

# SPOTLIGHT ON: ARTIFICIAL INTELLIGENCE

*A Public Policy and Law Practice Perspective*

K&L GATES

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YEARS  
PUBLIC POLICY  
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## The Potential Impact of Regulations on the AI Industry

Artificial Intelligence (AI) rose to the top of the world stage in spectacular fashion in late 2022 and early 2023 with the rollout of large language model generative AI systems like ChatGPT and Bard. From a technology that has been employed for many years in business predictive analytics and anomaly detection based on specific data sets—and sometimes in media hype settings (playing chess, for example)—it has reached the consumer level extraordinarily quickly.

Since first rolled out to the public, generative pre-trained transformer AI applications continue to develop at a rapid pace with new versions demonstrating greater capabilities as their parameters and data sources expand. These technologies have caught the attention of regulators and legislators in Washington, D.C., and Brussels, who are now focused on developing a regulatory regime to govern AI systems. The focus has quickly shifted to how AI risks will be regulated and their potential impact on a broad range of stakeholders. Make no mistake—stakeholders hold widely divergent views. And, regulation will have many different forms—legislation, agency guidance, enforcement, and litigation.

Whether the pace of regulation will keep up with the technology is an open question—as is whether the regulation will be able to comprehend a technology that is challenging to describe. Understanding how regulation will emerge, being involved in that development, and appreciating the long-term ultimate policy impacts on this industry will dramatically affect who will be “winners” and “losers”—almost as much as the technology itself.

### Key Issues

The European Union’s draft AI Act<sup>1</sup> will impose regulatory requirements on the AI industry throughout Europe. In the United States, the Biden administration released the Blueprint for an AI Bill of Rights<sup>2</sup> in the fall of 2022, and Senator Schumer released a framework for AI regulations in April 2023.<sup>3</sup> In January 2023, the National Institute for Standards and Technology published a Risk Mitigation Framework for AI.<sup>4</sup> On 23 May 2023, the White House announced<sup>5</sup> several new initiatives relating to AI, including a roadmap to focus federal investments in AI research and development, a request for information on national priorities for mitigating AI risk, and a report on the risks of AI use in education.

In general, these various proposals address a number of fundamental issues:

- Disclosing that an automated system is being used to understand how and why it contributes to outcomes.
- Understanding who trained the AI system and for what purpose.

- Revealing the source for the data used to train the AI system.
- Protecting stakeholders from abusive data practices via built-in protections and giving stakeholders agency over how data is used.
- Explaining how the AI arrived at any response or conclusion it provides.
- Protecting shareholders from unsafe or ineffective systems.
- Preventing discrimination by algorithms, and creating systems to be used and designed in an equitable way.
- Adhering to transparent and strong ethical boundaries.
- Providing the ability to opt out, where appropriate, and having access to a person who can quickly consider and remedy problems.

### Impacts for Stakeholders

How these issues will be addressed could impact different stakeholders in different ways. From a business perspective, larger and more well-funded stakeholders may be willing to agree to regulatory schemes that might limit market entry or safeguard their advances behind a common framework. Less well-funded stakeholders may feel differently, and many disruptors are creating applications and solutions far beyond current technology. Investors need to understand how these proposals will impact development of the industry and their return on investments.

In addition, the AI industry must address a number of important questions, such as:

- Who will own what?
- Will government regulation be “technology neutral?” If not, will compulsory licensing and fee schemes be adopted (e.g., similar to standard essential patents and fair and reasonable nondiscriminatory fees)? Those involved in some areas (e.g., health care) may have considerations that differ from other sectors (e.g., education and transportation). Will that result in sector-specific rules akin to existing privacy regulations in the United States (e.g., HIPAA; Gramm-Leach-Bliley Act)?
- Will there be international agreements or national conflicts?
- In the United States, will states end up taking the lead in specific areas (e.g., California on privacy)?
- Will a requirement for an AI system to explain its thinking or provide substantive sources for all results have a deleterious impact on its ability to “think” independently?

Regulations will also impose ethical guardrails on AI systems to ensure against inadvertent discrimination in a variety of different use cases. For example, the European Union’s regulatory proposal regulates AI systems used in certain “high-risk cases,” such as assigning credit

scores and making hiring decisions.<sup>6</sup> In those high-risk use cases, AI systems must adhere to ethics rules that ensure the AI systems do not discriminate on the basis of race, gender, age, or any other prohibited characteristic. Companies and AI investors must consider these requirements today in anticipation of more robust regulatory rules in the near future.

