

## Chair White Speaks on the SEC's Role in Corporate Governance, Focusing on Board Diversity, Non-GAAP Measures and Sustainability Reporting

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[Chair White's speech](#) before the International Corporate Governance Network (ICGN) discussed the SEC's role in U.S. public company governance and focused on the agency's efforts on board diversity, non-GAAP reporting and sustainability disclosure.

Contrary to shareholders in many European companies, the state law-based governance framework for U.S. companies makes it more challenging for investors to play a large role in corporate governance, according to Chair White. Shareholders outside the U.S. may be surprised to discover that corporate governance in the U.S. is a "patchwork" driven by state law and supplemented by federal law, including SEC regulations.

Investors have a range of private ordering options that they can exercise, such as directly engaging with boards, using shareholder proposals or voting against directors. However, given the variety in investor perspectives, Chair White noted that it is highly difficult to say that a particular practice or disclosure is "what investors as a whole want."

Within this complicated scheme, the appropriate role of the SEC in U.S. public company corporate governance is unclear. Chair White emphasized that the SEC's authority is particularly limited as it relates to the environmental, social and governance (ESG) matters that are of increasing importance to a growing number of investors and other constituents. The courts have made clear that the SEC must watch its boundaries.

Chair White also urged investors to recognize that more disclosure is only a small step, and practices to satisfy any additional disclosure requirements would not change the underlying issues. For example, requiring more information about climate change or political spending may not affect how a company acts, and fail to produce the results that some investors and constituents ultimately want.

**Board Diversity.** Chair White repeated well-known statistics that minority directors on boards of the top 200 companies on the S&P 500 have remained 15% for the last several years, and in fact the percentage of these companies with at least one minority director actually declined from 90% in 2005 to 86% in 2015. In 2009, women held only 15.2% of board seats at Fortune 500 companies and that number has only risen to 19.9% in the past six years; 73% of new directorships in 2015 at S&P 500 companies went to men.

She stated that the "low level of board diversity in the United States is unacceptable" and exhorted investors to continue to keep the issue in the forefront and demand concrete actions from the companies in which they invest. Chair White acknowledged that the SEC rule requiring board disclosure has produced only vague reporting that has not gotten any better over time. However, due to private ordering, a growing number of company proxy statements have recently begun to voluntarily provide an analysis of data, accompanied by pie charts and bar graphs, to describe the state of the board's gender, race and ethnic diversity composition, sometimes in addition to other categories.

These voluntary disclosures make it seem to the SEC that it is not difficult for companies to provide these disclosures. The SEC staff is preparing a recommendation to the Commission to propose amending the rule to require companies to include in their proxy statements more meaningful board diversity disclosures on their board members and nominees

where that information is voluntarily self-reported by directors.

**Non-GAAP Measures.** The SEC's general position is to provide companies with the flexibility to provide non-GAAP measures to investors, but there has been growing concern that companies are going "far and beyond what is intended and allowed by our rules." In the SEC's view, the non-GAAP information should supplement the GAAP information, not supplant it.

The SEC is concerned about a host of practices which can make the non-GAAP measures misleading, and Chair White urged that audit committees "carefully oversee" their companies' use of non-GAAP measures and disclosures. She warned that the SEC will act if necessary not only through the filing review process or rulemaking, but also enforcement actions.

**Sustainability Disclosures.** Chair White noted that the SEC is aware that "more work and thinking" needs to be done about sustainability reporting at the SEC, which is one of the reasons the topic is in the Regulation S-K Concept Release. However, she stressed that disclosure alone would not achieve sustainability objectives and it is the role of investors to "encourage and prod" companies toward the actions that they are seeking for their investments.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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