

# Akin™

## Akin Intelligence



November 2023

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Welcome to the November edition of Akin Intelligence. Looking back, October 2023 may be remembered as the month when the U.S. government tried to assume the mantle of global leadership on responsible artificial intelligence (AI) regulation. Specifically, the U.S. Department of Commerce (Commerce) broadened its export controls on semiconductors used to develop AI foundation models, and the Biden administration published its long-awaited executive order (EO) on AI. The long-term impact of these actions remains to be seen.

The past month also saw an increase in international pledges of cooperation on responsible use and regulation of AI, new AI products entering the market and an AI-assisted “final” Beatles song, *Now and Then*.

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## Akin Spotlight

## Watch Now: AI Executive Order

In the inaugural edition of the *Akin Intelligence* series, lobbying and public policy partner [Hans Rickhoff](#) and lobbying and public policy senior counsel [Reggie Babin](#) lead a discussion with international trade counsel [Alan Hayes](#) on the current state of AI policy, with a specific focus on the recent Biden administration executive order (EO) on AI. They discuss the implications of the EO for clients, its potential impact on future legislation, and the broader themes coloring the AI conversation globally. They also discuss the role of various agencies in implementing the EO and the potential challenges they might face.



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## Federal Action

### President Biden Signs Executive Order on AI

On October 30, 2023, President Biden signed his [Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence](#). Among other things, the sweeping EO directs over 20 federal agencies to consider the development, use and potential regulation of AI models and systems.

[Akin's summary of the EO is available here](#). We provide below a few high-level takeaways from the EO, but note that companies will need to review the EO's implementing regulations (once published) to identify any new obligations:

- **New defined terms.** Section 3 of the EO provides definitions for important terms like “[artificial intelligence](#),” “[AI model](#),” “[dual-use foundation model](#),” “[generative AI](#)” and “[model weight](#).” This is the first time the federal government has provided official

definitions for many of these technical terms. These definitions may help establish a common baseline of understanding for future discussions both within the government and between government and the private sector.

- **Reporting requirements for “dual use foundation models.”** The EO gives the Secretary of Commerce (Secretary) 90 days to “require . . . [c]ompanies developing or demonstrating an intent to develop potential dual-use foundation models” to provide the federal government with certain information about the development and testing of these models.

The Secretary must also define the specific models that are subject to this reporting requirement. Pending those definitions, the requirement will apply (at least) to “any model that was trained using a quantity of computing power greater than  $10^{26}$  integer or floating-point operations, or using primarily biological sequence data and using a quantity of computing power greater than  $10^{23}$  integer or floating-point operations[.]”

The EO also proposes a requirement that companies must report their “acquisition, development, or possession,” of “large-scale computing clusters” that have “a set of machines physically co-located in a single datacenter, transitively connected by data center networking of over 100 Gbit/s, and having a theoretical maximum computing capacity of  $10^{20}$  integer or floating-point operations per second for training AI.”

- **Considerations for Infrastructure as a Service (IaaS) Providers.** The EO also directs the Secretary to propose regulations that would require U.S. IaaS (e.g., cloud computing) providers and their non-U.S. re-sellers to report when foreign persons use IaaS for certain AI “training runs.” Pending updated definitions, this reporting requirement will apply to training runs for models that require “a quantity of computing power greater than  $10^{26}$  integer or floating-point operations and [are] trained on a computing cluster” that meets the datacenter reporting requirements identified above.

The EO also proposes new “know-your customer” (KYC) requirements for non-U.S. re-sellers of U.S. IaaS products. These proposed KYC requirements for non-U.S. parties mirror the KYC requirements proposed for U.S. IaaS providers in the Trump administration’s 2021 EO [“Taking Additional Steps To Address the National Emergency With Respect to Significant Malicious Cyber-Enabled Activities\[.\]”](#)

Additionally, many federal agencies were given specific directions to advance the EO’s objectives, with deadlines for implementation ranging between 30 and 540 days from the date of the EO’s publication. [Akin provides a detailed breakdown of these deadlines here.](#)

For more on the EO, see [Akin’s summary, key takeaways for health care and life sciences](#) and our forthcoming analyses for privacy, intellectual property and more.

## **Department of Commerce Issues New Export Controls on Semiconductors**

On October 17, 2023, the Commerce Department’s Bureau of Industry and Security (BIS) released three rules amending the Export Administration Regulations (EAR) that significantly build on BIS’s October 7, 2022, semiconductor controls and add several parties to the Entity List. [Akin’s full write-up of these rules is available here.](#)

Notably, these controls expand existing controls on advanced computing integrated circuits (ICs) that are particularly capable of training large-scale AI systems. These controls are targeted, in large part, at inhibiting the development of “frontier” AI models in the People’s Republic of China (PRC). In its commentary to the rules, BIS states that “[a]dvanced AI models, trained on advanced computing ICs, can be used to improve the design and use” of “weapons of mass destruction, advanced weapons systems, and high-tech surveillance applications that create national security concerns, including through their use in exascale supercomputing[.]” BIS also states that “[t]he PRC seeks to use advanced computing ICs and supercomputing

capacity in the development and deployment of these AI models to further its goal of surpassing the military capabilities of the United States and its allies.”

BIS is accepting comments on these rules until December 18, 2023.

