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Foundational Principles in an Evolving Governance Environment

We are increasingly asked for advice about directors' responsibilities in light of the rise in support of stakeholder governance, ESG, and corporate sustainability. These topics are at the top of the corporate governance agenda as a result of recent high-profile developments, including: (1) the Business Roundtable's adoption of stakeholder purpose, (2) the World Economic Forum's renewed strong endorsement of ESG and sustainability, (3) BlackRock's decision to consider sustainability in its investment and voting decisions, (4) the SEC's growing focus on disclosure of significant risks, and (5) the increase in direct and derivative litigation against directors.

In a series of memoranda, we have assessed the legal duties of directors and—equally important—evolving expectations of investors and the public regarding director conduct: [Risk Management and the Board of Directors](#); [Some Thoughts for Boards of Directors in 2020](#); [Stakeholder Governance—Issues and Answers](#); and [Delaware Supreme Court Reaffirms Core Principles of Exculpation and Director Independence](#). Here, we distill these assessments to a core set of operative principles:

1. Absent an apparent reason not to, directors may depend and rely on management's presentation of information and advice regarding ESG, sustainability, and stakeholder-facing issues.
2. Decisions related to these issues made with due care by unconflicted directors are fully protected by the Business Judgment Rule.
3. Oversight of risk management is a fundamental board function, and companies should implement board-level monitoring protocols addressed to "mission-critical" parts of their business.
4. The exculpation provision in a company's charter protects directors from monetary liability—even for actions alleged to be grossly negligent—so long as there is no claim of a knowing breach of duty.
5. With respect to public disclosures, again, directors may rely on information and advice from management, company counsel, and other advisors.

The legal rules as to directors' duties have not changed. What has changed—and what now calls for renewed board attention—are the expectations of investors for greater board oversight and greater opportunity to engage with directors.

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