

Biden Administration Issues Sweeping Executive Order on Artificial Intelligence

On October 30, 2023, President Biden signed an executive order (the “EO”) aimed at promoting the responsible development and deployment of artificial intelligence (“AI”). A significant expansion of the Biden Administration’s 2022 AI Bill of Rights¹ and consistent with its “whole-of-government” approach to other regulatory issues like competition, the near-100 page EO calls for AI regulation by more than 20 federal agencies, establishes an interagency AI council and imposes numerous obligations on private companies that use and develop AI. With implementation deadlines ranging from 30 to 540 days, the EO comes at the same time as a number of bipartisan congressional efforts to grapple with this evolving technology.

Divided into 13 sections of AI regulation, the EO covers everything from security and innovation to employment and social justice. We highlight below some provisions that are particularly noteworthy for developers and users of AI as EO implementation begins in earnest.

GUIDELINES AND BEST PRACTICES FOR AI SAFETY AND SECURITY

The National Institute of Standards and Technology (“NIST”), together with other relevant agencies, must establish guidelines and best practices relating to AI, including with respect to risk management, secure development practices for generative AI and dual-use foundation models.² This directive includes creating benchmarks for evaluating and auditing AI capabilities and developing appropriate AI testbeds.

LABELING AI-GENERATED CONTENT

The EO directs agencies to identify ways of distinguishing the provenance of digital content. These methods include labeling AI-generated content, such as watermarking output. The Secretary of Commerce, along with relevant agencies, must publish periodic reports on tools for authenticating and detecting synthetic content.

INTELLECTUAL PROPERTY

The U.S. Patent and Trademark Office must provide guidance surrounding intellectual property issues raised by AI, including the scope of protection for works produced using AI and the treatment of copyrighted works in AI training. Agencies such as the Department of Homeland Security must develop guidance for private sector actors on mitigating the risks of AI-related IP theft.

SETTING INDUSTRY STANDARDS

With the goal of promoting consensus industry standards, the Secretary of Commerce must establish guidelines and best practices for developing trustworthy AI systems. Regarding international standard-setting, the Secretary of Commerce and the Secretary of State will lead efforts to implement AI-related standards. Agencies must establish a plan for global engagement on promoting and developing AI

standards and provide the President with related recommendations.

REPORTING REQUIREMENTS

Any company that develops, or intends to develop, a dual-use foundation model must report on activities related to the model's training, development and production in addition to ownership and possession of its model weights and measures taken to protect them. These companies must share testing results with the Department of Commerce with the goal of ensuring no model is used for nefarious purposes. The EO also obliges companies and individuals that "acquire, develop, or possess a potential large-scale computing cluster" to report to the Department of Commerce (including the existence and location of these clusters and the amount of total computing power available in each cluster).

SECURITY

The Department of the Treasury must publish a public report on best practices for financial institutions so as to manage AI-specific cybersecurity risks. With particular attention to Infrastructure as a Service ("IaaS") products, the EO also requires enhanced record-keeping obligations with respect to foreign transactions. The Department of Commerce will propose regulations that require U.S. IaaS providers to report foreign persons transacting with U.S. IaaS providers to train large AI models that could be used for malicious cyber-related activities ("training run"). These reports must include, at a minimum, the identity of the foreign actor and each instance in which a foreign person transacts with the foreign reseller to use the United States IaaS Product to conduct a training run.

CONSUMER PROTECTION AND PRIVACY

As part of its rulemaking authority, the Federal Trade Commission is directed to consider enforcement with respect to AI and consumer protection, which will involve applying existing consumer protection laws to the AI context in order to continue protecting against fraud, unintended bias, discrimination, infringements on privacy, and other harms. The Director of the Office of Management and Budget must undertake an assessment of the

privacy risks impacted by AI development, and various other agencies must focus on the use of tools such as privacy-enhancing technologies to combat risks associated with AI's improper collection and use of personal data.

LABOR FORCE

The EO sets forth a number of immigration initiatives to attract and retain AI talent, including enhancing usage of the H-1B program. The Department of Labor must publish best practices for employers to mitigate AI's potential harms to employees and publish guidance for federal contractors regarding nondiscrimination in hiring involving AI and other technology-based hiring systems. The Secretary of Labor is directed to examine the effects of AI on the labor force, as well as develop principles and best practices of AI for employers so as to mitigate AI's potential harms and maximize its benefits. These principles must cover, among others, labor displacement, job quality and AI-related data collection. Because there will soon be a need for a substantial portion of the workforce to have at least some AI-specific capabilities and training, which only a few specialized workers currently have, the Director of the National Science Foundation is required to support AI-related education and workforce development.

MITIGATING DISCRIMINATION

The Secretary of Labor must examine the possibility of AI-related discrimination in hiring practices and publish guidance for federal contractors regarding nondiscrimination in hiring involving AI. The Attorney General must submit a report on, among others, potential discrimination of AI algorithms and use of AI in law enforcement. The Civil Rights Division of the Department of Justice must address potential algorithmic discrimination, provide guidance to local investigators and prosecutors on civil rights violations and discrimination related to AI, and promote public awareness of potential discrimination by AI.

WHITE HOUSE AI COUNCIL

Finally, the EO establishes a White House AI Council—composed of members from major federal

agencies—and charges it to oversee timely implementation of AI-related policies. The EO encourages agencies to enhance their use of AI, coordinate with each other, consult with industry experts and establish new programs and competitions in order to effectively implement directives in the EO.

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- 1 White House Off. Sci. & Tech. Pol., The Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People (Oct. 2022), <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf> (the “AI Bill of Rights”). The AI Bill of Rights comprised only non-binding guidelines for public- and private-sector use of AI; it did not impose any affirmative obligations on government agencies.
 - 2 Dual-use foundation models are defined as “an AI model that is trained on broad data, generally uses self-supervision, contains at least tens of billions of parameters, is applicable across a wide range of contexts and that exhibits, or could be easily modified to exhibit, high levels of performance at tasks that pose a serious risk to security, national economic security, national public health or safety, or any combination of those matters.”

NEW YORK

David J. Kappos
+1-212-474-1168
dkappos@cravath.com

Sasha Rosenthal-Larrea
+1-212-474-1967
srosenthal-larrea@cravath.com

Evan Norris
+1-212-474-1524
enorris@cravath.com

Carys J. Webb, *CIPP/US, CIPP/E*
+1-212-474-1249
cwebb@cravath.com

WASHINGTON, D.C.

Noah Joshua Phillips
+1-202-869-7740
nphillips@cravath.com

CRAVATH, SWAINE & MOORE LLP

NEW YORK

Worldwide Plaza
825 Eighth Avenue
New York, NY 10019-7475
+1-212-474-1000

LONDON

CityPoint
One Ropemaker Street
London EC2Y 9HR
+44-20-7453-1000

WASHINGTON, D.C.

1601 K Street NW
Washington, D.C. 20006-1682
+1-202-869-7700

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