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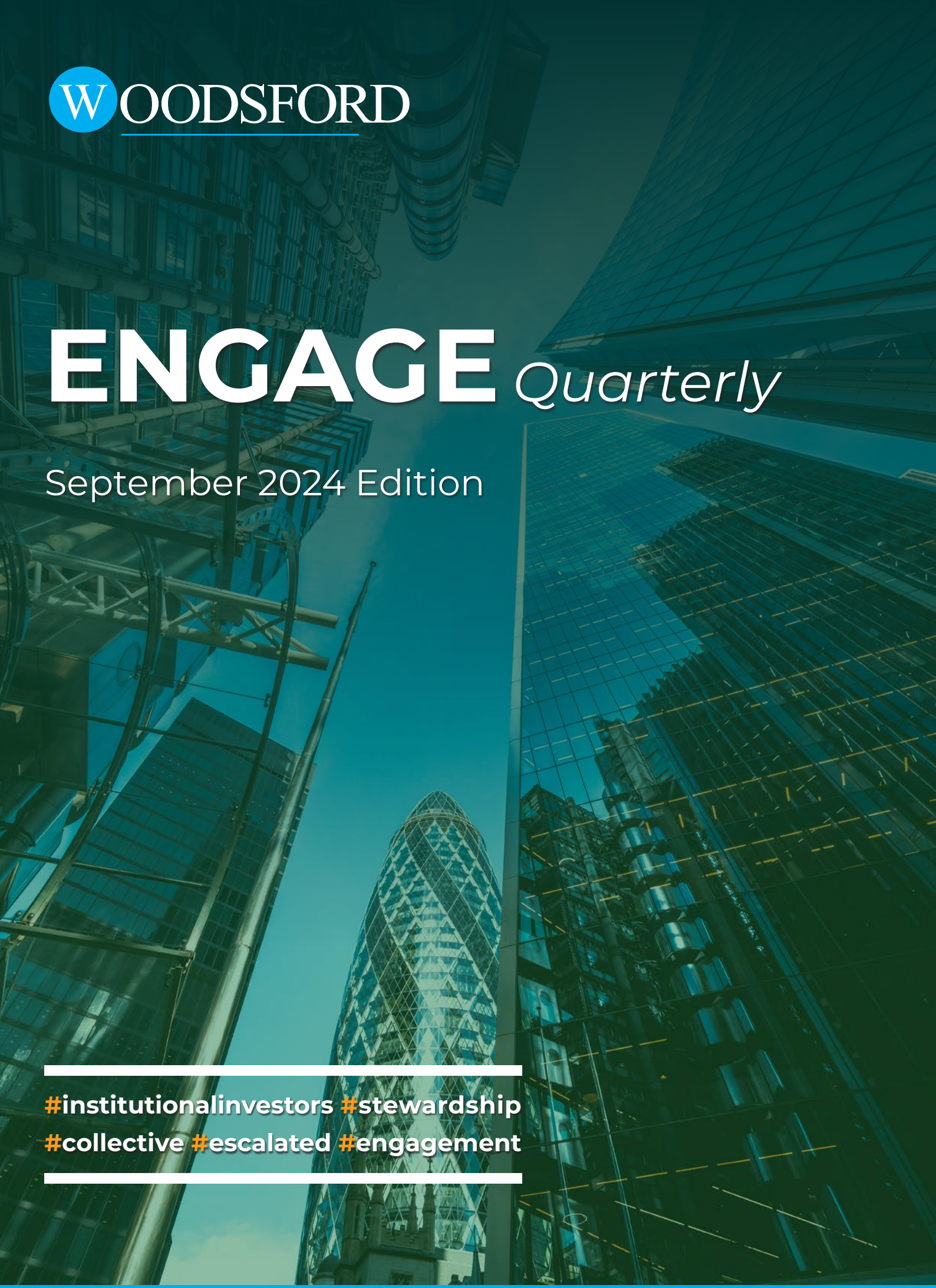
ENGAGE *Quarterly*

September 2024 Edition



#institutionalinvestors #stewardship
#collective #escalated #engagement

Steven Friel, CEO Woodsford

EDITOR'S NOTE

Welcome to the second edition of Woodsford Engage's quarterly newsletter aimed at stewardship and legal professionals within institutional investors.

