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CORPORATE GOVERNANCE

Analysis

A Formative Period for AI Regulation

With the issuance in October 2023 of a wide-ranging executive order on artificial intelligence, the Biden administration took its most significant action to date toward oversight of the development and use of AI technologies. In the absence of Congressional action in this area, the order represents a step toward laying the groundwork for future federal regulatory action by a broad swath of agencies and departments.

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David A. Katz and Laura McIntosh. Courtesy photos

With the issuance in October 2023 of a wide-ranging executive order on artificial intelligence (the AI EO), the Biden administration took its most significant action to date toward oversight of the development and use of AI technologies. In the absence of Congressional action in this area—which does not appear likely in the near or medium term—the AI EO represents a step toward laying the groundwork for future federal regulatory action by a broad swath of agencies and departments.

As the broadest indication to date of the Biden administration’s priorities for AI regulation going forward, the AI EO suggests a variety of issues for boards of directors to consider, depending on their business and industry. Overall, the most consequential action boards can take right now may be ensuring that their corporate priorities are taken into consideration by the relevant decision makers during this formative moment for the regulation and oversight of AI technologies.

Policy Priorities of the Executive Order

The AI EO sets forth eight guiding policy principles and a timeline for action by various sectors of the federal government. The priorities of the Biden administration with respect to AI are: (1) addressing key security risks, including by developing clear indicators of when content is AI-generated; (2) promoting innovation, competition, and collaboration by investing in AI education and development and addressing novel intellectual property issues; (3) protecting workers' rights and the quality of workplace life; (4) protecting civil rights; (5) protecting consumer rights; (6) protecting privacy and civil liberties; (7) managing the use of AI in the federal government and any associated risks; and (8) ensuring that the United States is an international leader in AI development and risk management.

To further the policy priorities of the administration, the AI EO outlines specific tasks for agencies and offices across the federal government along with timeframes for their completion. The sweeping order names the Treasury Department, the Department of Defense, the State Department, the Department of Justice, the Department of Energy, the Department of Homeland Security, the Department of Health and Human Services, the Department of Labor, the Department of Agriculture, the Department of Housing and Urban Development, the Department of Transportation, the Consumer Financial Protection Bureau, the Federal Housing Authority, the Federal Trade Commission, the Department of Veterans' Affairs, the National Science Foundation, the U.S. Patent and Trademark Office, the U.S. Copyright Office and even the Office of Management and Budget and the Office of Personnel Management (notably, the Securities and Exchange Commission is not named).

The timeframes for action range from one month after the AI EO to April 2025, with the majority of the deadlines in mid- 2024.

With such a wide array of federal entities involved, it is hard to imagine a public company that will be unaffected by AI- related regulatory initiatives. Directors should stay apprised of industry and company participation in opportunities for public comment to ensure, first of all, that they fully understand the interests of the company and its shareholders in the various regulatory spheres and, second, that these interests are being adequately represented at this crucial juncture in regulatory development.

This is particularly important as the nascent process of AI regulation is ongoing simultaneously at state and federal agencies and in legislative bodies at all levels, and companies are likely to find themselves subject to overlapping and potentially incongruous regulatory requirements.

Key Federal Entities

The Department of Commerce, primarily through the National Institute of Standards and Technology (NIST), is tasked with a leading role in the AI EO. Within nine months of the EO, NIST is instructed to coordinate with other agencies to "establish guidelines and best practices, with the aim of promoting industry standards, for developing and deploying safe, secure, and trustworthy AI systems." NIST is also responsible for specific key tasks; initiatives within its purview potentially constitute the most consequential practical effects in

the near term for AI developers and users.

NIST has been at the forefront of the federal government's work toward regulating and overseeing AI in recent years. Under a 2019 executive order signed by President Donald Trump, the institute developed the NIST AI Risk Management Framework, which was released in January 2023. This is a voluntary, non-sector-specific framework containing guidance for companies working on AI "to help manage the many risks of AI and prompt trustworthy and responsible development and use of AI systems."

In July 2023, NIST established its first Generative AI Public Working Group, intended to gather a wide range of practitioners, researchers, and other interested members of the public to collaborate in further developing aspects of the cross-sectoral risk management framework.

The National Telecommunication and Information Administration, which is located in the Department of Commerce, held a public comment period regarding AI accountability from April to June 2023. This request for comment asked for feedback as to "what policies can support the development of AI audits, assessments, certifications and other mechanisms to create earned trust in AI systems."

Companies would be well-advised to take advantage of such opportunities in order to ensure that their priorities are taken into account as policies and regulations are developed. Board members, for their part, should be well-versed in company priorities with respect to AI regulation and should stay informed as to the company's efforts to communicate these interests to key decision makers across the board.

Another important federal entity in this space is the National Artificial Intelligence Initiative Office (NAIIO), which was created by the Trump administration in 2021 under the White House Office of Science and Technology Policy, in accordance with the National Artificial Intelligence Initiative Act of 2020, to bolster American global leadership in AI and oversee federal strategy on AI. The NAIIO is intended to "serve as the central hub for federal coordination and collaboration in AI research and policymaking across the government, as well as with private sector, academia, and other stakeholders."

The White House Office of Science and Technology Policy released a Blueprint for an AI Bill of Rights in October 2022, the key themes of which are reflected in the AI EO.

Looking Ahead

Independent of the AI EO, other federal regulators have been actively working toward AI regulation in specific areas. In July 2023, the U.S. Securities and Exchange Commission proposed a rule aimed at protecting investors from AI technologies that could be optimized to place broker-dealer and investment advisory firms' interests ahead of their investors' interests.

In April 2023, the EEOC, FTC and CFPB released a joint statement reaffirming the applicability of anti-discrimination laws and consumer protection laws to new technologies, including AI.

This year is likely to bring further activity from regulators in targeted areas while overarching regulatory and legislative initiatives slowly gain momentum and direction.

Though the U.S. Congress does not appear likely to take action on AI legislation in the near future, the individual states have been active. One source reports that nearly 200 AI-related bills were introduced in state legislatures through September 2023, and 2024 is likely to bring many more. Meanwhile, abroad, jurisdictions including the United Kingdom and the European Union have been working toward developing policies and proposals for AI regulation.

As companies face an uncertain future of multifaceted legislative and regulatory activity from a variety of sources, it is key for directors to stay informed by management of the potential impact of new developments and to ensure that the company's voice is heard at this crucial juncture. Working together, boards of directors and management teams can position their companies to take advantage of the opportunities presented by this formative period in AI regulation while being appropriately cautious about the future.

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