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In-House Primer

Hot Topics in Corporate Governance

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Hot Topics in Corporate Governance

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Agenda

- Increasing importance and scrutiny of ESG issues
- Practical considerations around corporate culture issues and oversight
- Increased focus on board oversight of mission-critical enterprise risks (*Caremark*)
- Responsibilities and conduct of gatekeepers

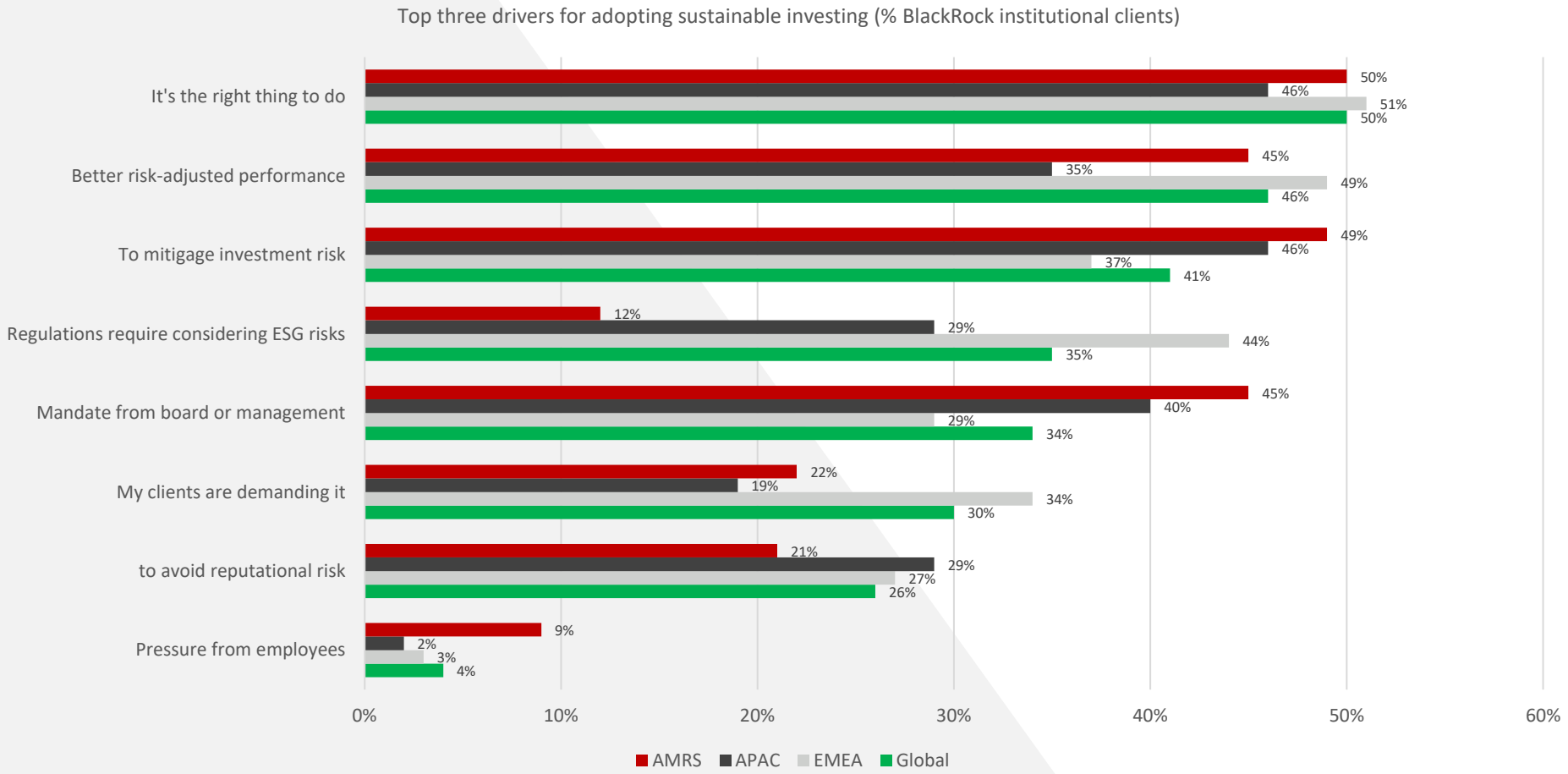
Increasing Importance and Scrutiny of ESG Issues

What Is ESG?