Woodsford Group is a global leader in collective redress. Our clients are investors or consumers who have suffered financial loss following breakdowns in corporate governance, and other ESG failures, at major companies.

Woodsford Group's investor engagement business, Woodsford Engage, focuses on identifying catastrophic breakdowns in corporate governance at public equity companies and bringing them to the attention of institutional investors. We help investors understand the loss they have suffered, and organise them into groups for the purpose of collective and escalated engagement with the investee company in the pursuit of accountability and compensation. Our clients include most of the top 100 global asset managers by AUM.

It is sometimes the case that we can assist investors in reaching an amicable resolution with their investee companies without need for litigation. However, if litigation is required, we assist our clients in that process, with litigation funding and other financial solutions available from our litigation funding business.

In our first edition of Engage Quarterly, we looked at the UK FCA's consultation paper on protected forward-looking statements; the Sustainability Due Diligence Directive; and the importance of accurate reporting to reduce emissions from the automotive sector. In this second edition of Engage Quarterly, we hear from Jen Sisson, CEO of the International Corporate Governance Network (ICGN), on why governance is fundamental to how companies are run, and how long-term sustainable economic returns are generated; from Heather Prosser of Sodali & Co. on how sustainability drives investor behaviour; and from my Woodsford colleague David Haughan and barrister Anson Cheung on the first ever judgment of the English Court of Appeal in relation to a group securities claim under sections 90 and 90A of the Financial Services and Markets Act 2000, in a Woodsford case against Standard Chartered plc.

If you would like further information or would like to contribute to Engage Quarterly contact mmodha@woodsford.com

Why "G is key" – advocating for shareholder rights in an era of turbulence

Jen Sisson
(ICGN)

Across Europe, the UK and the USA we have seen challenges to our ability as shareholders to exercise our rights, which have shown up in a range of new and worrying ways.

It's been quite a year for shareholder rights. This is important because shareholder rights are a key part of the system of corporate governance. Governance is fundamental to how companies are run, and how long-term sustainable economic returns are generated. So this system working well is critically important in making sure the capital markets ecosystem can achieve its goals, including getting money put to work to allow people to save for their futures.

Across Europe, the UK and the USA we have seen challenges to our ability as shareholders to exercise our rights, which have shown up in a range of new and worrying ways.
In the UK, the FCA has recently announced changes to the listing rules that remove two key shareholder votes and allow for the introduction of companies with dual class shares into the UK market.

Here are the problematic changes:

1. Allowing companies to list with dual class shares, with a complicated sunset provision that only applies to institutional investors, and not to founders.

   This means that companies can have two or more different types of shares, some that get one vote, some that get as many votes as the founder likes, maybe even 10 votes. Under the FCA rules, pre-IPO institutional investors have a 10-year sunset period, which means that their shares get converted back to being one share one vote, but founders' don't. This essentially means that founders can entrench themselves forever and that ordinary small shareholders are not able to hold them accountable or ever vote to change the situation.

2. Removing the vote to approve significant related party transactions. This is a key accountability point, for shareholders to have the opportunity to say yes – we think that is in the best interest of the long-term success of the company to make this transaction. This is

important because it protects for example, against directors doing deals that might not be best for all the shareholders with people or organisations they have personal relationships with.

3. And similarly, removing the vote to approve significant mergers or acquisitions, which is a huge capital allocation decision that can really impact the long-term returns for shareholders.

When we are talking about investing hard working people's pensions and savings, we want to make sure that there are good governance protections in place. Investors are not calling for undue burden of regulation, but for protection of fundamental ownership rights; this is ultimately for the benefit of their beneficiaries

And it's not just in the UK – we are seeing all sorts of changes to shareholder protections and rights around the world. Dual class shares are being allowed in more markets, recently in France. We are seeing companies continue to hold virtual only Annual General Meetings (AGMs), even now the main pandemic risk has passed. Even worse, in Italy since the Capital Markets bill passed, we have seen companies seeking to amend their articles to allow for a single investor representative, chosen by the company, to act as a proxy for all shareholders at the AGM – essentially holding closed door meetings.
This year in the USA, we have seen companies suing their shareholders over filing resolutions.

