The White House Executive Order on AI and its Impact on Government Contractors

Presented by:

- Townsend Bourne, Partner and Gov't Business Team Leader, Sheppard Mullin
- James Gatto, Partner and AI Team Leader, Sheppard Mullin
- Brian Craig, Assistant General Counsel, SAIC

February 20, 2024

Background

Practice focuses on national security, cybersecurity, and government business issues. Advises clients in a variety of industries, including aerospace and defense, critical infrastructure, IT, emerging technology, commercial products and services, and cloud service providers.

- **Cybersecurity** (training, policies, regulatory, incident response)
- **Government Contracts** (policies, investigations, protests, litigation)
- **National Security** (prohibited sources, supply chain risk, OCONUS work)
- **Emerging technology, IT, cloud, AI** (security, regulatory, best practices)

Recent Publications

- Governmental Practice Cybersecurity and Data Protection, 2023 Recap & 2024 Forecast Alert, 02.08.2024
- Unpacking The FAR Council's Cybersecurity Rules Proposal
  Law360, 10.25.2023
- Bracing For Rising Cyber-Related False Claims Act Scrutiny
  Law360, 09.18.2023
- ChatUSG: What Government Contractors Need To Know About AI
  Briefing Papers, 07.2023

Townsend Bourne

J.D., George Mason University School of Law, 2009, *cum laude*, Notes Editor, *George Mason Law Review*

B.A., Vanderbilt University, 2006, *summa cum laude*

tbourne@sheppardmullin.com

(202) 747-2184

SheppardMullin

Background

James ("Jim") Gatto

J.D., Georgetown University Law Center, 1988

B.E., Electrical Engineering (Physics minor), Manhattan College, 1984

Former U.S. Patent Examiner

jgatto@sheppardmullin.com

(703) 989-9288

35 years of business-focused, legal advice on all aspects of intellectual property strategy, technology transactions, technology-related regulatory issues and litigation, especially ones driven by new business models and/or disruptive technology.

- **Artificial intelligence** (training, policies, IP, regulatory) 20+ years
- **Open Source** (audits, diligence, license issues, policies) 20+ years
- **Blockchain** (blockchain games, crypto/NFTs, metaverses, digital art) 12+ years
- **Interactive entertainment** (games, AR, VR, fantasy sports, esports) 15+ years

Some Recent AI Activity
- Adjunct Professor, Ole Miss Law School "Legal Issues with AI"
- Invited Speaker, Korean Copyright Office "AI and Open Source"
- Speaker, US Copyright Office Listening Session on AI Authorship
- Speaker, USPTO Listening Session on AI Inventorship Issues
- ABA-IPL AI/Machine Learning (AI/ML) Task Force
- Member, Artificial Intelligence Committee, International Technology Law Association
- Member, NIST Generative AI Public Working Group

SheppardMullin

Background

Brian Craig

*J.D., American University, Washington, D.C.*

Brian.Craig@saic.com

Brian Craig has **over 25 years of cybersecurity and government contracts experience** in law firms, and companies both big and small.

He was formerly the General Counsel at early-stage cybersecurity startups, TruSecure and Cybertrust and was the European General Counsel for Lockheed Martin.

He formerly represented clients responding to serious cybersecurity incidents and is now an Assistant General Counsel at SAIC, where his responsibilities include cybersecurity issues.

Today's Discussion

- Overview of Some Key AI Legal Issues – litigation, regulation, guidance and enforcement

- Why Companies Need AI Policies

- Overview of the AI Order

  - Summary of each section

  - Key focus areas for government contractors

- Final Takeaways and Best Practices

SheppardMullin
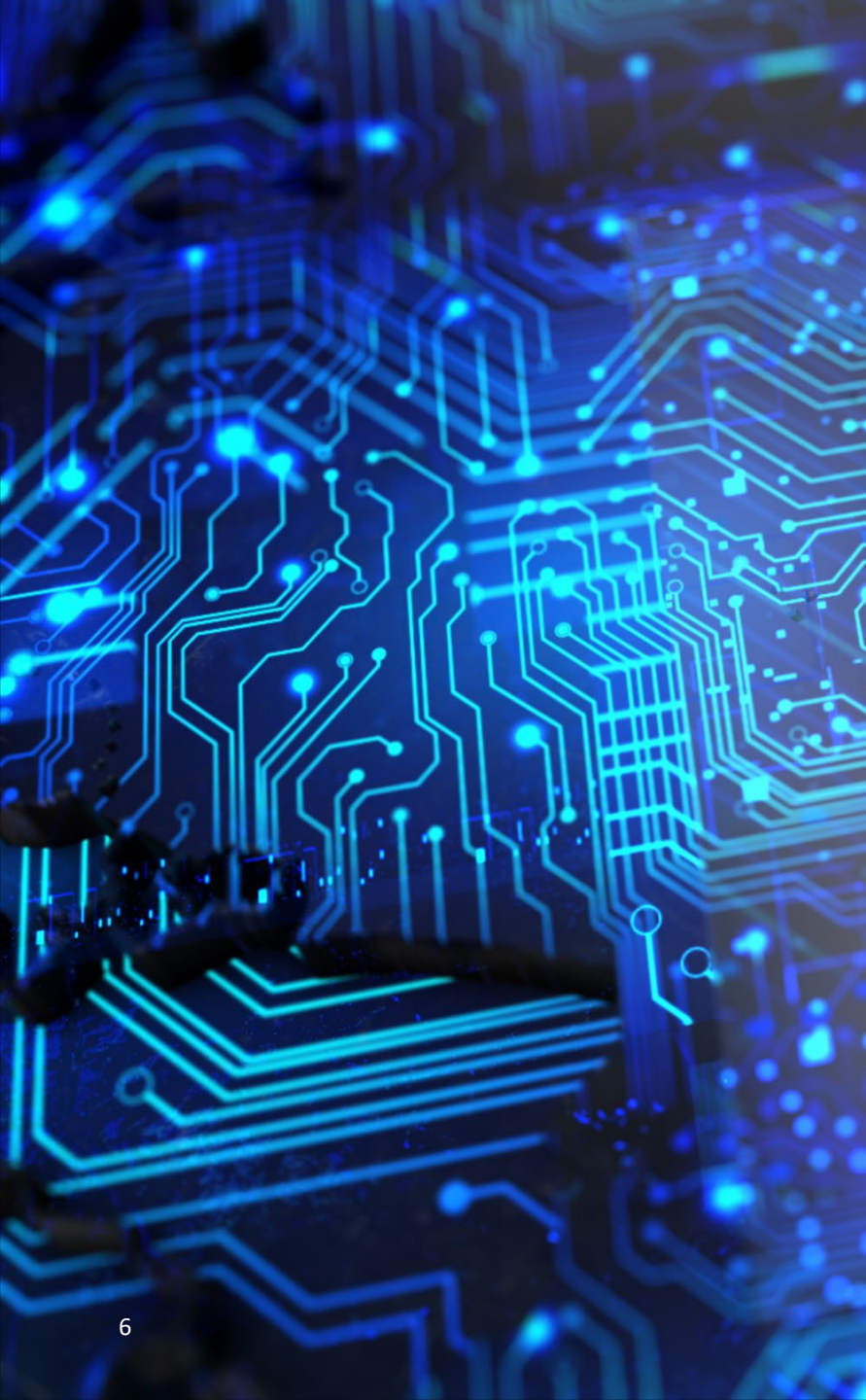
Overview of AI Legal Issues

SheppardMullin

GenAI Risks

Generative AI–related risks that organizations consider relevant and are working to mitigate,
% of respondents[1]

|	Organization considers risk relevant	Organization working to mitigate risk
Inaccuracy	56	32
Cybersecurity	53	38
Intellectual property infringement	46	25
Regulatory compliance	45	28
Explainability	39	18
Personal/individual privacy	39	20
Workforce/labor displacement	34	13
Equity and fairness	31	16
Organizational reputation	29	16
National security	14	4
Physical safety	11	6
Environmental impact	11	5
Political stability	10	2
None of the above	1	8

[1]Asked only of respondents whose organizations have adopted AI in at least 1 function. For both risks considered relevant and risks mitigated, n = 913.
Source: McKinsey Global Survey on AI, 1,684 participants at all levels of the organization, April 11–21, 2023

McKinsey & Company

SheppardMullin

AI Implicates Many Legal Issues

- Lawsuits and regulatory enforcements are coming fast; Algorithmic disgorgement is a severe remedy

- Agency activity is increasing (e.g., FTC)

- Increased focus on "Responsible AI"

- Legislation is increasing on AI use cases (e.g., employee issues)

- Open Source policies need updating due to AI code-generators

- IP protection and ownership of inputs/outputs – AI generated outputs not protectable; only human authored works

- Training of AI requires legal analysis and compliance

- Employee Use of AI without guardrails creates corporate risk

SheppardMullin
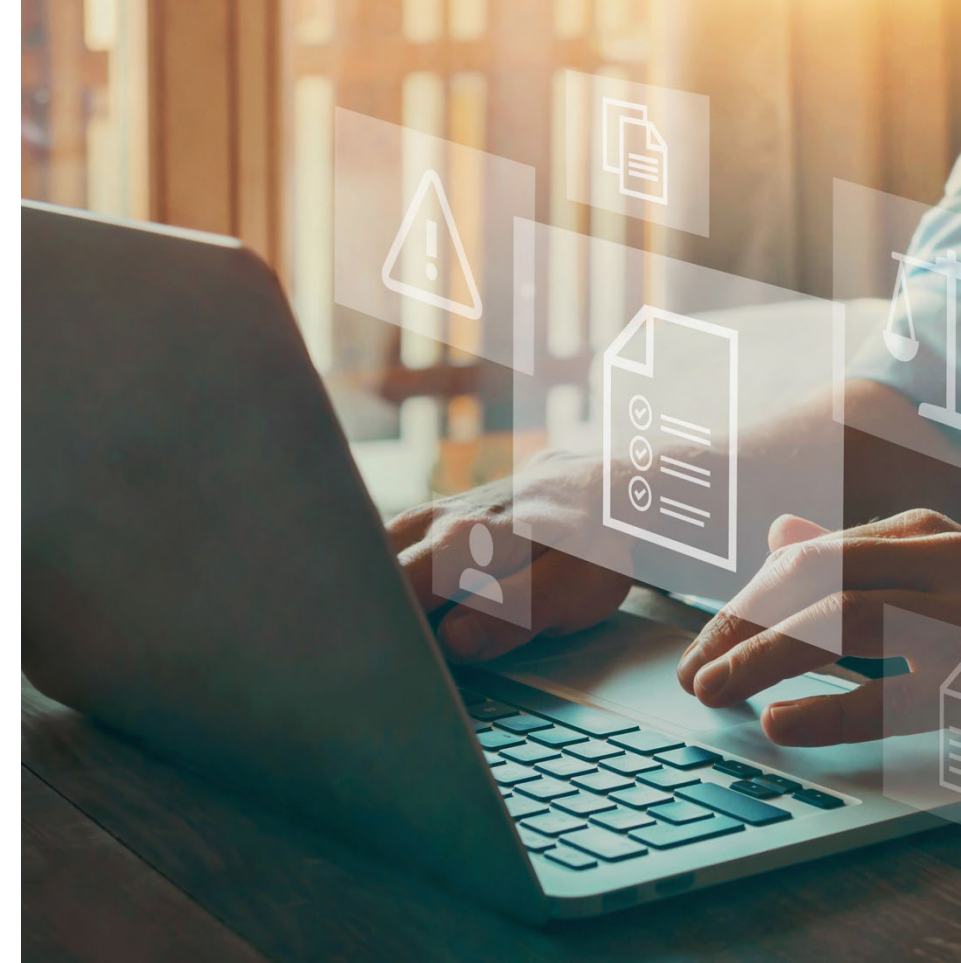
Sample Lawsuit Issues

Lawsuits Over Training AI Models

- Whether AI developers have the right to use the training data
  - Copyright
  - Privacy/Biometric information
  - Confidentiality

- **Infringement** - Do outputs infringe?

AI Code Generators (trained on Open Source code)

- Do AI developers have obligation to maintain copyright information?

- Must AI developers comply with OS license agreement conditions (attribution, notice of modifications, etc.)?

Defamation
- Do AI hallucinations falsely stating plaintiff is a party to a lawsuit alleging fraud/embezzlement constitute defamation?

