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Counsel's Guide to AI in the Board Room

By Jim Ryan and Tim Harris

Legal departments can often be viewed, rightly or wrongly, as the place where business principals go if they want to hear “no,” because lawyers see the risks when others see only the opportunities. This becomes more evident and more important when companies are faced with the adoption of new technologies.

A current trend that shows no signs of abating is the widespread adoption of artificial intelligence and machine learning (which we will refer to collectively as AI). For the most part, commercial implementations of AI have been targeted at automating rote tasks, chat bots, and background analysis. However, AI is increasingly working its way towards higher-functioning decision making. In one case, a Hong Kong-based private investment fund developed its own in-house AI, which they claim drove a significant shift in their investment thesis. Other companies are championing the ability of AI to augment customer relationship management, boost productivity, and identify emerging problem areas in their businesses.



As AI becomes more sophisticated and its results more reliable, even before the advent of general or strong AI, the likelihood that boards of directors are going to seek to implement AI directly in board decisions increases. While there are a myriad of legal issues that AI touches, from privacy to liability standards, the implementation of AI in the board room is fundamentally a question of corporate governance. It is therefore important for corporate counsel to keep a clear analytical framework in mind in order to facilitate their board's responsible deployment of AI without simply throwing up road blocks.

What is the technology?

Although most lawyers will never be experts in the underlying technology, it is important for counsel to understand how the technology works. Ask what parameters the AI is considering, what training data was used (and from where was the data sourced), and what risk tolerance is built into the algorithm. For example, an AI that is trained on the data of a pharmaceutical company will not produce relevant analysis for a manufacturer of widgets, and an algorithm trained to only return analysis that it is 95 percent confident in may fail to report an emerging trend that it does not have enough data points

for (that humans may nevertheless find relevant). Understanding the technology in question, at least at a basic level, will be key.

What decision is the AI assisting with?

Boards are tasked with making the most critical decisions that companies face, from the timing of product launches, to mergers and acquisitions, to selecting and evaluating the company's executive officers. AI is limited by its inputs, both in terms of availability of training data and access to the requisite information required to make an informed decision in any given case. In the near term at least, AI is best suited to assist directors with targeted pieces of analysis. For example, looking to AI to comb through financial metrics to determine potential capital allocation improvements is more realistic than expecting it to determine whether the CEO is a good team builder.

What is the applicable standard of care?

Once the technology and how it can be deployed by the board are understood, the time has come to consider the applicable standard of care. Among the various fiduciary duties that directors must fulfill, the duty of care is the one most relevant to the implementation of AI. The duty of care, at its most basic level, requires directors to make fully informed decisions. This does not mean that directors need to have all possible information, but rather that they need to consider the informa-

tion reasonably available to them.

How can directors fulfill their duty of care when implementing AI?

Directors do not need to be experts on every subject matter that comes before the board. Part of directors' exercise of their fiduciary duty of care is to engage experts where necessary. Some jurisdictions, like Delaware (to reference the most popular corporate domicile), directly address the ability of boards to rely on the opinions and reports of advisors. In short, directors are entitled to rely on outside advice where they reasonably believe that the expert is qualified to provide the advice.

In much the same way that directors determine whether their legal counsel or financial advisors are qualified prior to relying on their advice that a deal is appropriately structured or at a fair value to the company, they can look at the qualifications, background, and qualities of the AI they are considering implementing in order to determine whether the AI is qualified. Legal counsel who understand the technology and how it is being implemented can then assist the board in obtaining the information it needs to make this determination. This can be more or less difficult in the case of various AI products because many of the more complex implementations use black box decision making (meaning even the developer can't explain exactly how the AI

got to its output). However, it's still possible to look for ways to test the assumptions and sensitivities of the AI directly or interact with the AI's developers to understand the decision-making process in general (if not the specific straight line between input and output in a given situation).

Whether, and how, to bring AI into the board room will be an open question that each board needs to face for itself. However, directors and their counsel should look to take advantage of the best technology and information available to them in order to drive shareholder value. In times of change, remember to stick to the fundamentals and help boards, as their counsel, make fully informed, good-faith decisions.

Stay tuned for a follow-up article when legislatures begin considering whether AI may serve as directors instead of serving directors ...

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