

How The SEC Should Tackle Boardroom Diversity

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In 1971, Australian-American artist Helen Reddy changed music and helped to shape and define the women's liberation movement by recording the iconic and enduring "I Am Woman." This composition expressed Reddy's growing passion for female empowerment and states, in part:

*"I am woman, hear me roar
 In numbers too big to ignore
 And I know too much to go back an' pretend
 'Cause I've heard it all before
 And I've been down there on the floor
 No one's ever gonna keep me down again"*



Kerry E. Berchem

In a 2003 interview in Australia's Sunday magazine (Melbourne Sunday Herald Sun/Sydney Sunday Telegraph), Reddy explained:

"I couldn't find any songs that said what I thought being woman was about. I thought about all these strong women in my family who had gotten through the Depression and world wars and drunken, abusive husbands. But there was nothing in music that reflected that. The only songs were 'I Feel Pretty' or that dreadful song 'Born A Woman.' (The 1966 hit by Sandy Posey had observed that, if you're born a woman, "you're born to be stepped on, lied to, cheated on and treated like dirt. I'm glad it happened that way.") These are not exactly empowering lyrics. I certainly never thought of myself as a songwriter, but it came down to having to do it."

In 1971, I was a five-year-old girl. Happily for me and so many women (and the men who love and respect us), 45 years following Reddy's signature achievement, the world has changed in many, many ways. Women have added so much value on so many fronts in the last five decades — we go to Ivy League and other once all-male colleges, we play Division I sports in packed arenas (special shout out here to the UConn Huskies from a former point guard), we participate in the armed forces and we sit on the U.S. Supreme Court. The list goes on. So why do we — as a corporate society — largely keep women out of the boardroom?

Diversity on boards has been a topic of conversation worldwide for many years, and, yet, while the stats in the United States are increasingly better, they are still pathetic. The percentage of women on Fortune 1000 boards in 2015, according to a 2020 Women on Boards Gender Diversity Index, is less than 19 percent despite the fact that women make up more than 50 percent of our population.

It is not difficult to suggest that broader (any?) gender diversity in a boardroom would ferret out a greater range of perspectives, insights and skill sets. Do mothers and fathers address their child-rearing duties in the same ways? Um, no. Are they both huge contributors to raising children successfully? Of course. I hope you see where I am going with this one ...

But let's be intellectually honest. Boards don't bandage skinned knees, help with algebra II homework or visit colleges with the members of the C suite. They oversee and advise on strategy and the risks incumbent to large-cap, mid-cap and small-cap businesses in a variety of stages of corporate life cycles. They have fiduciary duties of care and loyalty and are expected to shepherd these institutions to long-term profitability for and on behalf of stakeholders. And therein lies my confusion. Because studies prove that the more women in key leadership positions, the more money companies make. So why are there not more women in leadership roles?

McKinsey & Co. has been examining diversity in the workplace for years. In "Diversity Matters" (Nov. 24, 2014), McKinsey, after having examined proprietary data sets for 366 public companies across a range of industries in Canada, Latin America, the United Kingdom and the United States, found, among other things:

- Companies in the top quartile for racial and ethnic diversity are 35 percent more likely to have financial returns above their respective national industry medians.
- Companies in the top quartile for gender diversity are 15 percent more likely to have financial returns above their respective national industry medians.
- Companies in the bottom quartile both for gender and for ethnicity and race are statistically less likely to achieve above-average financial returns than the average companies in the data set (that is, bottom-quartile companies are lagging rather than merely not leading).

The Peterson Institute for International Economics recently released results of its 2014 survey of almost 22,000 companies in 91 different countries in its working paper series: "Is Gender Diversity Profitable? Evidence from a Global Survey." Nearly 60 percent of the firms surveyed had no female board members, just over half had no female C-suite executives, and fewer than 5 percent had a female chief executive officer. The survey found robust positive correlations between female executive representation and firm performance, echoing findings by Corinne Post and Kris Byron in late 2014, where they "found that female board representation is positively related to profitability and market performance in countries with stringent shareholder protections," including the United States.

So why the slow embrace to female board members? One possible explanation: Shareholders can't vote on female board nominees if there aren't any female board nominees!

Maybe, just maybe, the fight is just about to really begin. Mary Jo White, chairman of the U.S. Securities and Exchange Commission, has seemingly taken a page from Reddy's songbook and, in what is likely to be her final full year at the helm of the SEC, is laser-focused on a range of initiatives that include boardroom diversity. While speaking at a securities conference in Coronado, California, in late January 2016, White announced that she is concerned that existing disclosures may not provide investors with

enough information and that she has instructed her staff to review existing company disclosures and give her recommendations on whether the agency should require companies to provide more specific information about the racial and/or gender composition of their boards.

SEC rules adopted in 2009 currently require companies to disclose whether diversity is considered for management-backed director candidates who appear on corporate ballots, but questions linger. What does “diversity” mean in that context? (Yes, I am a corporate lawyer — defined terms mean something to me.) Diversity, evidently, like beauty, lies in the eyes of the beholder. At least currently. But should it? Many investor advocates (besides me) have said that companies have not provided shareholders with sufficient information about the makeup of their boards, in part because the rules leave it up to the companies to define “diversity.”

Perhaps White and the rest of the SEC should consider the model adopted by the Ontario Securities Commission in January 2014, which requires that companies listed on the Toronto Stock Exchange (TSX) talk about diversity or risk being delisted. Evidently, TSX-listed companies must detail the representation of women on their boards and in executive officer positions, as well as disclose any plans to boost their numbers. This “comply or explain” approach is not a quota, but a system designed to increase women’s leadership roles over time. In other words: Let the shareholders, not the board, define beauty.

Maybe the SEC should take it a step further than TSX? For example, the SEC could require publicly listed companies to disclose the percentage of board positions, top management positions and employees that are occupied by women at their companies and maybe, upon a deeper look, the percentage of their targeted female consumers and stakeholders. If there is a glaring discrepancy between the number of women who work for, support or invest in a company and the number of women who run it, the company could be asked to disclose an explanation. Better yet, the SEC could require disclosure as to whether there is a glaring discrepancy between the company’s gender diversity and its competitors? What about a diversity peer comparison chart? A picture tells a thousand words. And there is no airbrushing in proxy statements.

Any potential SEC diversity disclosure rule would have to be proposed and subject to public comment before adoption. With one year left in her tenure, that might be difficult for White and her streamlined staff to complete. But not impossible.

Roar, Ms. White. Roar!

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