BOARD DIVERSITY

Bill H.R. 4718: Momentum forward?

By Anna T. Pinedo

In recent months, the call for regulatory intervention to promote gender diversity on U.S. boards of directors has gotten louder and become more urgent. The U.S. Government Accountability Office (GAO) published a report in December 2015 that analyzed gender diversity on U.S. corporate boards. In 2014, when the study data was collected, women comprised approximately half of the U.S. workforce, but only held approximately 16% of board seats of S&P 1500 companies. The report indicated that, based on current trends, it could take 10 years for women to comprise 30% of board positions and more than 40 years for representation of women to be equal to that of men.

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Among other recommendations, the report suggested that in order to improve female board representation, the Securities and Exchange Commission amend its current regulations regarding disclosure of diversity statistics on corporate boards. The report notes that if reporting requirements were made more specific and disclosures regarding gender and racial diversity of board members were mandated, there would be more pressure on public companies to address board composition.

In early March 2016, a group of Democratic Congressmen wrote to SEC Chair Mary Jo White urging the SEC to take action to consider recommendations made by public pension fund fiduciaries to implement additional disclosure requirements in public company filings regarding board of director diversity.

Shortly following this letter, Congresswoman Carolyn Maloney introduced a bill, H.R. 4718, which would require the SEC to establish a Gender Diversity Advisory Group. The Group would be responsible for studying and making recommendations to the SEC on strategies to promote gender diversity on public company boards. The SEC would be required to deliver a report on the study within nine months of the Group's establishment.

Beginning one year after the delivery of the report, the SEC would be required to release an annual report on the status of board gender diversity. In addition, the bill would require that the SEC amend the Securities Exchange Act to require public companies to disclose the gender composition of their board. The bill has garnered support from the U.S. Chamber of Commerce as well as other industry groups.

The GAO report suggestions and the proposed legislation assume that, once provided with more detailed information, public company stakeholders will exert some influence in favor of increased diversity on corporate boards. It is unclear whether more detailed and better disclosure alone, without additional measures, will have a demonstrable effect on board gender diversity. Initiatives intended to promote board diversity in other countries have revealed mixed results when formal quotas were employed, as well as when self-regulatory disclosure-based initiatives were launched.

Presumably the study mandated by the Gender Diversity Advisory Group that is referenced in Congresswoman Maloney's bill would seek to identify those aspects of the initiatives undertaken outside the United States that have proven most effective in achieving gender diversity on boards of directors. However, given the availability of academic and other studies regarding gender diversity on boards of directors, as well as on the effectiveness of the various measures employed in other jurisdictions to promote gender diversity, it would seem unnecessary to allow for a nine-month study period. In any event, such studies have shown that a commitment from business and professional groups to identifying potential board candidates, mentoring candidates, and promoting industry awareness of the skills and talents of the candidate pool has had a significant positive impact on board gender diversity.

There will be a number of related issues for the SEC to consider in relation to board diversity. Several recent articles have highlighted that although Sarbanes-Oxley and securities exchange corporate governance requirements have made independent boards of directors ubiquitous, most nominating and governance committees of corporate boards rely on their informal networks as a means of identifying potential director candidates. This tends to lead to the selection of directors that ostensibly meet the statutory and regulatory definitions of "independence" but may have close ties to company management.

If one considers the selection process together with entrenchment of board directors since many boards of directors do not have tenure limits, change may be slow to come. Perhaps additional consideration can be the board selection process and the responsibilities and roles of the nominating and governance committees of public company boards as an agent for change.

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