

Board Diversity

I. Regulatory Scheme

Federal

1. [Item 407\(c\)\(2\)\(vi\) of Regulation S-K](#) requires proxy disclosure of:

- Whether, and - if so - how, a nominating committee (or the board) considers diversity in identifying director nominees, and
- If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, disclosure about how the policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of the policy.

The rule does not define diversity; rather, it permits companies to define it in ways they consider appropriate.

[Item 401\(e\) of Regulation S-K](#) requires companies to "briefly discuss" - for each director or person nominated or chosen to become a director - "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." As such, the Item 407 disclosure can impact the Item 401 disclosure.

2. The Item 407 disclosure requirement was effected in February 2010 by the SEC's [Proxy Disclosure Enhancements rule](#).

3. In June 2016, following a previously-directed review of the current Reg. S-K rule and related company disclosures by SEC staff, former SEC Chair Mary Jo White [announced](#) that the staff was preparing a recommendation to the Commission to amend the current rule to require "more meaningful board diversity disclosures on their board members and nominees where that information is voluntarily self-reported by directors," and this [item was included](#) on the SEC's [Fall 2016 semi-annual regulatory \(aka Reg-Flex\) agenda](#). However, successive SEC regulatory agendas following former Chair White's tenure re-prioritized the SEC's rulemaking priorities and plans, and have since reclassified this proposed action as long-term.

4. In February 2019, the SEC's Division of Corporation Finance published guidance to companies in the form of two new identical Regulation S-K C&DIs: [C&DI 116.11](#) (re: Item 401(e)(1) - director qualifications disclosure) and [C&DI 133.13](#) (Item 407(c)(2)(vi) - director nominee diversity considerations and policies) on how to incorporate director and director nominee self-identified diversity characteristics (e.g., race, gender, ethnicity, religion, nationality, disability, sexual orientation, cultural background) into their Regulation S-K Item 401 and Item 407 disclosures.

5. Various lawmakers have from time-to-time pressed the SEC to mandate more robust diversity disclosure.

Most recently:

- In July 2019, [H.R. 1018: “Improving Corporate Governance Through Diversity Act of 2019”](#) (Gregory Meeks, D-NY) and [H.R. 3279: "The Diversity in Corporate Leadership Act of 2019"](#) (reintroduced by Carolyn Maloney, D-NY), passed the House Financial Services Committee. The Meeks bill would mandate - among other things - proxy disclosure of voluntarily self-identified diversity characteristics by directors, director nominees, and executive officers, as further described in this [release](#). The Maloney bill (also introduced in prior years) requires proxy disclosure of the board's and director nominees' gender, racial, and ethnic composition, and the creation by the SEC of a Diversity Advisory Group to conduct a board diversity study and issue a report on the findings that includes recommendations to increase board diversity.
- In June 2019, House Financial Services Committee Chair Maxine Waters (D-CA) and Subcommittee on Diversity & Inclusion Chair Joyce Beatty (D-OH) [reportedly](#) sent letters to 37 large (>\$50 billion) banks requesting an abundance of information on their workforce and board of directors diversity & inclusion demographics and policies/practices to further educate Congress on D&I in the financial services industry. The requested information includes workforce and board gender, racial, and ethnic composition; diversity policies, practices and initiatives; diversity-linked performance measures and compensation; gender pay equity data and efforts to address identified gaps; and more. The recipient institutions are identified in the release.
- A February 2019 [GAO report](#) on the diversity & inclusion efforts at Federal Home Loan (FHL) Bank boards, which was prompted by a request for review from the House Financial Services Committee, recommended (and the Federal Housing Finance Agency, which regulates the banks, agreed) that the FHFA should work with the FHL Banks to review banks' processes for collecting board gender and race/ethnicity data and communicate effective practices to banks.

State

In September 2018, California adopted the first US board gender quota law - [SB 826](#) - that requires California-based publicly held domestic or foreign corporations to have at least one female director by December 31, 2019 and, depending on board size, up to three female directors by December 31, 2021, as shown here:

Number of Total Directors	Number of Women Directors
6 or greater	At least 3
5	At least 2
4 or fewer	At least 1

A comparable bill: [NJ S3469](#) was being considered in the New Jersey legislature in early 2019. Yet another diversity bill: [Illinois HB3394](#), which would require Illinois-headquartered public

companies to report annually (beginning January 1, 2021) a plethora of board member and management demographics and diversity information to the Illinois Secretary of State for further study, and require the Secretary to State to make the information public online as it is received, was as of July 2019 awaiting the Governor's signature.

