# Keeping Pace with AI Developments as the Legal and Technological Landscape Quickly Evolves

***Prepared for The Association of Corporate Counsel***

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# Agenda

- The Basics of AI
- The Evolving Legal and Regulatory Landscape
- Key AI Risks and Principles
- Risk Management Approaches to AI Governance
- Practical Tips and Best Practices

# The Basics of AI

# AI and Its Beneficial Uses

## What is AI?

- Involves capacity to learn
- Generally based on large data sets
- Generative AI / large language models
- Deep learning & deep neural networks

“AI is the ability of a computer system to solve problems and to perform tasks that would otherwise require human intelligence.”
*Interim Report of National Security Commission on AI (2019)*

## Potential Use Cases

- Predictive analytics
- Pattern recognition in large data sets
- Cybersecurity and fraud defense
- Voice interaction
- Detecting deepfakes
- Automated diagnostics and maintenance
- Object recognition and imagery analysis
- ***Buzzwords:*** AI, ML, algorithms, natural language processing, generative AI

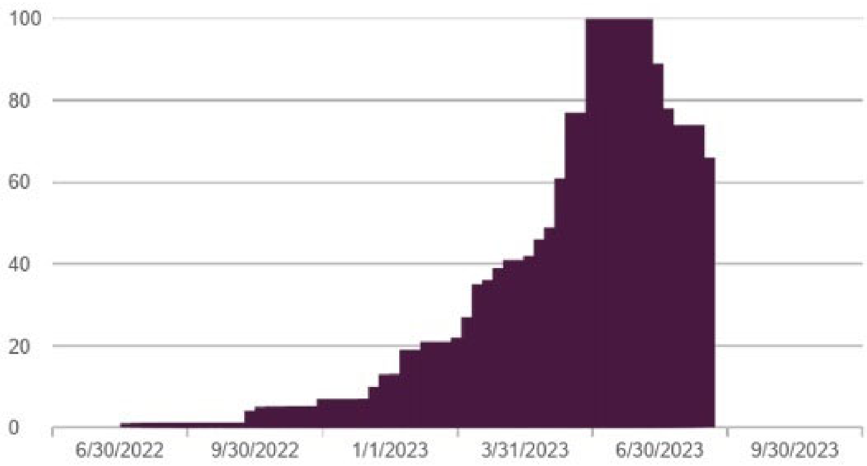
# Generative AI

## What Is Generative AI?

- “Generative AI is a broad label that’s used to describe any type of artificial intelligence (AI) that can be used to create new text, images, video, audio, code or synthetic data.” *Techopedia*
- Examples
  - ChatGPT
  - Codex
  - Dall-E
  - Llama-2

