

Helping Your Board to Navigate the Next Black Swan Event: Mission Impossible?

Guest and Dorsey Panelists

Peter Carter, Executive Vice President - External Affairs, Delta Air Lines, Inc.

James Chosy, Senior Executive Vice President and General Counsel, U.S. Bancorp

Amy Schneider, Vice President, Corporate Secretary and Securities, Xcel Energy Inc.

Robert Rosenbaum and **Cam Hoang**, Dorsey & Whitney LLP

Program Materials

PowerPoint Presentation

Dorsey Publications

Dorsey eUpdate: *SEC Accelerates Filing Deadlines for Beneficial Ownership Reports by 5% Shareholders, and Further Amends and Guides Reporting Standards*, Christopher Doerksen (October 23, 2023)

<https://www.dorsey.com/newsresources/publications/client-alerts/2023/10/sec-amends-schedule-13dg-requirements>

Dorsey eUpdate: *Prepare to Comply with SEC's Share Repurchase Disclosure Rules*, Cam Hoang (September 21, 2023)

[Prepare to Comply with SEC's Share Repurchase Disclosure Rules | News & Resources | Dorsey](#)

Dorsey eUpdate: *How California's Sweeping New Climate Laws May Impact Your Business*, Megan Houdeshel & Kayla Race (October 17, 2023)

<https://www.dorsey.com/newsresources/publications/client-alerts/2023/10/ca-new-climate-laws>

Dorsey eUpdate: *RIA Regulatory Review*, David Tang & Michael Schmieder (October 16, 2023)

<https://www.dorsey.com/newsresources/publications/client-alerts/2023/10/ria-regulatory-review>

Dorsey eUpdate: *New SEC Cybersecurity Rules Require Mandatory Disclosure*, Randal Jones, Cam Hoang & Robert Cattanaach (September 8, 2023)

<https://www.dorsey.com/newsresources/publications/client-alerts/2023/9/new-sec-cybersecurity>

Dorsey eUpdate: *SEC Proposes Rules to Address Conflicts of Interests Associated with the Use of Predictive Data Analytics*, David Tang & Michael Schmieder (August 17, 2023)

<https://www.dorsey.com/newsresources/publications/client-alerts/2023/8/sec-proposes-rules>

Dorsey eUpdate: *FAQs on the SEC's Prescribed Clawback Policy*, Cam Hoang, Christopher Doerksen, Anthony Epps, James Guttman, Dan Lyman & Dale Williams (June 1, 2023)

<https://www.dorsey.com/newsresources/publications/client-alerts/2023/6/faqs-on-the-secs-prescribed-clawback-policy>

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Guest and Dorsey Speakers



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Agenda

- **Cybersecurity**
- **Artificial Intelligence**
- **ESG and Anti-ESG Backlash**
- **Officer Exculpation**

Cybersecurity

SEC renews focus on cyber governance

- **Investors need more timely and consistent cybersecurity disclosure to make informed investment decisions**
- **New disclosures will be required in the annual report for fiscal years ending on or after December 15, 2023**
 - **Risk management and strategy**
 - **Processes, if any, for assessing, identifying, and managing material risks from cybersecurity threats**
 - **Whether any risks from cybersecurity threats, including from previous incidents, are material**
 - **Board's oversight of risks from cybersecurity threats**
 - **Management's role in assessing and managing material risks from cybersecurity threats**

Are companies prepared for incident disclosure?

- **Material cybersecurity incidents must be disclosed on Form 8-K within four business days of determining that the incident was material**
 - Material aspects of the nature, scope, and timing of the incident
 - Material impact or reasonably likely material impact on the issuer, including its financial condition and results of operations
- **Filings may be delayed only in very limited circumstances**

What is a material cyber incident?

- **Information that a reasonable investor would consider important in making an investment decision, and information that would alter the total mix of information made available**
- **Consider qualitative factors alongside quantitative factors**
 - Harm to an issuer's reputation, customer or vendor relationships, or competitiveness
 - Possibility of litigation or regulatory investigations or actions, including regulatory actions by state and Federal Governmental authorities and non-U.S. authorities

Cyber-oversight target for Caremark duty claims

- Board can't passively wait for "red flags." There's a duty of proactive oversight and supervision.
- Board should have in place "information and reporting systems . . . reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance."
- Liability for failure of oversight requires extreme lack of care amounting to "bad faith": complete failure to have oversight systems in place or consciously ignoring bad things identified by systems.

Caremark claims have survived dismissal

- *In re Wells Fargo & Company Shareholder Derivative Litigation* (N.D. Cal 2017) (creation of customer accounts)
- *Marchand v. Barnhill*, 212 A.3d 805 (Del. 2019) (Bluebell Creameries food safety)
- *In re the Boeing Co. Derivative Litig., No. 2019-0907* (Del. Ch. Sept 7, 2021) (737 MAX airplane safety)
- *In re McDonald's Corporation Stockholder Derivative Litigation*, C.A. No. 2021-0324-JTL at 1 (Jan. 25, 2023) (CHRO/corporate culture condoning sexual harassment and misconduct)

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Artificial Intelligence

What uses for artificial intelligence?

