

*Presenting a live 90-minute webinar with interactive Q&A*

# **Artificial Intelligence and Algorithms in Contract Development: New FTC Guidance and European Commission Regulations**

Overcoming Bias and Discrimination in Computer-Generated Contracts

---

TUESDAY, AUGUST 17, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

---

Today's faculty features:

Annmarie Giblin, Founding Attorney and Principal, **Giblin Law PLLC**, Garden City, NY

James A. Sherer, Partner, **BakerHostetler**, New York, NY

---

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact Customer Service at 1-800-926-7926 ext. 1.

### Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat or e-mail [sound@straffordpub.com](mailto:sound@straffordpub.com)** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press \*0 for assistance.

### Viewing Quality

To maximize your screen, press the ‘Full Screen’ symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

## *Continuing Education Credits*

FOR LIVE EVENT ONLY

---

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

**Recording our programs is not permitted. However, today's participants can order a recorded version of this event at a special attendee price. Please call Customer Service at 800-926-7926 ext.1 or visit Strafford's website at [www.straffordpub.com](http://www.straffordpub.com).**

# *Artificial Intelligence and Algorithms in Contract Development*

---

Annmarie Giblin, Giblin Law PLLC

James Sherer, BakerHostetler

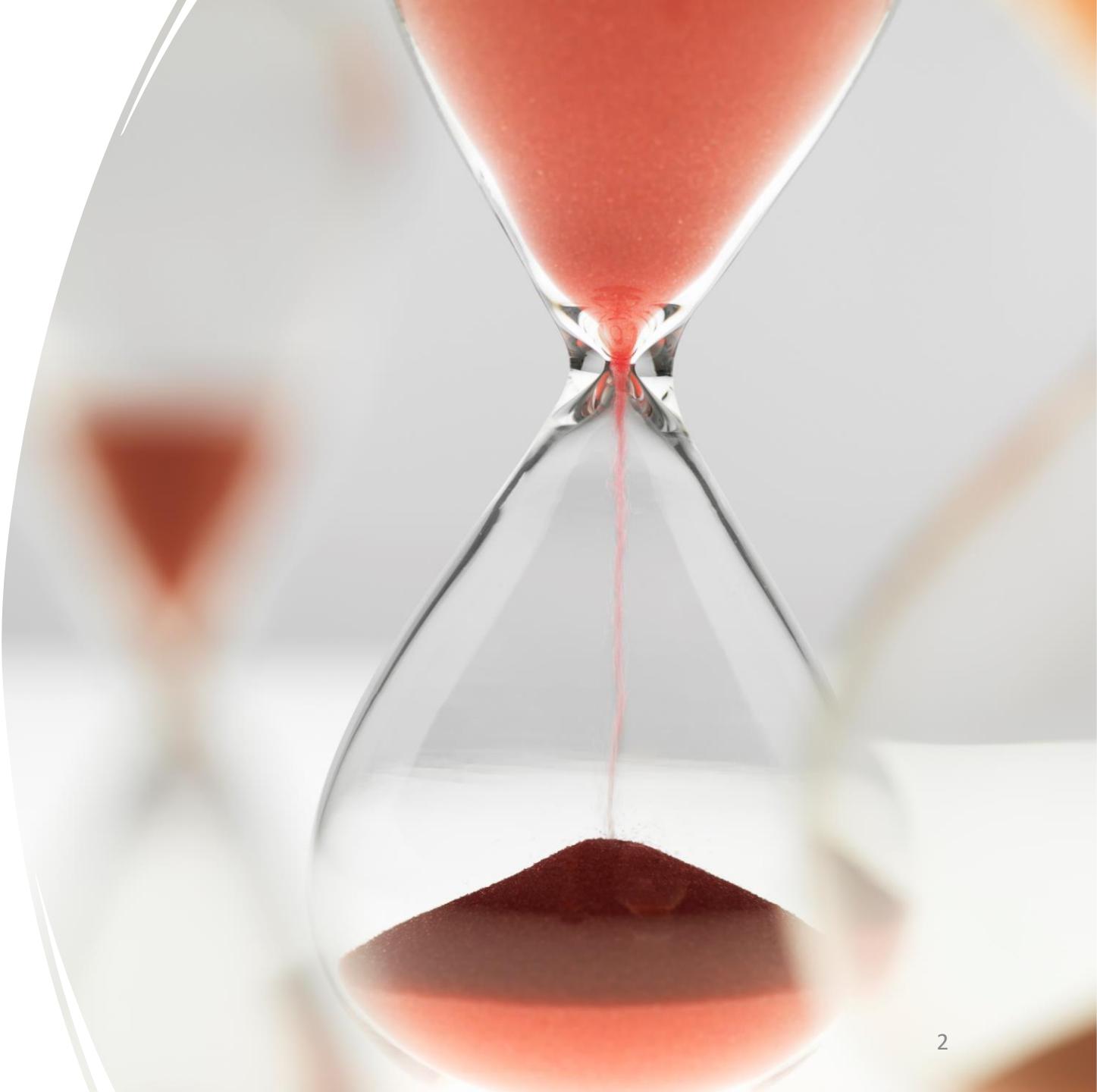
Strafford, August 17, 2021

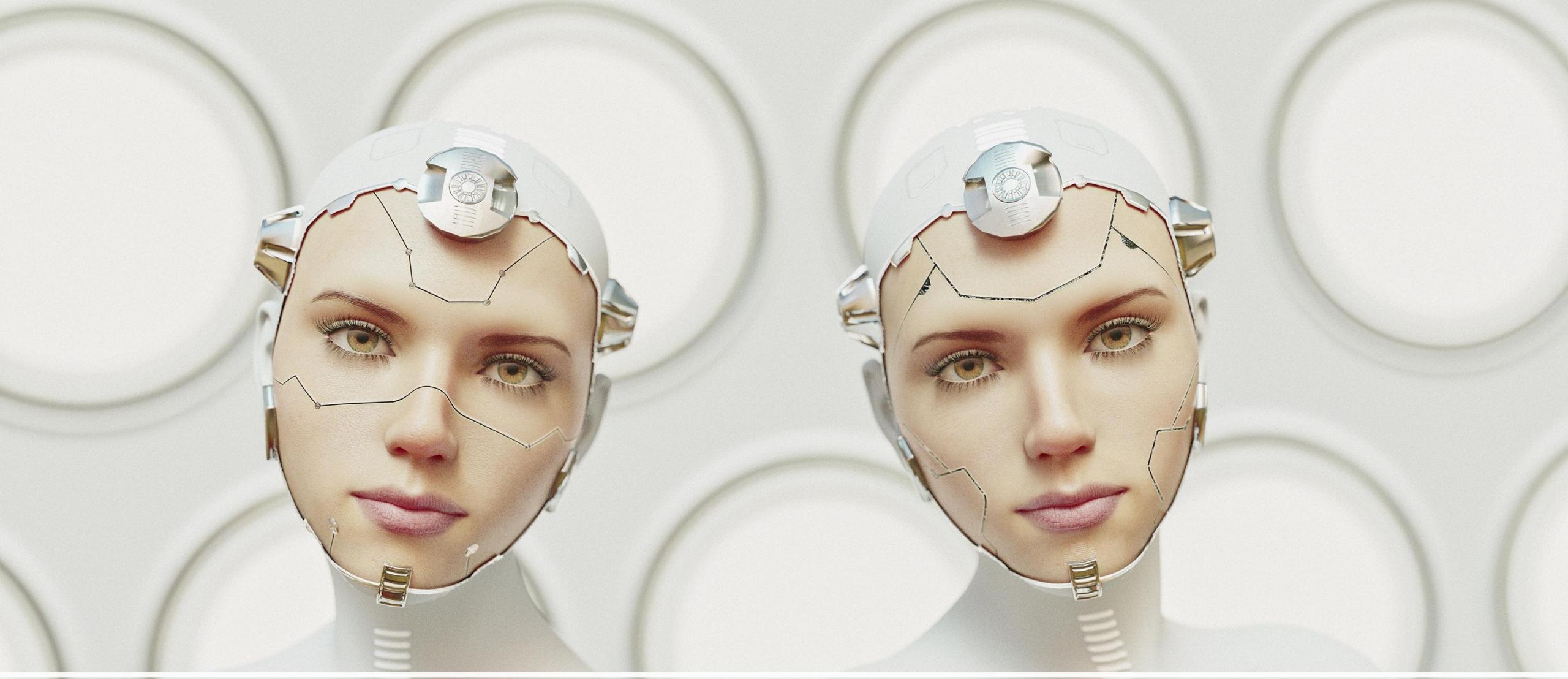