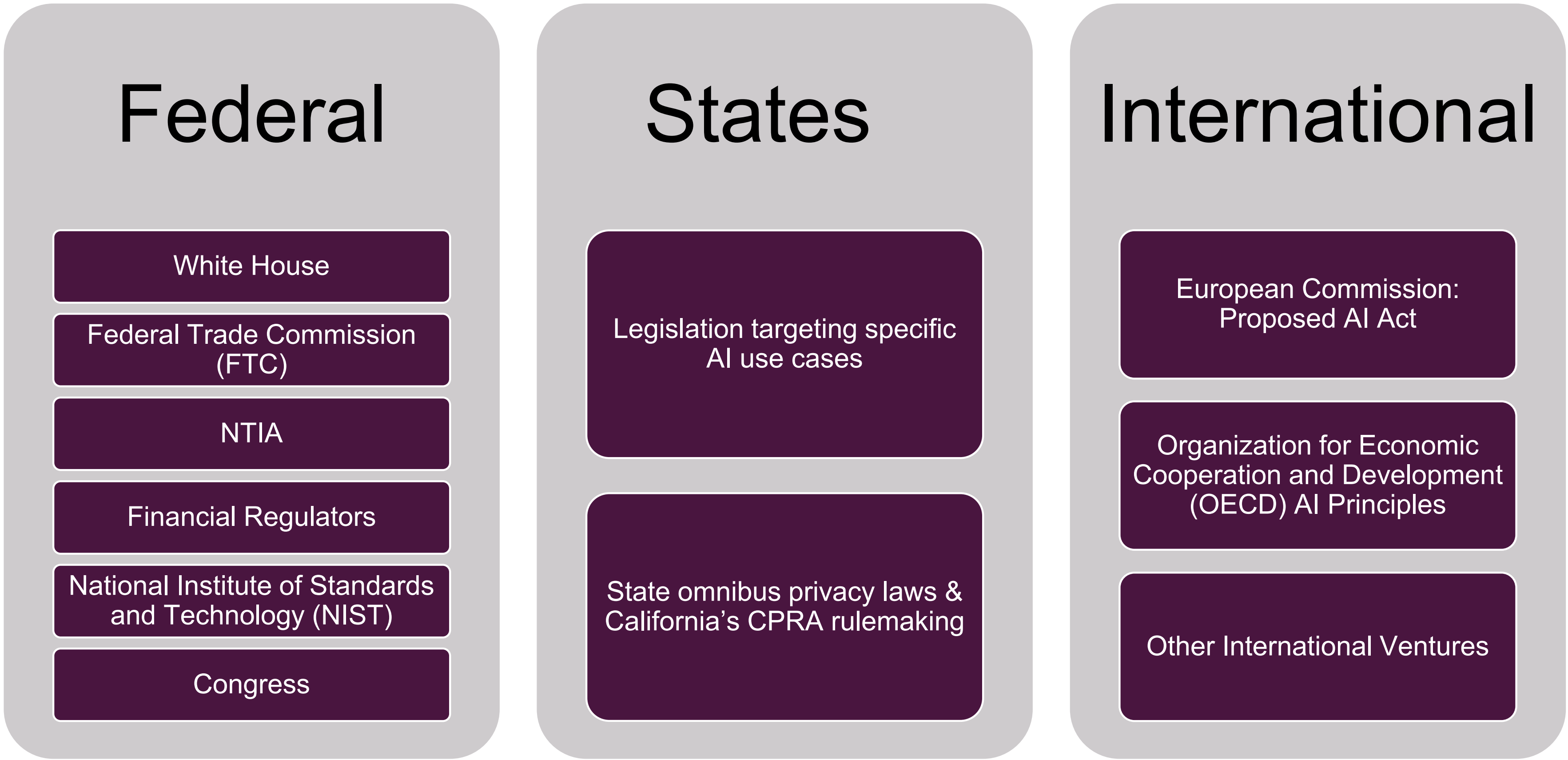
## Awareness Trends

Google Trends: Generative AI searches in the United States



# The Evolving Legal and Regulatory Landscape

# Key Government Actors and Workstreams



## Federal

- White House
- Federal Trade Commission (FTC)
- NTIA
- Financial Regulators
- National Institute of Standards and Technology (NIST)
- Congress

## States

- Legislation targeting specific AI use cases
- State omnibus privacy laws & California's CPRA rulemaking

## International

- European Commission: Proposed AI Act
- Organization for Economic Cooperation and Development (OECD) AI Principles
- Other International Ventures

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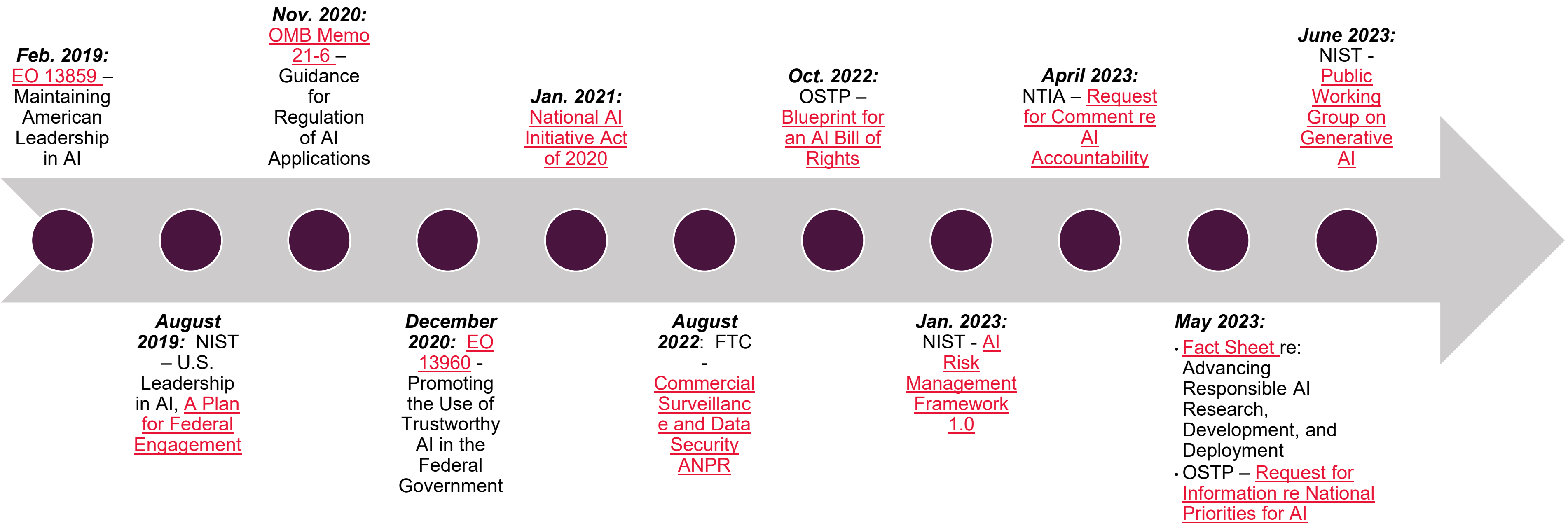
# Key Federal AI Developments



