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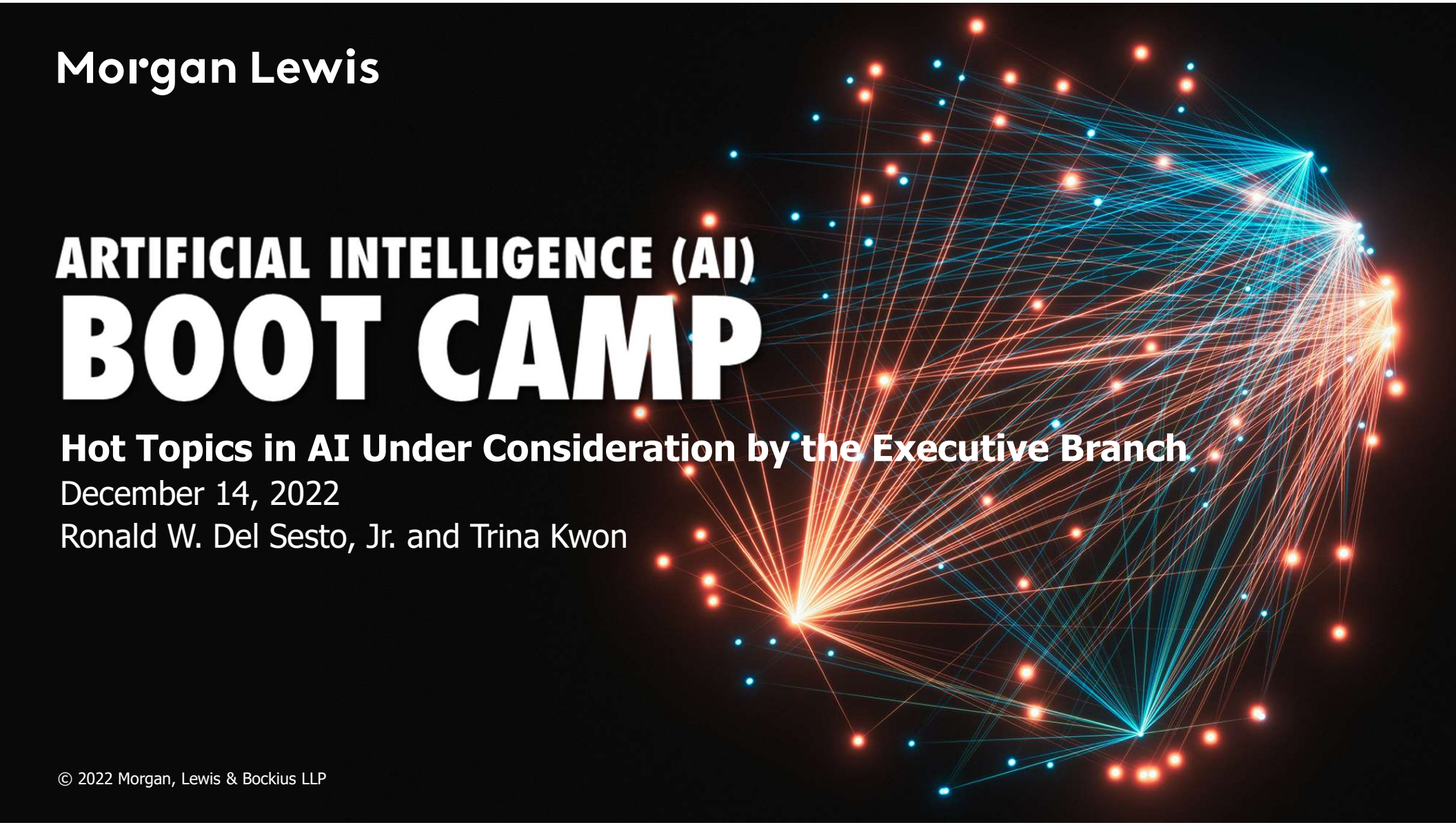

ARTIFICIAL INTELLIGENCE (AI) BOOT CAMP

Hot Topics in AI Under Consideration by the Executive Branch

December 14, 2022

Ronald W. Del Sesto, Jr. and Trina Kwon

Host

Andrew J. Gray IV

Presenters

Ronald W. Del Sesto, Jr

Trina Kwon

Morgan Lewis

Artificial Intelligence: What is it?