Investors are not calling for undue burden of regulation, but for protection of fundamental ownership rights; this is ultimately for the benefit of their beneficiaries.

While some of this is new, other markets have longstanding issues. For example, in Japan many companies don't disclose their annual reports until after their AGM, which means investors don't have all the information they might need to cast their votes. In the Nordic region, many companies impose restrictive "share blocking" rules, to prevent investors from trading their shares in the run up to the AGM.

For the avoidance of any doubt, ICGN believes:

- Companies should report in a transparent and timely fashion to their shareholders.
- One share should equal one vote.
- Shareholders should be able to actively and fairly participate in the AGMs of the companies.

All of this is really about accountability, how the basic contract of trust, checks and balances work between the principals (shareholders) and their agents (corporate management).

We need to get back to basics and remember why corporate governance is important in the first place. Good governance is the foundation of business success. Investors and company management are all on the same team here. We all want the same thing – long term sustainably successful companies that will drive good long term sustainable returns for investors.

About ICGN

ICGN is an investor led network that brings together leading thinkers and practitioners from across the governance and stewardship industry to advance governance standards around the world. We concentrate our efforts in 4 key areas:

1. *Strong and effective boards*
2. *Protecting shareholder rights*
3. *Reliable reporting*
4. *Best practices in investor stewardship*

You can find out more here.

About the Author

Jen Sisson is the CEO at the International Corporate Governance Network. Jen joined ICGN in May 2024 from Goldman Sachs Asset Management, where she was EMEA Head of Stewardship, driving engagement, proxy voting and industry collaboration efforts.

Below Standard: UK-Listed Bank to Face Entirety of Investor Action

Anson Cheung
(4 New Square)

David Haughan
(Woodsford)

Sanctions breaches and bribery investigation into Standard Chartered plc lead to the first ever judgment of the English Court of Appeal in a group securities litigation.

The English Court of Appeal has recently handed down its first ever judgment in relation to a group securities claim under sections 90 and 90A of the Financial Services and Markets Act 2000 ("FSMA") in Various Claimants v Standard Chartered plc.

The action relates to the bank's admitted evasion of sanctions against Iran and separate allegations involving the bribery of Indonesian government officials. Standard Chartered made an application to strike out shareholders' claims on the basis of purported deficiencies in the pleadings. This application was denied at first instance and it has now been denied again by the Court of Appeal.

This is an important judgment in the evolution of the securities litigation landscape in the UK. It clarifies the evidential bar shareholders will face when attempting to use s.90 and 90A FSMA to hold companies to account for corporate governance failures. In particular, the Court of Appeal confirmed that, given the likelihood that only limited information will be available to shareholders at an early stage in litigation, English courts will not impose such onerous requirements on a claimant's pleadings that it would be impossible for shareholders to bring actions under the legislation.

Background

In 2012, Standard Chartered Bank paid a total of US$667 million in fines and forfeitures to US authorities, and entered a deferred prosecution agreement with the US Department of Justice, to settle allegations of sanctions breaches involving billions of US dollar transactions with Iranian or Iran-linked entities. In August 2014, US authorities issued a further order requiring Standard Chartered Bank to pay US$300 million for breach of its 2012 deferred prosecution agreement in relation to deficiencies in the bank's anti-money laundering transaction surveillance system in its New York branch. On 9 April 2019, Standard Chartered Bank entered a further deferred prosecution agreement with US authorities, in which it admitted that until at least 2014, notwithstanding the previous fines, the bank had continued to facilitate US dollar transactions involving Iranian or Iran-linked entities. The bank agreed to pay an additional US$1.1 billion in penalties.

In addition to the wrongdoing related to Iranian sanctions, it was reported in April and May 2016 that a company that was majority-owned by Standard Chartered had engaged in bribery in Indonesia. The US Department of Justice subsequently opened an investigation into Standard Chartered's involvement in the bribery between 2013 and 2015. These developments caused further losses in shareholder value.

