ACC DOCKET
INFORMED. INDISPENSABLE. IN-HOUSE.

When to Take a Public Position

Compliance and Ethics

Government

Corporate, Securities, and Governance

Banner artwork by hxdbzxy / *Shutterstock.com*

When world events and national news leave us feeling overwhelmed (likely an understatement), we can feel at a loss as to where to start and what to do. It’s during times like this that channeling our energy at home and at work can help us feel a sense of control. Focusing on work opportunities, in-house counsel may not realize they can lead their companies to influence debate on one or more of these issues.

Guiding role of in-house counsel

In-house counsel remain the lighthouse amidst turbulent waves of corporate challenges. Artwork by Bur_malin / *Shutterstock.com*

Increasingly, companies face the daunting task of determining whether a public position is warranted on a particular hot button issue. Some companies are being pressured by employees, customers, and shareholders to take a position on an issue important to them. Company leaders may believe they have no choice but to do so, but this is not always in the best interest of the company.

In some cases, though, a public position makes sense. In weighing such a decision, it is best for a company to employ a methodical assessment process to build a record of consistency and transparency and minimize financial risk. Escalating tensions in social media can make this assessment nearly impossible, so the time to do it is *before* a company needs to act urgently.

> Some companies are being pressured by employees, customers, and shareholders to take a position on an issue...company leaders may believe that they have no choice to do so, but that is not always in the best interest of the company.

In-house counsel would be wise to take a leading role in this process. By doing so, in-house counsel may also find a sense of action to fixing global challenges.

There are some organizations that get it right from the outset and others that do not for a myriad of reasons. We can all think of a few cautionary tales from well-publicized missteps by Target, Disney, and others. In some cases, the public knows an organization's political perspective and is not surprised when it takes a position consistent with a prior one. In today's political climate it is important to get it right, or the organization could experience an unanticipated public backlash.

The court's take on corporate social responsibility

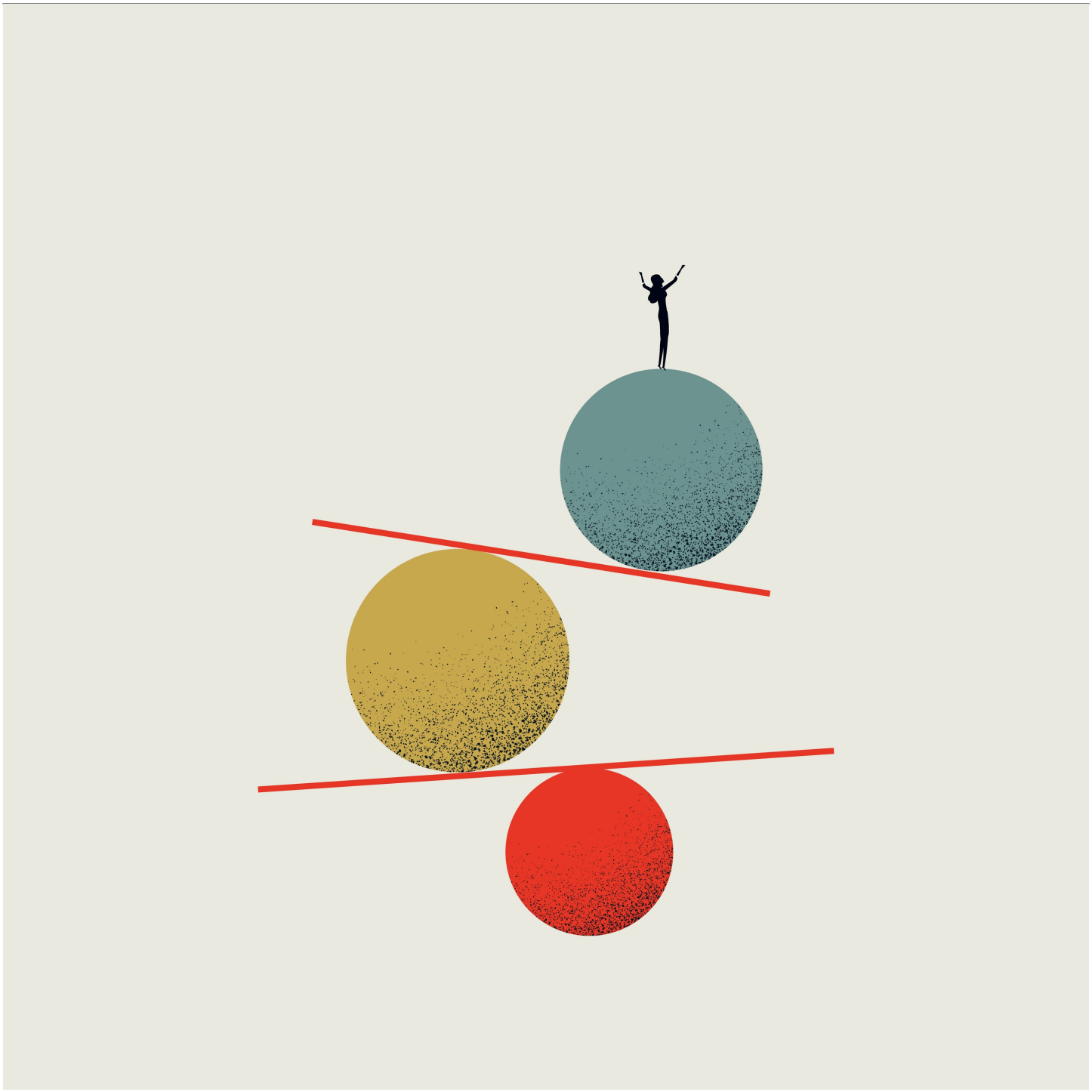
Any backlash could have legal implications, especially if the organization is a public company. A recent Delaware Chancery court ruling in Simeone v. Walt Disney Company clarifies that a board's decision to speak on political or social issues is a protected "business decision." This gives boards latitude to address issues like reproductive rights or ESG matters without fearing shareholder reprisals, provided they maintain formal records and consider long-term value. In-house counsel can be instrumental in this process, helping to navigate legal and financial risks. The ruling highlights the importance of a thorough assessment and record-keeping, especially in today's volatile political climate.

