

From the Public Company Advisory Group of Weil, Gotshal & Manges LLP

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SEC Disclosures of Artificial Intelligence Technologies

*Includes Survey Results and
Examples from 2023 Company
Filings And “What to Do
Now” to Address this
Emerging Trend*

The meteoric rise in generative artificial intelligence has dramatically altered the corporate landscape as companies increasingly invest in or incorporate artificial intelligence, including machine learning technologies (together referred to herein as “AI”), into their businesses. The increasing adoption of AI presents tremendous opportunities to harness data on a vast scale, but it also presents numerous risks and uncertainties. In this Alert, we review developments regarding AI disclosure in filings with the U.S. Securities and Exchange Commission (“SEC”) for Forms 10-K and 10-Q and proxy statements, based on our informal survey of disclosures by S&P 500 and Russell 3000 companies between January 1, 2023 and October 31, 2023 (“Informal Survey”). We also advise companies of what to do now to address this emerging disclosure trend.

Background

In [remarks](#) earlier this year, the chair of the SEC cautioned that “public companies making statements on AI opportunities and risks need to take care to ensure that material disclosures are accurate and don’t deceive investors.” Although no SEC disclosure requirement explicitly references AI, existing requirements arguably might beckon disclosures concerning AI in:

- Forms 10-K and 10-Qs: sections on business, management’s discussion and analysis (“MD&A”), risk factors, and financial statements; and
- Proxy Statements: letters to shareholders, director biographies and risk oversight, corporate governance, company policies, and compensation discussion and analysis (“CD&A”).

Annual Report on Form 10-K

Our Informal Survey indicated that over 40% of companies in the S&P 500 and 30% of companies in the Russell 3000 included disclosure regarding AI in their annual reports on Form 10-K. Companies that do address AI provide the information in one or several of the following areas.

Form 10-K, Part I, Item 1 – Business

Companies included disclosure in their Business section of the 10-K relating to:

- AI-related products and initiatives;
- research and development efforts;
- the impact of AI on the company’s products, services, relationships with customers or suppliers; and
- competitive conditions.

Examples – Technology Companies

For technology companies where use of AI is or may become central to the company's operations, disclosures are featured prominently throughout the company's business description in the 10-K. For example, some technology companies have weaved AI into disclosure on the company's mission, innovation, or ethical responsibilities:

Mission: “In a world of increasing economic complexity, AI has the power to revolutionize many types of work. [The Company] is now innovating and expanding our portfolio with AI capabilities to help people and organizations overcome today's challenges and emerge stronger. Customers are looking to unlock value from their digital spend and innovate for this next generation of AI, while simplifying security and management We're committed to making the promise of AI real – and doing it responsibly.”

Innovation: “Every day, the innovations that our people create fuel the data economy, enabling advances in artificial intelligence . . . that unleash opportunities. . . .”

Ethics: “Our work is guided by a core set of principles: fairness, reliability and safety, privacy and security, inclusiveness, transparency, and accountability.”

Examples – Other Industries

Other companies where AI is not central to the business have chosen to make briefer disclosures relating to AI in their business sections, such as to highlight technological advances and the integration of AI into business initiatives. For example:

Technological Advancement: “[We] are working to expand our use of artificial intelligence to drive efficiencies for our clients, with anticipated initiatives including automation of tasks and integration of natural language queries.”

Information Systems/Omni-channel Experience: “The Company's information systems are integral in supporting the Company's long-term strategies. Our information technology platform is a key capability used to support digital growth and drive consumer centricity and data-driven decision making. We are continually enhancing our digital technology platforms to elevate our e-commerce capabilities direct-to-consumer functionalities, and overall omni-channel experience, by utilizing cloud-based technology infrastructure. For example, we will continue to enhance certain of our machine learning models to improve our customer capture and segmentation capabilities.”

