

AI Regulation in 2024 and Beyond

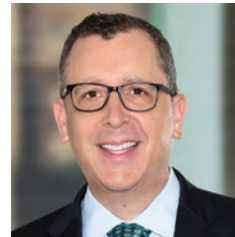
By Jason P.W. Halperin and Edmund P. Daley III

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One year ago, we published an article in the *New York Law Journal* about the state of digital asset regulation as the SEC and the CFTC were jockeying to be the lead crypto regulator. For years, the digital asset industry complained that the government had not provided clear regulatory guidance, and instead regulated through enforcement actions. Once again, a year passed with no comprehensive crypto legislation.

Unlike with crypto, governments around the world are showing profound interest in another potentially transformative technology: Artificial Intelligence (AI). AI recently captured mainstream attention with the release of AI chatbots and generative AI—technology that learns and acts without human direction. But for all the excitement about AI, many AI experts and others have raised serious concerns about AI's daunting capabilities and the need for safe and controlled AI development. Indeed, some see the development of advanced AI as an existential risk to humanity.

The promise of AI as technology that could affect every aspect of our lives has forced governments around the world to take notice. Whether this interest will generate comprehensive regulation in the near term is yet to be seen, but attempts to lay the groundwork are underway.



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What Is AI? About a year ago, AI captured headlines with the release of OpenAI's ChatGPT, a large language model ("LLM"), or AI chatbot. LLMs learn how to think and perform a wide range of actions similar to humans—far surpassing the capabilities of virtual assistants like Siri and Alexa. Relatedly, generative AI—another advanced class of AI—can create complex, original images from text prompts in just moments.

LLMs and Generative AI can now complete tasks that were impossible just a few years ago. This rapid advancement in AI technology poses unique challenges for governments focused on creating guardrails for a technology that changes—and learns—faster than the governments regulating it.

A World Waiting for AI Regulation. Without comprehensive AI regulation, tech companies have largely "regulated" themselves as they race to advance AI systems. <https://www.nytimes.com/2023/12/06/technology/ai-regulation-policies.html>. There is little consensus in the United

States about how best to regulate AI, but tech companies leading the AI revolution have been generally receptive to regulatory oversight.

In July 2023, leading AI companies, including Amazon, Anthropic, Google, Inflection, Meta, Microsoft, and OpenAI, formally committed to developing standards for safety, security, and privacy. *Id.* Indeed, AI regulation and safety has been a global topic of discussion, with the Global AI Safety Summit in the United Kingdom attracting hundreds of attendees from around the world.

The Current State of AI Regulation in the United States: Executive Action from the White House. While U.S. government officials are scrambling to move comprehensive legislation and regulation forward, they were not caught entirely flat-footed.

In 2019 and 2020, the Trump Administration released two executive orders seeking to prescribe objectives and request best practices for regulating AI. [//trumpwhitehouse.archives.gov/presidential-actions/executive-order-maintaining-american-leadership-artificial-intelligence/](https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-maintaining-american-leadership-artificial-intelligence/); [//trumpwhitehouse.archives.gov/presidential-actions/executive-order-promoting-use-trustworthy-artificial-intelligence-federal-government/](https://trumpwhitehouse.archives.gov/presidential-actions/executive-order-promoting-use-trustworthy-artificial-intelligence-federal-government/). Then, in October 2022, the Biden Administration released its “Blueprint for an AI Bill of Rights,” which sought to support the development of policies to help regulate AI. <https://www.whitehouse.gov/wp-content/uploads/2022/10/Blueprint-for-an-AI-Bill-of-Rights.pdf>.

These early steps acknowledged the power and importance of AI, but efforts to regulate AI significantly accelerated after the release of advanced LLMs and generative AI in 2022.

On Oct. 30, 2023, President Biden signed an executive order titled, “Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence” intending to provide guidance to the federal government about standards for regulating AI. <https://www.whitehouse.gov/briefing-room/presidential-actions/2023/10/30/>



Photographer: Al Drago/Bloomberg

US President Joe Biden signs an executive order with US Vice President Kamala Harris during an event in the East Room of the White House in Washington, DC, US, on Monday, Oct. 30, 2023.

[executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/](https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/).

Broadly, the executive order sets priorities in the areas of AI safety and security, privacy, equity and civil rights, supporting workers, promoting innovation and competition, advancing American leadership abroad, and ensuring responsible and effective government use of AI.

Biden’s executive order is not law, but it provides a comprehensive road map for how federal agencies should be thinking about AI. For example, the executive order seeks to “protect Americans from AI-enabled fraud and deception by establishing standards and best practices for detecting AI-generated content and authenticating official content.” <https://www.whitehouse.gov/briefing-room/statements-releases/2023/10/30/fact-sheet-president-biden-issues-executive-order-on-safe-secure-and-trustworthy-artificial-intelligence/>.

The executive order also implicitly acknowledges the tension between AI development and safety. On the one hand, the executive order promotes “competition” to “unlock the technology’s potential” but on the other hand it acknowledges that “[AI] must be safe and secure.” <https://www.whitehouse.gov/briefing-room/>

presidential-actions/2023/10/30/executive-order-on-the-safe-secure-and-trustworthy-development-and-use-of-artificial-intelligence/.

Safety advocates are already submitting research about the threats posed by AI, such as with the rise of deepfakes and disinformation while Congress is meeting with big tech executives to learn about the technology.

