

# AI in the Administrative State

## How is the federal government regulating artificial intelligence?

Ella Sohn, CAS 2026

Advised by: Cary Coglianese, Penn Carey Law, Penn Program on Regulation

### Background

- The European Union has proposed a regulatory framework for AI
  - In June 2023, it entered the final negotiating stage before the policy becomes law
- There is a perception that Europe is **ahead of the U.S.** on AI regulation
  - The EU is the “de facto global leader on tech regulation” (Washington Post) and “has far more centrally coordinated and comprehensive regulatory coverage than the U.S.” (Brookings Institution)
- The U.S. government is developing both **binding regulation** and **voluntary guidance** on AI

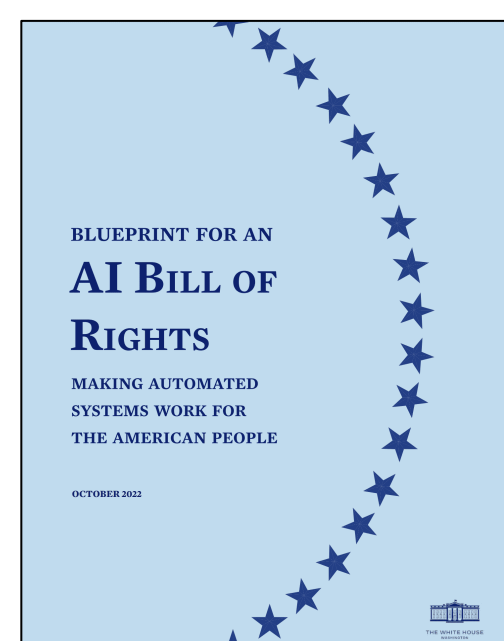
### General Policies

#### Congress

- AI in Government Act of 2020** established a dedicated center to facilitate government-wide adoption of AI
- National AI Initiative Act of 2020** created a coordinated federal program to accelerate AI research and development

#### The White House

- Executive Orders
  - Maintaining American Leadership in AI (Feb. 2019)
  - Promoting the Use of Trustworthy AI in the Federal Government (Dec. 2020)
- OMB Memo “Guidance for Regulation of AI Applications” (Nov. 2020)
- Blueprint for an AI Bill of Rights (Oct. 2022)



- Five principles**
  - Safe and Effective Systems
  - Algorithmic Discrimination Protections
  - Data Privacy
  - Notice and Explanation
  - Human Alternatives, Consideration, and Feedback
- “...envisioning a future where the American public is **protected from the potential harms**, and can fully enjoy the benefits, of automated systems.”

- National AI Advisory Committee, R&D Strategic Plan (May 2023)
- Voluntary commitments from **seven leading AI companies** (July 2023)

#### National Institute of Standards and Technology

- AI Risk Management Framework (Jan. 2023)
  - “...to incorporate **trustworthiness considerations** into the design, development, use, and evaluation of AI.”

### Consumer Protection

#### Federal Trade Commission

Protects the public from “**deceptive** or **unfair** business practices”

- Big Data: A Tool for Inclusion or Exclusion?* (Jan. 2016)
  - How does big data impact “low-income and underserved populations”?
  - Concerns over data gaps and **algorithmic bias**
- Combatting Online Harms Through Innovation* (June 2022)
  - How can AI help detect fraudulent, misleading, or harmful content?
  - FTC recommendations: “AI is **not the easy answer**”
- Guidance for businesses
  - “Using AI and Algorithms” (April 2020)
  - “Aiming for truth, fairness, and equity in your company’s use of AI” (April 2021)
- Trade Regulation Rule on Commercial Surveillance and Data Security (Aug. 2022)
  - How to mitigate algorithmic discrimination in **housing, credit, and employment**?
  - What is the potential for algorithmic discrimination **based on protected categories** such as race, sex, and age?



