



ARTIFICIAL
INTELLIGENCE:
Key Business and Legal
Issues to Consider

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SIDLEY

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ARTIFICIAL INTELLIGENCE: KEY BUSINESS AND LEGAL ISSUES TO CONSIDER

The rapid growth of artificial intelligence (AI) development and adoption, particularly generative AI and machine learning applications, has captured the attention of business leaders, academics, investors, and regulators worldwide. AI is also requiring companies to confront an evolving host of questions across different areas of law, including privacy, cybersecurity, commercial and intellectual property transactions, intellectual property ownership and rights, products liability, labor and employment, insurance, consumer protection, corporate governance, national security, ethics, government policy, and regulation.

Below, we outline questions that companies and their boards should consider as they navigate this ever-evolving technological innovation. Many of these questions are industry-agnostic, but all companies must also address challenges specific to the industry and regulatory environment in which they operate. Sidley has a multi-disciplinary AI industry team focused on providing our clients with practical and actionable guidance on the wide range of regulatory, transactional, and litigation issues companies face in evaluating, leveraging, and mitigating risk from AI. To discuss the business and legal implications for your company, please contact one of the individuals below or one of the dedicated Sidley lawyers with whom you work.

These questions are provided on September 19, 2023. In light of the developing regulatory and legal risk landscape, we are reviewing and frequently updating the information below.¹

¹ Disclaimer: These materials have been prepared by Sidley for informational purposes only and do not constitute legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship. You should not act on this information without consulting professional advisers.

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OVERARCHING QUESTIONS

Please note that the questions in this Overarching Questions section are fundamental to the further discussions and questions on specific areas of interest following this section.

- Should the Company establish an AI governance board or committee to oversee its deployment or use of AI or should it delegate AI oversight to an existing committee?
 - If delegating to an existing committee, which committee is best suited for this oversight role?
 - Is the board or committee comprised of stakeholders with a diversity of roles, experiences, and perspectives relevant to the Company's business and its obligations to its employees, partners, third parties, regulators, and others relating to AI?
 - If the Company has such a board or committee, have members received relevant training and do they have access to resources, including with respect to ongoing developments related to AI?
- Has the Company decided to build an AI model in-house or license an existing model from a third party?
 - If the Company is licensing from a third party, what contractual measures are in place — or need to be in place—to ensure compliance with applicable laws and to appropriately mitigate and apportion risk?
- What are the Company's relevant policies and procedures regarding the use of AI applications?
 - For example, to what extent can users/employees rely on AI applications and where might AI applications be prohibited?
 - Has the Company defined the specific permitted or prohibited use case(s) for AI applications?
- In what territories does the Company intend to use AI applications, or where will output or results of AI applications ("Output") be seen?
- Has the Company established any mechanisms to ensure the continued and appropriate measurement and management of risks related to the use of AI applications?
- Has the Company identified and developed an ethical framework for use of AI, including in relation to fairness, bias, human rights compliance, and nondiscrimination?
- Does the Company have an internal and/or external auditing framework in place to measure what AI application is in use and what function that AI application is performing?
- Has the Company considered documenting its processes and considerations underlying the development or use of AI applications?
- Has the Company incorporated meaningful human review and oversight in the decision pipeline, including to manage AI applications, review and oversee Output, and detect and correct any issues with AI applications?
- Has the Company implemented and provided training and resources to its employees, including to developers or other users of AI applications?
- If the Company is providing AI applications to the market or using AI applications in connection with products or services it provides to the market, has the Company effectively communicated and provided training and resources to its employees and customers on the functioning and risks of the Company's product?

- Is the Company monitoring the evolving legal and regulatory environment that might affect its use of AI applications and ensuring that relevant decisionmakers and stakeholders are informed of the results of that monitoring?