SheppardMullin

FTC and AI

The FTC has been actively involved in regulating AI and its applications – See Appendix for More

- Has issued warnings, guidance, policy statements, and engaged in enforcement actions related to AI and potential harms to consumers and competition

- Key Topics
    - Privacy, biometric privacy and security
    - Accuracy
    - Fairness and non-discrimination
    - Transparency and Explainability
    - Safety and reliability
    - Advertising

SheppardMullin
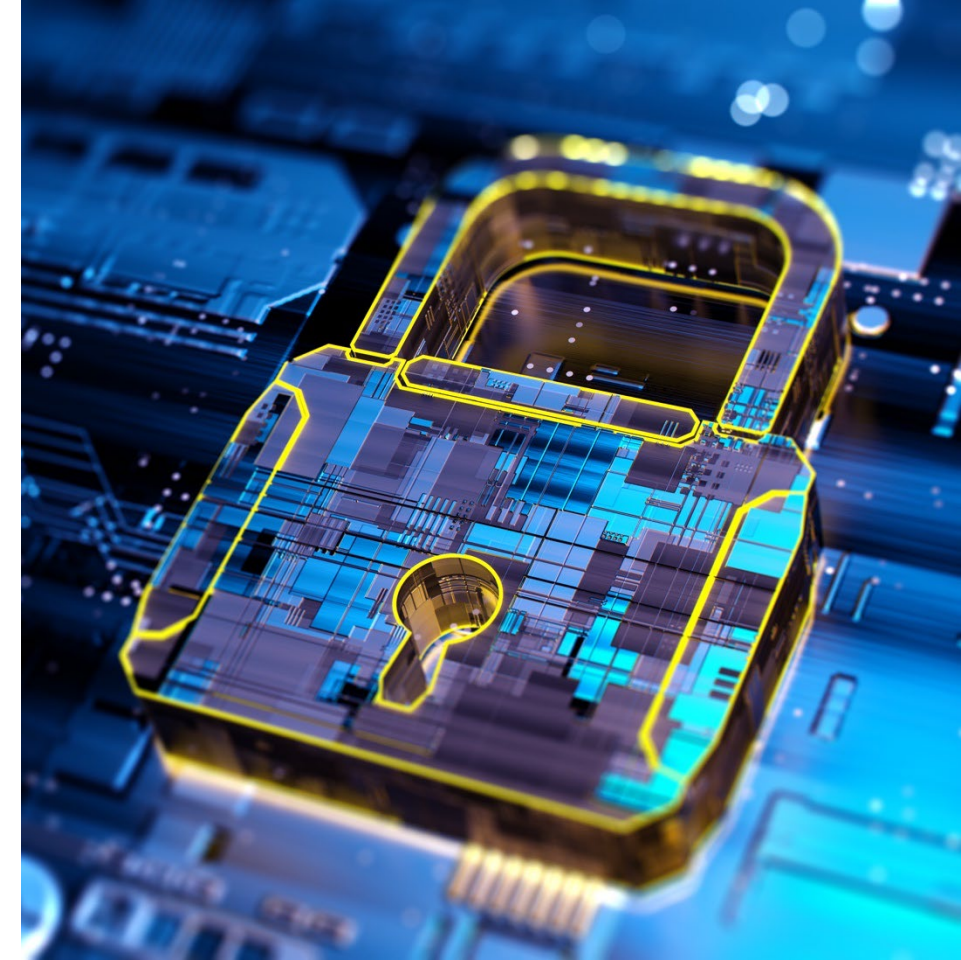
Regulatory Enforcements are Increasing

FTC Investigation of OpenAI

- Determining whether OpenAI "engaged in unfair or deceptive privacy or data security practices or engaged in unfair or deceptive practices relating to risks of harm to consumers"

- FTC sent a comprehensive 20-page letter with detailed requests for documents and policies related to developing, testing, training and advertising of its large language models

SheppardMullin

FTC and AI

May 2023 – FTC policy statement on biometric information; FTC will challenge the misuse of biometric information (facial recognition, fingerprints, iris scans, or voiceprints) by AI

May 2023 – the FTC/DOJ charged Amazon with violating COPPA – retained children's **voice recordings** indefinitely and allowed any employee or contractor to access them, even after parents deleted them from their accounts

SheppardMullin

FTC and AI

May 2023 - FTC charged Ring (home security cameras) with compromising customers' privacy by allowing employees/contractors to access consumers' private videos and by failing to implement basic privacy and security protections, enabling hackers to take control of consumers' accounts, cameras, and videos

SheppardMullin

# Just Because It's "Your" Data ≠ Right To Use

- You need the right to use the data on which you are training and for that purpose!

- Many companies have troves of valuable user data

- Want to use to train AI

- Use of customer data that exceeds use permitted by the privacy policy/terms in effect at the time the data was collected could be problematic

[Training AI Models – Just Because It's Your Data Doesn't Mean You Can Use It](#)

SheppardMullin

2022 FTC Settlement with Everalbum

- FTC enforcement for unauthorized use of images collected for one purpose (online photo albums) but used for another (train facial recognition technology)

- Result: "**Algorithmic disgorgement**"
  - Penalty for improperly using data to build algorithmic systems like AI/ML models
  - Required to destroy ill-gotten data and the models/algorithms derived from it
  - Wipes out investment made to develop the AI!

SheppardMullin
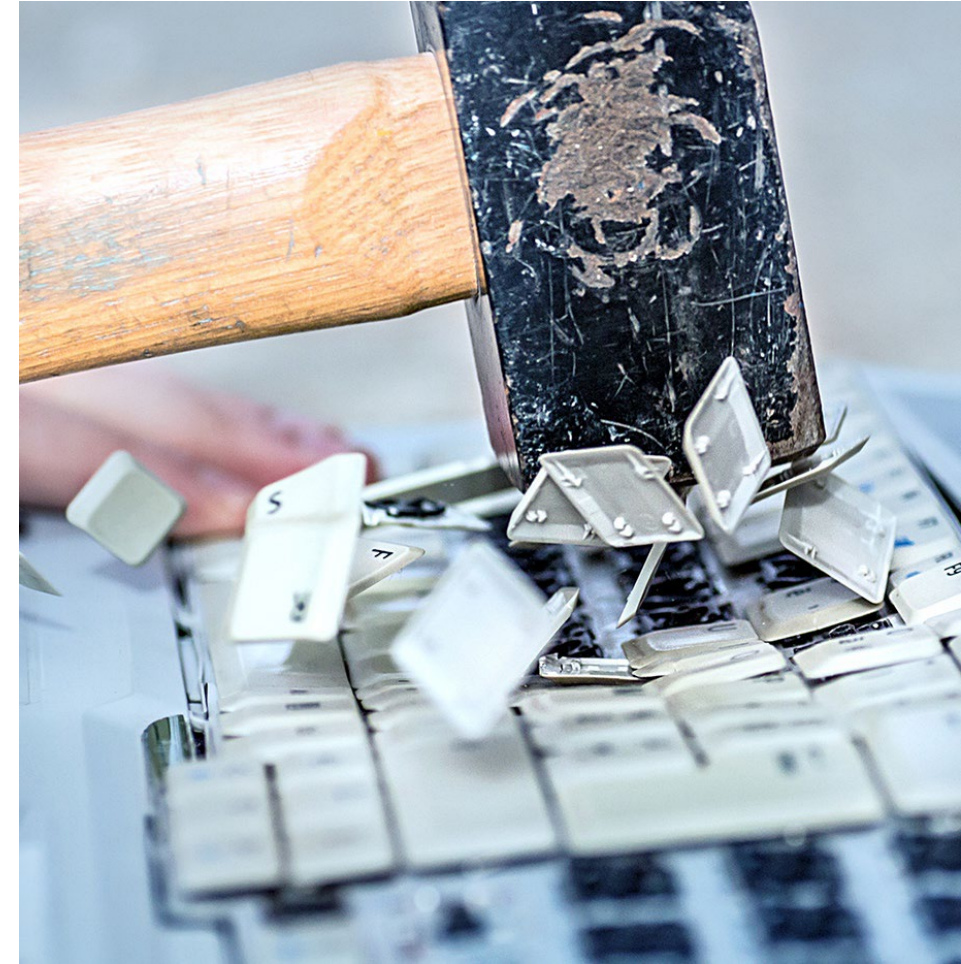
Employee Use of GenAI

- How do you manage the potential legal issues?

- Education/training

- Develop policies on GenAI use

- Often tools have enterprise version and individual version with significant differences in legal consequences

SheppardMullin

AI Code Generators

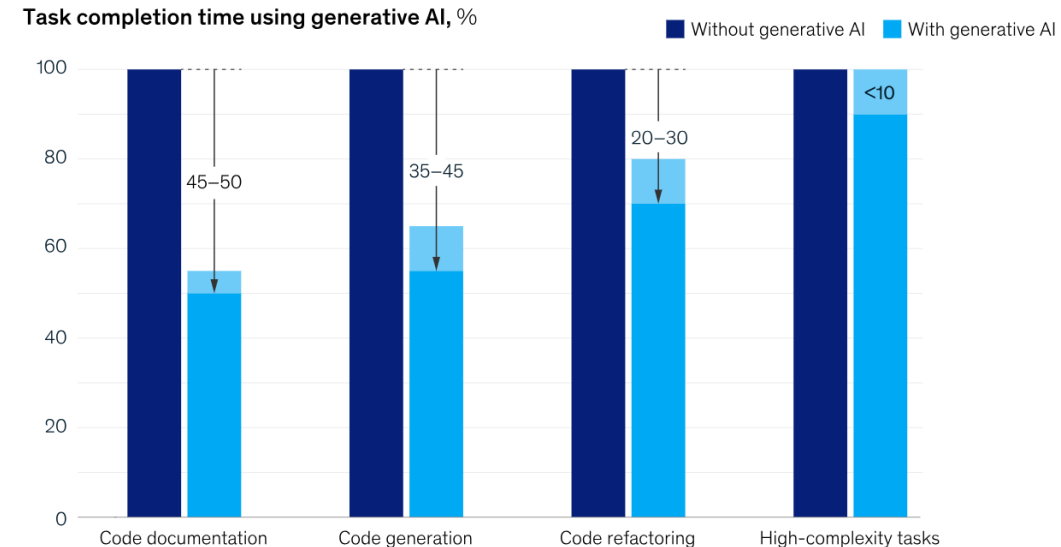Training models using OS code is likely not infringement, but consider …

- Tainting of proprietary code

- License compliance

- GenAI Tools for OS management:
  - Filters
  - Reference
  … but they are not 100% effective

- **If you do not have an OS policy, you need one**

Open Source Software Policies – Why You Need Them And What They Should Include

- **If you do, you need to update for GenAI**

Solving Open Source Problems With AI Code Generators – Legal issues and Solutions

Generative AI can increase developer speed, but less so for complex tasks.

Task completion time using generative AI, %

Legend: ■ Without generative AI ■ With generative AI

- Code documentation: 45–50
- Code generation: 35–45
- Code refactoring: 20–30
- High-complexity tasks: <10

McKinsey & Company

GenAI Inputs – Confidentiality

- Many employees don't know when their inputs are not confidential

- Whether confidential can depend on the tools, terms and features of tools

- Example from ChatGPT TOU:

  (c) Use of Content to Improve Services. We **do not use** Content that you provide to or receive from our API ("API Content") to develop or improve our Services. We **may use** Content from Services other than our API ("Non-API Content") to help develop and improve our Services

- Some TOU require **you to grant license** to tool provider

- Policies should approve specific tools, versions, features

Liability Issues – Output of GenAI Tools

If output infringes copyright/TM, who is liable – tool providers or users?

- Some TOS include indemnity:

  - **In some cases, user indemnifies tool provider**

  - Some tool providers now providing indemnity

Consider approving tools that *indemnify you*!

Disapprove where *you indemnify* tool provider!

Ownership of GenAI Output

- Terms of Use for different tools treat ownership differently

- Some grant ownership, some don't

- Some recognize another user's prompt may generate same output and they own it too

- Some require **you grant license** to tool provider

SheppardMullin

Protectability of GenAI Output

- Copyright Protection for output of GenAI is limited – must be human authorship

Patents

- AI Tech is protectable

- Patentability of AI-assisted inventions limited to significant human contribution

[USPTO Guidance on AI Inventorship](#)

SheppardMullin

Some Thoughts on Employee Use Policy

- Consider approval of specific versions of tools based on TOU and other criteria

- Specify approved versions (e.g., enterprise only) and features (e.g., API-based access)

- Consider approval based on use cases (e.g., content for internal use only vs. external use)

- Distinguish between use of content as asset vs. inspiration

- Ensure no right for AI platform to use inputs

- Ensure ownership of inputs/outputs

- Ensure fact checking, no biased use, etc.

SheppardMullin
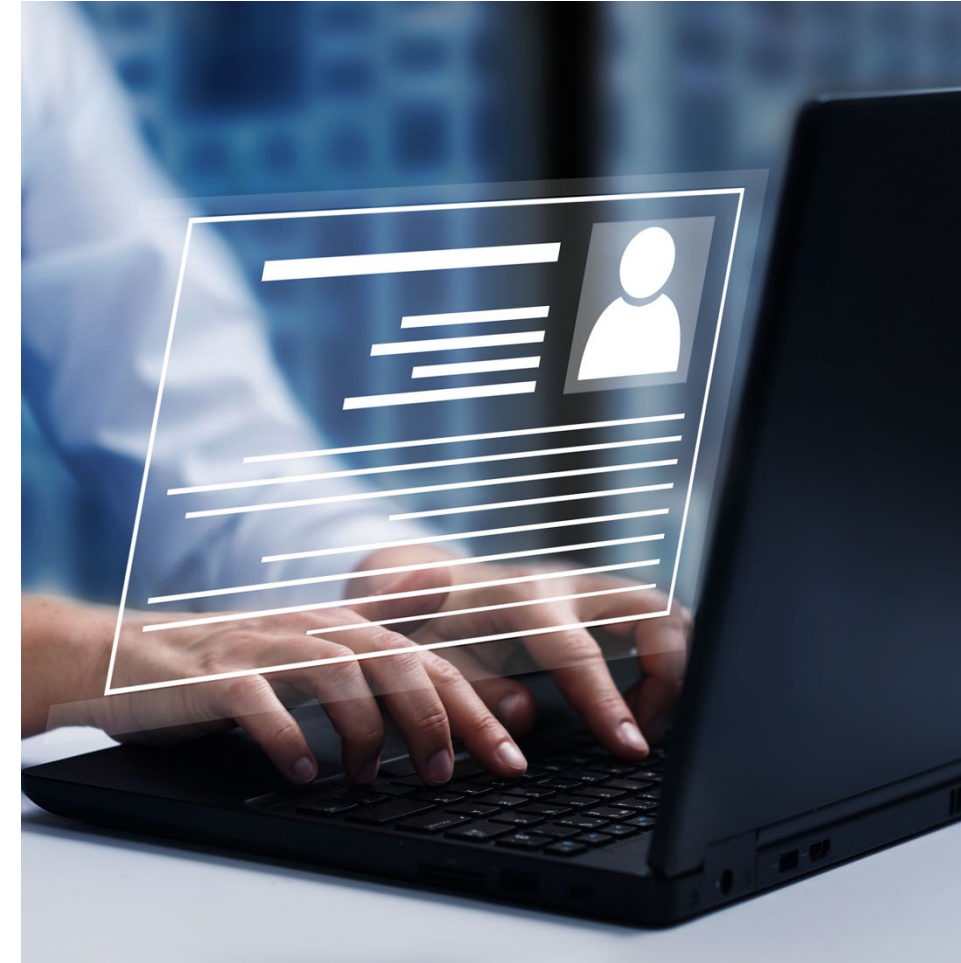
Policies on Training AI

- Do data mapping/audit for data used to train AI; ensure the right to use the data for the intended purpose

- Ensure compliance with any applicable restrictions/obligations in any licenses

- Responsible AI – fair, transparent, explainable … test for bias, discrimination