Operations: “. . . modernization efforts enabled by [], including a new network operating plan that uses machine learning and algorithms to develop more detailed and accurate volume forecasts, are enhancing productivity at [] Additionally, the company is testing autonomous, driverless technologies in the handling of large, non-conveyable packages, as well as artificial intelligence-enabled robotic product sortation systems to sort small packages.”

Form 10-K, Part I, Item 1A – Risk Factors

Risk factors related to AI are becoming increasingly common across a broad range of industries. Our Informal Survey indicated that approximately 18% of S&P 500 companies and 12% of Russell 3000 companies discussed or mentioned AI in their risk factors on Form 10-K. AI-related risk factors include regulatory risks, operational risks, competitive risks, cybersecurity risks, ethical risks, and third-party risks.

Regulatory Risks

Risks related to the regulation of AI and other emerging technologies were broadly cited across many industries. These risk factors expressed concerns about increased compliance and legal risks associated with evolving AI laws, regulations, and standards. A variety of legislative and regulatory actions at the federal, state, and international levels have recently emerged. For example, on October 30, 2023, President Biden issued an Executive Order on AI.¹ Among other things, this Executive Order requires federal agencies to develop (generally within three to twelve months of the date of the order) standards, practices, and guidance in numerous sectors to protect consumer safety and privacy, including in the consumer finance, labor and employment, healthcare, education, and natural security sectors. Examples of regulatory risks are below.

Example 1 (Insurance Industry)

“There has also been increased regulatory scrutiny of the use of “big data” techniques, machine learning, and artificial intelligence. It is likely that we will be subject to new regulations that could materially adversely affect our operations or ability to write business profitably in one or more jurisdictions. For example, the National Association of Insurance Commissioners (NAIC) has adopted guiding principles on artificial intelligence, to inform and articulate general expectations for businesses, professionals and stakeholders across the insurance industry as they implement artificial intelligence tools to facilitate operations. While not effective until adopted by a specific state, we expect these guidelines to be adopted by at least some states. In addition, regulators have recently requested information from insurers on their use of algorithms, artificial intelligence and machine learning. We cannot predict what, if any, regulatory actions may be taken with regard to “big data,” but any limitations could have a material impact on our business, business processes, financial condition, and results of operations.”

Example 2

“[L]egislative activity in the privacy area may result in new laws that are applicable to us and that may hinder our business, for example, by restricting use or sharing of consumer data, including for marketing or advertising or limiting the use of, limiting our ability to provide certain consumer data to our customers, or otherwise regulating artificial intelligence and machine learning, including the use of algorithms and automated processing in ways that could materially affect our business, or which may lead to significant increases in the cost of compliance.”

Example 3

“As with many technological innovations, artificial intelligence presents risks and challenges that could affect its adoption, and therefore our business. Uncertainty in the legal regulatory regime relating to AI may require significant resources to modify and maintain business practices to comply with U.S. and non-U.S. laws, the nature of which cannot be determined at this time. Several jurisdictions around the globe, including Europe and certain U.S. states, have already proposed or enacted laws governing AI. For example, on October 30, 2023, the Biden administration issued an Executive Order to, among other things, establish extensive new standards for AI safety and security. Other jurisdictions may decide to adopt similar or more restrictive legislation that may render the use of such technologies challenging. These obligations may make it harder for us to conduct our business using AI, lead to regulatory fines or penalties, require us to change our product offerings or business practices, or prevent or limit our use of AI. If we cannot use AI, or that use

¹ Executive Order on the Safe, Secure and Trustworthy Development and Use of Artificial Intelligence. Available [here](#).

is restricted, our business may be less efficient, or we may be at a competitive disadvantage. Any of these factors could adversely affect our business, financial condition, and results of operations.”

Operational Risks

Operational risk factors emphasized the impact of unpredictable disruptions, technical challenges and errors in AI projects that could affect the companies’ financial results and business operations.