- ESG refers to Environmental, Social and Governance issues that are relevant to an organization
- ESG has evolved from being managed and addressed through an organization's philanthropic and community service efforts to being a critical part of an organization's business success
- ESG has roots in "corporate social responsibility" but is a more rigorous and expansive construct that can apply to all aspects of a business' operations
- The scope of matters within the ESG purview continues to evolve

Why Does ESG Matter?

Investors Care, Driven by Risk Management and Doing the Right Thing



Source: "2020 Global Sustainable Investing Survey," BlackRock, 2020,
https://www.blackrock.com/corporate/literature/publication/blackrock-sustainability-survey.pdf

Stakeholders Make Decisions Based on ESG

Consumers

79%
of buyers are **changing preferences based on sustainability**

36%
of organizations **believe consumers are willing** to make these changes

Employees

61%
believe sustainability is mandatory for companies

46%
would **only work for a company with sustainable business practices**

Limited partners

88%
say they **use ESG performance indicators in making investment decisions**

87%
say they **invest in companies** that have reduced their near-term return on capital so they can **reallocate that money to ESG initiatives**

Bankers

78%
growth in **sustainable debt** to
$465B
from 2018 to 2019

168%
growth in **sustainability-linked loans** to
$122B
from 2018 to 2019

Regulators

European Green Deal climate neutral
by 2050

Disclosure of **EU Taxonomy alignment** by
Dec. 2021

Sources: Capgemini; HP; Edelman; EQT; Bloomberg; European Commission

ESG Developments

- Shareholders, institutional investors, proxy advisory firms, independent organizations and other stakeholders have been increasingly advocating for corporate change with regard to ESG issues, including climate change
- At a federal level, a “whole of government” regulatory approach is being taken, advanced primarily through disclosure (including “shaming disclosure”), often without substantive underlying requirements
- State attorneys general are active in ESG-related enforcement, including with regard to violations of state and federal environmental and employee health and safety regulations
- Activist groups are focusing on enforcing the truthfulness of advertisements for targeted industries (e.g., oil companies), as opposed to outright bans (e.g., Green Peace call to ban fossil fuel ads in the EU)
- Increased volume of derivative suits/220 demands under Delaware law related to ESG matters
- Increasing pressure for companies to address climate change is not limited to the fossil fuel industry
- Non-carbon intensive industries are experiencing pressure from investors, shareholders, peers, and their employees to state positions on climate and commit to action by a date certain
  - Several companies in industries outside of the oil and gas space have made public climate pledges, including financial services, manufacturing, technology and services companies

Is the SEC Now the Social and Environmental Commission?

- The SEC majority does not believe the current principles-based approach for required disclosures is enough or that voluntary disclosures are sufficient due to a lack of comparability across companies
- Thus far in 2022, the SEC has proposed rules on climate-related disclosures and the FASB has undertaken a project to consider reporting human capital expense items (e.g., labor costs/employee compensation)
- Based on Chair Gensler's rulemaking agenda, the SEC is expected to also propose enhanced disclosure rules about:
  - Diversity of board members and nominees
  - Human capital management, including workplace diversity
- During his confirmation hearings, Chair Gensler signaled that the SEC would increase pressure on corporations to disclose their political spending activities, though this may require legislative action
- Enforcement actions have been taken against issuers for ESG disclosures, e.g., against a mining company for claims in its annual sustainability reports about the safety of its dams

Recent Board-Related ESG Disclosure Trends

- Board oversight of ESG matters
  - Evolving board oversight structures – e.g., new committees on ESG, expanded role of compensation committees reflected in new titles (e.g., “HR and Compensation Committee”), and addition of duties to audit committees and nominating and governance committees
  - No “one-size-fits-all” approach
  - Greater board role in reviewing ESG disclosures
  - Shift from compliance mindset to strategic mindset
- ESG disclosures re directors/board matters
  - Beginning in August 2022, all Nasdaq operating companies are required to have disclosed board-level diversity data annually and begin complying with applicable board diversity objectives beginning in 2023
  - SEC climate and cyber proposals would require extensive disclosure of board oversight activities, including whether relevant subject matter experts are on the board
  - SEC Division of Corporation Finance has begun issuing futures comments to companies to expand their risk oversight disclosure (not limited to ESG matters) in future proxy statements

ESG Issues Affect Private Companies, Too!