- Truthful advertising

- Many other components depending on the use cases

- Questions To Ask Before Using Company Data to Train AI

SheppardMullin

AI Diligence in Transactions

- Need to consider unique issues when investing in/acquiring companies

- Need to supplement standard diligence when target building or using GenAI

- Need corresponding reps and warranties

- Companies looking to get funded/acquired need GenAI policies to be prepared for diligence
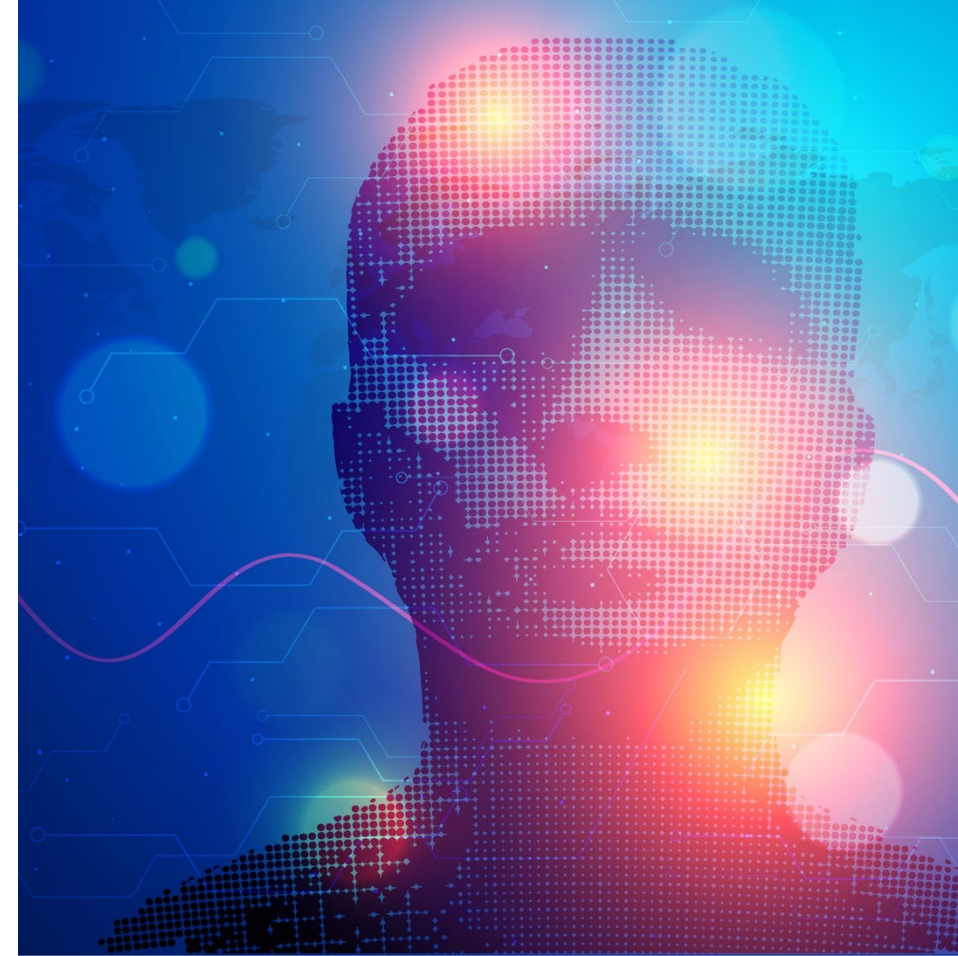
Overview of the AI Executive Order (Oct. 30, 2023)

Sec. 4 – Ensuring Safety and Security of AI Technology

Sec. 5 – Promoting Innovation and Competition

Sec. 6 & 7 – Supporting Workers; Advancing Equity and Civil Rights

Sec. 8 – Protecting Consumers, Patients, Passengers, & Students

Sec. 9 – Protecting Privacy

Sec. 10 – Advancing Federal Government Use of AI

Sec. 11 – Strengthening American Leadership Abroad

SheppardMullin

The Executive Order - Big Picture

The effect of the Executive Order will be far reaching:

- Will impose testing obligations on developers of the most powerful systems and require sharing results

- Directs many agencies to take specific actions to protect consumers, patients, students and workers and industries; mandates interagency cooperation

- Assess potential job displacement due to AI and how to remedy that

- Mandates efforts for managing content authentication and provenance (e.g., to prevent deepfakes)

- Calls on Congress to implement federal privacy legislation

- Takes aim at "BAD" AI (**b**iased **a**nd **d**iscriminatory AI) to promote equity and civil rights - See here

- Focuses on US Government's responsible use of AI

- Creates programs and provides resources to enhance US leadership in innovation

- Promotes US leadership in coordinating global regulatory efforts

- Takes steps to protect US infrastructure from foreign bad actors' use of AI

SheppardMullin
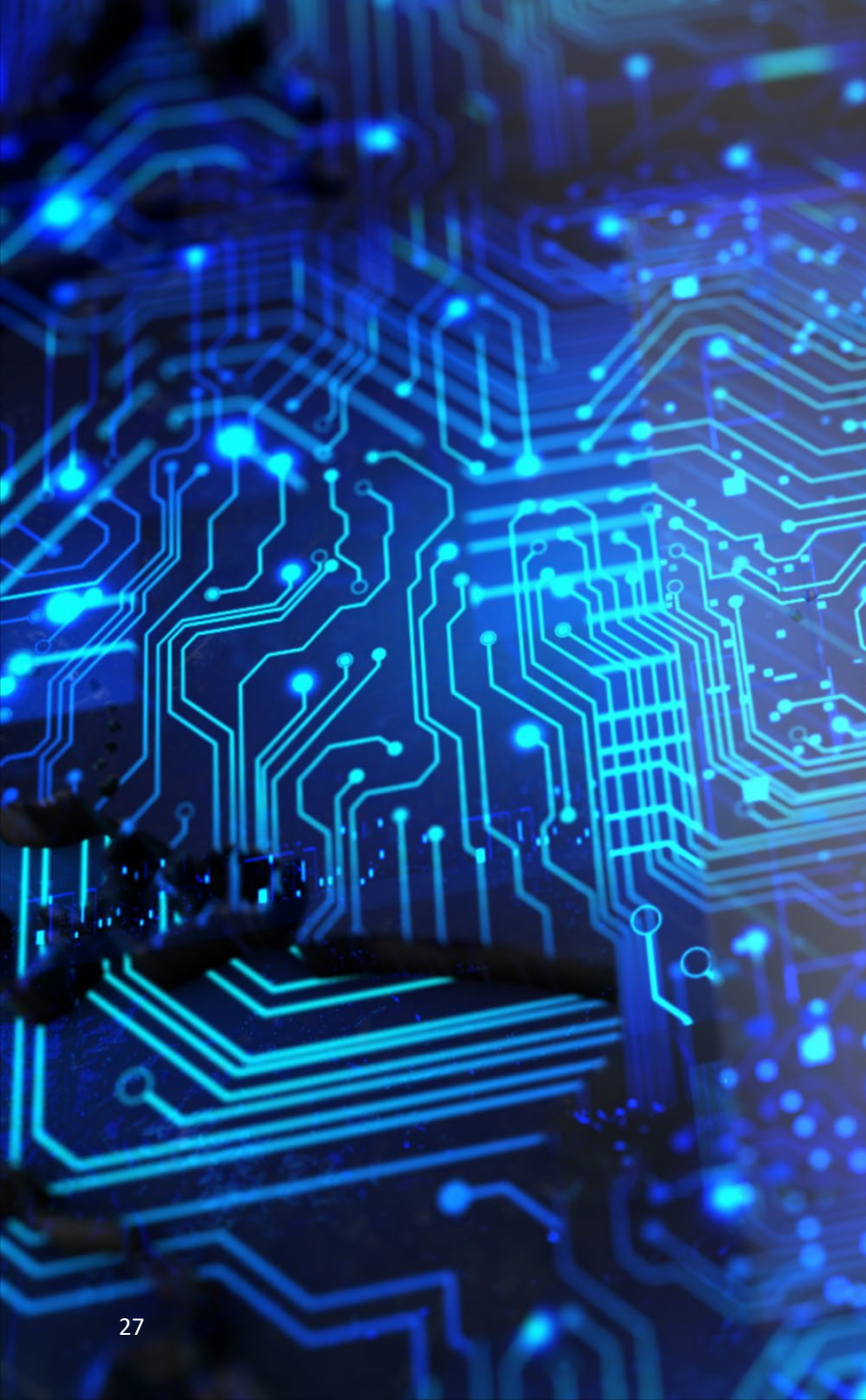
Legal Background to Executive Order

SheppardMullin

AI Bill of Rights

- In October 2022, the White House published the "Blueprint for an AI Bill of Rights, Making Automated Systems Work for the American People"

- Five Principles:
  - Safe and Effective Systems
  - Algorithmic Discrimination Protections
  - Data Privacy
  - Notice and Explanation
  - Human Alternatives, Consideration, and Fallback

- AI Bill of Rights is a voluntary, non-binding framework

SheppardMullin
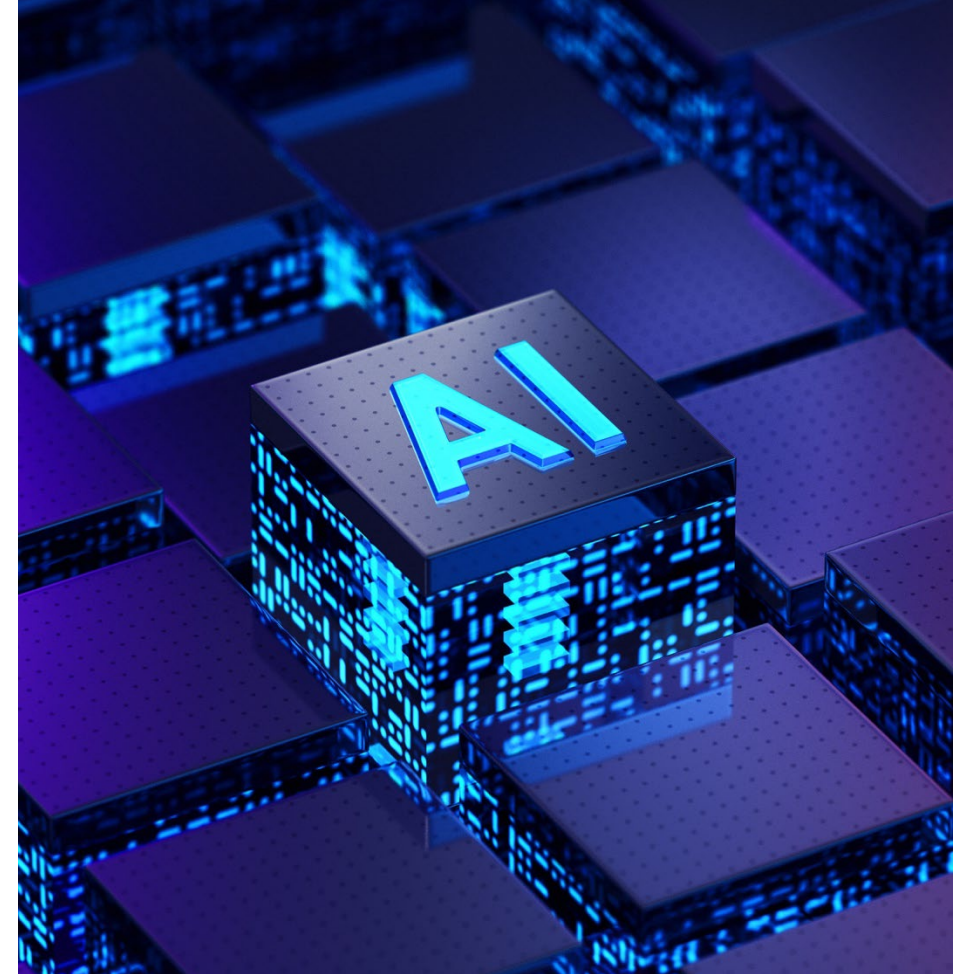
Artificial Intelligence Risk Management Framework

- On January 23, 2023, the National Institute of Standards and Technology ("NIST") released the first version of its "Artificial Intelligence Risk Management Framework"
  - The NIST AI RMF also is a voluntary framework
- Purpose: a resource for organizations designing, developing, deploying, or using AI systems regarding management of risks associated with AI and promoting trustworthy and responsible development and use of AI systems

SheppardMullin

Department of Homeland Security AI Task Force

- On April 21, 2023, the Secretary of Homeland Security announced a new initiative to combat evolving threats, including those related to generative AI

- The initiative includes the creation of an AI Task Force that will drive specific applications of AI to advance critical homeland security missions, including:
  - Integrating AI to enhance the integrity of supply chains and the broader trade environment, such as deploying AI to improve screening of cargo and identifying the importation of goods produced with forced labor
  - Collaborating with government, industry, and academia partners to assess the impact of AI on DHS's ability to secure critical infrastructure

SheppardMullin

Joint Agency Statement Regarding Enforcement Efforts in Automated Systems

- On April 25, 2023, officials from the Federal Trade Commission (FTC), the Department of Justice (DOJ), the Consumer Financial Protection Bureau (CFPB), and the U.S. Equal Employment Opportunity Commission (EEOC) released a joint statement on "Enforcement Efforts Against Discrimination and Bias in Automated Systems."
  - Outlines each respective agencies' commitment to enforce their respective legal and regulatory authority to ensure responsible innovation in the AI space
  - Reiterates these agencies understand their responsibility to ensure the development and deployment of AI systems is consistent with federal laws (e.g., Americans with Disabilities Act, Fair Housing Act, etc.)