Example 1

“The development, adoption, and use for generative AI technologies are still in their early stages and ineffective or inadequate AI development or deployment practices by [the Company] or third-party developers or vendors could result in unintended consequences. For example, AI algorithms that we use may be flawed or may be based on datasets that are biased or insufficient. In addition, any latency, disruption, or failure in our AI systems or infrastructure could result in delays or errors in our offerings. Developing, testing, and deploying resource-intensive AI systems may require additional investment and increase our costs.”

Example 2

“The development of generative AI technologies is complex, and there are technical challenges associated with achieving the desired level of accuracy, efficiency, and reliability. The algorithms and models utilized in generative AI systems may have limitations, including biases, errors, or inability to handle certain data types or scenarios. Furthermore, there is a risk of system failures, disruptions, or vulnerabilities that could compromise the integrity, security, or privacy of the generated content. These limitations or failures could result in reputational damage, legal liabilities, or loss of user confidence which, in turn, could result in lower than anticipated demand from hyperscalers for connectivity solutions in the AI/ML infrastructure market.”

Competition Risks

Many companies recognized the imperative of evolving with rapid advancements in AI in order to remain competitive. The financial services and technology sectors, in particular, are at the forefront of this technological transformation. A delay in investing in, adopting and integrating AI could lead to an erosion of market share. Companies indicated that not meeting consumer expectations due to a lag in technological innovation could adversely impact their business, reputation, results of operations and financial condition.

Example 1

“Our industry is marked by rapid technological developments and innovations (such as the use of artificial intelligence and machine learning) and evolving industry standards. If we are unable to provide enhancements and new features and integrations for our existing platform, develop new products that achieve market acceptance, or innovate quickly enough to keep pace with these rapid technological developments, our business could be harmed.”

Example 2

“Our success in the competitive environment in which we operate requires consistent investment of capital and human resources in innovation, particularly in light of the current “FinTech” environment, in which the

financial services industry is undergoing rapid technological changes and financial institutions are investing significantly in evaluating new technologies, such as artificial intelligence, machine learning, blockchain and other distributed ledger technologies, and developing potentially industry-changing new products, services and industry standards. Our investment is directed at generating new products and services, and adapting existing products and services to the evolving standards and demands of the marketplace. Among other things, investing in innovation helps us maintain a mix of products and services that keeps pace with our competitors and achieve acceptable margins.”

Example 3

“Our success is also subject to the risk of future disruptive technologies, such as artificial intelligence (“AI”) and machine learning. The failure to develop enhancements to our applications for, or that incorporate, technologies such as natural language processing, AI, machine learning, and blockchain may impact our ability to increase the efficiency of and reduce costs associated with our clients’ operations. If new technologies, including but not limited to those that may involve AI or machine learning or be created using AI or machine learning, emerge that are able to deliver HCM solutions at lower prices, more efficiently or more conveniently, such technologies could adversely impact our ability to compete.”

Cybersecurity Risks

Many companies have highlighted the cybersecurity-related risks that stem from the use of new technologies such as AI. Specifically, companies have stated that cyber threats and techniques used in cyberattacks may develop and evolve from emerging technologies such as AI and quantum computing.

Example 1

“As the Company pursues its strategy to grow through acquisitions and to pursue new initiatives that improve our operations and cost structure, the Company is also expanding and improving its information technologies, resulting in a larger technological presence, utilization of “cloud” computing services, and corresponding exposure to cybersecurity risk. Certain new technologies, such as use of autonomous vehicles, remote-controlled equipment, virtual reality, automation and artificial intelligence, present new and significant cybersecurity safety risks that must be analyzed and addressed before implementation. If we fail to assess and identify cybersecurity risks associated with acquisitions and new initiatives, we may become increasingly vulnerable to such risks.”

Example 2

“Cyber threats and the techniques used in cyberattacks change, develop and evolve rapidly, including from emerging technologies, such as advanced forms of AI and quantum computing.”

Some companies also have highlighted that cyberattacks may result in the theft or export of sensitive data, including key innovations in AI and other disruptive technologies.

