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17th Annual D&O Insurance ExecuSummit – When Less is More: The D&O Response to Activist Pressure

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Presentation Speaker

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Co-managing partner of the Miami Gordon & Rees, LLP office and a member of the Labor and Employment, Insurance, and Commercial Litigation Practice Groups. Ms. Symons' litigation and counseling practice focuses on employment practices liability, directors and officers liability, and complex insurance coverage litigation across all lines of insurance. Ms. Symons provides legal counsel and advice to small and mid-size employers, and has served as counsel to the local state court. She has tried numerous employment and insurance coverage cases, and serves as monitoring counsel/coverage counsel for insurers nationwide.

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Ms. Symons also has considerable experience handling commercial litigation and professional liability claims, and has defended employers and managers against employment claims in court and in arbitration. Ms. Symons is listed by Best Lawyers in America and has been rated "AV-Preeminent" by Martindale Hubbell © for over 25 years.

Overview

- Does the concept of exclusive dedication to increase earnings, dividends and share prices—Shareholder Value—align with current business and consumer culture? (And, what happens when companies confront, engage, or resist Stakeholder Activism?)

- Can companies have their cake and eat it, too—or serve two masters—shareholder value and social purpose?

Two Views:

1. The Fiduciary Duty View

Financial stewards such as institutional investors ignore their fiduciary duty when they support public-policy aims which impair value:

- “When stakeholder capitalism demands you be everything to everyone, you become nothing to anyone.”
- Anson Frericks, co-founder of Strive Asset Management, and a former Anheuser-Busch executive, as quoted in the Wall Street Journal, 2023
- “An entity’s greatest responsibility lies in the satisfaction of the shareholders.” (And has no civil responsibility to the society around it—other than as approved by the shareholders.)
- Milton Friedman, New York Times, 1970

Two Views: (continued)

2. The Stakeholder Capitalism View—ESG (Environmental, social and governance): shareholders expect companies to serve a social purpose beyond financial performance.

- A 2004 United Nations report, backed by major banks, made the case that companies that perform better with regard to ESG in a globalized economy can increase shareholder value.
- A 2018 call to arms was made by Larry Fink, CEO, Blackrock
- The SEC lowered the bar for inclusion in annual proxy statements shareholder proposals related to significant social policy issues in late 2021
- Activist shareholders and proxy advisory firms generated a 20% increase in shareholder proposals on social issues since 2021 and a 51% increase on environmental issues.

Legislative Initiatives

- Florida passed a new law in May, 2023 prohibiting state or local officials from considering ESG principles in investing public money, and from issuing EG bonds.

- A “Mind Your Own Business” bill has been proposed to amend the Securities Exchange Act of 1934 which would create a cause of action for aggrieved shareholders to sue directors under breach of fiduciary duty theories over corporate actions relating to certain social policies.

- It’s not likely to become law, but is now part of the national narrative.

Legislative Initiatives (continued)

- Anti-ESG initiatives in Texas were recently the subject of insurance lobbyists measured opposition, because environmental factors van represent significant physical risks to assets and transition risks associated with increased rules and regulations.
- On March 24, 2023, a group of hundreds of companies convened by Ceres released a letter justifying the use of ESG considerations, and calling for freedom to invest responsibly.
- Banking groups have initiated litigation over these issues.
- The intersection of ESG and antitrust is under increased scrutiny by regulators, legislators, and industry participants.

So, Where Are We Right Now? (In a state of flux between the good, the bad, and the clumsy?)

You decide which of these is which:

Example: An inflatable likeness of major insurer's Chief Executive was featured outside the U.S. Open tennis tournament of which the insurer was a sponsor, in 2021, by climate activist protestors, and in 2022, the insurer's response to a shareholder climate proposal included a comment that the company was not aware of any method by which it could reasonably measure [greenhouse gas emissions] of its insureds. In Q1 2023, the company announced a science-based and technical way to help with carbon reduction by requiring in the underwriting process that clients are taking required steps—and that it aims to develop best practices for existing operations but is not mandating blanket underwriting exclusions. These steps include evidence-based plans for methane emission management, and adoption of one or more flaring reduction technologies.