Voluntary Commitments to Manage AI Risks

July 21, 2023 – Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI

FACT SHEET: Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI | The White House

SheppardMullin

AI Executive Order and Beyond

- **October 30, 2023** – AI Executive Order issued

- **January 29, 2024 –** White House Report on 90-day action
  - Agencies report they have completed <u>all</u> of the 90-day actions tasked by the EO
  - <u>Fact Sheet: Biden-Harris Administration Announces Key AI Actions Following President Biden's Landmark Executive Order | The White House</u>

- Numerous additional actions due over next year; key dates:
  - **April 27, 2024** (180-day actions)
  - **July 26, 2024** (270-day actions)
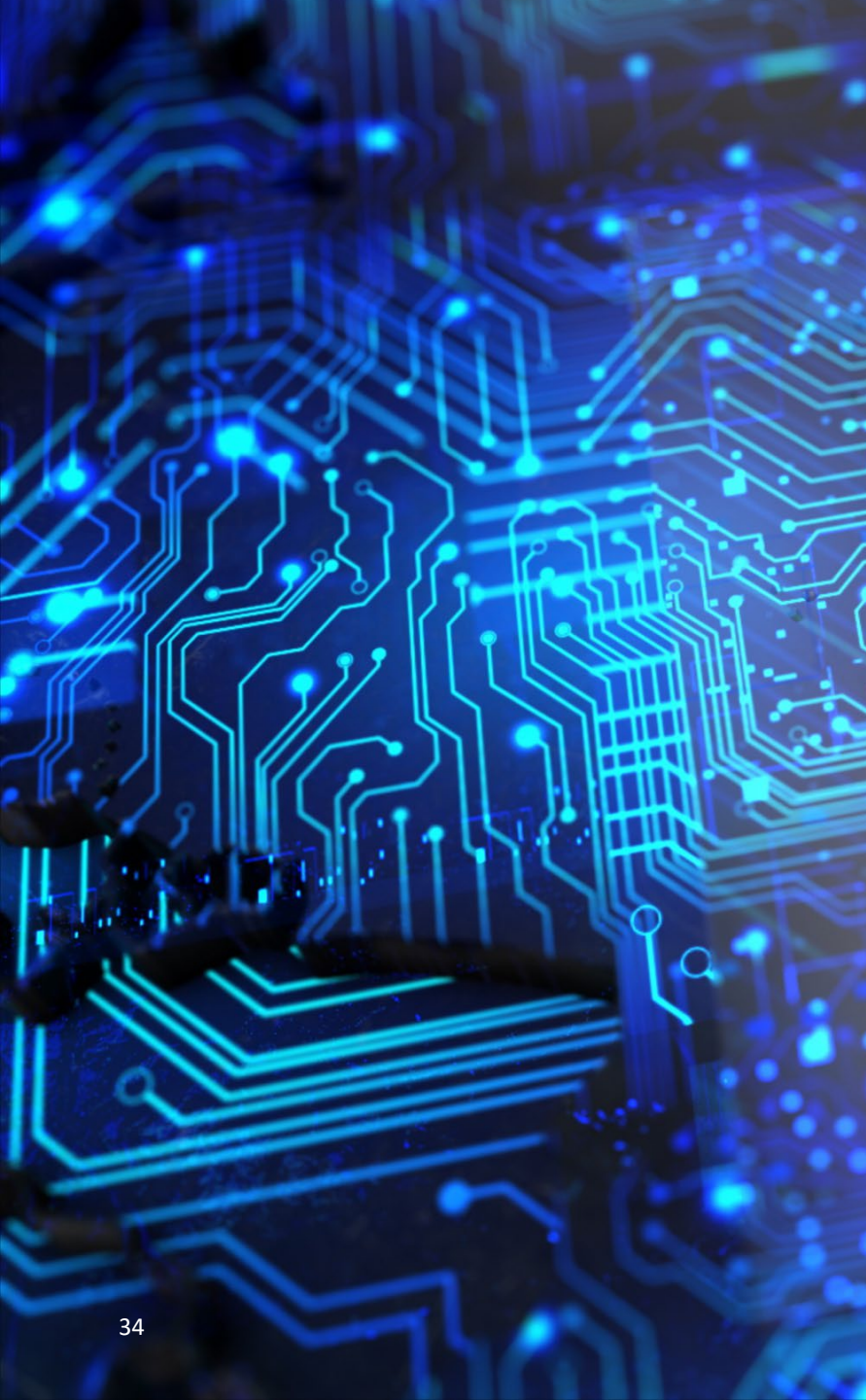
AI Executive Order: Promoting Innovation & Competition

SheppardMullin

AI Executive Order: Promoting Innovation & Competition

Key Takeaways:

- Focus on attracting AI talent to the United States

- Promote innovation through launch of pilot program to promote AI-related research and development

- Expand bilateral, multilateral, and multistakeholder engagements to collaborate on AI

- Promote competition through FTC efforts

- Commerce to continue CHIPS Act efforts and promote semiconductor innovation and competition where semiconductors power AI technologies

- Promote the responsible development and deployment of AI abroad to solve global challenges (e.g., sustainable development and mitigating dangers to critical infrastructure)

SheppardMullin

Intellectual Property

The USPTO Director will:

- Publish guidance to USPTO patent examiners and applicants addressing inventorship and the use of AI, including generative AI, in the inventive process
- Guidance was published: **USPTO issues inventorship guidance and examples for AI-assisted inventions**
- Consult with the CO, once it publishes its AI study and issue recommendations to the President relating to copyright and AI, including the scope of protection for works produced using AI and the treatment of copyrighted works in AI training

DHS will assist developers of AI in combatting AI-related IP risks by developing a training, analysis, and evaluation program to mitigate AI-related IP risks, including AI-related IP theft; enhance IP enforcement

SheppardMullin
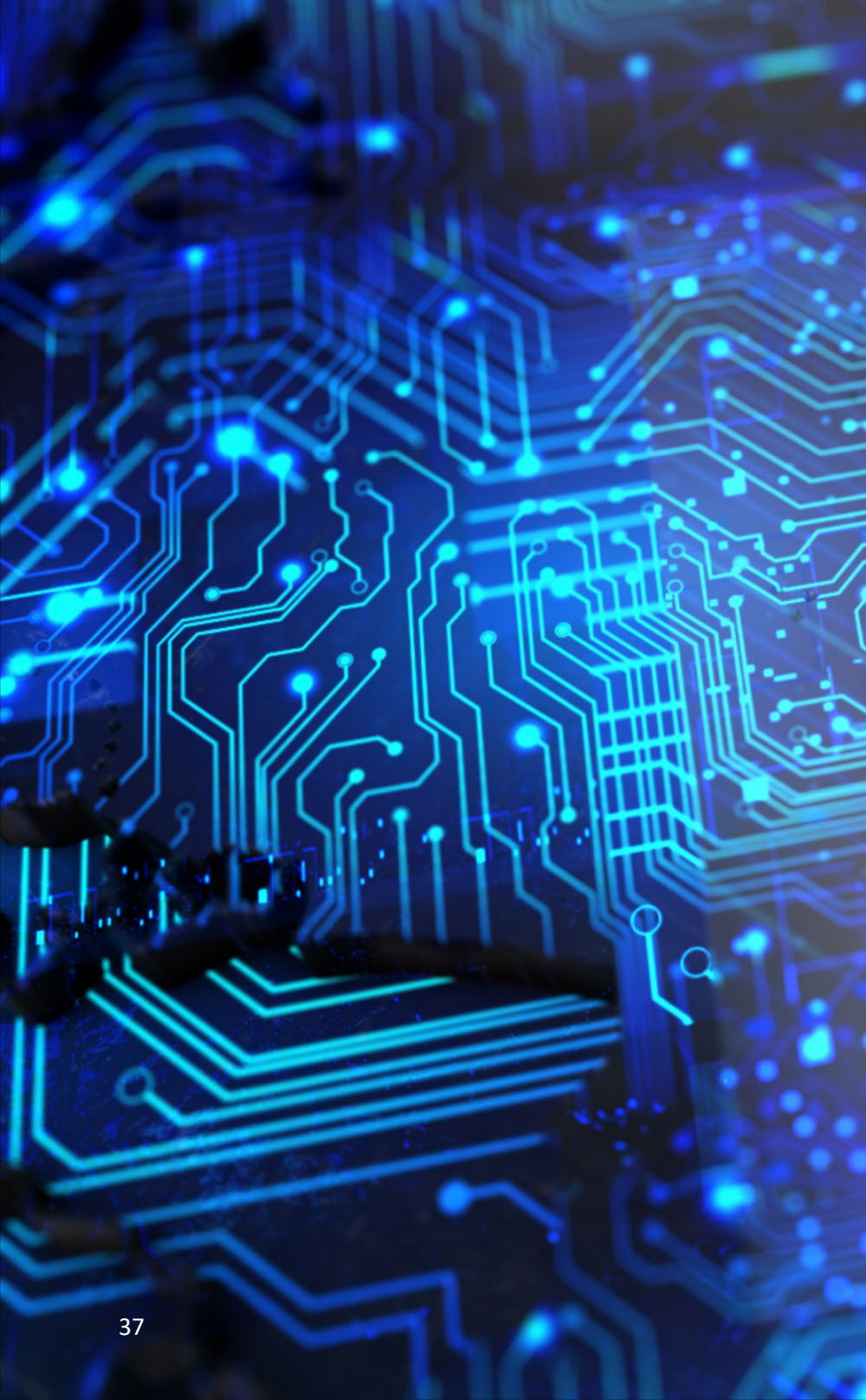
AI Executive Order – Supporting Workers

SheppardMullin

Workers

Key Takeaways: To protect against the dangers of increased workplace surveillance, bias, and job displacement, the EO proposes to:

- Support workers' ability to bargain collectively

- Invest in workforce training and development accessible to all

- Develop principles, guidance, and best practices to mitigate the harms and maximize the benefits of AI for workers by addressing job displacement; labor standards; workplace equity, health, and safety; and data collection

SheppardMullin

Workers

- To help ensure that AI deployed in the workplace advances employees' well-being, The Secretary of Labor shall, within 180 days of the date of this order **develop and publish principles and best practices for employers that could be used to mitigate AI's potential harms to employees' well-being and maximize its potential benefits**

- To support **employees whose work is monitored or augmented by AI in being compensated appropriately for all of their work time**, the Secretary of Labor shall issue guidance

Workers – AI Impact on Jobs

To advance the Government's understanding of AI's implications for workers, the following actions will occur in the next 180 days:

- The Chairman of the Council of Economic Advisers shall prepare and submit a report to the President on the **labor-market effects of AI**

- To evaluate necessary steps for the Federal Government **to address AI-related workforce disruptions,** the Secretary of Labor shall submit to the President a report **analyzing the abilities of agencies to support workers displaced by the adoption of AI and other technological advancements**

SheppardMullin
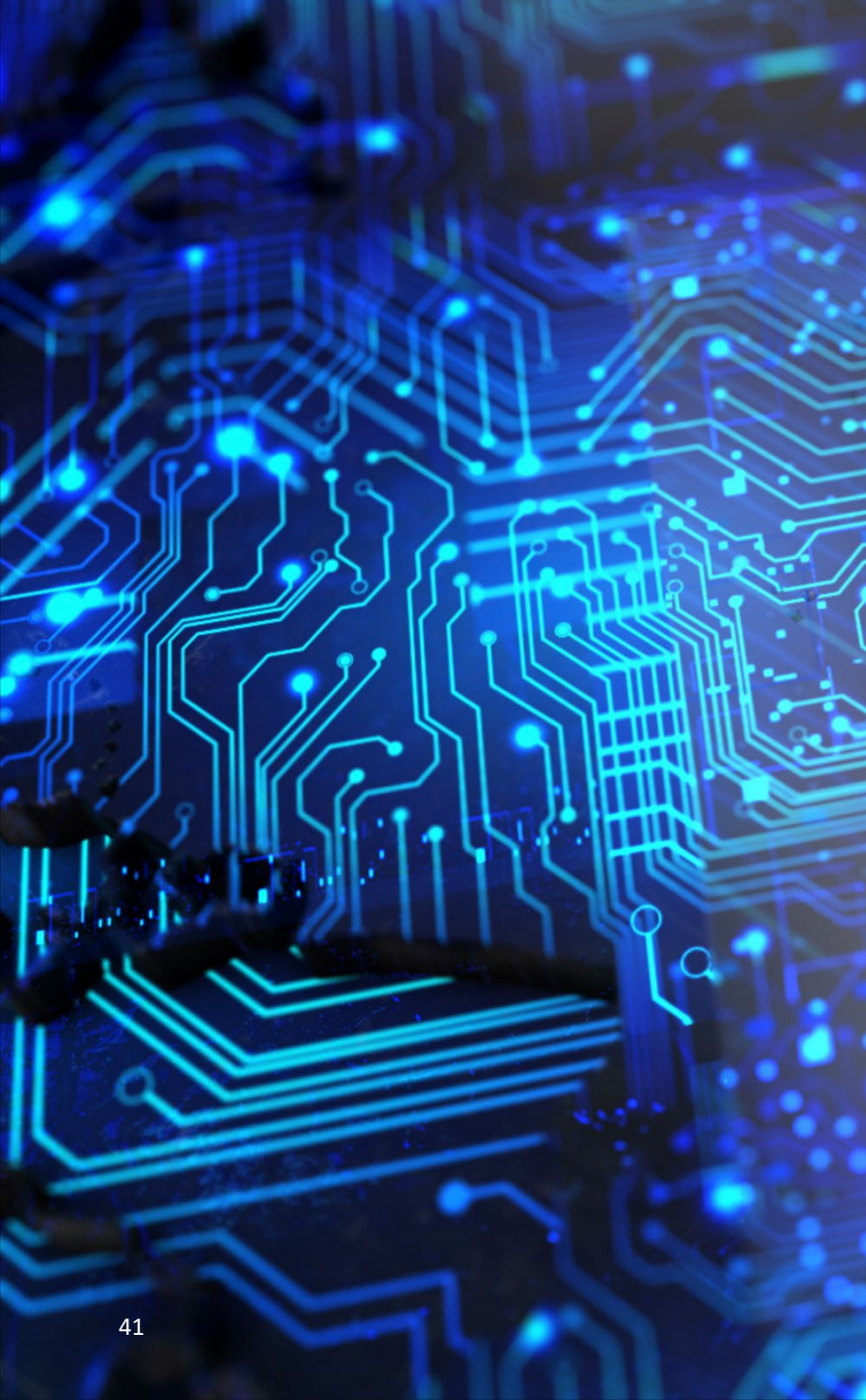
AI Executive Order – Protecting Consumers, Patients, Passengers & Students

SheppardMullin

Consumers

Encourages independent regulatory agencies to consider:

- Using their full range of authorities 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

- Rulemaking, emphasizing or clarifying where existing regulations and guidance apply to AI, including clarifying **the responsibility of regulated entities to conduct due diligence on and monitor any third-party AI services they use, and emphasizing or** clarifying requirements and expectations related to the transparency of AI models and regulated entities' ability to explain their use of AI models

SheppardMullin

Patients

- Advance the responsible use of AI in healthcare and developing affordable and life-saving drugs
- The Department of Health and Human Services will establish a safety program to address risks associated with the use of AI in healthcare which will receive reports of – and act to remedy – harms or unsafe healthcare practices involving AI
- Within 365 days of the date of this order, the Secretary of HHS shall develop a strategy for regulating the use of AI or AI-enabled tools in drug-development processes

