

October 31, 2023

Biden Administration Issues Executive Order on Artificial Intelligence

The Executive Order Directs Agencies to Take a Range of Actions to Address Perceived Risks and Opportunities of Artificial Intelligence

SUMMARY

On October 30, 2023, President Biden issued an Executive Order (“EO”) on the “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence,” which established a “Federal Government-wide approach” to addressing the challenges and opportunities posed by artificial intelligence (“AI”).¹ According to the EO, “the rapid speed at which AI capabilities are advancing compels the United States to lead in this moment for the sake of our security, economy, and society.”² To that end, the Order establishes a national policy toward AI and directs federal agencies to take actions to ensure that AI does not threaten national security, privacy, the labor force, competition, or civil rights, while seeking to maximize the economic and other potential benefits of AI.³

The EO builds upon prior work by the Biden Administration to address the perceived risks of AI. In December 2022, the White House issued a blueprint for an “AI Bill of Rights,” which “identified five principles that should guide the design, use, and deployment of automated systems to protect the American public in the age of artificial intelligence.”⁴ And a few months ago, the Biden Administration secured voluntary commitments from large AI companies “to seize the tremendous promise and manage the risks [of] AI,” which it announced alongside a call for bipartisan legislation to address AI.⁵

The EO is ambitious in scope, touching broad swaths of the American economy and involving more than a dozen federal agencies. In the press conference announcing the EO, President Biden touted it as “the most significant action any government anywhere in the world has ever taken on AI safety, security and trust.”

Although the EO does not create immediate obligations for private parties, its directives are likely to lead to the adoption of a host of regulations for businesses in the coming months and years, which will in turn help

shape the trajectory of AI development and implementation in the world economy going forward. Under the time limits established by the EO, agencies will issue new guidance and regulations related to AI over the next three to 12 months.

THE EXECUTIVE ORDER

The Executive Order articulates a broad national policy toward AI. That policy turns on “eight guiding principles and priorities,” and directs federal agencies to take actions with respect to each one.⁶

- 1. Ensuring the Safety and Security of AI Technology.** The EO’s safety and security provisions are extensive. Significantly, the EO directs the Secretary of Commerce to require, among other requirements, (i) “companies developing or demonstrating an intent to develop potential dual-use foundation models” (*i.e.*, an AI model trained on broad data without supervision that could pose a serious risk to security, national economic security, national public health or safety, or any combination of those matters) to provide to the Federal Government, on an ongoing basis, reports or records regarding development activities, “red-team” test results, and mitigation measures; (ii) certain reporting and other obligations for providers of Infrastructure as a Service (IaaS), including in relation to foreign persons using those services for training AI models that could be used in “malicious cyber-enabled activity”; and (iii) companies, individuals, and organizations to disclose the possession, development, or acquisition of “large-scale computing clusters” (*i.e.*, a collection of computers used as part of a single system).⁷ As authority for those reporting requirements, the EO invokes the Defense Production Act (“DPA”), which allows the President to take certain regulatory actions deemed important to national security.⁸ Originally passed in response to the Korean War, the DPA “confers upon the President a broad set of authorities to influence domestic industry in the interest of national defense,” and has been invoked in response to various crises, including the Covid-19 pandemic.⁹

The EO also directs (i) the National Institute of Standards Technology (“NIST”) to establish “guidelines and best practices, with the aim of promoting consensus industry standards,” for AI systems, including by establishing guidelines for “red team” testing of dual-use foundation models, and “developing a companion resource to the AI Risk Management Framework” previously published by NIST;¹⁰ (ii) the Secretary of Commerce and Secretary of Homeland Security to issue regulations aimed at deterring cybersecurity risks; (iii) the Secretary of Homeland Security and the Secretary of Energy to develop regulations to prevent the use of AI in chemical, biological and nuclear attacks; (iv) agencies that fund, or are otherwise involved with, life-sciences research regarding the establishment of guidelines and regulations related to the procurement of synthetic nucleic acids; and (v) the Secretary of Commerce to develop guidance related to the authentication of “synthetic content” (*i.e.*, AI-generated content), including authenticating content, tracking provenance of content, labeling synthetic content (such as by watermarking) and detecting synthetic content.¹¹

- 2. Promoting Innovation and Competition.** The EO also includes provisions aimed at ensuring that the United States attracts AI experts and maintains a competitive landscape for AI research. Specifically, the EO encourages the Federal Trade Commission to “exercise [its] existing authorities . . . to ensure fair competition in the AI marketplace and to ensure that consumers and workers are protected from harms that may be enabled by the use of AI.” It also directs the Secretary of State and the Secretary of Homeland Security to streamline visas for noncitizens working on AI and instructs grant-issuing agencies such as the National Science Foundation to make funds available for AI-related research.¹²

