GIBSON DUNN

PRESIDENT TRUMP ISSUES EXECUTIVE ORDER ON "MAINTAINING AMERICAN LEADERSHIP IN ARTIFICIAL INTELLIGENCE"

To Our Clients and Friends:

Yesterday, President Donald Trump signed an executive order ("EO") creating the "American AI Initiative"[1] intended to spur the development and regulation of artificial intelligence, machine learning and deep learning ("AI") and fortify the United States' global position by directing federal agencies to prioritize investments in research and development of AI.[2] Despite its position at the forefront of AI innovation, the U.S. still lacks an overall federal AI strategy and policy. And during the past two years, observers noted other governments' concerted efforts and considerable expenditures to strengthen their domestic AI research and development, particularly China's plan to become a world leader in AI by 2030.[3]

These developments abroad prompted many to call for a comprehensive government strategy and similar investments by the United States' government to ensure its position as a global leader in AI development and application.[4] Yesterday's announcement was therefore welcome but not entirely unexpected, following several recent statements made by President Trump that indicated an understanding of the urgency of some of these needs.[5] In announcing the AI Initiative, the Trump administration noted that "as the pace of AI innovation increase around the world, we cannot sit idly by and presume that our leadership is guaranteed."[6]

I.   Overview of the Executive Order

In support of this position, the Trump administration outlined five key areas for AI prioritization:[7]

(1) **Investing in AI Research and Development (R&D)**: encouraging federal agencies to prioritize AI investments in their 'R&D missions' to encourage "sustained investment in AI R&D in collaboration with industry, academia, international partners and allies, and other non-Federal entities to generate technological breakthroughs in AI and related technologies and to rapidly transition those breakthroughs into capabilities that contribute to our economic and national security."[8]

(2) **Unleashing AI Resources**: making federal data and models more accessible to the AI research community by "improv[ing] data and model inventory documentation to enable discovery and usability" and "prioritiz[ing] improvements to access and quality of AI data and models based on the AI research community's user feedback."[9]

(3) **Setting AI Governance Standards**: aiming to foster public trust in AI by using federal agencies to develop and maintain approaches for safe and trustworthy creation and adoption of new AI technologies

(for example, the EO calls on the National Institute of Standards and Technology ("NIST") to lead the development of appropriate technical standards).

(4) **Building the AI Workforce**: asking federal agencies to prioritize fellowship and training programs to prepare for changes relating to AI technologies and promoting Science, Technology, Engineering and Mathematics (STEM) education.

(5) **International Engagement and Protecting the United States' AI Advantage**: calling on agencies to collaborate with other nations but also to protect the nation's economic security interest against competitors and adversaries.

The AI Initiative is set to be coordinated through the National Science and Technology Council ("NSTC") Select Committee on Artificial Intelligence ("Select Committee"). The full impact of the AI Initiative is not yet known: while it sets some specific deadlines for formalizing plans by agencies under the direction of the Select Committee, the EO is not self-executing and is generally thin on details. Therefore, the long-term impact will be in the actions recommended and taken as a result of those consultations and reports, not the EO itself. Moreover, although the AI Initiative is designed to dedicate resources and funnel investments into AI research, the EO does not set aside specific financial resources or provide details on how available resources will be structured.

II. Regulation of AI Applications

For now, stakeholders should mark their calendars for August 10, 2019, the EO's internal deadline for agencies to submit responsive plans and memoranda. The EO directs the Office of Management and Budget ("OMB") director, in coordination with the directors of the Office of Science and Technology Police ("OSTP"), Domestic Policy Council, and National Economic Council, and in consultation with other relevant agencies and key stakeholders (as determined by OMB), to issue a memorandum to the heads of all agencies to "inform the development of regulatory and non-regulatory approaches" to AI that "advance American innovation while upholding civil liberties, privacy, and American values" and consider ways to reduce barriers to the use of AI technologies in order to promote their innovative application.[10] Companies and other organizations interested in helping to shape this memorandum should note that the EO directs the OMB Director to determine key stakeholders and issue a draft version of the memorandum for public comment before it is finalized.[11]