- Customers want, and may need, to know a company's ESG policies and metrics
- Many large private equity groups have been very vocal about investing based on ESG performance
  - E.g., TPG's The Rise Fund specifically invests in companies driving *measurable* social and environmental impacts
- Some regulations may apply to private companies
  - E.g., EU's Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) regulation and Corporate Sustainability Reporting Directive (CSRD), and the California Transparency in Supply Chains Act
- Employees increasingly seek to work for companies committed to ESG efforts, particularly diversity, equity and inclusion (DEI), community engagement and environmental preservation
- Private companies that are suppliers to public companies with reporting obligations may be requested by those public companies to provide certain emissions information to satisfy potential SEC disclosure requirements
- Proposed SEC disclosures may apply to IPO companies, and advance preparation could mitigate potential, future delays

Practical Considerations – Familiarize and Select from ESG Reporting Frameworks and "Raters and Rankers"

MULTIPLE ESG ORGANIZATIONS FIT INTO FOUR DISTINCT GROUPS:*

1 Frameworks for voluntary* disclosure

- CDSB Climate Disclosure Standards Board
- GRI Empowering Sustainable Decisions
- <IR>
- SUSTAINABLE DEVELOPMENT GOALS
- TCFD
- VALUE REPORTING FOUNDATION SASB STANDARDS

2 Request data from companies via questionnaires

- CDP DISCLOSURE INSIGHT ACTION
- Dow Jones Sustainability Indexes

3 Aggregate publicly available data from companies

- REFINITIV
- Bloomberg

4 Create assessments of companies based on public and/or private information to sell to

- FTSE4Good
- MSCI
- RepRisk ESG data science and quantitative solutions
- TRUVALUE LABS
- SUSTAINALYTICS
- ISS ESG
- S&P Global Sustainable1

Sampling of organizations; not intended to be comprehensive.
Based on a graphic originally published by SASB
*Some jurisdictions are requiring reporting on some issues

Practical Considerations – Common ESG Roles for the Corporate Secretary or General Counsel

- Interface between investors and management on ESG
- Quarterback disclosure process with IR, HR, finance/accounting and other relevant functional groups
- Coordinate establishment of and compliance with disclosure controls around ESG reporting
- Lead on governance structure around ESG initiatives and disclosure
- Review ESG disclosures
- Ensure that the board is informed and exercising appropriate oversight

Practical Considerations – Reporting on ESG Matters

Other Practical Considerations – Cybersecurity Oversight and Governance Recommendations

Review and Revise Policies

- Policies should provide enough detail to support new disclosures, while not offering a roadmap to bad actors or creating litigation risk

Identify and Communicate with Key Players

- If not already specified, consider whether board or committee has cybersecurity oversight
- Put cyber updates on board calendar/agendas
- Does board have a “cyber director”?
- Diligence formal academic and industry credentials of CIO, CISO and “cyber director”
- Companies (and boards) without robust programs and expertise will be exposed to scrutiny

Enhance Controls

- Inventory existing policies and procedures
- Brief responsible parties on legal privilege basics
- Internal education regarding identifying and reporting breaches
- Bring CISOs into disclosure committee process
- Consider cross-functional Cyber Response Team

Other Issues

- Check cyber and D&O insurance policies
- Diligence vendors carefully
- Consider “table-top” cybersecurity incident exercise and “white hat” testing
- Understand peer company strategies

Public companies should monitor for the SEC’s adoption of rules regarding cybersecurity disclosures, expected by April 2023.

Practical Considerations Around Corporate Cultural Issues and Oversight

Board Oversight Developments

- Delaware courts have said claims against directors for breach of the duty of oversight are "possibly the most difficult theory in corporation law upon which a plaintiff might hope to win"
- The chances of success may be increasing—motions to dismiss have been denied in at least five recent cases, most recently against directors of Boeing regarding the two 737 MAX crashes
- Recent litigation underscores importance of creating a record that reflects the board's diligence in (i) establishing appropriate systems, (ii) monitoring those systems and (iii) following up on red or yellow flags
- Matters within the board's duty of oversight and in the crosshairs of shareholder plaintiffs:
  - Cybersecurity
  - Employees, environmental, social and governance matters
  - Regulatory compliance

See slides 21 to 27 for more information on recent duty of oversight developments.

Trends in Board Oversight of ESG – Overview

- Board oversight of ESG matters is an evolving area, with many companies looking to regulatory developments from the SEC for increasing the robustness of their oversight structures
  - See Appendix for an illustrative example of ESG discussion topics for boards and other related content
- Delaware's *Caremark* decision establishes the conditions for director oversight liability:
  - "the directors utterly failed to implement any reporting or information system or controls" or
  - "having implemented such a system or controls, consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention"
- Plaintiffs could allege duty of oversight failures with respect to oversight of ESG-related matters
- Evolving state law requirements around ESG matters places additional mandatory compliance obligations on companies and potential pressures on boards to oversee compliance with these new obligations
  - E.g., Maryland, among other states, has passed board diversity reporting requirements, which captures companies registered to do business in Maryland