***Feb. 2019:*** EO 13859 – Maintaining American Leadership in AI

***August 2019:*** NIST – U.S. Leadership in AI, A Plan for Federal Engagement

***Nov. 2020:*** OMB Memo 21-6 – Guidance for Regulation of AI Applications

***December 2020:*** EO 13960 - Promoting the Use of Trustworthy AI in the Federal Government

***Jan. 2021:*** National AI Initiative Act of 2020

***August 2022***: FTC - Commercial Surveillance and Data Security ANPR

***Oct. 2022:*** OSTP – Blueprint for an AI Bill of Rights

***Jan. 2023:*** NIST - AI Risk Management Framework 1.0

***April 2023:*** NTIA – Request for Comment re AI Accountability

***May 2023:***

- Fact Sheet re: Advancing Responsible AI Research, Development, and Deployment
- OSTP – Request for Information re National Priorities for AI

***June 2023:*** NIST - Public Working Group on Generative AI

# Examples of AI-Specific Laws

## State

- Omnibus Privacy Laws & Regs
  - Opt-out rights for certain automated processing/profiling
  - Data protection assessment requirements for certain automated processing/profiling
  - Evolving expectations in CA
- Targeted AI Laws
  - The New York City AI Ordinance deals with use of AI in hiring
  - The California Bot Law creates chatbot disclosure requirements
  - CA Deepfake Political Ad Law covers the use of deepfakes in political ads
  - The Illinois AI Video Interview Act deals with use of AI analysis of video interviews
  - Laws that have established councils/commissions to study AI, e.g., Alabama and Illinois

## Federal

- National AI Initiative Act of 2020
- Key Examples of Proposed Legislative Approaches
  - Federal privacy legislation (ADPPA)
  - SAFE Innovation Framework for AI (Sen. Schumer)
  - Legislation focused on federal government and contractor use of AI, e.g.,
    - Oversee Emerging Technology Act (S. 1577)
    - Assuring Safe, Secure, and Ethical Systems for AI (Assess AI) Act (S. 1356)
- Multiple hearings focused on AI, e.g.,
  - May 2023 - Oversight of A.I.: Rules for Artificial Intelligence
  - June 2023 - Artificial Intelligence and Human Rights

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# Examples of Generally Applicable Laws with Impacts on AI

- April 2021 – FTC Blog Post providing guidance and signaling enforcement regarding discrimination in AI
  - Fair Credit Reporting Act (FCRA)
  - Equal Credit Opportunity Act (ECOA)
  - Section 5 of the FTC Act
- April 2023 – Joint Statement (FTC, DOJ, CFPB, EEOC) outlining a commitment to enforce their respective laws and regulations to promote responsible innovation in automated systems

# Looking Ahead on AI Policy

- AI legal frameworks are developing in real time
  - Lawsuits and regulatory actions look backwards – so what companies do now will be under scrutiny in the future
- Companies also must be ready for a patchwork of laws
- There are many open questions:
  - Will AI regulation happen?
    - If so: *Who* will regulate AI?
    - Fragmentation among federal regulators *and* potentially among states is on the horizon
  - Will regulation be prescriptive?
    - White House Office of Science and Technology Policy is seeking input on a National AI Strategy, and one question it has is: "Can inspiration be drawn from analogous or instructive models of risk management in other sectors, such as laws and policies that promote oversight through registration, incentives, certification, or licensing?"
    - Should foundation models be treated differently?
    - Or will new regulations be outcome-oriented?
  - Will regulation be technology-neutral?
    - Principles-based regulations – like UDAAP laws – do not need to focus on a particular technology