- **Computerized systems that work and react in ways commonly thought to require intelligence, such as the ability to learn, solve problems and achieve goals under varying conditions.**
- **Encompasses a range of methodologies and application areas including machine learning, natural language processing, and robotics.**

Artificial Intelligence: What is it? (cont'd)

- "[S]oftware and/or hardware that can learn to solve complex problems, make predictions or undertake tasks that require human-like sensing (such as vision, speech, and touch), perception, cognition, planning, learning, communication, or physical action."
- "The term 'artificial intelligence' means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to—(A) perceive real and virtual environments; (B) abstract such perceptions into models through analysis in an automated manner; and (C) use model inference to formulate options for information or action."

Artificial Intelligence: What is it? (cont'd)

- Narrow AI – systems tailored to a specific task. Examples include financial lending, search result, spam filtering, and voice assistants.
- Augmented AI – applications in physical and connected systems used to enhance human activities rather than replace them.
- General AI – Systems that demonstrate intelligent behavior across a range of cognitive tasks. Most experts believe that this type of AI is at least a decade away.

Artificial Intelligence and the Federal Government

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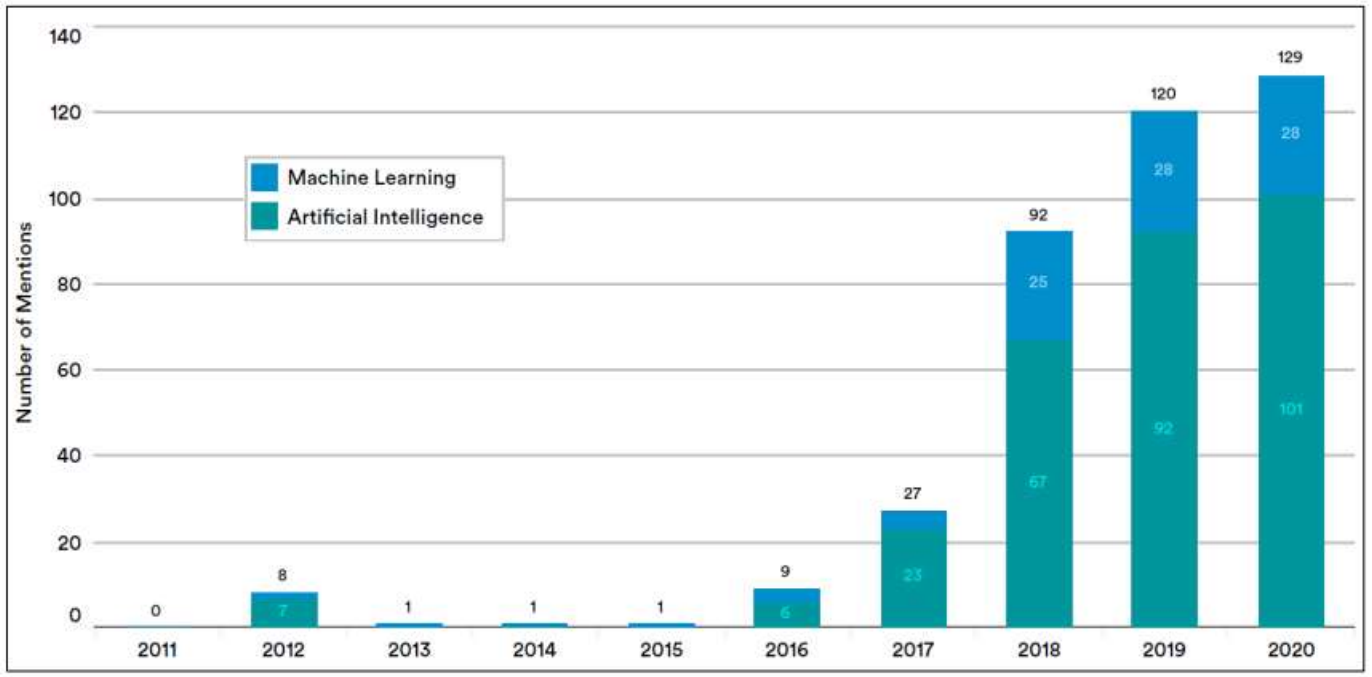
Artificial Intelligence and the Federal Government