Practical Considerations – Selected Oversight Takeaways

- For public companies, several SEC proposed rules would require disclosure of the management and board oversight of governance issues, including cybersecurity and climate change – **begin preparing now and engaging with your board about those potential disclosures**
- For public and private companies, duty of oversight claims are being brought in Delaware with increased frequency – **review minute-taking practices and actual board oversight activities to best position the company should an oversight challenge arise**
- All stakeholders, including customers, employees and regulators, are increasing demands for information about company positions on emerging and often politically charged topics – **silence may not be an option, and dutiful preparation and anticipation should be the new mindset**

Hypothetical

- You're the GC of a profitable financial services company. You're relishing winning major accolades from the local press about your company's success in the face of a challenging industry environment.
- You begin to hear that employees are being told that they would be out of a job if they failed to reach performance goals and "if we did not make the sales quotas … we had to stay for what felt like after-school detention, or report to a call session on Saturdays."
- Reporters begin sweeping through the employee ranks and publishing stories about these practices, purporting that employees may be skirting legal requirements to make aggressive quotas at some local sites. The article insinuates that the practice may be more widespread.
- Your CEO assures you these are isolated incidents, noting that nothing has risen up to senior management about wide-spread issues, and quickly rushes IR to issue a statement denying the accusations and asserting that the company has security procedures to swiftly root out employees who violate laws or bank ethics policy.
- Rumors seem to be quelled for the moment. Should you consider this matter closed, or is more follow-up and board attention necessary?

Hypothetical – Considerations and Takeaways

- Use cautious optimism when asked to join the company bandwagon
- Resist the urge to immediately deny allegations, particularly without having conducted an investigation into the matter
- Consider raising matters that could have future significance, even if not yet:
  - Assume a problem could be worse than initially reported and consider how your board might react to reading about it for the first time on social media or the local press
  - Consider the broader context, including related individual settlements or matters that might bear a connection to the latest matter for assessing the potential scope
- Encourage the board to investigate where things may seem too good to be true or seem immaterial
  - Even situations that pose immaterial financial impacts to remedy may bring about material consequences from regulators, Congress, public opinion or others
- Exercise professional skepticism and gather intel from multiple levels of the organization – the “mood in the middle” may be far different than the tone at the top

Increased Focus on Board Oversight of Mission-Critical Enterprise Risks (Caremark)

Key DE Supreme Court Cases Establishing Duty of Oversight

When a claim of director liability for corporate loss is predicated upon ignorance of liability – creating activities within the company, only a sustained or systematic failure of the board to exercise oversight will establish the lack of good faith that is a necessary condition to liability

Caremark (Sept. 1996)

Stone v. Ritter (Nov. 2006)

Underscores that board's oversight function must be more rigorously exercised with respect to "mission critical" regulatory compliance matters

Marchand v. Barnhill (June 2019)

Establishes standard for holding directors liable for oversight failures:

- the directors utterly failed to implement any reporting or information system or controls ("prong one" claims); or
- having implemented such a system or controls, the directors consciously failed to monitor or oversee its operations thus disabling themselves from being informed of risks or problems requiring their attention ("prong two" claims)

Post-Marchand DE Chancery Court Cases **Denying** Motion to Dismiss

In re Clovis Oncology, Inc. (10/1/19)
Inter-Marketing Group v. Armstrong (1/31/20)
Hughes v. Hu (4/27/20)
Teamsters Local 443 v Chou (8/24/20)

- Post-Marchand DE Chancery Court Cases **Granting** Motion to Dismiss
  - Rojas v. Ellison [JC Penney] (7/29/19)

In re Lending Club Derivative Litigation (10/31/19)
Owens v. Mayleban [Esperion] (2/13/20)
In re GoPro Inc. Derivative Litigation (4/28/20)
Richardson v. Clark [Moneygram] (12/31/20)

Two Recent Chancery Court Cases

In re The Boeing Company Derivative Litigation DE Chancery Court 9/7/21	Fireman's Retirement System of St. Louis v. Sorenson, et al (Marriott) DE Chancery Court 10/5/21
Publicly traded aerospace manufacturer whose new 737 MAX passenger airplane suffered two fatal crashes (one in Oct. 2018 and the second in Mar. 2019) that took 346 lives and led to an extended grounding of the 737 MAX.	Publicly traded hospitality company that in 2018 discovered a data security breach, perpetrated since 2014 through the reservation database of Starwood Hotels and Resorts (which Marriott acquired in 2016). The breach exposed the personal information of approximately 500 million guests. Marriott first received an alert of a potential issue on Sept. 7, 2018 and the board was first informed about the malware on Sept. 18, 2018. Marriott made its first public disclosure on Nov. 30, 2018.