Following California's lead in 2013 (with its [Senate Concurrent Resolution No. 62](#)), various states have also adopted, or are considering, non-binding board gender diversity resolutions applicable to non-profit, private and/or public companies in their jurisdictions to encourage greater board diversity. Generally, these resolutions aim for companies to have a minimum number or percentage of women directors on their boards by a specified date.

Illustrative examples include:

- [Pennsylvania House Resolution No. 273](#), April 2017
- [Colorado House Joint Resolution 17-1017](#), March 2017
- [Illinois House Resolution 0439](#), May 2015
- [Massachusetts Senate Resolution No. 1007](#), January 2015

II. Diversity Organizations & Initiatives

In addition to legislative efforts to encourage increased board diversity and related disclosure, there are numerous organizations and organizational initiatives/campaigns aimed at increasing board diversity. These organizations (which frequently partner with one another) and initiatives collectively offer a myriad of mostly complimentary resources to the public to further these objectives, including networking events, development/training, publications, trends data, portfolios or databases of diverse - often pre-screened or pre-qualified - board candidates, connections with diversity-focused recruiters/executive search firms, and much more. While most efforts to date have focused on gender diversity, the scopes are increasingly inclusive of race and ethnicity diversity.

Illustrative (but by no means exhaustive), well-known examples include:

- [2020 Women on Boards](#)
- [Alliance for Board Diversity](#)
- [Catalyst](#)
- [DirectWomen](#)
- [Equilar Diversity Network](#)
- [Midwest Investors Diversity Initiative](#)
- [Thirty Percent Coalition](#)
- [Women Corporate Directors](#)

III. Investor/Investment-Focused Board Diversity Campaigns

1. An increasing number of institutional investors with significant holdings in US (as well as non-US) public companies are calling on boards to increase their diversity to - among other

things - better represent the constituencies they serve and ensure a wide variety of experiences and perspectives are vetted in the boardroom deliberation and decision-making processes.

The more prominent campaigns among the larger institutions (which evolve annually) include:

- BlackRock: [Stewardship Engagement Priorities, approach to engagement on board diversity](#)
- CalPERS: [2019 board diversity engagement & voting objectives](#)
- LGIM: [2019 North America Corporate Governance & Responsible Investment Policy](#)
- Mass. Treasurer/Pension Reserves Investment Management (PRIM): [Bringing Diversity on Board](#) initiative (see also [release](#))
- NYC Comptroller/Pension Funds: [Boardroom Accountability Project 2.0](#)
- State Street Global Advisors: [Guidance on Enhancing Gender Diversity on Boards, Fearless Girl Campaign](#)
- Vanguard: [Investment Stewardship Pillars](#)

2. In March 2015, a group of nine public pension fund administrators, including CalPERS, CalSTRS, and the NYC Comptroller, submitted a rulemaking petition to the SEC seeking an amendment to the board nominee disclosure proxy rules to require companies to disclose board nominees' gender, racial, and ethnic diversity in a chart or matrix format.

- [Petition for Amendment of Proxy Rule Regarding Board Nominee Disclosure—Chart/Matrix Approach](#)

3. In addition to these focused campaigns, numerous (and an ever-increasing number of) institutional investors, including those listed above, include policies or principles in their more comprehensive proxy voting guidelines that set forth their expectations for board diversity at their portfolio companies, and the proxy voting ramifications (e.g., withholding votes for certain board leadership, board committees, or other directors) for non-compliance.

4. Proxy advisors ISS and Glass Lewis also are weighing in.

Under its [2019 Proxy Voting Guidelines](#), Glass Lewis will generally recommend voting against the chair of a nominating committee (and - depending on other factors - potentially also other nominating committee members) of a board with no female directors unless the company has disclosed a sufficient rationale or provided a timetable to address the lack of diversity.

Institutional Shareholder Services' (ISS) [Proxy Voting Guidelines](#) indicate that it will generally recommend against or withhold votes from the chair of the nominating committee (or other directors on a case-by-case basis) at companies lacking at least one female director on the board.

IV. Surveys & Studies

An abundance of surveys and studies are available that track changes in board diversity year-over-year, and other board diversity-related practices and trends. While the majority are currently gender diversity-focused, other minorities are increasingly being tracked as well.

Generally, surveys show that board diversity and company size are positively correlated, i.e., the larger company boards are most diverse and have demonstrated the most progress in terms of increasing their diversity year-over-year, and the smaller company boards are least diverse and show less progress over time.