Reputational balancing act

There are some companies that, by the very nature of their products, naturally fall on one side of an issue. Decisions to support basic social issues such as homelessness or mental health may be easy to make. Decisions on other issues may not be so clear cut, requiring a deeper analysis.

For instance, let's consider a fictional company selling camping and a variety of outdoor gear. It seems uncontroversial for it to take a policy position friendly to the environment given its customers and other stakeholders likely seek to maintain the environment they enjoy.

However, this outdoor company could also have a large base of hunters as customers. On the issue of gun control, it should carefully consider its position, given its diverse customer base and recent public focus on the availability of guns due to mass shootings.



Striking a balance is about constant awareness and adjustment.
Artwork by MJgraphics / *Shutterstock.com*

It would be difficult for the company to support gun control or outright gun bans if it is in the business of selling guns, particularly if it derives a good portion of revenue from such sales. A neutral position may seem the best option, though silence can be seen as acquiescence and viewed negatively by both sides of the issue. It's a tricky balancing act to pull off, but not impossible.

> A neutral position may seem the best option, though silence can be seen as acquiescence and viewed negatively by both sides of the issue.

Look at the numbers

What should such a company do, especially if it is pushed to take a stronger position? This is where data can assist and provide a defensible basis for its position. A company seeking to minimize the potential financial risk, should the issue backfire, ought to look at revenue trends and product roadmaps. Historical data on customers can also prove insightful.

Where has the company invested for future growth? Where might it divest if the political pressure is just too much? For political positions not directly related to the company's core mission or those that may materially impact the company, it is wise to review such data and gain consensus among executives and, in some cases, input from board members before going public with a position. A company needs to be positioned to weather a worst-case scenario in taking a public position and live with any negative consequences.

> A company needs to be positioned to weather a worst-case scenario in taking a public position and live with any negative consequences.

On other issues, like the abortion debate, it seems a public position on this issue for a camping gear company is far afield of its core mission, though leaders may have strong opinions one way or the other. A position on abortion will likely alienate one set of stakeholders and not yield any benefit to the company or potentially have a negative impact.

If the fictional company were a women's medical device company instead, the opposite may be true. Such a company could view abortion as less of a moral or personal issue and more of a health issue for women. Moreover, customers of the healthcare company include hospitals and other health care providers, who likely share the view of abortion as a health issue for women (with some exceptions).

Neutrality in the abortion debate may also be a viable option, particularly if it is a public company, but if its devices are used to perform abortions, then clearly the company may have a financial stake in the abortion outcome. If so, it may behoove the company to invest in political advocacy on this issue.

A symphony of resources

Today, companies are wise to seek external input from outside counsel, trade groups, or government relations firms in conducting this assessment. These external sources can provide benchmarking information and access to government regulators should a company wish to consider where its prospective position may sit on the spectrum.

In-house counsel find brilliance in the chorus of varied resources. Artwork by Jeruik / *Shutterstock.com*

Trade groups are attractive because they can provide protection in numbers via the company's industry. A company should also consider when board input is necessary on an issue in which the stakes may be high for investors. At the end of the process, there may be valid reasons to keep a company position private

All these strategic decisions need oversight from a centralized function within the company. In-house counsel, in most cases, are well-suited for such a leadership role, which may also present a personal opportunity to get involved in productive conversations directly impacting a particular issue through your company.

[Become an ACC member today!]

Disclaimer: The information in any resource in this website should not be construed as legal advice or as a legal opinion on specific facts, and should not be considered representing the views of its authors, its sponsors, and/or ACC. These resources are not intended as a definitive statement on the subject addressed. Rather, they are intended to serve as a tool providing practical guidance and references for the busy in-house practitioner and other readers.

Stephanie S. Lambert

AVP and Chief Compliance Counsel

NetScout Systems, Inc.

Stephanie S. Lambert is AVP and chief compliance counsel at NetScout Systems, Inc. where she oversees ethics and compliance, international trade, privacy, and litigation. She currently serves on ACC's Northeast Chapter board of directors and is a former chair of ACC's Law Department Management Network.