- Executive Order 13859 “Maintaining American Leadership in Artificial Intelligence” (Feb. 11, 2019)
- Executive Order 13960 on Promoting the Use of Trustworthy AI in the Federal Government (Dec. 3, 2020)
- National Defense Authorization Act for FY 2021
- National AI Initiative Act of 2020 (Division E, Sec. 5001)
- Consolidated Appropriations Act, 2021 (P.L. 116-260) included the AI in Government Act of 2020 (Division U, Title I)
- Identifying Outputs of Generative Adversarial Networks Act

Artificial Intelligence and the Federal Government (cont'd)

Mentions of Artificial Intelligence and Machine Learning in the Congressional Record, 2011-2020



Source: AI Index Steering Committee, The AI Index 2021 Annual Report, Human-Centered AI Institute, Stanford University, Stanford, CA, March 2021, pp. 171-172; data from the McKinsey Global Institute, 2020

Artificial Intelligence and the Federal Government (cont'd)

- National AI Research Resource (NAIRR) Task Force – established by the National AI Initiative Act of 2020
- Comprised of 12 members: 4 from federal government, 4 from academic institutions and four private sector members
- "The NAIRR is envisioned as a large-scale, shared cyberinfrastructure that fuels AI discovery and innovation and serves a diverse set of researchers and students across a range of fields. It will help democratize access to a variety of cutting-edge computational resources by providing the data and compute capacity to support tens of thousands of users. The NAIRR will provide access to data sets and aggregate or catalog AI-relevant tools, testbeds, environments, and training resources. The NAIRR has an opportunity to both leverage and augment the Nation's existing cyberinfrastructure to advance knowledge across a variety of AI-relevant disciplines."

Artificial Intelligence and the Federal Government (cont'd)

- NIST – U.S. Leadership in AI: A Plan for Federal Engagement in Developing Technical Standards and Related Tools (Aug. 9, 2019)
- OMB – Office of Management and Budget, "Guidance for Regulation of Artificial Intelligence Applications" (Nov 17, 2020)
- NIST Special Publication 1270 – Towards a Standard for Identifying and Managing Bias in AI (published March 2022)
- NIST Artificial Intelligence Risk Management Framework ("AI RMF") (draft Aug. 18, 2022)
- **FTC's ANPRM on Commercial Surveillance and Data Security (Aug. 22, 2022)**
- **White House's Blueprint for an AI Bill of Rights (Oct. 3, 2022)**

FTC's Advance Notice of Proposed Rulemaking

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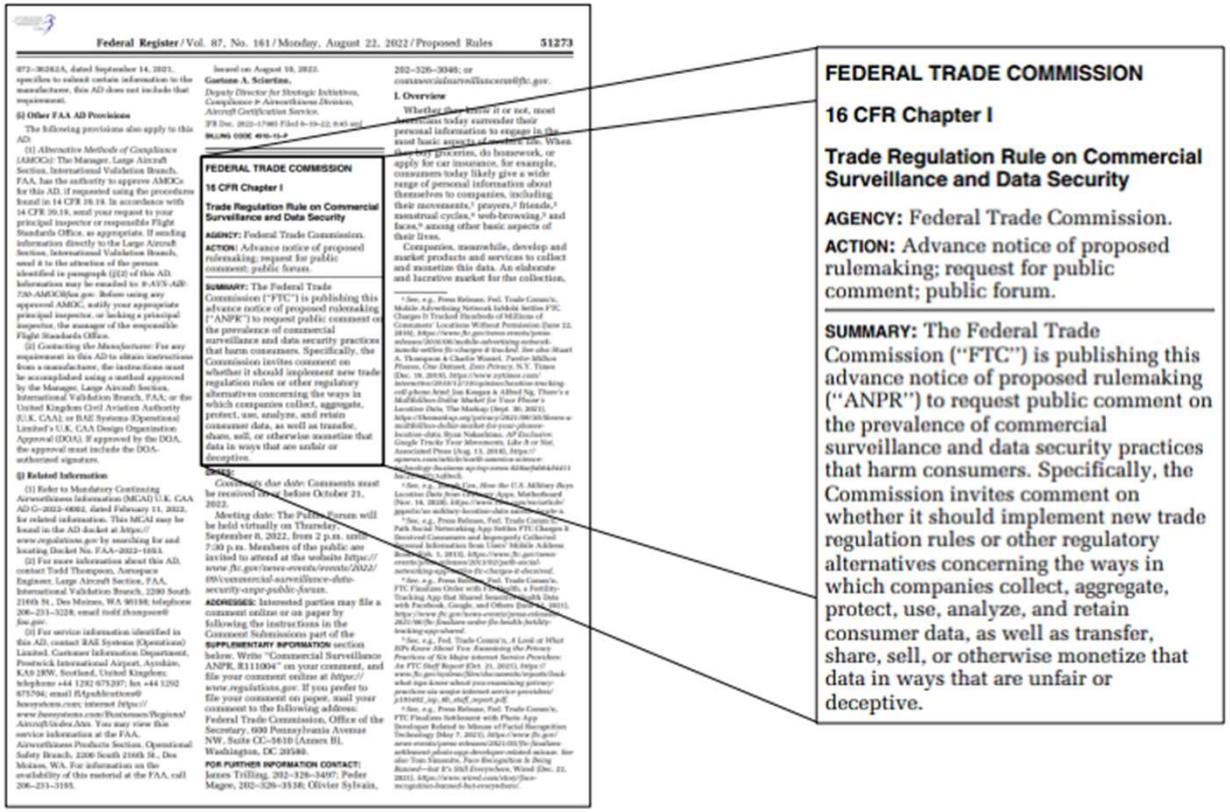
FTC's ANPRM on Commercial Surveillance & Data Security