Please note that supplementing the Overarching Questions above are area-specific questions below:

TECHNOLOGY, COMMERCIAL, AND INTELLECTUAL PROPERTY

Contacts: [Glenn Nash](#) and [Rollin Ransom](#)

- If the Company intends to license AI applications from third parties:
 - What applications will the Company use? Has the Company carefully assessed risk factors (e.g., liability associated with use and data security practices)?
 - What steps has the Company taken to evaluate the training data of the AI applications it intends to use?
 - Is the Company aware of what data has been used to “train” the AI applications? Has the Company confirmed that all such data has been properly licensed?
 - Has the Company evaluated the risks of bias and over/underrepresentation of data points in the Output?
 - Will the Company be submitting data to facilitate the training of the AI applications? Has the Company confirmed proper licensing of the data for such use?
 - Has the Company evaluated its license or purchase agreement for the AI applications it intends to use for:
 - Any restrictions on use of the tool (e.g., limitations on commercial use, sector use, operationally sensitive use such as diagnostics and medical records) or competitive restrictions?
 - Whether Output is owned by the Company or owned by the licensor of the AI applications and licensed back to the Company?
 - If owned by the Company, does the agreement require the Output and the intellectual property embodied therein to be licensed back to the licensor?
 - If owned by the licensor of the AI applications and licensed back to the Company, are there any restrictions on use of such Output?
 - Warranties, disclaimers of warranties, and indemnities from the licensor, including any actions Company must take to obtain indemnification from the licensor?
 - Warranties and indemnities from the Company?
 - Limitations of liability?
 - Has the Company evaluated the process by which it will input information (“Prompts”) to solicit Output to confirm security of its confidential information or third-party confidential information that the Company is obligated to protect?
 - Will the Company’s contemplated use of AI applications require Prompts that include or disclose confidential information of the Company (e.g., business plans, financials, or otherwise)?

- Also, has the Company evaluated information to be submitted to the AI applications to confirm that such information does not contain any privileged information? Has the Company considered the risk that submitting information to AI applications may erode any attorney-client privilege or similar protection with respect to such information?
 - Will Prompts include or disclose confidential or protected data belonging to third parties?
 - Has the Company confirmed its agreements with such third parties, including customers and partners, to permit it to use their data in Prompt creation?
- After generating Output, does the Company expect to further process the Output prior to or in connection with the Company's intended use?
 - Will any text, prose, or content be reviewed or edited by a human being?
 - Will any code, coding suggestions, or similar be modified or edited to comply with standards or best practices instituted with respect to an existing library?
 - Will any pictures, videos, animations, or other media content be processed, modified, or edited?
 - Will the Company review citations, quotations, and other attributions to confirm whether the cited material is accurate, or otherwise seek to identify incorporation of fabricated data purported to be accurate (an artificial hallucination)?
 - Will the Company review the Output, either directly or with assistive tools (e.g., open source software scans, TurnItIn, GPT-2 Output Detector, GPTZero), to confirm whether it incorporates protected content?
 - Will the Company's review confirm whether any additional steps (e.g., attribution or relicensing) need to be taken for any protected content included in the Output?
- Does the Company intend to own and register the Output for intellectual property protection?
 - Does the Company intend to file patents that it seeks to own covering Output (including software code)?
 - Does the Company intend to register copyrights for Output?
 - Does the Company intend to enforce its intellectual property rights in Output?
- Does the Company intend to share or make available the Output (edited or not) externally, or will only internal personnel and resources have access to the Output?
- Does the Company intend to commercialize the Output?
 - Does the Company intend to include the Output as elements or components of its proprietary offering or products?
 - Does the Company intend to sell or offer Output as independent products or offerings?
- Does the Company contemplate nonproduct applications for the Output?
 - Will the Company use Output as internal guidelines or procedures?
 - Will the Company use Output in external-facing communications (with customers, partners, vendors, and others)?
- Has the Company evaluated its regulatory obligations to confirm whether its contemplated use of Output meets those requirements?
 - Is the Company regulated by a government or other entity?

- Does the Company provide services that are subject to regulation?
- Does the Company work or contract with entities that provide regulated services?
- Has the Company evaluated options to reduce the risk of infringement of third-party intellectual property or proprietary rights in connection with its use of Output?
 - Content checkers (e.g., Turnitin, Originality, GPT-2 Output Detector, GPTZero, and others)?
 - Open source scans, to identify incorporated open source software and permit license-complying measures to be taken?
- Has the Company evaluated non-intellectual property legal risks related to use of Output (e.g., breach of contract, conversion/trespass to chattels, unfair competition, interference with prospective business advantage, and interference with contractual relations)?

PRIVACY AND CYBERSECURITY

Contacts: [Colleen Brown](#) and [William Long](#)

- Has the Company considered whether its use of AI applications meets the definition of using AI in applicable AI legislation or other global AI standards?
- Has the Company prepared an overall risk assessment and strategy for its proposed AI applications use (e.g., both in terms of short-term risks such as financial risks and long-term risks such as regulatory enforcement and reputational risks)?
- Has the Company created a data provenance record to assess the quality of Prompts? A data provenance record documents where data comes from and the processes and methodology by which it was produced.
- Has the Company established processes and policies for data generation, acquisition, collection, ingestion, storage, transformation, security, maintenance, and dissemination?
- Has the Company identified and developed an ethical framework for use of AI, including in relation to fairness, bias, human rights compliance, and nondiscrimination?
- Does the Company have plans, policies, or procedures in place to detect and mitigate any undue influence of unfairness or bias in AI training models?
 - Has the Company considered whether data on any protected characteristics will be collected or processed in order to detect and/or correct any AI applications exhibiting bias?
- Has the Company identified and controlled for risks of bias in Prompts and Output?
- Does the Company perform transparency testing where possible? This includes, but is not limited to, being open to relevant stakeholders and Company members about data handling, the model's limitations, and any potential biases.
- If the Company has decided to work with a third-party AI application provider, has the Company developed a vendor-oversight program in relation to AI applications, including for diligence, contracting, and continual oversight processes?
- What contractual obligations or restrictions with respect to data rights may impact the development or use of AI applications (e.g., contracts with vendors or business affiliates that might restrict the use of AI applications or the use of data to create or power AI applications)?

- Is there an automatic means by which the Company can log and record events, cyber incidents, and Output?
- Has the Company assessed access controls around the data and algorithmic life cycle?
- How will the training data that will be used to train the model, algorithm, or Output data be collected, and where will the training data be stored?
- Is there a record retention policy in relation to AI application data?
- Does AI application data contain personally identifiable information, or any other particularly regulated personal data (e.g., Protected Health Information subject to HIPAA, European personal data subject to the GDPR, children's data, payment card information, biometric data, or any other category of personal information or data subject to specific regulation)?
- Has the Company considered anonymizing AI application data where possible or required?
- What public statements or commitments has the Company made around the use of AI, or on the use of personal or other information, that may impact the adoption of AI applications?
- Does the Company have any notices to users of AI applications, or data subjects whose information was used to train the AI applications, or data subjects whose data will be processed by the AI applications, of the purposes of processing and methodologies and risks associated with AI applications?
- Has the Company developed instructions to employees for AI application use?
- Has the Company considered best information security practices for AI applications to prevent the misuse of data, or corruption or unavailability of the data and algorithms?
- Does the Company undertake AI-specific impact assessments pursuant to any data protection laws?
- Has the Company identified a lawful basis for the processing of personal data (to the extent required by relevant data protection regimes)?
- Has the Company considered international data flows in connection with AI application deployments?
- Has the Company ensured that its use of AI applications complies with relevant privacy requirements, existing law, upcoming requirements, regulatory guidance, and the Company's own privacy commitments?

CORPORATE GOVERNANCE

Contact: [Holly Gregory](#)

- Does the board, working with its advisors, have an adequate understanding of:
 - How the business and industry could be disrupted by AI, and what strategic opportunities and risks AI presents?
 - How AI is used or intended to be used in Company processes and third-party products used by the Company?
 - How the Company is positioned to leverage its data assets, the risks that may stem from the use of data for the AI application use cases, and management's existing processes for tracking and protecting the data used to train or be input into AI applications?