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# Key AI Risks and Principles

# Trustworthy AI Principles

- Avoiding Bias
- Explainability
- Accountability
- Transparency
- Privacy
- Security & Safety

- There is significant consensus forming around key principles for “trustworthy” and “responsible” AI
- Examples:
  - NIST
  - OECD

# Avoiding Bias

## Key Issues

- Mitigating harmful AI bias
- Existing laws
  - Anti-discrimination laws and regulations apply (e.g., ECOA)
  - Sector-specific laws: credit, housing, employment
- Biased data sets vs. algorithmic bias
- Third party testing proposals
- Data can be used not only to avoid bias but to promote fairness

## Resources & Best Practices

- ***NIST research***
  - Towards a Standard for Identifying and Managing Bias in Artificial Intelligence
  - Managing AI/ML Bias in Context
- ***FTC guidance***
  - Don't discriminate based on protected classes.
  - Focus on inputs as well as outcomes.
  - Ensure AI models are validated and revalidated to ensure that they work as intended, and do not unlawfully discriminate.
  - Ask questions before using algorithm.
    - How representative is your data set?
    - Does your data model account for biases?
    - How accurate are your predictions based on big data?
    - Does reliance on big data raise ethical or fairness concerns?

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# Explainability

## Key Issues

- When do you need to explain how AI reached a conclusion? And can you?
- Different explanations may be appropriate for different audiences
- Explanability requirements in practice:
  - Credit decisions and adverse action notices

## Resources & Best Practices

- NIST's Four Principles of Explainable Artificial Intelligence:
  - Explanation
  - Meaningful
  - Explanation Accuracy
  - Knowledge Limit

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# Accountability and Transparency

## Accountability

- Who is accountable for making sure nothing goes wrong with AI?
- Multiple participants in AI lifecycle: software developers, product developers, downstream operators
- Human oversight / “human-in-the-loop” is a key concept when dealing with algorithms
- Third-party vendor oversight is critical
- Even if legal responsibilities are in flux, negative outcomes will result in consequences

## Transparency

- When do you need to disclose that AI is being used?
- Particularly critical for audio or visual content – e.g., provenance or watermarking systems
- State law examples
  - The California Bot Law creates chatbot disclosure requirements.
  - The Illinois AI Video Interview Act deals with use of AI analysis of video interviews.

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# Privacy and Security & Safety

## Privacy

- Are there privacy risks unique to AI?
- Federal Trade Commission (FTC)
  - Enforcement: Focus on deception – what is said in privacy policy?
  - Rules: Commercial Surveillance and Data Security ANPR
- State privacy laws
  - Omnibus privacy laws in VA, CO, and CT create "opt-out" right for automated profiling in furtherance of legally significant decisions
  - Forthcoming rulemaking in CA to establish access and opt-out rights
- What's next? Congress?

## Security & Safety

- Are there security and safety risks unique to AI?
- AI faces a range of cybersecurity threats – which pose both operational risk and legal risk in case of an incident
- Physical safety issues
- Reputational risks and IP-related issues
- Certain controls – e.g., internal access controls to personal data – serve critical functions for both cybersecurity and privacy

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# AI Risks/Principles in Practice

- Potential tension between principles (e.g., explainability and security)
- Tension with traditional privacy principles (e.g., purpose specification and avoiding secondary use)
- Standards and measurements continue to be developed
- Will there be clear rules and guidance on issues like bias?

