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Federal Policymakers' Recent Actions Seek to Regulate AI

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Federal lawmakers and policymakers have expressed increasing alarm about artificial intelligence (AI) and debated how to effectively provide transparency and protections for consumers following the success of ChatGPT and other rapid advances in AI technology.[1] At the same time, lawmakers and policymakers have expressed an awareness of the utility of AI for innovation, defense, and security, including the imperative for the United States to stay ahead of China.[2]

In recent weeks, we have seen significant activity on AI issues in Washington:

- On May 16, 2023, both the Senate Judiciary Committee's Subcommittee on Privacy, Technology, and the Law and the Senate Homeland Security and Governmental Affairs Committee held public hearings to discuss AI issues, with one featuring high-profile testimony from industry leaders like OpenAI CEO Sam Altman.[3]
- On May 4, 2023, the White House held a high-level meeting with the CEOs of companies at the forefront of AI innovation[4] and announced new actions to promote responsible American innovation in AI.[5] These actions include new investments in AI research and development, public assessments of existing generative AI systems, and policies to ensure the federal government is leading the way on mitigating AI risks and harnessing AI opportunities.
- On April 27, 2023, the White House released a request for information (RFI) on how AI is "being used to surveil, monitor, and manage workers."[6]
- On April 25, 2023, the heads of multiple key federal agencies—including the Civil Rights Division of the Department of Justice (DOJ), Equal Employment Opportunity Commission (EEOC), Federal Trade Commission (FTC), and Consumer Financial Protection Bureau (CFPB)—outlined their commitment to focus on mitigating potential discrimination arising from AI systems,[7] which the Chair of the EEOC called a "new civil rights frontier."[8]
- On April 13, 2023, Senate Majority Leader Chuck Schumer (D-NY) announced that he would lead a Senate effort to develop a legislative framework that outlines a new regulatory regime for AI.[9]

This alert highlights the major federal legislative efforts on AI and the White House initiatives on AI, which together represent a growing momentum for Washington to potentially play a major role in the regulation of AI to balance innovation, accountability, and transparency.

I. Federal Legislation

Bipartisan urgency has arisen in Washington around the need to regulate risks and create uniform standards for AI. Representative Frank Lucas (R-OK-3), Chair of the House Science, Space, and Technology Committee, recently remarked that legislators are "all trying to focus" on AI in response to the technology's rapid growth.[10] Senator Mark

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Warner (D-VA), Chair of the Senate Intelligence Committee, observed the “mad rush amongst many members to try to get educated as quickly as possible” on AI issues.[11]

Lawmakers in both chambers of Congress have recently introduced new legislation and regulatory frameworks that try to address the risks associated with AI. They now face the challenge of striking the appropriate balance between countering potential risks in connection with AI systems and ensuring that regulatory burdens do not stifle American innovation in AI.

a. Majority Leader Schumer’s AI Framework:

In April 2023, Senate Majority Leader Schumer announced his intent to craft a framework to regulate AI in collaboration with stakeholders and experts from academia, advocacy groups, industry, and government.[12] Majority Leader Schumer expects robust actions from Senate committees with jurisdiction over the development of AI legislation. The key question is what will the final comprehensive AI legislation look like and what will it mean for companies utilizing this technology?

What we know now is that the framework is expected to center around four “guardrails” designed to guide the effective disclosure and testing of AI technologies by independent experts without stifling innovation.[13] These guardrails, which aim to regulate AI technology properly and align AI systems with American values, are:

- **Who**: Identification of the AI system’s intended audience, as well as “who trained the algorithm;”[14]
- **Where**: “[D]isclosure of [the AI system’s] data source;”[15]
- **How**: Explanation for “how [the AI system] arrives at its responses;”[16] and
- **Protect**: Transparent and strong ethical boundaries, focused on “aligning AI systems with American values and ensuring that AI developers deliver on their promise to create a better world.”[17]

When announcing the framework, Majority Leader Schumer encouraged Republican senators to contribute to the development of the comprehensive AI legislation the framework envisions. Notably, the framework’s focus on transparency in the AI industry mirrors past efforts at AI regulation that have been widely supported by Republicans, such as the Trump Administration’s 2020 Executive Order on Promoting the Use of Trustworthy Artificial Intelligence in the Federal Government.[18]

Majority Leader Schumer’s AI framework is still in its early stages, with no particulars yet on what exactly the legislation will entail. Additionally, no timeline has been provided for the release of the AI legislative framework, and it may even carry over to future Congresses. But bipartisan interest exists on AI issues generally with both political parties leaning into its potential for innovation and utility in defense.

Beyond the lack of specifics for the AI framework, Majority Leader Schumer’s announcement is significant because, as Majority Leader, he determines what bills are considered on the Senate floor and has outsized influence in setting the agenda on behalf of Senate Democrats. Given that Majority Leader Schumer urged Congress to “move quickly,” it is fair to expect multiple Senate committees to hold hearings and potentially advance AI bills during the 118th Congress.[19] But, the key factor to watch is whether these bills will be bipartisan, which will impact both whether the bills can obtain the 60-votes needed to pass the Senate over a filibuster and whether a Republican-led House will take up an AI bill from a Democratic-led Senate. This is especially true with a Democratic-controlled administration during a presidential election year, which could prove to be an obstacle to AI legislation during this Congress.

b. Algorithmic Accountability Act of 2022:

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While it remains unclear if Washington will pass comprehensive AI legislation during this Congress, it is possible that Congress could take up narrower AI bills aimed at increasing transparency and preventing bias, like the Algorithmic Accountability Act. This legislation is an example of a policy proposal that could be included in Majority Leader Schumer's broader framework or a proposal that could move as a stand-alone bill if a comprehensive framework lacks momentum.

First introduced by Senator Ron Wyden (D-OR) and Representative Yvette Clarke (D-NY-9) in 2019,[20] the Algorithmic Accountability Act would authorize the FTC to require companies under its jurisdiction to study and address potential unfair bias and discrimination in computer algorithms. Senator Cory Booker (D-NJ) has said this bias is "significantly harder to detect" than many other forms of discrimination.[21] As examples of possible undetectable discrimination, Booker cited "houses that you never know are for sale, job opportunities that never present themselves, and financing that you never become aware of."[22]

Specifically, the Algorithmic Accountability Act would require the FTC—in consultation with other stakeholders in the private sector, civil society, and government—to promulgate regulations requiring "covered entit[ies]" to perform impact assessments of certain AI systems and "augmented critical decision process[es]."[23] These impact assessments would include detailed documentation of consultations with relevant stakeholders, ongoing testing and evaluation efforts, employee training, and consumers' rights. Covered entities would also be required to assess any likely negative impacts on consumers, as well as the need for any guardrails on the use of the AI system.[24]

For any new AI system, the covered entity would submit an "initial summary report" of its impact assessment to the FTC prior to deployment.[25] Non-covered entities that deploy covered AI systems and processes are also encouraged, but not required, to submit summary reports of their AI impact assessments.[26] The Act lays out specific requirements for the form and substance of these summary reports.[27]

In addition to these individual impact assessments, covered entities would be required to submit a "summary report" to the FTC on an annual basis to demonstrate ongoing impact assessment of deployed AI systems and processes.[28]

These requirements apply to any entity over which the FTC has jurisdiction and that meets certain cut-offs for annual gross receipts, quantity of personal identifying information used, and AI use.[29] The "critical decision[s]" covered by this bill are likewise broad, incorporating any decision with "legal, material, or similarly significant effect" on a person's access to a wide range of interests such as housing and employment.[30]

Identical versions of the Algorithmic Accountability Act enjoyed broad Democratic support in both the Senate and the House during the 117th Congress, but neither version was able to obtain any Republican co-sponsors.[31] We expect the bills to be reintroduced in both chambers in the 118th Congress.