# Agenda

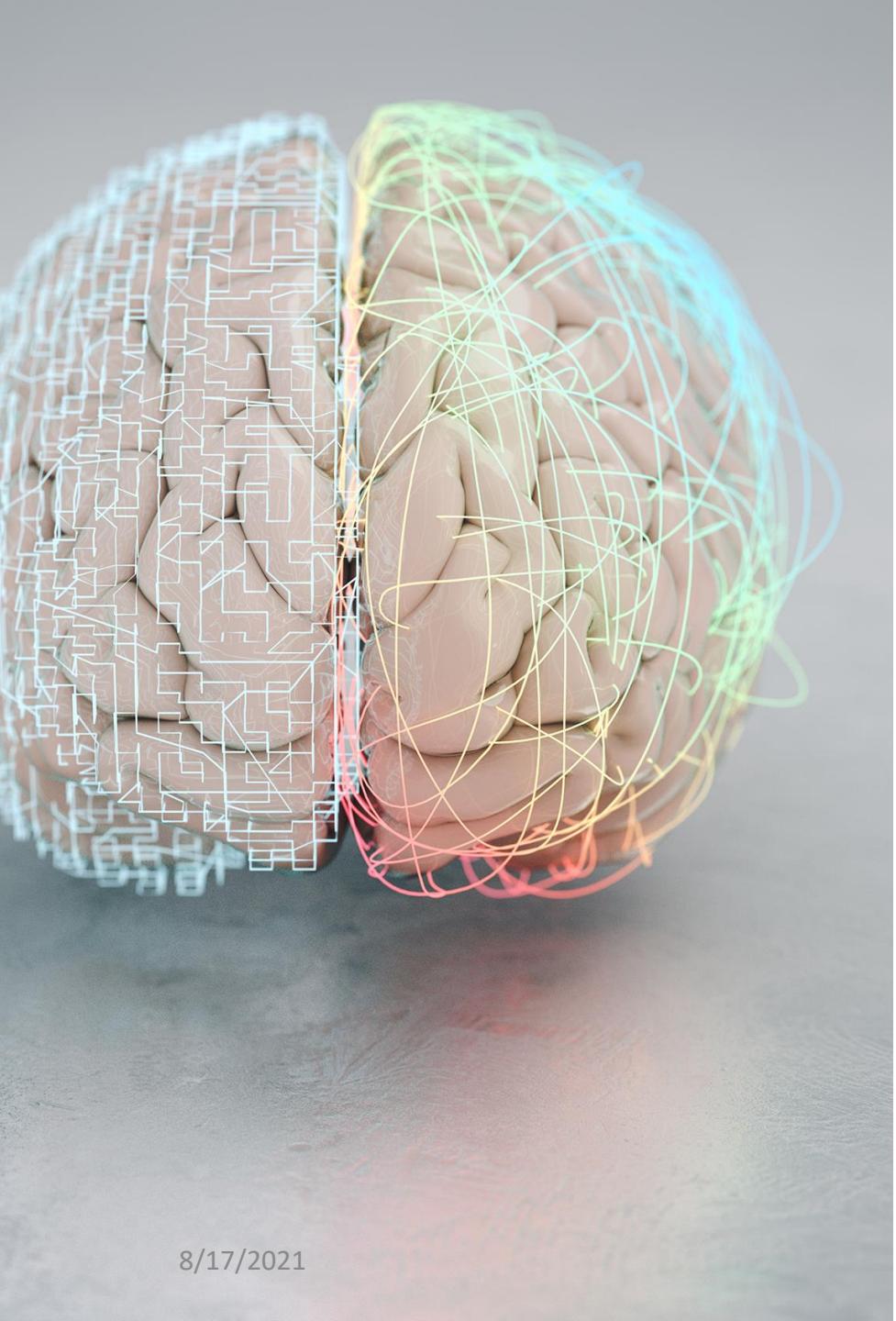
---

- I. AI and Algorithms
- II. FTC Guidance and Current U.S. Law
- III. E.U. Current Law and Proposed Regulations





# AI and Algorithms



# What is Artificial Intelligence?

---

- No universal definition – including no legal definition
- Generally, refers to the field of computer science dedicated to simulating or creating intelligent behavior or thought in a computer.
- The Second Circuit recently used the Oxford Dictionary definition of Algorithm:  
*"a precisely defined set of mathematical or logical operations for the performance of a particular task,"*  
Algorithm, Oxford English Dictionary (3d ed. 2012)\*

# Basics of AI

- Machine Learning
  - Supervised vs. Unsupervised Learning
  - Semi-Supervised Learning



# Neural Networks/Deep Learning

---

- Idea of training a computer to learn and eventually “think” in the same manner that toddlers learn language and about the world.
- “Modeled loosely on the Human Brain, a neural net consists of thousands or even millions of simple processing nodes that are densely interconnected.”\*\*
- Now more commonly referred to now as “Deep Learning”

\*\*Explained: Neural Networks, Ballyhooed artificial-intelligence technique know as ‘deep learning’ revives 70-year-old idea”, Hardesty, Larry, MIT News Office, April 14, 2017, available at: <https://news.mit.edu/2017/explained-neural-networks-deep-learning-0414>, last visited on 1/10/21; see also, Tiny four-bit computers are now all you need to train AI, Hao, Karen, MIT Technology Review, December 11, 2020, available at <https://www.technologyreview.com/2020/12/11/1014102/ai-trains-on-4-bit-computers/>, last visited 1/13/21.

