

SEC Issues Guidance on Director Diversity Disclosure Requirements

I. Background

Board diversity has been an important topic under discussion for some time at the Securities and Exchange Commission (“SEC”) and among investor groups. Several SEC commissioners have been outspoken about the need for disclosures to assist investors in evaluating whether a board is diverse.¹ On February 6, 2019, the SEC issued two identical Compliance and Disclosure Interpretations (the “C&DIs”)² which provide guidance with respect to what disclosure of diversity characteristics of directors and nominees is required under Items 401 and 407 of Regulation S-K.³ It is important that reporting companies understand these C&DIs and take steps to ensure compliance.

II. Diversity Disclosure Requirements

Item 401(e) of Regulation S-K requires a brief description of a director’s background, including business experience, other directorships held by the director during the past five years, and the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director.⁴

Item 407(c)(2)(vi) requires a description of the board’s process for identifying and evaluating nominees for director, including whether and how the board considers diversity in identifying nominees for director and how the board assesses the effectiveness of its policy.⁵

The C&DIs state that “[t]o 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 ... (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

¹ See, for example, “Diversity in the Boardroom is Important and, Unfortunately, Still Rare” by Commissioner Luis A. Aguilar, September 16, 2010, available at <https://www.sec.gov/news/speech/2010/spch091610laa.htm>; “Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability,” Keynote Address at International Corporate Governance Network Annual Conference by Chair Mary Jo White, June 27, 2016, available at <https://www.sec.gov/news/speech/chair-white-icgn-speech.html>; and “Mutualism: Reimagining the Role of Shareholders in Modern Corporate Governance,” Remarks at Stanford University by Commissioner Kara M. Stein, February 13, 2018, available at http://www.shareholderforum.com/access/Library/20180213_SEC-speech.htm.

² See C&DI Questions 116.11 and 133.13 (added February 6, 2019), available at <https://www.sec.gov/divisions/corpfin/guidance/regs-kinterp.htm#116-11>.

³ Also on February 6, 2019, a bill was introduced into Congress proposing the “Improving Corporate Governance Through Diversity Act of 2019” which, if enacted, would require public companies to annually disclose the gender, race, ethnicity and veteran status of their board directors, nominees, and senior executive officers. See <https://meeks.house.gov/media/press-releases/rep-meeks-and-sen-menendez-introduce-corporate-diversity-bill> and <https://www.congress.gov/bill/116th-congress/house-bill/1018/text?r=278&s=3>

⁴ See generally 17 CFR 229.401.

⁵ See generally 17 CFR 229.407.

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well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics.”⁶

III. Conclusion

Based on the guidance provided in the C&DIs, reporting companies should consider updating their director questionnaires, if necessary, to gather from each director and nominee information as to his or her self-identified diversity attributes and consent to the disclosure of that information. Additionally, if a reporting company has a policy to take into account diversity characteristics when evaluating potential board nominees, it should review and update its disclosures as appropriate to ensure that (i) if it has obtained the appropriate consents, its Item 401 disclosures include identification of any relevant self-identified diversity characteristics of directors and nominees and how they were considered, and (ii) its Item 407 disclosures include a description of any applicable diversity policies, how the company considers self-identified and other diversity characteristics its policies take into account and how such policies affected decisions regarding the makeup of the board of directors.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email Helene Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Ross Sturman at 212.701.3831 or rsturman@cahill.com; Donna M. Bryan at 212.701.3690 or dbryan@cahill.com; or Philip Merenda at 212.701.3348 or pmerenda@cahill.com.

⁶ *Supra*, note 2.