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Doing good with other people's money. We now know that companies, investors and consumers care about ESG issues, so what does this mean for managers charged with driving investor returns? Can ESG be compatible with their basic fiduciary duties?

The world is changing for the good! Another fund manager has announced her commitment to embedding ESG into her investment decisions! That is great! But should she be careful? That wonderful commitment is, after all, about what she will do with the money of her investors rather than her own. This is the traditional "agency problem". A manager acts as the agent for a principal or a number of beneficiaries, it is unlikely that the manager's personal interests are in perfect alignment with those of the beneficiaries. This is made worse by an information asymmetry between the expert manager and the inexpert beneficiaries who do not possess the requisite information to manage their own funds as effectively.

The law has sought to come up with a solution to this problem by imposing over-riding "fiduciary duties" that ensure that managers act in the best interests of the beneficiaries. In English law, a short form formulation of the core obligations of the fiduciary would be that they must act loyally, honestly, carefully and transparently in the interests of their beneficiaries rather than themselves and avoid conflicts of interest. In both common law and civil law jurisdictions, legislative codification now applies these principles in many different contexts in order to establish the duties of various kinds of fiduciaries.

So what are the best interests of the beneficiaries? Traditionally, best interests have been the best *financial* interests – this creates issues for our fund manager - are ESG considerations in conflict with financial best interests? Are ESG goals even capable of forming part of the "best interests" of investors since they are not obviously capable of reduction to a financial measurement of loss to the investor? Which ESG priorities must they focus on? Our manager's views on ESG are just as prone to being unaligned with her investors' view as their financial interests are. She may want to promote some ESG cause, perhaps to make herself look or feel good, but can she justify doing this with her investors' money?

Some strongly refute that this conflict exists; they assert that ESG considerations are entirely consistent with traditional fiduciary duties. The EU and the UK, for example, have not embarked on a wholesale re-writing of fiduciary duties in order to accommodate ESG considerations. In

fact, the UK codified an embedding of ESG into directors' fiduciary duties in Section 172 of the Companies Act 2006. Does this mean that our conscientious fund manager need not worry about embracing ESG considerations?

What about the lack of information or a unified idea of what ESG considerations are? There is a legislative push to now consider a taxonomy to define sustainable investments. Groups are lobbying legislators to codify explicit obligations to be considered sustainable investments. There are transparency "light touch" initiatives centred on disclosure, more activists in the space and more scrutiny from beneficiaries. Our fund manager's risk profile has shifted. Is it time for a new conception of fiduciary duty so that it includes, or even prioritises ESG goals, for her own sake?

We will explore what all of this means further at our seminar on Fiduciary Duties on Wednesday, 26 February 2020 in London.

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Other authors: Associate, Amoetsoe Mkwena

Contacts



**Andrew
Carey**

Senior Counsel

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