



Diversity Disclosure Requirements: SEC Staff Issues New C&DIs Clarifying Regulation S-K Requirements

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Item 401(e) requires a company to “briefly discuss the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director....” If diversity is a factor that is considered when nominating directors, Item 407(c)(2)(vi) requires a company to discuss how “the nominating committee (or the board) considers diversity in identifying nominees for director.” Additionally, Item 407(c)(2)(vi) requires a company to disclose whether its “nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees” and a description of how such a policy is implemented.

The New C&DIs address the type of disclosure required under Items 401(e) and Item 407(c)(2)(vi) when board members or nominees (i) voluntarily provide certain self-identified diversity characteristics, such as, race, gender, ethnicity, religion, nationality, disability, sexual orientation or cultural background; and (ii) consent to the company disclosing these diversity characteristics. According to the New C&DIs, if a company’s board or nominating committee considers such self-identified diversity characteristics in assessing the fitness of the individual to serve as a director, the SEC Staff expects a company to discuss these diversity characteristics and how they were considered by the nominating committee when disclosing information about the individual as required by Item 401(e) (e.g., Form 10-K filings, proxy statements and certain registration statements).

Additionally, the New C&DIs address disclosure when a nominating committee has a policy with regard to consideration of diversity characteristics in selecting nominees for the board

of directors. In such cases, the SEC Staff expects the description of diversity policies required by Item 407(c)(2)(vi) (e.g., in a proxy statement) to include a discussion of how such self-identified diversity attributes or other qualifications (e.g., diverse work experiences, military service, or socio-economic or demographic characteristics) are considered by the nominating committee during the nomination process.

As companies prepare Form 10-K filings and proxy statements this year, they will need to consider how the New C&DIs may impact their disclosure.

Complete Text of the New C&DIs

For reference, below is the complete text of C&DI 116.11 and C&DI 133.13 (which are identical):

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 that it follows with regard to the consideration of diversity in identifying director nominees. To the extent that 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 that 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 that its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics.

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