- Purpose
- November 21, 2022 deadline
- 95 "Questions"
  - "Automated decision-making tools"
  - "Algorithmic error"/"Algorithmic discrimination



Federal Register / Vol. 87, No. 161 / Monday, August 22, 2022 / Proposed Rules 51273

FEDERAL TRADE COMMISSION

16 CFR Chapter I

Trade Regulation Rule on Commercial Surveillance and Data Security

AGENCY: Federal Trade Commission.

ACTION: Advance notice of proposed rulemaking; request for public comment; public forum.

SUMMARY: The Federal Trade Commission ("FTC") is publishing this advance notice of proposed rulemaking ("ANPR") to request public comment on the prevalence of commercial surveillance and data security practices that harm consumers. Specifically, the Commission invites comment on whether it should implement new trade regulation rules or other regulatory alternatives concerning the ways in which companies collect, aggregate, protect, use, analyze, and retain consumer data, as well as transfer, share, sell, or otherwise monetize that data in ways that are unfair or deceptive.

ANPRM: Automated Decision-Making Systems

- **Factual Questions**
  - (48) To what extent would data minimization requirements or purpose limitations unduly hamper algorithmic decision-making or other algorithmic learning-based processes or techniques? To what extent would the benefits of a data minimization or purpose limitation rule be out of proportion to the potential harms to consumers and companies of such a rule?
  - (53) How prevalent is algorithmic error? To what extent is algorithmic error inevitable? If it is inevitable, what are the benefits and costs of allowing companies to employ automated decision-making systems in critical areas, such as housing, credit, and employment? To what extent can companies mitigate algorithmic error in the absence of new trade regulation rules?
  - (54) What are the best ways to measure algorithmic error? Is it more pronounced or happening with more frequency in some sectors than others?
  - (55) Does the weight that companies give to the outputs of automated decision-making systems overstate their reliability? If so, does that have the potential to lead to greater consumer harm when there are algorithmic errors?

ANPRM: Automated Decision-Making Systems (cont'd)

- **Factual Questions (cont'd)**
  - (56) To what extent, if at all, should new rules require companies to take specific steps to prevent algorithmic errors? If so, which steps? To what extent, if at all, should the Commission require firms to evaluate and certify that their reliance on automated decision-making meets clear standards concerning accuracy, validity, reliability, or error? If so, how? Who should set those standards, the FTC or a third-party entity? Or should new rules require businesses to evaluate and certify that the accuracy, validity, or reliability of their commercial surveillance practices are in accordance with their own published business policies?
  - (57) To what extent, if at all, do consumers benefit from automated decision-making systems? Who is most likely to benefit? Who is most likely to be harmed or disadvantaged? To what extent do such practices violate Section 5 of the FTC Act?
  - (58) Could new rules help ensure that firms' automated decision-making practices better protect non-English speaking communities from fraud and abusive data practices? If so, how?
  - (59) If new rules restrict certain automated decision-making practices, which alternatives, if any, would take their place? Would these alternative techniques be less prone to error than the automated decision-making they replace?

