STRADLEY RONON

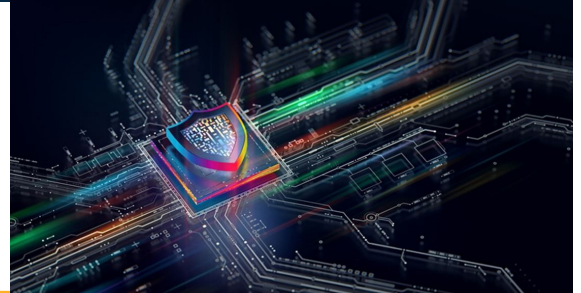## Client Alert | April 17, 2024

The Impact of Artificial Intelligence on Federal Criminal Cases

The discussion of artificial intelligence (AI) and how it is impacting every aspect of our society has been a constant throughout 2024, so it is no surprise that the U.S. Department of Justice (DOJ) has turned its attention toward it as well. Through a series of public statements at the beginning of 2024, the DOJ has signaled that it is bringing a significant focus onto future enforcement against crimes involving and aided by AI.

This focus is twofold, as announced by Deputy Attorney General Lisa Monaco on February 14. First, Monaco announced that defendants convicted of crimes involving the use of AI will be subject to more severe sentencing recommendations from the government. Second, Monaco announced the implementation of Justice AI — an internal initiative that will explore how the DOJ can utilize AI to further its work.

Both of these new AI initiatives come after Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence was signed in October 2023. This executive order (EO) establishes eight guiding principles and priorities for the development and use of AI, focusing on using AI safely and responsibly while also taking into account the promise of AI in aiding productivity, innovation and security. Notably, the EO tasks the DOJ with submitting to the U.S. president a report that addresses the anticipated impact of AI in the criminal justice system, including on sentencing, parole, bail, pretrial and the like, as well as on competition and on our national security.

To deter the use of AI in criminal conduct, federal prosecutors are now being instructed to seek more significant prison sentences for crimes that are "made significantly more dangerous" by the involvement of AI. Monaco noted that she is "particularly focused on the potential risks posed by AI" when it comes to election security. In her speech on March 7, Monaco again discussed the DOJ's renewed focus on AI and provided more examples of crimes likely to be impacted by tougher sentencing recommendations, such as crimes including fraud, price-fixing and the manipulation of markets. Prosecutors are also expected to look at compliance programs and assess whether and to what extent companies have managed AI-related risks. The purpose of the stiffer sentences and more scrutinized approach is to "deepen accountability and exert deterrence" when it comes to the misuse of AI.

It is expected that prosecutors will seek to utilize a number of existing Federal Sentencing Guideline provisions to enhance sentencing exposure for those committing crimes using AI. Such existing sentencing enhancements include, among others, Section 3B1.3 use of a special skill, and Section

2B1.1 (b) (10) sophisticated means. However, Monaco has indicated that existing sentencing enhancements in the Federal Sentencing Guidelines may not go far enough in reaching the DOJ's stated objectives. If the DOJ "determine[s] that existing sentencing enhancements don't adequately address the harms caused by misuse of AI, [the DOJ] will seek reforms to those enhancements to close that gap." This statement signals that stronger sentencing recommendations by prosecutors are only the start of AI-related deterrence measures. Over time, we can expect to see more legislation seeking more significant penalties for AI-related crimes, as well as proposed Federal Sentencing Guidelines additions and amendments.

The tools and uses for AI are also being explored internally by the DOJ. As part of the DOJ's second AI-related focus, Justice AI, Monaco discussed the appointment of Jonathan Mayer as the DOJ's chief AI officer and DOJ's first chief science and technology adviser. The mission of Justice AI is to "convene individuals from across civil society, academia, science and industry" in order to "understand and prepare for how AI will affect the Department's mission and how to ensure we accelerate AI's potential for good while guarding against its risks." This study will culminate in a report to President Biden at the end of the year.

Monaco's announcements clearly indicate the DOJ's ongoing and increasing focus on AI. The exact effects of AI on sentencing and other aspects of the criminal justice process have yet to be determined, but as signaled by the DOJ, the measures put in place to deter the misuse of AI right now are just the beginning of a series of possible reforms to come. In the interim, it is important that businesses and individuals alike evaluate their AI uses; put proper safeguards, policies and procedures in place; and ensure AI is used responsibly in adherence with the law.

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