Students

- To help ensure the responsible development and deployment of AI in the education sector, the Secretary of Education shall, within 365 days of the date of this order, develop resources, policies, and guidance regarding AI

- Include the development of an "AI toolkit" for education leaders implementing recommendations from the Department of Education's AI and the Future of Teaching and Learning report

SheppardMullin
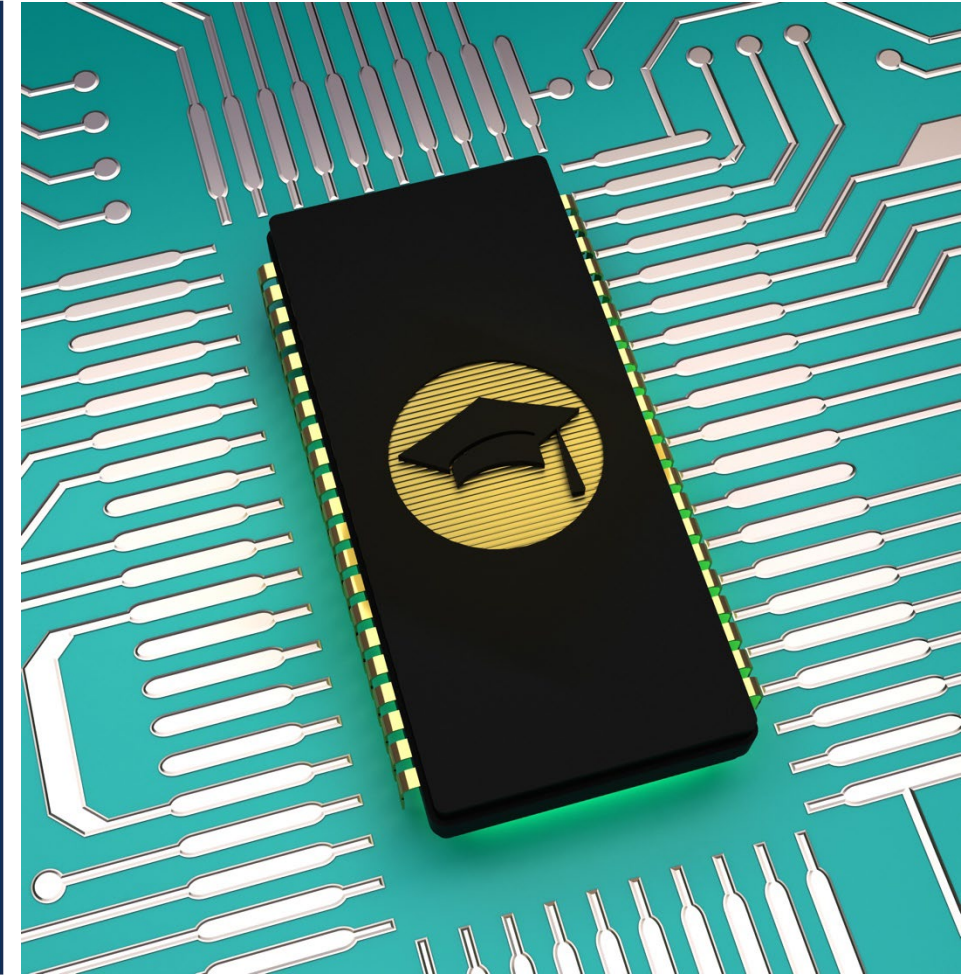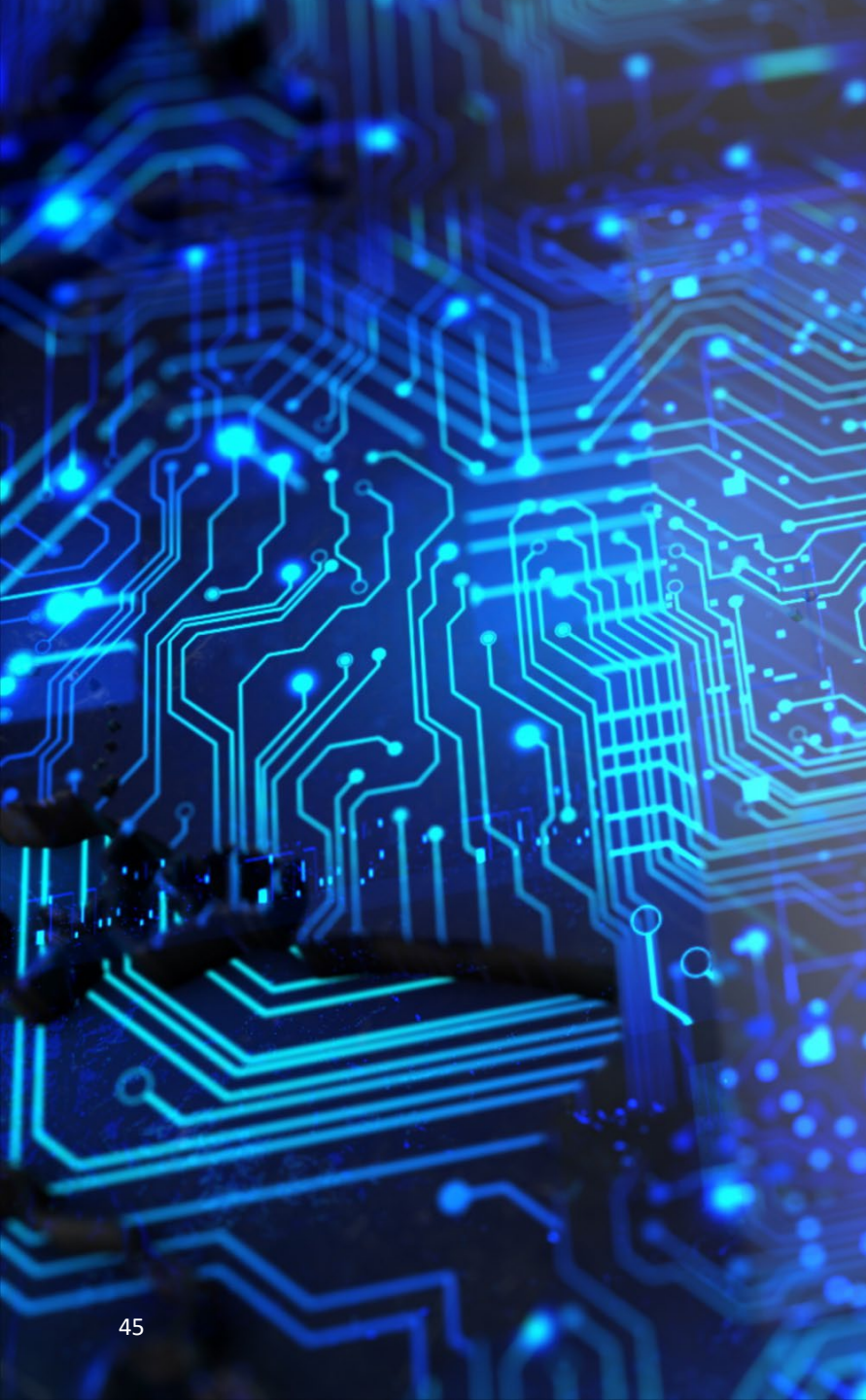
AI Executive Order – Protecting Privacy

SheppardMullin

Privacy

- The Federal Government will enforce existing consumer protection laws and principles and enact appropriate safeguards against fraud, unintended bias, discrimination, infringements on privacy, and other harms from AI

- Emphasis on critical fields like healthcare, financial services, education, housing, law, and transportation

- **Calls on Congress** to pass bipartisan data privacy legislation to protect Americans (especially kids)

Privacy – Agency Use

To mitigate AI privacy risks including by collection or use of personal information the Director of OMB shall:

- Evaluate and take steps to identify commercially available information (CAI) procured by agencies

- Evaluate agency standards and procedures associated with the collection, processing, maintenance, use, sharing, dissemination, and disposition of CAI that contains personally identifiable information (other than when it is used for the purposes of national security)

- Inform potential guidance to agencies on ways to mitigate privacy and confidentiality risks from agencies' activities related to CAI

SheppardMullin
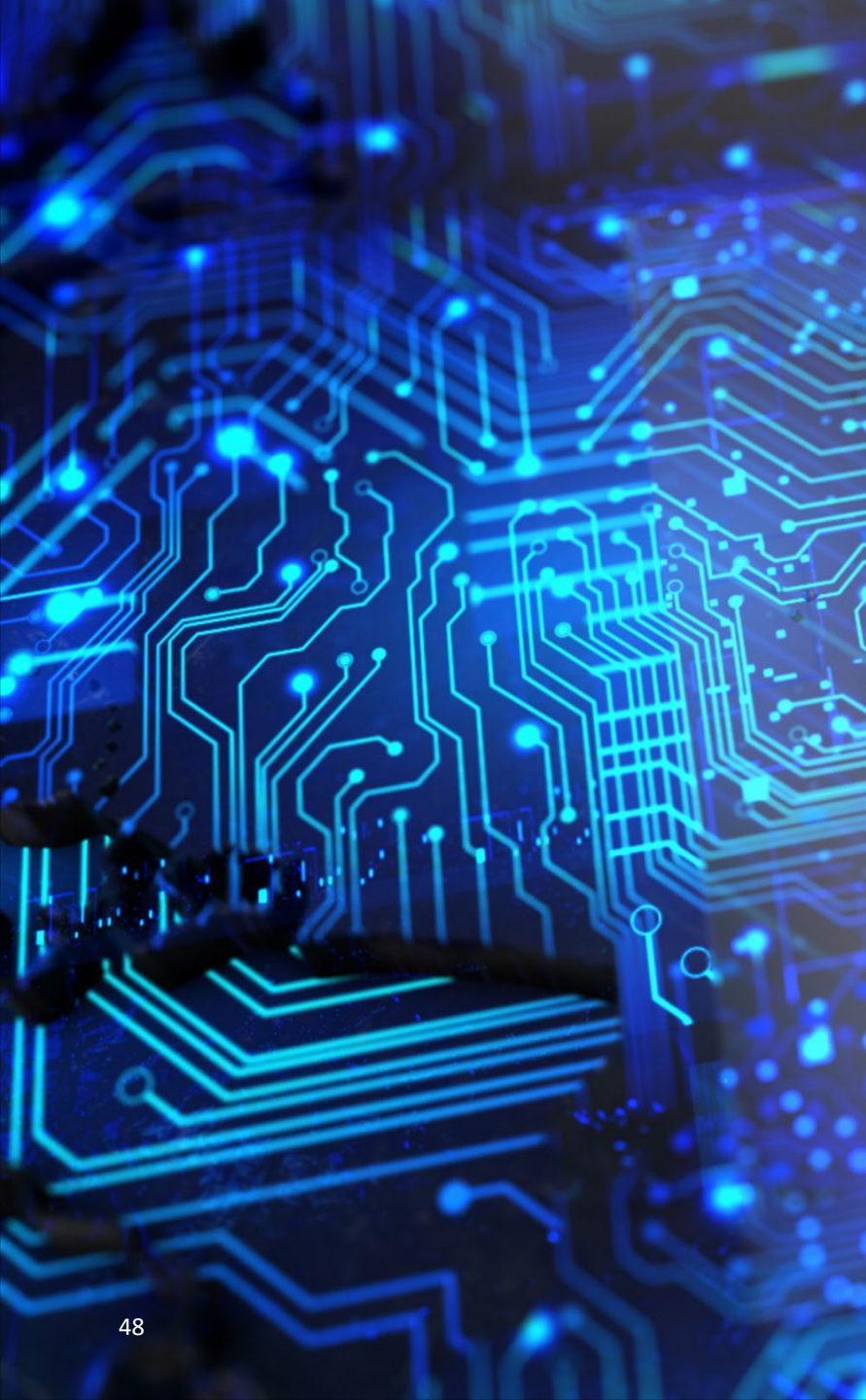
AI Executive Order – Ensuring Safety and Security of AI

SheppardMullin

Standards and Testing

- National Institute of Standards and Technology (NIST) to establish guidelines, standards, best practices within 270 days (building on its <u>AI Risk Management Framework)</u>

  - AI RMF companion publication for generative AI

  - Companion resource for secure software development practices for generative AI

  - Guidance and benchmarks for evaluating AI capabilities focusing on harm in cybersecurity and biosecurity

  - Guidelines for development and testing to enable safe, secure, and trustworthy AI – particularly dual-use foundation models

- Dept of Energy and DHS to address AI systems' threats to critical infrastructure, and chemical, biological, radiological, nuclear, and cybersecurity risks

- *NIST standards likely to form basis for contractor expectations and requirements

SheppardMullin

Safety and Testing

- Developers of the most powerful AI systems (e.g., foundation models) must share their safety test results and other critical information with the U.S. government **(in line with the Defense Production Act)**
  - The **DPA** is the primary source of presidential authorities to expedite and expand the supply of materials and services from the U.S. industrial base needed to promote the national defense
- **This applies to any foundation model** that poses a serious risk to national security, national economic security, or national public health and safety

Malicious Cyber-Enabled Activity & Foreign Interference

- Concern regarding foreign malicious cyber actors and the use of U.S. Infrastructure-as-a-Service ("IaaS") providers

- Secretary of Commerce proposed regulations for IaaS providers to report transactions with foreign persons to train large AI models with potential malicious cyber capabilities

- U.S. IaaS providers to ensure foreign resellers of U.S. IaaS products verify the identity of any foreign person that obtains an IaaS account from the foreign reseller
  - Regulations to provide minimum standards for verifying identity

- Possible exemption for compliance with security best practices

- NPRM released January 29, 2024 (info here)

- Comment period open through April 29, 2024

SheppardMullin

Leveraging AI in Critical Infrastructure and in Cybersecurity

- Relevant heads of agency with authority over critical infrastructure will work with CISA to evaluate potential risks related to the use of AI in critical infrastructure

- Commerce and DHS to incorporate NIST AI RMF and other appropriate security guidance into relevant safety and security guidelines for critical infrastructure
  - Regulatory action to mandate guidelines for critical infrastructure (within 240 days)

- DHS to establish AI Safety and Security Board with experts from private sector, academia, and government to advise on AI use in critical infrastructure

- Pilot project to identify and deploy AI to help identify and remediate US government cyber vulnerabilities