Example 3

“Successful cybersecurity attacks or other security incidents could result in, for example, one or more of the following: unauthorized access to, disclosure, modification, misuse, loss, or destruction of company, customer, or other third party data or systems; theft or import or export of sensitive, regulated, or

confidential data including personal information and intellectual property, including key innovations in artificial intelligence, quantum, or other disruptive technologies; the loss of access to critical data or systems through ransomware, crypto mining, destructive attacks or other means; and business delays, service or system disruptions or denials of service.”

Ethical Risks

A few companies highlighted the social and ethical issues related to the use of AI and other emerging technologies and the potential for reputational harm, liability, and increased costs. The incorporation of AI into company technology may draw controversy due to the perceived or actual impact on human rights, privacy, employment, or other social contexts.

Example

“Social and ethical issues relating to the use of new and evolving technologies such as artificial intelligence (“AI”) in our offerings, may result in reputational harm and liability, and may cause us to incur additional research and development costs to resolve such issues. We are increasingly building AI into many of our offerings. As with many innovations, AI presents risks and challenges that could affect its adoption, and therefore our business. If we enable or offer solutions that draw controversy due to their perceived or actual impact on society, we may experience brand or reputational harm, competitive harm or legal liability. Potential government regulation related to AI use and ethics may also increase the burden and cost of research and development in this area, and failure to properly remediate AI usage or ethics issues may cause public confidence in AI to be undermined, which could slow adoption of AI in our products and services. The rapid evolution of AI will require the application of resources to develop, test and maintain our products and services to help ensure that AI is implemented ethically in order to minimize unintended, harmful impact.”

Third-Party Risks

A few companies highlighted the risks associated with reliance on third-party service providers, especially those involving third-party AI systems. Disruptions or inefficiencies integrating with these systems could result in increased costs, reputational damage, security vulnerabilities, heightened regulatory scrutiny, and other risks.

Example 1

“We have established a self-service development environment in which such third party developers integrate their AI models onto our platform, and we will be dependent in part upon their ability to do so effectively and quickly. We may not have full control over the quality and performance of third-party providers, and therefore, any unexpected deficiencies or problems arising from these third-party providers may cause significant interruptions in the operation of our platform. The failure of third party developers to integrate their AI models seamlessly into our platform and/or provide reliable, scalable services may impact the reliability of our platform and harm our reputation and business, results of operations and financial condition.”

Example 2

“[O]ur or our customers' sensitive, proprietary, or confidential information could be leaked, disclosed, or revealed as a result of or in connection with our employees', personnel's, or vendors' use of generative AI technologies. Any such information that we input into a third-party generative AI or machine learning

“ML”) platform could be revealed to others, including if information is used to train the third party's AI/ML models. Additionally, where an AI/ML model ingests personal information and makes connections using such data, those technologies may reveal other sensitive, proprietary, or confidential information generated by the model. Moreover, AI/ML models may create incomplete, inaccurate, or otherwise flawed outputs, some of which may appear correct. We may use AI/ML outputs to make certain decisions. Due to these potential flaws, the model could lead us to make decisions that could bias certain individuals or classes of individuals and adversely impact their rights. As a result, we could face adverse consequences, including exposure to reputational and competitive harm, customer loss, and legal liability.”

Stand-alone AI Risk Factors

While most companies have incorporated risks related to AI in their pre-existing risk factors, an increasing number of companies, primarily in the technology industry, have added stand-alone risk factors that discuss an array of risks related to AI. The following example was drawn from a new risk factor in a Form 10-Q, Part II, Item 1A.

Example

“We may not be successful in our artificial intelligence initiatives, which could adversely affect our business, reputation, or financial results.