In July 2019, Standard Chartered's share price suffered another fall following reports of a whistle-blower claim that between 2009 and 2014 the bank had cleared far more transactions in violation of Iran sanctions than had been admitted in April 2019. It then suffered a further drop of 5.82% on 21 September 2020 following media reports that Standard Chartered Bank was one of five global banks that continued to facilitate transactions for certain clients even after raising suspicious activity reports about them with the US authorities.

The collective redress team at Woodsford brought the above problems and related loss in shareholder value to the attention of institutional investors and organised a number of international investors into a group for the purposes of escalated and collaborative engagement with Standard Chartered. After the bank refused to be held accountable to its shareholders, litigation was commenced against Standard Chartered in the High Court in London.

Strike Out Attempt

The securities fraud claims brought by shareholders in Standard Chartered allege that there were various deficiencies in published information between 2007 and 2019, as well as untrue or misleading statements or omissions in prospectuses. These claims have in part been founded on:

1. It being common ground that Standard Chartered breached US sanctions on Iranian entities by illegally sending payments through the US financial system between 2001 and 2014. In addition, Brutus Trading LLC, founded by the former global head of transaction banking at Standard Chartered, has brought an action alleging that the defendant had misled US authorities as to the scale and nature of the wrongdoing (the "Brutus complaint").

2. The Indonesia allegations: It has been reported by global news agencies that a company called Maxpower Group PTE Ltd, in

which the defendant held a minor interest, had engaged in a corrupt scheme to bribe Indonesian government officials to win or renew contracts.

Standard Chartered plc sought to strike out the claim on the following bases:

1. The Iran allegations: Standard Chartered suggested that a pleading must disclose on its face a "solid evidential foundation" for any allegation of fraud or dishonesty alleged and that the Brutus complaint did not meet this bar. In addition, Standard Chartered submitted that a pleading of fraud or dishonesty must include all primary facts said to support that inference and that the claimants had pleaded conclusions drawn from the Brutus complaint rather than primary facts.

2. The Indonesia allegations: To establish liability of an issuer under s.90A of FSMA, knowledge and dishonesty on the part of "persons discharging managerial responsibilities" ("**PDMRs**") must be proven. Standard Chartered contended that the claimants' allegation that Standard Chartered's "Group Executive" had the requisite level of knowledge and dishonesty was an allegation of fraud en bloc against many individuals who would be within the bank's Group Executive, and it was therefore unacceptable.

The Court of Appeal's Decision

The Court of Appeal dismissed Standard Chartered's appeal and upheld the High Court's refusal to strike out the claims.

As to the Iran allegations, the Court of Appeal held that there was no rule that a pleading had to disclose a solid evidential foundation for an allegation of fraud or dishonesty; rather it was to plead the facts relied upon (as opposed to detailing the evidence behind it). While there was a need for proper particularisation where allegations of fraud and dishonesty were made, "*the Courts also need to beware of imposing such onerous pleading requirements as to make it impractical to bring meritorious fraud claims, particularly given the limited information that might initially be available to a victim*." Ultimately "'*a measure of generosity in favour of a claimant' is to be allowed*." (at [49]). Further, there was nothing inherently objectionable on a claimant "*piggybacking*" on allegations by a third party. Ultimately, the Brutus complaint had been made by a former employee of the bank, and the pleadings were not so inadequately particularised as to justify striking out.

> **This judgement clarifies the evidential bar shareholders will face when attempting to use s.90 and 90A FSMA to hold companies to account for corporate governance failures.**

As to the Indonesia allegations, the Court held that while it was "*desirable*" that the claimants should spell out what they alleged regarding individual PDMRs "*as soon as they can*", it was not appropriate to strike out the allegations on the basis that they had been made against the Group Executive en bloc "*for the time being*" (a reference to the relatively early stage in litigation). This was particularly given that the claimants were faced with a somewhat opaque management structure which made it difficult to assess the roles of particular individuals, and in respect of which the bank had not provided additional information. The Court of Appeal held it would be sufficient to plead that "one or more" of the PDMRs and/or the wider group had the requisite knowledge, or dishonesty (at [65]).