The EO also includes important provisions related to intellectual property. The EO requires the Under Secretary of Commerce for Intellectual Property and the Director of the United States Patent and Trademark Office to “publish guidance” to “patent examiners and applicants addressing inventorship and the use of AI . . . in the inventive process” and to consult with the Director of the United States Copyright Office to “issue recommendations to the President on potential executive actions relating to copyright and AI.”¹³ It also instructs the Director of the National Intellectual Property Rights Coordination

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Center to “develop a training, analysis, and evaluation program to mitigate AI-related IP risks,” including “AI-related IP theft.”¹⁴

3. **Supporting Workers.** In order to better understand “AI’s implication for workers,” the EO directs the Council of Economic Advisors to submit a report to the President on the labor market effects of AI. It also instructs the Secretary of Labor to develop guidelines on best practices to minimize AI’s harms to workers (including as to “job-displacement risks”, “labor standards and job quality” and the “implications for workers of employers’ AI-related collection and use of data about them”) and requires the National Science Foundation to prioritize funding for AI-related education and workforce development programs.¹⁵
4. **Advancing Equity and Civil Rights.** The EO includes broad provisions addressing potential discrimination or other civil rights violations related to the use of automated systems and AI. It directs the Department of Justice and other agencies with civil rights responsibilities to develop best practices to investigate and prosecute AI-related civil rights offenses.¹⁶ And it calls on all federal agencies—such as the Department of Health and Human Services and the Department of Agriculture—to use their authorities “to prevent and address unlawful discrimination and other harms that result from uses of AI in Federal Government programs and benefits administration.”¹⁷ The EO also directs the Secretary of Labor, the Director of the Federal Housing Finance Agency, the Director of the Consumer Financial Protection Bureau, and the Secretary of Housing and Urban Development to use their existing authorities to prevent AI-related discrimination in federal contracting, consumer finance, and housing.¹⁸
5. **Protecting Consumers, Patients, Passengers, and Students.** The EO requires federal regulatory agencies—including agencies responsible for areas such as healthcare, transportation, education and communications—to take a series of specific actions “to protect American consumers from fraud, discrimination, and threats to privacy and to address other risks that may arise from the use of AI, including risks to financial stability.”¹⁹ Many of the provisions in this section direct agencies to take actions directed at entire industries, such as healthcare/life sciences, transportation, education, and communications.
6. **Protecting Privacy.** The EO calls on the Office of Management and Budget to examine and evaluate the federal government’s existing privacy policies and related procedures to “mitigate privacy risks potentially exacerbated by AI,”²⁰ direct NIST and the Secretary of Commerce to create guidelines for federal agencies to assess the efficacy of their cybersecurity measures, and direct the Director of the National Science Foundation in concert with other agencies to fund, coordinate, and implement privacy research.
7. **Advancing Federal Government Use of AI.** The EO includes numerous provisions related to the federal government’s own use of AI, which are designed both to mitigate the risks of AI and to encourage agencies to use AI in a manner that is responsible and appropriate. Those provisions empower the Office of Management and Budget to develop guidelines for the use of AI and to track agencies’ progress incorporating AI into their operations.²¹ The EO also includes provisions designed to attract more talent with AI expertise to the federal government,²² and it directs OMB to issue for guidance for each agency to designate a Chief Artificial Intelligence Officer to coordinate the agency’s use of AI, promote AI innovation, and manage AI-related risks.²³
8. **Strengthening American Leadership Abroad.** The EO directs various federal agencies to work with allies abroad to develop AI standards outside of the military or intelligence areas. It also requires agencies to work with international partners to promote AI research and to address cross-border threats to critical infrastructure involving AI.²⁴ The EO coincides with the G7’s new cross-border Guiding Principles on Artificial Intelligence and voluntary Code of Conduct under the Hiroshima AI Process (an international effort to develop global AI standards), which were also announced on October 30, 2023.

IMPLICATIONS

As noted above, the EO is broad in scope and sets an ambitious agenda for the federal government to regulate potential risks and to cultivate potential opportunities associated with AI. By issuing the EO ahead

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of the EU's adoption of the EU AI Act (expected later this year),²⁵ the Biden Administration is seeking to position the United States as a global leader in AI regulation. The EO also reflects a major shift in U.S. policy toward proactive regulation of AI at the federal level, extending well beyond the Biden Administration's 2022 "Blueprint for an AI Bill of Rights."