Caremark Prong One Allegations Before the Court

	Boeing	Marriott
Prong One Claims: Utter failure to implement any reporting or information system or controls	Court allowed case to proceed on following allegations: • Board had no committee charged with direct responsibility to monitor airplane safety • Board did not monitor, discuss or address airplane safety on a regular basis • Lack of an internal reporting system by which whistleblowers and employees could bring safety concerns to the board's attention • Absence of process or protocol requiring management to appraise the board of airplane safety issues	Court dismissed claims, finding that demand was not excused because none of the director defendants faced a substantial likelihood of liability on a non-exculpated claim. With respect to the prong one claim, the court said that: • Marriott's board consistently ranked cybersecurity as one of the Company's primary risks • The board and its audit committee were routinely apprised of cybersecurity risks and mitigation and received annual reports on the Company's Enterprise Risk Assessment that specifically evaluated cyber risks • The Company engaged outside consultants to improve, and auditors to audit, corporate cybersecurity practices • Marriott had internal controls over its public disclosure practices • Management provided the board with the information and reports plaintiff described as red flags

Caremark Prong Two Allegations Before the Court

	Boeing	Marriott
Prong Two Claims: Conscious failure to monitor or oversee operation of system or controls	Court also indicated that plaintiffs adequately pleaded a Prong Two claim based on the following allegations: • Board's passive acceptance of CEO's safety assurances following the first 737 MAX crash and after media reports of safety issues In Nov. 2021, the current and former Boeing directors reached a $237.5m agreement (funded by insurance) to settle these claims. Boeing also agreed to hire an ombudsman to handle internal issues and appoint a board member with experience in aviation safety. There was no admission of wrongdoing.	With respect to the prong two claim, the court found that plaintiffs had not "pleaded with particularity that the Post-Acquisition Board learned of legal or regulatory violations. And even if it had, the Board did not consciously choose to remain idle." Specifically, the court said that: • Pleading non-compliance with non-binding industry standards (e.g., PCI DSS) is not the same as pleading directors knowingly permitted violation of positive law • Simply listing statutes "in vague, broad terms" without alleging what law was violated and how is insufficient • There were no properly pleaded allegations of "known illegal conduct, lawbreaking, or violations of a regulatory mandate" • There were no properly pleaded allegations that the board knew personal data was accessed such that state law notification obligations had been triggered prior to Nov. 2018

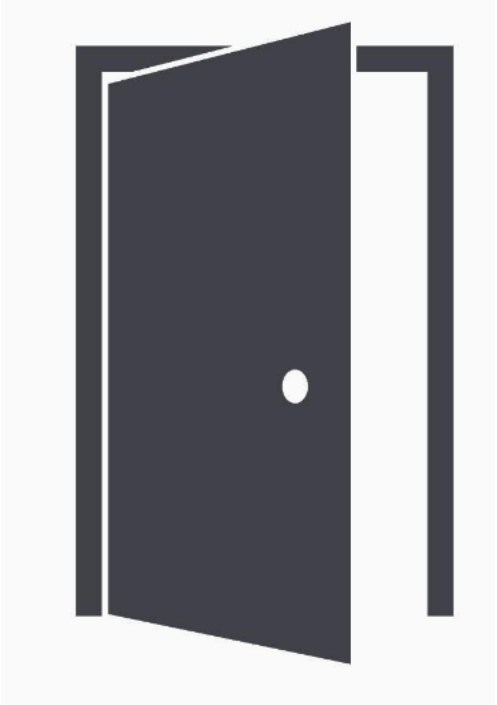
Practical Considerations – Caremark

- *Caremark* cases continue to be brought with some frequency
- Beware of increasing DGCL 220 books and records demands by potential plaintiff shareholders to build duty of oversight claims by trying to identify gaps in board minutes and other materials
- Delaware has suggested that cyber could easily become a "mission critical risk," noting as follows:
  - "*But as the legal and regulatory frameworks governing cybersecurity advance and the risks become manifest, corporate governance must evolve to address them.*[142] *The corporate* ***harms presented by non-compliance with cybersecurity safeguards increasingly call upon directors to ensure that companies have appropriate oversight systems in place***."