# Current Use of AI in Contracts

- Contract Management
- Contract Analysis
- Contract data extraction



## Contract Creation

- Has a Contract been created?

## Enforceability

- Is the Contract Enforceable?

## Liability

- Which Party is liable for any mistakes?
- Does Liability analysis change because of no Human Involvement?

# AI Contract Creation Legal Issues

- Statute of Frauds
  - Uniform Electronic Transactions Act (“UETA”)(adopted by 48 States, not Illinois or New York)
  - Electronic Signatures in Global and National Commerce Act (“E-Sign Act”)(15 U.S.C.S. §§ 7001-7031)
  - Uniform Commercial Code (“UCC”)
- Meeting of the Minds

# Contract Enforceability

---

- Parole Evidence vs. Four Corners
- Fraud
- Arm's Length Transaction
- Mistake
- AI Black Box issues



# Liability

IS AI A TOOL OR  
AN AGENT?

PROGRAMMING  
ERROR OR  
MALFUNCTION?

FAILURE TO  
PATCH, OR A  
CYBERSECURITY  
BREACH?

# Case Law Examples

***Halabu Holdings, LLC v. Old Nat'l Bancorp***, 2020 US Dist. LEXIS 200086; 2020 WL 6317110 (E.D. Mich. October 28, 2020)

***Gillis v. Wells Fargo Bank, N.A.***, 875 F. Supp. 2d 728 (E.D. Mich. 2012)

***ABRY Partners V, L.P. v. F&W Acquisition LLC***, 891 A.2d 1032 (Del. Ch. 2006)

***Int'l Casings Group, Inc. v. Premium Std. Farms, Inc.***, 358 F. Supp. 2d 863 (W.E. Mo. February 9, 2005)

***Bazak Int'l Corp. v. Tarrant Apparel Group***, 378 F. Supp. 2d 377 (S.D.N.Y. 2005)



# FTC Guidance

FTC has reiterated its enforcement power within the following three laws:

**Section 5 of the FTC Act and prohibitions against unfair or deceptive practices**

- Specifically, the sale or use of racially biased algorithms as an enforcement priority

**The Fair Credit Reporting Act**

- FCRA application when an algorithm might deny employment, housing, credit, insurance or other benefits

**The Equal Credit Opportunity Act**

- When a biased algorithm could result in credit discrimination on the basis of race, color, religion, national origin, sex, marital status or age, or because a person receives public assistance



## FTC's direction related to the following:

---

- FTC April 19, 2021, guidance, Aiming for truth, fairness, and equity in your company's use of AI
- FTC's April 8, 2020, guidance, Using Artificial Intelligence and Algorithms
- FTC January 2016, report, Big Data: A Tool for Inclusion or Exclusion?
- FTC September 15, 2014, public Big Data: A Tool for Inclusion or Exclusion? workshop



# Data Gathering

- Evaluate the quality of the data (including accuracy, completeness and representativeness) — and if the data set is missing certain population data, take appropriate steps to address and remedy that issue (2016).
- Honor promises made to consumers and provide consumers with substantive information about the organization's data practices when gathering information for AI purposes (2016).
  - Any related opt-in mechanisms must operate as disclosed to consumers (2021).



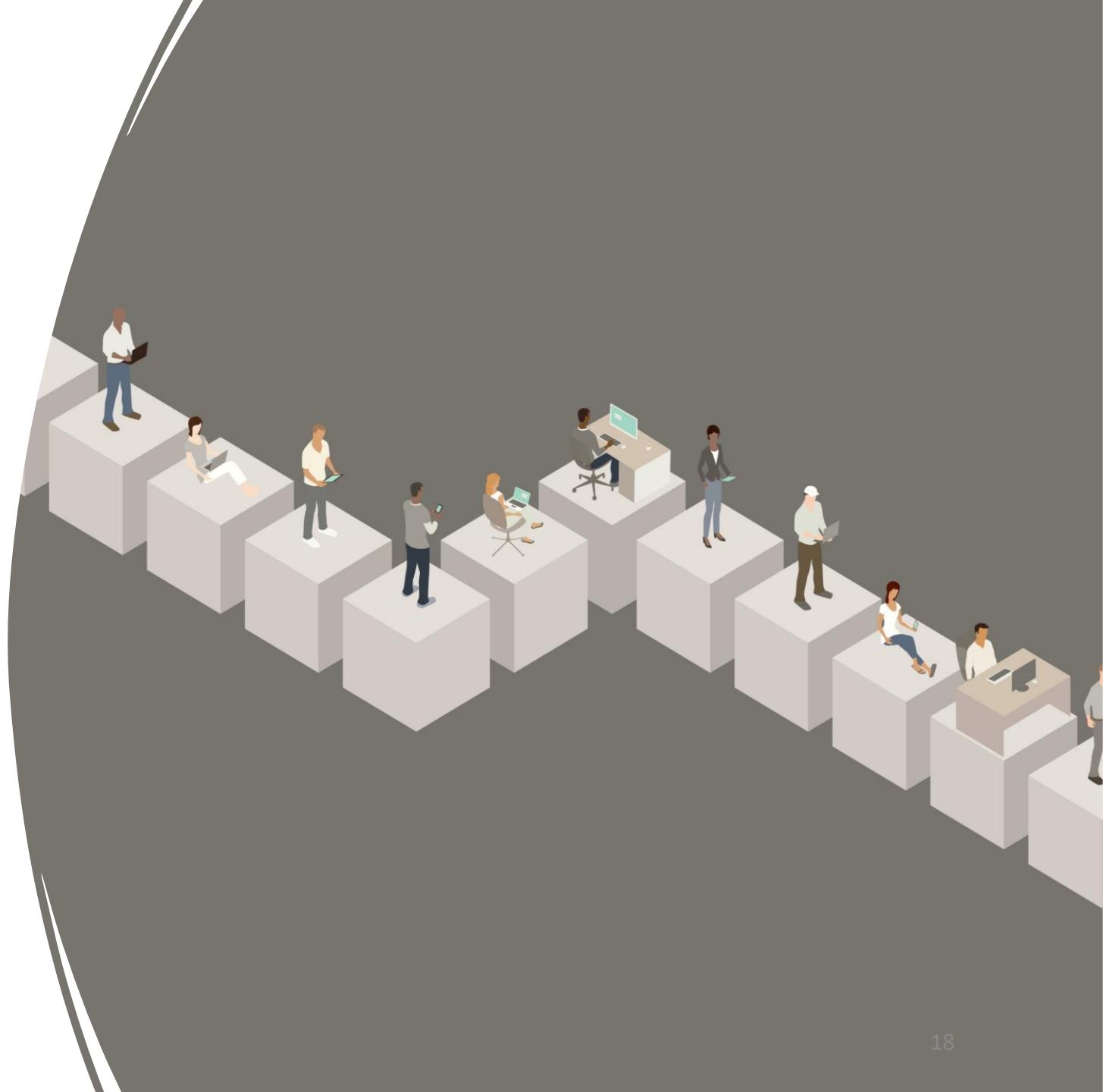


## Data Compilation

- Recognize the data compilation step as a “descriptive activity,” which the FTC defines as a process aimed at uncovering and summarizing “patterns or features that exist in data sets” — a reference to data mining scholarship (2016).
- Organize compilation efforts around a life cycle model that provides for compilation and consolidation before moving on to data mining, analytics and use (2016).
- Recognize that there may be uncorrected biases in underlying consumer data that will surface in a compilation; therefore, an organization should review data sets to ensure hidden biases are not creating unintended discriminatory impacts (2016).
- Maintain reasonable security over consumer data (2016).
- If data are collected from individuals in a deceitful or otherwise inappropriate manner, the organization may need to delete the data (2021).