ANPRM: Automated Decision-Making Systems (cont'd)

- **Policy Questions**
  - (60) To what extent, if at all, should new rules forbid or limit the development, design, and use of automated decision-making systems that generate or otherwise facilitate outcomes that violate Section 5 of the FTC Act? Should such rules apply economy-wide or only in some sectors? If the latter, which ones? Should these rules be structured differently depending on the sector? If so, how?
  - (61) What would be the effect of restrictions on automated decision-making in product access, product features, product quality, or pricing? To what alternative forms of pricing would companies turn, if any?
  - (62) Which, if any, legal theories would support limits on the use of automated systems in targeted advertising given potential constitutional or other legal challenges?
  - (63) To what extent, if at all, does the First Amendment bar or not bar the Commission from promulgating or enforcing rules concerning the ways in which companies personalize services or deliver targeted advertisements?
  - (64) To what extent, if at all, does Section 230 of the Communications Act, 47 U.S.C. 230, bar the Commission from promulgating or enforcing rules concerning the ways in which companies use automated decision-making systems to, among other things, personalize services or deliver targeted advertisements?

ANPRM: Automated Decision-Making Systems (cont'd)

- **Policy Questions (cont'd)**
  - (89) To what extent should trade regulation rules, if at all, require companies to explain (1) the data they use, (2) how they collect, retain, disclose, or transfer that data, (3) how they choose to implement any given automated decision-making system or process to analyze or process the data, including the consideration of alternative methods, (4) how they process or use that data to reach a decision, (5) whether they rely on a third-party vendor to make such decisions, (6) the impacts of their commercial surveillance practices, including disparities or other distributional outcomes among consumers, and (7) risk mitigation measures to address potential consumer harms?
  - (94) How should the FTC's authority to implement remedies under the Act determine the form or substance of any potential new trade regulation rules on commercial surveillance? Should new rules enumerate specific forms of relief or damages that are not explicit in the FTC Act but that are within the Commission's authority? For example, should a potential new trade regulation rule on commercial surveillance explicitly identify algorithmic disgorgement, a remedy that forbids companies from profiting from unlawful practices related to their use of automated systems, as a potential remedy? Which, if any, other remedial tools should new trade regulation rules on commercial surveillance explicitly identify? Is there a limit to the Commission's authority to implement remedies by regulation?

ANPRM: Algorithmic Discrimination

- **Factual Questions**
  - (65) How prevalent is algorithmic discrimination based on protected categories such as race, sex, and age? Is such discrimination more pronounced in some sectors than others? If so, which ones?
- **Policy Questions**
  - (66) How should the Commission evaluate or measure algorithmic discrimination? How does algorithmic discrimination affect consumers, directly and indirectly? To what extent, if at all, does algorithmic discrimination stifle innovation or competition?
  - (67) How should the Commission address such algorithmic discrimination? Should it consider new trade regulation rules that bar or somehow limit the deployment of any system that produces discrimination, irrespective of the data or processes on which those outcomes are based? If so, which standards should the Commission use to measure or evaluate disparate outcomes? How should the Commission analyze discrimination based on proxies for protected categories? How should the Commission analyze discrimination when more than one protected category is implicated (e.g., pregnant veteran or Black woman)?
  - (68) Should the Commission focus on harms based on protected classes? Should the Commission consider harms to other underserved groups that current law does not recognize as protected from discrimination (e.g., unhoused people or residents of rural communities)?

ANPRM: Algorithmic Discrimination (cont'd)

- **Policy Questions (cont'd)**
  - (69) Should the Commission consider new rules on algorithmic discrimination in areas where Congress has already explicitly legislated, such as housing, employment, labor, and consumer finance? Or should the Commission consider such rules addressing all sectors?
  - (70) How, if at all, would restrictions on discrimination by automated decision-making systems based on protected categories affect all consumers?
  - (71) To what extent, if at all, may the Commission rely on its unfairness authority under Section 5 to promulgate antidiscrimination rules? Should it? How, if at all, should antidiscrimination doctrine in other sectors or federal statutes relate to new rules?
  - (72) How can the Commission's expertise and authorities complement those of other civil rights agencies? How might a new rule ensure space for interagency collaboration?

