



Corporate Boards Face ESG Pressure From Both the Left and Right

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Key Points

- Companies face pressure from all sides on ESG issues, with advocates pressing their agendas and opponents seeking to rein in diversity and other programs.
- The U.S. Supreme Court's 2023 ruling against race-conscious university admissions policies has encouraged challenges from opponents of diversity programs.
- Often, the challenges involve claims against boards. Increasingly, the disputes are making their way to court.
- Courts have generally deferred to boards' decisions, citing the business judgment rule and saying that boards' judgments about the business pros and cons of ESG policies will not be overruled absent some evidence that they breached their duties.

Over the past decade, environmental, social and governance (ESG) topics have featured heavily in social and political discourse. ESG has also become prominent in the boardroom as directors navigate how best to address ESG-related issues.

Stockholders have weighed in, too, using tools such as stockholder proposals, books and records and litigation demands, and litigation to put pressure on corporations to address or, in some cases, ignore ESG matters. Initially, the claims were left-leaning. More recently, the right has chimed in, buoyed by the [U.S. Supreme Court's ruling in 2023 involving university admissions](#) and by growing anti-ESG sentiment in some quarters.

Though the issues are often charged, courts have been reluctant to let politics invade corporate boardrooms and have deferred to directors' business judgment. Nevertheless, directors and management should remain informed and seek advice on these issues as litigation and other legal maneuvering plays out.

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With the election year in full swing and an ideologically divided country, ESG litigation against boards is not going away anytime soon. But, at the end of the day, a board's business judgment does not have to be perfect and certainly does not have to follow any political trend. It just needs to be made in good faith and in the best interests of the company and its stockholders.

The Left Challenges Board Oversight of Social and Environmental Issues

Early ESG-related claims targeting boards were liberal-leaning and argued primarily that directors were not properly overseeing diversity, equity and inclusion (DEI) initiatives or meeting DEI targets.

Stockholders used various tools:

- Some sought books and records to investigate board action (or alleged inaction).
- Others demanded that boards investigate and take action.
- Still others chose to go straight to the courthouse.

These stockholders sought wide-ranging corporate governance changes, such as removing directors and tying executives' compensation to diversity goals.

This movement coincided with other efforts to promote diversity, such as California's Board Diversity Statute, AB 979, which required public companies headquartered in the state to include a minimum number of directors from "underrepresented communities." However, few of the lawsuits managed to survive the pleading stage. And California's Board Diversity Statute was struck down by a federal district court as unconstitutional in 2023, though appeals remain pending.

Regardless, the challenges on this issue continue.

The Right Chimes In

More recently, bolstered by the Supreme Court's decision in June 2023 striking down race-conscious affirmative action programs in university admissions,¹ challenges to boards' oversight and reactions to DEI and ESG initiatives from conservative groups and individuals have proliferated. (See "[Employers Offering DEI Training Need To Monitor Both Pro- and Anti-DEI Court Challenges and Legislative Proposals](#).") These stockholders have also utilized books and records and litigation demands, and filed lawsuits.

¹ *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* and *Students for Fair Admissions, Inc. v. University of North Carolina*, Nos. 20-1199 & 21-707.

Several companies have been on the receiving end of challenges to their boards' ESG actions alleging that their DEI initiatives violate federal and state anti-discrimination laws. Thus far, these challenges have been unsuccessful.

In some cases, the overtly political aims of the plaintiffs have worked against them when they have targeted boards. For instance, a federal district court in Washington state dismissed a derivative suit challenging Starbucks' DEI hiring initiative,² saying that the plaintiff "is engaged in a nationwide campaign to litigate against so-called 'woke' corporate practices concerning issues of diversity, equity, and inclusion."

In the court's view, the plaintiff "did not file this action to enforce the interests of Starbucks, but to advance its own political and public policy agendas." In addition, the plaintiff failed to allege that Starbucks wrongfully refused the plaintiff's demands that it rescind its policies.

Citing the business judgment rule, the court held that "[t]his Complaint has no business being before this Court and resembles nothing more than a political platform."

A complaint brought against Disney in the Delaware Court of Chancery³ seeking books and records regarding the Disney board's public denouncement of Florida's HB 1557 (otherwise known as "Don't Say Gay" bill) met a similar fate. The stockholder alleged that the directors violated their fiduciary duties and harmed the company by making the public statement in opposition to the Florida law.

The Court of Chancery disagreed and found that the stockholder had not stated a credible basis of wrongdoing and was not entitled to inspect board documents. The court broadly condemned allegations of mismanagement predicated on business decisions, saying that "[t]his suit concerns ... a business decision by the Disney board — a decision that cannot provide a credible basis to suspect potential mismanagement irrespective of its outcome."

The court also rejected claims that the board's consideration of employee concerns came at the expense of stockholders. To the contrary, the court said, it was within Disney's business judgment to conclude that "addressing interests of corporate stakeholders — such as the workforce that drives a company's profits — is 'rationally related' to building long-term value."

² *National Center for Public Policy Research v. Schultz*, No. 2:22-cv-00267 (E.D. Wash.).

³ *Kenneth T. Simeone v. The Walt Disney Company*, 2022-1120-LWW (Del. Ch.).

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Both Sides Challenge Climate Change

The “E” in ESG has also garnered attention. After several years of consideration, on March 6, 2024, the Securities and Exchange Commission (SEC) adopted final climate-related disclosure rules by a 3-2 vote. The rules require both domestic and foreign registrants to make certain climate-related disclosures including, among other things, material climate-related risks and information about board of directors’ oversight of and management’s role in managing climate-related risks.

The SEC’s rules come on the heels of other regulators, including those in the European Union and California, which have already implemented environmental-related disclosure requirements.

The SEC climate-related disclosure rules have already sparked litigation. This remains a developing situation.

Companies Go to Court

At least one company has attempted to use litigation to rein in stockholder attempts to impose ESG initiatives — specifically environmental reforms — via stockholder proposals.

ExxonMobil filed a lawsuit in January 2024 in Texas federal court against two activist stockholders that put forth proposals to be voted on at the annual meeting that would require the company to set targets to reduce greenhouse emissions. The company accused the stockholders of abusing the process by submitting stockholder proposals that interfere with ExxonMobil’s business and “promote their own interests over those of ExxonMobil’s shareholders.”

The stockholders ultimately withdrew the challenged proposal, but ExxonMobil refused to dismiss the case and has asked the court to block the investors from presenting future climate proposals. The stockholder defendants have moved to dismiss.

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