# Model and AI Application Selection

- Recognize the model and AI application selection step as a predictive activity, where an organization is using “statistical models to generate new data” — a reference to predictive analytics scholarship (2016).
- Determine if a proposed data model or application properly accounts for biases (2016).
  - Where there are shortcomings in the data model, the model’s use must be accordingly limited (2021).
- Organizations that build AI models may “not sell their big data analytics products to customers if they know or have reason to know that those customers will use the products for fraudulent or discriminatory purposes.” An organization must, therefore, evaluate potential limitations on the provision or use of AI applications to ensure there is a “permissible purpose” for the use of the application (2016).
- As a general rule, the FTC asserts that under the FTC Act, a practice is patently unfair if it causes more harm than good (2021).





## Model Development

- Design models to account for data gaps (2021).
- Consider whether reliance on particular AI models raises ethical or fairness concerns (2016).
- Consider the end uses of the models and cannot create, market or sell “insights” used for fraudulent or discriminatory purposes (2016).

# Model Testing and Refinement

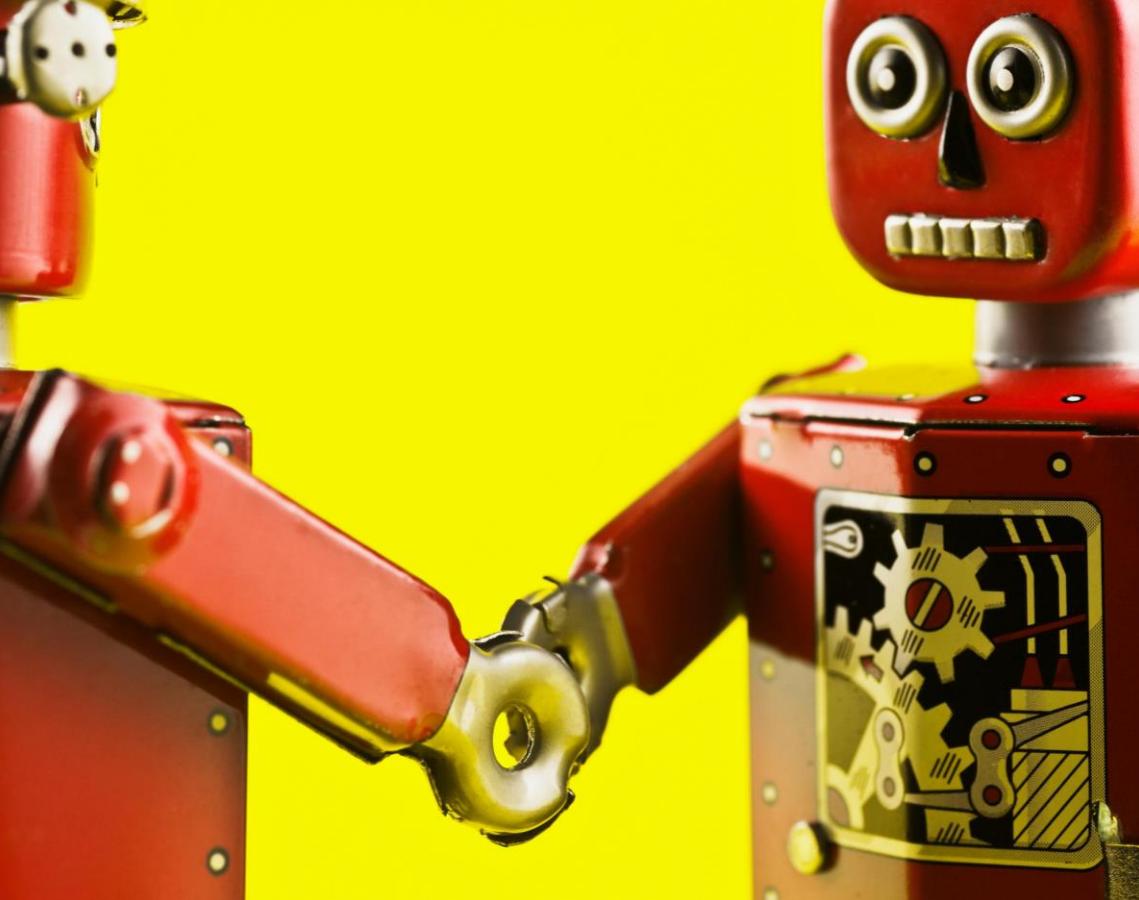
- Test the algorithm before use (2021). This testing should include an evaluation of AI outcomes (2020).
- Consider prediction accuracy when using “big data” (2016).
- Focus on both inputs and AI models may not discriminate against a protected class (2020).
- Include considerations of ethnically based factors or proxies for such factors.
- Outcome evaluation is critical for all models, including facially neutral models.
- Model evaluation should consider alternative models, as the FTC can challenge models if a less discriminatory alternative would achieve the same results (2020).
- If data are collected from individuals in a deceptive, unfair, or illegal manner, deletion of any AI models or algorithms developed from the data may also be required (2021).