ANPRM's Impact?

- Rulemaking authority under Section 18 of the FTC Act – lengthy rulemaking process
- ANPRM's record may:
  - (1) "help to sharpen the Commission's enforcement work" and
  - (2) "may inform reform by Congress or other policymakers"
    - Federal and state
- **BUT**, "National Nanny" cloud for FTC

State-level AI legislation

- Enacted:
  - Illinois' Artificial Intelligence Video Interview Act
  - Vermont's H.B. 410 creating the Artificial Intelligence Commission
  - Washington's S.B. 5693 appropriating funds for automated decision-making working group
  - New York City's AI Law (Local Law 144)
- Pending:
  - DC's Stop Discrimination by Algorithms Act
  - Illinois' amendment to Equal Pay Act and Consumer Fraud and Deceptive Business Practices Act
  - Massachusetts' H.B. 119 relating to state agency automated decision-making

Blueprint for an AI Bill of Rights

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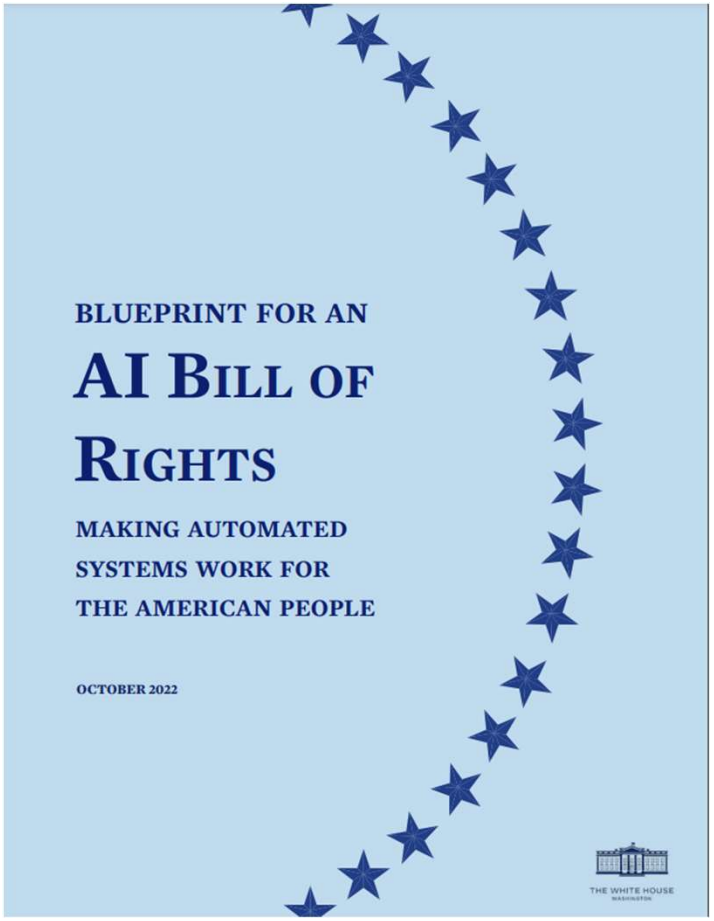
White House's Blueprint for AI Bill of Rights

- White House Office of Science and Technology Policy ("OSTP") white paper
- Intended to guide design, use, and deployment of AI systems to "protect the American public in the age of AI"
- Calls for human-centric AI "designed to proactively protect [people] from harms stemming from unintended, yet foreseeable, uses or impacts of automated systems"
- "Automated systems" = any system that uses computation for decision making



Blueprint Principles

- Identifies 5 non-binding “backstop” principles to minimize potential harms from AI applications:
  1. **Safe and Effective Systems**
  2. **Algorithmic Discrimination Protections**
  3. **Data Privacy**
  4. **Notice and Explanation**
  5. **Human Alternatives, Consideration, and Fallback**

Blueprint's Impact?

