US public policy spotlight: artificial intelligence

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Artificial intelligence (AI) has seized the attention of US policymakers in recent months. It's also generating important dialogue in the C-suite and in boardrooms. The launch of new AI tools and the rapid adoption of AI have sparked a dialogue about how best to foster innovation and opportunity while addressing associated risks.

Perspectives on AI include predictions that the technology will lead to promising scientific breakthroughs and an explosion of innovation and efficiencies, as well as serious concerns that AI could threaten national security, replace workers, result in discriminatory decision-making, introduce a host of privacy and copyright infringement risks, and promote deepfake content.

Whatever the perspective, AI policymaking also faces challenges such as:

- **Fully understanding the benefits and risks of AI:** Many US policymakers are focused on understanding what AI could mean for capital markets, the economy and society at large before deciding what, if any, rules to craft governing the technology.

- **Keeping pace with the rapidly evolving AI landscape:** The fast pace of change in the development of new technologies is an added challenge. Keeping pace with the dynamic field of AI while seeking to create a stable regulatory scheme that remains relevant in the face of future changes is complex.

- **Navigating multiple sectors and jurisdictions:** As the use of AI expands, it crosses multiple sectors and aspects of society. Consequently, the issues presented by AI technologies are varied. As a result, every legislative committee and regulatory agency has its own areas of concern, and jurisdiction to potentially regulate. State and federal agencies, regulators and legislative bodies at every level have entered the debate, which could lead to a patchwork of regulations and requirements for companies, organizations and other stakeholders to navigate.

As the US debate evolves, several themes have emerged. This publication explores eight key AI-related issues attracting US policymaker attention as well as related developments at the federal and state levels and considerations for boards of directors engaging on the issue.

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Eight key AI-related issues attracting US policymaker attention

1. National security

Many lawmakers are concerned with the implications of AI for national security, including the pace of adoption by the US defense and intelligence communities and how AI is being used by geopolitical adversaries. For example, congressional hearings have examined barriers[1] to the Department of Defense (DoD) adopting AI technologies and considered risks from adversarial AI. There have also been calls for guidelines to govern the responsible use of AI in military operations, including weapons systems, to avoid unintended actions when AI is used.[2]

Establishing and maintaining a competitive advantage on the global stage is a top priority of many lawmakers. Launching a bipartisan initiative to develop AI regulation, Senate Majority Leader Chuck Schumer (D-NY) expressed the need for the "U.S. to stay ahead of China and shape and leverage this powerful technology." Likewise, in a House hearing of the Committee on Science, Space and Technology, Chairman Frank Lucas (R-OK) stated:

"It is in our national interest to ensure the United States has a robust innovation pipeline that supports fundamental research, all the way through to real-world applications.

"The country that leads in commercial and military applications will have a decisive advantage in global economic and geopolitical competition."

2. Workforce

Many policymakers have raised concerns about AI's potential impact on jobs, particularly in areas where workers could eventually be replaced, and who should bear the cost of displacement and retraining workers. In a letter to other members of Congress, Senate Democrat leaders wrote, "AI is already changing our world, and experts have repeatedly told us that it will have a profound impact on everything from our national security to our classrooms to our workforce, including potentially significant job displacement."

In a new world powered by AI, there are also questions about how to train a workforce to adjust to the rapidly evolving technology and whether AI-reliant companies should be regulated and taxed differently than companies staffed by humans. While concerns about the impacts of technology on workers are not new, the rapid pace of companies adopting AI technology is unparalleled, creating additional challenges and pressure.

3. Bias and discrimination

Bias issues have been examined in several congressional hearings on AI and will continue to be a key concern as regulatory approaches are considered. Policymakers are focused on the risk AI technologies carry in making discriminatory decisions – just as human decision-makers do – and how AI technologies are only as effective as the data sets and algorithms they are built upon and the large language models that underpin them. In congressional hearings, policymakers have expressed concerns about the potential for AI to discriminate and have heard testimony about the misidentification of individuals, particularly those in minority groups, by facial recognition software.