c. Algorithmic Justice and Online Platform Transparency Act:

Another example of a narrower bill that could be acted upon by Congress as a stand-alone bill or rolled into Senator Schumer's broader AI bill is the Algorithmic Justice and Online Platform Transparency Act. This bill, introduced by Senator Ed Markey (D-MA) and Representative Doris Matsui (D-CA-6), would make it unlawful for someone to use AI on an online platform in a manner that deprives an individual of a right or privilege under the Civil Rights Act of 1964. Representative Matsui called the bill "an essential roadmap for digital justice to move us forward on the path to online equity" by addressing what Senator Markey described as "[b]iased artificial intelligence systems that have become embedded in the fabric of our digital society."[32]

Specifically, the Algorithmic Justice and Online Platform Transparency Act would:

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- Prohibit algorithmic processes on online platforms that discriminate on the basis of race, age, gender, ability and other protected characteristics. This includes discrimination against users, the use of platform design features in a discriminatory manner, discriminatory advertising, and the processing of personal information in a manner that intentionally deprives any individual of their right to vote in federal, state, or local elections;[33]
- Establish a safety and effectiveness standard for algorithms, such that online platforms may not employ automated processes that harm users or fail to take reasonable steps to ensure algorithms achieve their intended purposes;[34]
- Require any online platforms that uses an "algorithmic process" to disclose the types of algorithmic processes they employ and the information they collect to power them;[35]
- Require online platforms to publish annual public reports detailing their content moderation practices;[36]
- Empower the FTC to enforce the Act by making any violation qualify as an "unfair or deceptive act or practice."[37] It also would empower the FTC to issue advisory opinions on compliance with the Act upon request from any online platform.[38]
- Create an inter-agency task force comprised of the FTC, Department of Education, Department of Housing and Urban Development, Department of Commerce, and DOJ, to investigate discriminatory algorithmic processes employed in sectors across the economy.[39]

Substantively identical versions of the bill enjoyed Democratic support in both the Senate and the House during the 117th Congress, but neither version was able to garner a Republican co-sponsor.[40] Given the 118th Congress's focus on AI, we expect the bills to be reintroduced in both chambers.

II. Recent White House Initiatives

Congress is far from the only branch of the U.S. government focused on potential benefits and risks associated with AI. On May 1, 2023—International Workers' Day—the White House Office of Science and Technology Policy released an RFI seeking guidance on how AI is "being used to surveil, monitor, and manage workers."[41] The RFI cited concerns about public reporting suggesting that eight of the ten largest private employers had used advanced technologies to monitor workplace productivity.[42] Specifically, the White House is seeking "workers' firsthand experiences with surveillance technologies," "details from employers, technology developers, and vendors on how they develop, sell, and use these technologies," and "best practices for mitigating risks to workers," along with any other relevant data or research.[43] The White House intends to use these responses to inform new policies and amplify best practices among employers and other stakeholder groups.

Notably, the blog post announcing this RFI was authored jointly by the White House Office of Science and Technology Policy and the White House's Deputy Assistant to the President for Racial Justice and Equity.[44] The announcement specifically links these surveillance concerns with the administration's goal of "advancing racial equity" and "promot[ing] fair and equitable workplaces."[45]

On May 4, 2023, the Biden Administration announced a number of different actions designed to "promote responsible American innovation in artificial intelligence."[46] Although noting AI's great potential for positive change, President Biden emphasized that his administration would "place people and communities at the center" of AI policies.[47]

These efforts to promote responsible AI growth include:

- **New Investments in American AI Research & Development**: The National

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Science Foundation announced $140 million in funding to launch seven new National AI Research Institutes focused on promoting responsible innovation by facilitating collaborative efforts across government, academia, and the private sector and by pursuing transformative (but ethical) AI advances. This will bring the total number of Institutes in the United States to 25.