## **Department of Commerce to Launch U.S. Artificial Intelligence Safety Institute**

On November 1, 2023, the Biden administration announced that the National Institute of Standards and Technology (NIST) will establish the U.S. Artificial Intelligence Safety Institute (USAISI) to evaluate the safety and trust of advanced AI technology. The new institute will specialize in developing standards for safety and testing of models, best practices for evaluating and mitigating risks, authenticating AI-generated content, mitigating algorithmic discrimination, enabling privacy-preserving AI and providing an environment for researchers to share information. USAISI will also be collaborating with similar entities abroad, such as the U.K.'s AI Safety Institute, and outside experts from the public and private sectors. This new initiative is one of Commerce's responsibilities listed in the new AI executive order released by President Biden on October 30, 2023.

## **NIST Seeks Safety Consortium Members and Hosts Initial Workshop**

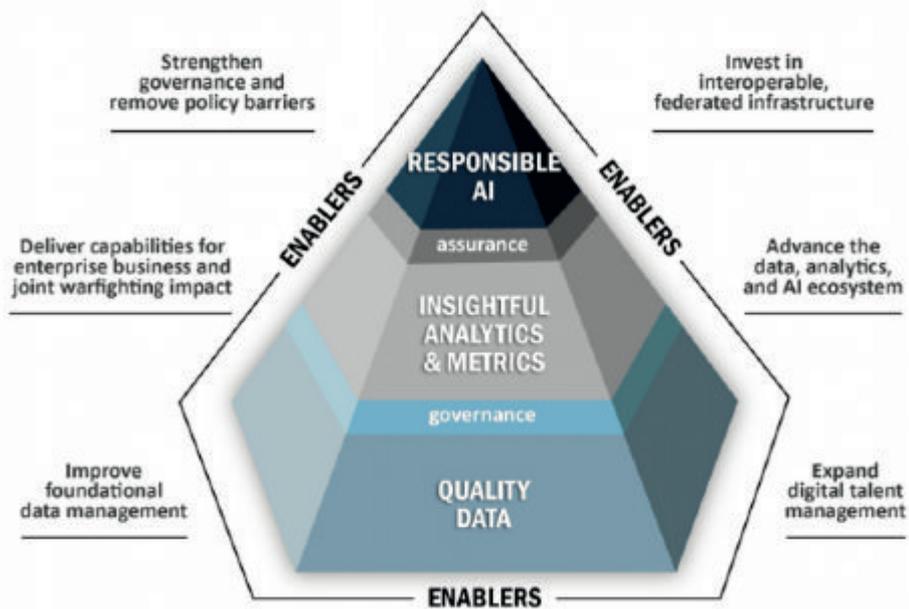
NIST is searching for participants from all fields to join its new Consortium, which is intended to be a core element of the newly established USAISI. The Consortium is intended to function as a collaborative space for AI dialogue, research and testing to further the USAISI's mission to develop standards for safety, security and testing of AI models.

Members will be expected to contribute expertise and support in a variety of areas, such as data documentation, metrology, governance, safety guidelines, availability of testing environments and more. Organizations interested in joining the consortium must submit a letter of interest by December 2, 2023. Additional details are available in the *Federal Register*.

NIST will also host the USAISI Workshop: Collaboration to Enable Safe and Trustworthy AI on November 17, 2023. The workshop is intended to cover how NIST and stakeholders can work together to foster safe and trustworthy development of AI, with a focus on measuring gaps and risk management. Registration for in-person and virtual attendees is available here.

## **Department of Defense (DOD) Releases AI Adoption Strategy**

On November 2, 2023, the DOD's Chief Digital and AI Office released its 2023 Data, Analytics and Artificial Intelligence Adoption Strategy. The document focuses on how the DOD can integrate emerging AI capabilities going forward and aims to achieve several outcomes including: battlespace awareness and understanding; adaptive force planning and application; fast, precise and resilient kill chains; resilient sustainment support; and efficient enterprise business operations. The individual goals are intended to support the DOD's version of the AI Hierarchy of Needs, which incorporates a foundation of solid data to enable insightful analysis and responsible AI. A copy of the DOD's Hierarchy is reproduced below.



## Vice President Kamala Harris Announces Several Artificial Intelligence (AI) Initiatives

On November 1, 2023, Vice President Harris revealed seven new initiatives advancing the White House’s goal to manage risks posed by AI. In addition to the USAISI discussed above, Vice President Harris announced that the White House’s Office of Management and Budget (OMB) would be releasing for public comment its first Draft Policy Guidance on the U.S. Government Use of AI—a core aspect of how the EO functions—and that input is welcome through December 5, 2023.

The other initiatives and updates announced include:

- That over 30 countries have joined the Political Declaration on the Responsible Military Use of Artificial Intelligence and Autonomy, which was originally announced in February.
- A new Initiative to Advance AI in the Public Interest, in collaboration with prominent philanthropic organizations, designed to promote AI that advances the public interest across five critical areas.
- A virtual hackathon to develop technology that can help detect and block robocalls and fraud, with a focus on AI-generated voice models.
- A call for international support for the development of standards to authenticate government-produced content and trace deceptive or manipulated content.
- A pledge to work with the Freedom Online Coalition, which includes 38 countries, to incorporate responsible and rights-respecting practices in government AI-usage. This pledge adheres to the OMB’s draft policy of government use of AI.

## FTC Weighs in On Copyright NOI and Potential Consumer Harm

On October 30, 2023, the Federal Trade Commission (FTC) submitted a comment to the U.S. Copyright Office in response to its Notice of Inquiry (NOI) regarding AI and copyright. The FTC indicated that it may have an interest in copyright-related issues when AI-generated content is used to compete unfairly or deceive consumers as an extension of the FTC’s existing legal authority to regulate such behavior. In addition to copyright issues, the FTC’s comment states that using private consumer information to train AI could violate consumer privacy.



