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Corporate Boardroom Diversity: Pressure's On

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There has been much discussion and focus in recent years on the lack of diversity inside corporate boardrooms. Public companies in particular have been seeing a wave of pressures to increase the diversity of directors sitting around the boardroom table. Champions of diversity have echoed that the ongoing lack of boardroom diversity is not only problematic in an increasingly diverse society, but that boards risk missing the opportunities for concrete improved business results and enhanced overall board effectiveness if they lack diversity. This article considers the current landscape and rising pressures for corporate boardroom diversity. The article also highlights some of the challenges faced by companies trying to diversify and offers some tools that companies may find effective as they endeavor and respond to the pressures and challenges.

CURRENT LANDSCAPE

A review of recent data suggests some increase in the gender diversification of boardrooms. As a sign of meaningful, if incremental progress, women now constitute 24% of all directors serving on the boards of the S&P 500; whereas a decade ago that number stood at 16%. Furthermore, 99% of S&P 500 boards have at least one woman serving on them; in 2008 women sat on only 89% of such boards. In an interesting turn of events, nearly 40% of new directors are women. Additionally, 87% of boards include two or more women, which represents a 7% increase over just the past year, while 33% of boards now have at least three women serving on them, representing a 6% increase over the same timeframe. In sum, boards now have 2.6 female directors on average compared with just 1.7 in 2008. Just three years ago, the number of men and women on boards was expected to equalize by 2032, but this recent spurt in growth now produces estimates that this will occur by 2025.

Although the S&P 500 has shown vast improvement in women's representation on boards, smaller companies have witnessed much slower progress as 17% of all Russell 3000 companies are still all-male. Additionally, while women have seen increases in board representation, men of color have not experienced nearly as much growth. Although 90% of the largest 200 S&P companies have at least one male director of color (up from 84% in 2008), men of color still only composed 10% of new board appointees last year, which was actually a decrease from the previous year. With respect to the Fortune 500, only 11.5% of board members were men of color as of 2018. Furthermore, the number of new independent men of color directors actually decreased by a percentage point from 2017 to 2018 and women of color are the least represented in boardrooms.

RISING PRESSURE

The road to diversifying boardrooms has been paved in part by the Securities and Exchange Commission (SEC), which in 2009 began requiring companies to disclose how boards consider diversity when identifying director nominees. The SEC could easily spur greater diversity with more concrete and explicit regulations. For instance, "diversity" is not defined by the SEC in any rules or regulations and this lack of definition has resulted in vague reporting that does not provide investors with enough useful information.

In spite of this, there is more substantive support on the federal level for increasing diversity. Earlier this year, the "Improving Corporate Governance Through Diversity Act of 2019" was introduced in the U.S. Congress. If passed, the legislation would require issuers to report annually the racial, ethnic, and gender composition of a company's board, nominees for the board, and the composition of executive officers. Companies would also be required to disclose whether they have adopted a policy, plan or strategy to promote diversity among the aforementioned groups.

Even if the federal legislation is not passed, there have already been many developments on the state level that will spur increased diversity in the boardroom. California passed legislation in 2018 requiring publicly traded companies headquartered in the state to have at least one woman on their boards by the end of 2019. New Jersey introduced analogous legislation to that of California and, if enacted, 42% of New Jersey companies would have to allocate roughly 130 board seats to women. Illinois is the most recent state to take legislative action aimed at promoting diversity as a law passed late this summer requiring publicly-traded companies to report the demographic composition of their boards, as well as their plans for promoting diversity, to the Illinois Secretary of State. Pursuant to this statute, the University of Illinois will then study the data and begin publishing yearly reports in 2021 under the new law. Additionally, while California, Illinois and New Jersey have taken the most meaningful action to increase corporate boardroom diversity, four other states (Colorado, Massachusetts, Ohio, and Pennsylvania) have adopted nonbinding resolutions aimed at encouraging board diversity.