We are making significant investments in artificial intelligence (AI) initiatives, including generative AI, to, among other things, recommend relevant unconnected content across our products, enhance our advertising tools, develop new products, and develop new features for existing products. . . There are significant risks involved in development and deploying AI and there can be no assurance that the usage of AI will enhance our products or services or be beneficial to our business, including our efficiency or profitability. For example, our AI-related efforts may give rise to risks related to harmful content, accuracy, bias, discrimination, toxicity, intellectual property infringement or misappropriation, defamation, data privacy, and cybersecurity, among others. In addition, these risks include the possibility of new or enhanced governmental or regulatory scrutiny, litigation, or other legal liability, ethical concerns, negative consumer perceptions as to automation and AI, or other complications that could adversely affect our business, reputation, or financial results. . . Further, we face significant competition from other companies that are developing their own AI products and technologies. Those other companies may develop AI products and technologies that are similar or superior to our technologies or are more cost-effective to develop and deploy. . . We are also developing AI technology that we make available via open source, commercial, and bespoke license agreements to third-parties that can use this technology for use in their own products and services. We may not have insight into, or control over, the practices of third parties who may utilize such AI technologies. As such, we cannot guarantee that third parties will not use such AI technologies for improper purposes, including through the dissemination of inaccurate, defamatory or harmful content, intellectual property infringement or misappropriation, furthering bias or discrimination, cybersecurity attacks, data privacy violations, or to develop competing technologies. . . As such, it is not possible to predict all of the risks related to the use of AI and changes in laws, rules, directives, and regulations governing the use of AI may adversely affect our ability to develop and use AI or subject us to legal liability.”

Form 10-K, Part II, Item 7 – MD&A

In the context of known trends and uncertainties that have or are reasonably likely to have a material impact on a company's liquidity, capital resources, and results of operations, there are a number of items to consider relating to AI, focusing in particular on describing the business through the eyes of management, including forward-looking information. Based on our Informal Survey, approximately 7% of companies in the S&P 500 and Russell 3000,

primarily in the technology and financial services sectors, made disclosures relating to AI in the MD&A section of their 10-Ks. Thus far, the most common area of disclosure is in the Overview or Executive Summary section, similar to the overview found in the Business section, and the Private Securities Litigation Reform Act cautionary statements that accompany forward-looking statements, which are often included in the MD&A.

Example – Overview

“We combine our strength in technology and leadership in cloud, data and AI with unmatched industry experience, functional expertise and global delivery capability to help the world’s leading businesses, governments and other organizations build their digital core, optimize their operations, accelerate revenue growth and enhance citizen services-creating tangible value at speed and scale.”

Example – Strategy

“Beginning in fiscal 2022, we launched a new productivity program, which is designed to drive a better, faster and more agile organization that is supported by a culture of continuous improvement and faster decision-making. . . . The second pillar is the use of new digital solutions like artificial intelligence and predictive analytics to drive efficiency in operations, supply chain planning, logistics and warehousing. We expect the productivity savings to be recognized in each of our reportable segments as they benefit from the achievements connected with the three pillars of the program.”

Examples – Forward Looking Statements (drawn from a Form 10-K and Form 10-Q)

Example 1

“efficiencies and improvements anticipated from our investments in AI and machine learning products and services”

Example 2

“our ability to stay on the leading edge of technology and digital payment and travel solutions, which will depend in part on our success in evolving our products and processes for the digital environment, developing new features in the [Company] app and enhancing our digital channels, building partnerships and executing programs with other companies, effectively utilizing artificial intelligence and increasing automation to address servicing and other customer needs, and supporting the use of our products as a means of payment through online and mobile channels, all of which will be impacted by investment levels, new product innovation and development and infrastructure to support new products, services, benefits and partner integrations;”

Technology-based companies have provided more detail in MD&A. For example, the company below included AI disclosure in Overview, Segment Disclosure, Cash Flow and Capital Expenditure Trends, and Liquidity and Capital Resources.

Excerpt from Overview:

“Our mission is to accelerate the world’s transition to sustainable energy. . . . Additionally, we are increasingly focused on products and services based on artificial intelligence, robotics and automation.”

