Artificial Intelligence

Significant Regulatory Developments In 2023 In Artificial Intelligence

By
Camila Tobón

Shook, Hardy & Bacon
Denver, CO

Commentary

Significant Regulatory Developments In 2023 In Artificial Intelligence

By
Camila Tobón

[Editor's Note: Camila Tobón is a Partner with Shook, Hardy & Bacon and counsels clients on data protection compliance, information governance, and AI governance. Any commentary or opinions do not reflect the opinions of Shook, Hardy & Bacon or LexisNexis®, Mealey Publications™. Copyright © 2024 by Camila Tobón. Responses are welcome.]

While true that technology moves faster than the law, 2023 saw a number of developments in the regulation of Artificial Intelligence (AI) that together forecast an active legislative agenda in 2024. Below we summarize the key events of 2023.

United States

The biggest news in the U.S. was the issuance, on October 30, of President Biden's Executive Order 14110 on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence. The order intends to establish a coordinated, federal government-wide approach to governing the development and use of AI and directs various federal agencies to assess and address the risks of using AI.

Although the Order is directed at Federal agency action, the guidelines and potential regulatory developments to follow may impact businesses. For example:

- the Director of the National Institute of Standards and Technology must develop a companion resource to the Artificial Intelligence Risk Management Framework (NIST AI 100-1) for generative artificial intelligence;
- the Secretary of the Treasury must issue a report on best practices for financial institutions to manage AI-specific cybersecurity risks;
- the Secretary of Commerce for Intellectual Property and the U.S. Patent and Trademarks Office must publish guidance to patent examiners and applicants addressing inventorship and the use of AI (including generative AI) in the inventive process;
- the U.S. Federal Trade Commission is encouraged to consider rulemaking to ensure fair competition in the AI marketplace and that consumers and workers are protected from harms that may be enabled by the use of AI;
- the Secretary of Labor must develop principles and best practices for employers to use in mitigating AI's potential harms to employees' wellbeing and maximize its potential benefits;
- the Secretary of Housing and Urban Development must issue guidance to combat unlawful discrimination enabled by automated or algorithmic tools used to make decisions about access to housing and in other real estate-related transactions;
- the Secretary of Health and Human Services must develop a strategic plan that includes policies and frameworks on responsible deployment and use of AI and AI-enabled technologies in the health and human services sector, including healthcare delivery and financing; long-term safety and real-world performance monitoring of AI enabled technologies; incorporation of equity principles in AI enabled technologies; incorporation of safety, privacy, and security standards into the software development lifecycle; and identification of uses of AI to promote workplace efficiency and satisfaction (e.g., reducing administrative burdens); and

- the U.S. Federal Communications Commission is encouraged to consider actions related to how AI will affect communications networks and consumers including, among others, efforts to combat unwanted robocalls and robotexts and deploying AI technologies that better serve consumers by blocking such communications.

The agency directives are based on guiding principles that include: ensuring safety and security; promoting responsible innovation; supporting workers; advancing equity and civil rights; protecting consumers; protecting privacy and civil liberties; promoting responsible use of AI; and strengthening American leadership in global efforts. These principles – and the actions outlined in the Order – may eventually become the baseline for industry adoption of AI and will certainly inform future legislation.

At the state level, on September 21, the Colorado Division of Insurance (CDI) adopted regulations governing life insurers' use of big data systems - including external consumer data and information sources (ECDIS), algorithms, and predictive models. The regulations are the first to be promulgated under the authority of SB 21-169, which was signed into law in 2021 and prohibits insurers from engaging in insurance practices that result in unfair discrimination based on a protected class. Under the new regulations, life insurers licensed to do business in the state must establish a risk-based governance and risk management framework to determine whether the use of such ECDIS, algorithms, and predictive models potentially result in unfair discrimination with respect to race; remediate unfair discrimination, if detected; and submit annual compliance reports beginning December 1, 2024. These regulations are likely to be the first in a series that will extend beyond life insurance, given that the law applies to the insurance industry generally.