# Front-End Consumer and User Disclosures

- Be transparent and not mislead consumers “about the nature of the interaction” — and not utilize fake “engager profiles” as part of their AI services (2020).
- Do not exaggerate an AI model’s efficacy or misinform consumers about whether AI results are fair or unbiased. According to the FTC, deceptive AI statements are actionable (2021).
- If algorithms are used to assign scores to consumers, an organization must disclose key factors that affect the score, rank-ordered according to importance (2020).
- Organizations providing certain types of reports through AI services must also provide notices to the users of such reports (2016).
- Organizations building AI models based on consumer data must, at least in some circumstances, allow consumers access to the information supporting the AI models (2016).





## Back-End Consumer and User Disclosures

---

- Automated decisions based on third-party data may require the organization using the third-party data to provide the consumer with an “adverse action” notice (for example, if under the Fair Credit Reporting Act 15 U.S.C. § 1681 (Rev. Sep. 2018), such decisions deny an applicant an apartment or charge them a higher rent) (2020).
- General “you don’t meet our criteria” disclosures are not sufficient. The FTC expects end users to know what specific data are used in the AI model and how the data are used by the AI model to make a decision (2020).
- Organizations that change specific terms of deals based on automated systems must disclose the changes and reasoning to consumers (2020).
- Organizations should provide consumers with an opportunity to amend or supplement information used to make decisions about them (2020) and allow consumers to correct errors or inaccuracies in their personal information (2016).

# Model Deployment

- When deploying models, organizations must confirm that the AI models have been validated to ensure they work as intended and do not illegally discriminate (2020).
- Organizations must carefully evaluate and select an appropriate AI accountability mechanism, transparency framework and/or independent standard, and implement as applicable (2020).
- An organization should determine the fairness of an AI model by examining whether the particular model causes, or is likely to cause, substantial harm to consumers that is not reasonably avoidable and not outweighed by countervailing benefits (2021).



# Model Audit

- Test AI models periodically to revalidate that they function as intended (2020) and to ensure a lack of discriminatory effects (2021).
- Account for compliance, ethics, fairness and equality when using AI models, taking into account four key questions (2016; 2020):
  - How representative is the data set?
  - Does the AI model account for biases?
  - How accurate are the AI predictions?
  - Does the reliance on the data set raise ethical or fairness concerns?
- Embrace transparency and independence, which can be achieved in part through the following (2021):
  - Using independent, third-party audit processes and auditors, which are immune to the intent of the AI model.
  - Ensuring data sets and AI source code are open to external inspection.
  - Applying appropriate recognized AI transparency frameworks, accountability mechanisms and independent standards.
  - Publishing the results of third-party AI audits.
- Remain accountable throughout the AI data life cycle under the FTC's recommendations for AI transparency and independence (2021).