A. Development of Technical Standards "In Support of Reliable, Robust, and Trustworthy Systems"

AI developers will need to pay particular attention to future agency developments concerning standards setting. So far, the primary concern for standards sounds in safety, and the AI Initiative echoes this with a high-level directive to regulatory agencies to establish guidance for AI development and use across technologies and industrial sectors, and highlights the need for "appropriate technical standards and reduce barriers to the safe testing and deployment of AI technologies."[12] Within 180 days of the EO, the Secretary of Commerce, through the Director of NIST, shall "issue a plan for Federal engagement in the development of technical standards and related tools in support of reliable, robust, and trustworthy systems that use AI technologies" with participation from relevant agencies as the Secretary of

Commerce shall determine. The plan is intended to include "Federal priority needs for standardization of AI systems development and deployment," the identification of "standards development entities in which Federal agencies should seek membership with the goal of establishing or supporting United States technical leadership roles," and "opportunities for and challenges to United States leadership in standardization related to AI technologies."[13]

Accordingly, within the next six months, we can expect to see proposals from the General Services Administration ("GSA"), OMB, NIST, and other agencies on topics such as data formatting and availability, standards, and other potential regulatory efforts. NIST's indirect participation in the development of AI-related standards through the International Organization for Standardization ("ISO") may prove to be an early bellwether for future developments.[14]

B.   AI Policy and Ethics

So far, there has been relatively little substantive discussion at federal level about AI governance, its societal impact and related ethical issues—such as data privacy and job security—and while the EO notionally aims to "[r]educe barriers to the use of AI technologies to promote their innovative application while protecting American technology, economic and national security, civil liberties, privacy, and values"[15] and "foster public trust and confidence in AI technologies,"[16] it is otherwise vague about how the program plans to ensure that responsible development and use of AI remain central throughout the process, and the extent to which AI policy researchers and stakeholders (such as academic institutions and non-profits) will be invited to participate.[17]

III.   Data and Computing Resources for AI Research and Development

The promised availability of governmental data[18] may prove to be a boon for those in certain AI industries that have reached or are fast approaching commercial viability—particularly those for whom government agencies have already expressed interest in certain forms of data collection (e.g., in the context of the regulation of autonomous vehicles by the National Highway Traffic Safety Administration ("NHTSA")). Within 90 days of the EO, the OMB Director will publish a notice in the Federal Register inviting the public to identify additional requests for access or quality improvements for federal data and models that would improve AI R&D and testing and, in conjunction with the Select Committee, "investigate barriers to access or quality limitations of Federal data and models that impede AI R&D and testing."[19] OMB has also been directed to update implementation guidance for Enterprise Data Inventories and Source Code Inventories to "support discovery and usability in AI R&D" within 120 days."[20]

IV.   Unites States' Leadership in AI Policy

While the Trump administration's formal recognition of the importance of federal guidance and leadership on AI policy is certainly a step in the right direction, it also remains to be seen how calls for thoughtful global AI governance and international collaboration can be reconciled with national narratives focusing on leading the "AI race."[21] Notably, the EO requires NIST to submit an action plan—intended to "organize the development of an action plan to protect the United States advantage in AI and AI technology critical to United States economic and national security interests against strategic

competitors and adversarial nations"—to the President within 120 days.[22] While the EO stakes an opening position for the United States government and seeks to align the Trump administration with leadership in AI innovation, it is at this point largely aspirational, and interested parties will need to closely monitor further developments in the coming months as the various agencies respond to its decrees to gauge the full impact of the AI Initiative. We will continue to closely follow the situation.

---

[1] Donald J. Trump, *Executive Order on Maintaining American Leadership in Artificial Intelligence*, The Whitehouse (Feb. 11, 2019), *available at* https://www.whitehouse.gov/presidential-actions/executive-order-maintaining-american-leadership-artificial-intelligence/.

[2] The White House, *Accelerating America's Leadership in Artificial Intelligence*, Office of Science and Technology Policy (Feb. 11, 2019), *available at* https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-is-accelerating-americas-leadership-in-artificial-intelligence/.

