

2021 Governance Outlook

PROJECTIONS ON EMERGING BOARD MATTERS



A publication of the National Association
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ABOUT THIS REPORT

The *2021 Governance Outlook: Projections on Emerging Board Matters* is designed to give corporate directors and senior executives a comprehensive overview of major business and governance issues that are likely to demand board focus over the coming year. The report begins with an introduction from NACD that highlights survey findings about leading board priorities for 2021 and follows with five partner contributions that provide distinct insights and projections on the following themes: strategic business risks, legal risks, data privacy, M&A oversight, and virtual shareholder engagement.

Each partner contribution provides (1) an overview of key trends in a particular area of governance, (2) an outlook for how those trends will play out in 2021, and (3) relevant implications and questions for boards to consider. The *2021 Governance Outlook: Projections on Emerging Board Matters* is designed as a collection of observations to help corporate boards to prioritize their focus in 2021 and increase their awareness of emerging issues through both detailed topical analysis and coverage of broader governance implications.

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Rethinking the Future of Privacy

Preparing the Board for Growing Consumer Privacy Expectations

Daniel P. Frank, Deloitte & Touche LLP

Boards must continue to educate themselves on cyber risk and privacy concerns as they work to maintain oversight and provide guidance to their management teams.

Prior to the effective date of the European Union's General Data Protection Regulation (GDPR)¹, privacy was largely viewed as a “compliance” exercise, with the ramifications for a lack of “compliance” rarely, if ever, necessitating board-level attention. But when the GDPR became effective, the role of the board in consumer privacy changed significantly, whether you were a European Union-based company or not. In what seemed like the blink of an eye, the impacts of noncompliance suddenly mattered and could not be ignored. The privacy world hasn't been the same since, and it may never be the same again.

Boards must continue to educate themselves on cyber risk and privacy concerns as they work to maintain oversight and provide guidance to their management teams. Boards should be aware of four emerging privacy trends that will impact how they can help organizations manage ever-increasing consumer privacy expectations:

KEY PROJECTIONS

1. The global proliferation of privacy laws and regulations will continue.

GDPR ushered in a new era in privacy laws and regulations with “copycat” laws and regulations proliferating both domestically and globally. The California Consumer Privacy Act (CCPA)² has forced US-based organizations that may not have had to comply with the GDPR to fundamentally rethink their approach to privacy. CCPA-like laws are popping up in the United States at a rapid pace, with 27 out of 50 US states having passed or proposed a full-state privacy law.³ It likely won't be long before each of the 50 states has some version of this law, making the requirements of the CCPA the new “norm.”

The proliferation of privacy laws and regulations, however, does not stop here in the United States. The implementation of laws similar to the GDPR has and will continue to spread globally, as well. Brazil, for example, has passed Lei Geral de Proteção de Dados (“LGPD”), a directive that clearly took inspiration from the GDPR.⁴ Australia, Japan, South Korea, Thailand, Chile, New Zealand, and India have also recently passed or proposed GDPR-like privacy laws. According to a report from Gartner, by 2023, 65 percent of the world's population will have its personal data covered under modern privacy regulations, up from 10 percent in 2020.⁵

Gone are the days when organizations only had to worry about privacy laws in effect in Europe. It won't be too long before adherence to GDPR-like requirements are a necessary part of doing business globally.

¹ See “What is GDPR, the EU's new data protection law?” on gdpr.eu.

² See “California Consumer Privacy Act (CCPA)” on oag.ca.gov.

³ Sarah Rippey, “US State Comprehensive Privacy Law Comparison,” on iapp.org.

⁴ Read the law in English translation: [Brazilian General Data Protection Law](#).

⁵ Susan Moore, “Gartner Predicts for the Future of Privacy 2020,” January 20, 2020.

