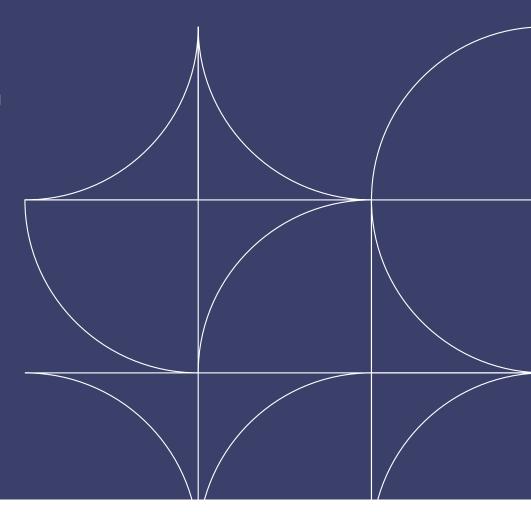


## Navigating the DEI and ESG Landscape: Balancing Opportunity and Risks

May 2, 2023

**Seyfarth Shaw LLP** 

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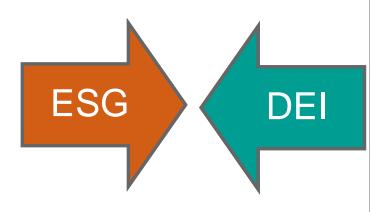
## **Agenda**





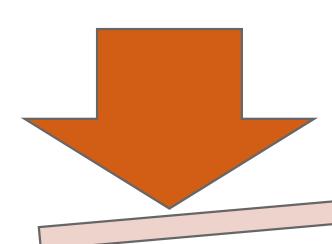


# Leveraging DEI Efforts to Support ESG Strategy



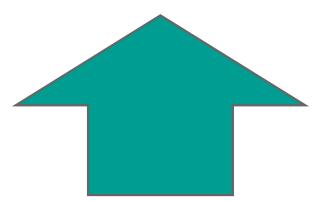


## Risks and Opportunities of Published DEI Strategies

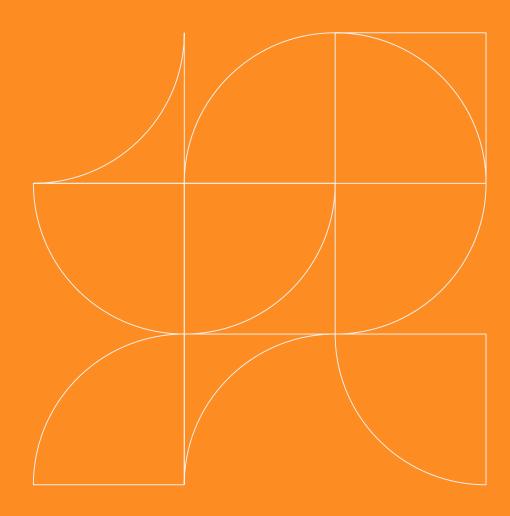


- Setting the Agenda in response to Proactive Shareholder Proposals
- Employee Demands
- Attracting Top Talent
- Response to Consumer Demands
- Strengthening Company Culture
- Competitive Advantage

- "Anti-Woke" Shareholder Measures
- Litigation
  - Shareholder
  - Discrimination claims attacking DEI programs
- State legislative investigations and hearings
- Public response and boycotts



## **ESG Framework**



## **ESG** – Trying to Define it

#### What it is....

8

#### What it is not....

- Amorphous
- Enterprise-wide financial proposition
- A path to develop resiliency and profits
- Integrated with business strategy
- A way to tell potential hires, clients and the marketplace who you are
- Aligned with purpose, mission & values

- A single thing
- An area of law (yet)
- Climate, DE&I, pro bono, data privacy or any other single topic under the umbrella of ESG
- A check the box exercise
- A "do good" business