- **Public Assessments of Existing Generative AI Systems**: The Biden Administration announced that it had secured independent commitments from a wide range of leading AI developers to participate in a public evaluation of their AI systems. As part of this evaluation, AI experts will consider how these systems align with the draft Blueprint for an AI Bill of Rights published by the White House in October 2022.[48]
- **Policies to Mitigate AI Risks and Harness AI Opportunities**: The White House Office of Management and Budget announced that it will be releasing for public comment a draft policy on the use of AI systems by the U.S. government. The policy is intended to empower agencies to responsibly use AI to advance their missions and improve their ability to equitably serve Americans.

The same day that these actions were announced, President Biden, Vice President Harris, the Secretary of Commerce, and other senior officials in the Biden White House and Administration met with CEOs of key technology companies such as Microsoft and Open AI at the White House.[49] President Biden told the CEOs that they have a "fundamental responsibility to make sure their products are safe and secure before they are deployed or made public."[50] Vice President Harris noted AI's "potential to improve people's lives and tackle some of society's biggest challenges."[51] However, echoing remarks from the President, the Vice President warned that their companies have an "ethical, moral, and legal responsibility" to ensure the safety and security of AI technologies.[52] Given that the meeting was attended by a wide range of top administration officials, expect a whole of government approach to address issues involving AI.

III. How Gibson Dunn Can Assist

Gibson Dunn's Public Policy, Artificial Intelligence, and Privacy, Cybersecurity and Data Innovation Practice Groups are closely monitoring legislative and regulatory actions in this space and are available to assist clients through strategic counseling; real-time intelligence gathering; developing and advancing policy positions; drafting legislative text; shaping messaging; and lobbying Congress.

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[1] Cat Zakrzewski, *Federal regulators call AI discrimination a 'new civil rights frontier*,' WASH. POST (Apr. 25, 2023), https://www.washingtonpost.com/technology/2023/04/25/artificial-intelligence-bias-eeoc/ ("Though this generation of regulators long has sounded the alarm about the risks posed by AI, its work has taken on greater urgency as tech companies engage in an arms race following the release of ChatGPT.").

[2] Press Release, Senate Democrats, Schumer Launches Major Effort to Get Ahead of Artificial Intelligence (Apr. 13, 2023), https://www.democrats.senate.gov/newsroom/press-releases/schumer-launches-major-effort-to-get-ahead-of-artificial-intelligence ("Leader Schumer believes that it is imperative for the United States to lead and shape the rules governing such a transformative technology and not permit China to lead on innovation or write the rules of the road.").

[3] *Oversight of A.I.: Rules for Artificial Intelligence: Hearing Before the Subcomm. on Privacy, Tech., and the Law of the S. Comm. on the Judiciary*, 118th Cong. (2023), https://www.judiciary.senate.gov/committee-activity/hearings/oversight-of-ai-rules-for-artificial-intelligence; *Artificial Intelligence in Government: Hearing Before the S. Comm. on Homeland Sec. & Gov't Affairs*, 118th Cong. (2023),

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https://www.hsgac.senate.gov/hearings/artificial-intelligence-in-government/.

[4] Ashley Gold, *Top AI CEOs will meet at White House*, Axios (May 2, 2023), https://www.axios.com/2023/05/02/white-house-ai-leaders-ceos-meeting.

[5] Press Release, White House, FACT SHEET: Biden-Harris Administration Announces New Actions to Promote Responsible AI Innovation that Protects Americans' Rights and Safety (May 4, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/04/fact-sheet-biden-harris-administration-announces-new-actions-to-promote-responsible-ai-innovation-that-protects-americans-rights-and-safety/.

[6] The White House, Office for Science and Technology Policy, Blueprint for an AI Bill of Rights, https://www.whitehouse.gov/ostp/ai-bill-of-rights/; Deirdre Mulligan & Jenny Yang, *Hearing from the American People: How Are the Automated Tools Being Used to Surveil, Monitor, and Manage Workers?*, The White House – OSTP Blog (May 1, 2023), https://www.whitehouse.gov/ostp/news-updates/2023/05/01/hearing-from-the-american-people-how-are-automated-tools-being-used-to-surveil-monitor-and-manage-workers/.