Practical Considerations – Mitigating Caremark Exposure

- Board-level policies and company compliance practices and procedures should be thoroughly documented
- Boards should evaluate risk policies regularly and address risks related to company operations, discussions of which should be accurately and timely noted in board minutes
- Companies in regulated industries should consider expertise of board members and/or advisors to assist with assessments of mission-critical risks
- Consider whether appropriate to delegate oversight to a board committee, to which management routinely reports
- Ensure adequate D&O insurance to protect against potential claims – make sure the right policies are chosen

Responsibilities and Conduct of Gatekeepers



Who is a Gatekeeper?

- Regulators take a broad view of who can be considered a gatekeeper
  - E.g., legal, compliance, audit and risk functions
- Anyone serving in a role that can prevent misconduct from happening
- Have those people discharged their duties appropriately?

Hypothetical

- You are the GC of a public technology company.
- You attend and prepare the minutes of audit committee meetings. During one of these meetings, you hear the company's CFO explain that the company was encountering issues with unbilled receivables due to "management changes" at a large customer. Neither you nor the CFO share the additional fact with the audit committee or note in the meeting minutes that the customer did not consider there to be a transaction with the company because a written contract was required, and none had been provided. This fact was also not shared with the company's auditor, and representations were instead made to the auditor that the receivables were all collectable.

Hypothetical

- You are also involved in negotiating a transaction to acquire a business. On the same day, the company entered into a separate transaction to sell a license to the acquired business. The license was purportedly entered into to settle infringement claims that had not been identified until after negotiations to acquire the business had commenced. The accounting for the license fee depends on when the license was negotiated relative to the business acquisition, a fact that you as GC know.
- The SEC is investigating the company for accounting improprieties associated with revenue recognition.

Stay tuned for more…

A Not So Hypothetical Scenario…

In the Matter of Ronald Prague, Exchange Act Release No. 95055 (June 7, 2022)

- The SEC charged the GC with misleading auditors and causing the company to commit disclosure violations. The SEC focused on the GC's role in attending meetings and preparing meeting minutes. In addition, as part of this charge, the SEC took the position that because of the GC's involvement in negotiating the acquisition and license arrangement, he "knew or should have known" from those discussions that the accounting treatment depended upon the cadence of events giving rise to the license sale and that the accounting treatment actually applied was improper.
- As part of its enforcement action, the SEC settled with the company for $12.5 million, with the GC for $25,000, and with other executives, including the CFO and Controller
- In addition to the monetary penalty, the GC is also subject to a cease-and-desist order, including to prohibit him from committing or causing books and records violations

Regulators Are Taking a Fresh Look at the Role of a Gatekeeper

SEC

- "When gatekeepers are living up to their obligations, they serve as the first lines of defense against misconduct. But when they don't, investors, market integrity, and public trust all suffer. **Encouraging your clients to play in the grey areas or walk right up to the line creates significant risk. It's when companies start testing those lines that problems emerge and rules are broken**. And even if that's not the case, the public loses faith in institutions that appear to be trying to get away with as much as they can. That's why gatekeepers will remain a significant focus for the Enforcement Division."
  - *SEC Director of Enforcement Gurbir Grewal, in remarks at SEC Speaks 2021 (Oct. 13, 2021)*

FinCEN

- Has proposed regulations to implement the Corporate Transparency Act, which would require in-scope companies (mostly private companies) to report identifying information to FinCEN about "company applicants" (i.e., persons who file the document that forms the entity and "anyone who directs or controls the filing of the document by another"), in addition to "beneficial owners"

Practical Considerations – Mitigating Gatekeeper Liability

- Government regulators are aggressively focusing on the role of gatekeepers and increasing enforcement
- Compliance activities and the proper observation of compliance controls and procedures are squarely in focus
- Review applicable controls and procedures
  - Assess the need for updates to reflect changes in the law
  - Scrutinize for imprecise wording or extraneous requirements that could result in foot-faults
- Monitor for developing areas of enforcement focus and creative enforcement theories, particularly if advising on novel, uncertain and potentially regulated spaces

Happy Hour

Appendix

E&S Voting Trends

- Shift and recalibration from 2021*
  - On an **absolute basis**, E&S proposals received fewer majority votes in 2022 than in 2021
    - Despite the higher number of E&S proposals submitted to a shareholder vote (~70% increase year-over-year)
    - Number was bolstered by companies making "FOR" recommendations or issuing "No Recommendation"
  - Average support for E&S proposals was generally down from the 2021 proxy season
    - **But**, some sub-categories saw average support increase compared to 2021, including requests for racial justice reporting and values congruency reporting