## “Big Four” Respond to AI Executive Order; Senators Continue Additional AI Forums, Including on Privacy/Liability

The Biden administration’s AI EO arrived on the heels of Senate Majority Leader Chuck Schumer’s (D-NY) second “AI Insight Forum,” where the Majority Leader outlined the need to provide for \$32 billion in annual federal investment to enable the U.S. to lead in safe innovation.

Following the AI EO’s release, Leader Schumer and Sens. Mike Rounds (R-SD), Martin Heinrich (D-NM) and Todd Young (R-IN) (collectively, the “Big Four”) met with President Biden to discuss a path forward on AI legislation. Leader Schumer said the meeting was constructive and focused on bipartisanship and investment, noting that the lawmakers will continue to closely coordinate with the White House. Sen. Rounds said the meeting focused on both regulating and furthering U.S. leadership in AI, with the goal of bringing talent to the U.S. and enhancing innovation.

Following the second AI Insight Forum, the “Big Four” have convened four additional forums over the past couple of weeks:

**Third Forum:** At the third forum, which focused on the workforce, lawmakers outlined the need to prioritize incentives for companies to train AI-capable workers, while leaving guardrails to be worked out by congressional committees. The full list of speakers, and their statements, is available [here](#).

**Fourth Forum:** The fourth forum focused on how AI developers and deployers can mitigate potential harms in “high impact” areas such as the financial sector and health industry. The full list of speakers, and their statements, is available [here](#).

**Fifth Forum:** The fifth forum was focused on elections and democracy. The full list of speakers, and their statements, is available [here](#).

**Sixth Forum:** At the sixth forum, which focused on privacy and liability, Leader Schumer and Sen. Young led the privacy-focused panel, while Sens. Rounds and Heinrich led the liability discussion. Participants, including those from Public Knowledge and the Information Technology and Innovation Foundation (ITIF), broadly reiterated the need to enact a comprehensive federal privacy law. In the absence of such legislation, the Center for Democracy and Technology (CDT) outlined the need for any AI legislation to, at a minimum, encompass protections that would address the privacy harms created and exacerbated by use of AI. The full list of speakers, and their statements, is available [here](#).

## Sen. Thune Unveils AI Certification Bill

On November 15, 2023, Sen. John Thune (R-SD) unveiled his long-awaited AI certification bill—the [Artificial Intelligence Research, Innovation and Accountability Act](#) (one-pager available [here](#)). The legislation outlines content provenance and detection standards to be developed by NIST. NIST is also tasked with developing recommendations for federal agencies on guardrails for “high-risk” AI systems and provides new definitions of “generative,” “high-impact” and “critical impact” systems, with distinctions made between developers and deployers. The bill requires companies deploying “critical-impact AI” to conduct risk assessments and submit transparency reports to the Commerce Department. The bill is co-sponsored by Sens. Amy

Klobuchar (D-MN), Roger Wicker (R-MS), John Hickenlooper (D-CO), Shelley Moore Capito (R-WV) and Ben Ray Lujan (D-NM).

## House E&C Committee Continues Exploration of AI Across Sectors; Maintains Focus on Privacy

The House Energy and Commerce (E&C) Committee continues to explore the role of AI across every sector of the economy, including health care, telecommunications, emerging technologies and energy.

**Data/Innovation:** On October 18, 2023, the House E&C Subcommittee on Innovation, Data and Commerce held a [hearing](#) titled, “Safeguarding Data and Innovation: Setting the Foundation for the Use of Artificial Intelligence.” During the hearing, all witnesses and members on both sides of the aisle reiterated the need to build on the Committee’s efforts to advance the American Data Privacy and Protection Act (ADPPA; [H.R. 8152](#)) as a foundational step to AI regulation. Witnesses and members also discussed the benefit of increasing the fining authority of the Federal Trade Commission (FTC), mandating impact assessments for companies deploying or developing AI and watermarking AI-generated content. A full summary of the hearing is available [here](#).

**Energy:** On October 19, 2023, the Committee held a [hearing](#) to examine AI’s use in the energy sector, where Ranking Member Frank Pallone (D-NJ) also reiterated his concerns about the data privacy implications of AI technologies, stating, “I strongly believe that the bedrock of any AI regulation must be privacy legislation that includes data minimization and algorithmic accountability principles. Last year, Chair Rodgers and I worked in strong bipartisan fashion to pass the American Data Privacy and Protection Act out of our Committee by a vote of 50 to 2. I will continue to push for a comprehensive, national federal privacy standard.” In an [op-ed](#) for Bloomberg Law, Rep. Cathy McMorris Rodgers (R-WA), Chair of the House E&C Committee, and Rep. Jay Obernolte (R-CA), who was tapped by then-House Speaker Kevin McCarthy (R-CA) to lead an informal AI working group, urged passage of comprehensive federal privacy legislation to set the stage for AI regulation.

**Communications:** The Committee’s Communications and Technology Subcommittee held a [hearing](#) on November 14, 2023, to examine the use of AI technology on communications networks. During the hearing, witnesses and Members on both sides of the aisle discussed implementation of the Biden-Harris Administration’s AI EO. While they noted the EO is a step in the right direction, participants called for concurrent legislative reforms, including disclosures of AI-generated content and algorithmic accountability standards. Committee leaders also reiterated the need for a federal privacy standard. A full summary of the hearing is available [here](#).