SheppardMullin

Reducing Risks Posed by Synthetic Content/Content Authentication

- To protect Americans from AI-enabled fraud and deception (including deepfakes) and foster capabilities for identifying and labeling "synthetic content" (created or modified by AI)

- To establish the authenticity and provenance of digital content, both synthetic and not synthetic, produced by the Federal Government or on its behalf

- OMB Guidance (within 180 days) on:
  - Detecting AI-generated content
  - Authenticating content and tracking its provenance
  - Watermarking and clearly labeling AI-generated content
  - Preventing GenAI from producing child sexual abuse/non-consensual intimate imagery
  - Testing software for the foregoing
  - Auditing and maintaining synthetic content

- *FAR Council to consider FAR updates incorporating guidance

National Security Memorandum

- Development of a National Security Memorandum on AI to the President
  - Address the governance of AI used as a component of a national security system or for military or intelligence purposes

- Required Items:
  - Guidance to DoD, other relevant agencies, and the Intelligence Community regarding the continued adoption of AI capabilities the advance national security mission
    - Includes guidance regarding AI assurance and risk management practices
  - Order continued actions for addressing potential use of AI systems by adversaries and foreign actors that threaten DoD or Intelligence Community capabilities/objectives, or otherwise pose a risk to security of the U.S. and its partners/allies

SheppardMullin
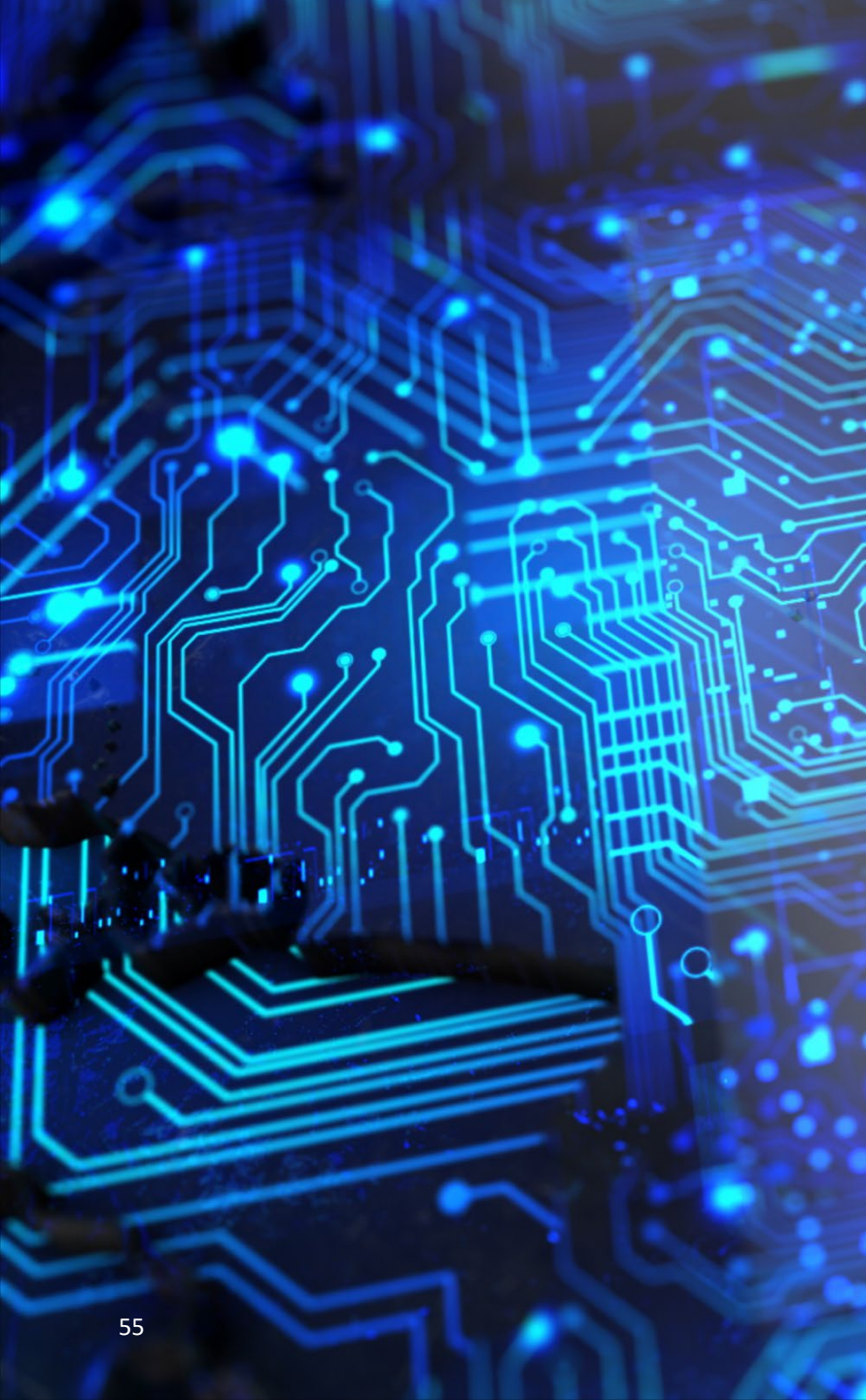
AI Executive Order – Equity & Civil Rights

Sheppard Mullin

Responsible AI, Equity & Civil Rights

- The Secretary of Labor shall publish guidance for Federal contractors regarding nondiscrimination in hiring involving AI and other technology-based hiring systems

- To address BAD AI in **housing** markets and **consumer financial** markets, the Director of the Federal Housing Finance Agency and the Director of the CFPB are encouraged to require their respective regulated entities to use appropriate methodologies to ensure compliance with Federal law and:
    - evaluate their underwriting models for bias or disparities affecting protected groups; and
    - evaluate automated collateral-valuation and appraisal processes in ways that minimize bias.

Responsible AI, Equity & Civil Rights

To combat BAD AI enabled by automated or algorithmic tools used to make decisions about access to **housing and in other real estate-related transactions**, the Secretary of HUD shall, and the Director of the CFPB is encouraged to, issue additional guidance:

- addressing the use of **tenant screening systems** in ways that may violate the Fair Housing Act (Public Law 90-284), the Fair Credit Reporting Act (Public Law 91-508), or other relevant Federal laws, including how the use of data, such as criminal records, eviction records, and credit information, can lead to discriminatory outcomes in violation of Federal law; and

- addressing how the Fair Housing Act, the Consumer Financial Protection Act of 2010 (title X of Public Law 111-203), or the Equal Credit Opportunity Act (Public Law 93-495) apply to the **advertising of housing, credit, and other real estate-related transactions through digital platforms**, including those that use algorithms to facilitate advertising delivery, as well as on best practices to avoid violations of Federal law.

SheppardMullin

Responsible AI, Equity & Civil Rights

- Ensure that people with **disabilities** benefit from AI's promise while being protected from its risks

- To avoid unequal treatment from the use of biometric data like gaze direction, eye tracking, gait analysis, and hand motions, the Architectural and Transportation Barriers Compliance Board is encouraged to:
  - issue technical assistance and recommendations on the risks and benefits of AI in using biometric data as an input; and
  - provide people with disabilities access to information and communication technology and transportation services.

SheppardMullin

Strengthen Civil Rights in Criminal Justice

Requires report by OSTP within 365 days that addresses the use of AI in the criminal justice system, including any use in:

- sentencing;

- parole, supervised release, and probation;

- bail, pretrial release, and pretrial detention;

- risk assessments, including pretrial, earned time, and early release or transfer to home-confinement determinations;

- police surveillance;

- crime forecasting and predictive policing, including the ingestion of historical crime data into AI systems to predict high-density "hot spots";

- prison-management tools; and

- forensic analysis.

SheppardMullin

Responsible AI: Discrimination and Bias

- The Executive Order encourages agencies to develop additional guidance for companies on preventing unlawful bias and discrimination

- Particular concern for bias in AI tools that are not properly regulated – particularly if they are trained on biased data sets

- Equity and Civil Rights Issues in the White House Executive Order on AI

SheppardMullin
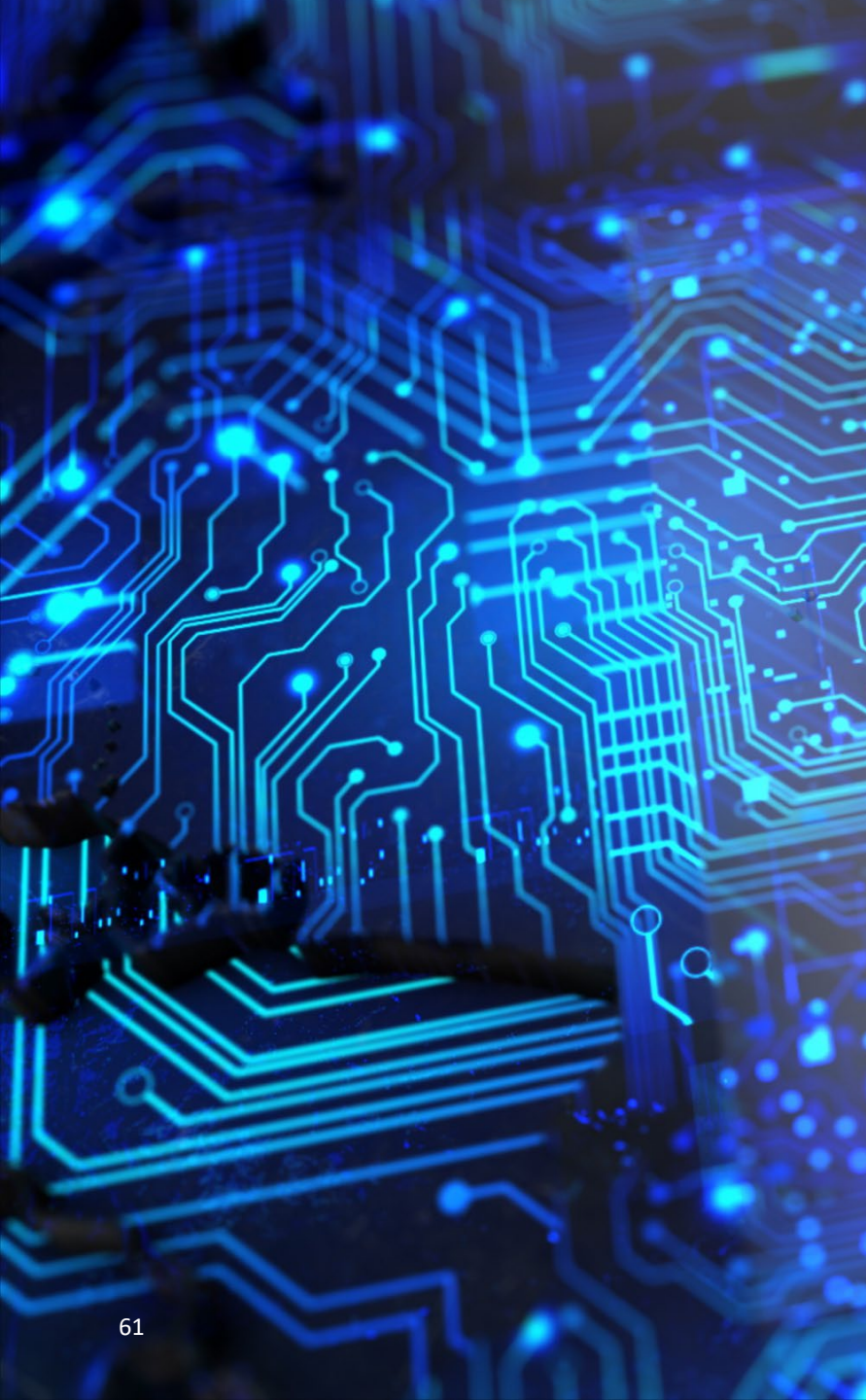
AI Executive Order – Advancing Federal Government Use of AI

SheppardMullin

Ensuring Responsible and Effective Government Use of AI

- Actions to ensure responsible deployment of AI by the Federal government and the modernization of Federal AI infrastructure

- Interagency council to coordinate development and use of AI in government programs and operations

- OMB Guidance for agencies (*issued Nov. 1, 2023)

- Establish minimum risk practices for government use of AI based on Blueprint for AI Bill of Rights and NIST AI Risk Management Framework

Equity and Civil Rights Issues in the White House Executive Order on AI

SheppardMullin

OMB Draft Memorandum (Nov. 1, 2023)

- Each agency to designate a Chief AI Officer

- Advance responsible AI innovation and manage risks

- Take actions to improve procurement of AI
  - Ensure transparency and adequate performance through, e.g., documentation, regularly evaluating contractor performance claims, contract provisions to incentivize continuous improvement
  - Promote competition and avoid improperly entrenching incumbents
  - Retain sufficient data rights to avoid "vendor lock-in" and facilitate government design, development, and testing of AI
  - Protect government data and limit use in training or improving commercial AI without express permission
  - Specific considerations for generative AI around testing, safeguards, and content authentication

- Public comments on draft were due December 2023

SheppardMullin

Advancing Federal Government Use of AI

- Enhance agency procurement capabilities for acquiring AI products and services faster and cheaper through rapid and efficient contracting
  - OMB Guidance on AI acquisitions (within 180 days of initial OMB Guidance)
- Agencies discouraged from imposing broad general bans on use of generative AI
- Coordination with FedRAMP to prioritize certain generative AI offerings
- Consideration of prioritized funding for AI projects
- Facilitate GWAC solutions for specified types of AI
- Increase government-wide hiring of AI professionals

SheppardMullin

FedRAMP Emerging Technology Prioritization Framework

- DRAFT Framework published Jan. 26, 2024 (here)

- Designed to get emerging technology prioritized and through the FedRAMP authorization process

- First three generative AI capabilities selected:
  - chat interfaces
  - code generators
  - debugging tools

- Emerging Technologies selected will have reduced waiting time (i.e., they get to skip the line) but the authorization process will not be accelerated

