

# **Knowing What You Don't Know: Questions Boards Should Be Asking**

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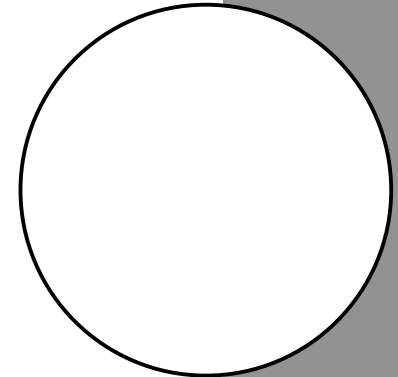
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# Agenda

- BoD Duties & Legal Obligations
- Information Limitations – Knowing What You Don't Know
- Missing the Big Questions?
- Data: Strategy, Privacy & Ethics
- Building Now for the Regulations of Tomorrow
- Bias & Innovation
- Disruptive Risks
- Absence of Experts
- Identifying What's Not Being Asked
- Independent Evaluations
- Growing Knowledge



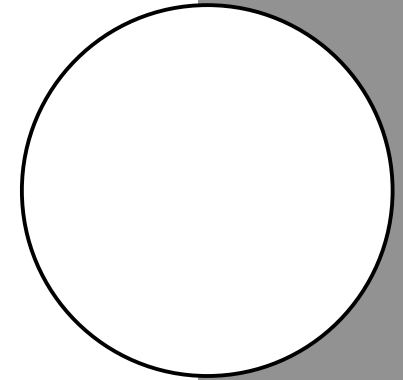
# Boards of Directors – Duties

- *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996),<sup>[1]</sup> is a civil action that came before the Delaware Court of Chancery. It is an important case in United States corporate law and discusses a director's duty of care in the oversight context. It raised the question regarding compliance, "what is the board's responsibility with respect to the organization and monitoring of the enterprise to assure that the corporation functions within the law to achieve its purposes?"
- *Francis v United Jersey Bank*, requires directors to have 'at least a rudimentary, understanding of the business of the corporation [to] become familiar with the fundamentals of the business in which the corporation is engaged.<sup>1</sup>
- OECD Principles of Corporate Governance "The corporate governance framework should ensure the strategic guidance of the company, the **effective monitoring of management** by the board, and the board's accountability to the company and the shareholders."

<sup>1</sup>*Francis v United Jersey Bank*, (198t) 87 NJ 15, 30, 432 A 2d 814, 821-822.

# Boards of Directors – Duties

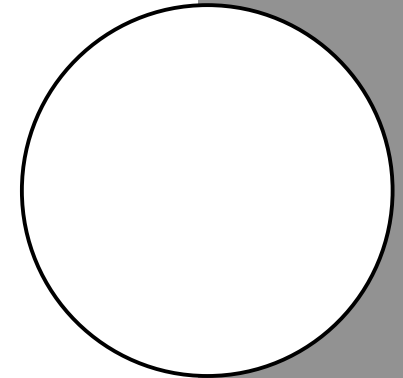
Boards must be able to show, and can be held liable if they are unable to show, that they have made a good faith effort to establish appropriate reporting systems and reporting procedures that enable the board to discharge its oversight responsibilities. This potential liability exposure will be particularly significant with respect to matters that are critical to a company's operations and business.



# Boards of Directors – Duties

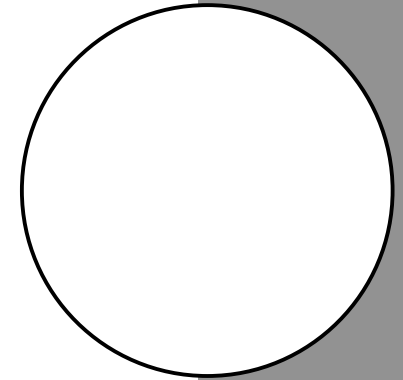
In short, to satisfy their duty of loyalty, “directors must make a good faith effort to implement an oversight system and then monitor it.” *Caremark’s* “bottom-line requirement is that the “board must make a good faith effort – i.e., try – to put in place a reasonable board-level system of monitoring and reporting.”

....in order to demonstrate that they have fulfilled their duty of oversight boards must be able to show that they have made a good faith effort to monitor a critical area of company risk. Data security and privacy clearly are two areas of company risk that for many companies are absolutely critical. The lesson for boards here is not just that boards can be held liable for breaches of their duty of oversight. The lesson here is also that boards should take steps to ensure that they can demonstrate a good faith effort to oversee and monitor company risks – which for many companies will include a company’s data and privacy security concerns.



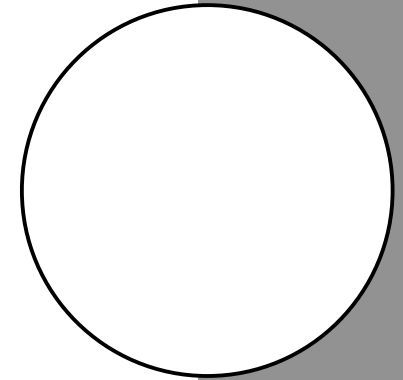
# Technology Information Limitations: Knowing What You Don't Know

- Boards Not Asking the Right Questions
- The Role of Counsel & Compliance Officers
- Expanding Information Horizons
- Technical Competence



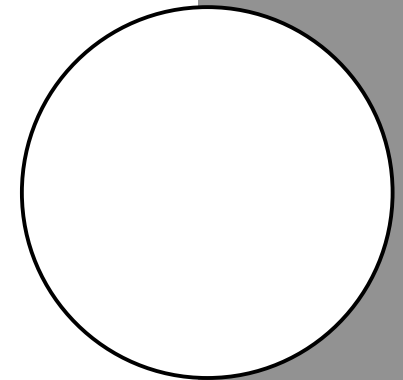
# Missing the Big Questions?