On a more global scale, there are several non-U.S. jurisdictions that have taken even more significant action to increase board diversity and that may provide examples of more policies that could someday be adopted in the United States. For example, Norway instituted gender quotas for corporate boards back in 2003 requiring that boards be composed of at least 40% of either sex. Norway has since been followed by four key European Union nations (France, Germany, Italy and Belgium) in adopting such legislation. Canada has also enacted legislation requiring corporate disclosure regarding women, visible minorities, Aboriginals, and people with disabilities on boards and in executive officer positions.

While government can be a force in driving increased diversity, arguably the most impactful force is coming from institutional shareholders. For example, BlackRock, State Street Global Advisors, New York State Common Retirement Fund, and Legal & General Investment Management have all indicated that they intend to vote against boards that have few or no female directors. Additionally, shareholders submitted 30 proposals during the 2018 proxy season requesting the adoption of a board diversity policy or a report on board diversity. In 2019, the support level of board diversity proposals rose to around 30% from about 18% percent recorded in 2018. Proxy advisory firms, namely ISS and Glass Lewis, have also applied meaningful pressure on companies to increase boardroom diversity. In a sign that such firms mean business, by 2020 both of the aforementioned firms will recommend votes against the election of the nominating committee chair if a board lacks women.

CHALLENGES

As a result of these pressures, it is imperative that companies tackle the leading obstacles to diversity. One of the leading challenges is an excessive reliance placed on existing director networks and connections. For example, over two-thirds of new directors in 2017 had previously served on another outside board, while only 5% of boards currently limit tenure. In fact, the average member has served for 8.1 years. Other key impediments to growing boardroom diversity include a focus on traditional business attributes, a lack of diverse leadership (both on boards, and amongst key officers and employees) to help guide efforts to diversify an organization, a lack of efforts to address biases inherent in workplace culture, and also the existence of practices within an organization that result in a lack of inclusion of diverse leaders and employees.

Perhaps less perceived challenges include those associated with network limitations, both in the boardroom as a whole and on an individual level. For example, people within a network will often choose to interact with people possessing similar traits; likewise, people within the same network will choose other people that are the most available at a certain time for interaction. These simple facets of human nature often mask or can even propel a network's limitations as social similarity is an extremely poor proxy for competence and fitness.

TOOLS FOR CHANGE

Companies can plant the seeds for organic change. Some examples of ways companies can initiate change and growth include having a forward thinking and progressive succession plan. Companies can consider increasing the size of their boards in order to add new board members rather than feel the need to replace a board member. Companies can also develop programs focused on promoting diversity and inclusion throughout the entire organization within all ranks – from the bottom up. By doing this, a company can promote an awareness and progressive attitude towards diversity that starts from the beginning of an employee's experience with the company. There are also dynamic frameworks available to companies interested in increasing boardroom diversity. For instance, State Street Global Advisors has publicly shared a framework that when utilized can assist in achieving true gender diversity.

It is important to keep in mind and acknowledge that those in the legal profession, especially those in roles as counselors and trusted advisors to companies and their respective boards, are especially well-situated to assist with and advocate for, when appropriate, boardroom diversity. Those lawyers privileged to advise and influence a company's corporate leadership should be aware of and remember helpful practices in fostering increased board diversity. Some of these practices include encouraging clients to enhance transparency and communication with investors on the board's position on diversity and report on progress toward goals; ensure that diverse candidates are included in the nominee pool – and genuinely considered for the position; encourage the search to go beyond CEOs; and articulate to search firms the company's commitment to recruiting boards that are diverse. Attorneys can also steer such client towards organizations actively involved in promoting the diversity effort – for example, Catalyst, DirectWomen, The Thirty Percent Coalition, Vision 2020, 2020WOB, as well as numerous other organizations.

CONCLUSION

It is important to be aware of the requirements, pressures and challenges that your clients face, including today's pressure regarding corporate boardroom diversity. In an effort to serve your clients in this important conversation you may choose to develop a group of corporate leadership and advisors to share helpful practices and leverage collective voices for change, while also encouraging mentorships and sponsorships within one's own workplace and community. Personalized efforts toward increasing boardroom diversity may not wield the dramatic impact on diversity that federal and state legislation, or institutional shareholders can bring, but they will help shape the path forward and foster change in societal attitudes that help enable an environment more conducive to a more diverse corporate future with all the benefits such a future can provide.

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