1   Edward Graham, "Lawmakers, DOD Officials Note Benefits of AI to Department's Information Networks," *Nextgov/FCW*, March 30, 2023.
2   Diane Bartz, "US senators express bipartisan alarm about AI, focusing on biological attack," *Reuters News*, July 25, 2023, via Dow Jones Factiva, ©2023 Thomson Reuters.

A report from the National Institute of Standards and Technology (NIST) provides an "initial socio-technical framing for AI bias" that focuses on mitigation through appropriate representation in AI data sets; testing, evaluation, validation, and verification of AI systems; and the impacts of human factors (including societal and historical biases).

4. Transparency and explainability

Some policymakers are focused on the need for consumers to understand how and why AI technologies work, to help promote acceptance of the technologies and create trust in the results AI produces.

In its *Four Principles of Explainable Artificial Intelligence report,* NIST identifies key qualities of an explainable AI system:

"We propose that explainable AI systems deliver accompanying evidence or reasons for outcomes and processes; provide explanations that are understandable to individual users; provide explanations that correctly reflect the system's process for generating the output; and that a system only operates under conditions for which it was designed and when it reaches sufficient confidence in its output."

These factors are aimed at addressing the so-called "black box problem": Consumers might understand what data is inputted into an AI system and see the result it produces, but they don't understand how that result is reached. As AI technology continues to permeate society, both consumers and policymakers are likely to demand more information about how and why it works.

Transparency is also part of the policymaking debate as being critical to building trust. AI typically works behind the scenes, which means consumers often are unaware that they are engaging with an AI system that is making recommendations, calculations and decisions based on an algorithm. To address transparency concerns, some policymakers have called for new rules requiring disclosure to consumers when they are communicating with AI software so they can make an informed decision about the use of the technology.

5. Data privacy

AI systems often collect, analyze and use large sets of data, including individuals' personally identifiable information. Policymakers are concerned that consumers may not be aware that such information is being collected or know how long it is being retained and for what purposes. At a hearing in May 2023 of the Senate Judiciary Subcommittee on Privacy, Technology, and the Law, senators on both sides of the aisle voiced concerns about data privacy, including calls for greater awareness of how consumer data is being used in AI applications. There also is growing discussion in Washington about whether consumer data protection measures are needed to specifically address the use of AI; for example, the Federal Trade Commission reportedly has launched an investigation into OpenAI's use of consumer data in its ChatGPT system.[3]

6. Deepfakes

Recent congressional hearings also have highlighted that while disinformation and inaccuracies are rampant on the internet, modern AI technologies have the potential to push those concerns to a new level. AI can fabricate videos of individuals, generate lifelike photographs of fictitious people and create social media profiles for nonexistent people. During a hearing earlier this year, Sen. Richard Blumenthal (D-CT) used AI to impersonate himself and demonstrate to committee members the risks of deepfakes.

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3   Brian Fung, "FTC is investigating ChatGPT-maker OpenAI for potential harm to consumers," *CNN*, July 13, 2023.

As deepfakes proliferate, it will become increasingly difficult for consumers to trust the content they encounter even from seemingly trusted sources.[4],[5] Proposals to address the threat include requirements to "watermark" AI-generated content and outright bans of certain deepfake content.[6] Most recently, the Federal Election Commission in August 2023 advanced a petition that calls for banning political campaigns from disseminating deepfake content that may fraudulently deceive voters about candidates.

7. Accountability

Some policymakers have suggested governance requirements for the development and deployment of AI to address concerns about bias and potential unintended consequences. The Algorithmic Accountability Act is one response being considered. The bill seeks to "bring new transparency and oversight of software, algorithms and other automated systems that are used to make critical decisions about nearly every aspect of Americans' lives" by requiring assessments of algorithms and public disclosures about their use.

