



## Put Some Teeth in Those Rules

Posted By [Janice Reals Ellig](#) On October 13, 2010 @ 9:30 am In [Blogs](#)

The new rules the Securities and Exchange Commission (SEC) enacted in December 2009 do not go far enough to truly impact a section of the new regulations – Diversity and Board Recruitment Practices. The rules state that *if* the board considers diversity in identifying nominees for director, the board must disclose how they consider diversity and how this policy is implemented, as well as how the board assesses the effectiveness of its policy.



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There is a significant lack of mandate. First, there is no definition for diversity. What does that mean? Diversity of thought and background is diversity in a broad sense – but when it is an all male, white board, a part of the diversity factor is definitely missing. Second, the SEC requirements say “if” a company has a diversity policy, it asks “what is that policy” and how does it work. “If” is not good enough because if there is no policy, then no disclosure is required regarding how boards approach diversity in their recruitment practices.

The issue here is that the rules rely more on requiring the companies to *report* on what they are doing, rather than *directing* them to do something. One could argue the SEC needs to put *some teeth* into its transparency and disclosure requirements. It needs to mandate that companies *must have a diversity policy* and that there is a *definition for diversity*, such as national origin and gender. Only then can a public company be held accountable for how it applies diversity to its board recruitment practices.

Furthermore, it would be nice if the rules went even further to state that if the company *does not* have at least 20% representation with regard to gender and racial diversity, then the company must outline their *action plan* to achieve parity (not equality) over a five-year period. To that end, there has to be a biased affirmative action plan. That means that the chairman of the board and the head of the nominating committee must commit to achieving parity on their boards by a stated time frame. This is essential, especially where no diversity currently exists on a board. Without a specific directive and time frame, change will not happen.

It could be argued that these suggested requirements go beyond the charter of the SEC. Clearly, its mandate is to ensure an *investor has sufficient information to decide where to buy, sell, or hold a*

*particular company's stock.* However, if the SEC cannot take this on, then perhaps other options are needed.

Certainly, one option is legislation. Norway did it! In 2003, the Norwegian government proposed legislation that public companies must have 40 percent female representation. At that time, it was seven percent. Companies raised strong objections saying they could reach the 40 percent requirement of women on their boards without legislation. However, *two years* later, there was no change in the female representation rate on their boards. The legislation was enacted July 2005 and by December 2008, all companies met the 40 percent requirement; no company was delisted.

Clearly, the best companies will take the SEC's new rules and read between the lines to have a board recruitment diversity practice, and if not already there, set up an action plan to achieve parity on their boards. For other companies, only a clear directive will get them to make the necessary changes to embrace board diversity. According to Catalyst, \* at the rate Corporate America is going, it will be another 70 or more years before we reach gender parity on U.S corporate boards. It is difficult to defend this as an appropriate target. So, will boards voluntarily take action, or is the Norway approach required?

*\*Catalyst is the leading nonprofit membership organization working globally with businesses and the professions to build inclusive workplaces and expand opportunities for women and business.*

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