Finally, amid all these developments, will an overly broad definition and regulation of AI capture and impede more commonly used tools and applications, such as machine learning and data analytics, already widely used in many business sectors?

### Opportunities to Shape the Regulatory Landscape

The AI issues are somewhat unique in that policy issues are being considered on a slate that is both blank and constantly changing. Thus, the opportunity to influence what is written on that slate and how it is written is both broad and deep.

One of the first pieces of legislation in the United States involving AI will be the Fiscal Year 2024 National Defense Authorization Act (NDAA), which is currently being drafted separately by both the House and Senate Armed Services Committees. Both committees held a variety of hearings discussing AI in the context of US national security. Our US National Security Law and Policy team is actively tracking the NDAA with a particular focus on AI-related provisions.

### We Can Help

K&L Gates has a long demonstrated track record of supporting clients as they adapt to new legal, regulatory, and policy regimes governing new technologies. Below are a few highlights of our extensive experience and capabilities in the AI realm.

- In 2016, the firm created the K&L Gates Endowment for Ethics and Computational Technologies<sup>7</sup> at Carnegie Mellon University, which serves as a leading center of expertise in the development of “transparent and strong” ethical boundaries for AI.
- The firm has been assisting companies that develop different AI programs and tools for several years, including large-scale generative AI models.
- The Honorable Bart Gordon, former chairman of the US House Science and Technology Committee, is a partner in our Washington, D.C., office and was responsible for some of the earliest congressional explorations of the issues as experienced at the intersection of policy and emerging technologies.
- The Honorable Mike Doyle, former chairman of the US House Energy and Commerce Committee Subcommittee on Communications and Technology and former chairman of the Congressional Robotics Caucus, is a government affairs counselor in our Pittsburgh office.
- US National Security Law and Policy partner Guillermo Christensen, a former Central Intelligence Agency officer, is a founder and board member of the National Artificial Intelligence and Cybersecurity Information Sharing and Analysis Organization.

- Government affairs advisor Finch Fulton, former deputy assistant secretary of policy at the US Department of Transportation, previously led White House AI efforts at the G7 Multistakeholder Summit on AI and participated in numerous federal AI working groups.
- US National Security Law and Policy partner Jamie Jackson, former deputy general counsel of the US House Armed Services Committee, previously worked to support legislative passage and implementation of the National Security Commission on AI, which was comprised of national security and technology sector stakeholders. The commission made recommendations to the president and Congress on increasing federal spending on AI research and development, as well as streamlining the US Department of Defense's acquisition systems to accelerate technological innovation.
- We have helped promote and protect the Internet—the last great information technology advance—by leading the effort to ensure that strong encryption could be used; that the Internet is governed through a multistakeholder model; and that any regulation should be market driven, industry led, and technology neutral.
- K&L Gates was one of the first law firms to develop and deploy a proprietary e-discovery analysis and technology<sup>8</sup> tool to enable more streamlined and efficient litigation discovery processes.

Our team and combined experience are poised for this next technology challenge. We are focused on addressing the issues that will enable our clients to successfully navigate the AI landscape, delivering solutions and value.

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<sup>1</sup> <https://artificialintelligenceact.eu/>.

<sup>2</sup> <https://www.whitehouse.gov/ostp/ai-bill-of-rights/>.

<sup>3</sup> <https://www.axios.com/2023/04/13/congress-regulate-ai-tech>.

<sup>4</sup> <https://nvlpubs.nist.gov/nistpubs/ai/NIST.AI.100-1.pdf>.

<sup>5</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/23/fact-sheet-biden-harris-administration-takes-new-steps-to-advance-responsible-artificial-intelligence-research-development-and-deployment/>.

<sup>6</sup> <https://www.nytimes.com/2023/04/16/opinion/this-is-too-important-to-leave-to-microsoft-google-and-facebook.html?searchResultPosition=5>.

<sup>7</sup> <https://www.klgates.com/KL-Gates-Carnegie-Mellon-University-Create-10-Million-Endowment-to-Study-Ethical-Issues-Posed-by-Artificial-Intelligence-11-02-2016>.

<sup>8</sup> <https://www.klgates.com/e-Discovery-Analysis-and-Technology-e-DAT-Group-Practices>.