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Top Corporate Governance Trends for 2024

Increasing focus on governance practices and oversight requirements will drive corporate governance trends in 2024. General counsel must facilitate discussions with the board and senior leaders to ensure the organization is rising to the challenge and adopting crucial governance frameworks.

Introduction

New laws and regulations, along with increased scrutiny from regulators and other stakeholders, the current risk environment, and emerging technologies, will require organizations to get even more rigorous about formalizing governance practices in 2024. General counsel (GC) are at the forefront of these efforts and can lead the charge in terms of establishing internal frameworks and processes to oversee risk, manage disclosures and ensure adequate internal information sharing.

Figure 1: Top Corporate Governance Trends for 2024

1. **Expanded Duty of Oversight.** Complex set of emerging and evolving risks to manage and oversee. Increased scrutiny on effectiveness of oversight.

2. **Focus On Disclosure Management.** Increased demand for mandatory and voluntary nonfinancial disclosures. Increased scrutiny on accuracy and quality of disclosures.

3. **Enhanced Board Oversight Using AI.** Ability to aid in the board's oversight of strategy and risk by improving information and augmenting risk and strategy assessments.

Source: Gartner

Trend 1:
Expanded Duty of Oversight

Directors' duty of oversight stems from their fiduciary duties. In re Caremark International Inc. Derivative Litigation (Caremark) established directors' duty of oversight.[1] Through Caremark and its progeny of cases, courts have established this duty as requiring a good faith effort to establish board-level reporting or information systems with respect to "central compliance" risks and to monitor those systems, including by addressing "red flags."

Essentially, directors are expected to oversee significant and critical risks and document their oversight of the organization's strategies, policies and procedures adopted to address those risks. Management historically has been tasked with identifying, assessing and managing these risks, which includes regular reporting to the board, and adopting and enforcing escalation frameworks for when material risk events occur.

Why Trending:

Cases brought under Caremark have been on the rise in the last several years.[2] Notably, in 2023, the Delaware Chancery Court expanded Caremark duties to officers through its holding in In re McDonald's Corporation Shareholder Derivative Litigation (McDonald's).[3]

This recent expansion of Caremark duties comes at a time when the U.S. Securities and Exchange Commission (SEC) and other regulators are mandating more extensive risk-related disclosures. Also, prosecuting agencies, such as the U.S. Department of Justice (DOJ), are ramping up efforts to prosecute organizations for failure to establish effective corporate compliance programs.

Lisa Monaco, the U.S. deputy attorney general, was quoted as follows on the DOJ's website.[4]

> "Gone are the days when executives could view corporate enforcement matters as the cost of doing business. In this new era, corporate executives need to redouble time and attention to compliance programs, compensation programs and diligence on acquisitions."
>
> — Lisa Monaco, U.S. Deputy Attorney General

Not only are directors and officers facing a complex set of emerging and evolving risks, but they're facing increased scrutiny on the effectiveness of their oversight of these risks. Examples of emerging and evolving risks impacting this duty of oversight include:

- Legal and Regulatory Compliance: In an FTI Technology and Relativity survey of general counsel (GC), 30% noted that regulatory compliance was the top risk concern for 2024, and 92% of GC responded that regulatory compliance was among the top five risks for 2024.[5] This was largely driven by GC concern over the growing complexity of complying with a fragmented regulatory environment, further driving heightened expectations on corporate compliance programs.
- M&A Activity: Regulators are exercising more oversight and scrutiny of merger and acquisition deals because of antitrust and foreign investment concerns. This increased scrutiny can impact deal timing, increase deal costs and increase the potential for litigation.
- GenAI: While 93% of companies recognize the risks associated with using AI, only 9% say they're prepared to manage this threat.[6] In a survey of GC, 20% mentioned AI in the context of top risks for 2024.[5]
- Cybersecurity: Sixty-four percent of directors ranked cybersecurity and data privacy among the top five board oversight topics in 2023.[7] And 38% of directors believe cybersecurity is the most challenging area for the board to oversee.[8] At the same time, global cyberattacks are rising and the global average data breach cost reached an all-time high in 2023.[9]
- ESG: Environmental, social and governance risks are on the rise, particularly due to the increased action by regulators globally (e.g., the adoption of the Corporate Sustainability Reporting Directive (CSRD) in the European Union (EU)). The rise in regulatory activity is likely why 53% of GC list ESG in their top five risks for 2024.[3]
- Political Environment: Globally, in 2024, people will participate in elections in markets representing approximately 54% of the global population (and nearly 60% of global GDP).[10] This will amplify the existing geopolitical and regulatory uncertainty.[10]