Excerpt from Disclosure on a Segment:

“Our cost reduction efforts, cost innovation strategies, and additional localized procurement and manufacturing are key . . . We will also continue to generate demand and brand awareness by . . . including through products based on artificial intelligence such as . . .”

Excerpt from Cash Flow and Capital Expenditure Trends:

“Our capital expenditures are typically difficult to project beyond the short-term given the number and breadth of our core projects at any given time, and may further be impacted by uncertainties in future global market conditions. We are simultaneously ramping new products, building or ramping manufacturing facilities . . . and investing in autonomy and other artificial intelligence enabled training and products, and the pace of our capital spend may vary depending on overall priority among projects, the pace at which we meet milestones, production adjustments to and among our various products, increased capital efficiencies and the addition of new projects.”

Excerpt from Liquidity and Capital Resources:

“We expect to continue to generate net positive operating cash flow . . . The cash we generate from our core operations enables us to fund ongoing operations and production, our research and development projects for new products and technologies including . . . and autonomy and other artificial intelligence enabled products.”

We expect that future MD&A disclosures across industries will cover metrics relating to AI-related operations, costs of investments in AI, and impacts of AI on the consolidated company and across the company’s business segments. Further, we expect that such disclosures would be in the context of the company’s strategy and management of risks.

Form 10-K, Part II, Item 8 – Financial Statements and Supplementary Data

The development of AI technologies likely will impact a company’s financial statements and notes thereto. Our Informal Survey indicated that approximately 6% of S&P 500 companies and 5% of Russell 3000 companies made disclosure relating to AI in the notes to the financial statements. Many of these disclosures were related to the acquisition of AI technologies or platforms, or the status of existing AI initiatives at the company.

Example 1

“On September 7, 2021, we completed [an] acquisition of . . . The [] acquisition advances our digital capabilities and its AI-based integrated kitchen order management and delivery technologies are intended to strengthen store operations, enhance the customer experience and make it easier for team members to run a restaurant.”

Example 2

“As AI is critical to delivering our mission of bringing our breakthrough innovations into the real world, beginning in January 2023, we will update our segment reporting relating to certain of [the Company’s] AI activities.”

Proxy Statement

According to our Informal Survey, over 30% of S&P 500 companies and 17% of Russell 3000 companies discussed AI in some way in their proxy statements. More specifically, companies referenced AI in letters to stockholders, board member qualifications, descriptions of company policies, CD&A, risk oversight and corporate governance sections.

Letter to Stockholders

Companies discussed, at a high level, development or innovation in AI technologies at the company.

Example 1

“This heritage of innovation – and our instinct to always have an eye on the frontier of technological change – uniquely prepares us to harness the power of a new generation of artificial intelligence tools. We recognized early how important AI would be to cybersecurity to ensure that our customers enjoy cyber protections that meet and defeat rapidly evolving cyber threats. Generative AI technology will accelerate the promise of AI. We embrace this signal moment of change for our company, our industry and the broader economy and will lead in AI-powered cybersecurity solutions.”

Example 2

“The emergence of generative AI is yet another exciting prospect for [the Company]. We rolled out a new “virtual teammate” for our customers that we call [] (which is already driving cloud migrations) and have more time-saving capabilities in the works. Over the long term, AI will make software far easier to create, ultimately giving rise to more software development teams - as well as the accompanying sales, support, and service teams.”

Board of Directors Qualifications and Risk Oversight

Some companies have disclosed that their boards of directors are becoming increasingly involved in the oversight of AI at the company. Those that have disclosed such oversight generally charge the Audit or Technology Committees with AI oversight.

Examples – Qualifications

Example 1

“From May 2019 until December 2020, [] served as the Chief Operating Officer and Advisor of [], an artificial intelligence company which creates transformative core technology for the robotics industry.”

Example 2

“[] is Executive Chairman of the Board of [], a privately held, artificial intelligence company focused on supply chain management.”