Comment

A common theme in this judgment was the Court of Appeal's emphasis on the need for a measure of generosity in favour of claimants where there is an asymmetry of information. With the Iran allegations, it was the asymmetry of information that may be available to the victim of a fraud. With the Indonesia allegations, the Court was clearly alive to the lack of disclosure from the defendant, which hampered the claimants' ability to plead against specific individuals, as opposed to "one or more" members of a wider group.

The Court of Appeal's judgment confirms that an information asymmetry will not necessarily prevent shareholders from being able to pursue securities litigation, and reduces the risk that companies will be able to escape accountability to their shareholders for corporate governance failures by seeking a strike-out of the claims.

About the Authors

Anson Cheung is a commercial junior barrister at 4 New Square Chambers with a particular focus on civil fraud, commercial litigation, international arbitration, construction and engineering disputes and professional liability.

David Haughan is an English-qualified lawyer and Investment Officer at Woodsford with particular experience in group litigation, class actions, and other high-value commercial disputes.

How Sustainability Drives Investor Behaviour: The Key to Long-Term Success

Heather Prosser
(Sodali & Co.)

The shift toward sustainable investing reflects broader societal changes, where environmental, social, and governance (ESG) factors play a critical role in shaping investor priorities.

In today's rapidly evolving financial landscape sustainability has become a central driver of investor behavior. Publicly traded companies must deeply understand how sustainability influences their key investors' decisions, as this knowledge is crucial for securing long-term investment and maintaining a competitive edge.

The shift toward sustainable investing reflects broader societal changes, where environmental, social, and governance (ESG) factors play a critical role in shaping investor priorities. This article explores why it is imperative for companies to grasp these dynamics, compares past and present investor trends, and provides examples of both divestment and engagement on sustainability issues. To date, investors have primarily focused on financial performance metrics such as revenue growth, profitability, and risk management. However, over the past decade, there has been a significant shift towards incorporating sustainability into investment decisions. This change is driven by several factors:

- **Increasing Awareness of Climate Risks:** The growing recognition of climate change as a material risk to business operations has led investors to demand greater transparency and action on sustainability issues. Companies that fail to address these risks are increasingly seen as less viable long-term investments.

- **Regulatory Pressures and Policy Changes:** Governments worldwide are implementing stricter environmental regulations and sustainability reporting requirements. (Think about how CSRD is impacting disclosures!)

- **Consumer and Social Activism:** In some places we can see consumer preferences shifting towards more sustainable products and services. Social movements advocating for environmental and social justice have also pressured companies to adopt more sustainable practices. Investors are responding by aligning their portfolios with companies that meet these evolving expectations.

- **Long-Term Value Creation:** Investors are increasingly recognizing that sustainability is not just about risk mitigation but also about value creation. Companies that invest in sustainable practices, such as reducing carbon emissions, improving labor conditions, and promoting diversity, are seen as better positioned to achieve long-term success.

In the past, sustainability was often considered a secondary concern, if considered at all, in investment decisions. The focus was predominantly on financial returns, with little regard for the long-term impact of business practices on the environment or society. ESG factors, which largely represent risk (as opposed to sustainability overall which may include opportunities as well) were largely overlooked, and companies with strong financial performance but poor sustainability records could still attract substantial investment.

Today, the landscape has started to shift. If you consider that ESG metrics have matured to a large degree – though are not yet fully mature across the board – we have seen an increasing reliance on this once 'nice to have' information. In many ways we can say ESG criteria have become integral to investment analysis, with more sophisticated metrics and data many investors now considering these factors alongside traditional financials. Investors are increasingly demanding that companies not only disclose their sustainability performance but also set and achieve ambitious ESG targets.

This shift has been fueled by growing evidence that companies with strong ESG performance tend to outperform their peers in the long run. Studies have shown that such companies are better equipped to manage risks, attract and retain talent, and build stronger customer loyalty.

As a result, investors are now more

willing to engage with companies on sustainability issues and hold them accountable for their ESG performance.

