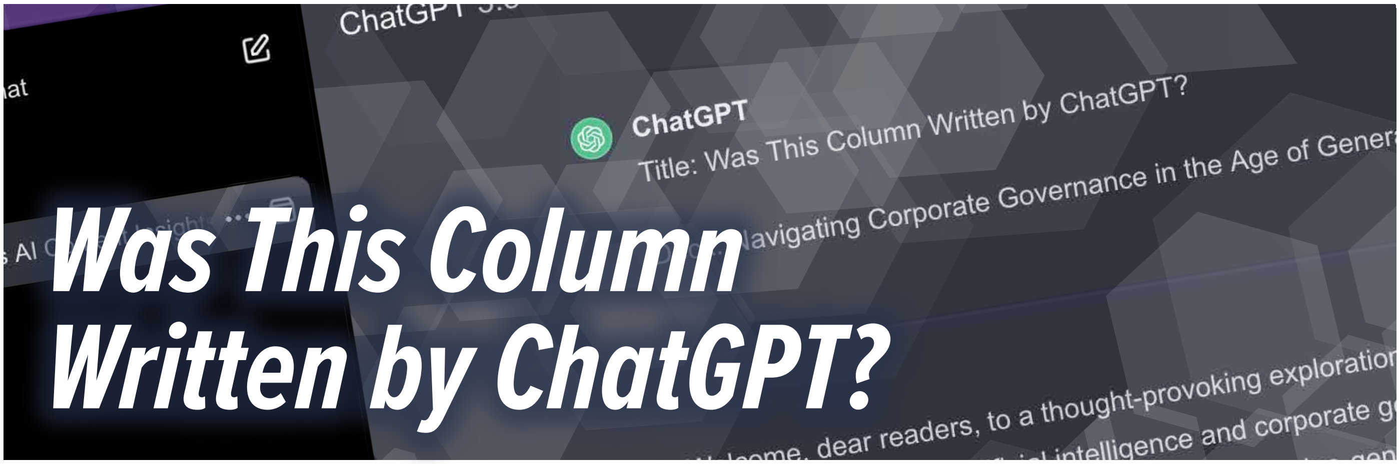

Was This Column Written by ChatGPT?

Navigating corporate governance in the era of generative AI. **BY DOUG RAYMOND**

Over the last year, ChatGPT and similar programs have become ubiquitous. They are authoring sales pitches and other customer interactions, writing legal briefs and scripts for movies and television shows, and editing public speeches and perhaps even columns in journals. These programs rely on generative AI, a rapidly evolving technology that has the ability to produce original content, learn from data and automate decision-making.

As businesses rush to incorporate the revolution that AI brings into their operations, boards face an old and familiar dilemma — should they embrace a potentially transformative technology to enhance business growth and drive innovation and efficiency, or risk being Luddites and tap the brakes on implementing processes that neither they nor their management may fully understand? As boards grapple with this dilemma, they need to assess the benefits as well as the challenges and risks that may accompany a full adoption of generative AI technologies. Trade journals as well as the popular press continually report on the perceived advantages of generative AI, describing how it will dramatically reshape business. But with all of its hailed advantages, this technology brings with it risks such as ethical and regulatory compliance challenges, data security and privacy issues, and potential reputational harm. Others have raised the concern that too many companies may end up relying on a small number of models and data aggregators as they incorporate AI into their business models, raising systemic risks if something goes wrong with those nodes.

As boards consider this new technology and the role it should play in the business, directors (speaking here principally of Delaware corporations) remain bound by their foundational fiduciary duty of care, by making informed decisions based on all material and available information, relying on experts where appropriate; and their fiduciary duty of loyalty, by acting in good faith and on a disinterested and independent basis, with an honest belief that their actions are in the best interests of the corporation and its stockholders, as well as with their duty to provide risk oversight, which is still an evolving obligation. The board's oversight obligations have been the focus of a recent line of cases following *In re Caremark International Inc. Derivative Litigation* (1996), which have described the importance of establishing a board-level system of monitoring and reporting on legal and regulatory compliance and related protocols in highly regulated mission-critical aspects of a corporation's business.

With the increasing presence of generative AI in many businesses, boards should determine what level of oversight they need to assert over how their businesses should adopt these technologies, and with what guardrails and protocols. In fact, many businesses are probably already experimenting with or have adopted generative AI without any board oversight. In developing their generative AI strategy and oversight framework, directors should first identify how the company has engaged with generative AI, how that compares with other players in their industry and whether a further embrace of this technology may be necessary to stay competitive. If generative AI may be material to their business, they should also:

- Understand the capabilities and limitations of generative AI technology for the company and the risks associated with its use, including the privacy and cybersecurity risks that can arise when outsourcing data to third-party platforms and the potential for "algorithmic bias" when using AI decision-making tools (i.e., systemic and repeatable errors that can create unfair outcomes, such as privileging one arbitrary group of users over others and, depending on how utilized, violating antidiscrimination laws). Directors should understand who has access to these technologies and how they are being developed and used, as well as how management is addressing these considerations.

  The board should also receive regular updates from and engage in discussions with management regarding how this technology is used in the business's operations and strategy, as well as the risks that accompany such implementations.
- Follow industry and regulatory developments related to generative AI, making sure that management provides regular updates on how such developments impact the company's use of this technology.
- Ensure that there are appropriate reporting and management oversight frameworks in place to ensure that the company is in compliance with evolving laws and regulations governing generative AI. In doing this, boards may look to the general oversight approach they have applied to other crucial management, compliance and risk topics, including cybersecurity risk management and ESG initiatives. There is no "one-size-fits-all" approach, and this framework will not be uniform among corporations because of the different levels of investment in and use of generative AI technologies. However, it will be particularly important for corporations that have heavily invested in generative AI and where the use of this technology is or may become essential and mission-critical to the corporation's business.

> By adhering to their foundational fiduciary duties and proactively addressing the risks posed by generative AI, directors can support competitive innovation, while mitigating corporate risks.

Directors have a critical role to play in guiding corporations through the opportunities and challenges posed by generative AI. By adhering to their foundational fiduciary duties and proactively addressing the risks posed by this technology, they can support competitive innovation, while mitigating corporate risks. ■

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