

February 8, 2019

DEVELOPMENTS ON PUBLIC COMPANY DISCLOSURES ON BOARD AND EXECUTIVE DIVERSITY

To Our Clients and Friends:

On February 6, 2019, the staff (Staff) of the Division of Corporation Finance of the Securities and Exchange Commission (SEC) issued two new identical Compliance and Disclosure Interpretations (C&DIs). The C&DIs address disclosure that the Staff expects public companies to include in their proxy statements and other SEC filings regarding “self-identified diversity characteristics” with respect to their directors and director nominees. In addition, legislation was introduced in both the U.S. House of Representatives and the U.S. Senate that would require public companies to annually disclose the gender, race, ethnicity and veteran status of their directors, director nominees, and senior executive officers.

Background

The SEC already has rules requiring board diversity-related disclosure. Item 407(c)(2)(vi) of Regulation S-K requires companies to disclose “whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director.” It further requires that, “[i]f the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, [the company must] describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.” Historically, it has been our understanding that the Staff takes a broad view of what qualifies as a “policy,” and that if a company considers diversity in identifying director candidates, the company has a “policy” for purposes of this requirement and is expected to provide disclosure about the implementation and effectiveness of its policy. This disclosure requirement therefore can influence what companies report under Item 401(e) of Regulation S-K, which requires directors’ and nominees’ biographical information to “briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director for the registrant at the time that the disclosure is made, in light of the registrant's business and structure.”

These rules have “been subject to some criticism” that they don’t provide “enough useful disclosure,”^[1] as noted by Bill Hinman, the head of the SEC’s Division of Corporation Finance, in testimony before the House Committee on Financial Services Subcommittee on Capital Markets, Securities and Investment in April 2018. Hinman added that the Staff had been reviewing company disclosures regarding directors’ diversity and considering concerns raised about directors’ privacy issues. As a result, the SEC’s regulatory agenda states on the long-term agenda that the Division of Corporation Finance “is considering recommending that the [SEC] propose amendments to the proxy rules to require additional disclosure about the diversity of board members and nominees.”^[2]

New C&DIs

The two new Regulation S-K interpretations are identical and are set forth in Question 116.11 (relating to Item 401, Directors, Executive Officers, Promoters and Control Persons) and Question 133.13 (relating to Item 407, Corporate Governance).[3] They convey the Staff's expectation that in some situations (1) a discussion of a director or nominee's experience would include disclosure of "self-identified diversity characteristics" and how they were considered, and (2) the description of the company's diversity policies would include how the company considers "the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account." The C&DIs are framed as addressing a situation where "board members or nominees have provided for inclusion in the company's disclosure" those characteristics and where the "individual . . . has consented to the company's disclosure of those characteristics," demonstrating that the Staff recognizes important considerations that companies wrestle with when addressing these disclosure requirements.

In light of the new interpretations, companies should review and consider whether their disclosures appropriately reflect information provided by directors and nominees (and whether those individuals have consented to disclosure of that information), and how that information is taken into account under their board diversity policies. In practice, there are a wide variety of approaches that companies follow in evaluating directors and nominees and, as recognized in the new CD&Is, there are often also a wide variety of factors considered. Among the ways that companies have addressed these matters to date are: aggregated disclosure of the specific diversity characteristics of their boards; discussions of the stage in the nomination process at which diversity characteristics are considered; skills and characteristic matrices; and individualized discussions of qualifications and characteristics. In light of the variety of factors typically considered by boards when identifying and nominating directors, we expect that many companies will enhance their existing diversity disclosures in a variety of ways depending on their specific circumstances.

Text of New C&DIs

The full text of the new C&Dis is set forth below:

Question 116.11 and Question 133.13

Question: In connection with preparing Item 401 disclosure relating to director qualifications, certain board members or nominees have provided for inclusion in the company's disclosure certain self-identified specific diversity characteristics, such as their race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background. What disclosure of self-identified diversity characteristics is required under Item 401 or, with respect to nominees, under Item 407?

Answer: Item 401(e) requires a brief discussion of the specific experience, qualifications, attributes, or skills that led to the conclusion that a person should serve as a director. Item 407(c)(2)(vi) requires a description of how a board implements any policies it follows with regard to the consideration of diversity in identifying director nominees. To the extent a board or nominating committee in determining the specific experience, qualifications, attributes, or skills of an individual for board membership has considered the self-identified diversity characteristics referred to above (e.g., race, gender, ethnicity,

religion, nationality, disability, sexual orientation, or cultural background) of an individual who has consented to the company's disclosure of those characteristics, we would expect that the company's discussion required by Item 401 would include, but not necessarily be limited to, identifying those characteristics and how they were considered. Similarly, in these circumstances, we would expect any description of diversity policies followed by the company under Item 407 would include a discussion of how the company considers the self-identified diversity attributes of nominees as well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics. [February 6, 2019]

Congressional Developments

On the same day that the C&DI were issued, Representative Gregory Meeks (D-NY) – who was recently named the Chair of the House Committee on Financial Services' Subcommittee on Consumer Protection and Financial Institutions – introduced legislation requiring public companies to provide additional diversity disclosures.^[4] The “Improving Corporate Governance Through Diversity Act of 2019,” would require public companies to disclose annually the gender, race, ethnicity, and veteran status of their directors, director nominees, and senior executive officers. A companion bill in the Senate was simultaneously introduced by Senator Bob Menendez (D-NJ), who serves on the Senate's Banking Committee.

The bill also would involve the SEC's Office of Minority and Women Inclusion (OMWI). OMWI would (1) be empowered to publish triennially best practices, in consultation with an advisory council of investors and issuers, for compliance with these enhanced disclosure rules, (2) be required to create an advisory council consistent with the Federal Advisory Committee Act requiring formal reporting, public openness and accessibility, and various oversight procedures, and (3) be allowed to solicit public comment on its best practices publication consistent with the formal rulemaking process under the Administrative Procedures Act.

According to a press release issued by Rep. Meeks, the bill is supported by The NAACP, the Urban League, the Council for Institutional Investors, and the U.S. Chamber of Commerce.

[1] See https://www.congress.gov/committees/video/house-financial-services/hsba00/rNdly_FXIKs.

[2] See <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=3235-AL91>.

[3] See <https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm>.

[4] See <https://meeks.house.gov/media/press-releases/rep-meeks-and-sen-menendez-introduce-corporate-diversity-bill>.

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Gibson Dunn's lawyers are available to assist in addressing any questions you may have about these developments. To learn more about these issues, please contact the Gibson Dunn lawyer with whom you usually work, or any of the following lawyers in the firm's Securities Regulation and Corporate Governance practice group:

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