[7] Press Release, Fed. Trade Comm'n, Joint Statement on Enforcement Efforts Against Discrimination and Bias in Automated Systems (Apr. 25, 2023), https://www.ftc.gov/system/files/ftc_gov/pdf/EEOC-CRT-FTC-CFPB-AI-Joint-Statement%28final%29.pdf.

[8] Zakrzewski*, supra* note 1.

[9] Press Release, Senate Democrats, Schumer Launches Major Effort to Get Ahead of Artificial Intelligence (Apr. 13, 2023), https://www.democrats.senate.gov/newsroom/press-releases/schumer-launches-major-effort-to-get-ahead-of-artificial-intelligence ("Leader Schumer believes that it is imperative for the United States to lead and shape the rules governing such a transformative technology and not permit China to lead on innovation or write the rules of the road.").

[10] Brendan Bordelon, *Congress in a 'mad rush' to catch up on AI*, Politico (Apr. 26, 2023), https://subscriber.politicopro.com/article/2023/04/congress-in-a-mad-rush-to-catch-up-on-ai-00094070.

[11] *Id.*

[12] Press Release, Senate Democrats, Schumer Launches Major Effort to Get Ahead of Artificial Intelligence (Apr. 13, 2023), https://www.democrats.senate.gov/newsroom/press-releases/schumer-launches-major-effort-to-get-ahead-of-artificial-intelligence.

[13] Andrew Solender & Ashley Gold, *Scoop: Schumer lays groundwork for Congress to regulate AI,* Axios (Apr. 13, 2023), https://www.axios.com/2023/04/13/congress-regulate-ai-tech.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] Press Release, Senate Democrats, Schumer Launches Major Effort to Get Ahead of Artificial Intelligence (Apr. 13, 2023), https://www.democrats.senate.gov/newsroom/press-releases/schumer-launches-major-effort-to-get-ahead-of-artificial-intelligence. Schumer has often invoked American values when discussing the need to "grapple with artificial intelligence" while also "seek[ing] to invest in American ingenuity" and "solidify[ing] American innovation and leadership." See Press Release, Senate Democrats, Majority Leader Schumer Floor Remarks on Artificial Intelligence (May 4, 2023), https://www.democrats.senate.gov/newsroom/press-reports/majority-leader-schumer-floor-remarks-on-

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artificial-intelligence.

[18] *See* Press Release, White House, Office of Science and Technology Policy, Promoting the Use of Trustworthy Artificial Intelligence in Government (Dec. 3, 2020), https://trumpwhitehouse.archives.gov/articles/promoting-use-trustworthy-artificial-intelligence-government/ (listing transparency as one of the "nine common principles for the design, development, acquisition and use of AI" that must guide federal agencies).

[19] Press Release, Senate Democrats, Schumer Launches Major Effort to Get Ahead of Artificial Intelligence (Apr. 13, 2023), https://www.democrats.senate.gov/newsroom/press-releases/schumer-launches-major-effort-to-get-ahead-of-artificial-intelligence.

[20] *See* Press Release, Booker, Wyden, Clarke Introduce Bill Requiring Companies to Target Bias in Corporate Algorithms (Apr. 10, 2019), https://www.booker.senate.gov/news/press/booker-wyden-clarke-introduce-bill-requiring-companies-to-target-bias-in-corporate-algorithms.

[21] *Id.*

[22] *Id.*

[23] Algorithmic Accountability Act of 2022, S. 3572, 117th Cong. § 3(b)(1) (2022). *See also* Algorithmic Accountability Act of 2022, H.R. 6580, 117th Cong. § 3(b)(1) (2022). [Because the Senate and House versions of this bill are identical, all subsequent citations will be to S. 3572 only.]