With new information comes new power... in fact the rise of sustainability concerns as a key driver of investor behavior has led to both divestment from companies with poor ESG performance and active engagement with companies to improve their sustainability practices.

This shift has been fueled by growing evidence that companies with strong ESG performance tend to outperform their peers in the long run.

Divestment

One of the most powerful strategies could be divestment. A notable example of divestment is the global movement to divest from fossil fuels. Over the past decade, numerous institutional investors, including pension funds, university endowments, and religious organizations, have committed to divesting from companies involved in the extraction and production of fossil fuels.
This trend has been driven by concerns about the long-term viability of the fossil fuel industry in a world transitioning to renewable energy sources. For instance, Norway's sovereign wealth fund, one of the largest in the world, announced in 2019 that it would divest from companies primarily involved in coal production. This decision was based on the recognition that coal posed significant financial and reputational risks.

Another example is the divestment from companies involved in deforestation. In 2020, BlackRock, the world's largest asset manager, announced that it would divest from companies that were not taking sufficient action to address deforestation in their supply chains. This move reflected growing concerns about the environmental and social impact of deforestation and the financial risks associated with unsustainable land use practices.

Engagement

Divestment is indeed a powerful tool, but it is also a permanent action. Once you leave the table your voice is no longer heard. Instead, many investors are choosing to engage with companies on sustainability issues rather than divest. This approach involves actively working with companies to improve their ESG performance, often through dialogue, shareholder resolutions, and voting at annual general meetings.

A great deal of engagement happens behind the scenes with investors, NGOs and corporations trying to work towards a more sustainable future. Through collaborative efforts, investors have successfully helped move companies in more sustainable

directions. Topics of concern for a sector or of specific interest to an investor can be brought to the table and worked on in a productive manner. This can be a lengthy and challenging path to take, but ultimately one which brings more stakeholders together.

Conclusion

Understanding how sustainability drives investor behavior is crucial for publicly traded companies aimingto secure long-term investment and maintain competitiveness. The shift towards sustainable investing reflects broader societal changes, with ESG factors playing an increasingly important role in investment decisions.

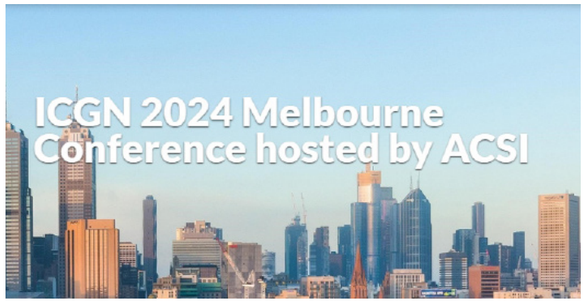
Companies that fail to recognize and respond to these trends risk losing the support of key investors, while those that proactively address sustainability issues are better positioned to attract long-term investment and achieve sustained success.

About the Author

Heather Prosser is the Managing Director, Head of Sustainability, at Sodali & Co. Japan. She has over 15 years of experience in the Asia-Pacific financial services and sustainability sectors.

In other news...

Alex Hickson and Emily Woolcott from Woodsford's Brisbane team will be attending the ICGN Melbourne Conference, hosted by ACSI on 12 - 14 November, 2024. Leading expert speakers will provide attendees, comprising over 400 governance professionals, with key insights into best practice and highlight future priorities for companies, investors and stakeholders.



Established in 1995 and led by investors responsible for assets under management of around US$77 trillion, ICGN advances the highest standards of corporate governance and investor stewardship worldwide in pursuit of long-term value creation, contributing to sustainable economies, societies, and the environment.

Woodsford is an active member of the ICGN. Our CEO Steven Friel is a member of the ICGN Global Stewardship Committee.

If you plan on attending, we look forward to seeing you there! If you haven't purchased your tickets yet there's still time to do so here.

Future editions

If you or your colleagues would like to contribute to future editions of Engage Quarterly covering all things escalated engagement and stewardship, then get in touch with Mitesh Modha by email at mmodha@woodsford.com.

Contributions from institutional investors, professional advisors and academics would be particularly welcome. Similarly, should any colleagues wish to be added to our distribution list then let us know.

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