



NYC COMPTROLLER REQUESTS ROONEY RULE FOR S&P 500 COMPANIES TO BOOST DIVERSE HIRING

BY LAUREN LIPSYC

Some people fear getting stuck in an elevator, but others know to expect the elevator to stop moving before it reaches the C-Suite. For example, women and racial minorities are among the groups that frequently get stuck in the broken elevator together. They seldom have the opportunity to ride it all the way to the top leadership positions, regardless of how hard they press the buttons. Unfortunately, the meager numbers support the need for some heavy mechanical work. In 2018, only 5.4% of S&P 500 CEOs were women, and in 2017, less than 1% of Fortune 500 CEOs were African-American.

In stark contrast to these low numbers, studies confirm the undeniable benefits of diverse leadership. A McKinsey & Company study covered more than 1,000 companies across 12 countries and found that greater gender, ethnic, and cultural diversity correlates with a greater likelihood of financial outperformance measured by profitability and long-term value creation. Companies with diverse leadership may outperform others because diversity increases creativity and decreases the risk of “groupthink.” With a greater variety of perspectives represented at the decision-making level, boards are more likely to think innovatively and challenge inherent biases that could otherwise hold the company back from reaching better outcomes. In other words, diverse leadership is not only good for people, but also good for business.

Some leaders are beginning to recognize the issue and take steps toward meaningful change. New York City Comptroller Scott Stringer — whose nationwide influence results from his control of the NYC Public Pension Funds, which amount to over \$215.5 billion — has asked large companies to improve diversity among their top leaders by tweaking

their hiring processes. As part of his larger Boardroom Accountability Project, Stringer intends to “seek meaningful, long-lasting, and structural change to market practice” and will rely on the National Football League’s Rooney Rule as a backdrop.

The NFL adopted the Rooney Rule in 2003, in response to a serious lack of diversity in its highest leadership positions. Named after Dan Rooney, former chairman of the NFL’s diversity committee and former owner of the Pittsburgh Steelers, the Rooney Rule requires every team to interview at least one racially diverse candidate for every open head coach, general manager, and similar front office position.

Motivated by both a lack of diversity in the highest leadership positions and the potential for increased diversity to result in greater financial success, Comptroller Stringer specifically requested that companies in which his office invests adopt a modified version of the Rooney Rule. On October 10, 2019, he sent a letter to 56 S&P 500 companies, including AT&T Inc., The Boeing Company, The Walt Disney Company, and The Kraft Heinz Company, requesting that each company adopt practices to boost the hiring of diverse leaders. Specifically, he requested that each company consider at least one diverse candidate — *e.g.*, a female candidate or a racially or ethnically diverse candidate — during the hiring process for open director and CEO positions. Stringer’s proposed policy would also require companies to consider candidates from non-traditional backgrounds such as academia, government, and non-profit organizations. Because most people with prior C-Suite experience come from traditional corporate backgrounds and are not female or racially diverse, the consideration of candidates without prior C-Suite experience increases the chances that a woman or racial minority will be considered

for employment. Stringer’s letter noted that he planned to file shareholder proposals reflecting his request with companies lacking racial diversity in their senior leadership.

Companies around the United States are taking notice of the importance of diversity in their leadership, and several large companies already have some version of a Rooney Rule in place. For example, in 2018, Amazon.com, Inc. adopted an official policy to consider female and racial minorities for senior management positions. More recently, in January 2020, Goldman Sachs announced its new policy to refuse to take a company public in the United States and Europe if the company does not have at least one diverse candidate on its board of directors. Goldman Sachs backed up its decision by pointing to the facts: companies with diverse boards perform better than those lacking diversity when they first hit the stock market. Facebook and Xerox also have Rooney-type policies in place.

While it is still too early to see many corporate policy changes based on Stringer’s most recent request, his past attempts to promote corporate diversity have been successful. In 2014, when only six U.S. companies included proxy access in their bylaws, Stringer pushed to make proxy access more common. Today, more than 600 U.S. companies have enacted proxy access bylaws. Similarly, since Stringer began his board diversity initiatives, the number of companies that publicly report on the diversity of their boardrooms has doubled. Stringer’s past successes suggest that the influence he holds over large companies motivate them to act upon his requests. His latest request, coupled with his powerful influence, may significantly improve diversity at the highest level.