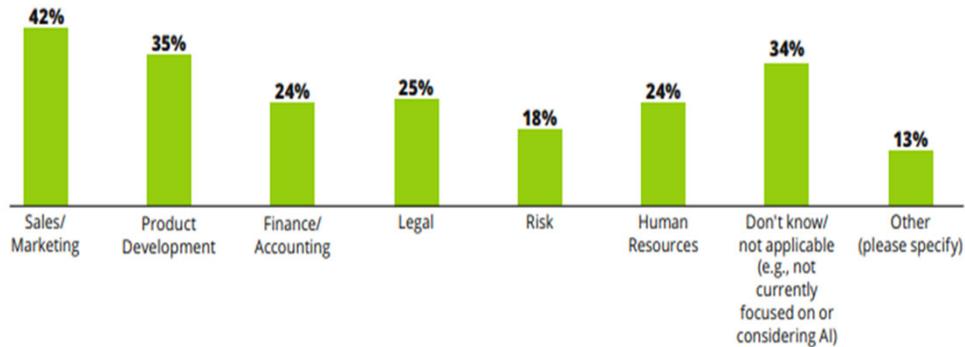


Chart used with Permission from the Society for Corporate Governance

AI risk management framework

- [Artificial Intelligence Risk Management Framework \(AI RMF 1.0\)](#) developed with input from both the private and public sectors as a voluntary, flexible risk framework to “promote trustworthy and responsible development and use of AI systems”
- Characteristics of trustworthy AI systems include being “valid and reliable, safe, secure and resilient, accountable and transparent, explainable and interpretable, privacy-enhanced, and fair with harmful bias managed.”
- Companies called on to establish policies that define AI risk management roles and responsibilities, including for the board

Agencies in the AI scuffle

- California's chatbot law on consumer interactions
- EEOC technical assistance on employment selection processes
- New York City local Law 144 on bias audits
- California Consumer Privacy Act on privacy of employee data
- NAIIA on coordination across federal agencies

Agencies in the scuffle: CFPB, DOJ, EEOC, FDA, FTC and SEC have issued guidance or otherwise indicated through enforcement activity that they view AI as within their current authority.

Considerations for AI policies

- Prohibit certain uses of AI
- Require approval for other uses of AI
- Require tracking of AI usage
- Audit AI work product
- Address disclosure of AI work product
- Regulate AI usage by business partners

AI Minefields

- **Confidentiality of information input into AI, e.g., licensed information, trade secrets, personal information of employees, clients or consumers**
- **Auditing AI work product**
- **Intellectual property rights to AI-generated work product; Intellectual property infringement through use of AI**
- **Discrimination for use of AI to screen applicants and employees**
- **Recordkeeping on AI usage for purposes of internal policies, insurance, contract requirements or regulatory requirements**
- **Disclosure of use of AI**

ESG and Anti-ESG Backlash

Supreme Court decisions on the “S” in ESG

Students for Fair Admissions v. President & Fellows of Harvard College, No. 20- 1199 (U.S. June 29, 2023): Outlawed race-based admissions criteria, with implications for DEI programs adopted in workplaces.

Dobbs v. Jackson Women's Health Organization (2022): Overturned *Roe v. Wade* (1973), which guaranteed a constitutional right to abortion.

Greenwashing claims across industries

- **California Attorney General reached a settlement on utility’s portrayal of natural gas as “renewable.”**
- **SEC fined BNY Mellon and Goldman Sachs over ESG misstatements and policy failures within their investment management units**
- **Britain's advertising watchdog criticism of:**
 - Ryanair calling itself Europe's "lowest emission airline"
 - Lufthansa saying it was "protecting the future"
 - Etihad referring to "sustainable aviation"
- **Delta class action lawsuit over “carbon neutrality” advertisements based on carbon offset purchases.**

ESG shareholder proposals

- In the 2023 proxy season, the number of shareholder proposals soared to a record high: Shareholders filed 836 proposals in the Russell 3000 compared to 801 during the same timeframe in 2022 and 792 in 2021.
- At the same time, average support for shareholder proposals dropped from 31% in 2022 to 23% in 2023, falling in every category: governance, executive compensation, environmental, social, and human capital management (HCM).
- Shareholder proposals from anti-ESG groups increased but continued to perform poorly.
 - Proposals from anti-ESG groups grew sharply: 54 proposals were filed in 2022 compared to 92 in 2023.
 - But support plummeted: 9% in 2022 compared to 5% in 2023.

Officer Exculpation

Officer exculpation, anybody?

- **Now available under DE law, but only with stockholder approval**
- **Applies only to claims for breach of the duty of care, similar to (but not as broad as) protection for directors**
- **Exculpation does not apply to:**
 - Breaches of the duty of loyalty
 - Acts or omissions not in good faith or that involve intentional misconduct
 - Knowing violations of the law
 - Transactions involving the receipt of any improper personal benefits
 - Derivative actions

Stockholder support for exculpation

- **Up to July 5, 2023, 279 proposals**
- **Stockholders approved proposals at 221 (79.2%) companies and did not approve the proposals at 42 of the 279 companies (15.1%)**
- **18 of the 42 proposals that failed required a supermajority vote, 13 of which would have passed had the Delaware default standard applied**

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