

LAWSUITS CHALLENGE ALLEGED FALSE PROXY STATEMENTS ABOUT COMMITMENT TO DIVERSITY

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A well-known plaintiffs' law firm recently filed derivative lawsuits against four prominent companies, alleging false proxy disclosures and breaches of fiduciary duties. The allegations focus on the absence of Black directors and executive leadership, and in some cases other persons of color, and very few Black employees, and purported false statements about the companies' commitment to diversity.

The allegations of proxy statement misstatements, which include breaches of the duty of candor, vary somewhat among the complaints, but generally focus on:

- Statements touting the board's consideration of diversity in the nominating process;
- Statements regarding the importance of diversity and inclusion in the company's employment practices;
- The absence of terms limits and the failure to discuss their effect on the nomination of Blacks and minorities; and
- The failure to consider diversity and inclusion goals in executive compensation decisions and the lack of disclosure of the company's unlawful discriminatory hiring and pay practices.

The complaints typically cite disclosures in the corporate governance and CD&A sections of the proxy statement, but in some cases also focus on company responses to shareholder proposals that relate to diversity and employment practices.

The allegations of breaches of fiduciary duties focus on directors' failure to oversee compliance with anti-discrimination laws, citing class action settlements and/or government investigations regarding gender or other discrimination, and failing to ensure the inclusion of diverse candidates as directors, citing board committee charters and proxy disclosures. Some of the complaints also challenged director and/or executive compensation as excessive or unjust in light of the purported discriminatory practices.

In addition to damages, the complaints seek a variety of remedies, including one or more of:

- requiring a diversity officer to create substantive plan for diversity and inclusion for the board, management and throughout the company;
- replacing one to three directors with Blacks or persons of color;
- replacing the CEO as chairman of the board with an independent director;
- disgorgement by directors of their 2020 compensation;
- publishing an annual diversity report;
- creating a sizeable fund to hire and promote Blacks and minorities;
- annual training of directors and officers;
- setting specific goals for the number of hires of Blacks and minorities;
- changing compensation programs to incentivize the achievement of diversity goals; and
- replacing the external auditor.

The plaintiffs also request equitable relief, restitution and punitive damages.

Although the cases may face challenges under various litigation doctrines, they likely will attract attention from other potential plaintiff firms or trigger attention from activists, legislators or other constituencies. Practically speaking, they also have the potential to create reputational challenges for companies. As a result, boards should continue to monitor compliance with employment laws and pay attention to their diversity and inclusion efforts, including their governance documents and disclosures, creating an appropriate record in the process. Companies should continually evaluate their public statements regarding such matters to ensure they provide an accurate presentation of their programs and do not provide unsubstantiated commitments, as well as their training programs relating to unconscious bias, racism and diversity.

The cases include *Ocegueda v. Zuckerberg* (filed July 2, 2020 in U. S. District Court, N.D. Cal.); *Klein v. Ellison* (filed July 2, 2020 in U. S. District Court, N.D. Cal.); *Kiger v. Mollenkopf* (filed July 17, 2020 in U. S. District Court, S.D. Cal.); and *Esa v, Pilette* (filed August 5, 2020 in U. S. District Court, N.D. Cal.).

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