Board Oversight of Gender Pay Equity

Questions and Guidance for Directors

Semler Brossy

Some observers continue to view pay equity between men and women primarily through the lens of fairness and social justice—after all, why shouldn't two people earn equal pay for the same work? Recently, this question of fairness is increasingly eclipsed by one of competitiveness, as a growing number of corporate leaders recognize that companies who fail to reward their employees fairly for the same work risk losing out on the best and brightest talent.

That recognition gained more traction in 2015, when McKinsey & Co. issued a report which found that firms in the top quartile for gender diversity on their executive teams were 15 percent more likely to experience above-average profitability. In 2018, McKinsey published a second study, which found that "companies in the top-quartile for gender diversity on executive teams were 21% more likely to outperform on profitability."[1] Links like those found in McKinsey's data, and other studies that have arrived at similar conclusions, are increasing the focus on companies' pay data. Given this landscape, firms that ignore pay inequity issues are likely to be at a disadvantage in attracting high-potential employees, particularly women.

The stakes are high for directors and executives alike, especially given that pay equity is often viewed, by employees, as a signal of management's commitment to diversity and inclusion. To avoid potential risks, boards should consider ensuring that their companies not only champion equality, but honor that ideal in employees' paychecks. This tool offers guidance for senior executives and directors who are dedicated to achieving pay equity for women. Companies that are willing to understand and confront this issue are likely to distinguish themselves from peer competitors and gain an edge in the recruitment and retention of high-potential women as well as other traditionally underrepresented groups.

MAKING SENSE OF GENDER PAY EQUITY

In discussions of gender equality, the gender pay gap and gender pay equity are often conflated. A company's "gender pay gap" refers to the difference between the median pay for all men compared to that of their female counterparts. On the other hand, "gender pay equity" refers to "equal pay for equal work," a concept long enshrined in US law. (See The Regulatory Backdrop for information on the regulatory landscape.)

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1 McKinsey & Co., Vivian Hunt, Sara Prince, Sundiatu Dixon-Fyle, and Lareina Yee, *Delivering Through Diversity* (McKinsey & Co., 2018), p. 1.

The Regulatory Backdrop

EQUAL PAY ACT OF 1963: Signed by President Kennedy, the EPA amended the Fair Labor Standards Act with the aim of abolishing wage inequity based on gender. The law forbids wage discrimination for equal work based on sex, although it includes exceptions for factors such as seniority, merit, and production quality/quantity.

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: This act broadened the Equal Pay Act to cover professionals and other white-collar workers, including those in executive, administrative, and sales capacities. It expanded protections to cover all employees in businesses with 15 or more employees.

LILLY LEDBETTER FAIR PAY ACT: President Obama signed the act in 2009, amending the Civil Rights Act of 1964 to provide an extension of the 180-day statute of limitations for people filing an unequal pay lawsuit based on their first discriminatory paycheck. The statute of limitations now restarts upon the issuance of every paycheck that violates the Civil Rights Act.

Gender pay equity is assessed by calculating the difference in pay between men and women doing the same job with similar skills, education, and performance.

Eliminating the disparity in both cases has become increasingly urgent. Regulators, the public, and investors have steadily ramped up calls for faster progress. Of note, since last year, the pay gap has received more regulatory attention, perhaps because it serves as a reminder that fewer women are being promoted into senior and/or high-paying roles. For instance, all companies in the United Kingdom with more than 250 employees are required to report the mean and median pay gaps—including bonuses—between men and women. Though the United States has no such mandate, there is an Obama-era rule that requires companies with more than 100 employees to report to the government employee pay, broken down by race and gender.[2]

Shareholders are also signaling a stronger focus on this issue. In the United States, Institutional Shareholder Services (ISS), one of the most influential proxy advisory firms, reported that 60 percent of investors surveyed wanted more robust disclosures of the gender pay gap.[3] Concerned investors are also targeting companies directly—Arjuna Capital, for example, regularly submits shareholder proposals asking for pay-equity disclosure.[4] Another important constituency, an organization's workforce, also views this issue as a critical concern. Survey data show that a majority of both men and women employees in the United States, 59 and 78 percent respectively, believe the gender pay difference for equal work is a serious problem.[5]

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2 Samantha Schmidt, "'Victory for equal pay': Judge rules Trump administration must require companies to report pay by gender, race," the *Washington Post*, March 5, 2019.

3 Institutional Shareholder Services, *2017–2018 ISS Policy Application Survey: Summary of Results* (ISS, 2017), p. 15.

4 Ryan Resch and Ruby Tewani, "New Developments in Shareholders' Gender Pay Gap Proposals," the *Harvard Law School Forum on Corporate Governance and Financial Regulation* (blog), March 22, 2019.

5 Glassdoor Inc., *Fact Sheet: 2019 Glassdoor Data on the Gender Pay Gap and Salary Transparency* (Glassdoor, 2019), p. 2.