Example 3

“[] has focused on critical Digital and Technology issues, founding the Senate’s Artificial Intelligence Caucus and advocating for improved cybersecurity practices, including co-authoring the bill that would become the Cyber Incident Reporting for Critical Infrastructure Act of 2022. As a result, he brings meaningful insight and expertise on how technology, infrastructure, and cybersecurity intersect within government and private enterprise, further strengthening the Board’s oversight of this important area.”

Examples – Board Committee Oversight

Below, are either direct quotes about oversight or are drawn from example disclosures explaining responsibilities of the committees of the Board:

Example 1:

Audit, Risk, and Compliance Committee oversees the company’s risk management framework and reports to the Board on risk matters, including cybersecurity, data privacy and responsible AI practices.

Example 2:

Technology Committee, among other things, reviews trends that may affect the Company’s strategy, including distributed ledgers, cryptocurrency, Artificial Intelligence and Machine Learning

Examples – Risk Oversight

Example 1:

“Our global data privacy and governance team, in cooperation with the chief data office, also is responsible for our artificial intelligence (“AI”) ethics and governance program, which ensures compliance with AI ethical principles and regulatory requirements in development and usage of AI systems, including generative AI tools. AI governance is integrated with the reporting discussed above.”

Example 2:

“In 2022, the Board’s ERM oversight primarily focused on, but was not limited to, the following areas . . . (ix) our ongoing effort to embed AI, machine learning (ML) and robotic process automation (RPA) into our solutions so that our offerings are at the forefront of offerings that leverage these technological disruptors.”

Corporate Governance

Some companies have made disclosures related to AI under the “social” prong of ESG disclosure, particularly with regard to the company’s human capital initiatives, AI ethics practices and corporate governance initiatives. With the increased focus on the ethical risks associated with AI, several companies have formed working groups or management committees to steward the responsible use of AI.

Example 1:

“Our AI Ethics Board, which is comprised of a cross-disciplinary team of senior [] leaders, co-chaired by [] Chief Privacy Officer and [] AI Ethics Global Leader, reports to the highest level of the company, and works with experts throughout our business to address our most complicated questions. We regularly share our AI Ethics Board governance process with clients and others outside of [] so that we can collectively advance the responsible use of technology. Continuous collaboration with governments, companies, and other organizations has helped us as we embed privacy, tech ethics, and security into our operations.”

A few companies also have made disclosure about their use of AI in the human capital management context, such as to identify opportunities to develop workplace skills. For example:

Example 2:

“[I]n 2022, we launched . . . [an] innovative internal talent marketplace that offers artificial intelligence (AI) powered personalized suggestions to help colleagues identify opportunities that will expand their skillsets in and outside of their current business area, gain visibility to internal jobs, ad hoc projects and mentoring opportunities and empower leaders to achieve business goals by providing access to a broader internal talent pool.”

Company Policies

Some companies have disclosed the adoption of an AI policy or code of conduct. Such policies may, among other things: establish the purpose and scope of the company’s use of AI; establish mechanisms to maintain data privacy and security; deploy mechanisms to prevent bias in the use of AI; discuss board oversight of management-level AI compliance and reporting; provide for periodic AI risk assessments; and establish AI incident response mechanisms.

Example

“We seek to ensure that our use of artificial intelligence in our business and operations is ethical and trustworthy. We emphasize data integrity as key to eliminate bias in the application of AI. We have a global AI Governance Policy and framework, and a cross-functional AI Governance Committee that oversees and governs our use of AI, with the overall aim of vetting and minimizing potential unethical or unlawful biases in AI processes. Pursuant to our AI Governance Policy, for each deployment of AI, our business teams are guided by our AI bias principles and, in many cases, include a risk assessment exercise. Applicable employees also participate in trainings to identify and reduce bias in AI.”

