Green Boardrooms?

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Overview

• Corporate/securities law and climate change
• Disclosure
• Shareholder engagement
• Fiduciary duty
• Future possibilities
Corporate/securities law and climate change

• Corporate governance debate
  • Long-term shareholder value
  • Friedman on maximizing profits
  • Stakeholder proponents

• Environmental debate
  • Pragmatic middle
  • Focus on other legal regulation
  • Corporate reform towards sustainability

• Methodology
  • Comparative (US/Australia)
  • Interviews
Disclosure

• Limited mandatory disclosure
• Proliferation of private standards
• Interviews:
  • Inconsistency, highly mixed quality
  • Customers and employees, not just investors, as targets
  • Little evidence of much effect on outcomes yet
    • Difference in optimism on company and side
  • Australia similar, but more consensus on TCFD
Shareholder Engagement

- Formal (Rule 14a-8 shareholder proposals) and informal
- Big Three, pension funds, activists
- Legal developments
  - 14a-8: limits on shareholding for proposers
  - Ordinary business exclusion
  - ERISA fiduciary rules
- Interviews:
  - Growth in both types of engagement, 2-way interaction
  - Various types of proposals
  - Limited effects so far
  - Australia: longer history of informal engagement, fewer resolutions
Fiduciary Duty

• Caremark duty to oversee legal compliance
  • Extremely difficult for plaintiffs, but some movement in recent cases
• Interviews:
  • CC effects still too far off for some businesses
  • Much variation in how monitoring handled at board and officer level
  • Trend towards CC expertise at board level
  • Threat of suit not on radar screen
  • Australia: settled case against superannuation fund, prominent legal opinions, suggest duty may have traction, but practice still highly variable
Future Possibilities

• Framework:
  • Some support for all 3 corporate governance positions
  • Strong stakeholder reform v. pragmatic long-term shareholder value reform

• Disclosure:
  • Strong: New statute, agency, materiality tied to stakeholders
  • Pragmatic: New SEC regs (SASB?), materiality tied to financial

• Engagement:
  • Strong: Stakeholder empowerment
  • Pragmatic: Roll back Trump rules, suggestions for SH proposals

• Duty:
  • Strong: Duty to avoid environmental harm
  • Pragmatic: Potential for Caremark?