## Senate Lawmakers Introduce Standalone AI Bills

**Deepfakes:** Sen. Chris Coons (D-DE), Chair of the Senate Judiciary Subcommittee on Intellectual Property, and Sens. Marsha Blackburn (R-TN), Amy Klobuchar (D-MN) and Thom Tillis (R-NC) have unveiled a [discussion draft](#) of their Nurture Originals, Foster Art and Keep Entertainment Safe (NO FAKES) Act, which aims to protect the voice and visual likeness of all individuals from unauthorized recreations from generative AI. A one-pager on the draft is available [here](#).

**Defense:** On October 3, 2023, Sens. Joe Manchin (D-WV) and Mike Rounds (R-SD) introduced a bill to establish the Chief Digital and Artificial Intelligence Officer’s (CDAIO) Governing Council, which would be tasked with providing oversight of the Department of Defense’s (DoD) AI priorities ([S. 3004](#)). Both Sens. Manchin and Rounds expressed interest in getting this bill included in this year’s National Defense Authorization Act (NDAA).

**Bug Bounty Programs:** On October 17, 2023, Leader Schumer and Sens. Mike Rounds, Martin Heinrich (D-NM), and Todd Young (R-IN) introduced the Artificial Intelligence Advancement Act of 2023 ([S. 3050](#)), which would establish AI bug bounty programs and require reports and analyses on a variety of AI-use cases.

**Labels/Disclosures:** On October 24, 2023, Sens. Brian Schatz (D-HI) and John Kennedy (R-LA) introduced the AI Labeling Act ([S. 2691](#)), which would, among other things, notify consumers when they are interacting with AI-generated content, require developers to disclose such content, and create a working group that establishes related standards for social media platforms.

**Procurement Standards:** On November 2, 2023, Sens. Jerry Moran (R-KS) and Mark Warner (D-VA) introduced the Federal Artificial Intelligence Risk Management Act ([S. 3205](#)), which would direct OMB to issue guidance requiring federal agencies to incorporate the NIST AI Risk Management Framework into their AI management efforts. Rep. Ted Lieu (D-CA) plans to introduce companion legislation in the House.

**Testing/Evaluation:** On October 30, 2023, Sens. Ben Ray Lujan (D-NM), Dick Durbin (D-IL), John Thune (R-SD), Jim Risch (R-ID) and Marsha Blackburn (R-TN) introduced the TEST AI Act ([S. 3162](#)), which would encourage NIST and the Department of Energy (DOE) to develop testbeds for testing and evaluation of AI systems and establish guardrails on the development of AI systems. A one-pager on the bill is available [here](#).

**Medicare Fraud:** Sen. Mike Braun (R-IN) plans to soon introduce the Medicare Transaction Fraud Prevention Act to utilize AI and machine learning to detect suspicious diagnostic testing and durable medical equipment coverage. Sen. Braun has indicated he is still looking for a Democratic sponsor for the bill prior to introducing it on November 16.

## Other Congressional Committees Continue Slew of AI-Focused Hearings

**Senate HSGAC:** On November 8, 2023, the Senate Homeland Security and Governmental Affairs Committee (HSGAC) held a [hearing](#) titled, “The Philosophy of AI: Learning from History, Shaping Our Future.” A summary of the hearing is available [here](#).

**Senate HELP:** On October 31, 2023, the Senate Health, Education, Labor and Pensions (HELP) Subcommittee on Employment and Workplace Safety held a [hearing](#) on “AI and the Future of Work: Moving Forward Together.” During the hearing, Chair John Hickenlooper (D-CO) emphasized the need to support workforce development programs around AI and ensure that programs are inclusive. A summary of the hearing is available [here](#). On November 8, 2023, the Committee convened another AI-focused [hearing](#) on “Avoiding a Cautionary Tale: Policy Considerations for Artificial Intelligence in Health Care.” A summary of the hearing is available [here](#).

**Senate Foreign Relations:** On November 15, 2023, the Senate Foreign Relations Committee held a [hearing](#) to examine U.S. leadership on AI, featuring testimony from [Nathaniel Fick](#), Ambassador-at-Large of the State Department’s Bureau for Cyberspace and Digital Policy, and [Matthew Graviss](#), the State Department’s Chief Data and Artificial Intelligence Officer. During the hearing, Fick reiterated President Biden’s commitment to building on his AI EO and working with Congress to craft bipartisan AI legislation that establishes an enduring domestic policy framework, as well as to working internationally to advance shared views on AI policy.

**Senate Aging:** On November 16, 2023, the Senate Aging Committee held a [hearing](#) to discuss the role of AI in fraud and scams. Chair Bob Casey (D-PA) voiced concern about the proliferation of deepfakes and their ability to easily dupe consumers and businesses into giving away personal information or money. Ranking Member Mike Braun (R-IN) highlighted his plans to soon introduce the Medicare Transaction Fraud Prevention Act to notify beneficiaries in real

time with suspicious purchase alerts. The Ranking Member also outlined the need to avoid “heavy-handed” federal regulations on AI.

**House Science:** On October 18, 2023, the House Committee on Science, Space and Technology held a joint subcommittee [hearing](#) with the Subcommittee on Investigations and Oversight and the Subcommittee on Research and Technology, titled “Balancing Knowledge and Governance Foundations for Effective Risk Management of Artificial Intelligence.” During the hearing, members called for increased resources for the research and development of AI systems, with a focus on risks and benefits.

**House Judiciary:** On October 19, 2023, the House Judiciary Subcommittee on Courts, Intellectual Property, and the Internet held a [hearing](#) titled “Intellectual Property and Strategic Competition with China: Part III - IP Theft, Cybersecurity, and AI.” During the hearing, witnesses broadly called on the federal government to bolster its investment in AI to avoid ceding leadership in AI to U.S. adversaries. A summary of the hearing is available [here](#).

