

SEC Issues New C&DIs Regarding Disclosure of Board Qualifications and Diversity Characteristics

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On February 6, 2019, the SEC staff issued two new identical C&DIs that apply to Item 401 of Regulation S-K, [Question 116.11](#), and Item 407 of Regulation S-K, [Question 133.13](#). The new interpretation provides guidance on disclosure when a director or a director nominee voluntarily provide self-identified diversity characteristics, such as their race, gender, ethnicity, religion, nationality, disability, sexual orientation, or cultural background, and the director or nominee has consented to disclosure of these diversity characteristics. The staff noted that (1) Item 401(e) of Regulation S-K 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 and (2) Item 407(c)(2)(vi) of Regulation S-K requires a description of how a board implements any policies it follows with regard to the consideration of diversity in identifying director nominees.

In light of these requirements, the staff stated 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 referred to above . . . , 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 well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics.”

As companies prepare for the 2019 proxy season, including reviewing D&O Questionnaire responses and updating director bios and qualifications in the proxy statement, they should keep in mind the new C&DIs and be prepared to expand their disclosure related to any self-identified diversity characteristics.

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