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U.S. Regulation of Artificial Intelligence: Presidential Executive Order Paves the Way for Future Action in the Private Sector

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On October 30, 2023, President Joe Biden issued an [Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence](#) (Order) that addresses the responsible use of artificial intelligence (AI) by the federal government and endorses regulation of AI usage in the private sector.

The Order directs all executive offices and agencies to comply with articulated guiding principles for AI development and implementation. These principles focus on security and safety, responsible innovation and competition, support for American labor, dedication to equity and civil rights, consumer protection, privacy, development of AI professionals in government, and American leadership in AI globally. Perhaps most important for U.S. businesses, the Order further directs executive offices and agencies to rely on the AI principles when establishing future rules and regulations governing AI development in the private sector.

Private Sector Focus

The Order addresses several regulatory areas that immediately impact the private sector—or will do so in the very near future.

National Security

The Order places immediate focus on the use of “dual-use foundation” AI models that “exhibit[,], 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.”¹ Regulating “dual use” items is hardly a new concept, but the Order compels regulators and the private sector to immediately consider the impact of “dual-use” on AI, which is still a new and largely untested technology. For companies contemplating or engaged in development of such dual-use foundation models, the Order requires that within 90 days of issuance of the Order,² the companies commence ongoing reporting to the Department of Commerce regarding the safe development and use of these models.

Privacy and Consumer Protection

The Order addresses concerns regarding the potential impact of AI on privacy and consumer protection and directs the Federal Trade Commission and the Federal Communications Commission to consider rulemaking that encourages the private sector to adopt AI protocols that comport with the Order. Underscoring the urgency of the Order, the President’s statement on the Order calls for bipartisan support for federal privacy legislation

Intellectual Property

The Order directs the United States Patent and Trademark Office (USPTO) to³ publish guidance to patent examiners and applicants that addresses the use of AI and that will include illustrative examples and guidance on how to analyze inventorship issues. The Order also directs the USPTO to⁴ issue additional guidance on the intersection of patent eligibility in AI and other critical and emerging technologies.

While the true measure of the Order's impact has yet to be felt, clearly federal agencies and executive offices are now required to devote rigorous analysis and attention to AI within their own operations, and to embark on focused rulemaking and regulation for businesses in the private sector. For the present, businesses that have or are considering implementation of AI programs should seek the advice of qualified counsel to ensure that AI usage is tailored to business objectives, closely monitored, and sufficiently flexible to change as laws evolve.

¹ Executive Order at Sec. 3(k).

² On or about January 29, 2024.

³ Within 120 days of the date of the Order.

⁴ Within 270 days of the date of this Order.

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