[24] *Id.* at § 4(a).

[25] *Id.* at § 3(b)(1)(D)–(E).

[26] *Id.* at § 3(b)(1)(F).

[27] *Id.* at § 5.

[28] *Id.* at § 3(b)(1)(D).

[29] *Id.* at § 2(7)(A).

[30] *Id.* at § 2(8).

[31] In the Senate, nine Democratic senators currently co-sponsor the bill, while thirty-nine Democrat Members co-sponsor the House bill. Algorithmic Accountability Act of 2022, S. 3572, 117th Cong. (2022); Algorithmic Accountability Act of 2022, H.R. 6580, 117th Cong. (2022).

[32] Press Release, Senator Markey, Representative Matsui Introduce Legislation to Combat Harmful Algorithms and Create New Online Transparency Regime (May 27, 2021), https://www.markey.senate.gov/news/press-releases/senator-markey-rep-matsui-introduce-legislation-to-combat-harmful-algorithms-and-create-new-online-transparency-regime.

[33] Algorithmic Justice and Online Platform Transparency Act, S. 1896, 117th Cong. § 6(a)–(d) (2022); Algorithmic Justice and Online Platform Transparency Act, H.R. 3611, 117th Cong. § 6(a)–(d) (2022). [Because the Senate and House versions of this bill are substantively identical, all subsequent citations will be to S. 1896 only.]

[34] *Id.* at § 6(e).

[35] *Id.* at § 4(a).

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[36] *Id.* at § 4(b).

[37] *Id.* at § 8(a).

[38] *Id.* at § 6(h).

[39] *Id.* at § 7.

[40] Algorithmic Justice and Online Platform Transparency Act, S. 1896, 117th Cong. (2022); Algorithmic Justice and Online Platform Transparency Act, H.R. 3611, 117th Cong. (2022).

[41] Deirdre Mulligan & Jenny Yang, *Hearing from the American People: How Are the Automated Tools Being Used to Surveil, Monitor, and Manage Workers?*, The White House – OSTP Blog (May 1, 2023), https://www.whitehouse.gov/ostp/news-updates/2023/05/01/hearing-from-the-american-people-how-are-automated-tools-being-used-to-surveil-monitor-and-manage-workers/.

[42] *Id.*; *see The Daily: The Rise of Workplace Surveillance*, N.Y. Times (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/podcasts/the-daily/workplace-surveillance-productivity-tracking.html.

[43] Mulligan & Yang, *supra* note 43.

[44] *Id.*

[45] *Id.*

[46] Press Release, White House, FACT SHEET: Biden-Harris Administration Announces New Actions to Promote Responsible AI Innovation that Protects Americans' Rights and Safety (May 4, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/04/fact-sheet-biden-harris-administration-announces-new-actions-to-promote-responsible-ai-innovation-that-protects-americans-rights-and-safety/.

[47] *Id.*

[48] *See* The White House, Office for Science and Technology Policy, *Blueprint for an AI Bill of Rights*, https://www.whitehouse.gov/ostp/ai-bill-of-rights/.

[49] Press Release, White House, FACT SHEET: Biden-Harris Administration Announces New Actions to Promote Responsible AI Innovation that Protects Americans' Rights and Safety (May 4, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/04/fact-sheet-biden-harris-administration-announces-new-actions-to-promote-responsible-ai-innovation-that-protects-americans-rights-and-safety/.

[50] Press Release, White House, Readout of White House Meeting with CEOs on Advancing Responsible Artificial Intelligence Innovation (May 4, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/04/readout-of-white-house-meeting-with-ceos-on-advancing-responsible-artificial-intelligence-innovation/.

[51] Press Release, White House, Statement from Vice President Harris After Meeting with CEOs on Advancing Responsible Artificial Intelligence Innovation (May 4, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/04/statement-from-vice-president-harris-after-meeting-with-ceos-on-advancing-responsible-artificial-intelligence-innovation/.

[52] *Id.*

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