So, Where Are We Right Now? (In a state of flux between the good, the bad, and the clumsy?)

Example: A previously apolitical light beer manufacturer recently partnered with a transgender activity spearheaded by a marketing vice president who claimed that the beverage company needed to be more inclusive and that the beer product's "fratty image" was out of touch. (This initiative followed the establishment in 2020 of an Global Diversity and Inclusion Council, 2021 bias training and individualized D&I dashboards for all senior executives.) Some commenters pointed out that the product in question was already inclusive (or at least it had been, until it wasn't.)

So, Where Are We Right Now? (In a state of flux between the good, the bad, and the clumsy?)

Example: A popular streaming platform declined in 2021 to censor a spicy comedy special after certain employees objected to it on the basis that it was offensive. The company updated its corporate culture guidelines to inform employees that they may need to work on titles they perceive to be harmful, and that if they cannot support the company's content breadth, the company may not be the best place for them.

So, Where Are We Right Now? (In a state of flux between the good, the bad, and the clumsy?)

Example: Conservative investor, David Bahnsen, proposed a resolution calling for an evaluation of JP Morgan's discrimination policies, in response to media reports of debanking of certain conservative or Christian customers. Management and its counsel refused, and an appeal was made to the SEC, which ruled on March 21, 2023 that the proposal was reasonable. It was placed the agenda for the May 16, 2023 shareholder meeting. Mr. Bahnsen argued for the proposal; the Board voted against it.
Scrutiny of the debanking allegations continues, and of the narrative that activism distracts from the core mission to make profits and serve investors and customers.

Where Do Americans Stand?

- In 2021, 63% of corporate executives felt that companies should speak out on social issues, according to a report by the Brunswick Group—but only 36% of the public agreed.

- A recent WSJ poll found that 63% of respondents wished that companies would not take stands on political and social issues.

The Shift in Tone and Focus

- In December, 2022, Vanguard pulled out of a Net Zero 2050 pledge

- Shortly thereafter, a former BlackRock executive, Terrence Keely, argued that an investment manager lacks sufficient clairvoyance to deliver and can't make such commitments without reneging on its fiduciary duties.

- Larry Fink's annual letters to CEOs have morphed from focusing on climate change to focusing on trust, fiduciary responsibilities and the need for people to save and invest for their retirement.

The Shift in Tone and Focus

- Although McKinsey is often credited with establishing a positive correlation between board and executive diversity and company stock performance, McKinsey caveats its own reports (e.g. 2015, 2018, 2020) to say that positive correlations between executive racial or ethnic diversity do not imply causation—data that increased diversity causes improved financial performance is scarce on the ground—although studies by Deloitte, Boston Consulting Group, the Harvard Business Review, and Forbes suggest that more diverse and inclusive companies are more innovative, and therefore, more profitable.

What Can Directors and Officers Do?

- Activist shareholders may continue to press divisive agendas, especially given that proxy advisory firms are unregulated and grass-roots movements sometimes have a flavor of the month approach to outrage. Directors and Officers should leverage the gains their organizations have made to further deliver sustainable value to shareholders.

- Of the 3,000 largest U.S. businesses, racial and ethnic minorities now hold 20% of all board seats for the first time. Of these, 8.3% are Black, 3.6% are Hispanic, and 7.2% are Asian. S&P 500 companies added more Black women to their boards in 12 months spanning 2021 and 2022 than in any similar period in the last 15 years.

What Can Directors and Officers Do?

- The case for neutrality may be especially potent as we approach the 2024 election; a focus on shareholder value can include both unapologetic commitment to DEI and profit-making. The distraction and brand-degradation of a firestorm over ESG issues can have a direct impact on shareholder value—just ask that beer company whose sales are down over 20% the last two consecutive months!

- Take a page from companies who are positioning themselves as thought leaders without issuing hard mandates—they are shaping the national conversation while paying due attention to and and providing incentives for their clients to drive mutual success.


Q&A