Massachusetts Issues Advisory Opinion With Implications for Private Equity Firms' Use of AI

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I. Introduction

Consumer-facing businesses across the U.S. are increasingly incorporating artificial intelligence (AI) into their decision-making processes and business models. As businesses become more reliant on AI, we envision that the level of scrutiny from state attorneys general (AG) will continue to increase. State AGs across the U.S. have indicated that their offices are devoting more resources to investigating companies' deployment of AI technology, which consequently may result in enforcement actions pursuant to data privacy laws, consumer protection statutes, and even anti-discrimination laws, among others.

Most recently, the Massachusetts AG's office issued an advisory on April 16, to provide guidance on how existing consumer protection, civil rights, and privacy laws apply to AI.[1] This is in addition to the AGs of California, Connecticut, Florida, Minnesota, and South Dakota announcing increased focus on AI, especially with respect to marketing to consumers. The advisory warns that despite AI's "tremendous potential benefits to society" and "exciting opportunities to boost efficiencies and cost-savings in the marketplace," it nevertheless poses risks such as lack of transparency, bias, and threats to privacy. In its advisory opinion, Massachusetts emphasized that (1) novelty and complexity do not exempt AI systems from applicable law, and (2) the law applies to AI just as it would within any other applicable context.

II. Relevant Laws Implicated

A. Consumer Protection Laws

First, businesses should take care to ensure that AI technology complies with applicable consumer protection law, including the Massachusetts Consumer Protection Law.[2] Indeed, legal risk is high where consumers are not aware of AI usage and cannot "meaningfully opt out of most AI use cases." Furthermore, businesses that use AI should not misrepresent audio or video content generated by AI, such as "deepfakes" and "voice cloning," to deceive consumers about a product or service the user is offering to consumers.

Developers that market AI tools should also ensure that the AI system is functioning as they claim it does, particularly where developers do not have knowledge or control over how AI generates its results. It could be an unfair or deceptive practice for developers to make false claims about AI systems, including the systems' quality, value, or usability. AI systems must be usable for the purpose advertised, and developers should take care to accurately represent the reliability and condition of the AI system.

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[1] *Attorney General Advisory on the Application of the Commonwealth's Consumer Protection, Civil Rights, and Data Privacy Laws to Artificial Intelligence*, MASS. OFFICE OF THE ATT'Y GEN. (April 16, 2024), available at https://www.mass.gov/news/ag-campbell-issues-advisory-providing-guidance-on-how-state-consumer-protection-and-other-laws-apply-to-artificial-intelligence.

[2] Mass. Gen. Laws Chapter 93A.

Finally, the advisory notes the Massachusetts AG's Office can also enforce federal consumer protection laws applicable to AI.[3] For example, federal law requires covered creditors to provide consumers specific and accurate reasons regarding denial of their loan applications even when the creditor is using AI models as part of its decision process.

B. Anti-Discrimination

Another area where AI developers and users should be cautious is with respect to civil rights laws. Where AI-based systems are created using discriminatory inputs or generate outputs that reflect bias toward a protected class, the Massachusetts AG warns that state and federal civil rights laws could apply. Businesses should work to ensure that their use of AI does not have discriminatory effects, including disfavoring or disadvantaging persons or groups based on legally protected characteristics such as race or gender.

C. Data Privacy

Finally, the advisory states that AI must comply with Massachusetts data privacy laws and regulations, including the Commonwealth's Standards for the Protection of Personal Information of Residents of the Commonwealth.[4] AI developers, suppliers, and users must safeguard personal data that their systems use, and must comply with breach notification requirements as well.

III. Implications for Private Equity Firms

Privacy equity firms and other investors should be aware of the legal risks associated with AI systems in two areas. First, they should ensure that their own use of AI complies with applicable law and contractual obligations. For instance, investment firms may use AI to evaluate potential investments and analyze market trends. When used correctly, AI tools can play a crucial role in risk management, allowing firms to analyze large volumes of data during its diligence process to identify and weigh risks associated with potential investments. These benefits, however, may carry a different type of legal risk. If the use of such AI disadvantaged legally protected groups, for example, investors may face allegations of discrimination.

Second, investors should also consider how the companies in which they invest utilize AI. In addition to financial risk, investment and private equity firms face legal risk when they fund companies that violate applicable law. Regulators are increasingly focused on legal theories that allow them to bring claims not only against consumer-facing businesses but also the companies that exercise control of those businesses. For example, in the fall 2021, a private equity fund agreed to pay $25 million in a settlement with the Massachusetts AG based on its alleged oversight of a portfolio company.[5] Given this trend and to protect and maximize the value of their investments, investors should incorporate into their due diligence

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[3] The advisory specifically mentions that the Federal Trade Commission (FTC) "has taken the position that deceptive or misleading claims about the capabilities of an AI system, and the sale or use of AI systems that cause harm to consumers" violate the FTC Act. The FTC consistently collaborates with state AGs on various regulatory matters, and the regulation of AI will be no exception.

[4] Mass. Gen. Laws Chapter 93H.

[5] *Private Equity Firm and Former Mental Health Center Executives Pay $25 Million Over Alleged False Claims Submitted for Unlicensed and Unsupervised Patient Care*, MASS. OFFICE OF THE ATT'Y GEN. (Oct. 14, 2021), available at https://www.mass.gov/news/private-equity-firm-and-former-mental-health-center-executives-pay-25-million-over-alleged-false-claims-submitted-for-unlicensed-and-unsupervised-patient-care

processes an analysis of a company's use of AI, both internally and with third parties, to ensure that the business is appropriately using AI in compliance with applicable state and federal law and contractual obligations and then structure the investment accordingly.

IV. Conclusion

While Massachusetts encourages AI innovation that complies with the law, it also cautions companies that develop and use AI about the legal risks associated with the technology. Private equity and investment firms, which not only utilize AI themselves but also invest in businesses that use AI, should be particularly attuned to the legal risk associated with such programs. Further, as technology continues to evolve, private equity and investment firms and the companies in which they have invested should follow developments in the legal landscape, including amendments to regulatory advisory opinions, state law, and federal law.

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