The difference in gender pay equity is particularly acute for women in executive roles. According to Glassdoor, female executives in the C-suite earn 24 percent less than men in the same roles.[6] The inequities are even worse for older women and women of color.

The disparity that persists in most companies explains why the Pew Research Center reports that one in four women employees say they have earned less than a man doing the same job.[7] These discrepancies can be detrimental to companies' recruitment efforts. According to a 2019 Harris Poll, 72 percent of women (and 58% of all employees) reported that they would not apply to work at a company where such a pay discrepancy exists.[8]

Leading companies have responded to these pressures with decisive action; in fact, some have even reached equity. In 2016, Salesforce.com announced that it had achieved its goal of pay parity.[9] In 2019, the company spent $1.6 million to reestablish parity in cases where inequity had reemerged between men, women, and minorities.[10] In 2016, another Silicon Valley firm, Intel, also achieved parity,[11] and starting in 2019 began counting not just cash pay but stock grants in their calculations.[12] To maintain their successes, both companies remain vigilant by regularly monitoring—and as necessary adjusting—the salaries of men and women to keep them on par with one another. The two organizations also conduct in-depth compensation surveys annually.

For most companies, progress is slow. Research from 2019 shows that, across the American workforce, women in identical jobs with equal capabilities continue to earn just 95 to 98 cents for every dollar earned by their male counterparts.[13] This represents a significant differential, although it remains much smaller than the median pay gap, which is 79 to 85 cents for every dollar earned by men.[14]

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6 Glassdoor Inc., *Fact Sheet: 2019 Glassdoor Data on the Gender Pay Gap and Salary Transparency* (Glassdoor, 2019), p. 2.

7 Nikki Graff, Anna Brown, and Eileen Patten, "The narrowing, but persistent, gender gap in pay," the Pew Research Center's *Fact Tank*, March 22, 2019.

8 Glassdoor Inc., *Fact Sheet: 2019 Glassdoor Data on the Gender Pay Gap and Salary Transparency* (Glassdoor, 2019), p. 3.

9 Cindy Robbins, "Equality at Salesforce: The Equal Pay Assessment Update," *Salesforce Blog*, March 8, 2016.

10 Cindy Robbins, "2019 Salesforce Equal Pay Update," *Salesforce Blog*, April 2, 2019.

11 Danielle Brown, "Reflections on Intel's Diversity & Inclusion Journey: 2016 Diversity & Inclusion Annual Report," *CSR@Intel* (blog), February 28, 2017.

12 Julie Ann Overcash, "Intel Achieves Gender Pay Equity Globally," an editorial on intel.com, January 22, 2019.

13 Different sources are responsible for the range cited in the text. See PayScale Inc.'s web page, "The State of the Gender Pay Gap 2019," and Glassdoor Inc.'s *Fact Sheet: 2019 Glassdoor Data on the Gender Pay Gap and Salary Transparency*, p. 2.

14 Different sources are responsible for the range cited in the text. See Nikki Graff, Anna Brown, and Eileen Patten, "The narrowing, but persistent, gender gap in pay," on the Pew Research Center's *Fact Tank,* March 22, 2019; PayScale Inc.'s web page, "The State of the Gender Pay Gap 2019"; and Glassdoor Inc.'s *Fact Sheet: 2019 Glassdoor Data on the Gender Pay Gap and Salary Transparency*, p. 2.

THE BOARD'S ROLE RELATIVE TO GENDER PAY EQUITY

Given the strategic consequences, how can boards reassure investors that their companies are reaping the benefits of equal pay for equal work—making both women and men feel valued as employees? How can a company stay clear of action by the Equal Employment Opportunity Commission, which enforces pay discrimination laws? The issue of fair compensation is likely to continue drawing scrutiny from employees, customers, regulators, and investors. As boards engage with this issue, the following questions can serve as a guide for directors to effectively probe and challenge senior executives' assumptions and strategies.

1. **RISKS:** Is the company at undue risk from ignoring the consequences of unequal compensation practices? Is it susceptible to legal liabilities under the Equal Pay Act, Title VII of the Civil Rights Act, and/or the Lilly Ledbetter Fair Pay Act? Is our management team adequately weighing the potential for reputational damage from public perception?
2. **OPPORTUNITIES:** Has management assessed enterprise-wide efficiencies that might occur as a result of narrowing or closing pay differences for men and women doing the same work? What kind of untapped talent and/or productivity benefits might be in the offing?
3. **POLICY:** Has our management team instituted policies at all levels of the organization to clarify its commitment to pay equity—the same pay, for the same job, for people with similar skills, education, and performance? How are standards, behavioral expectations, and quantitative goals established and evaluated?
4. **DATA AND REPORTING:** Does the executive team get annual data on pay discrepancies? Are the numbers disaggregated to help them understand how pay inequity may manifest differently among employee populations? Has the management team explored employee perceptions of pay equity at the company? If so, is this information and management's response included in reporting to the board?
5. **PROCESSES:** Has management evaluated recruiting, promotion, and performance review systems for biases introduced into pay offers and raises?
6. **BENCHMARKING:** Has management benchmarked its policies, processes, and performance against a cross section of other leading companies?
7. **ACTION PLAN:** What approach is management using to effectively reduce inequities in pay offers, promotions, and performance-pay increases?
8. **SUPPORTING SYSTEMS:** Does the company have a robust pipeline of women candidates ready to take positions of equal pay? If not, why not? Are there talent development, recruitment, retention, or other failings? What signals might an empty pipeline send to members of management and the board?