- How does the Board identify what they should be tracking?
- What is being settled for in the absence of meaningful information?
- How questions are framed may pre-determine the answer



# Data: Strategy, Privacy & Ethics

- Benefits and risks in information technologies
- Relationship with state, federal and foreign regulators?
- Readiness:
  - New laws and regulations e.g. CCPA, Ill biometrics law, GDPR developments, new decisions
  - New technologies, e.g., A.I., IOT, robotics, drones, facial rec
- Relevant data ethics developed and developing?
- Privacy – right for company, culture, customers, clients, employees, jurisdictions operated in?
- Security – resources best allocated? Evolving? Continuity?





# Building Now for the Regulations of Tomorrow



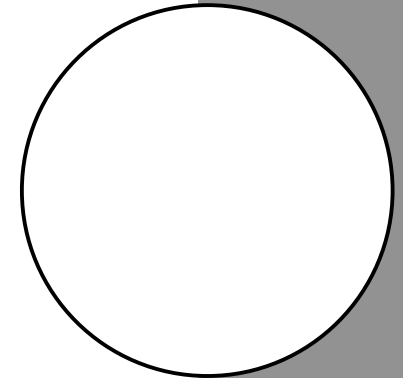
Written by Daniel J. Solove

Illustrated by Ryan Beckwith

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- Aligning Government Affairs, Legal, IT, Strategy, Senior Management, Ops and others for a cohesive projection to Boards
- IT is changing in its role supporting rapid and continuous innovation



# Bias & Innovation

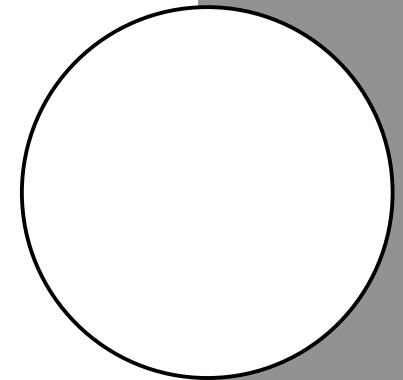


Source: <https://marketoonist.com/2018/04/dataprivacy.html>

- Culture of embracing anything 'new.'
- Technology – solver or creator of problems?
- Reducing the risk of undue bias so that adequate attention is paid to differences in viewpoints that may exist among different executives.
- Board confirmation: management and director bias do not impede innovation?

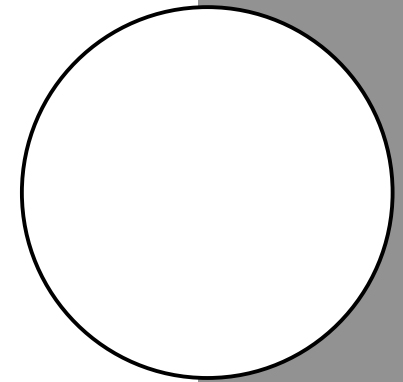
# Disruptive Risks

*“Enterprise risk is more than a risk listing. It requires more than taking an inventory of all the risks in the organization. It is broader and includes practices management puts in place to actively manage the risks.”* [COSO ERM 2017 Executive Summary]



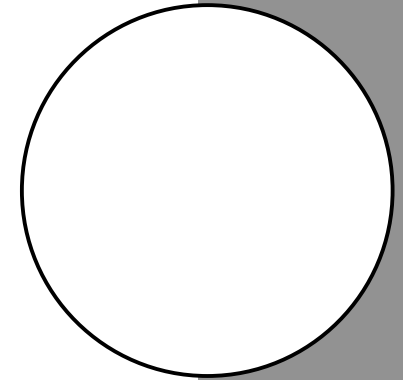
# Absence of Experts – Where Does the Board Get Information?

- Low technology expertise and knowledge on many boards
- Who should the Board be collaborating with?
- Security incidents, current affairs...
- **The need for technologists on boards**



# Identifying What's Not Being Asked

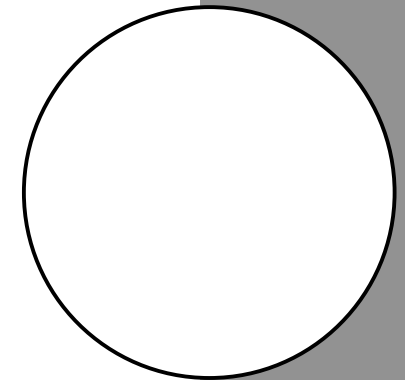
- What external data is the board using to evaluate emerging and disruptive risks?
- What third-party resources are being used to validate the company's risk mitigation on such things as cybersecurity, data privacy and geopolitics?
- Is the board engaged with the company's investors, employees, customers and regulators such that it clearly understands their key views, priorities (which may be at odds) and can appropriately incorporate them into the company's strategy?
- How frequently are business leaders, middle managers and rank and file employees being consulted? By whom?
- Impacts? Employees, future jobs, ethical and reputational, training, are we creating new threats on the home front?



# Growing Knowledge

***In a 2019 survey conducted by Deloitte revealed that only 26% of employees believe their organizations are “ready” or “very ready” to address the impact of disruptive technologies.<sup>2</sup>***

- Keeping information current
- Regular reporting from CIO's & CSO's
- Knowledge of the organization's information assets, competencies and capabilities
- Knowledge of emerging IT trends and capabilities
- Knowledge of the industry and competitor use of IT
- Knowledge of the organization's key information-asset-related business risks
- Regular assessments of balancing opportunities with risks
- Training & Awareness
- Conducting periodic board member skills and competency reviews



<sup>2</sup><https://www2.deloitte.com/us/en/insights/focus/cio-insider-business-insights/boards-technology-fluency-cio-guide.html>

Questions?

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