The Current State of AI Regulation in the United States: Federal Agencies. Several federal agencies have also started exploring AI regulation. For example, the Equal Employment Opportunity Commission has explored the impact of AI on employment decisions to specify how businesses can comply with equal opportunity laws. <https://www.eeoc.gov/newsroom/eeoc-launches-initiative-artificial-intelligence-and-algorithmic-fairness>.

On Feb. 27, 2023, the Federal Trade Commission released guidance titled “Keep Your AI Claims in Check,” describing to businesses the types of issues it will be monitoring. <https://www.ftc.gov/business-guidance/blog/2023/02/keep-your-ai-claims-check>. These issues include exaggerations about what an AI product can do and “promises” about how an AI product does something better than a non-AI product.

Two months later, on April 25, 2023, the FTC, the DOJ, the CFTC, and the EEOC released a Joint Statement on AI pledging to “uphold America’s commitment to the core principles of fairness, equality, and justice as emerging automated systems...become increasingly common in our daily lives.” <https://www.ftc.gov/news-events/news/press-releases/2023/04/ftc-chair-khan-officials-doj-cfpb-eeoc-release-joint-statement-ai>.

AI Regulation in the Various States. States are also taking up the task of regulating AI. Ten states enacted comprehensive AI laws that came into effect in 2023 (CA, CO, CT, GA, HI, MD, ND, NY, VA, and UT), and a handful of other states have passed laws that will come into effect in the years to come. <https://epic.org/the-state-of-state-ai-laws-2023/>.

AI-focused legislation is also being proposed and considered in a number of other states. The states taking the first steps toward regulating AI are taking varying approaches, with some states enacting sector-specific laws targeting AI in healthcare, employment, and consumer protection, while other states are seeking to regulate AI more generally.

New York has been particularly active in this space and has emerged as a pioneer in AI regulation. Across the state, at all levels of government, AI regulation has become a priority. For example, New York City passed a law in 2021 and enforcement began this past July for hiring and promotion decisions. <https://www.shrm.org/topics-tools/news/talent-acquisition/nyc-outlines-compliance-requirements-ai-bias-law>.

The law requires companies using AI software in hiring to notify candidates that an automated system is being used. It also requires companies to have independent auditors check the technology annually for bias.

Then, on Aug. 4, 2023, the New York State Senate introduced a bill (S07623), which would impose statewide requirements for regulating AI that assists in employee monitoring and the employment decision-making process. These initiatives are only the start of New York’s attempts at regulating this technology. Just this week at her State of State address, New York Governor Kathy Hochul announced the creation of Empire AI, an artificial intelligence consortium aimed at identifying AI opportunities that benefit the public good with \$400 million in public and private funding.

The Challenges of Regulating AI: Lessons from the EU. Keeping pace with this rapidly developing technology will be a formidable task for governments around the world. On Dec. 8, 2023, The European Union (EU) reached an agreement to enact comprehensive AI legislation, which was in the works since 2021.

This process underscored the difficulty with regulating technology that quite literally learns,

grows, and changes daily. The pace of AI development soon made the initial EU framework nearly obsolete. As has been widely reported, the release of AI chatbots and generative AI in 2022 surprised EU policymakers. <https://www.nytimes.com/2023/12/06/technology/ai-regulation-policies.html>. The existing draft laws had not contemplated advanced AI capabilities. In response, EU lawmakers expanded the 2021 draft Act to deal with this change in technology. Some EU members were hesitant to expand the law since changes were seen as potentially stifling Europe's prospects as an AI leader.

Described as "groundbreaking" AI legislation, this new EU AI Act will require companies building foundational models to explain their technology, comply with EU copyright law, and detail the content AI uses for training itself. The Act will also require images made with AI to be labeled as such.

The EU's new AI Act provides a helpful lesson. As governments seek to regulate this technology, it remains unclear whether they can keep up with how quickly the technology is changing. Even with a law as comprehensive as the EU's, it will not go into full effect until at least 2025. This means there are two years in which AI may race ahead of the intended regulation.

What the State of AI Regulation Means for the United States. AI will continue to impact all sectors of the economy, with or without regulation. As governments are figuring out how to regulate this technology, businesses can integrate AI as they see fit, and without specific guidance. But freedom to act in a regulatory void comes with significant risks. Businesses will need to adapt if they have already integrated certain technology that then becomes non-compliant with new regulation. This is not a hypothetical—New York's Department of Financial Services has alleged, e.g., that Apple's credit card algorithm discriminates against women, and then investigated

Apple. <https://www.nytimes.com/2019/11/10/business/Apple-credit-card-investigation.html>; See https://www.dfs.ny.gov/system/files/documents/2021/03/rpt_202103_apple_card_investigation.pdf.

To comply with the new possible regulations in both the United States and Europe, companies will need to adapt with new processes and tools, system audits, documentation, and trainings.

Just as regulators are rushing to keep up with advancements in AI, businesses using AI must also keep up with what will be a constantly evolving regulatory landscape. Understanding who will regulate a particular industry or business, and how the regulation will be enforced must be of paramount importance for AI-enabled businesses.

From risks associated with data privacy, bias, and intellectual property implications arising from AI, there will be plenty for businesses to monitor. Businesses will also have to confront how AI will affect their employees, and the potential that AI will not just optimize a workforce, but could displace it.

With tension increasing between AI safety advocates and AI developers, governments will be working hard to bridge this gap by establishing a regulatory framework. Although government regulations may never fully catch up to the fast pace with which AI continues to develop, businesses will have to stay lively and current to make sure they are complying with the array of new regulations.

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