### **Bipartisan Letter to Vice President Harris Ahead of the U.K.’s AI Safety Summit**

On October 31, 2023, a bicameral, bipartisan group of lawmakers issued a [letter](#) to Vice President Kamala Harris ahead of her attendance at the United Kingdom’s AI Safety Summit, urging the Vice President to promote democratic values in the governance of AI systems. The letter calls on the U.S. to reinforce similar values that were outlined in the White House’s AI Bill of Rights and prioritize civil rights and safety in the deployment of AI technologies.

### **Bipartisan Senate Pair Voice Concerns About Voice Cloning Technology**

On October 31, 2023, Sens. Amy Klobuchar (D-MN) and Susan Collins (R-ME) sent a [letter](#) to Federal Trade Commission (FTC) Chair Lina Khan and Federal Communications Commission (FCC) Chair Jessica Rosenworcel expressing concerns about the growing threats of AI systems and voice cloning technologies. Specifically, the senators ask the agencies how they are cracking down on voice cloning technology, what they have learned from consumer reports on the issue, what resources the agencies are devoting to the issue and whether there should be greater enforcement.

### **Bipartisan, Bicameral Group of Lawmakers Probe FEC on the Use of AI in Campaigns**

On October 3, 2023, a bicameral and bipartisan group of lawmakers sent a [letter](#) to the Federal Election Commission (FEC), calling on the Commission to use its authority to regulate the use of AI in campaign advertisements.

### **House Democrats Urge Civil Rights Focus in Schools’ Use of AI**

On October 19, 2023, Reps. Lori Trahan (D-MA), Sara Jacobs (D-CA), Hank Johnson (D-GA), Bonnie Watson Coleman (D-NJ) and Adam Schiff (D-CA) sent a [letter](#) urging the U.S. Department of Education to address the negative impacts of AI technologies on students’ civil rights following a [report](#) from the Center for Democracy and Technology.



## Health Care and Life Sciences

On October 30, 2023, the Biden administration released an expansive EO on the [Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence](#), which issues directives related to the use of AI across several sectors, including health care. Akin previously provided an overview of the EO [here](#), and discussed the EO directives related to the health care sector [here](#).

The EO tasks the Department of Health & Human Services (HHS) with promoting responsible AI innovation, development, and use, including addressing the potential risks associated with AI-enabled technologies in health care and use of AI in drug development. The EO directs HHS to establish an AI Task Force, develop an AI Assurance Policy, consider actions to advance compliance with nondiscrimination laws, create an AI Safety Program, prepare a strategy for use of AI in drug development and issue grants and awards to encourage AI innovation and support responsible AI development and use. The EO should bolster the efforts the Food and Drug Administration (FDA) has already undertaken to regulate AI and instructs HHS to take on the use of AI in technologies not under FDA's purview.

### FDA's New Digital Health Advisory Committee

On October 11, 2023, FDA [announced](#) the creation of a [new advisory committee on digital health technologies \(DHTs\)](#), including technologies that employ AI/machine learning. The new Digital Health Advisory Committee will advise FDA on the benefits, risks and clinical outcomes associated with the use of DHTs. The Committee will help to ensure digital health medical devices are designed and targeted to meet the needs of diverse populations, and further FDA's goal of advancing health equity. FDA plans for the Committee to be fully operational in 2024.

### Lawmakers Call for CMS to Restrict Use of AI for Prior Authorization

A group of [Democratic representatives is urging](#) the Centers for Medicare & Medicaid Services (CMS) to increase its guardrails around the use of AI for prior authorization by Medicare Advantage (MA) plans. MA plans may currently use AI to assist in coverage determinations in certain care settings, such as inpatient hospital, skilled nursing facilities and home health. The letter points to a [report](#) from the HHS Office of Inspector General (OIG), which reported high numbers of inappropriate denials, linked to use of AI. The letter pressures CMS to adopt a list of measures, such as requiring MA plans to justify denials, assess the frequency of denials, determine the extent to which AI contributed to the denial decision, whether algorithms are self-correcting (i.e., if the denial is reversed on appeal, whether that would be factored into the algorithm) and whether plans are inappropriately using race or other factors in algorithms.

## Judicial Action



### Many Copyright Claims Against Image Generators and LLMs Dismissed

On October 30, 2023, U.S. District Judge William Orrick (N. D. Cal.) largely granted a motion to dismiss [copyright claims](#) brought against notable AI image generators. Judge Orrick found the complaint defective for a number of reasons, including that not all training images were copyrighted (as opposed to copyrightable) and a failure to identify alleged infringement with sufficient specificity. The plaintiffs will be allowed an opportunity to amend the complaint regarding some issues—such as specifying which copyrighted images are involved and more definite allegations of whether the generated images are “substantially similar” to the original works and should be considered derivatives of those works. Judge Orrick did not dismiss allegations of direct copyright infringement based on scraping images from the internet.

On November 20, 2023, U.S. District Judge Vince Chhabria (N. D. Cal.) granted a motion to dismiss all claims, except for unauthorized copying, in *Kadrey et al v. Meta Platforms, Inc.*—one of the first copyright cases filed against a large language model (LLM). Judge Chhabria rejected plaintiffs’ derivative work theories, finding them “not viable,” “nonsensical,” and lacking “any plausible allegation of an infringing output [as a derivative work].” Judge Chhabria noted that plaintiffs were incorrect to claim that duplication of their works meant that they need not allege similarity and that there was no factual basis that the original works were distributed with the LLM model. Like the image generator case above, the plaintiffs will be allowed an opportunity to amend the complaint.

