

INSIGHTS

The Corporate & Securities Law Advisor

VOLUME 38, NUMBER 7, JULY 2024

CLIMATE

SEC Climate Disclosure Rules: Your Questions Answered

Page 3

Brian V. Breheny, Raquel Fox, Marc S. Gerber, Caroline S. Kim, Liz Malone, and Jeongu Gim

SHAREHOLDER PROPOSALS

What's ExxonMobil Doing to Activists—and Why Does It Matter?

Page 7

Michael R. Levin

SEC ENFORCEMENT

SEC Charges Now Suspended Auditor BF Borgers with Massive Fraud Affecting More Than 1,500 SEC Filings

Page 9

Eric Juergens, Morgan Hayes, Jonathan Tuttle, and Maeve O'Connor

STATE OF INCORPORATION

Delaware's Status as the Favored Corporate Home: Reflections and Considerations

Page 12

Amy Simmerman, Bill Chandler, David Berger, Joe Slights, Brad Sorrels, and Ryan Greecher

Converting a Corporation Is Not Domestication

Page 26

Keith Paul Bishop

BOARD STRATEGY

How Should Boards of Directors Engage with the AI Revolution?

Page 27

Sarah Dodson and Maggie Welsh

BOARD STRATEGY

How Should Boards of Directors Engage with the AI Revolution?

By Sarah Dodson and Maggie Welsh

Recently, Maggie Welsh, host of the “AI Counsel Code” podcast, interviewed Sarah Dodson about board-level considerations concerning artificial intelligence (AI). The interview addresses how boards should consider AI within their stewardship and governance roles, focusing on both the risks and opportunities AI presents. This Q&A has been adapted from that discussion between Maggie and Sarah and edited for conciseness and clarity.

Maggie: What is a high-level strategy for boards to consider when they’re thinking about AI?

Sarah: What I would encourage board members to consider with respect to AI is its role as an organization-wide strategic imperative. We see many board members naturally focusing on the risks AI presents and taking a protective posture towards managing those risks appropriately. That’s a very important element of the board’s duties. However, just as important as risk management is understanding the opportunities presented by AI.

With such a potentially disruptive technology, it is important for the board to make sure that the organization they govern can appropriately take advantage of those opportunities and achieve their full potential. So, there are really two sides to the AI question as it occurs in the boardroom: risk, but also opportunity.

Sarah Dodson and Maggie Welsh are partners of Baker Botts LLP.

Taking this more holistic approach and view is critical. To that end, a starting approach for board members is to first understand the company’s current and potential use of AI, its competitors’ use of AI, and whether there are strategic uses of AI within the organization or the broader industry that aren’t yet captured.

Having this conversation with management and understanding how AI can be useful, is currently being used, and the opportunities that exist, is important.

Maggie: What is the best way to figure out the use case and the opportunities for using AI? Is that a conversation with management or does it involve something else?

Sarah: The starting point is absolutely a conversation with management. The company’s management team should be thinking about these issues, as AI has captured everyone’s attention.

You would be hard-pressed to find a company that isn’t thinking: How could we use AI?, How are our competitors using it?, and What are our options?

As a board member, you should talk to management about whether and how it is considering these matters. What have they identified as AI’s potential uses? What is management’s vision of how it could advance? The conversation with management—a gut check on where they are right now and into the future—is important.

But then, self-education also becomes very important. As a director, it’s less about understanding the technical detail and more about knowing

enough to be conversant with AI and being able to spot issues. Directors don't need to be technical experts, but they do need to have a basic grasp of the key issues surrounding AI. Otherwise, it's going to be a lot harder to have meaningful conversations with management around AI strategy and oversight.

Maggie: What are some ways that the board can educate themselves on AI? Do you have any recommendations or best practices for getting up to speed on everything AI?

Sarah: Absolutely. There are a lot of options. As a starting point, as I mentioned, the management team has probably been thinking about AI quite a bit. They will have people on their team who have been looking at these issues. Requesting that management provide a presentation is one easy way to leverage the work the company is already put in to AI.

You can also self-educate through research. There are many great organizations that provide summaries of how AI works and potential use cases. Even better would be to experiment with some AI tools—this is a fun way to better understand the capabilities, the limitations, and imagine different use cases.

Another helpful approach is bringing in outside experts. Say you are serving an organization with a management team that hasn't done as much on the AI front as other teams; they are not as engaged with it as they could be. You can request an outside expert to talk to the board about AI technology, use cases, strategy options and what's happening in that particular industry and gain more information that way.

Finally, there are all kinds of events where you can learn more about AI and get plugged in. Looking for those opportunities is another healthy way to get up to speed on what's happening in AI.

Maggie: Attending conferences, talking to knowledgeable people in the field, and bringing in outside experts who might be able to give training on certain AI issues are all excellent recommendations. So now, assuming the board is up to speed on AI and has enough general knowledge about AI, what is the board's role in directing management to pursue AI applications?

Sarah: The important thing to remember is that the board's role is that of a custodian. The board members won't be the boots on the ground who are actually implementing and effectuating AI within the organization. They are in this key governance role where they need to make sure that management is doing this.