- Plan for three CSOs to maintain prioritization

- Comment period open through March 11, 2024
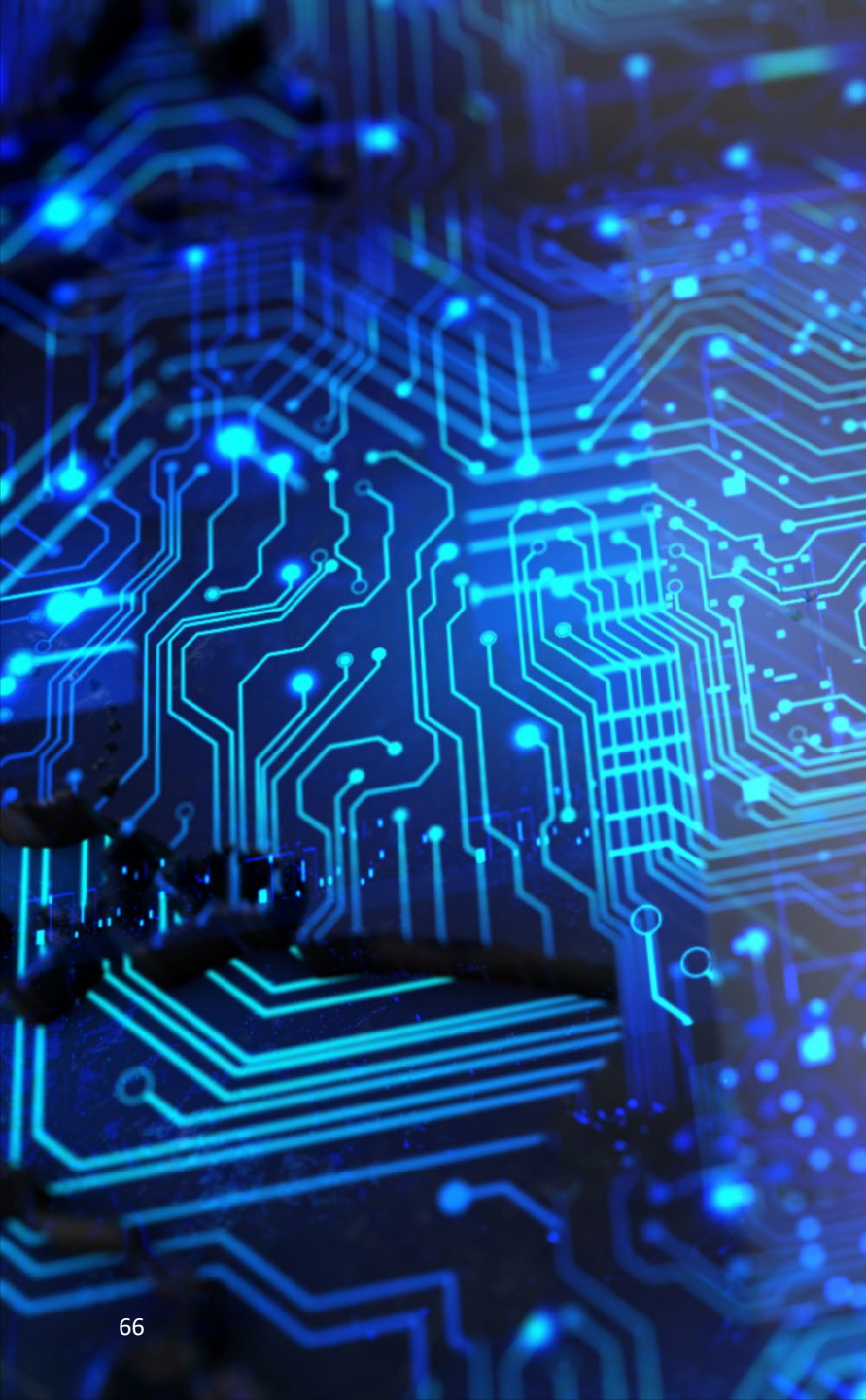
SheppardMullin

AI Executive Order: Strengthening American Leadership Abroad

SheppardMullin

# AI Executive Order: Strengthening American Leadership Abroad

- Collaborate with allies and partners abroad to develop a strong international framework to govern the development and use of AI

- Expanding bilateral, multilateral, and multistakeholder engagements to collaborate on AI

- Accelerating development and implementation of vital AI standards

- Promoting the responsible development and deployment of AI abroad to solve global challenges (e.g., sustainable development and mitigating dangers to critical infrastructure)

SheppardMullin

Key 90-Day Actions

Action	Agency	Required Timeline	
Evaluated ways to prioritize agencies' adoption of AI through the Technology Modernization Fund	Technology Modernization Board	30 days	COMPLETE
Directed the Nontraditional and Emerging Transportation Technology Council to evaluate the transportation sector's need for AI guidance and technical assistance	Department of Transportation	30 days	COMPLETE
Reported federal agency resources available to incorporate into the National AI Research Resource (NAIRR) pilot	Agencies identified by the National Science Foundation	45 days	COMPLETE
Identified priority areas for increasing federal agency AI talent and accelerated hiring pathways	Office of Science and Technology Policy & Office of Management and Budget	45 days	COMPLETE
Convened AI and Tech Talent Task Force	White House Chief of Staff's Office	45 days	COMPLETE
Launched an AI Talent Surge to accelerate hiring AI professionals across the federal government, including through a large-scale hiring action for data scientists	Agencies coordinating with the AI and Tech Talent Task Force	45 days	COMPLETE
Published a Request for Information (RFI) on whether to revise the list of Schedule A job classifications that do not require permanent labor certifications	Department of Labor	45 days	COMPLETE
Convened an interagency council to coordinate federal agencies' use of AI	Office of Management and Budget	60 days	COMPLETE
Reviewed the need for -- and granted -- flexible hiring authorities including direct hire and excepted service authorities for federal agencies to hire AI professionals	Office of Personnel Management	60 days	COMPLETE
Used Defense Production Act authorities to compel developers of powerful AI systems to report vital information, especially AI safety test results	Department of Commerce	90 days	COMPLETE

Key 90-Day Actions

Proposed a draft rule that compels U.S. cloud companies that provide computing power for foreign AI training to report that they are doing so	Department of Commerce	90 days	COMPLETE
Completed risk assessments covering AI's use in every critical infrastructure sector	Sector Risk Management Agencies	90 days	COMPLETE
Launched a pilot of the NAIRR	National Science Foundation	90 days	COMPLETE
Streamlined visa processing, including by renewing and expanding interview-waiver authorities	Department of State	90 days	COMPLETE
Established an AI Task Force to develop policies to provide regulatory clarity and catalyze AI innovation in healthcare	Department of Health and Human Services	90 days	COMPLETE
Convened federal agencies' civil rights offices to discuss the intersection of AI and civil rights	Department of Justice	90 days	COMPLETE
Directed key Federal Advisory Committees to advise on AI and transportation	Department of Transportation	90 days	COMPLETE
Launched a pooled hiring action, to accelerate federal AI hiring, by letting certain applicants apply for roles in multiple agencies with just one application	Office of Personnel Management	90 days	COMPLETE
Released a draft framework for prioritizing generative AI technologies in security authorizations for federally procured products and services	General Services Administration	90 days	COMPLETE
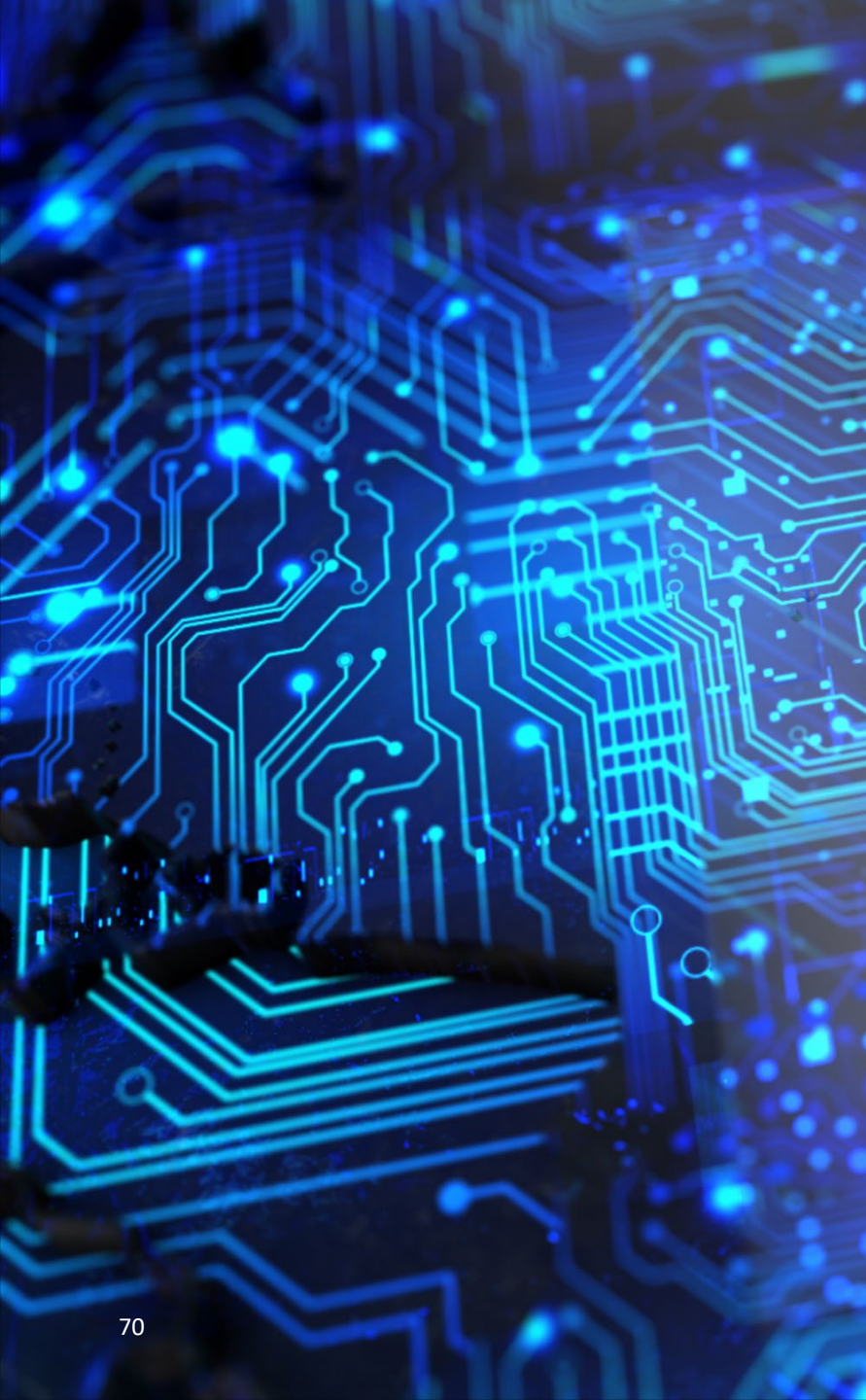
Transportation and Communications

SheppardMullin

Transportation

To promote the safe and responsible development and use of AI in the transportation sector:

- Within 30 days of the date of this order, the Secretary of Transportation shall direct the Nontraditional and Emerging Transportation Technology (NETT) Council to assess the need for information, technical assistance, and guidance regarding **the use of AI in transportation**

- Coordinate and Evaluate the outcomes of **pilot programs** to assess when DOT, or other Federal or State agencies, have sufficient information to take regulatory actions

- **Establish a new DOT Cross-Modal Executive Working Group**, which will consist of members from different divisions of DOT and coordinate applicable work among these divisions, to solicit and use relevant input from appropriate stakeholders

- Within 90 days of the date of this order, the Secretary of Transportation shall direct appropriate Federal Advisory Committees of the DOT to **provide advice on the safe and responsible use of AI in transportation**

- Within 180 days of the date of this order, the Secretary of Transportation shall direct the Advanced Research Projects Agency-Infrastructure (ARPA-I) to explore the transportation-related opportunities and challenges of AI

SheppardMullin

Communications

The FCC is encouraged to consider actions related **to how AI will affect communications networks and consumers**, including:

- examining the potential for AI to improve **spectrum management**, increase the efficiency of non-Federal spectrum usage, and expand opportunities for the sharing of non-Federal spectrum;

- coordinating with the National Telecommunications and Information Administration (NTIA) to create opportunities for **sharing spectrum** between Federal and non-Federal spectrum operations;

- providing support for efforts to **improve network security, resiliency, and interoperability** using next-generation technologies that incorporate AI, including self-healing networks, 6G, and Open RAN; and

- encouraging, including through rulemaking, efforts to combat **unwanted robocalls and robotexts that are facilitated or exacerbated by AI** and to deploy AI technologies that better serve consumers by blocking unwanted robocalls and robotexts.