The US Equal Employment Opportunity Commission (EEOC) is also exploring the potential benefits and harms of AI in employment decisions through hearings and the efforts of the EEOC's Artificial Intelligence and Algorithmic Fairness Initiative.

In addition, policymakers could look to some of the accountability mechanisms contemplated in the NIST AI Risk Management Framework to address their concerns. The U.S. Department of Commerce's National Telecommunications and Information Administration (NTIA) delved specifically into the issue of AI assurance in an April 13, 2023, request for information, which observed that:

"Real accountability can only be achieved when entities are held responsible for their decisions. A range of AI accountability processes and tools (e.g., assessments and audits, governance policies, documentation and reporting, and testing and evaluation) can support this process by proving that an AI system is legal, effective, ethical, safe, and otherwise trustworthy – a function also known as providing AI assurance."

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> Investment advisers under the law have a fiduciary duty, a duty of care, and a duty of loyalty to their clients. And whether you're using an algorithm, you have that same duty of care.
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> SEC Chair Gary Gensler

On the subject of accountability, regulators and others are also looking at outcomes based on AI technologies. For example, Securities and Exchange Commission (SEC) Chair Gary Gensler recently remarked in an interview that investment advisors who use AI remain responsible for their recommendations:

"Investment advisers under the law have a fiduciary duty, a duty of care, and a duty of loyalty to their clients. And whether you're using an algorithm, you have that same duty of care."[7]

8. Copyright

Policymakers are also raising questions about the rights and ownership of content created by AI. During recent congressional hearings, members have considered whether AI-generated content is protected via patents, trademarks and copyright like other intellectual property and raised questions about who owns the AI-generated content and the data sets that are used to train AI systems.[8] These and other questions have already been the subject of litigation and will continue to be debated as the AI regulation discussion evolves.

4   Adam Satariano and Paul Mozur, "The People Onscreen Are Fake. The Disinformation Is Real," *The New York Times*, February 7, 2023.
5   John Villasenor, "Artificial intelligence, deepfakes, and the uncertain future of truth," *The Brookings Institution*, February 14, 2019.
6   Diane Bartz and Krystal Hu, "OpenAI, Google, others pledge to watermark AI content for safety - White House," *Reuters News*, July 21, 2023, via Dow Jones Factiva, ©2023 Thomson Reuters.

7   Andrew Ross Sorkin, Ravi Mattu, Sarah Kessler, Michael J. de la Merced and Ephrat Livni, "The S.E.C.'s Chief Is Worried About A.I.," *The New York Times DealBook Newsletter*, August 7, 2023, via Dow Jones Factiva, ©2023 The New York Times Company.
8   Gil Appel, Juliana Neelbauer and David A. Schweidel, "Generative AI Has an Intellectual Property Problem," *Harvard Business Review*, April 7, 2023.

Recent US AI public policy developments

Congress

▸ Despite the recent spike in media coverage of AI issues, Congress has been considering the technology for some time. Both the House (in 2017) and Senate (2019) formed AI Caucus groups to inform members about the technological, economic and societal implications of AI deployment. Likewise, the wide array of committees with jurisdiction over AI and its applications has created a multitude of forums for examination of the technology.

▸ Congress has notably passed legislation to increase the resources available to the federal government as it confronts the rise of AI technologies. The AI in Government Act (enacted as part of appropriations legislation in December 2020) required the General Services Administration to establish an AI Center of Excellence to promote government acquisition of novel uses of AI technologies, provide guidance for government use of AI and update federal employee systems for positions with AI expertise.

▸ Also approved by Congress that year (as part of annual defense policy legislation), the National AI Initiative Act sought to maintain continued US leadership in AI by the establishment of a coordinated program across government to boost AI research. The legislation specifically created the National Artificial Intelligence Initiative Office, within the White House, to carry out these responsibilities, and mandated that various federal agencies initiate programs to promote AI research and development.