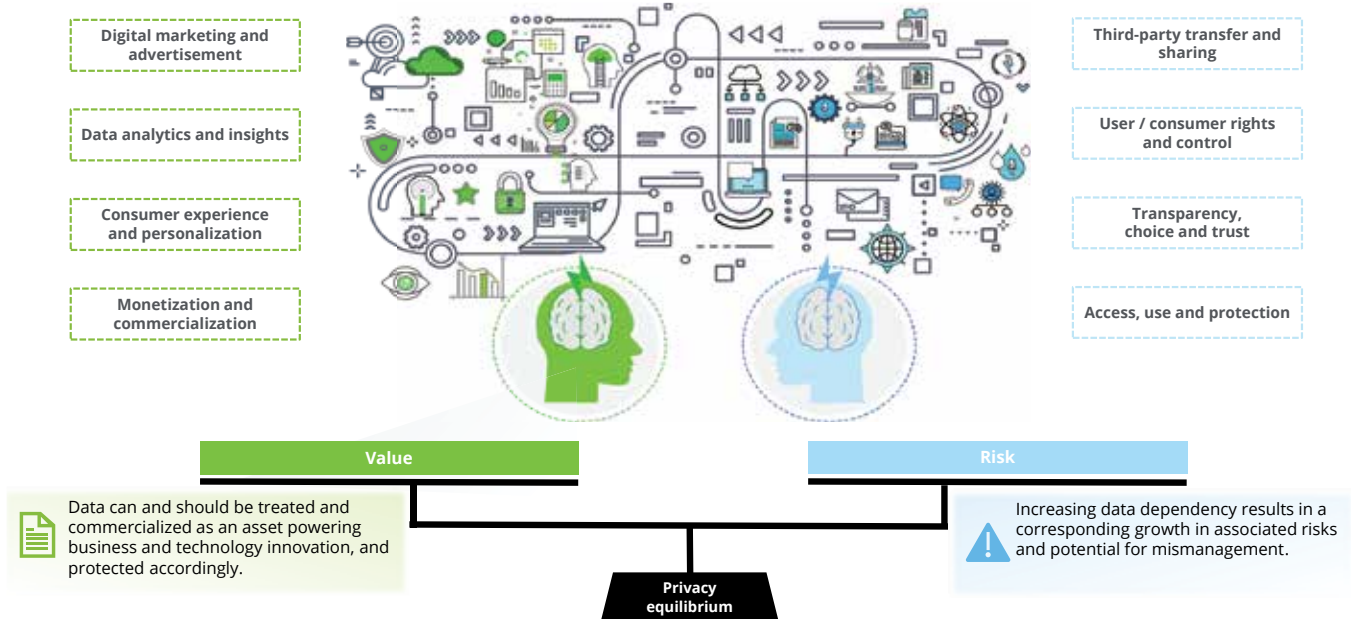
2. There will be an increased focus on data ethics vs. compliance with privacy laws.

While the global proliferation of privacy laws and regulations is certainly garnering organizations' attention, a more important fundamental shift in leading organizations' philosophy on privacy might have an even bigger impact on your business. According to Salesforce's third *State of the Connected Customer* report, 70 percent of consumers strongly associate transparency with trust while 58 percent of consumers are comfortable with relevant personal information being used in a transparent and beneficial manner.⁶ Therefore, increasingly, leading organizations are not just putting privacy capabilities (people, process, and technology) in place because a privacy law or regulation says they have to (i.e., to comply). These organizations are implementing leading privacy practices because they believe consumer trust is instrumental in effectively executing their business strategy and establishing a competitive advantage. Consumer trust, from a privacy perspective is based primarily on two increasingly important organizational data-ethics necessities: full transparency and complete control.

Full transparency means that forward-looking organizations have no secrets when it comes to their consumers' privacy. These organizations are very clear about what personal information they are collecting from their consumers, why they are collecting it, how they are using it, with whom they are sharing it, whether they are selling it (and to whom), where they are sending it (geographically), and how long they are going to keep it. Complete control means that these organizations are putting consumers in full control of how their personal information is shared, sold, moved, or otherwise used. As outlined in the graphic on page 27, this transparency from the organization and the control that the consumer has over their own data helps to balance the data value versus risk equilibrium and increases consumer trust. This allows organizations to do more with their consumers' information, including using it for advanced data analytics, digital marketing and advertising, personalization of consumer experience, and data monetization.

⁶ See Salesforce, *Third Edition: State of the Connected Customer* (2019).

