Securities Regulation Daily Wrap Up, CORPORATE GOVERNANCE— 'Lady on Board' signaling may send mixed message, says SEC's Peirce, (Jun. 28, 2019)

Securities Regulation Daily Wrap Up

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The commissioner sees positive signs in the push to increase the number of women on public company boards but worries that some of the rhetoric may overstate the benefits while imposing additional costs and undermining private ordering.

Speaking before the Society for Corporate Governance National Conference, SEC Commissioner Hester Peirce said that the recent attention focused on the presence or absence of women on public company boards gives her both concern and hope for the future. Much like the "Baby on Board" signs on the rear windows of automobiles, which signal that the presence of persons who cannot fend for themselves, the recent "Lady on Board" trend may unintentionally send a message that undermines the respect given to women who are in boardrooms. On the positive side, Peirce expects that companies will increasingly draw from previously underrepresented populations as they seek to fill substantive gaps in their expertise.

Mixed evidence. Peirce noted that much of the push for women on boards has come from private actors, such as investors, asset managers, and proxy advisors. For example, the proxy advisory firm ISS will include in its voting guidance a recommendation that, with regard to companies in the Russell 3000 or S&P 1500 indices, shareholders generally vote against the chair of the nominating committee at companies when there are no women on the company's board. Similarly, the 2019 guidance from the next largest proxy advisor, Glass Lewis, states that the firm will "generally recommend voting against the nominating committee chair of a board that has no female members."

In Peirce's view, however, there is mixed evidence as to whether the mere inclusion of women on boards has a positive effect on a company's performance. While some studies have found that having women on corporate boards has a positive effect on a company's return on assets, others have found no impact on performance at all. In addition, several countries have already implemented "hard" or "soft" quotas for the number of women directors or imposed disclosure requirements concerning the board's gender diversity. Peirce believes that the results of these experiments have not been encouraging.

Regulatory initiatives. For example, since 2008 Norway has required that the country's public companies have boards with at least 40 percent of each gender represented. If the company does not comply, the result can be forced dissolution. One study found that the quality of public company's boards may have suffered because the boards were overall younger and less experienced as measured by CEO experience. The study also found an increase in leverage and acquisitions and deterioration in operating performance. The law may have even had unintended negative effects on social policy grounds, as one study found that the law resulted in a decrease in the overall number of female board members because more companies became private, making fewer public company board seats available.

Peirce also expressed concern about state regulatory and legislative initiatives in the United States, such as the California law requiring minimum numbers of women on the boards of public companies headquartered in California. The commissioner finds it odd that the California legislature would need to act to require companies to take action that, in the language of the law itself, is of great benefit to the companies themselves. She also observed that the decision of whom to place on a board is an intensely "bespoke" decision for a company. Adding another director is not always a good option, and each seat, and the specific qualifications of the director

that fills it, must therefore be carefully considered by the company. Peirce finds federal involvement on the issue of board diversity even more troubling than state involvement. While corporations can simply move to another state to seek better governance provisions, federal law permits no such escape.

Reasons for optimism. On the positive side, Peirce noted that companies will now have to think more creatively in filling board seats. As boards bring on younger directors, these directors are likely to include women and minorities, who have the requisite education, experience, and expertise, even though they have not yet served as CEO. Peirce said that this may already be happening without explicit mandates, as the percentage of corporate directors at Fortune 1000 companies who are women increased from 14.8 percent to 19.8 percent between 2011 and 2017. In addition, Peirce's experience at the SEC has underscored for her how collective decision-making on a wide range of complex matters can benefit from being informed by diverse personal and professional experiences. Peirce expressed confidence that those on today's corporate boards faced with so many difficult and complex problems, will reach similar conclusions.

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