- The AI governance system the Company's management has put in place, including whether the system has appropriate input from relevant business functions, IT, human resources, legal, risk, and compliance?
- The Company's goals and why a specific AI application is an appropriate tool for achieving them. In evaluating this issue, the board should seek management's input on:
 - Whether the Company has the expertise and resources to pursue a strategy that relies on AI in a responsible way.
 - How resilient the Company's use of AI applications is in terms of cybersecurity, operations, and data access and management.
 - How success with respect to the use of AI applications will be measured.
 - What proof of concept will look like, and how to test for efficacy and compliance as an AI application initiative launches and as AI application use develops over time.
 - What the key risks of AI applications are and what risk mitigation tools are available.
 - Whether there are material disclosure considerations concerning the use or impact of AI applications that are relevant to any audience (e.g., users, regulators, business partners, or shareholders).
- Has the board evaluated:
 - The need for or outcome of discussions with management about the National Institute of Standards and Technology's AI Risk Management Framework and its application to the Company?
 - Whether it has appropriate access to information, advice, and expertise on AI matters to be able to understand strategic opportunities and risks and consider related controls?
 - What additional steps should be taken to ensure that the board is kept appropriately informed on AI matters?
- Has management identified:
 - Risks to the business from AI?
 - Any mission-critical compliance or safety risks related to the Company's use of AI and, if so, discussed them with the board? (These risks should be mapped to a board committee for more frequent and in-depth attention, and reflected in the committee charter, agenda, and minutes)?
- Does the board (or the responsible board committee):
 - Appropriately reflect AI issues on its agenda?
 - Regularly get updated about rapidly emerging legislative and regulatory developments related to the use of AI?
 - Review the Company's policies and procedures concerning the use of AI?
 - Consider, together with management, the implications of AI for the Company's cybersecurity, privacy, and other compliance policies and controls programs?
 - Discuss with management the potential for misuse and unintended consequences from the Company's use of AI applications with respect to employees, customers, other key stakeholders, and the environment, and how to avoid or mitigate those risks?

- Understand the extent to which AI applications are used in tracking and assessing employee performance, and how the Company has ensured that controls are in place to foster compliance with any relevant regulation?
- Understand who in the Company is responsible for monitoring AI application use, and AI-specific compliance and risk management, and how the Company ensures compliance with AI-specific requirements (e.g., “secure by design” requirements)?
- Oversee the Company’s policies and procedures related to the use of AI applications, including whether those policies and procedures consider the potential for bias, inaccuracy, breach of privacy, and related issues of consumer protection, cyber and data security, intellectual property, litigation, and quality control?
- Does the board (or responsible board committee) document its understanding, evaluation, and oversight of AI-related issues in meeting minutes, materials, and agendas?
- Do the minutes of the full board provide a detailed recitation of any report made by the responsible board committee?

SECURITIES DISCLOSURE AND LITIGATION

Contacts: [Jaime Bartlett](#), [Hardy Callcott](#), and [Matt Dolan](#)

- Has the Company made public statements, or statements to investors or potential investors, about its use of AI applications?
 - If so, are those statements consistent?
 - Is there an authoritative person or function for reviewing and approving those statements?
- Does the Company have a process to confirm whether the public/investor statements about use of AI applications are consistent with the Company’s operational processes concerning AI applications?
 - Are these statements fully substantiated?
 - Are these statements consistent with internal training and written policies on use of AI applications?
 - Have internal policies (e.g., regarding cybersecurity, data retention, and insider trading) changed in light of AI applications use/risks, and are related public statements still accurate?
- Does the Company have a process to update public/investor statements about its use of AI applications as its AI application use-cases evolve over time, and to remove statements that are out of date or no longer complete and accurate?
- Consider each of the Company’s risk-related disclosures:
 - Do the Company’s public/investor statements fairly disclose the potential material risks and limitations of the Company’s use of AI applications as well as the potential benefits?
 - Do the Company’s public/investor statements fairly disclose potential legal or regulatory changes that could materially affect the Company’s use of AI applications?
 - Regardless of the Company’s own statements about its use of AI applications, has the Company disclosed material risks that use of AI applications by competitors, customers, or suppliers may pose to the Company and its results?

