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Continued Focus on Diversifying the Boardroom

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The 2021 U.S. Spencer Stewart Board Index found that directors from historically underrepresented groups accounted for 72 percent of all new directors at S&P 500 companies, up from 59 percent in 2020. Female representation increased to 30 percent of all S&P 500 directors. Despite the record number of new directors from historically underrepresented groups, the overall representation of some demographic groups on S&P 500 boards falls short of their representation in the U.S. population. For example, although 42 percent of the U.S. population identifies as African American, Hispanic, Asian, American Indian/Native Alaskan or multiracial, those groups make up only 21 percent of S&P 500 directors.[1]

A report published by the Conference Board in October 2021 found that, for the first time in its annual analysis of proxy statements, in 2021 the majority of S&P 500 companies disclosed the racial makeup of their boards. The disclosures show that women's representation on boards continues to increase, but boards remain overwhelmingly white.[2]

Evolving Legal and Regulatory Requirements

Against this backdrop, legislators and regulators are increasingly focused on board diversity. In August 2021, the SEC approved NASDAQ's board diversity disclosure listing standards that require companies listed on their exchange to (i) publicly disclose their board-level diversity statistics and (ii) have at least two diverse board members (one of which must identify as female, and the other a racial or ethnic minority or member of the LGBTQ+ community) or explain the company's reasons for not meeting this diversity objective.[3] Listed companies must comply with the disclosure requirement by the later of August 8, 2022, or the date the company files its proxy materials for its 2022 annual meeting.

On January 12, 2022, the President of the European Commission announced a renewed push to enact legislation requiring companies to fill at least 40 percent of non-executive board seats with women, or face fines, aiming to reach a deal in the first half of 2022.[4] Several European countries, including Germany, Italy, Belgium, France and the Netherlands, already impose mandatory quotas requiring gender diversity on the boards of directors of certain companies.

In the U.S., California was the first state to enact board diversity requirements, requiring all publicly held companies with principal executive offices in California to have (i) at least two women on boards of five members and at least three women on boards of six or more directors and (ii) one director from an underrepresented community by the end of 2021. By the end of 2022, California companies must have at least two directors from an underrepresented community on boards of five to eight members and three such directors on boards of nine or more members. Washington state followed California's lead with respect to gender diversity, enacting legislation requiring public companies incorporated in Washington to have at least 25 percent women on their board by January 1, 2022, or comply with board diversity disclosure requirements. Hawaii, Massachusetts, Michigan, New Jersey and Oregon are also considering imposing diversity quotas, and Colorado and Pennsylvania previously passed nonbinding resolutions urging corporations to have a minimum number of female directors.

Mandatory Disclosure of Board Composition

Other U.S. states use disclosure-based legislative regimes to encourage board diversity. Maryland requires business entities with corporate headquarters in Maryland to disclose in their annual reports their total number of directors and the total number of female directors. Illinois requires Illinois-headquartered, publicly listed corporations to include in their annual reports (i) data on the specific qualifications, skills and experience the corporation considers for directors and executive candidates; (ii) the self-identified gender of its directors; (iii) whether any of its directors self-identify as a minority person and their applicable race or ethnicity; (iv) the corporation's process for identifying, evaluating and appointing director and executive candidates, including whether and how demographic diversity is considered; and (v) the corporation's policies for promoting diversity, equity and inclusion among its board of directors and executive officers. In New York, corporations authorized to do business in the state must report the number of directors on their boards and how many of those directors are women. The Department of State will publish a report of its findings by February 1, 2022.

Shareholders Continue Calls for Board Diversity

Institutional investors and proxy advisory firms to expect companies to make continuous, measurable progress in board diversity, as reflected in their proxy voting guidelines and other policies. For example:

- Starting in July 2021, Goldman Sachs will only take a company public in the U.S. or Western Europe if it has at least two diverse board members, one of which must be a woman.[5]
- Based on feedback from institutional investors and the SEC's approval of NASDAQ's diversity listing guidelines in 2021, Institutional Shareholder Services extended its board gender diversity policy to all companies, effective February 2023. The policy states that Institutional Shareholder Services (ISS) will generally recommend voting against the nominating committee (or other directors on a case-by-case basis) at companies where there are no women on the board.[6]
- Glass Lewis expanded its policy on board gender diversity and beginning in 2022 will generally recommend voting against the chair of the nominating committee of a board with fewer than two gender diverse directors, or the entire nominating committee of a board with no gender diverse directors at companies within the Russell 3000 index. Glass Lewis may also recommend voting against the chair of the nominating and/or governance committee for companies in the S&P 500 index that fail to disclose director diversity and skills.[7]
- State Street Global Advisors implemented diversity expectations into its proxy voting practices in March 2021. In 2022, State Street will (a) vote against the Chair of the Compensation Committee at companies in the S&P 500 that do not disclose their EEO-1 Survey responses and (b) vote against the Chair of the Nominating and Governance Committee at companies in the S&P 500 and FTSE 100 that do not have at least one director from an underrepresented community on their boards.[8]

Conclusion

The social unrest and racial reckoning of 2020 thrust board diversity into the spotlight. Diversity is likely to continue to be a priority for shareholders, investors, regulators, and other stakeholders in 2022 and beyond. Companies should keep diversity at top of mind and be proactive to keep up with the fast-changing landscape.

Akin Gump has written extensively on issues of board diversity over the years. To read some of our prior writings, click here and here to read about the Nasdaq board diversity rule, and earlier writings here.

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[1] 2021 U.S. Spencer Stuart Board Index.

[2] Corporate Board Practices 2021 Edition.

[3] SEC Statement on Nasdaq's Diversity Proposals (August 6, 2021).

[4] Sam Fleming, "Von de Leyen expects EU deal on rules for women in boardrooms" (January 12, 2022).

[5] Goldman Sachs Board Diversity Initiative.

[6] ISS 2022 Proxy Voting Guidelines for the US.

[7] Glass Lewis 2022 Proxy Paper Guidelines for the US.

[8] State Street Global Advisors Proxy Voting and Engagement Guidelines (March 2021).

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Corporate Governance

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