Here is a sampling of recent surveys and studies that illustrate the breadth of coverage:

- ISS: [U.S. Board Diversity Trends in 2019](#), June 2019
- Proxy Insight: [Diving Into Diversity](#), April 2019
- CGLytics: [Increasing Boardroom Diversity – 2017-2018 S&P 500 Review](#), April 2019
- IR Magazine: [Board Diversity](#), April 2019
- Fenwick & West: [Gender Diversity in Silicon Valley](#), April 2019
- PwC: [Age diversity in the boardroom](#), March 2019
- Prof. Solomon: [As California Goes, So Goes the Nation? The Impact of Board Gender Quotas on Firm Performance and the Director Labor Market](#), March 2019
- Morningstar: [Few, but Increasing, Signs of Gender Diversity on Corporate Boards](#), February 2019
- Deloitte/Alliance for Board Diversity: [Missing Pieces Report - The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards](#), January 2019
- Equilar, [Gender Diversity in Boardrooms, by U.S. Region](#), January 2019
- Board Governance Research: [Women on Boards of Public Companies Headquartered in California - 2018 Report](#), January 2019
- MSCI: [Women on Boards - Progress Report](#), January 2019
- Egon Zehnder: [2018 Global Board Diversity Tracker](#), December 2018

V. Additional Practical Resources

Memos

- Athena Alliance, [California's Board Gender Diversity Mandate: Are Companies Making Tangible Progress?](#), July 2019
- Corporate Secretary, [SEC's Peirce raises concerns over board diversity push](#), July 2019
- Weil, [Strengthening Board Diversity - A push from the SEC and Congress](#), June 2019
- Women Corporate Directors/KPMG Board Leadership Center, [Diversity in the Boardroom](#), May 2019
- Toppan Merrill, [Privacy Matters \(p.7\)](#), May 2019
- Toppan Merrill, [The Rising Importance of Board Diversity](#), May 2019
- Proxy Insight, [Diving Into Diversity](#), April 2019
- IR Magazine, [Should boardrooms consider political diversity?](#), April 2019
- CLS Blue Sky Blog, [Diversity's Role in Boardroom Leadership](#), April 2019

- IR Magazine, [Fearless Girl campaign prompts more than 400 firms to add female director](#), March 2019
- Harvard Business Review, [You've Committed to Increasing Gender Diversity on Your Board. Here's How to Make it Happen](#), February 2019
- Gibson Dunn, [Developments on Public Company Disclosures on Board and Executive Diversity](#), February 2019

Samples/Templates

1. In November 2018, Argyle released "[Communicating Gender Diversity](#)," which provides examples of recent proxy statement, annual report, or similar disclosures that illustrate each of the six components of State Street Global Advisors' board gender diversity framework set forth in its "[Guidance on Enhancing Gender Diversity on Boards](#)."

2. In July 2018, the UAW Retiree Medical Benefits Trust-led [Midwest Investors Diversity Initiative](#), in conjunction with University of San Diego School of Business Prof. Annalisa Barrett, released a "[Diverse Search Company Toolkit](#)" aimed at assisting boards with implementing a diverse search policy from adoption to the final steps of the search process inclusive of a best practice checklist, sample diverse search policies, and diverse candidate search resources, and this compendium of "[Examples of Candidate Diverse Search Language](#)," which provides instructive excerpts of diversity search language adopted by 33 companies across industries and incorporated into their Nom/Gov Committee Charters, Corporate Governance Guidelines/Principles or other disclosure.

3. Aimed at, but in no way limited to use by, Canadian companies subject to [National Instrument 58-101 Disclosure of Corporate Governance Practices](#) (which requires annual board gender diversity disclosure), in November 2016, the Institute of Corporate Directors and Osler, Hoskin & Harcourt published an online template designed to facilitate boards' discussion, development, and disclosure of board diversity policy. The template encompasses three alternative diversity clauses for companies to choose from within a more comprehensive disclosable policy template, and otherwise can (and is intended to) be easily tailored to a company's specific facts and circumstances.

- Institute of Corporate Directors/Osler Hoskin & Harcourt: [Board Diversity Policy Template](#)

4. Donnelley's annual [Guide to Effective Proxies](#) (Oct. 2018, but updated annually) is always a great resource for sample disclosures. The searchable, interactive guide - designed to help companies improve their proxy statement's visual appeal, clarity, and navigability, as well as select a company-specific style and format - includes numerous sample disclosures on the most commonly-addressed and hot topics including board diversity disclosures with graphics, board skills matrices, etc., as well as the ability to easily access full proxies (for contextual purposes).

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Editor's Note: Users of this website may access additional or updated information on this topic (Board Diversity) by contacting the author: rmorrison@societycorpgov.org at the Society for Corporate Governance.