



GOVERNING HEALTH UPDATE from Michael W. Peregrine

For the Board's Governance, Compliance and IT Committees

RE: THE WALL STREET JOURNAL COVERAGE PROMPTS NEW FOCUS ON BOARD OVERSIGHT OF "AI"

A recent series of articles in *The Wall Street Journal* on the use and regulation of artificial intelligence ("AI") offers a useful prompt for the board to evaluate its current oversight of organizational use of AI. It also encourages the Audit Committee to confirm the ability of the compliance program to respond to nascent efforts to regulate such use.

This is especially relevant given that one of the articles in the WSJ series dealt specifically with [the application of AI in the health care industry](#). The other articles addressed [the arguments in favor of regulating AI](#), and [emerging government efforts to implement such regulation](#). These can be read along with an April 10 Op/Ed co-authored by [Dr. Ezekiel Emanuel](#) promoting AI as "a readily available and effective technological approach for helping ensure Americans can get high-quality care."

The board will want to note five key themes arising from the WSJ series:

- First is the rapidly increasing practice of health care organizations to use AI and predictive models to timely provide clinicians with insights from the "voluminous amounts" of available data, in order to improve patient outcomes. That should not come as a surprise to the board.
- Second is the need to identify and mitigate against the most common causes of potential AI failure; i.e. to "understand when AI is not working as intended, and prioritize problems based on whether they are solvable rather than simply what AI tools are available."
- Third is the growing recognition that the risks and uncertainties arising from the business use of AI, and their potential to harm consumers or communities, may need to be addressed by government regulation as opposed to government guidance or by self-regulation.
- Fourth is that in considering new AI regulation, policy makers seek to balance the need to protect the interests of consumers, with the need to encourage innovation and competitiveness.
- Fifth is that initial attempts at regulation are focusing on five key areas, among others: fairness and nondiscrimination, transparency and openness, safety and cybersecurity, privacy protection, and sustainability.

A general awareness of these themes is essential to the basic ability of the board to exercise oversight of, and render informed decisions with respect to, AI matters.

With these articles as a backdrop, the CLO can help identify ways in which board oversight of AI can be supported, and—working in tandem with the CCO—consider enhancements to the compliance program that anticipate the most likely areas of AI regulation. This is particularly important given the potential that AI failure could rise to the level of a "mission-critical risk" under the **Caremark** doctrine. The CLO can also help the board determine whether individuals with specialized AI experience should be recruited for board and committee service.

The U.S. Chamber of Commerce's new AI Commission on Competitiveness, Inclusion and Innovation is expected to release a report this fall on how best to approach AI from a regulatory perspective. Given the likely attention to be paid to this report, it may make sense to confirm the most appropriate board/committee approach to AI oversight before its release.

The overarching board "take-away" from the WSJ series is the urgent need for board oversight of AI to keep pace with its use within the health care system; with the risks associated with such use; and with looming regulatory initiatives at the local, state and federal level. The CLO and CCO, working together, can serve an important board support role on AI matters.