- How is the Company retaining data concerning its AI application use, including tracking of documents or information created or revised using AI applications?
- To the extent that the Company is a regulated entity (such as a broker-dealer, investment advisor, insurance company, or bank), has the Company taken into account the appropriate regulatory framework and how that framework impacts the use of AI applications, potential conflicts of interest in AI applications, disclosures to customers and potential customers, and how the Company reviews, supervises, and retains communications with customers and potential customers?

M&A

Contacts: [Sara Carian](#) and [Vijay Sekhon](#)

- If the target of an acquisition develops or uses AI applications, has the Company evaluated what due diligence review should be conducted regarding such use and/or development and the target's policies, procedures, and compliance with regulatory obligations relating thereto?
- Has the Company evaluated whether the definitive agreement for a transaction should include representations and warranties, or other provisions related to a target's development and/or use of AI applications, and any policies, procedures, and compliance with regulatory obligations relating thereto?
- If the Company is using AI applications for due diligence review or in connection with drafting and negotiating definitive agreements in connection with a transaction:
 - Has the Company clearly defined the tasks for which AI applications will be used, including which documents, contracts, or matters are appropriate for review or preparation by or with AI applications?
 - Has the Company incorporated sufficient human review and oversight?
 - Has the Company evaluated the AI applications to ensure that it meets expectations regarding confidentiality to ensure that any inputs that are protected by contractual confidentiality obligations, attorney-client privilege, and/or the work product doctrine are used and maintained in compliance with such obligations?
- If representations and warranties insurance (RWI) will be used in a transaction:
 - Is the Company able to give the RWI insurer comfort regarding the diligence performed by the Company related to any representations and warranties related to AI applications?
 - Is the Company able to give the RWI insurer comfort that sufficient human review and oversight was instituted if AI applications were used in the due diligence review process?

COMMERCIAL LITIGATION

Contacts: [Dave Gordon](#) and [Rollin Ransom](#)

- Has the Company evaluated its business agreements with vendors who are delivering services or work product to the Company for:
 - Any limitations on liability, warranties, or indemnities that may impact the Company's ability to recover for losses or claims related to inaccuracies, failures to deliver, or other issues arising out of its business vendors' use of AI applications?

- Any representations, disclosures, or disclaimers the vendors have provided (or should provide) concerning AI applications?
- Has the Company evaluated its business agreements with partners to whom the Company is delivering services or work product for:
 - Any limitations on liability, warranties, or indemnities that may protect the Company from claims related to inaccuracies, failures to deliver, or other issues arising out of the Company's use of AI applications?
 - Any representations, disclosures, or disclaimers the Company has provided (or should provide) concerning AI applications?
- Has the Company evaluated its terms and conditions with its customers for:
 - Any limitations on liability, warranties, or indemnities that may protect the Company from claims related to inaccuracies, failures to deliver, or other issues arising out of Company's use of AI applications?
 - Any representations, disclosures, or disclaimers the Company has provided (or should provide) concerning AI applications?
- Has the Company evaluated legal theories that could be used by business partners or customers (as individuals or as a class) in the main jurisdictions in which the Company operates relating to AI, including:
 - Breach of contract
 - Conversion/trespass to chattels
 - Negligence
 - Unfair competition
 - Unjust enrichment and quantum meruit
 - Interference with prospective business advantage
 - Interference with contractual relations
 - Antitrust
 - Other commercial claims

PRODUCTS LIABILITY

Contact: [Elizabeth Chiarello](#)

- Has the Company assessed:
 - Whether there are reasonably foreseeable injuries (including but not limited to physical injury, emotional distress, property damage, economic loss) that may result from use of AI applications, and, if so, what are they?
 - Whether the reasonably foreseeable injuries, if any, have been considered in relation to the benefits of the use of AI applications?
 - Whether there is a failure mode and effects analysis, process hazard analysis, or other risk assessment tool for the use of AI applications?