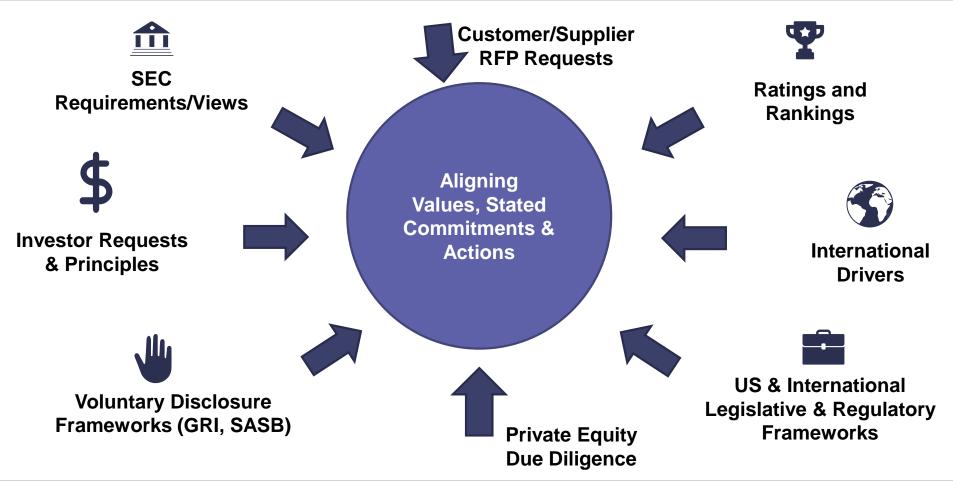
#### **Definitions**

ESG & Impact

A framework for assessing an organization's practices and performance on relevant ESG issues against certain stakeholder-centric factors in furtherance of a sustainable and resilient business

The net effect of an activity on an organization's stakeholders, the well-being of individuals and families and within its value chain

## **ESG** is Everywhere – The Why



## **Organizing ESG**

Interconnectedness of the E, S, G with business strategy & impact

#### **GOVERNANCE**

- ESG oversight
- Policy
- Executive compensation benchmarking
- Board structure & Independence

- Connecting the dots
- Fiduciary duty
- Disclosure oversight
- Business ethics
- ERM

#### **ENVIRONMENTAL**

- Natural resources consumed in operations
- Impact on the environment or climate
- Environmental impact of supply chain
- Climate change and regulatory response
- Emissions tracking and disclosure
- Biodiversity impacts

#### **SOCIAL**

- Board diversity
- Human capital (well-being, fair and equitable pay, health and safety, talent management, inclusion, equity and diversity)
- · Racial equity audits
- Supplier agreements with ESG standards
- Human rights and labor standards and policy
- Community & stakeholder engagement
- Data privacy

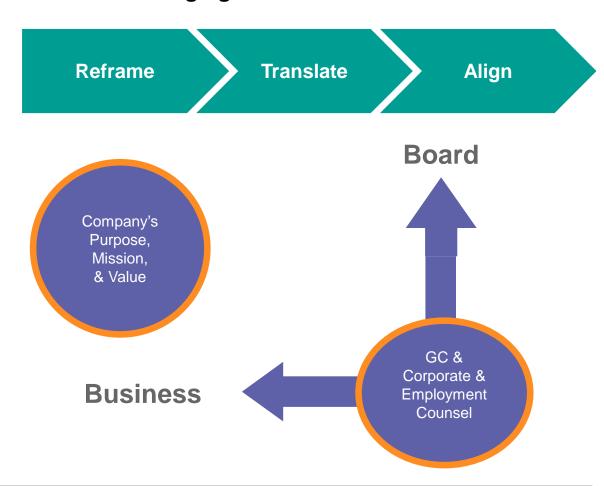
#### **Business Risks:**

- Brand / reputation
- Economic
- Compliance / regulatory
- Operational
- Supply chain
- Physical and transition climate risks
- Human capital
- Human rights

## Primary Legal Risks & Considerations:

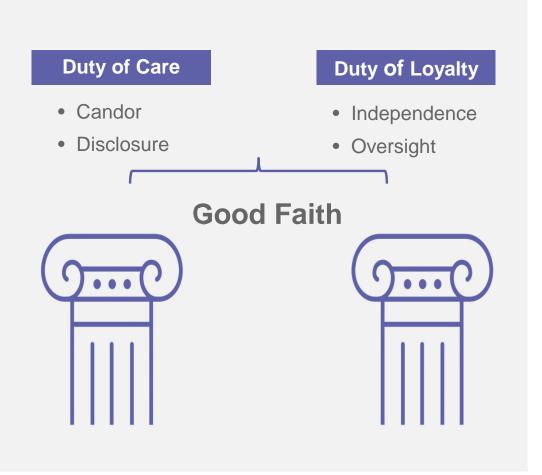
- US federal securities law exposure for materially misleading or false statements in any public report or statement &/or omissions
- US state corporate law breach of fiduciary duty by the board
- Eroding pro-defense strategies