- Broad applicability – applies to all "automated systems"
- **BUT**, no prohibitions on AI deployments and mechanisms for enforcement
- Intent: Further ongoing privacy discussions between federal government and public stakeholders

Key Takeaways

- Identify AI applications within operations
- Conduct documented risk assessments
- Integrate structural compliance measures throughout organization
    - E.g., Privacy officers and compliance regimes

Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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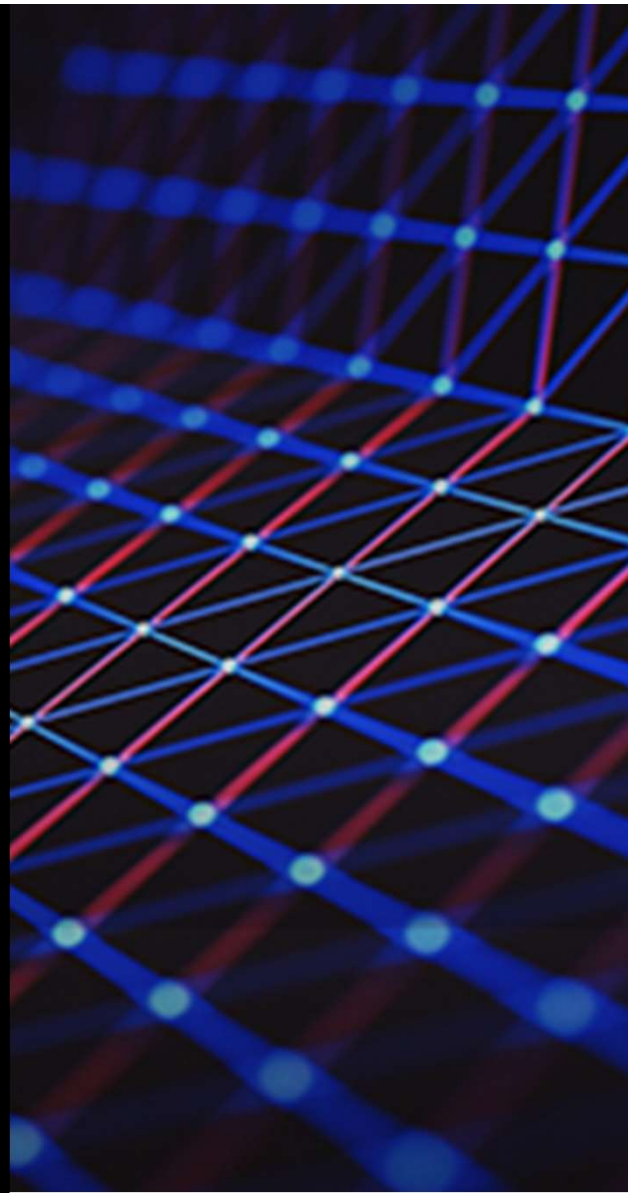
To help keep you on top of developments as they unfold, we also have launched a resource page on our website at **www.morganlewis.com/topics/coronavirus-covid-19**

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to **subscribe** using the purple "Stay Up to Date" button.



Biography

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Ron Del Sesto represents technology companies on a broad range of issues including corporate, financial, regulatory, and cybersecurity. Ron also advises financial institutions, private equity firms and venture capital funds with respect to investments in the telecommunications, media, and technology (TMT) sectors.

Biography

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Trina Kwon represents clients in the technology and communications industry. She advises clients before the Federal Communications Commission and State Public Utility Commissions on matters such as domestic and international licensing, regulatory compliance with regard to corporate transactions, and rulemaking proceedings. Trina's clients include domestic and international telecommunications carriers, technology companies, and media companies.

Biography

Andrew J. Gray IV
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Serving as the leader of the firm's semiconductor practice and as a member of the firm's fintech and technology industry teams, Andrew J. Gray IV concentrates his practice on intellectual property litigation and prosecution and on strategic IP counseling. Andrew advises both established companies and startups on AI, machine learning, Blockchain, cryptocurrency, computer, and Internet law issues, financing and transactional matters that involve technology firms, and the sale and licensing of technology. He represents clients in patent, trademark, copyright, and trade secret cases before state and federal trial and appellate courts throughout the United States, before the US Patent and Trademark Office's Patent Trial and Appeal Board, and before the US International Trade Commission.