Implications

- As risks continue to evolve and emerge, directors face a barrage of information needed to fulfill their oversight duty. However, directors aren't spending substantially more time in board and committee meetings. This means GC and organizations need to improve the efficiency and effectiveness with which they convey information to the board.
- To oversee risks, directors must have heightened visibility into the efficacy of the organization's risk management system. Organizations must continuously improve their risk resilience through their risk management strategies, particularly by focusing on improving risk escalation frameworks that clearly define triggering events and document formal processes for escalating them.
- Officers need to understand their oversight and management of risks doesn't only require them to establish information reporting systems to gather and report relevant information to the board. It also requires them to identify red flags, ensure information reporting systems are effective at raising those red flags and then either directly deal with the issues or report them to the board.

Actions

Assess the efficacy of risk escalation, reporting and oversight using a checklist (see Table 1).

Table 1: Checklist for Assessing the Efficacy of Risk Escalation, Reporting and Oversight

Action	Oversight Checklist
Evaluate and test information systems and escalation procedures.	• Review how management monitors material risks (i.e., how are they getting information about material risks and how often, and are risks evaluated frequently to assess evolving and emerging risks?). • Review the policies and procedures that detail how issues are elevated to management and the board. Determine whether “red flags” are relevant to the material issues being elevated, whether they are elevated on a timely basis, and whether management and the board are receiving enough information to oversee and evaluate management’s response. If no formal policies and procedures exist, work to adopt such policies and procedures. • Review the mechanisms for the board and senior leaders to receive internal and other whistleblower complaints (i.e., does the whistleblower policy or other policy detail notification, investigation and communication requirements?). • Review the ability of current board committees to effectively oversee material risks (e.g., is there sufficient time and director expertise?). • Review whether crisis response plans are adequate for managing material risks (i.e., do the plans contemplate risk response for both evolving material risks and emerging material risks?).
Reassess the information directors are receiving through both reports and education.	• Consider the leaders and functions presenting to the board (i.e., are the leaders responsible for managing a material risk presenting directly to the board or a committee?). • Review the board and committee agendas to determine if risk owners should be included or if the amount of time allocated to a risk owner needs to increase. • Review how often directors receive reports on mission-critical operations and trends affecting enterprise-level risk. • Review the types and depth of education directors are receiving on material risks and emerging risks. Ask whether the education provides familiarity and expertise, so directors can fulfill their oversight duty, and enables directors to evaluate risk areas and the sufficiency of management’s plans to manage and mitigate the risk. • Consider how the board (or a committee) should receive interim updates (e.g., either through a formal process in which the board receives monthly reports highlighting material financial, risk and operational trends or through an informal process based on a risk escalation framework).
Determine if board and committee meeting minutes document the directors’ diligence in overseeing risk.	• Discussion of mission-critical topics • Discussion beyond financial risks and profits • Receipt of reports on status of material risks (including emerging risks), management’s process for identifying, assessing and managing those risks, and capability of managing those risks • Review of risk appetite and risk tolerance levels, and alignment with the organization’s strategy

Source: Gartner

Trend 2:
Focus on Disclosure Management

In the U.S., Rule 13a-15 of the Securities Exchange Act of 1934, as amended (Exchange Act), requires that SEC registrants maintain disclosure controls and procedures (DCPs). These are designed to ensure information required to be disclosed by the company in its Exchange Act reports is timely recorded, processed, summarized and reported. Simply put, DCPs are the processes used to collect information for disclosures. These processes benefit more than just mandatory disclosures, but all disclosures that inform an organization's disclosure strategy. Effective DCPs ensure the organization is disclosing an accurate, consistent and cohesive narrative.

Why Trending:

The rapidly evolving global regulatory landscape extends beyond financial metrics. Organizations will face increasing demands for disclosures in 2024 as jurisdictions integrate more nonfinancial disclosure in filings and stakeholders demand more transparency. Beyond increases in nonfinancial disclosures, regulators have also established they will bring actions against companies for disclosure failures.

- ESG: Nearly all S&P 500 companies published ESG reports in 2022.[11] And as early as 2025 (using 2024 data), certain entities will be mandatorily reporting under the EU's CSRD (for more, see How to Assess Double Materiality for CSRD). It's expected that 50,000 entities that aren't currently required to report on ESG activities under the EU's Non-Financial Reporting Directive will be affected.[12] In the U.S., California was one state that passed legislation in 2023 mandating certain climate-related disclosures for entities doing business in the state. The SEC is still expected to adopt its own climate-related disclosures. The bottom line is that these various ESG-related disclosures mean multinational companies must baseline their existing nonfinancial data while preparing for various jurisdiction-level requirements.