The EO does not impose direct obligations on private businesses. Instead, it directs agencies to use their existing legal authorities to take actions respecting AI. In many cases, the EO requires agencies to develop regulations or guidance relatively quickly, with the first rules expected by the end of January 2024. And by empowering federal agencies with broad rulemaking and regulatory powers, the EO anticipates that the regulation of AI will evolve in response to rapid changes in AI technology and deployment. Once the EO has been fully implemented by federal agencies, it has the potential to address a number of fundamental risks associated with powerful AI models and related computing infrastructure.

At the highest level, the broad and systematic coverage by the EO of many (if not most) sectors of the American economy suggests that the federal government will become highly involved in shaping how new AI technologies are implemented in the United States. This degree of close involvement appears significantly greater than in prior waves of innovation in information technology, for which the exercise of federal regulatory power was often less direct and immediate. While this is consistent in some ways with trends in technology regulation in various jurisdictions during the past decade (e.g., expansions of foreign investment filing requirements, growing protections for personal information or increasing technology-specific investment and export prohibitions), the EO (and various follow-on guidance and regulations) will surely affect various decision-points for companies that are developing and implementing AI, and, as a result, crucially define the nature, scale, speed and risks of implementing AI technologies.

In terms of immediate practical implications, as agencies begin to solicit feedback in connection with the EO, businesses that wish to shape the content of agency guidelines and regulations should begin now to develop advocacy arguments and strategy to inform these decision-makers. Given the breadth of the EO, there will be businesses across dozens of industry verticals that may have an interest in the outcome of these guidelines and regulations. For instance, firms that have interests in the standards development process should continue to engage NIST when it comes to the agency's work on standards guidance, as the agency has been tasked with this responsibility in the EO and similar initiatives.²⁶ Many of the EO's directives are quite broad and therefore provide considerable leeway to agencies to develop AI policy, so agency-level advocacy will likely be important.

Similarly, firms that contract with the Federal Government or participate in federal benefit programs should also stay apprised of any requirements that may be imposed on contractors and grant recipients. For instance, the EO gives the Secretary of Labor one year to publish guidance for federal contractors "regarding nondiscrimination in hiring involving AI and other technology-based hiring systems."²⁷ Guidance

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in this area is likely to have significant ramification for the use of AI by firms doing business with the Federal Government.

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ENDNOTES

- 1 Executive Order on the on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence § 1 (Oct. 30, 2023) (“Executive Order”).
- 2 *Id.*
- 3 White House, *Fact Sheet: President Biden Issues Executive Order on Safe, Secure, and Trustworthy Artificial Intelligence* (Oct. 30, 2023).
- 4 White House, *Blueprint for an AI Bill of Rights* (Dec. 2022), <https://www.whitehouse.gov/ostp/ai-bill-of-rights/>.
- 5 White House, *Fact Sheet: Biden-Harris Administration Secures Voluntary Commitments from Eight Additional Artificial Intelligence Companies to Manage the Risks Posed by AI* (Sept. 12, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/>.
- 6 Executive Order § 2.
- 7 *Id.* § 4.2.
- 8 See 50 U.S.C. § 4501 et seq.
- 9 Alexander G. Neenan & Luke A. Nicastro, *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress*, R32767, Cong. Res. Serv. 1 (Oct. 6, 2023).
- 10 Executive Order, § 4.1(i). Those guidelines build upon NIST’s existing work on AI. See NIST, *Technical AI Standards* (May 4, 2023), <https://www.nist.gov/artificial-intelligence/technical-ai-standards>.
- 11 Executive Order §§ 4.3, 4.4, 4.5.
- 12 *Id.* §§ 5.2, 5.1.
- 13 *Id.* § 5.2(c)(i)-(iii).
- 14 *Id.* § 5.2(d)(i).
- 15 *Id.* § 6.
- 16 *Id.* § 7.1.
- 17 *Id.* § 7.2.
- 18 *Id.* § 7.3.
- 19 *Id.* § 8.
- 20 *Id.* § 9.
- 21 *Id.* § 10.1.
- 22 *Id.* § 10.2.
- 23 *Id.* § 10.2(b).
- 24 *Id.* § 11.
- 25 See European Parliament, *EU AI Act: First Regulation of Artificial Intelligence* (June 14, 2023), <https://www.europarl.europa.eu/news/en/headlines/society/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence>.
- 26 See, e.g., National Institute of Standards and Technology, *Artificial Intelligence Risk Management Framework (AI RMF 1.0)* (Jan. 2023), <https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf>; National Institute of Standards and Technology, *Request for Information on Implementation of the*

ENDNOTES (CONTINUED)

United States Government National Standards Strategy for Critical and Emerging Technology, 88 Fed. Reg. 61,527, at 61,528 (Sept. 7, 2023).

²⁷ Executive Order § 7.3.

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