

It's Time to Talk Diversity in D and O Questionnaires (with Sample Question)

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by Cam C. Hoang

Corporate secretaries of public companies will soon be updating their D&O questionnaires for the 2021 proxy season, and they should consider whether to include a question that allows directors to self-identify as diverse. While companies may be hesitant to raise the issue, increasingly, they are being asked for diversity data on their boards and employees. In recent news:

- The California governor has signed into law [AB 979](#), mandating that the boards of public companies incorporated or headquartered in the state initially include at least one “director from an underrepresented community” by the end of 2021, meaning a director who self-identifies as “Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual or transgender.” There are already legal challenges pending based on state constitutional grounds.
- The New York City Comptroller [announced](#) that in response to its campaign, nearly half of S&P 100 companies will now publicly disclose their Consolidated EEO-1 Reports. These Reports give a comprehensive breakdown of a company's U.S. workforce by race, ethnicity and gender according to 10 employment categories, including senior management, defined to incorporate individuals within two reporting levels of the CEO.

Ethnic and gender diversity have dominated current discussions on board and employee diversity, but the SEC's [Compliance and Disclosure Interpretations 116.11 and 133.33](#) recognize a greater range of diversity characteristics. 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 self-identified diversity characteristics (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, the SEC staff would expect that the company's proxy discussion would include identifying those characteristics and how they were considered. Similarly, in these circumstances, the staff would expect any description of diversity policies to 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

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account, such as diverse work experiences, military service, or socio-economic or demographic characteristics.

Our sample question for D&O questionnaires (copied below) invites directors to self-identify by gender, and according to categories of race and ethnicity consistent with the 2020 US Census and the EEO classifications, but the question also invites identification of a broader range of diversity characteristics, consistent with the SEC guidance discussed above. Corporate secretaries who choose to include a director diversity question should review it against any existing board diversity policies. They may also wish to provide directors with a supplemental explanation as to why they are being asked to self-identify and how the information will be used, particularly if it may be disclosed in the proxy statement and other media including the company website, responses to ESG surveys and the corporate responsibility report. Corporate secretaries may also choose to emphasize that responses are optional.

Sample Director Diversity Question:

We are planning to disclose director diversity information in our [] Proxy Statement. Please answer the following questions if you agree to inclusion of the information:

1. Gender:

- Male
- Female
- Other: _____
- Prefer not to answer

2. Ethnicity or Race (check one or more):

- White
- Hispanic, Latinx or Spanish Origin
- Black or African American
- American Indian or Alaska Native
- Asian
- Native Hawaiian or Other Pacific Islander
- Other: _____
- Prefer not to answer

3. Other Diversity Characteristics that You Wish to Identify (e.g., religion, nationality, disability, sexual orientation, military service or socio-economic or demographic characteristics):

Please note that if you choose to provide this information, you consent to our possible public disclosure of the information in other public media, including on our website and our corporate responsibility report and in response to inquiries from surveys, analysts, shareholders or journalists.

