

Diversity and Disclosure: How Far?

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How much disclosure of a candidate's background actually would inform the board, its committees, and shareholders how a director will think inside the boardroom? Or does "diversity" disclosure tend towards a witch hunt for "people who look like me?"

The SEC's proposal to superimpose a "diversity" standard on board director candidates might actually produce the unintended consequences of discouraging new candidates from applying, thereby reducing the number of qualified candidates with diverse perspectives from pursuing public company director roles.

Tougher Disclosure for New Candidates

The proposed rules would require tougher disclosure before "selecting someone for a board position." New candidates would be held to the higher standard, paying the penalty for past failures of the marketplace to include more independently-minded directors. By mandating a 5 to 10 year look-back in director disclosures, the SEC will require traditionally under-represented groups to leap over a much higher barrier of personal and professional disclosure than has been applied to their predecessor directors. This might discourage nominees who otherwise might bring fresh, independent perspectives into our corporate board rooms.

The diversity burden is reminiscent of the specific certification requirements once imposed on WMDV businesses (women, minority, disabled, veterans and now, LGBTs). Such "proof that you are diverse" proposals did little to enhance the actual contractor pool of eligible bidders. Only a few "big winners" figured out how to game the system. Professional woman who worked under these historic efforts to "right the wrongs of history" know only too well the failures of diversity quotas.

Pick Your Diversity Category

Director candidates may not consider themselves "different" except as to the independence of their minds. Thus, the SEC would exclude many capable candidates who choose not to define themselves by a particular ethnicity, gender, or racial categorization.

Today's director candidates have invested significantly in their educations, experience, and professional development to overcome historic biases and prejudices in the marketplace. Now, just as they have reached a pinnacle of success, overcoming past labels of second class status, the SEC would ask them to re-state and re-affirm their historically limiting experiences.

Diversity Is a Very Ill-Defined Concept

Diversity is a poorly defined term. How much diversity is enough for firms of different sizes, industry categories, employee classes or types? Would one token representative from every isolated group produce better governance? The job of a corporate board is to select identifiable

competencies and expertise that offer the greatest probability of helping the business chart its strategic direction in the best interests of all its shareholders and stakeholder interest.

The argument that “diversity” produces specific “value added” in governance is poorly supported by quality research studies. Research about women directors alone is rife with misconceptions as to correlation vs. causation, errors of sample size and stratification, selection of too short time periods and data sampling biased by economic booms. Research that suggests that firms experience “greater profitability” due to the presence of a few directors from selected diversity classifications are more ‘urban legend’ than substance. Such studies fail to factor in or out other contributing forces such as the strong influence of management, leadership, or directors who brought the women on board.

Conclusion

In her testimony July 14, 2009 before the Senate confirmation hearings, Judge Sonia Sotomayor said,

“I want to state upfront, unequivocally and without doubt: I do not believe that any racial, ethnic or gender group has an advantage in sound judging. I do believe that every person has an equal opportunity to be a good and wise judge, regardless of their background or life experiences.”

If Judge Sotomayor has the right to not pre-judge (based on her background) issues and cases which might come before her in the Supreme Court, why wouldn't we allow corporate director candidates the same inherent right to not be pre-judged (based on their experiences) as to how they will assess the risks, rewards, issues, or strategies that they might face as a member of a board of directors?

Background:

The Securities and Exchange Commission (SEC) requested comments on a Proposed Rule 33-9052 **Proxy Disclosure and Solicitation Enhancements** (July 10, 2009) as part of efforts to improve the content and transparency of information companies should make available to shareholders about director qualifications. (See: <http://www.sec.gov/rules/proposed/2009/33-9052.pdf>)

Nine days earlier, SEC Commissioner Luis A. Aguilar, (re: proposals for *Enhanced Director and Nominee Disclosure*) asked how far the SEC should go in requesting director and nominee “diversity” information.

Portions of Commissioner Aguilar's written comments (emphasis added):
<http://www.sec.gov/news/speech/2009/spch070109laa.htm>

“I would like to highlight one additional topic. The release before us also solicits comments concerning disclosures related to board diversity. Because of the importance of boards of directors, investors increasingly care about how directors are appointed, and what their background is. This is especially true as American businesses increasingly compete in both a global environment, and in a domestic marketplace that is, itself, increasingly diverse. In this ever more challenging business environment, the ability to draw on a wide range of viewpoints, backgrounds, skills, and experience is critical to a company's success.

It should be no surprise that studies indicate that diversity in the boardroom can result in real value for companies — and for shareholders. It also should be no surprise that many investors — from individual investors to sophisticated institutions — have asked the Commission to provide for disclosures about the diversity of corporate boards and a company's policies related to board diversity.

Like these investors, I care a great deal about diversity in corporate America, including in the board room. Accordingly, this proposal raises the issue of whether investors and other market participants believe that diversity in the boardroom is a significant issue. We are soliciting comment on whether we should amend our rules to provide for disclosure of whether diversity is a factor a nominating committee considers when selecting someone for a board position. We also seek comment on whether we should amend our rules to provide for additional or different disclosure related to diversity.”

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