SheppardMullin

International Activity and Forum Shopping

Disparate global regulatory approach will result (is resulting) in forum shopping:

- EU – Artificial Intelligence Act – will regulate unacceptable and high risk uses (for now)

- Japan – will not enforce copyrights on data used in AI training

- **Canada** – proposed Artificial Intelligence and Data Act

- **Singapore** – National AI Strategy

- **China** – draft Administrative Measures for Generative Artificial Intelligence Services

- UK – text and data mining exception; A pro-innovation approach to AI regulation

SheppardMullin

Key Takeaways

SheppardMullin
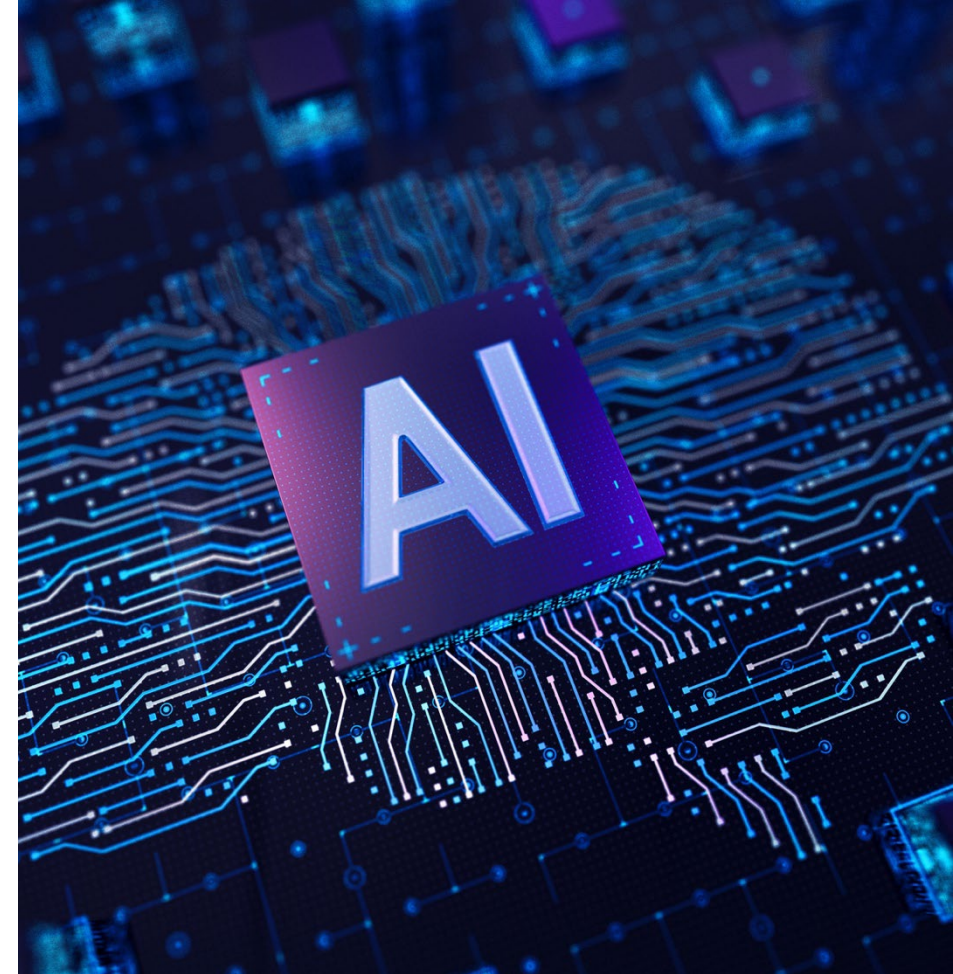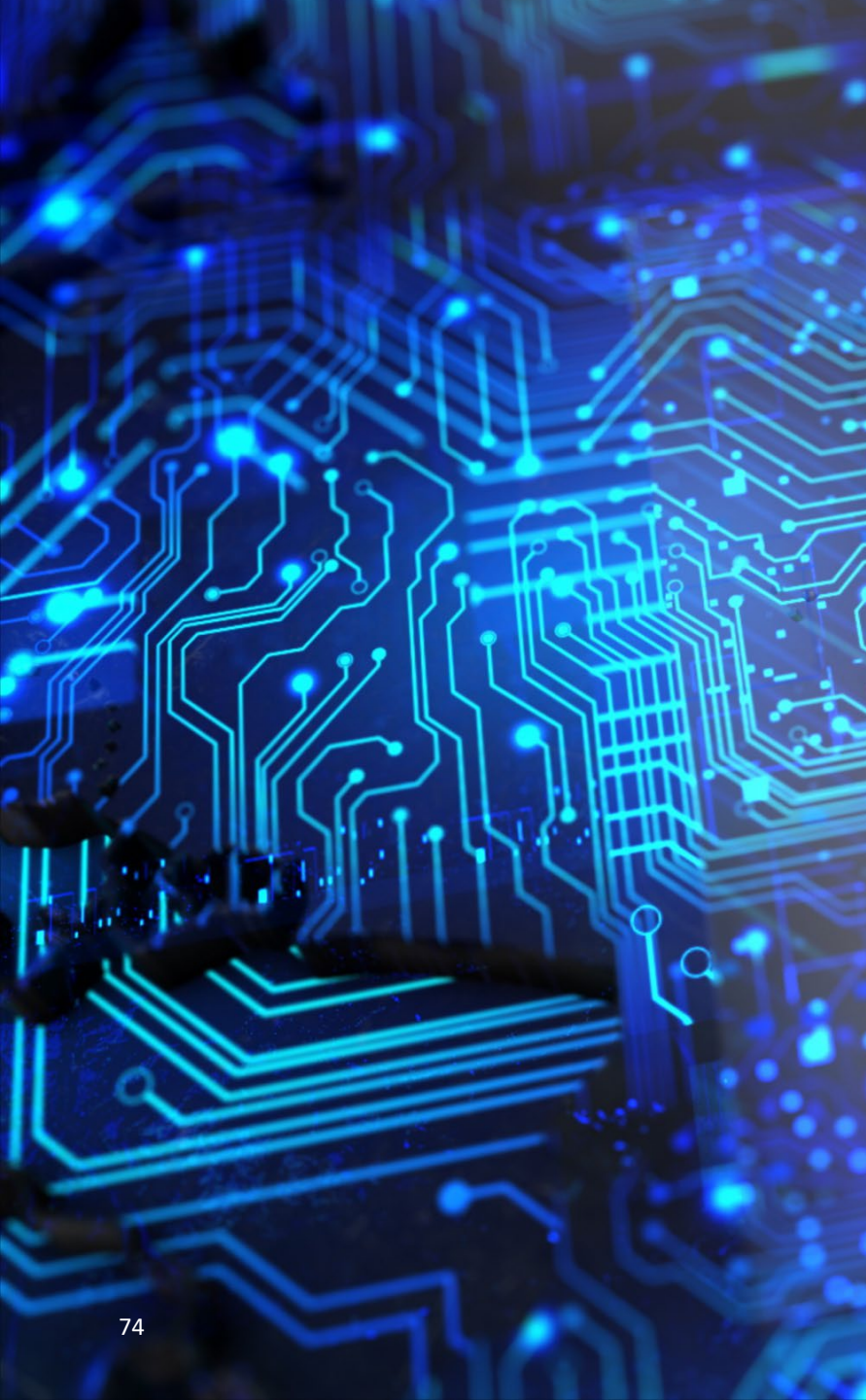
Key Takeaways

- AI is a powerful tool, but comes with many legal and business risks
- The U.S. is pro innovation but with regulation
- The EO embraces U.S. government (responsible) use and acquisition of AI
- Expect new laws, regs, guidance and enforcements due to EO and otherwise
- Agency guidance under EO will inform expectations and requirements for contractors

SheppardMullin

Key Takeaways

- The AI legal landscape is complex and rapidly changing

  - New and evolving proposed legislation, regulation, case law, guidance (US and abroad)
  - Companies need to get and stay educated on the legal issues – Boards, executives and legal departments

  5 AI Risks For Corporate Boards To Examine

- Companies Need Policies to Manage AI Legal Risk:

  - Assess specific legal issues with: i) use of AI; ii) training AI models; and ii) developing AI tools
  - Consider: Customers, Developers, Employees, Suppliers
  - Develop and regularly update customized policies for applicable use cases

- We provide in-house training and help developing customized AI policies

SheppardMullin

Thank you!

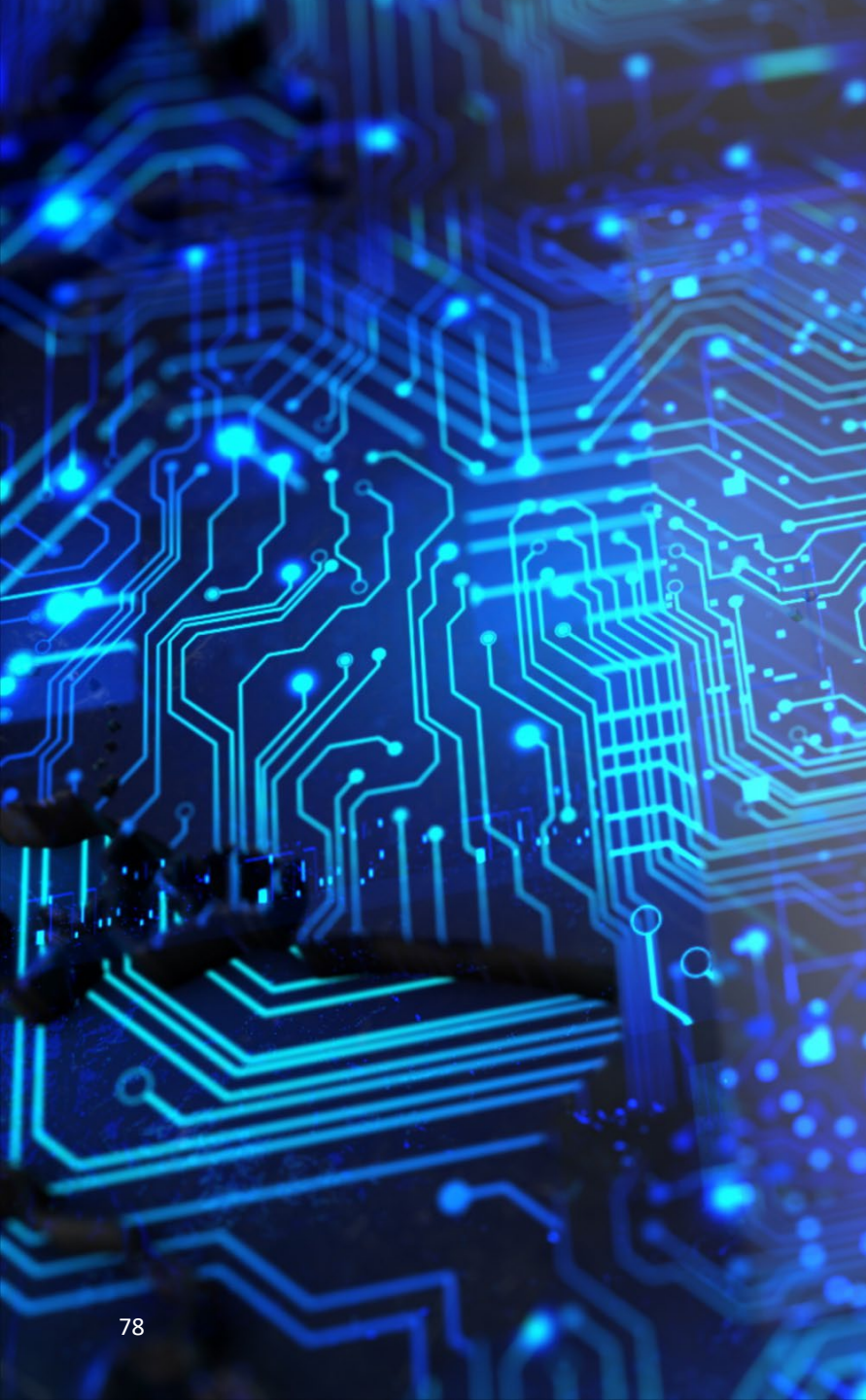## Keep Up To Date with These Resources

AI Law and
Policy Blog

Subscribe
for updates

SheppardMullin

Appendix

SheppardMullin

FTC and AI

February 2023 – the FTC Division of Advertising Practices updated guidance on the use of AI to caution on:

- Making exaggerated or unsubstantiated claims about their AI products or services

- Promising that your AI product does something better than a non-AI product

- Being aware of the risks of your AI products

April 2023 – FTC guidance on enforcement efforts against AI systems that result in illegal discrimination, such as in credit, employment, housing, or health care

SheppardMullin

FTC and AI

- November 2023 - FTC authorized "compulsory process" for AI-related Products and Services -
will streamline FTC staff's ability to issue civil investigative demands (CIDs)
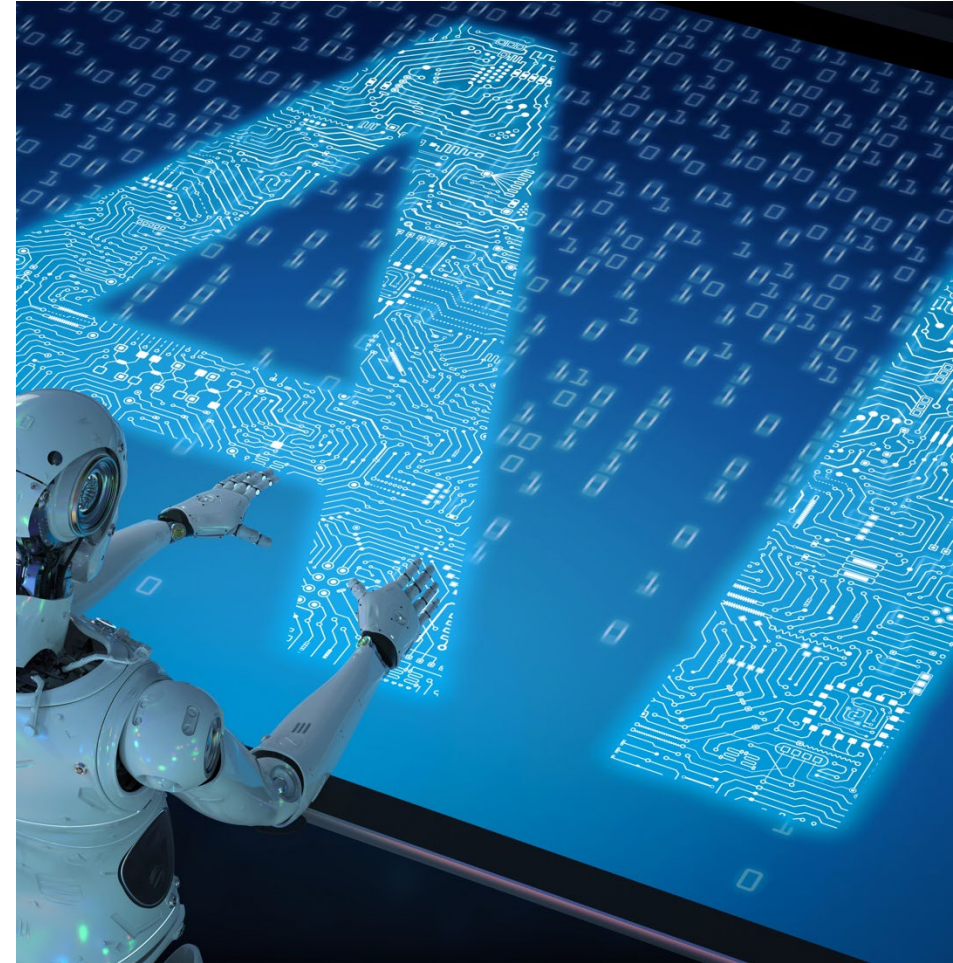
UK AI Safety Summit

- Bringing together leading AI nations, technology companies, researchers, and civil society groups to turbocharge action on the safe and responsible development of frontier AI around the world

- Nov 1-2, 2023

AI Safety Summit| AISS 2023

State Regulations

States are focusing AI regulation

- New York (other states) laws on using AI in employment decisions

- Consumer credits decisions

- Insurance

SheppardMullin