5 Keys to Fiduciary Duties for ESG

ESG is changing the landscape for fiduciary duties. **Is your board ready?**

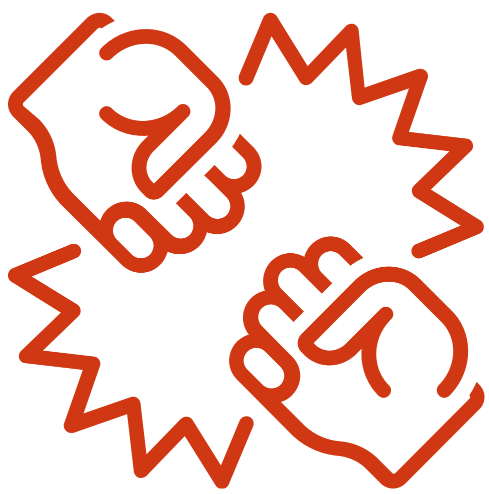
"ESG is the new frontier in defining fiduciary duties."

- *Harvard Law School Forum on Corporate Governance*

Corporate boards are in the spotlight when it comes to ESG.

Investors, politicians, regulators, clients and activists have strong opinions on how corporations should be addressing ESG.

And all too often, these opinions conflict.



Boards must take a step back from the hype and ensure they meet their fiduciary duties in this evolving context.

When evaluating fiduciary duties, courts focus on the decision-making process rather than the outcome.

Boards must evaluate ESG issues with appropriate expertise and apply their best business judgement.

Recording of the decision-making process will help insulate Boards from liability.

Here are 5 key steps to follow . . .

1/ Review Business Context

Boards cannot rely on a cookie-cutter set of solutions for ESG challenges.

The process starts with evaluating how ESG risks and opportunities apply based on:

- Industry
- Locations
- Strategy
- Operations
- Risk profile

And other company-specific factors.

Examples:

Fashion companies must consider consumer perceptions on waste and labor conditions.

Tech companies must consider impact on talent acquisition and retention.

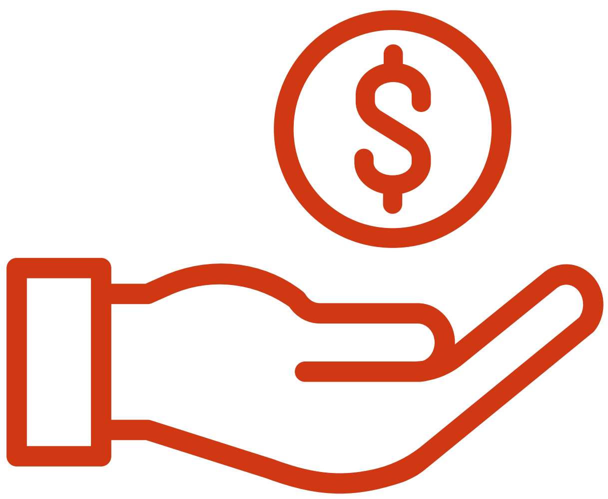
Industrials must consider regulations and opportunties for efficiency.

2/ Develop Business Case

Boards must ensure that that the business case for ESG is closely linked to:

- Shareholder value
- Business opportunies
- Risk mitigation

This is particularly important in the US given the political context of the anti-ESG movement.



3/ Communicate

Building the business case and stuffing it away in Board minutes is not enough.

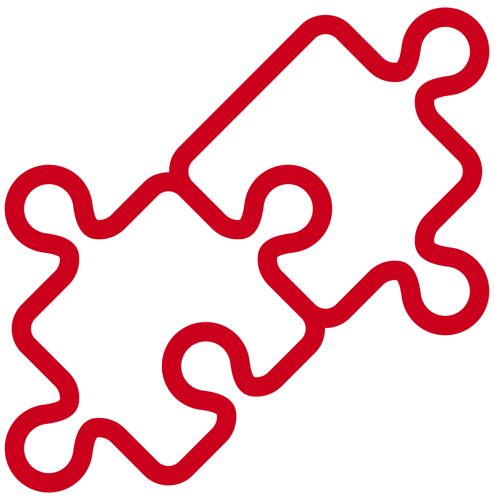
Board members, executives, investors, and other key stakeholders must consistently communicate the business case.

4/ Integrate

ESG actions should not be a separate siloed activity.

Siloed attempts at ESG will not be successful and they are open targets for criticism.

Integrate ESG into business operations, strategy, and budgets across the business.



4/ Document

General counsel must take responsibility for documenting the decision-making process:

- Build time for discussion of ESG into Board agendas
- Consider ESG background in Board composition discussions
- Provide Board education on ESG

Remember - **process matters.**

A note for EU Boards . . .

Under the Corporate Sustainability Due Diligence Directive (CSDDD), directors duty of care will be expanded to overseeing:

- Due diligence requirements
- Climate requirements

This regulatory change requires special attention.

Hello! I am Christine

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