Our Global Reach

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Asia Pacific
Europe
Latin America
Middle East
North America

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Astana
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Brussels
Century City
Chicago
Dallas
Dubai
Frankfurt
Hartford
Hong Kong*
Houston
London
Los Angeles
Miami
New York
Orange County
Paris
Philadelphia
Pittsburgh
Princeton
San Francisco
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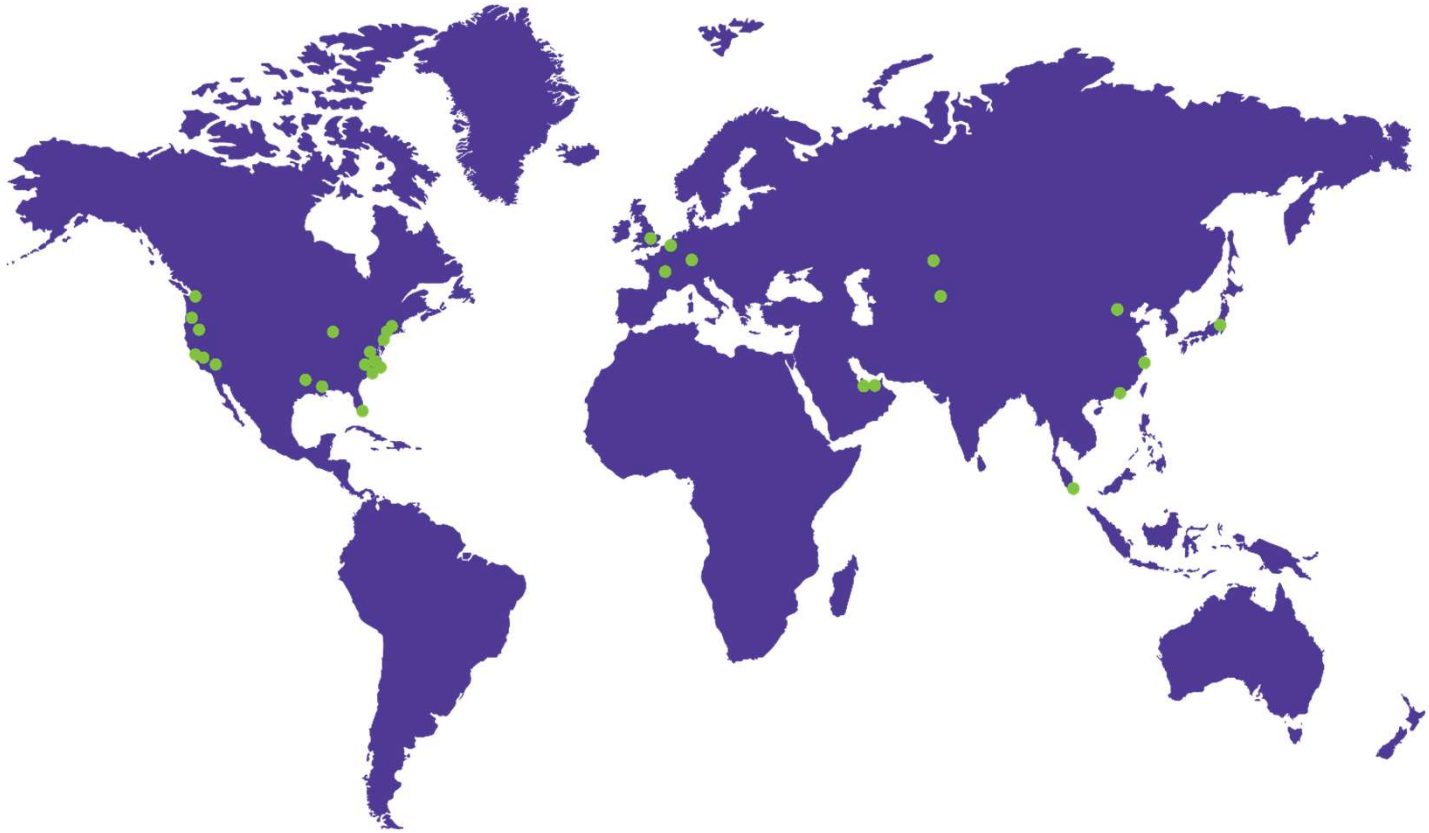

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THANK YOU