[3] *See, e.g.,* Jamie Condliffe, *In 2017, China is Doubling Down on AI*, MIT Technology Review (Jan. 17, 2017), *available at* https://www.technologyreview.com/s/603378/in-2017-china-is-doubling-down-on-ai/; Cade Metz, *As China Marches Forward on A.I., the White House Is Silent*, N.Y. Times (Feb. 12, 2018), *available at* https://www.nytimes.com/2018/02/12/technology/china-trump-artificial-intelligence.html?module=inline; Jessica Baron, *Will Trump's New Artificial Intelligence Initiative Make The U.S. The World Leader In AI?*, Forbes (Feb. 11, 2019), *available at* https://www.forbes.com/sites/jessicabaron/2019/02/11/will-trumps-new-artificial-intelligence-initiative-make-the-u-s-the-world-leader-in-ai/#70d3ea99a017 (noting that, after Canada in March 2017, the U.S. will be the 19th country to announce a formal strategy for the future of AI); *see also*, as noted in our recent Artificial Intelligence and Autonomous Systems Legal Update (4Q18), the German government's new AI strategy, published in November 2018, which promises an investment of €3 billion before 2025 with the aim of promoting AI research, protecting data privacy and digitalizing businesses (*available at* https://www.bundesregierung.de/breg-en/chancellor/ai-a-brand-for-germany-1551432).

[4] Joshua New, *Why the United States Needs a National Artificial Intelligence Strategy and What It Should Look Like*, The Center for Data Innovation (Dec. 4, 2018), *available at* http://www2.datainnovation.org/2018-national-ai-strategy.pdf.

[5] David McCabe, *Trump Points to Tech in State of the Union*, Axios (Feb. 6, 2019), *available at* https://www.axios.com/trump-tech-state-of-the-union-1549422117-866c9b49-c029-4e36-acb8-3b78117579f0.html.

[6] *Supra*, n.2.

[7] *Id*.

[8] *Supra*, n.1 at § 2(a).

GIBSON DUNN

[9] *Id.* at § 5(a).

[10] *Id.* at § 6(a).

[11] *Id.* at § 6(a); (b).

[12] *Id.* at § 1(b).

[13] *Id*. at § 6(d)(i)(A)-(C).

[14] NIST's officially recognized U.S. representative to ISO is the American National Standards Institute ("ANSI"), which acts as the standards organization representing the United States as a full ISO member, influencing ISO standards development and strategy by participating and voting in ISO technical and policy meetings. *See* Members List for the International Organization for Standardization, *available at* https://www.iso.org/members.html.

[15] *Supra,* n.1 at § 2(c).

[16] *Id.* at § 1(d).

[17] *Id.* at § 4(c) (noting that "[t]o the extent appropriate and consistent with applicable law, heads of AI R&D agencies shall explore opportunities for collaboration with non-Federal entities, including: the private sector; academia; non-profit organizations; State, local, tribal, and territorial governments; and foreign partners and allies, so all collaborators can benefit from each other's investment and expertise in AI R&D."; *see also* § 6(d)(ii) (noting that NIST's plan for the development of technical standards "shall be developed in consultation with the Select Committee, as needed, and in consultation with the private sector, academia, non-governmental entities, and other stakeholders, as appropriate.").

[18] *Id.* at § 5 (stating that "[h]eads of all agencies shall review their Federal data and models to identify opportunities to increase access and use by the greater non-Federal AI research community in a manner that benefits that community, while protecting safety, security, privacy, and confidentiality.").

[19] *Id*. at § 5(a)(i).

[20] *Id*. at § 5(a)(ii).

[21] *Id.* at § 1 (listing as part of its policy and principles "enhancing international and industry collaboration with foreign partners and allies" as a means to "[m]aintain[…] American leadership in AI.").

[22] *Id.* at § 8.

■ ■ ■ ■ ■

GIBSON DUNN

Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, or any of the following lawyers:

Artificial Intelligence and Automated Systems Group:
H. Mark Lyon - Chair, Palo Alto (+1 650-849-5307, *mlyon@gibsondunn.com*)
Frances A. Waldmann - Los Angeles (+1 213-229-7914, *fwaldmann@gibsondunn.com*)

Administrative Law and Regulatory Group:
Eugene Scalia – Co-Chair, Washington, D.C. (+1 202-955-8206, *escalia@gibsondunn.com*)
Helgi C. Walker – Co-Chair, Washington, D.C. (+1 202-887-3599, *hwalker@gibsondunn.com*)
Michael D. Bopp - Washington, D.C. (+1 202-955-8256, *mbopp@gibsondunn.com*)
Thomas H. Dupree, Jr. – Washington, D.C. (+1 202-955-8547, *tdupree@gibsondunn.com*)