### Mike Huckabee Joins the LLM Copyright Bandwagon

On October 17, 2023, Former Arkansas governor Mike Huckabee [filed a complaint](#) in the Southern District of New York against Meta and Microsoft alleging copyright infringement based on training large language models with copyrighted material, including use of the books3 data set. This complaint is similar to the copyright cases covered in Akin’s September and October newsletters and presents nearly identical allegations.

## State Action



### Michigan

On November 1, 2023, the Michigan House of Representatives passed [HB 5141](#), a bill that prevents AI-generated content in election communications. The legislation requires a disclaimer on political advertisements that were created using AI. The legislation would also ban AI deepfakes in election communications unless a clear disclaimer is included.

### New York

On October 27, [Assembly Bill 8179](#) was introduced and referred to the Ways and Means Committee. The bill, if passed, will impose a tax on certain businesses in instances where a company’s adoption of automation, AI or other technology causes any workers to be laid off or displaced. The tax would equal the sum of any taxes or fees imposed by the state or a political subdivision thereof, as determined based on an employee’s wages. If the bill is enacted, it would take effect immediately and apply to taxable years starting in 2024.

## Industry Action



### Industry Responds to AI Executive Order

- **Microsoft:** In a [tweet](#), Brad Smith, President, stated, “Today’s executive order is another critical step forward in the governance of AI technology. This order builds on the White House Voluntary Commitments for safe, secure, and trustworthy AI and complements international efforts through the G7 Hiroshima Process. AI promises to lower costs and improve services for the Federal government, and we look forward to working with U.S. officials to fully realize the power and promise of this emerging technology.”
- **Alphabet:** In a [tweet](#), Kent Walker, President of Global Affairs and Chief Legal Officer, stated, “AI should benefit everyone in America. We’re reviewing today’s Executive Order,

and we are confident that our long-standing AI responsibility practices will align with its principles. We'll continue working together to maximize AI's potential for good.”

- **Adobe:** In a [statement](#), Dana Rao, General Counsel & Chief Trust Officer, said, “It’s great to see the White House investing in AI’s growth by creating a framework for responsible AI practices.”
- **U.S. Chamber’s Technology Engagement Center:** In a [statement](#), Tom Quadman, Executive Vice President, stated, “The Chamber appreciates the priorities outlined in the Executive Order, such as attracting highly skilled workers, bolstering resources needed for intra-government coordination, and speeding up the development of standards.”
- **Business Roundtable:** In a [statement](#), Joshua Bolten, CEO, said, “AI’s continued advancement and adoption is poised to benefit society and the economy. Business Roundtable members, whose companies are leading developers and users of AI, are committed to building trust in AI by responsibly developing and deploying these technologies. We appreciate the Biden Administration’s focus on this important issue and encourage policymakers to work closely with the business community to maximize the societal, economic and security benefits of AI, while addressing risks.”
- **Information Technology Industry Council:** In a [statement](#), Rob Strayer, Executive Vice President of Policy, said, “To successfully implement this significant measure, we urge the administration to work with its global partners and industry to advance a common vision of safe and secure AI, leveraging a risk-based approach to address potential harms while also realizing AI’s incredible potential. Agencies must prioritize appropriate resources for the activities needed to operationalize these new AI policies, while managing an increasingly complex procurement environment without suppressing innovation. ITI looks forward to continuing to work with the administration to implement a policy framework that advances AI in a way that benefits everyone.”

## Companies Announce New AI Features

- **Airbnb:** In an aim to address disruptive and unauthorized parties, Airbnb has [deployed](#) AI-powered software in its app to identify potentially higher-risk one-night and two-night booking attempts for entire home listings and prevent those bookings from being made.
- **Samsung:** On November 8, 2023, Samsung Electronics [introduced](#) its new generative AI model—Samsung Gauss. The model aims to help users compose emails and translate content and also allow for AI-powered photo generation and editing. Daniel Araujo, Vice President of Samsung’s mobile business, indicated that the model will likely be available to its handset customers sometime next year.
- **Microsoft:** Microsoft has [announced](#) that the company has begun “enabling government agencies to adopt new AI technologies for mission critical solutions with Azure OpenAI Service in the Azure commercial cloud.”

## Meta Bars Political Advertisers from using Generative AI Ads Tools

On November 6, 2023, Meta [announced](#) that the company will be barring political campaigns and advertisers in other regulated industries from using its new generative AI advertising products.

## Google Releases AI “Opportunity Agenda”

On November 14, 2023, Google [unveiled](#) an AI Opportunity Agenda, which outlines policy recommendations in the form of a three-part agenda for policy-makers, companies and civil

society. The agenda outlines the overarching need to (1) invest in AI infrastructure and enable innovation by advancing frameworks that support responsible AI growth; (2) maintain a focus on workforce development by investing in human capital, education, and training systems; and (3) promote widespread adoption and universal accessibility.

## **TechNet Releases Federal Policy Framework**

TechNet has released a comprehensive federal framework with policy recommendations for AI regulation, with a focus on addressing potential risks while maintaining U.S. global leadership.

## **Nonprofit Releases Guidance for Foundation and Frontier Model Providers**

The Partnership on AI (PAI) released guidance for foundation and frontier model providers at its AI Policy Forum in London. PAI is seeking public feedback on the framework until January 15, 2024, before releasing an updated version in the spring.

## **Retailers Unveil AI Principles**

On November 13, 2023, the National Retail Federation (NRF) unveiled its Principles for the Use of Artificial Intelligence in the Retail Sector, which were developed by the group's Center for Digital Risk and Innovation. The principles are organized by four categories: (1) Governance and Risk Management; (2) Customer Engagement and Trust; (3) Workforce Applications and Use; and (4) Business Partner Accountability.