▸ In addition to the numerous bills introduced in Congress to regulate AI, Senate Majority Leader Chuck Schumer (D-NY) in June 2023 announced the SAFE Innovation Framework, which is intended to provide an outline for potential legislation through five principles:

" ▸ *Security: Safeguard our national security with AI and determine how adversaries use it, and ensure economic security for workers by mitigating and responding to job loss;*

▸ *Accountability: Support the deployment of responsible systems to address concerns around misinformation and bias, support our creators by addressing copyright concerns, protect intellectual property, and address liability;*

▸ *Foundations: Require that AI systems align with our democratic values at their core, protect our elections, promote AI's societal benefits while avoiding the potential harms, and stop the Chinese Government from writing the rules of the road on AI;*

▸ *Explain: Determine what information the federal government needs from AI developers and deployers to be a better steward of the public good, and what information the public needs to know about an AI system, data, or content.*

▸ *Innovation: Support US-led innovation in AI technologies – including innovation in security, transparency and accountability – that focuses on unlocking the immense potential of AI and maintaining US leadership in the technology."*

White House

- Executive action on AI similarly has been ongoing since at least 2019, when then-President Donald Trump signed an executive order (EO) that directed NIST to develop an AI framework. The NIST Artificial Intelligence Risk Management Framework (AI RMF 1.0) was released in January 2023.

- Since 2019, the previous and current administrations have issued other EOs that create voluntary guidelines and resources for stakeholders developing and deploying AI, such as the National Artificial Intelligence Initiative Office to oversee the federal agencies' strategy on AI in accordance with the National AI Initiative Act and the Blueprint for an AI Bill of Rights to "help guide the design, development, and deployment of artificial intelligence."

- The White House under President Joe Biden has directly partnered with industry as well. In May 2023, several tech companies agreed to participate in a public evaluation of their AI systems. More recently, in July 2023, the White House announced nonbinding commitments from several tech companies to manage risks of the deployment and development of AI systems.

Regulators

- On August 10, 2023, the Federal Election Commission unanimously advanced a petition requesting that it regulate deepfakes in political campaign advertisements, for the first time soliciting public comment on the AI-generated hyper-realistic media. Commissioners will consider comments and then determine whether to take up a final rule.

- In July 2023, the U.S. Securities and Exchange Commission (SEC) proposed a rule to address conflicts of interest associated with the use of advanced technologies, including predictive data analytics and AI, by broker-dealers and investment advisors. The rule would require these entities to identify and neutralize or eliminate conflicts of interest related to their use of certain technologies, including AI, in investor interactions. This was the first rulemaking where the SEC addressed AI.

- On June 22, 2023, U.S. Secretary of Commerce Gina Raimondo announced a NIST Public Working Group on Generative AI that will build on the NIST AI Risk Management Framework. The working group will address opportunities and challenges associated with AI-generated content such as code, text, images, videos and music.

- In April 2023, the U.S. Department of Commerce's National Telecommunication and Information Administration (NTIA) released a request for public comment on AI accountability. Many stakeholders, including Ernst & Young LLP (EY US), provided input on the benefits, risks and challenges of AI accountability.

- Also in April 2023, the Equal Employment Opportunity Commission (EEOC), Department of Justice (DOJ) and Consumer Financial Protection Board (CFPB) released a joint statement on AI and automated systems that reaffirmed their commitment to enforcing federal laws that prohibit discrimination and highlighted common instances of abuse.

- The Federal Trade Commission (FTC) has applied its broad authorities over "unfair or deceptive acts or practices in commerce" to cases related to data privacy and data security. In recent months, the commission reaffirmed that its authorities also apply to new AI tools. In an FTC release announcing a joint statement on enforcement efforts against discrimination and bias in automated systems with the FBI, CFPB and EEOC, Chair Lina Khan stated, "there is no AI exemption to the laws on the books, and the FTC will vigorously enforce the law to combat unfair or deceptive practices or unfair methods of competition."