- Whether the Company's product or service using AI applications could be designed to eliminate (to the extent possible) or mitigate the risks of using AI applications?
- Whether the Company's product or service using AI applications could be designed to be safer?
- Whether the possible misuse of the AI applications could impact the usefulness or safety of the final product or service?
- Whether the use of AI applications could lead to a manufacturing defect?
- What is the likely error rate from the use of AI applications?
 - What does an error look like?
 - How will an error be identified?
 - What are the injuries that could result from such an error? How severe are those potential injuries?
- With respect to the Company's product or service using AI applications, is the AI application or data used by the AI application provided by the Company or by a supplier or other third party?
- Can the Company introduce guardrails to help reduce the introduction of data that could cause the AI application to evolve in detrimental ways?
- Is there a process for monitoring the use of AI applications with regard to the Company's product or service, if applicable?
- If the AI application used in connection with the product or services evolves and could potentially improve the product, is there a process in place for evaluating such possible improvements?
- To the extent the product or service is regulated by a federal agency (e.g., the Food and Drug Administration (FDA)):
 - Is the product considered a medical device? If so, is FDA exercising regulatory discretion?
 - Has the regulator provided any guidance or issued any regulations applicable to the use of AI applications?
 - Has the Company had communications with the regulator about the validation and verification data, benefits, risks, or warnings regarding the use of AI applications in connection with the product or service?
 - Is the algorithm locked or frozen?
- Are others within the industry using AI applications to provide similar products or services?
 - What is the industry standard in terms of developing or providing products or services using AI applications, even if the industry standard is evolving?
- Is there literature about the product or service that uses AI applications (e.g., instructions for use, product information sheet, patient information sheet, material safety data sheet, promotional material, marketing, and advertising)?
- Is the product or service using AI applications intended for use by a layperson or by a physician or other sophisticated party?
- What warnings or information about risk are communicated about the use of AI applications with respect to the product or service?

- How conspicuous are such warnings or information about the risk of AI applications with respect to the product or service?
- Are the warnings appropriately targeted to the intended audience (e.g., layperson or physician)?
- Does the Company know in which jurisdictions the AI applications will ultimately be used to develop the product or service?
- Has the Company considered warranties pursuant to the Uniform Commercial Code as well as a possible disclaimer of warranties regarding the use of AI applications in connection with the product or service?
- Does the Company have agreements with organizations and companies utilizing AI applications to develop products or services?
- What contractual rights does the Company have against the supplier of AI applications, including, for example, indemnity, contribution, or the duty to defend?
- Does the Company have insurance, or can it obtain insurance, for product liability claims that may be made with respect to the Company's product or service using AI applications?
- Does the Company have a plan for monitoring comments or complaints received about products or services using AI applications and a plan for investigating them?

LABOR & EMPLOYMENT

Contacts: [Wendy Lazerson](#) and [Kate Roberts](#)

- Is the Company using AI applications to conduct any aspect of preemployment screening (e.g., AI-assisted interviews, resume matching software, or applicant scoring systems)?
 - If so, is the use of AI applications acceptable under local law? Has it been validated by an industrial psychologist or other expert? Has the Company tracked outcomes among various ethnic groups to ensure that the use of the AI application does not have a disparate impact?
- Is the Company using AI applications to assign work or assess employee performance or productivity?
 - If so, is the use of AI applications acceptable under local law? Has it been validated by an industrial psychologist or other expert? Has the Company tracked outcomes among various ethnic groups to ensure that the use of the AI application does not have a disparate impact?
 - Would the Company be able to explain how the AI application made its decision, if required to do so in litigation, to justify a negative employment action based on an AI-generated performance metric?
- Is the Company using AI applications to monitor employees' behavior or assess their trustworthiness?
- Is any AI application used by the Company collecting data about employees that may be subject to privacy laws?
- Does the Company have policies in place to prohibit employees from using AI applications for the Company's business that has not been approved to be used for the Company's business?