## **OpenAI Holds First DevDay and Launches New Models**

On November 7, 2023, OpenAI held DevDay, its first developer conference. The event included keynotes, breakout sessions, new models and a number of developer and consumer launches. The developer and enterprise launches included an updated model, GPT-4 Turbo, and multimodal capabilities to integrate more functionality. On the consumer side, the launches focused on ease-of-use and customization, with special emphasis on "GPTs"—customized AI applications made for specific purposes that can be built by anyone, without coding.

OpenAI also introduced Copyright Shield, which protects ChatGPT Enterprise and developers against copyright infringement allegations, similar to the user indemnification policies from other companies reported in last month's newsletter.

## **The Last Beatles Song Is Released**

On November 2, 2023, the Beatles released Now and Then—a song written and recorded on cassette by John Lennon in the late 1970s. Due to the low quality of the recordings and untimely passing of John Lennon, the track was never finished—even during renewed efforts by the remaining band members in the 1990s. Specialized AI was developed to recover the audio and allowed the remaining Beatles to finish the song.

## **YouTube Announces AI Disclosure Requirements and Content Marking**

On November 14, 2023, YouTube introduced its plan to require disclosures and content labels for "altered or synthetic content that is realistic, including using AI tools." In addition to its existing policies and community guidelines, YouTube plans to update its platform over the next few months with new features and moderation. YouTube is also adding the ability to request, if appropriate, removal of synthetic or altered content of individuals through the existing privacy request process.

YouTube intends to create a system that informs viewers when content may be synthetic by flagging this in the video description and displaying a more prominent label when sensitive

topics are involved. Content with a high risk of harm, such as graphic violence, will continue to be removed from the platform.

## EU and U.K. Updates



### U.K. Global AI Safety Summit Is the First of Its Kind

From November 1-2, 2023, the U.K. held a global “[AI Safety Summit](#).” The event brought together leaders from the United States, the European Union (EU), China and elsewhere, along with executives at leading AI companies, for a two-day discussion on “how to best manage the risks from the most recent advances in AI.”

The event was heralded as a “remarkable” diplomatic achievement concluding in the [Bletchley Declaration](#), a statement signed by more than 25 countries and the EU. The Declaration recognized the “enormous global opportunities” of AI, as well as its “significant risks.” To that end, the participants stated their “resolve to support an internationally inclusive network of scientific research on frontier AI safety . . . to facilitate the provision of the best science available for policy making and the public good.” The parties also “resolve[d] to sustain an inclusive global dialogue,” including by meeting in 2024 at another AI Safety Summit hosted by France. While the U.K. has [called](#) the Declaration a “world-first” agreement, experts have criticized it for not going far enough to establish concrete action steps on regulating AI.

### ICO Focus on Biometric Data Guidance

On October 20, 2023, the Information Commissioner’s Office (ICO), the U.K. personal data protection regulator, [closed a public consultation](#) on its draft guidance on biometric data. Vendors or users of biometric recognition systems, including both controllers and processors, would be required to comply with the guidance once finalized. As the definition of biometric data is relatively broad and includes, for example, a person’s voice or face that have been analyzed using technology for the purposes of identifying such person, the draft guidance is likely to apply to a wide range of companies across all industry sectors in and outside the U.K.

### Progress on Biometric Identification in the Draft EU AI Act Negotiations

On November 3, 2023, EU policy-makers reportedly [reached a potential breakthrough](#) on the treatment of remote biometric identification (RBI) in the forthcoming draft EU AI Act, resolving a major roadblock in the ongoing “trilogue” between the European Commission, the European Parliament and the European Council to finalize the law. While the European Commission had envisioned a limited use of RBI, the European Parliament had sought a total ban on the technology. Under the compromise, RBI would apparently be permitted in exceptional circumstances, such as tracking down a suspected criminal for a severe offense. RBI systems would also likely need to register in the EU public database and undergo a fundamental rights impact assessment. Finally, a judicial authority would likely need to validate the real-time usage of RBI or, if necessary, approve its use within 48 hours.

The European Parliament reportedly received a number of concessions in return, including an expanded list of banned AI applications and others. The breakthrough builds on progress at the three European institutions’ last trilogue session, during which they [reportedly](#) made headway on how to approach “high-risk” AI systems, another major sticking point. While issues like predictive policing remain, negotiators have [signaled confidence](#) that they could resolve these differences by the final trilogue session of the year on December 6, 2023.

## Further Progress on Clarifying Obligations on AI Foundation Models in the Draft EU AI Act Negotiations

Relatedly, on November 7, 2023, the Spanish presidency of the European Council proposed a governance architecture for supervising foundation models' obligations under the draft EU AI Act. Under the proposal, the European Commission would have exclusive powers to investigate and enforce certain foundation models' obligations, either upon its own initiative or upon receipt of a complaint. To conduct its investigation, the Commission could require providers to give it access to the foundation model. For "high-impact" foundation models, the European Commission would be required, under the proposal, to use adversarial evaluations by internal or qualified external red teams—i.e., groups that pretend to be a threat actor to help organizations improve their operations.

Upon a finding of a violation, the European Commission could order the provider to comply with the Act's obligations or impose sanctions. It is not known whether the proposal would be accepted by the European Commission or European Parliament. However, its use as a compromise text could help the trilogue reach a breakthrough on one of the largest remaining sticking points in the negotiations.

