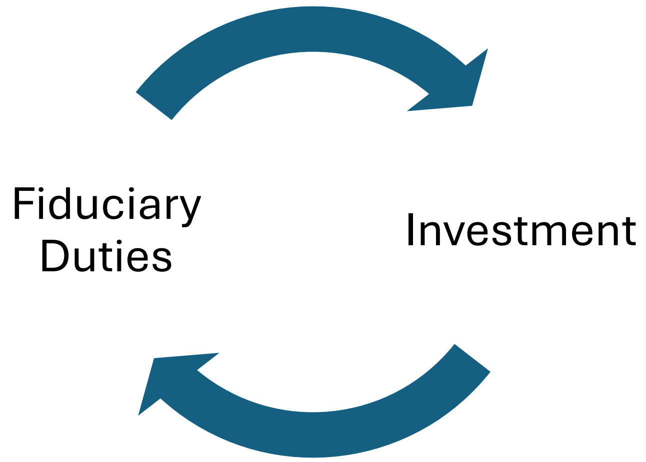
The ESG Exception to Fiduciary Duties

Asian Corporate Law Forum 2024

Singapore Management University

Fiduciary Duties



- Directors and asset managers, acting as agents of shareholders and investors, are subject to fiduciary duties, and must act in the best interests of the company which would effectively extend to the best interests of shareholders/ investors.
- The duty of care requires a reasonable level of skill, diligence, and good faith in their decision-making processes
- The duty of loyalty mandates that directors and officers prioritize the best interests of the company and its shareholders while avoiding personal conflicts of interest
- The duty of disclosure necessitates that directors and officers provide shareholders with material information

Is ESG violative of Fiduciary Duties?

- The duty of loyalty, inclusive of the duty of sole benefit interest, requires that fiduciaries act in the sole interest of their beneficiaries
- If fiduciaries were to act upon their ethical, environmental and social values, that would violate their fiduciary duties
- This leads to what most detractors refer to as ‘values based’ investing as opposed to ‘value based’ investing

Adjusting fiduciary duties

United Kingdom	Australia	Singapore	India
Regal (Hastings) Ltd v Gulliver Section 180(4)(a) of the UK Companies Act 2006	*Hospital Products Ltd. v United States Surgical Corporation* *ASIC v. Citicorp*	*Raffles Town Club Pte Ltd v Lim Eng Hock* Peter	Section 166 (2) of Indian Companies Act 2013 Corporate Social Responsibility

Creating the Exception

UK and India both have statutory clauses that

- Allow shareholders to ratify deviations from fiduciary duties
- Enable directors to consider stakeholder benefit

In fiduciary relationships that are born out of contract, the contract is central to the relationship

Where the contract ends, parties’ rights are guided by fiduciary duties

Conclusions

- ESG based decision making is not violative of fiduciary duties if
  - Beneficiaries consent to ESG based decision making and acknowledge the possibility of lower returns
- This is made simpler if the applicable statute or common law allows for shareholders and investors to ratify deviations from fiduciary duties