Before the
Office of Science and Technology Policy
Washington, D.C.

In re

Request for Information on Automated
Worker Surveillance and Management

Document Number: 2023-09353

COMMENTS OF
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

In response to the Request for Information ("RFI") published in the Federal Register at 88 Fed. Reg. 27932 (May 3, 2023), the Computer & Communications Industry Association ("CCIA")[1] submits the following comments to the Office of Science and Technology Policy ("OSTP").

I.   Introduction

CCIA is pleased to provide comments on how the federal government can facilitate and promote the responsible use and development of automated systems and tools in the field of employment. Automated systems and similar technologies have created tremendous benefits for employees and employers. Businesses in every industry sector use automated systems to improve their competitiveness and enhance their products and services, including routine and low-risk applications such as filtering and spell-check. During COVID-19, the use of automated systems has enabled individuals to work safely by helping employers utilize cameras, sensors, and augmented reality to create important social-distancing tools and enforce relevant health protocols.[2]

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[1] CCIA is an international, not-for-profit trade association representing a broad cross-section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than $100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. A list of CCIA members is available at https://www.ccianet.org/members.

[2] James Vincent, *Amazon deploys AI 'distance assistants' to notify warehouse workers if they get too close*, The Verge (June 16, 2020), https://www.theverge.com/2020/6/16/21292669/social-distancing-amazon-ai-assistant-warehouses-covid-19.

Automation has also increased organizational efficiency to provide employees with new opportunities to engage in more impactful work. However, at the same time, such technologies may pose risks to individuals if poorly developed and implemented, especially if organizations fail to account for important considerations like those around bias and fairness. The 1974 Equal Credit Opportunity Act sought to prevent discrimination in the lending market through the use of credit scores.[3] But as studies have shown, numerous issues like flawed or incomplete data, have undermined this objective.[4]

CCIA and its members appreciate the Administration's commitment to providing workers access to high-quality, well-paying jobs.[5] While CCIA shares the Administration's concerns and agrees more work can and must be done to study the potential implications of automated systems and related technologies, we caution against any overly prescriptive approach to such technologies, especially concerning the use of low-risk technology. Further, the Administration's recent adoption of the word "surveillance" in connection with new technologies is troubling. The word suggests a nefarious purpose, as well as intent to police or sanction individuals and employees, and a clandestine mode of operation. Most of all, "surveillance" connotes a violation of rights and thus appears to presuppose the existence of actionable harm. Using this word further attempts to undermine the progress and benefits associated with automated systems. CCIA encourages the federal government to reject the term "surveillance" as a divisive, inflammatory, and inapt term for all practices contemplated by this RFI. It would be more productive to distinguish between high- and low-risk uses of automated systems, aligning with emerging legislative approaches seen in the states and other jurisdictions. The Association appreciates the opportunity to further detail our experiences with automated systems, including the benefits created by these technologies and opportunities for the federal government to provide guidance, foster collaborations, and facilitate the sharing of best practices.

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[3] Michelle Singletary, *Credit scores are supposed to be race-neutral. That's impossible.,* Washington Post (Oct. 16, 2020), https://www.washingtonpost.com/business/2020/10/16/how-race-affects-your-credit-score/.
[4] Edmund L. Andrews, *How Flawed Data Aggravates Inequality in Credit*, Stanford University, Human-Centered Artificial Intelligence (Aug. 6, 2021), https://hai.stanford.edu/news/how-flawed-data-aggravates-inequality-credit; Mya Frazier, *The High Cost of Bad Credit*, New York Times (June 7, 2023), https://www.nytimes.com/2023/06/07/magazine/bad-credit-repair.html.
[5] Exec. Order No. 14036, 86 Fed. Reg. 36987 (2021).