When thinking about the relationship between the board and management, focus on that oversight role and understand what management is doing to take advantage of the opportunities and to appropriately manage the risks.

That can look different for different organizations. If you have an organization that is highly technical, well-resourced and very involved in this space, it is going to be a lot bigger piece of the oversight role, and that might require more effort versus an organization that is small and curious about use cases for AI but otherwise doesn't live and breathe in the AI space.

There also are different ways that you can think about what is the right way to approach oversight from a structural perspective. An important feature is making sure that you have a good process in place. That might entail thinking about who or what is the right constituency to perform the AI-specific oversight role.

For example, you can take an existing board committee and task it with AI oversight. Or it may be the case that given the importance of AI within the organization and its strategic imperatives, the board

should consider forming a new committee that is individually tasked with AI. In addition, identifying the right individuals within the board to really focus on these issues is going to be a very important consideration. For some, a technical background in computer science or data science may prove to be critical. For others, this may not be meaningful.

Maggie: Sarah, you make an excellent point about forming new board committees or having existing board committees focus on AI. Could you give some tips on how you would see these board committees run and operate? What should they be looking for, and what should they be doing to implement some of these AI questions we've been talking about?

Sarah: What these committees do and how they function will vary a lot depending on the organization and its needs. But what's important is that the board members and the committee members are having conversations about what really makes sense for them and their company.

Part of that is asking, what information do we need as a committee to make educated decisions about AI? What metrics might management need to present to us? And with what regularity do we need to receive this information?

Again, we come back to the key point we talked about earlier, which is having a conversation with management and understanding the organization's strategic goals with AI.

If you're asking yourself whether the company should try to optimize an existing function and use AI as an ancillary or a copilot to this, that might look really different from a use case where AI is totally automating an existing workstream or function. Understanding how the company plans to use AI strategically also helps show what information that committee needs and how they can effectively make those decisions.

Maggie: AI is changing so rapidly, and new programs and offerings are released every day. How often should boards revisit AI with management and discuss their different use cases or the metrics you discussed?

Sarah: That's a great question. Let's think about AI in two different ways the organization could be exploring.

One could be, are you creating your own proprietary AI tool within the organization? Is this something you are developing in-house and having to commit capital and other resources to its development?

Or is your organization not in the business of doing that, but rather looking to contract with a third-party vendor that's providing an existing AI tool to help you serve some kind of need?

If you're in the former camp, your organization is putting a lot of time, effort, and energy into developing these tools. You want to make sure that you're appropriately resourced to do that, both from a capital perspective, from a talent perspective, and making sure that your workforce is educated and up to speed on the latest, so that as you develop your product and what you're working on, you're able to do the best you possibly can with it.

That can look very different if you've identified a need or an area where AI can help your business be more effective, but you're not the one creating it. If you're looking to a third party, then your resources will focus on being diligent in how you engage potential providers.

Directors need to understand which provider makes the most sense for their organization. At that point, you're entering into an agreement, and you're leveraging that tool. Boards should have confidence in what that third party is going to be doing, and just as importantly *not* doing, in order to continue to advance and improve on the platform.

So, board interactions with management can look quite different depending on how you're planning

to use AI within the organization. But again, these are the kinds of conversations that you need to have, think about, and approach strategically.

Maggie: How should boards consider workforce allocation?

Sarah: If you have a critical function in your organization that you think is going to be augmented by AI, then you need to think about a few things: Is there a way that we can identify the individuals who are currently supporting that function and address the implementation thoughtfully? Is it providing additional outside training to educate them on how to use the AI tools and to understand how to be effective in that regard? Should the organization assess whether the function is appropriately sized once the AI tools are running?

Alternatively, if you think that AI might be replacing a particular function, is there a way to pivot impacted employees to other areas where they can apply their skills? Can we train them in other areas? And is there a way they can continue to provide value?

It's a huge part of the conversation.

People worry about job replacement. There's something to be said for making sure that people across the board are appropriately educated and understand how AI can impact their existing role. Thoughtful organization and communication in this regard can be incredibly important from a talent management perspective.

Maggie: From the board level, are there any frameworks that the board should consider or that management might consider in its AI implementation?

Sarah: There are so many different companies with varying levels of understanding and familiarity with AI and the potential frameworks that govern its use. From the board level, it's important to understand where management sits in the spectrum. Are they aware of the different frameworks? Have they chosen one to follow?

That could be the National Institute of Standard and Technology (NIST) AI Risk Management Framework, which is the one we see and refer to most commonly, or it could be something else. But from the board's perspective, having a conversation with management, making sure that they're thinking about these things, and considering what frameworks make sense for their particular organization is important.

Maggie: Thank you for shedding light on AI in the boardroom. As we wrap up, do you have any final thoughts or advice for our listeners?

Sarah: I encourage directors and executives to consider AI very thoughtfully. Boards that can be proactive in understanding, governing, and leveraging AI are putting themselves in the best position to drive positive outcomes for their organizations.