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PERSPECTIVE

The ABC's of AI for Boards

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Artificial intelligence has been making its debut for some time now partially because the term means so many things to so many different people. Artificial intelligence is fundamentally about making machines intelligent where intelligence is measured primarily as the confluence of foresight and outcomes. In other words, and more simply stated, AI assists systems to predict and then perform. The trouble and increasing concern with AI is that its foundation is formed from the basis of human assumptions, assumptions that can introduce bias directly into a system that is supposed to operate with a sense of perfection.

Whether developing or buying, leaders have been seeking to implement AI across all systems to expertise data in an efficient manner and drive innovation and increased growth. AI provides a tangible mechanism for capturing value and increasing competitive edge. While AI implementation and expansion is growing exponentially, few boards or management teams have developed a framework to oversee AI within their companies primarily because regulation of AI is in its early days. The vagueness surrounding what AI is and what AI does is precisely what has allowed it to flourish without significant regulation. That is finally beginning to change, and new laws and standards are being proposed which is reinvigorating the need of boards to refocus. It may be difficult for a Board to provide guidance when regulations are merely proposals and there is significant uncertainty around what components of such proposals will stick. However, the regulatory proposals share common themes and concepts which can be helpful in developing a framework for AI. Further, certain governmental agencies (like the FTC) have already voiced guidelines around AI and enforcement cases have been helpful to further solidify systems aspects that can be implemented.

Evolving Regulatory Landscape

While the regulatory landscape continues to evolve, it is helpful to understand the current state of such proposals to identify patterns of focus that are unlikely to change when the current proposals become law. The European Union very recently proposed rules governing any AI system whose decisions impact an EU citizen, whether they are a customer or an employee. Companies that violate the new regulations would be subject to fines of up to 6% of a company's annual revenue. The key focus of the regulation is on high-risk manipulative AI as the proposed rules intend to ban the use of AI for "manipulative, addictive, social control and indiscriminate surveillance practices." The EU regulation proposes to place stricter requirements on AI applications that are "high-risk".

The United States is not far behind in implementing more formal regulations. Recently, the Algorithmic Accountability Act was introduced in Congress in 2019. While it failed to pass, it is anticipated that the bill will be reintroduced. The FTC has also been vocal in emphasizing their focus and attention on AI and reiterating that AI is at the forefront of their law enforcement actions, including cases focused on violations of the Fair Credit Reporting Act of 1970, Equal Credit Opportunity Act of 1974 and Section 5 of the FTC Act. The FTC has repeatedly stressed the need for AI to focus on truth, fairness and equity.

The European Union has indicated it can take up to two years for this proposal to become actionable and it remains to be seen when specific United States regulation will again be proposed and implemented. Those companies who want to be ahead of the curve are thinking ahead on how to implement best practices for AI. This will help ensure compliance when proposed regulations become actual law.

An AI Approach for Boards

Directors are required to exercise loyalty and care to the companies they serve and the shareholders of those companies. Recent case law has reinforced that a director fulfills these duties through appropriate oversight over company activities and risks. In particular, courts have emphasized the need for boards to be focused on systemic and knowable risks and to institute effective disclosure mechanisms and compliance programs to avoid liability. As such, it is important for all boards to begin to develop fluency and visibility about AI, the regulatory impacts and the risks posed for their respective companies. To do so, boards can rely on a few strategies that overlap with some of the common concepts outlined in the regulatory landscape.

Assess the Landscape: Data, Function & Regulations

The most critical component is to first understand what the company has, is and will do as it relates to AI. This includes how AI is used internally and externally. For regulation purposes, the key factors to identify is what data is used and for what function the AI technology is intended. A common theme that emerges from the legislation proposed globally is documentation. What data is collected, how it is used and its function directly impact what pieces of legislation are applicable and how to narrow the universe of risks to provide effective risk management oversight. Further, this documentation function will be an important attribute of compliance with current and future AI regulation.

Once the landscape is determined, boards will be better equipped to assess whether and how the company's current AI technology is passing regulatory muster. To the extent it is not,

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action plans can be implemented to bring the technology back in line with current and proposed regulation. Boards will also need to stay abreast of the ever-changing regulatory landscape so they can adapt their AI technology to ensure ongoing compliance.

Develop a Framework Based on Key Company Ethics

In assessing AI's data and functionality and its intersection with current and future regulatory compliance, it is important for boards to identify applicable key company ethics. These ethics can serve as a foundation for documentation, future analysis, and risk mitigation strategies. Depending on the AI implemented, boards may place different levels of magnitude on each of these risks and identifying the magnitude of such risks for each specific company is critical to being able to provide proper oversight. These key ethical risks may include assessing bias, transparency, safety, security and disclosure and determining which risks are most applicable to a company's use of AI.

When it comes to AI, do more good than harm

As AI increasingly becomes the backbone of many of our systems, it is more important than ever that companies, management teams and boards adapt and learn the tools needed to better position their companies for success. Given the complexity and fast pace of innovation, AI is an area where it will benefit boards to be leaders and get ahead of regulation as stewards of their respective companies rather than race to catch up. Bottom line, boards should aim to do more good than harm. ■