- On April 18, 2023, the Department of Health and Human Services released a notice of proposed rulemaking to incorporate new requirements into the Office of the National Coordinator for Health Information Technology's Health IT Certification Program, for Health IT Modules that support AI and machine learning technology.

In the states

- Several state legislatures, often some of the first actors in emerging US policy spaces, have spent a considerable amount of time introducing, debating and in some cases passing legislation to govern AI.

- Thus far in 2023, 32 states introduced a total of 160 bills related to the regulation of AI. Of those bills, seven have been signed into law, while four others are awaiting action by the governor to either sign or veto.

- There is no single model of legislation being circulated in the states. However, the following trends can be observed:

  - Many bills, such as one enacted in Texas, are aimed at studying AI technology and how it is used and employed by state agencies. Working groups and task forces in several states are also expected to study and monitor the issue over the coming months and then offer recommendations.

  - In some states, such as California, bills have been introduced to regulate AI where it has a significant impact on civil rights, opportunities for advancement and access to critical services. California Governor Gavin Newsom recently signed an executive order to study the development and use of AI throughout the state and to create a process for evaluating and deploying AI for state government purposes.

  - Other states, such as Pennsylvania, have introduced legislation to study AI's potential and guard against risk. Another bill proposal would make the unauthorized dissemination of AI-generated deepfakes a criminal offense.

  - Connecticut and other states have introduced bills that put tighter governance around the state government's current and future uses of AI and establish a working group to create an AI Bill of Rights.

  - Montana recently adopted the Facial Recognition for Government Use Act, which prohibits the use of facial recognition technology for continuous facial surveillance or facial identification by state and local government agencies and law enforcement agencies. However, the law allows the use of facial recognition technology by law enforcement in certain circumstances.

  - At the municipal level, a law went into effect this year in New York City regarding automated employment decision tools (AEDTs). The law requires employers that use such tools to audit the AEDT for bias before it is deployed. The law also requires employers to notify candidates or employees that reside in the city about the use of AEDTs "in the assessment or evaluation for hire or promotion, as well as, be notified about the job qualifications and characteristics that will be used by the automated employment decision tool."

How we see it

It is unlikely that Congress will pass comprehensive legislation regulating AI in a highly polarized political environment leading up to the 2024 US elections. In the absence of congressional action, state legislatures may fill the policy void, which could lead to a patchwork of laws. We also expect the Biden administration to continue to work with leading AI companies to enact change on a voluntary basis, and the federal agencies to continue to use enforcement actions to police AI use. Differing national approaches in the development of AI regulation may complicate the regulatory landscape for multinational companies using AI technology.

Questions for boards to consider

The challenge of how to balance the opportunities and risks of AI is not only a topic of discussion for regulators and policymakers. Other capital markets stakeholders, including boards of directors, are engaging on the topic, considering questions such as the following:

- How does management stay informed about regulatory and legislative developments related to AI, machine learning, data privacy, and emerging technologies in relevant jurisdictions? How is it monitoring whether the company is staying in compliance and assessing potential impacts to strategy?

- How is the board structured to oversee and monitor a company's use of generative AI? What information does the board or its committees receive, and whom is the board engaging with from management about related strategic initiatives, risk management and policy developments?

- How is the organization using sensitive data (including personal data from employees or customers) to support innovation – for example, via AI, machine learning and automated decision-making? How would these uses be perceived by consumers, employees, the media, regulators, investors, or other stakeholders?

- How is the company assessing and mitigating the risks of generative AI? Is it using an external framework such as the NIST AI Risk Management Framework? does management establish that these applications are performing as intended to mitigate ethical and compliance risks?

- How is the company using generative AI to challenge the existing business model and key strategic assumptions?

- How will the company's AI strategy empower its people and business to be unique and best-in-class in a new way? Does the company have a professional development plan in place that includes new AI-related training programs, career paths and retention methods – as well as ways to reward new AI competence?

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