Privacy in the Digital Age Requires Balancing Value and Risk



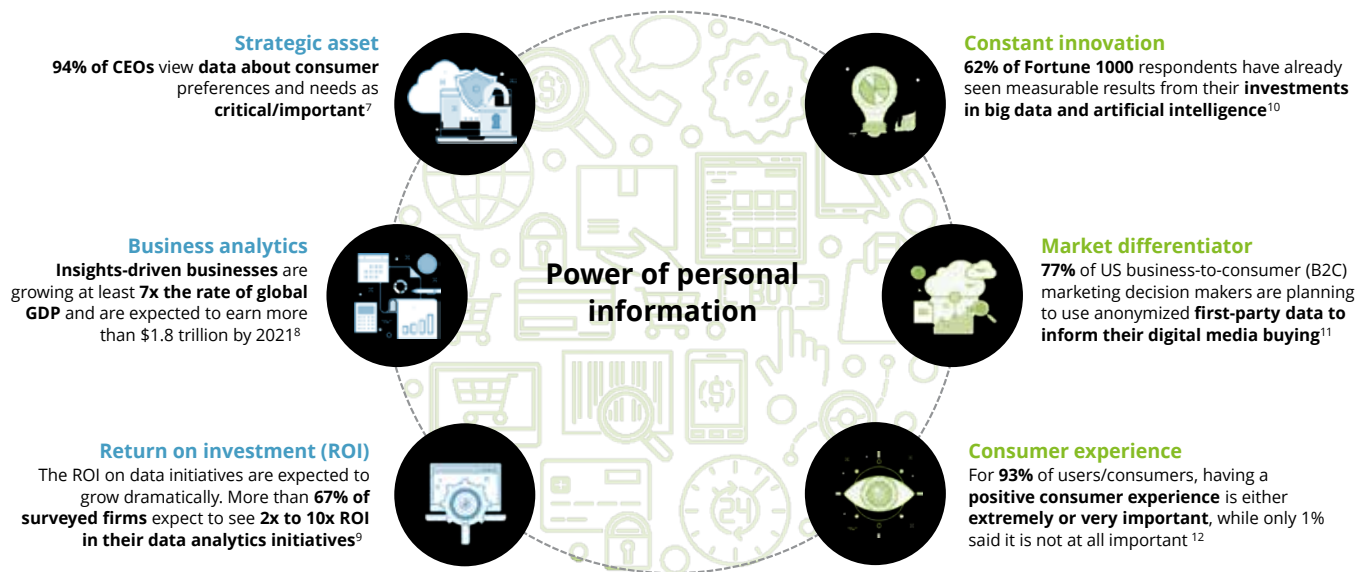
Source: Deloitte.

3. Emerging technology will rely heavily on personal information.

Why are leading organizations focusing on the ethical use of personal information vs. merely focusing on legal and regulatory compliance? The answer is simple: to compete (and candidly, to survive) in today's business world, organizations, regardless of their industry, need to have a substantial focus on emerging technology innovations. As outlined in the graphic on page 28, personal information now powers technology innovation.

As a result of the availability of personal information, we have witnessed the rapid rise of technologies such as artificial intelligence (AI) and machine learning (ML), the Internet of Things (IoT), ad tech and mar tech, fintech, telehealth, etc. These technologies were developed to take advantage of vast quantities of available personal information. Technologies such as these have created unprecedented business opportunities such as data-driven consumer journeys, hyper-personalized shopping experiences, consumer behavior monitoring, and digitized loyalty programs, among others.

Personal Information Powers Both Business and Technology Innovation



Source: Deloitte.

⁷ Andrew Busby, “New PwC Survey Reveals Consumer Data Is the Most Highly Valued,” *Forbes*, March 4, 2019.

⁸ Brian Hopkins, James McCormick, and Ted Schadler with Srividya Sridharan, Carlton A. Doty, Canny Little, Emily Miller, and Jeremy Vale, *Insights-Driven Businesses Set the Pace for Global Growth*, available on Forrester.com, October 19, 2018.

⁹ Forrester, *Unlock the Power of Data to Transform Your Business* (Cambridge, MA: Forrester, 2018), p. 6.

¹⁰ NewVantage Partners, *Big Data and AI Executive Survey 2019: Executive Summary of Findings* (Boston, MA: NewVantage Partners, 2019), p. 2.

¹¹ Joanna O’Connell and Susan Bidel with Mary Pilecki, David Novitzky, and Christine Turley, *Second-Party Data Powers Customer-Focused Advertising: Another Marketer’s First-Party Data Complements and Extends Yours*, available on Forrester.com, March 8, 2019.

¹² Bob Thompson, “An Inconvenient Truth: 93% of Customer Experience Initiatives Are Failing,” on customerthink.com, February 7, 2018.

In the future, organizations that continue to expand their digital interaction with consumers will also need to enhance their data governance capabilities to control personal information use.

4. Businesses' digital focus and excess data collection will continue due to COVID-19.

Unquestionably, COVID-19 has had worldwide consequences that have impacted many businesses, regardless of their industry. The inability to interact with consumers in person has forced organizations to rethink their business model and increase their emphasis on and investment in methods to enable digital interaction with consumers such as websites, mobile apps, social media, etc. While these digital abilities are helping some companies to survive and others to thrive during the pandemic, they are also significantly increasing the amount of data that is collected from and about consumers. This abundance of consumer data can have its advantages, including for use in emerging technologies such as artificial intelligence and machine learning. However, this proliferation of data can also significantly increase business risks associated with its misuse if appropriate data governance practices are not in place. In the future, organizations that continue to expand their digital interaction with consumers will also need to enhance their data governance capabilities to control personal information use.