- Cybersecurity: The SEC adopted cybersecurity disclosure rules in 2023, which will largely impact disclosures starting in 2024 (for more, see SEC's Cybersecurity Disclosure Rules: Actions for General Counsel). Prior to the adoption of these rules, many organizations were already voluntarily disclosing aspects of their cyber risk management and strategy in both SEC or other regulatory filings and annual ESG reports. Organizations are required to comply with these new requirements while coordinating with existing disclosures.

- Regulatory Enforcement: The SEC brought an action against SolarWinds for failure to align its public-facing statements and disclosures with material issues known to executives concerning their cybersecurity program.[13] The SEC also brought an action against Activision Blizzard in early 2023 for failure to establish DCPs designed to ensure that information related to employee complaints of workplace misconduct would be communicated to key employees involved in disclosures.[14]

- SEC Comment Letters: During 2023, the SEC continued a recent trend of issuing comment letters focused on risk factor disclosures related to the effects of geopolitical and macroeconomic challenges.[15]

Implications

- Organizations can be subject to enforcement or other regulatory actions for false and misleading disclosures, including voluntary disclosures (such as in ESG reports). Courts and regulators have demonstrated the willingness to scrutinize the quality of disclosures when crises occur. Organizations can also be sued by shareholders seeking accountability for inaccurate or misleading voluntary disclosures. Beyond the potential financial impact, these types of actions can also lead to reputational harm.
- Voluntary disclosures often don't have the same rigor and processes for assessing and evaluating statements, thereby increasing the risk of misalignment and inaccuracies between voluntary and mandatory disclosures. Organizations must develop, and adhere to, efficient, repeatable processes for making consistent, accurate disclosures, including voluntary disclosures. This means GC and other leaders involved in mandatory disclosures must ensure processes are formalized and documented. They must then share those processes throughout the organization with the individuals collecting information that will form the basis for the disclosures, and ensure that all disclosures, whether mandatory or voluntary, are approved by the disclosure committee.
- Organizations may seek to mitigate these risks by limiting voluntary disclosures to those aligned with the organization's strategic plans and goals, or those most demanded by stakeholders.

Actions

- Ensure key risk owners are members of your disclosure committee, they are collecting the information necessary to assess disclosures, and a formal process is followed for approving disclosures.
- Evaluate how your risk oversight process aligns with your DCPs. Essentially, your DCPs should ensure that the systems effectively oversee material risks (both existing and emerging) and influence disclosure decisions.
- Review and evaluate the types of information collected on material risks throughout the organization and how that information influences and aligns with public disclosures. Ensure DCPs are in place for the risks highlighted in the risk factors section of Exchange Act reports.

Trend 3:
Enhanced Board Oversight Using AI

AI creates original content using text, images and videos from user prompts. Many believe it has the potential to disrupt industries and businesses, though these disruptions have the power to also transform business and how we work. In particular, there is growing potential for boards to use GenAI to provide information that enables more strategic and sound decision-making, which continues to be an imperative due to the board's expanding and evolving oversight role.

Why Trending:

- The GenAI market is poised to grow to $1.3 trillion over the next 10 years from a market size of $40 billion in 2022.[16]
- Many boards already use technologies, such as board portals. However, AI could transform board activities both inside and outside of the boardroom, particularly with improved information sharing and augmented risk and strategy assessments.
- Only 50% of U.S. C-suite executives believe their boards have a good understanding of the impact of digital transformation or emerging technologies on their business.[17]

Implications

- AI's ability to aggregate and analyze data could aid the board in its oversight of strategy and risk. For example, GenAI may improve the depth and applicability of information being provided to the board (e.g., "intelligent assistants"). With the expanding oversight role, information sharing is key for boards.
- Using or incorporating GenAI into board processes and decision making doesn't excuse the board from exercising its fiduciary duties. GC will need to help directors determine how best to leverage efficiencies and other benefits of using GenAI in the context of executing their fiduciary duties in accordance with current law.
- Boards must be apprised of whether information received from management and third-party advisors (such as auditors, legal counsel and consultants) has been produced by GenAI. Where it is GenAI-generated, they must be advised of the assumptions and models used to produce the information. For example, if the board receives a report on risks prepared using GenAI, directors should receive information on how the AI model assessed risk (including inputs, weighting and measurements).