# Risk Management Approaches to AI Governance

# NIST AI Risk Management Framework (AI RMF)

- The AI RMF is a risk management resource for organizations designing, developing, deploying, or using AI systems
  - Provides voluntary guidance and risk management practices
- Frames AI related risks
  - 7 “trustworthy AI characteristics”
- Outlines the AI RMF “Core”
  - 4 “Functions,” along with “Categories” and “Subcategories” that help organizations address AI system risks as a practical matter

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# AI RMF: Trustworthy AI Characteristics

- Valid and reliable
- Safe
- Secure and resilient
- Accountable and transparent
- Explainable and interpretable
- Privacy enhanced
- Fair – with harmful bias managed

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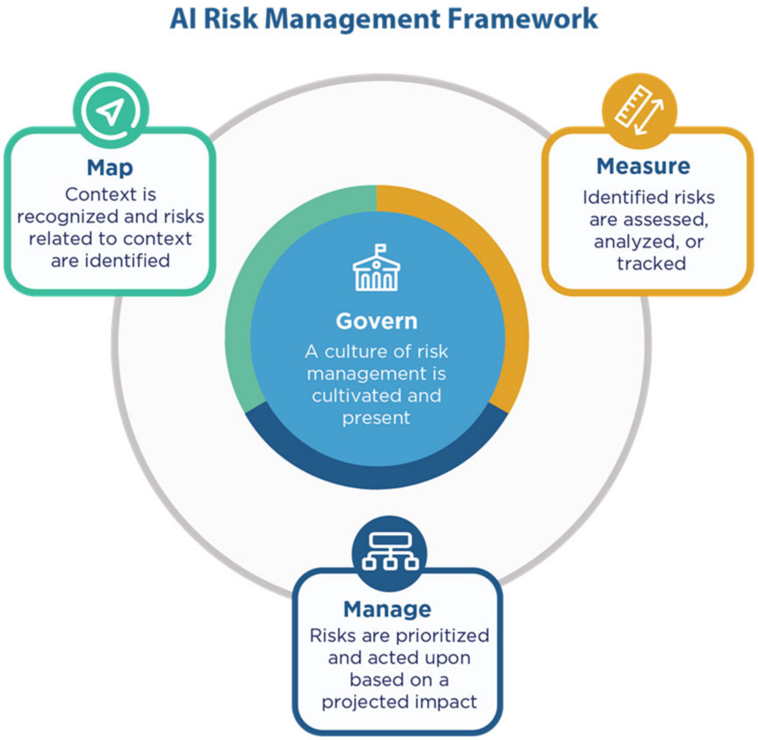
# AI RMF: 4 Functions

- Govern: recommendations concerning high level processes and organizational schemes for fostering a culture of risk management throughout an organization
- Map: recommended methods for contextualizing and identifying AI system risks
- Measure: recommendations for assessing, analyzing, and tracking identified AI risks
- Manage: recommendations for allocating resources and prioritizing AI system risks


AI Risk Management Framework
Map
Context is recognized and risks related to context are identified
Measure
Identified risks are assessed, analyzed, or tracked
Govern
A culture of risk management is cultivated and present
Manage
Risks are prioritized and acted upon based on a projected impact

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# Generative AI: What’s All The Chatter About?

# Unique Considerations for Generative AI

## Background / Frame of Reference: ChatGPT

- **Based on OpenAI’s GPT**: Generative Pretrained Transformer
- **GPT-3**: Jun ‘20, A large language model (“LLM”) trained on vast quantities of text (100s of Billions of words), self-supervised learning to predict “what might come next?” from a sequence.
- **ChatGPT**: Nov ‘22, Chat bot on GPT-3.5, fine-tuned with reinforcement learning from human feedback.
- **GPT-4**: Feb ‘23, Next-generation model with dramatic quality improvements.

## Compare “Standard” AI / ML to Generative AI

- **Training**: Supervised v. Self-Supervised
- **Training Data Size**: Big v. Enormous
- **Training Data Set**: Known & Labelled v. ?
- **Use Case**: Specific v. Multiple

# Unique Considerations for Generative AI

## Legal Issues

- **Data Protection** (Who Can See / Own / Use Your Data?)
- **Intellectual Property** (Litigation; Ownership)
- **Privacy** (Training Data)
- **Accuracy** (Hallucinations)
- **Fairness** (Explainable?)
- **Cyber Risks** (e.g., deepfakes and social engineering)
- **Reputation Risks** ("creepy" factor? notification?)
- **Emerging ESG** concern around social disruption (ethics)

# Practical Tips and Best Practices

# Developing Best Practices

- Adopt risk-based approach to identify and proactively mitigate risks
  - Ensure review processes throughout lifecycle of AI
  - Establish clear responsibility and accountability within organization
  - Ensure both technical and non-technical personnel are engaged
  - Establish incident response protocols and training
- Consider corporate or industry-wide principles and policies
  - Establish generative AI policies
- Pay attention to “informal” guidance from regulators like the FTC

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# Questions? Contact Us.

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