Dec. 2018), https://www.upturn.org/static/reports/2018/hiring-algorithms/files/Upturn%20--%20Help%20Wanted%20-%20An%20Exploration%20of%20Hiring%20Algorithms.%20Equity%20and%20Bias.pdf; Brian Naylor, *IRS Has Second Thoughts About Selfie Requirements,* NPR (Feb. 7, 2022), https://www.npr.org/2022/02/07/1078024597/want-information-from-the-irs-for-some-the-agency-wants-a-selfie.
[18] Exec. Order No. 13985, 86 Fed. Reg. 7009 (2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

wide range of activities, including detecting and addressing disparate outcomes.[19] Small businesses, particularly those that are owned by women and members of marginalized communities, rely on and benefit from sensitive data to help serve communities that are traditionally underserved.[20]

Conclusion

The Future of Privacy Forum appreciates this opportunity to comment on these issues and NTIA's efforts to ensure privacy, equity, and civil rights is centered in the privacy conversation.

We welcome any further opportunity to provide resources or information to assist in this important effort. If you have any questions regarding these comments and recommendations please contact Adonne Washington at awashington@fpf.org (cc:info@fpf.org).

Sincerely,

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Felicity Slater, *Policy Fellow*
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The Future of Privacy Forum
https://fpf.org/

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[19] *FPF Urges Federal Trade Commission to Craft Practical Privacy Rules*, Future of Privacy Forum (Nov. 21, 2022), https://fpf.org/blog/fpf-urges-federal-trade-commission-to-craft-practical-privacy-rules/.
[20] Ashton Jackson, *This Black founder sold her company to P&G—why she says she's 'selling up,' not selling out,* CNBC (Jan. 21, 2023), https://www.cnbc.com/2023/01/21/black-founder-mielle-organics-sold-her-company-to-pandg-why-she-says-shes-selling-up.html#:~:text=On%20Jan.,Black%20Twitter%20into%20a%20frenzy; Andre M. Perry & Carl Romer, *To Expand the Economy Invest in Black Businesses,* Brookings (Dec. 31, 2020), https://www.brookings.edu/essay/to-expand-the-economy-invest-in-black-businesses/.