** Alliance Advisors, 2022 Proxy Season Review (August 2022)*

Debate Regarding "Materiality" of ESG and Regulation of ESG Disclosures

- **SEC materiality**:
  - "[M]aterial if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote"
  - "[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available"

Basic Inc. v. Levinson, 485 U.S. 224 (1988)

- **Non-SEC reporting**:
  - Not within the purview of *Basic's* definition of materiality
  - Some commenters to the SEC's climate risk proposal would like the SEC to adopt an approach similar to double materiality that "focuses on outward effects, rather than effects on an issuer's long-term financial value"
  - Ultimately, use caution when describing ESG topics as being "material"

Evolving Role of the Corporation

- In 2019, the Business Roundtable released a new Statement on the Purpose of a Corporation, with support of 181 CEOs from among largest U.S. companies
  - Purpose of a corporation is to promote "an economy that serves all Americans" with regard to *all* stakeholders (i.e., customers, employees, suppliers, communities and shareholders)
- Changing shareholder demands around ESG are expanding the application of stockholder primacy
  - Delaware case law holds that "within the limits of their discretion, directors must make stockholder welfare their sole end, and that other interests may be taken into consideration only as a means of promoting stockholder welfare"
  - The means of promoting stockholder welfare shift when considering evolving views of investors about the value of a corporation in the marketplace, including vis-à-vis ESG considerations

Selected Insights from Leo Strine

- In a 2021 Iowa Law Review article, former Chief Justice and Chancellor of the State of Delaware, Leo Strine, laid out a "practical approach to implementing an integrated, efficient and effective *Caremark* and EESG strategy"
  - Posits that "private plaintiffs will all take steps to hold corporate America accountable for some of the harm suffered by stakeholders like workers during the [COVID-19] crisis"
  - Connects ESG-related risks to fact patterns that historically have given rise to *Caremark* claims
  - To orient director and management thinking about ESG risk, suggests that as a foundational matter, the most important question to answer is "How does the company make money?"
    - Further questions to analyze are likely to follow regarding salient legal regimes for the company and ESG implications

Selected Insights from Leo Strine – Risk Oversight Takeaways

- "To more effectively and efficiently organize the compliance and EESG function of the corporation, **the board should integrate them and allocate responsibility to committees in a functionally sensible way**. This allocation of responsibility should track the skills needed to do the task well and mirror the way the task is allocated at the management level. **A sensible committee structure will not put all the weight on the audit committee for the most intensive tasks**, and it should not prevent key officers standing in line behind the CFO from getting time with a board committee"
- "For most companies, this will **necessitate creating at least one committee that has risk management, compliance, and EESG functions addressing some critical non-financial areas of concern**, such as environment for an energy company or product safety for a pharmaceutical or food company"

Source: Leo E. Strine, Jr. et al., *Caremark and ESG, Perfect Together: A Practical Approach to Implementing an Integrated, Efficient, and Effective Caremark and EESG Strategy*, 106 Iowa L. Rev. 1885 (2021).

Practical Considerations – Illustrative Example of ESG Discussion Topics Among Boards

- Environmental:
  - Based on greenhouse gas and carbon footprint measurements, how are we achieving carbon neutrality?
  - How are we measuring water use and waste?
  - On the topic of our environmental narrative (which everyone has seemed quick to develop), do we have metrics to back up our progress?
- Social:
  - How are we measuring the achievement of diversity in our organization?
  - How is management impacting the processes that result in those outcomes? Are they examining opportunities for promotions, especially into positions with profit and loss responsibility?
  - What is our impact on local communities?
  - Do those in our supply chain reflect the values of our organization?

Practical Considerations – Illustrative Example of ESG Discussion Topics Among Boards

- Governance:
  - Do we have transparency on how our board governs?
  - Have we set targets on board diversity?
  - Do we have the right set of skills in our boardroom to provide the best independent oversight of the organization and its strategic imperatives?
  - Is there transparency in and a performance orientation to the compensation structure for the CEO and executive leadership?
  - Are our compensation practices aligned with investor and stakeholder interests?