#### **Changing Role of Counsel**

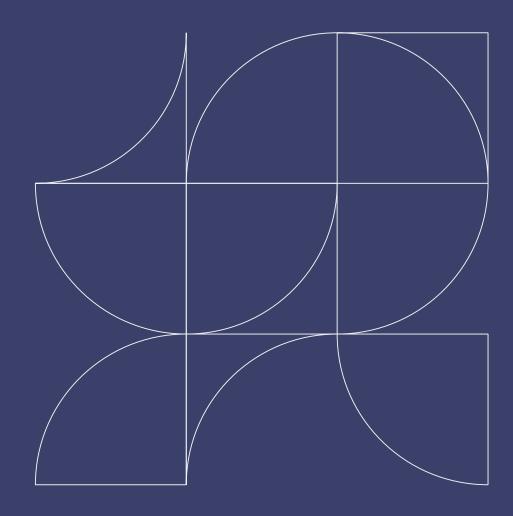


## **US Fiduciary Duties and Governance of the E&S**

- Role of the Board vs. role of management
- Board oversight (Caremark duties)
  - Design information and reporting system
  - Monitor the system
- Changing Landscape
  - Tested in courts
  - Possible extension to officers
  - Relationship to ESG



## Human Capital Management





#### Social

- Human capital
- New SEC Disclosure requirements in 2020
- Second Annual Seyfarth HCM Report
- 2022 Report Insights
  - Board oversight references up
  - Safety still important
  - DEI continues to be important
  - Recruiting and retention focus
  - Benefits



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**Human Capital Management Industry At-A-Glance** 

Haman	Oupitui	management industry At A Sianoc								
	Agriculture & Food	Construction & Real Estate	Energy & Natural Resources (Incl Utilities)	Financial & Insurance	Healthcare & Pharma	Industrial & Manufacturing	Retail	Services	Technology & Telecom	Transportation
COVID-19										
	75%	60%	80%	60%	80%	75%	70%	60%	65%	55%
Culture	<b>O</b>	<b>O</b>		• F50/	000/	750	0		0	• FEO.
Demographics	95%	70%	75%	55%	90%	75%	80%	100%	85%	55%
zemegrapines		•					•			
	70%	40%	65%	75%	80%	50%	30%	50%	60%	70%
Diversity and Inclusion	1000/	050/	100%	0.504	1000/	050/	950/	050/	050/	050/
Employee Health	100%	85%	100%	95%	100%	95%	95%	95%	95%	85%
and Safety	95%	80%	100%	65%	100%	75%	80%	85%	75%	85%
Initiatives	90%	95%	65%	80%	100%	90%	70%	90%	80%	75%
Pay Equity	30%	• 25%	25%	40%	50%	25%	• 25%	25%	40%	10%
Recruiting and Retention	60%	75%	90%	90%	95%	90%	65%	100%	75%	85%
Talent Development and Management								1000/		
Did it mention the	90%	85%	90%	90%	100%	90%	85%	100%	95%	95%
Board or a Board committee as having oversight of human capital?	65%	<b>35</b> %	60%	60%	40%	40%	40%	35%	40%	<b>35%</b>

### **Disclosure Roadmap**

Connect disclosure to purpose, mission & values

- Balance stakeholder interests and consider risks – legal and business
- How will other functions use the information



- What is our strategy on HCM topic X?
- Where are we now?
- Where are we going?
- What data do we have & is it credible/verifiable?

- Create balanced disclosure:
  - Positive & Negative (areas of growth)
  - Quantitative & qualitative

- Reflect actions & commitments
- Look to mature disclosure

## Tying it Together

REFRAME

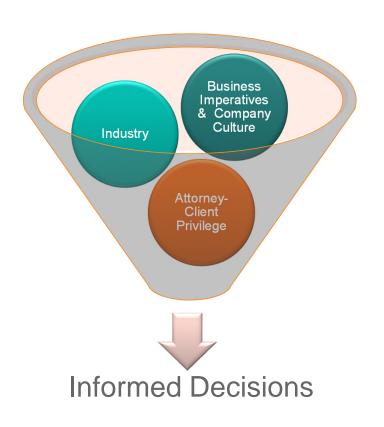
TRANSLATE

**ALIGN** 

#### **Breaking Down Organizational Siloes**



### What Does Transparency Look Like?



What To Share?

With Whom Will You Share It?

How Will You Describe Efforts?

Attorney Client Privilege

## **Best Practices for DEI Related ESG Strategy**



- Know Your Why
- Create a Reasonable Oversight Process
- Create a Cross Functional Team
- Deploy Training
- Consider How Much to Disclose
- Consider Legal Defensibility
- Consider Language Usage
- Consider Privilege Waiver Issues
- Ensure Accuracy
  - statements are credible and verifiable
- Ensure Consistency

## thank you

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