II.   Benefits Created from the Use of Automated Systems and Related Technologies

The adoption of automated systems and AI across industries is widespread and growing. A 2022 McKinsey and Company study found that 56% of business leaders across the globe now report using AI in at least one business function.[6] The report highlights that the most common AI use cases are low-risk, involving service-operations optimization, AI-based enhancement of products, and contact-center automation. These advancements have enabled small businesses to effectively market their products to the right consumers at affordable prices and allow for better customer experience and cheaper prices.[7] Such automated systems have helped small businesses improve their efficiency and productivity, increase accuracy and reduced errors, and improve internal collaboration and communication.[8]

The use of these technologies has yielded tremendous benefits for employers of all sizes and employees of all abilities, with online recruitment and job advertising, applicant screening, and qualitative assessments. These systems and tools have helped employers improve their hiring procedures and process, such as using AI-driven neuroscience games to assist in identifying new traits and considerations like emotion and generosity.[9] Cost savings for organizations of all sizes enables resources to be allocated to other important interests and priorities beyond hiring, including diversity, equity, and inclusion initiatives.

In anticipation of this year's U.S.-EU Trade and Technology Council meeting, the Administration released its economic study on the impact of AI on the future of workforces in the European Union and the U.S.[10] The comprehensive report highlights the economics behind AI-driven technological change with a focus on the institutional and policy decisions that will shape its future impact on the workforce. Notably, the case study on the use of AI in Human Resources and Hiring concluded that "[t]he overarching message from discussions with firms in

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[6] Report, *The State of AI in 2022—And A Half Decade in Review*, McKinsey (Dec. 6, 2022), https://www.mckinsey.com/capabilities/quantumblack/our-insights/the-state-of-ai-in-2022-and-a-half-decade-in-review.

[7] Alessandra Alari, *As consumer decision-making gets more complex, automation helps to simplify*, Think with Google (Aug. 2021), https://www.thinkwithgoogle.com/intl/en-gb/marketing-strategies/search/consumer-decision-making-automation/.

[8] Shopify Staff, *How Workflow Automation Can Streamline Your Business*, Shopify (Feb. 24, 2023), https://www.shopify.com/blog/workflow-automation.

[9] Shlomik Silbiger, *The Pymetrics Games – Overview and Practice Guidelines*, Oxford University Career Services (Nov. 21, 2021), https://www.careers.ox.ac.uk/article/the-pymetrics-games-overview-and-practice-guidelines.

[10] Report, U.S.-EU Trade Technology Council, *The Impact of Artificial Intelligence on the Future of Workforces in the EU and the US* (2022), https://www.whitehouse.gov/wp-content/uploads/2022/12/TTC-EC-CEA-AI-Report-12052022-1.pdf.

the hiring space was that AI-powered algorithms *could improve nearly every step* in the hiring process for firms, HR staff members, and candidates."[11]

With the United States still facing serious labor shortages in both the public and private sectors,[12] the federal government has an opportunity to prioritize the advancements of these technologies for the betterment of workers and society. Current and future workforces will depend on a blend of using traditional hiring methods and automated employment decision tools.

III.   Policies, Practices, and Standards

Innovation brings new opportunities with improvements to existing technologies and the creation of new tools. Despite these rapid advancements, the decisions and activities driven by automated systems and artificial intelligence are subject to Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, and other existing civil rights laws. In April, the Department of Justice's Civil Rights Division, the Consumer Financial Protection Bureau, the Equal Employment Opportunity Commission, and the Federal Trade Commission all reaffirmed in a joint statement that "their existing legal authorities apply equally to the use of new technologies as they do to any other conduct. The joint statement summarizes recent accomplishments, including policy guidance and enforcement actions, the agencies have taken to combat illegal behavior committed through the use of automated systems."[13] These agencies have continued to use these existing authorities to enforce non-discrimination, consumer protection, and other important legal protections.

CCIA cautions against rushed attempts to regulate automated and AI systems, which are complex and warrant adequate understanding to reach intended outcomes appropriately. Any regulation of automated systems and decision-making technology should keep in mind that automated systems are a subset of decision-making — and so existing laws, including those

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[11] *Id.* at 29 (emphasis added).

[12] Jennifer Liu, *Roughly 47 million people quit their jobs last year: 'All of this is uncharted territory'*, CNBC (Feb. 1, 2022), https://www.cnbc.com/2022/02/01/roughly-47-million-people-quit-their-job-last-year.html.