Diversity initiatives are not limited to just the corporate world. The United States House

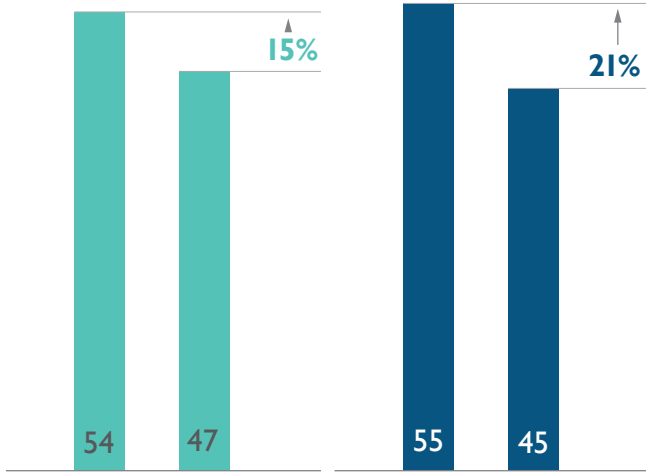
Gender and ethnic diversity are clearly correlated with profitability, but women and minorities remain underrepresented.

Likelihood of financial performance above national industry median, %

Executive gender diversity by quartile

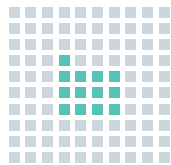
2014²

2017³

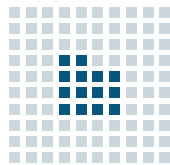


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Average of 13% women in sample

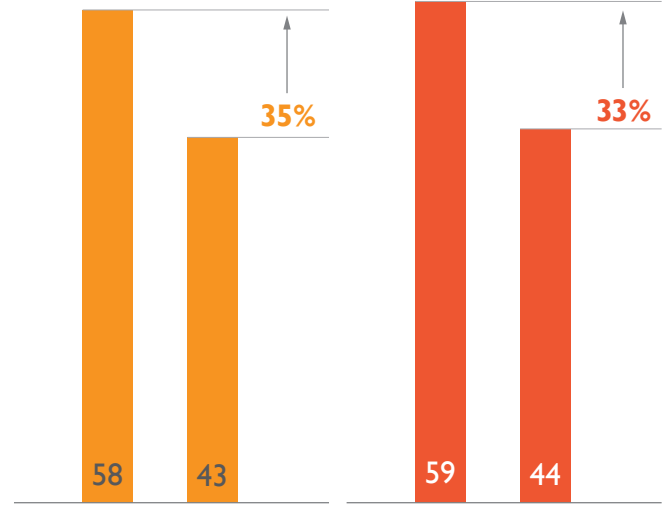


Average of 14% women in sample

Executive ethnic diversity by quartile

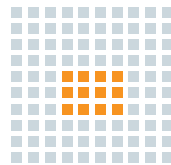
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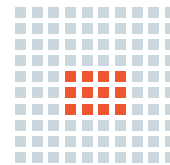


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Average of 12% minority in sample



Average of 12% minority in sample

¹Average earnings-before-interest-and-taxes (EBIT) margin, 2010–13 in Diversity Matters I and 2011–15 in Diversity Matters II.

²Results are statistically significant at p-value <0.10.

³Results are statistically significant at p-value <0.05.

McKinsey&Company



of Representatives also has picked up on the diverse leadership message. On November 19, 2019, shortly after Stringer sent his Rooney Rule request letter to large companies, the House passed H.R. 5084, the “Improving Corporate Governance Through Diversity Act of 2019” bill. Like the Rooney Rule, this resolution aims to enhance boardroom diversity and encourage diverse hiring for leadership positions. Unlike the Rooney Rule, H.R. 5084 focuses on disclosure requirements. If enacted into law, H.R. 5084 would require public companies to annually report diversity data on race, gender, and veteran status in their proxy statements, stating the composition of the board of directors, any nominees for the board, and the executive officers. The bill would also require public companies to disclose whether the company has adopted any policy or strategy to promote diversity among its board, nominees for its board, or executive officers.

In addition to disclosure requirements, the bill would task the Director of the Office of Minority and Women Inclusion of the

Securities and Exchange Commission with publishing best practices guides for compliance with the bill’s requirements. H.R. 5084 would also require the Securities and Exchange Commission to create a Diversity Advisory Group to perform studies and identify strategies to increase gender, racial, and ethnic diversity among corporate leadership.

H.R. 5084 is currently pending in the Senate’s Committee on Banking, Housing, and Urban Affairs, where it has remained since November 20, 2019 when the Senate received the bill from the House. The chance of speedy success for H.R. 5084 is highly questionable, but Comptroller Stringer’s efforts may indeed yield widespread, successful results.

The nationwide push to increase corporate leadership diversity is an important issue for labor and employment lawyers. Lawyers should be aware of the opportunity for clients to improve their long-term financial position by interviewing and employing diverse candidates for C-Suite positions. Candidates who are diverse in gender, ethnicity, race, religion, or

even background experience often provide an influx of creativity and innovation that can help propel companies forward in an unexpected yet highly profitable direction. To best guide clients through changes to their hiring process, employment lawyers should be on the lookout for companies complying with Comptroller Stringer’s advice to adopt diverse hiring policies. These policies will likely allow more women and racial minorities to step off the elevator directly onto the rooftop and start making creative, smart, and profitable decisions to improve their company’s overall success.



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