The other key development in AI regulation came at the municipal level, when New York City Law 2021/44 took effect on January 1. This law requires notice of the use of AI in hiring decisions as well as annual audits to assess potential bias in the use of such AI. Regulations for conducting such bias assessments were issued by the New York City Department of Consumer and Worker Protection in April and enforcement began in July. While this law is specific to

a particular use case – the use of AI in making hiring and promotion decisions – it has already been copied as proposed legislation at the state level in New York and New Jersey and may serve as a framework for new bills in 2024.

European Union
After a marathon round of negotiations, the European Commission, European Parliament, and the Council of the European Union agreed in principle on the final version of the EU's AI Act. Although the final text of the AI Act was not yet available at the time of this writing, we know from the draft text as well as the negotiation points that the AI Act will have a tiered system of regulation. Certain prohibited uses will be banned outright because they pose unacceptable risks; high-risk AI systems and high-impact general purpose AI models will be subject to a number of significant requirements; limited risk AI systems will have a more limited set of obligations; and AI systems with minimal or no risk will remain unregulated.

Once the text of the regulation is finalized, it must be submitted to the Member States' representatives for endorsement and then confirmed by the Parliament and the Council before formal adoption. The provisional agreement provides that the AI Act will become effective two years after entry into force, meaning that the bulk of the requirements would not become enforceable until 2026.

China
The Cyberspace Administration of China (CAC), on July 10, issued the final version of the Interim Measures for the Management of Generative Artificial Intelligence (GAI) Services. The Interim Measures took effect on August 15 and apply to the provision of GAI services from within and outside the territory of the People's Republic of China. The measures generally require GAI services to comply with laws and administrative regulations and respect social morality and ethics. They also include several specific requirements such as obligations to label content generated by the service; inform users about how to appropriately use the technology; report unlawful conduct or illegal content; and obtain individual consent for processing personal data. The relevant authorities are authorized to take technical measures and other necessary measures to ensure compliance.

Other Developments of Note

There are a few other developments worth noting, which may serve as a foundation for future regulation.

In June, consultation on the UK Government's policy paper on "A pro-innovation approach to AI regulation" closed. The purpose of the consultation was to solicit feedback on the government's proposed approach to AI regulation, which involves issuing a set of five principles to regulators that the regulators must then apply to their respective areas of remit. The five principles include safety, security, and robustness; transparency and explainability; fairness; accountability and governance; and contestability and redress. Following the consultation, the government will publish its response and then issue the principles to regulators together with guidance for implementation. At the time of this writing, the response and guidance had not yet been presented.

In September, the Canadian Minister of Innovation, Science and Industry, announced a "Voluntary Code of Conduct for the Responsible Development and Management of Advanced Generative AI Systems." The code is based on the following principles: accountability; safety, fairness and equity; transparency; human oversight and monitoring; and validity and robustness. At the time of writing, 19 companies had become signatories.

In October, representatives of governments in Latin America and the Caribbean issued the "Santiago Declaration" that creates an inter-governmental working group – led by the government of Chile – to, among others, study the need for the development and adoption of new legal frameworks for the responsible design, development, and use of AI systems. The Declaration also contains assurances to foster innovation, respect human rights, protect workers, and promote the responsible use of data to train AI systems.

In November, public agencies from 18 countries including the United States and the United Kingdom published a non-binding international agreement, titled "Guidelines for secure AI system development," focused on safety in the design, development, and deployment of artificial intelligence. The Guidelines, which are intended to push companies to create AI systems that are "secure by design," set out a series of recommendations throughout the AI system lifecycle to ensure that AI systems function as intended, are available when needed, and work without revealing sensitive data to unauthorized parties.

What to Expect in 2024

Based on the foundations laid down in 2023, 2024 will likely bring significant AI regulatory activity with a particular focus on principles including accountability, transparency and explainability, fairness and safety, accuracy, and human oversight. ∎