TRADE AND FOREIGN INVESTMENT CONTROLS

Contact: [Jen Fernandez](#)

- If the Company sources AI applications, computing capacity, or any software, hardware, or any other products or services involving AI from higher risk jurisdictions (e.g., China), has the Company considered the evolving requirements under Executive Order 13873 (Securing the Information and Communications Technology and Services Supply Chain) and any implementing regulations?
- If the Company develops AI applications:
 - Has the Company assessed any export controls that may be applicable to cross-border research?
 - Has the Company assessed risks or regulatory filing requirements related to foreign investment?
- If the Company makes AI applications or computing capacity available to third parties, what steps is the Company taking to ensure ethical use of these products/services?
- Is the Company using AI applications or computing capacity in support of any foreign military activities?
- If the Company uses AI applications in R&D or other technical applications:
 - Has the Company considered whether the technology inputted is export controlled? If so, where is the technology processed and stored?
 - Does the Company have a process for assessing whether the technology created is subject to export controls?
- Is the Company monitoring the rapidly evolving international trade regulatory environment to ensure compliance?

INSURANCE

Contact: [Andrew Holland](#)

- If using AI applications for underwriting or claims handling:
 - Has the Company evaluated the potential for unfair discrimination claims by regulators and/or insureds?
 - Has the Company considered the ability of state insurance regulators to evaluate the workings of such tools when approving rating plans and/or examining insurers?
 - If using AI applications for purposes of recommending coverages and policy limits, has the Company considered its potential liability for after-the-fact determined coverage deficiencies?
 - If using AI applications for customer service (e.g., chatbots), has the Company considered whether any licensing concerns are implicated?
 - Has the Company considered the possible inadvertent incorporation of elements of bias/discrimination from using AI applications over time?
 - Has the Company considered implementing verification protocols during the initial implementation to confirm and verify the results/recommendations of the AI applications?
-

- Has the Company considered whether regulators will be able to replicate results from the use of the AI application over time?
- If using AI applications to detect fraud, has the Company coordinated such use with its Special Investigative Unit?

EDISCOVERY

Contacts: [Robert Keeling](#) and [Colleen Kenney](#)

- If the Company plans to use AI applications in the course of its business:
 - Has the Company evaluated the extent to which data associated with the AI applications (e.g., inputs and Outputs), as well as any intermediate or ancillary data, are within the Company's "possession, custody, or control" and, therefore, potentially subject to discovery?
 - Has the Company evaluated information governance aspects of the AI applications, including how long data associated with the AI applications will be retained in the ordinary course (e.g., are chat messages with an AI bot retained indefinitely or only for a set period, or are they ephemeral)?
 - Has the Company evaluated foreign privacy laws and the ability to transfer data from other jurisdictions?
 - Has the Company evaluated the ability to preserve data associated with the AI applications pursuant to a legal hold?
 - Has the Company evaluated the ability to export data associated with the AI applications in the event it needs to be collected during discovery?
 - Has the Company evaluated the AI applications for purposes of the attorney-client privilege and the work product protection, including whether privileged information might be waived as a result of providing it to the AI applications?
- If the Company plans to use AI applications for purposes of eDiscovery:
 - Has the Company clearly defined the tasks for which the AI applications will be used (e.g., document summarization, key documents analysis, identification of privileged information, responsiveness classification)?
 - Has the Company evaluated the AI applications to ensure that it meets expectations regarding confidentiality to ensure that any inputs or training documents protected by the attorney-client privilege and/or the work product doctrine are maintained?
 - To the extent that the Company plans to use the AI applications to cull documents for review, similar to Technology Assisted Review, has the Company considered the possibility that the opposing party may demand disclosure of details of the AI applications and their use, including potentially any prompts used?