BOARD IMPLICATIONS

The common thread across these trends is that privacy is becoming increasingly difficult and complex. Boards should understand that while leveraging consumer data is essential to business and technology innovation and growth, it also presents considerable brand risks. Being privacy-aware is therefore essential for today's board members. A study of 1,000 privacy professionals by Thomson Reuters found that 75 percent of board members who are generally engaged on privacy issues still "struggle to understand the implications of data privacy and protection obligations."¹³

Below are some tips to assist board members in helping their organizations to unlock data's potential while managing consumers' increasing privacy expectations:

1. Approach privacy holistically.

Many organizations approach privacy in a very siloed manner. They address each privacy law, regulation, and standard individually, often-times spinning up teams and programs each time a new law or regulation passes. This approach is wildly inefficient, and very difficult and costly to maintain over time. It also promotes localized privacy practices, which can be a recipe for disaster for global organizations where consumers expect the same treatment.

The reality is that while each new privacy law or regulation typically has some differences, at their core, they often require similar capabilities and

¹³ Thomson Reuters, *Why Boards of Directors Need to Engage on Privacy Issues*, June 13, 2019.

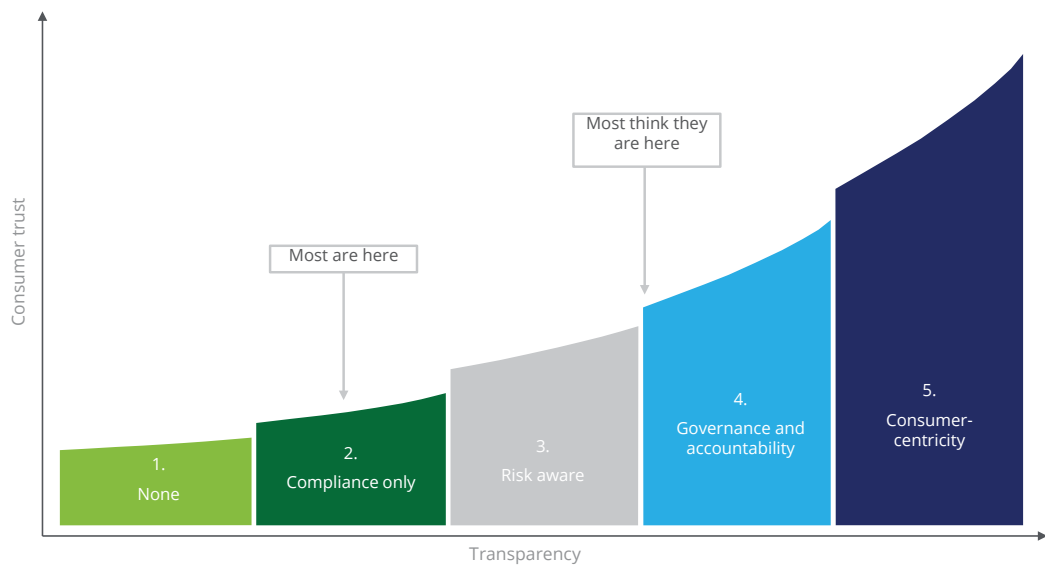
practices. This situation has increasingly been the case over the last four years as GDPR and CCPA copycat laws have been passed. Therefore, boards should work with their management teams to build and implement privacy programs based on what is commonly required across privacy laws in the countries where they operate and only deviate from global standards based on business risk tolerance.

2. Make privacy a part of the organization’s brand.

Oftentimes, organizations approach privacy as a compliance exercise. They check boxes because a privacy law or regulation says they must, putting the bare minimum in place to meet requirements. As outlined in the graphic below, this compliance-only focus frequently leads to an overestimation of the organization’s privacy program maturity level.

The Privacy Maturity Model of the Future

Companies often overestimate the maturity of their privacy capabilities:



Source: Deloitte.

Consumers want organizations to respect their privacy and protect their personal information, not because a privacy law or regulation made them do it, but because it is the ethical thing to do. The privacy model of the future will therefore focus on achieving consumer centricity, where organizational actions are directly influenced by consumers’ privacy expectations. Achieving this level of maturity will take a considerable investment in privacy programs, and many organizations are planning ahead. According to a survey conducted by FTI Consulting, 97 percent of organizations will increase their spending on data privacy in the coming year, with nearly one-third indicating plans to increase their budget between 90 percent

Boards should confirm that their organizations have privacy technology enablement strategies in place to introduce automation into currently manual processes.

and more than 100 percent.¹⁴ Boards should therefore encourage organizations to make privacy a part of the very fabric of their business, their culture, and their brand to create a competitive advantage. For example, some organizations have taken out full-size, privacy-focused ads at airports, while others have made consumer privacy the focus of their commercials.