Compensation Discussion and Analysis

A few dozen companies have discussed AI in the CD&A section of the proxy statement. Some companies have incorporated metrics related to AI in their incentive compensation structures. Other companies may highlight AI-related achievements with regard to compensation decisions for executive officers. A paraphrase of various disclosures in one company’s CD&A is below:

Example

The development of data/AI strategy for reduction of supply risk was a component of one executive’s annual performance-based incentive award. This metric was weighted at 20% of the executive’s strategic goals, which in turn comprised 40% of the weight of the executive’s performance-based incentive award.

What To Do Now

Almost all companies need to prepare to meet the challenges and opportunities that AI presents. In the context of SEC disclosure and governance, below are some of the steps companies should be considering.

Enhance AI Disclosure Compliance

- **Conduct a Thorough Review.** Reexamine the company’s AI-related disclosure to ensure that disclosures are accurate, and consider whether additional disclosures are necessary given this emerging disclosure trend and the SEC’s disclosure requirements.
 - **Assess Material Impact.** Identify foreseeable AI issues that could affect your company’s performance and that may be material to an investor’s understanding of your company’s business and financial condition.

- **Update Risk Factors.** Consider areas of risk related to AI and, for calendar fiscal-year end companies update risk factors in the upcoming Form 10-K to be filed in 2024. Risks should be specific to the company and should not be presented as hypothetical if the risk actually has materialized itself.
- **Consider Featuring Management Expertise.** Consider whether to highlight management’s experience with AI, particularly as it relates to cybersecurity. As a reminder, new Item 106 of Regulation S-K requires in Form 10-K a description of management’s role in assessing and managing material risks from cybersecurity threats.
- **Monitor Regulatory Developments.** Stay vigilant to regulatory developments related to AI to ensure ongoing compliance and evaluate for disclosure in SEC filings.

Evaluate Governance

- **Outline Board and Management Oversight.** Clearly define the responsibilities and activities of the board and management concerning AI oversight.
 - **Develop Oversight Framework.** Disclosure of the board’s oversight of AI enterprise risks is particularly recommended for companies that incorporate AI into their core business functions. These companies should consider and develop a board oversight framework and be prepared to disclose this framework in the proxy statement. Such a framework may include:
 - identification of the differing roles of the board and management as they relate to AI oversight;
 - selection of board oversight structure (e.g. full board, committee, or subcommittee oversight of AI);
 - identification of directors with AI expertise;
 - implementation of effective data reporting and compliance systems; and
 - maintenance of robust recordkeeping and documentation processes.
 - **Allow Sufficient Time for Board Engagement.** Ensure the board’s agenda provides ample time, on a regular basis, for oversight of the company’s AI risk management practices and the review of any related public disclosures.
 - **Document Diligently.** Ensure that the board’s AI oversight activities and management’s compliance efforts are well-documented in board minutes and supporting materials.
 - **Reevaluate Board Composition.** Take a fresh look at board composition and director competency. The nominating and corporate governance committee should evaluate the composition of the board as a whole, as well as director skill sets and experiences to determine if the board is comprised of people with the optimal mix to oversee AI issues facing the company.
 - **Update D&O Questionnaires.** Consider updating D&O Questionnaires to include a question about AI experience/expertise.

Establish Company Policies and Foster Education

- **Establish and Update Relevant Policies.** Create or refresh your AI Policy, Code of Conduct, or Acceptable Use Policy to, among other things:
 - govern the use of third-party AI tools;
 - educate employees on the responsible use of AI technologies;
 - assure adherence to pertinent AI-related regulations and standards; and
 - monitor the parameters around use cases to prevent misuse and ensure ethical practices.



- **Implement Training and Awareness.** Implement ongoing training programs to keep all employees abreast of AI policies, ethical considerations, and best practices.

* * *

Please reach out to your regular contact at Weil, Gotshal & Manges LLP with any questions.

Authors

P.J. Himelfarb	View Bio	pj.himelfarb@weil.com	+1 202 682 7208
Julie Rong	View Bio	julie.rong@weil.com	+1 212 310 8201

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