

# How can UK pension funds hold US companies to account?

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© (photoVs/Envato) Approximately 10 per cent of all UK pension fund money is invested in US tech behemoths such as Apple and Amazon

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The UK pensions sector manages more than £2tn of assets for more than 30mn savers.

In 2023, the Pensions and Lifetime Savings Association advised that UK pension funds invest almost £1tn in the UK through a mix of UK shares, corporate bonds, government debt and other asset classes. A significant proportion of the rest is invested in US companies.

A recent study found that approximately 10 per cent of all UK pension fund money is invested in US tech behemoths such as Apple and Amazon.

Investment in these tech giants is just the tip of the iceberg when it comes to overall investment in US companies.

“UK pension funds have incredible power to engage with their invested US companies.”

It is timely then, given the government’s ongoing pensions review, to remind UK funds what options exist when a US company in which they have invested acts negligently, fraudulently, outside of expected standards or has engaged in governance failures leading to losses.

The US has several laws that allow UK-based institutional investors – including pension funds – to actively engage, and, if necessary, litigate these issues on behalf of shareholders/fund members.

Critically, each tool discussed below allows institutional investors to remain aligned with their fiduciary or stewardship obligations while furthering impact goals. These avenues often yield meaningful results for shareholders through financial recovery and corporate reforms.

## **Section 220 books and records demands**

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The UK's robust stewardship code obligates institutional investors – including pension funds – to be transparent about their investment processes and fulfil their fiduciary duties to workers and their beneficiaries.

As a result, a fiduciary first monitors investments to ensure compliance with the pension fund's investment goals.

Where pension funds have questions about corporate policies or need to ensure they are making a proper investment, they often engage with companies directly to obtain information to advance their prudent decision-making.

However, this monitoring and engagement does not always work because some companies avoid transparency or may actively attempt to hide negative information.

As an initial tool to act on behalf of shareholders, Section 220 of Delaware's General Corporation Law allows any shareholder – even those outside the US – to request internal US company books and records for review.

A Section 220 demand allows shareholders to investigate various issues, including breaches of fiduciary duty, suspected corporate wrongdoing and mismanagement.

Through this process, pension funds may identify and suggest governance reforms to improve shareholder value. The demand can be made “for any proper purpose”, through a letter to the corporation.

Importantly, this letter demand is not public, which provides many pension funds with the attractive opportunity to privately seek information and promote internal reforms without a lawsuit.

To permit inspection, shareholders must demonstrate that there is more likely than not a “credible basis from which the court can infer a possibility of wrongdoing”.

When a US company's actions run contrary to stockholders' and the company's interests, a successful Section 220 demand can yield valuable information to shape next steps.

Some Section 220 demands provide an environment for a pension fund to promote corporate reform privately.

However, sometimes companies refuse to reform or publicly disclose and remedy wrongdoing, thus compromising the company's future value.

In these circumstances, a pension fund has the option (but not the obligation) to use materials obtained from a Section 220 demand to threaten or bring a lawsuit.

For example, in 2021, following the Boeing Company's widely publicised 737 MAX aeroplane crashes, shareholders brought a Section 220 demand that yielded more than 630,000 pages of documents.

Similarly, a Section 220 demand and subsequent investigation against Dell Technologies, relating to a go-private transaction, yielded documents that later formed the basis for a lawsuit alleging governance failures that resulted in a historic \$1bn (£791mn) settlement for shareholders.

## **Shareholder derivative lawsuits**

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Through shareholder derivative litigation, investors exercise their rights as shareholders to sue a company's board of directors (on behalf of the company) for breaching their legal duties by enacting irresponsible corporate policies.

These actions are brought in state court, usually in Delaware, where most US companies are incorporated.

For example, a public pension fund successfully settled a derivative lawsuit against 21st Century Fox, arising from a series of sexual harassment scandals in 2016 within Fox News that negatively affected the company's value and standing in the corporate community.

Ultimately, the pension fund recovered \$90mn on behalf of shareholders. Similarly, in 2023, shareholders reached a \$30mn settlement in a lawsuit against clothing brand Guess?, alleging breach of fiduciary duty arising from a pattern of sexual harassment by Paul Marciano, co-founder and chief creative officer.

The lawsuit also spurred significant corporate governance reforms within the company.

Notably, the plaintiff pension fund was able to reorganise the board and appoint an independent board member to monitor future compliance.

## **Securities class actions**

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Pension funds can also protect shareholder value while advancing impact goals through class action litigation pursuant to federal securities laws.

For example, through *In re Massey Energy Co. Securities Litigation*, a pension fund obtained a \$265mn settlement for shareholders.

The suit alleged that Massey Energy – a large coal mining company – made false and misleading statements related to its commitment to worker safety.

Massey Energy's claims were proven false when a massive and fatal coal dust explosion resulted from clear safety violations.

In 2024, UK-based Norfolk Pension Fund secured a \$490mn settlement in a shareholder class action against Apple, stemming from fraudulent statements related to its business in China.

Similarly, a recent class action against Boeing alleges a systemic pattern of safety failures – including a door ripping from an aircraft mid-flight.

The case, with billions of dollars in damages, is proceeding to trial next year.

## **Balancing responsibilities and goals**

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In upholding their stewardship duties, UK-based pension funds can advance corporate impact goals in US companies by achieving corporate reforms through shareholder engagement and litigation.

The tools discussed herein all seek to maximise shareholder value by demanding transparency and accountability from US companies – an increasingly important concept given UK institutional investors' heavy investment in US companies.

This also aligns with a recent survey finding that 68 per cent of institutional investors ranked corporate governance quality as the type of impact initiatives most critical to their investment decisions.

Shareholder engagement and litigation often speak to corporate governance in a way that spurs meaningful change.

## **Conclusion**

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UK pension funds have incredible power to engage with their invested US companies to positively shape the investments that form the basis of their portfolios and returns.

Shareholder engagement and litigation involving US companies function as important tools for investors to maximise shareholder value while holding companies accountable to their sustainability and value commitments.

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