**** Source: NACD BoardTalk (Summary of NACD Texas TriCities Chapter Webinar "2021 Proxy Season & ESG: What Just Happened?")***

The Focus on ESG Has Increased Interest in B Corps

- What is a Benefit Corporation (B Corp)?
  - Businesses that promote social health and environmental responsibility while making an economic profit
- Becoming a B Corp brings heightened incorporation and reporting requirements
  - In DE, for example, the certificate of incorporation must declare the company is a Public Benefit Corporation and provide the specific public benefit the company hopes to achieve
  - Directors must report to its stockholders every two years the activities conducted to achieve such public benefit
  - State law varies greatly on the requirements of a B Corp and can have much stricter rules than in DE
- Certified B Corps are entities that have obtained an optional and rigorous third-party certification run by B Lab, intended to publicly convey that the company is living up to its public benefit mission

Certified B Corporation™

B Corps v. Certified B Corps

ISSUE	BENEFIT CORPORATION	CERTIFIED B CORPORATION
ACCOUNTABILITY	Directors are required to consider impact on all stakeholders	Same
TRANSPARENCY	Must publish a public report of overall social and environmental performance assessed against a third-party standard*	Same
PERFORMANCE	Self-reported	Must achieve minimum verified score on B Impact Assessment of 80 points Recertification required every three years against evolving standard
AVAILABILITY	Available for corporations in most U.S. states; British Columbia, Canada; and a few other countries worldwide.	Available to every business regardless of corporate structure or country of incorporation
COST	Filing fees differ per state/ province. Ranging from approximately USD 70 to USD 350.	B Lab Certification fees range from USD 1,000 to USD 50,000/year based on revenues
ROLE OF B LAB	Developed the model legislation, works for its passage and use, offers a free reporting tool to meet transparency requirements. No role in oversight	Certifying body and supporting 501c3, offering access to Certified B Corporation logo, portfolio of services, and vibrant community of practice among B Corps. Learn more about B Corp Certification.
	*In the state of Delaware, benefit corps are not required to report publicly or against a third-party standard **Source**: https://usca.bcorporation.net/benefit-corporation/	

Speaker Biographies

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Lillian Brown is a partner in the Transactional and Securities Departments and a member of the Corporate Practice Group. Ms. Brown advises clients, including public companies and their boards, on federal securities law compliance and corporate governance matters. She has extensive experience in SEC reporting and disclosure requirements, shareholder proposal and proxy matters, the federal securities laws relevant to control-related transactions, proxy access and shareholder activism and engagement. Ms. Brown regularly counsels public company clients on new and evolving disclosure and governance requirements and practices, including under the Dodd-Frank and JOBS Acts. Ms. Brown works with a diverse range of companies, from Fortune 500 to private companies, spanning multiple industries including financial services, technology, entertainment, consumer products, security, biotechnology and retail.

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Stephanie Evans advises domestic and international clients on a wide range of corporate transactions, with a particular focus on mergers and acquisitions, joint ventures, strategic alliances and financings. She regularly advises boards and special committees in connection with transactions and provides advice on governance and commercial transactions. Her clients include private and public companies in a variety of industries, including financial services, defense and technology. She is active with emerging growth companies throughout their development cycle (see more on Ms. Evans' emerging growth company practice on WilmerHaleLaunch.com). She was previously Vice Chair of the Corporate Practice Group. Ms. Evans also worked as an associate in the Global Investment Banking Group of Deutsche Banc.

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Justin Ochs represents both public and private companies on a variety of corporate finance and other matters. Borrowers, private equity sponsors and financial institutions rely on Mr. Ochs' experience and strategic business advice and turn to him for counsel on a wide range of debt financing transactions. Mr. Ochs successfully represents his clients in matters involving secured and unsecured financings, leveraged buyouts and acquisition financings, bridge loans, first- and second-lien, mezzanine and other subordinated debt, working capital facilities, commercial paper programs and letters of credit. He is also a trusted advisor to clients on mergers and acquisitions and other general corporate and securities matters. Mr. Ochs is a member of the American Bar Association (Business Law Section), the DC Bar Association and the New York State Bar Association. He also serves on the Advisory Board of the Georgetown Law Corporate Counsel Institute.

Zoe Sharp
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Zoe Sharp is General Counsel & Secretary at Optoro, Inc., a company using innovative technology to help its clients manage excess and returned inventory. In that role, she provides counsel in a number of areas, including governance, employment, privacy, security, compliance and software licensing.

Previously she served as Special Counsel to a Board Member at the Public Company Accounting Oversight Board (PCAOB), a nonprofit corporation established by Congress to oversee the audits of public companies. Before PCAOB, Zoe worked as an Assistant General Counsel at Sallie Mae, Inc. and handled a variety of litigation matters. She started her legal career as a judicial law clerk to Judge Sidney H. Stein in the Southern District of New York, and then was an Associate at Williams & Connolly LLP for several years.

Zoe is both a lawyer and a CPA. She is a graduate of Stanford University Law School, holds a master's degree in accounting from American University, and a bachelor's degree from Yale University. She is an adjunct instructor at American University and Georgetown University Law Center.