9. **TRANSPARENCY:** Has management assessed the pros and cons of increased transparency in salaries or salary bands to reassure stakeholders of the company's commitment? What privileged information should not be shared during the reporting process?
10. **REGULATORY AND INVESTOR CONCERNS:** Is management prepared for shareholder or regulatory pressure to improve pay equity? How is the senior leadership team preparing for potential legislative mandates (whether from states or municipalities) around gender-equity reporting?

ENGAGING YOUR INVESTORS ON GENDER PAY EQUITY

When engaging investors, how can directors best convey the company's commitment to pay equity as an aspect of enhancing performance? Put differently, how does the company take control of the narrative around its efforts to build value as an inclusive corporation? Corporate leaders should avoid abdicating the telling of their story to regulators, litigators, watchdogs, and/or the press. Here are five tips for building your company's narrative:

1. **LEAD WITH DATA**. Gather your audited data, with salaries and bonuses disaggregated by gender, function, tenure, age, location, experience, education, and training. Data will help make your case more compelling and bolster your company's credibility.
2. **HIGHLIGHT MANAGEMENT'S COMMITMENT.** Itemize the policies, procedures, and initiatives in the company that assure equity. Where appropriate, note how incentive mechanisms—pay, bonuses, and other rewards and recognition—are linked to broader gender pay equity goals.
3. **STRESS CONTINUOUS IMPROVEMENT.** Utilize trends over the last few years to highlight your dedication to equity. Highlight substantial changes in recruitment, salary negotiation, promotion, performance review, and other procedures.
4. **REPORT ON MITIGATION EFFORTS.** Summarize management's investment in identifying and rectifying gaps in gender pay equity. Group the data by underrepresented individuals or classes of employees. Call attention to the company's transparency—to the board and to workers—for correcting shortfalls.
5. **ITEMIZE GOALS.** Present goals for improvement for the coming year to demonstrate that the company is aware of existing shortfalls.

Leading the Charge at Boston Scientific

Boston Scientific offers a powerful example of a company leading the charge on this issue. Under the leadership of CEO Michael Mahoney, Chief Human Resource Officer Wendy Carruthers, and the board's compensation committee, the company has elevated diversity and inclusion to a core business imperative. Since 2014, Boston Scientific has hired a third party to annually analyze pay for its salaried and sales employees, and beginning in 2018, it broadened this practice to include its entire global workforce. Results are publicly reported, ensuring easy access for all interested stakeholders. Last year, the company achieved near parity, with the female/male ratio reaching 100 percent for salespeople, 99.9 percent for salaried employees, and 99.5 percent for hourly workers.[15]

Boston Scientific annually corrects discrepancies by raising pay when the root cause of the differential cannot be explained by a known variable. Rededicating itself annually to programs that facilitate greater representation of women and minorities at all levels—including leadership development, succession planning, recruiting with mandatory consideration of candidate diversity, and regular auditing of policies and practices—has been critical to the company's efforts.[16]

COMMITTING TO PAY EQUITY

Absolute equity remains an ideal, though it is not quite a reality at numerous companies. Many executives have good intentions, but they struggle to correct discrepancies or lack the data to adequately address them. That makes it critical for the board to effectively communicate its company's commitment to pay equity. An inability to do so may result in shareholder concerns about cultural and diversity failures. By leveraging the information and questions previously provided, directors can mitigate such concerns by closely monitoring management's progress on pay equity, and explicitly placing oversight responsibility under the purview of the full board or a specific committee.

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15 Bostonscientific.com, "Ensuring Equal Pay for Equal work."

16 For example, see Wendy Carruthers, "Viewpoint: Pay equity is just the beginning," the *Boston Business Journal*, April 1, 2019.

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Semler Brossy is an established, independent executive compensation and corporate governance consulting firm founded in 2001. The firm serves both public and private firms across the country and has offices in Los Angeles and New York City.

NACD NXT™

NACD, in collaboration with NACD NXT™ founding, lead program, and content contributor Deloitte, has created a multiyear initiative focused on helping directors and boards understand how to leverage the power of diversity and inclusion to create long-term value. CACI, Heidrick & Struggles, and Semler Brossy serve as program and content contributors to the initiative.

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