

Strictly Boardroom - why dancing around issues of diversity and inclusion is a risk for D&Os

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Two events have defined 2020: Covid-19 and the Black Lives Matter movement. Whilst these events have tragedy at their core, they have brought into sharp focus the need for, and benefits of, diversity and inclusion (“D&I”) and present a real opportunity for change. Does the current, typical, composition of company boards remain fit for purpose, and what are the risks for directors if the status quo remains unchanged?

D&I in the boardroom

Deloitte’s report “*Women in the Boardroom: A Global Perspective*” published in October 2019 found that women held just 16.9% of board positions globally. This represented a nominal increase of 1.9% since 2017, showing that progress has been slow despite gender parity having been high on the boardroom agenda for a number of years.

Similarly the 2017 Parker Review, which reported on the ethnic diversity of UK boards, revealed poor representation of ethnic minorities at executive level. The Parker Review recommended that each FTSE 100 board should have to have at least one BAME director by 2021 (“One by 21”). In an update published in February 2020, the Parker Review Committee also reported that progress had been slow; with less than a year to go, 37% of FTSE 100 companies have yet to meet the “One by 21” target.

Progress is impossible without change and Covid-19 brought worldwide change in its wake. The almost overnight disarray into which the world was thrown illustrated that for a company to survive and thrive in the post-pandemic era, it had to be primed to adapt and to embrace change. The traditional boardroom model of leadership which lends itself to office based, traditional stereotypical workforces is becoming less and less relevant in a world of remote working and video calls. This change to the world of work presents an opportunity for boards to reimagine the structure, diversify their composition, and draw on the talent of those who may otherwise have been excluded from executive positions.

In addition to the organic changes to boards brought about by the new way of working, if D&I follows the same trajectory as [climate change](#), we may see regulators taking a keen interest in provisions made by companies around D&I, perhaps further forcing the pace of change. In the meantime, stakeholders will continue to expect companies to make, and deliver on, serious commitments to engendering and prompting D&I at all levels, especially in the boardroom.

D&I based exposures

The recent Black Lives Matter movement has brought a new energy and momentum to holding accountable those who fail to demonstrate a true commitment to D&I. Whilst many companies are championing the cause, others are facing intense public scrutiny about the lack of diversity around the boardroom table; one example being *Newsweek*’s recent publication of the names of the 20 largest US companies without a black director on their board. Also in the US, some of the world’s most well-known companies are facing shareholder derivative actions based on allegations around the lack of, and failure to address the lack of, diversity at board level.

In those actions the plaintiffs’ complaints are that, despite public statements giving assurances about their commitment to D&I, the boards remain dominated by white men. It is said that these statements were misrepresentations amounting to breaches of the directors’ fiduciary duties and violations of federal securities laws. If a company suffers a drop in share price as a result of issues around D&I, it is possible that shareholders may look to bring claims alleging pre-investment reliance on false statements made about a company’s commitment to D&I.

Whilst these claims are currently confined to the US, it is possible that the momentum will gather pace and similar claims may be seen in other jurisdictions. Regardless of whether these actions are ultimately successful, D&O Insurers will be acutely aware that there are time and cost implications for companies, their directors and their insurers when claims are made or intimated, whether or not they have merit.

Commentary

The recent derivative actions in the US could be the tip of the iceberg of claims made against directors based on issues relating to diversity and inclusion. Companies may wish to seize this opportunity to deliver change by revisiting their D&I policies, the commitments made, and the promises delivered.

Authors



Sarah Crowther

London - Walbrook

+44 (0)20 7894 6254

scrowther@dacbeachcroft.com



William Allison

London - Walbrook

+44 (0) 20 7894 6440

wallison@dacbeachcroft.com

DAC
DAC BEACHCROFT