

# SEC Reporting & Compliance Alert

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## SEC Staff Issues Interpretive Guidance on Board Diversity Disclosures

On February 6, 2019, the Division of Corporation Finance (Staff) of the Securities and Exchange Commission published new interpretive guidance regarding board diversity disclosures, which should be considered when preparing proxy statements for upcoming annual shareholder meetings. The guidance focuses on the requirements of Regulation S-K Items 401(e)(1) and 407(c)(2)(vi). Item 401(e)(1) requires a brief discussion of the specific experience, qualifications, attributes or skills that led to the conclusion that the person should serve as a director in light of the company's business and structure. Item 407(c)(2)(vi) requires a description of the nominating committee's process for identifying and evaluating nominees for director, including whether, and if so how, the nominating committee (or the board) considers diversity in identifying director nominees.

The Staff guidance, set forth below, explains that, to the extent a company's board or its nominating committee considers diversity characteristics identified by a director nominee in forming its recommendation that such person should serve on the board, the company should — consistent with its existing obligations under Item 401(e)(1) — identify those characteristics in its proxy statement disclosure. In addition, the guidance further explains that in those circumstances where diversity characteristics identified by a director nominee are taken into account by the board or its nominating committee, the disclosure already called for by Item 407(c)(2)(vi) regarding how the board or nominating committee considers diversity in identifying director nominees should discuss how those self-identified characteristics were considered.

As a result of the interpretive guidance, companies preparing their annual meeting proxy statements should consider what, if any, changes should be made to enhance their disclosures regarding director qualifications and nomination processes. For example, companies with initiatives to increase diversity on their boards should consider providing details of such initiatives in their proxy statements. Companies whose director nominating process did not specifically take into account the diversity characteristics provided by director nominees may conclude that no enhanced disclosures are necessary.

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The Staff's interpretive guidance is reproduced below:

## Compliance and Disclosure Interpretations, Regulation S-K Questions 116.11 and 133.13

**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 it follows with regard to the consideration of diversity in identifying director nominees. To 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 (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 well as any other qualifications its diversity policy takes into account, such as diverse work experiences, military service, or socio-economic or demographic characteristics. [February 6, 2019]

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