

CONSIDER UPDATES TO D&O QUESTIONNAIRE AS PRESSURE MOUNTS FOR VOLUNTARY RACIAL, ETHNIC AND GENDER DIVERSITY DISCLOSURES

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As the pandemic and racial unrest continue in 2020, companies should consider whether to update their D&O questionnaires to gather information in response to the growing pressure for voluntary diversity disclosures from investors, proxy advisors, activists and others, as noted in our recent posts on [August 3](#) and [August 10](#).

Boards grappling with the possibility of voluntary diversity disclosures must consider how to accurately collect data. In February 2019, the SEC issued Compliance and Disclosure Interpretation [133.13](#) requiring certain disclosures if a board or nominating committee considers self-identified diversity characteristics of an individual who has consented to the company's disclosure of those characteristics. Companies understandably were slow to address self-identification of diversity traits in D&O questionnaires, given the sensitivity of the topic.

But now, as pressures mount and some companies publicly [pledge](#) to add diverse directors to their boards within one year, the annual D&O questionnaire can be a useful way to document the issue and provide a basis for any voluntary disclosures a company may decide to make. Given the sensitivity of the issue, companies could consider discussing the topic in advance of circulating the questionnaire in order to evaluate whether or how directors wish to proceed. To maintain collegiality, companies should make clear responses are optional, and take care to avoid any implication that particular directors were appointed because of their race, gender or other characteristics. In lieu of a questionnaire, the board could consider addressing self-identification disclosures during a board meeting or in private conversations, and documenting the results in an appropriate manner, although individual director consent would still be needed for disclosures.

One example of a possible D&O additional question: "If you are willing to provide this information, please self-identify up to three classifications of racial/ethnic/gender/other diversity characteristics. Please note that if you choose to provide this information, you consent to possible public disclosure of the information, including in the company's proxy statement, on our website or in response to inquiries from analysts, shareholders or the media." Alternatively, a separate consent checkbox could be added to the D&O questionnaire if a company wants to include only the first sentence of

the sample question in order to gather diversity data and instead give directors a separate option to self-identify without consenting to public disclosure.

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