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Actions

- Arrange hands-on training for the board, so directors can understand how the technology works and can draw on that knowledge when fulfilling their duty of oversight. For example, some clients are using microsimulations to train boards on the risk of AI.
- Identify routine-type board processes that may benefit from the use of GenAI. For example:
  - Assessing the types of experiences and skills directors typically possess in your industry
  - Assessing the types of director experiences and skills relevant for the organization's strategic plans, and then assessing existing gaps
  - Gathering information on compensation paid to directors and officers at similarly situated companies (e.g., taking into account board size, committees, company size, industry, geographic areas)
- Consider how GenAI can help management provide more extensive and complete information to the board to aid them in their decision making. For example, consider gathering information:
  - On risks, such as general risks, regulatory risks, legal risks, litigation or enforcement-type risks impacting the organization's market and industry
  - To assess scenario planning and evaluate potential impacts to various parts of the business
  - On stakeholders' needs, preferences and concerns to develop more effective communication and engagement strategies for diverse stakeholders

Changes Since Last Year

Table 2 outlines each of the five trends from 2023, along with a summary and status update.

Table 2: Summary and Status of 2023 Trends

Trend	Summary	Status
Demands for Increased Director Diversity	To meet stakeholders' expectations for increased director diversity, organizations can implement more robust board evaluation processes, increase board size and adopt refreshment policies.	Director diversity continues to increase, but at a slow pace. Although still relevant, this trend is "played out" in the sense that we don't expect organizations to materially adjust their governance strategies in response to this trend.
Alignment of ESG Goals and Incentive Compensation	Public companies are aligning ESG goals to incentive compensation to further progress ESG goals.	Continued benchmarking and client voice indicates that as ESG programs evolve and mature, companies are examining when and how to align ESG goals with incentive compensation. We expect this trend to continue, particularly with how organizations choose to align ESG and incentive compensation.
Privacy and Cybersecurity as ESG Priorities	Organizations are expected to increasingly incorporate privacy, data protection and cybersecurity as material issues in their ESG reports.	We expect more organizations to include privacy and cybersecurity as ESG priorities, partially propelled by the SEC's new cybersecurity disclosure rules and continued fragmentation of privacy regulations. In 2024, we evolved and expanded this into both Trend 1 and Trend 2.
Challenging Political and Social Climate	Organizations frequently navigate the competing interests of contributing money to politicians promoting business policies against politicians promoting social policies.	Given the current geopolitical climate, we expect organizations to continue to navigate these competing interests. 2024 is expected to be the "year of elections" globally. In 2024, we evolved this into Trend 1 and expect geopolitical and political risks to impact organizations and oversight responsibilities.
Increase in Director Time Commitment	Increased legislative and stakeholder demands for greater transparency into business practices and societal impacts significantly impacts directors' increasing oversight role.	Continued legislative and stakeholder demands in 2023 have put pressure on directors' oversight role. For this reason, we have expanded this trend to focus on both risk oversight and the DCP's aspect of the board's oversight duty for 2024.

Source: Gartner

Evidence

[1] In re Caremark International Inc. Derivative Litigation, 698 A.2d 959, Justia.

[2] The "State" of Delaware, Cooley.

[3] In re McDonald's Corporation Shareholder Derivative Litigation, C.A. No. 2021-0324-JTL, Delaware Court of Chancery.

[4] Deputy Attorney General Lisa O. Monaco Announces New Safe Harbor Policy for Voluntary Self-Disclosures Made in Connection With Mergers and Acquisitions, U.S. DOJ.

[5] General Counsel Indicate Tipping Points in Strategy, Technology Adoption and Operations, FTI Technology and Relativity Survey (July and August, 2023). The survey is based on responses of 60 general counsel or chief legal officers.

[6] Report: Only 9% of Companies Prepared to Manage Generative AI Risk, Corporate Compliance Insights.

[7] Americas Board Priorities 2023 — How to Build Resiliency in Uncertain Times, EY.

[8] What Directors Think, Diligent Institute and Corporate Board Member survey (2023), based on responses of 300 public company directors.

[9] Global Cyberattacks Increased 38% in 2022, Security. IBM Report: Half of Breached Organizations Unwilling to Increase Security Spend Despite Soaring Breach Costs, IBM.

[10] Top 10 Geopolitical Developments for 2024, EY.

[11] New Research Shows Mid-Cap U.S. Public Companies Closing Sustainability Reporting Gap in 2022, Governance & Accountability Institute.

[12] CSRD reporting: What You Need to Know, Grant Thornton.

[13] SEC v. SolarWinds Corp. and Timothy G. Brown, October 30, 2023, SEC.

[14] In the Matter of Activision Blizzard, Inc., Administrative Proceeding File No. 3-21294, filed February 3, 2023, SEC.

[15] SEC Comment Letter Considerations, Including Industry Insights, Deloitte.

[16] Generative AI to Become a $1.3 Trillion Market by 2032, Research Finds, Bloomberg.

[17] Board Effectiveness: A Survey of the C-suite, PwC and The Conference Board.

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