# E.U. Current Law and Proposed Regulations

---

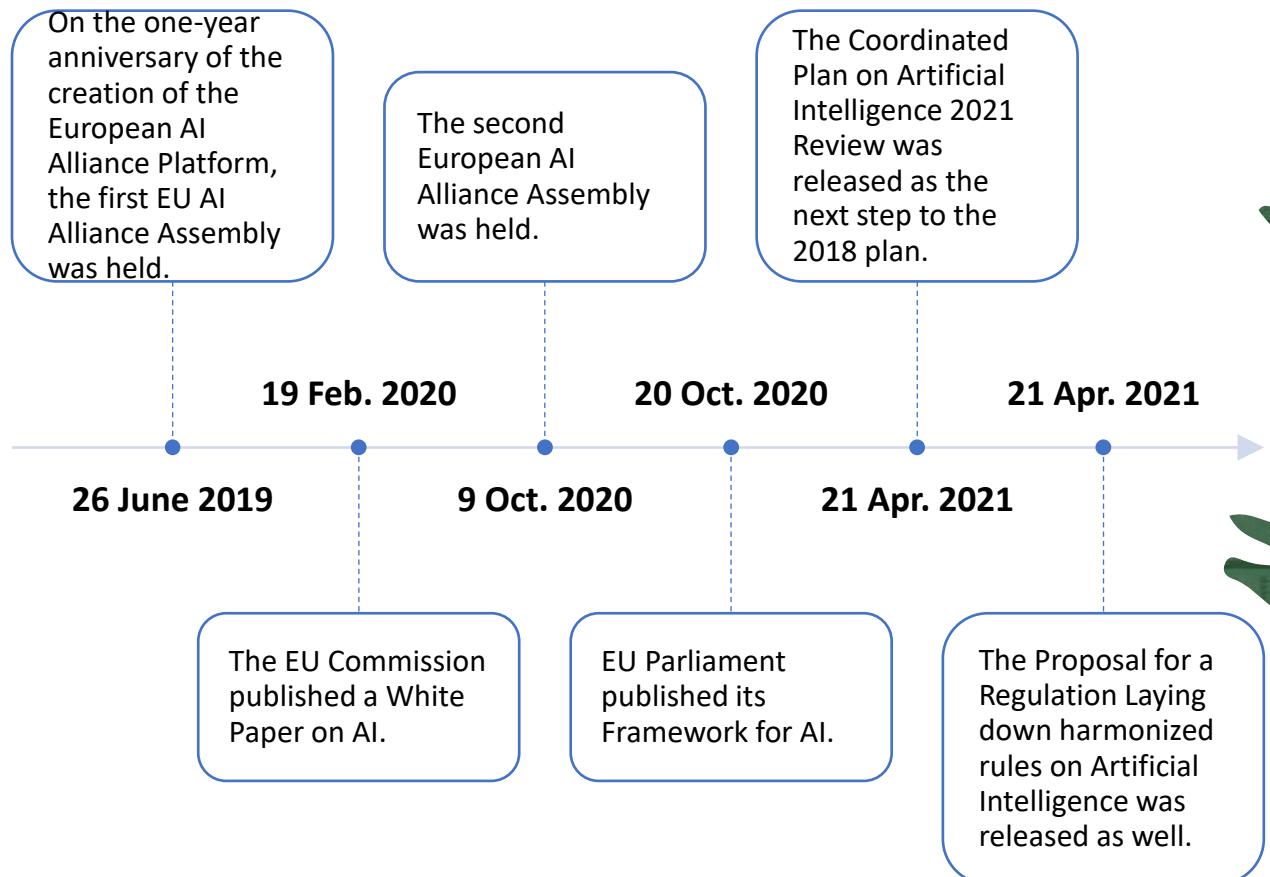


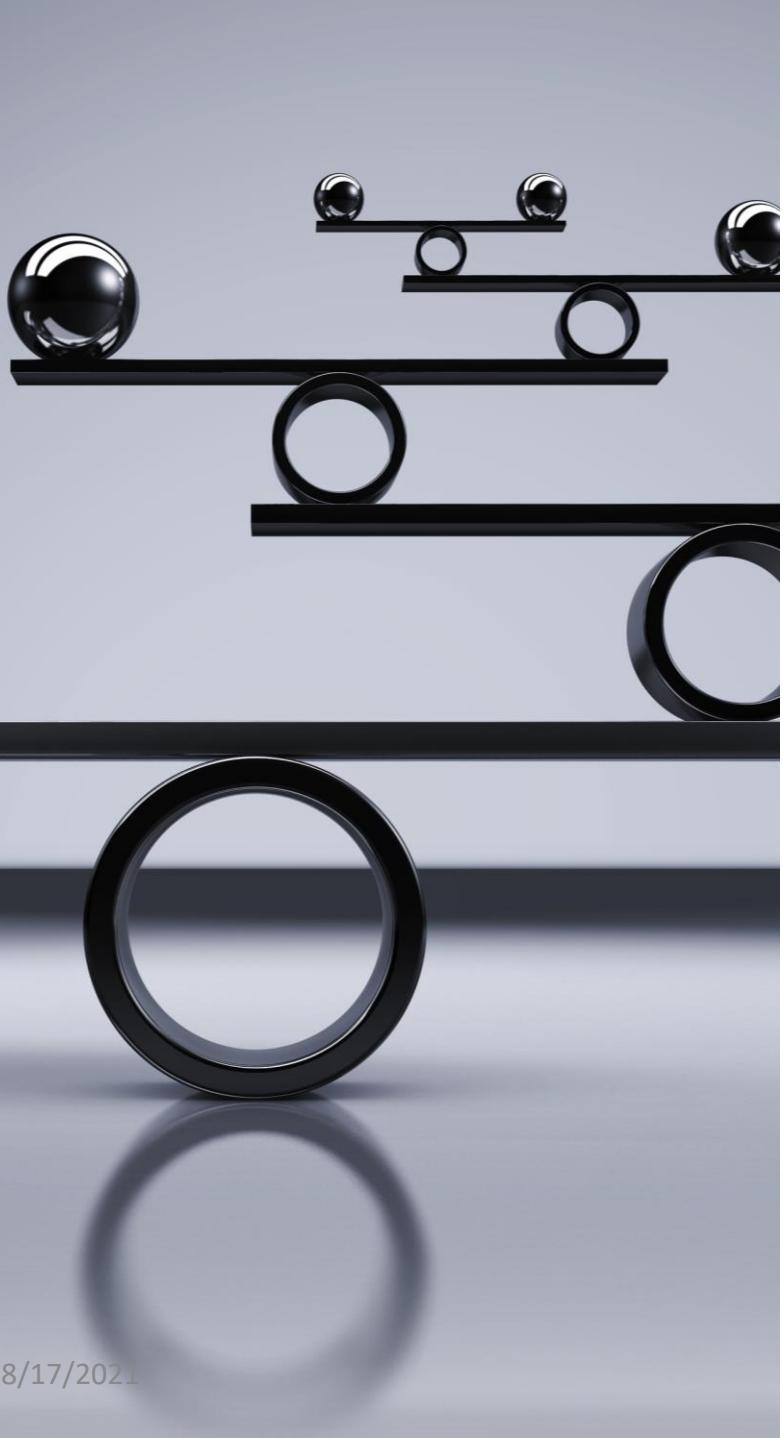


# European AI Strategy



# European AI Strategy





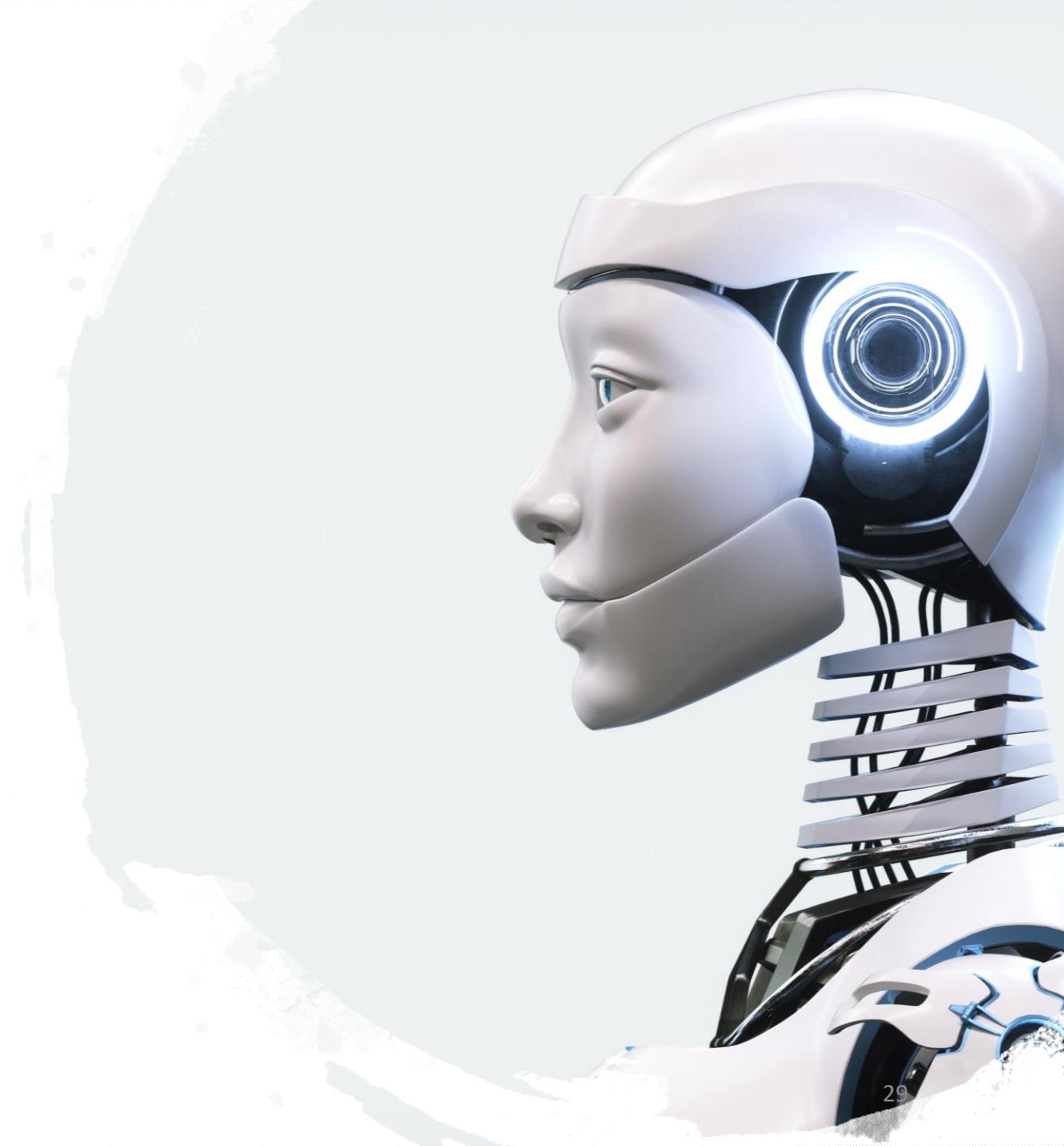
# Current Legal Framework

---

- General Data Protection Regulation (Regulation EU 2016/679)
- E-Privacy Directive (2002/58/EC)
- The Regulation on a framework for the free flow of Non-Personal Data in the EU (Regulation EU 2018/1807)
- Autonomous Vehicles: the Motor Insurance Directive (2009/103/EC), the Product Liability Directive (85/374/EEC) and the Framework for the approval of Motor Vehicles Directive (2007/46/EC).
- Markets in Financial Instruments Directive II (“MiFID II”)
- EU Anti-Trust and Competition Laws

# Proposed Regulations

- Proposal for the EU Data Governance Act (2020/0340 (COD))
- Proposal for a Regulation Laying Down Harmonised Rules on Artificial Intelligence (2021/0106 (COD))



# Questions?



Annmarie Giblin  
AGiblin@GiblinLaw PLLC.com  
www.GiblinLaw PLLC.com

James Sherer  
Jsherer@BakerLaw.com

This presentation and its contents may be considered attorney advertising under the rules of certain jurisdictions. Prior results do not guarantee a similar outcome.

This presentation and, the information and materials presented, are for general informational purposes only. Nothing presented constitutes, was meant to constitute, and should not be considered to be legal advice. The material and information is being presented without any representation or warranty whatsoever, including as to the accuracy or completeness of the information. No one should, or is entitled to, rely in any manner on any of the information presented. Parties seeking advice should consult with legal counsel familiar with their specific situation.

This presentation may not be copied, reproduced, republished, uploaded, posted, transmitted, or distributed in any way without the prior written permission of Giblin Law PLLC, except that you may download one copy of the materials on a single computer for your personal, non-commercial use, provided you keep all copyright and other proprietary notices intact. Giblin Law PLLC assumes no liability or responsibility for any errors or omissions in the content of this presentation and is not responsible for any third-party content that may be accessed through or linked to this presentation.



Giblin Law PLLC