[13] *See* Press Release, Department of Justice, *Justice Department's Civil Rights Division Joins Officials from CFPB, EEOC and FTC Pledging to Confront Bias and Discrimination in Artificial Intelligence* (Apr. 25, 2023), https://www.justice.gov/opa/pr/justice-department-s-civil-rights-division-joins-officials-cfpb-eeoc-and-ftc-pledging ("Our agencies reiterate our resolve to monitor the development and use of automated systems and promote responsible innovation. We also pledge to vigorously use our collective authorities to protect individuals' rights regardless of whether legal violations occur through traditional means or advanced technologies").

aforementioned, that govern how a company makes decisions generally would also apply to such automated systems.

Regarding laws targeted solely at automated systems, companies in the United States are subject to several existing state privacy laws that already impose substantial obligations concerning the individual right to opt-out of automated decision-making. This includes the Colorado, Connecticut, and Virginia state privacy laws. Critically, each of these laws is limited to high-risk decisions, described as those which have "legal or similarly significant effects," and in the case of Connecticut, target "solely" automated decisions.

To ensure interoperability with those laws and to strike the right balance between protecting individuals while enabling access to important technology, the federal government should seek to align its approach by focusing on only those systems that (i) involve decisions with legal or similarly significant effects, (ii) are limited to solely or fully automated decisions, and (iii) apply only after an automated decision is made. Low-risk automated systems, such as GPS systems, spam filters, and driver monitoring, should not be the focus of any potential regulation. Organizations should not have to design objectively worse, and potentially even dangerous, versions of their products and services merely to give the individual the right to opt-out of the automated system. For example, Amazon's use of its real time alerts for drivers has produced "remarkable safety improvements–accidents decreased 48 percent, stop sign violations decreased 20 percent, driving without a seatbelt decreased over 60 percent, and distracted driving decreased 45 percent."[14]

Furthermore, the regulatory focus should be limited to high-risk use cases, such as using technology to make final decisions regarding access to housing, credit, medical benefits, or other critical services without appropriate human involvement. Although organizations routinely use such automated systems to aid in employment decisions, such final decisions are still a result of human oversight and input. Importantly, responsible companies remain committed to the responsible use of advanced automated systems and similar technologies. Some examples include Meta's five pillars of Responsible AI, AWS's guide on the Responsible Use of Machine Learning, and Google's Responsible AI practices. For example, AWS's guide provides

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[14] Grace Kay, *Amazon's AI-cameras reportedly determine drivers' pay and employment status by scoring safety infractions like tailgating and running red lights*, Business Insider (Aug. 2, 2021), https://www.businessinsider.com/amazon-ai-cameras-score-driver-safety-decide-pay-employment-report-2021-8.

considerations and recommendations for responsibly developing and using machine learning systems across three major phases of their life cycles: design and development; deployment; and ongoing use.

However, organizations could benefit from increased guidance and sharing of best practices which enable employers of all sizes to learn about important risks and considerations in using these tools. Expert agencies like OSTP can play a pivotal role in developing trustworthy automated systems and AI, which will require a comprehensive approach and extensive collaboration between all stakeholders.[15] CCIA encourages the federal government to consider alternative non-regulatory approaches to policy issues affecting artificial intelligence applications, including enforcement guidance and sharing of frameworks and consensus standards. The Administration can look to the National Institute of Standards and Technology's ("NIST") AI Risk Management Framework, a voluntary and flexible framework that was the result of significant collaboration between government, industry, civil society, and other stakeholders. Additionally, the NIST AI Playbook helps organizations navigate and incorporate the Framework's considerations like trustworthiness in the design, development, deployment, and use of AI systems. Industry and the advocacy community continue to collaborate on many of the difficult policy considerations relating to advanced systems, including fairness, transparency, the future of work, and economic impacts.[16]

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[15] Christophe Dupuy et al., *Advance in Trustworthy Machine Learning at Alexa AI, Amazon Science* (Apr. 28, 2022), https://www.amazon.science/blog/advances-in-trustworthy-machine-learning-at-alexa-ai.
[16] *See* Partnership on AI, which includes over 100 industry and advocacy members, conducting research and thought leadership to advance understanding of AI technologies, https://www.partnershiponai.org/.

IV.   Conclusion

CCIA applauds the Administration's commitment to encouraging the responsible use and development of automated systems and similar technologies.

Respectfully submitted,

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June 15, 2023