3. Embed data privacy and governance into new and emerging technology “by design.”

There is no question that business and emerging technology innovation is essential to driving exponential growth. However, due to their use of personal information, emerging technologies are also inherently fraught with data governance, data privacy, and data protection risks. Agile software development and the need for speed to market introduce additional challenges and consistently lead to the protection of consumers’ privacy and personal information being an afterthought. Boards should confirm that their organizations have the people, processes, and technologies necessary to embed privacy and personal information protection controls—such as governance over personal information use, sharing, sale, transfer, and retention—into technology innovation initiatives “by design.” Boards should also ask their management teams to provide metrics related to privacy-by-design consultation requests and for data protection impact assessments for verification of proactive privacy planning related to new technology.

4. Implement privacy technology to introduce automation.

Compliance with the GDPR and CCPA took a significant amount of time and effort for many organizations. The capabilities demanded by the GDPR and CCPA required the establishment of many new processes, as well as updates to existing processes. Unfortunately, in many cases, companies waited too long to begin their compliance efforts. The result was, and in many cases still is, a heavy use of manual, unstructured, documentation-reliant privacy processes (e.g., Microsoft Office products). These manual processes may have worked to check the box and demonstrate compliance in the short term. However, as CCPA-like laws proliferate domestically and GDPR-like laws proliferate globally, these manual processes are unlikely to be sustainable and will become increasingly prone to failure due to unmanageable operational support volumes (e.g., for consumer individual-rights requests). Forward-looking organizations are investing in privacy-enabling technologies, including those that help with data discovery and cataloging, preference and consent management, individual rights management, and compliance monitoring and testing, among others. According to research conducted by Gartner, through 2022,

¹⁴FTI Consulting, “FTI Consulting Survey Shares Data Privacy Budget and Solutions Forecast,” press release on GlobeNewswire, May 19, 2020.

privacy-driven spending on compliance tooling will rise to \$8 billion worldwide.¹⁵ Boards should confirm that their organizations have privacy technology enablement strategies in place to introduce automation into currently manual processes, reduce the likelihood of human error, decrease effort and costs, and increase efficiency. Boards should also ask their management teams for metrics on statistics such as the average consumer individual-rights request response time that demonstrate technology automation's effectiveness and benefits.

5. Flip the script on artificial intelligence and machine learning.

Privacy professionals tend to cringe when they hear the terms artificial intelligence and machine learning. Organizations use these technologies to ingest and process massive quantities of personal information, allowing organizations to make crucial (and in many cases automated) decisions related to consumers and about products to market or advertise, when to advertise them, how to advertise them, etc. This automated decision making can be in direct opposition to consumers' privacy rights, including those related to transparency and consumers' control over personal information processing. But could AI and ML actually be used to provide organizations with privacy benefits versus increased risk? For example, by using AI and ML could organizations ascertain whether consumers' individual-rights requests or preference changes and consent revocations are somehow related to marketing and advertising practices or privacy incidents or complaints?

Boards should encourage their organizations to investigate how AI and ML can potentially be utilized to provide valuable insights into consumer privacy behaviors that result from business practices, which could result in fewer consumer complaints, fewer consumer restrictions on personal information processing, and less-frequent consumer requests for deletion of personal information, among other positive outcomes.

CONCLUSION

Board members are expected to understand consumer privacy expectations well enough to credibly monitor and oversee organizational privacy and brand risks as well as the use of privacy as a competitive advantage. To do this, directors will need to motivate their organizations to approach privacy holistically, focus on data ethics vs. compliance, embed privacy into emerging technologies by design, and implement privacy technologies to automate manual processes. ■

¹⁵ Gartner, "Gartner Says Over 40% of Privacy Compliance Technology Will Rely on Artificial Intelligence in the Next Three Years," press release, February 25, 2020.



QUESTIONS FOR DIRECTORS TO ASK MANAGEMENT TEAMS

- What are we doing to stay ahead of the rapidly evolving legal and regulatory environment around privacy?
 - How does our approach to privacy focus on consumers' expectations vs. the content of privacy laws and regulations?
 - How are we confirming that our use of emerging technologies is being done in an ethical manner and in a way that is consistent with our consumers' expectations?
- What are we doing about the proliferation of sensitive consumer data that has been caused by digital expansion and COVID-19?
 - What privacy technologies are we implementing to introduce automation into currently manual processes, reduce the likelihood of human error, decrease effort and costs, and increase efficiency?



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