## EU Cybersecurity Agency Warns of Increased Cyber Risk Due to Generative AI

On October 19, 2023, the European Union Agency for Cybersecurity (ENISA) released a report containing several warnings about the disruptive effects of AI. Primarily, the report expressed concern that "generative AI is providing an avenue for threat actors to craft sophisticated and targeted attacks at speed and scale," and that it anticipates "more targeted social engineering attacks using AI-based technology in the future." The largest threats the report identifies includes the misuse of AI in "phishing attempts, information manipulation and cybercrime," as well as even more sophisticated voice cloning used for the spread of misinformation during critical periods like elections.

## Writers Plead for Transparency Obligations on Generative AI

Also on October 19, 2023, the European Writers' Council, the Federation of European Publishers and the European and International Booksellers Federation published a statement urging European lawmakers to take action on the use of pirated books and other literary works to train AI models. Arguing that "[g]enerative AI models have been developed in an opaque and unfair way, illegally making use of millions of copyright-protected books without permission from authors or publishers," the statement warns that such a practice "impacts negatively not only rightsholders, but also democracy itself, by facilitating the mass creation of misleading, biased, and even dangerous content which has the potential to undermine European democracy."

## China Updates



### Artificial Intelligence Model Law 1.1

On September 7, 2023, the research team of the Chinese Academy of Social Sciences issued the Artificial Intelligence Model Law 1.1 (Draft of Expert Suggestions), which updates the 1.0 version released in August. The Draft specifies safety issues and the distribution of responsibilities and obligations under the rapid development of AI. The draft sets out recommendations for comprehensive AI governance and how to allocate legal liability. This Draft supports legislative work and further revisions are expected.

## Global AI Governance Initiative

On October 18, 2023, President Xi Jinping introduced the [Global AI Governance Initiative](#) in his keynote speech at the Opening Ceremony of the [Third Belt and Road Forum for International Cooperation](#). The Initiative systematically outlines China's proposals on AI governance, and urges international cooperation, around three major issues: development, security and governance. Core components of the Initiative include:

Uphold a people-centered approach to developing AI and adhere to the principle of developing AI for the good of humanity, so that AI is developed in a way that is beneficial to human progress.

Uphold the principles of mutual respect, equality, and mutual benefit in AI development, and oppose drawing ideological lines or forming exclusive groups to obstruct other countries from developing AI.

Promote the establishment of a testing and assessment system based on AI risk levels, so as to make AI technologies more secure, reliable, controllable and equitable.

Support efforts to develop AI governance frameworks, norms, and standards based on broad consensus and with full respect for policies and practices among countries, and support discussions within the United Nations framework to establish an international institution to govern AI.

Oppose using AI for the purposes of manipulating public opinion, spreading disinformation, interfering with other countries' internal affairs and disrupting social systems and social order.

Respect other countries' sovereignty and laws when providing AI products and services.

Conduct international cooperation with and provide assistance to developing countries, to bridge the gap in AI and governance capacity.

## Guidance on the Development of Humanoid Robots

On October 20, 2023, the Ministry of Industry and Information Technology published the [Guiding Opinions on the Innovation and Development of Humanoid Robots](#), which aims to significantly improve the technological capabilities of humanoid robots and form a safe, reliable industrial chain and supply chain system by 2027. The Opinions call for focusing on key manufacturing areas, such as 3C (Computer, Communication and Consumer electronics) and automobiles; improving the tool operation and task execution capabilities of humanoid robots; building demonstrative humanoid robot production lines and factories; and investigating in-depth applications in typical manufacturing scenarios.

## Akin Thought Leadership

[Digital Lords Committee Hears Evidence From Artificial Intelligence \(AI\) Firms and Regulators](#) (November 22, 2023)

[Timeline: Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence](#) (November 13, 2023)

[President Biden's AI EO: Key Takeaways for Health Care & Life Sciences](#) (November 9, 2023)

[Exploring government action on AI: State attorneys general define priorities](#) (November 9, 2023)

[President Biden Issues Long-Awaited Artificial Intelligence Executive Order](#) (October 30, 2023)

[Akin IP Lawyers Author Article on Safeguarding Fund Data and IP When Using AI](#) (October 23, 2023)

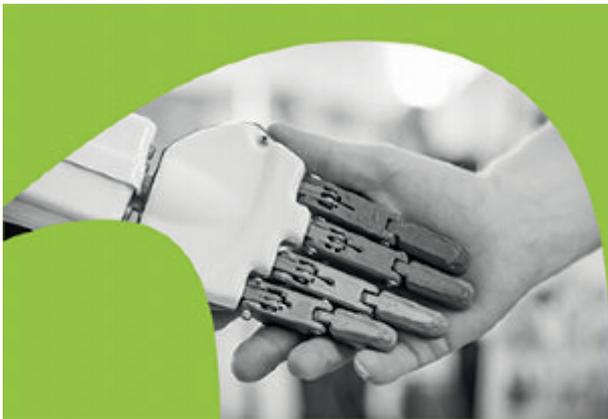
[Rising AI Use Paired With Layoffs Invites Age Bias Litigation](#) (October 17, 2023) (Paywall)

[Embracing AI in Private Funds: Emerging AI Technology and Valuable Legal- and Compliance-Related Applications](#) (October 16, 2023)

[Firms Taking Cautious Approach To AI-Assisted Lobbying](#) (October 16, 2023) (Paywall)

[Newsom on GenAI: Executive Order Mandates Ethical Innovation in View of Risk](#) (October 5, 2023)

[AI Concerns of WGA and SAG-AFTRA: What Is Allowed?](#) (October 2, 2023)



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