#### FTC investigation of OpenAI

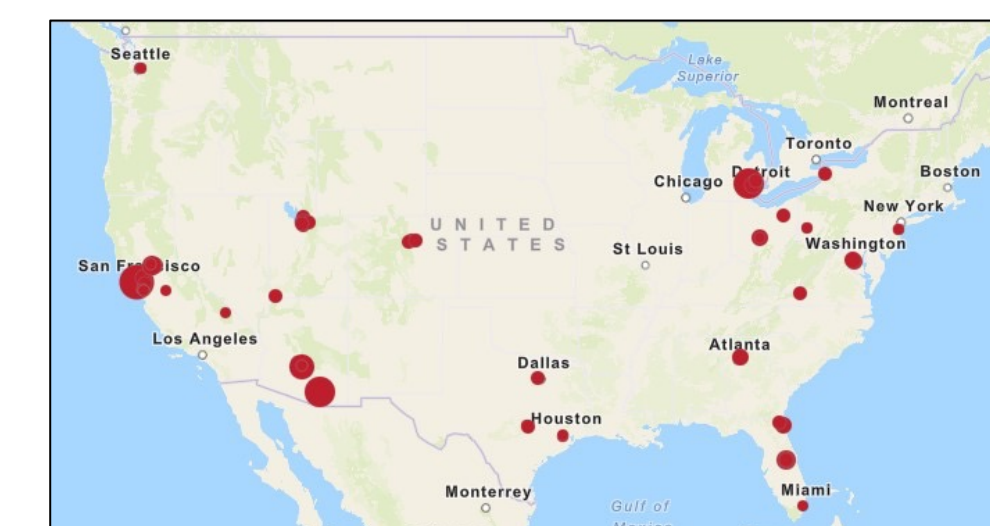
Launched July 2023

- Has the maker of ChatGPT **violated consumer protection law**?
- OpenAI must submit information on its AI products
  - How are the models trained?
  - How does the company mitigate risk of false or disparaging statements?
  - How does the company use personal data?

### Automated Driving Systems

#### National Highway Traffic Safety Administration

- Automated Driving Systems 2.0: A Vision for Safety* (Sep. 2017)
  - Voluntary guidance for manufacturers: 12 **safety design elements**

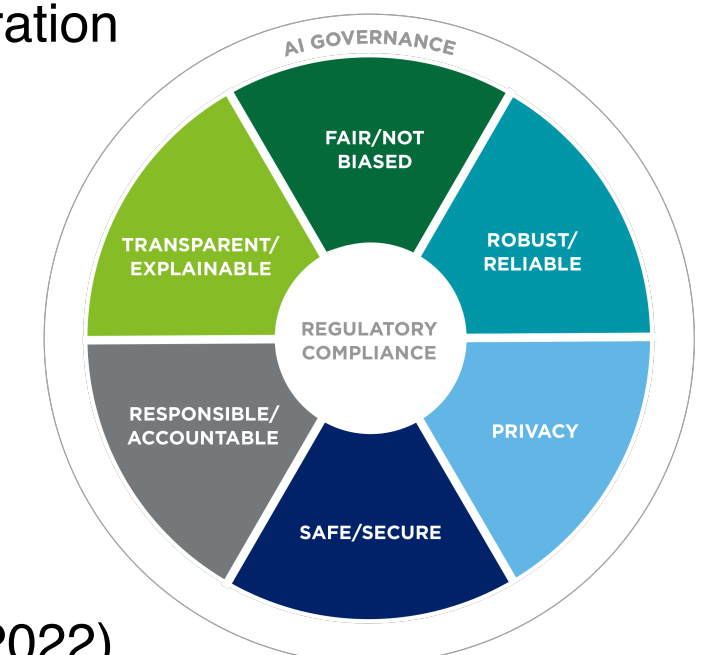


- AV Test Initiative (launched June 2020)
  - Online tool to track **testing of automated vehicles**
  - Organizations and states voluntarily submit testing information
- Standing General Order: Incident Reporting for ADS and Level 2 ADAS (April 2023)
  - Requires manufacturers to **report automated vehicle crashes**

### Healthcare

#### Department of Health & Human Services

- AI Strategy (July 2021)
  - A strategic approach to “enable Department-wide familiarity, comfort, and fluency” with AI adoption, scaling, and acceleration
  - Establishes the **HHS AI Council**
- Trustworthy AI Playbook (Sep. 2021)
  - Six trustworthy AI principles** based on E.O 13960
  - Step-by-step process to “promote ethical AI and achieve the full operational and strategic benefits of AI solutions”
- Use of Clinical Algorithms in Decision-Making (Aug. 2022)
  - Proposed rule to **outlaw algorithmic discrimination** in healthcare settings



#### Centers for Medicare & Medicaid Services

How is the government **reimbursing for AI devices**?

1. New Technology APC	2. New Technology Add-on Payment	3. PE methodology
For emerging technologies	Three criteria to qualify for NTAP:	CPT codes
Heartflow: coronary artery disease diagnostic service	<ul style="list-style-type: none"> <li>Newness</li> <li>Cost</li> <li>Substantial clinical improvement</li> </ul>	IDx-DR: algorithm to detect retinopathy

### Other Agency Actions

- Consumer Financial Protection Bureau
  - Policy statement: Creditors who use complex algorithms must disclose the “specific principal reasons for taking an adverse action”
- Food and Drug Administration
  - Has authorized over 500 AI/ML medical devices
  - AI in Drugs Manufacturing* (2023)
- Department of Justice
  - Algorithms, AI, and Disability Discrimination in Hiring* (2022)
- National Aeronautics and Space Administration
  - Framework for the Ethical Use of AI* (2021)
  - Responsible AI Plan* (2022)
- Copyright Office
  - Guidance on copyright policy for AI-generated content

For more information on Prof. Coglianese’s AI work:

