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NYC Comptroller Seeks Public Disclosure of EEO-1 Reports: Shareholder Proposals Expected for 2021 Annual Meetings

*Also Reports on its
“Rooney Rule” Initiative*

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The Office of New York City Comptroller (the NYC Comptroller) on behalf of three of the New York City Retirement Systems (NYCRS) has sent a [letter](#) to the CEOs of [67 S&P 100 companies](#) calling on them to match their companies’ recent statements in support of racial equality and diversity with concrete action by providing transparency into – and thereby enhancing their accountability for – the composition their own workforce. Specifically, the NYC Comptroller is asking these companies to adopt a policy to publicly disclose their annual Consolidated EEO-1 Reports, which reflect the race, ethnicity and gender of their employees, with oversight to be provided by independent members of the board. The NYC Comptroller requested recipients of the letter to commit in writing by August 30, 2020 to publicly disclose their EEO-1 Report when they submit their next Report in 2021. If companies are unresponsive to the request, the NYC Comptroller indicated that it may submit a shareholder proposal or factor such unresponsiveness in evaluating director nominees standing for re-election at the company’s next annual meeting. The NYC Comptroller’s announcement can be found [here](#).

In addition, as we previously discussed [here](#), in October 2019, the NYC Comptroller sent a [letter](#) to [56 S&P 500 companies](#) requesting that they adopt a diversity search policy akin to the “Rooney Rule” -- a [policy of the National Football League \(NFL\)](#) that requires football teams to, among other things, interview minority candidates for head coach, general manager jobs and equivalent front office positions. The policy sought by the NYC Comptroller would require the initial lists of management-supported director nominees and CEO candidates to include qualified female and racially or ethnically diverse candidates from non-traditional fields, such as government, academia and not-for-profit sectors.

In this Alert, we discuss the NYC Comptroller’s call for EEO-1 Report disclosure and the results of its “Rooney Rule” initiative.

NYC Comptrollers Call on EEO-1 Workforce Data Disclosure

The EEO-1 Report is an annual compliance survey requiring companies to provide to the U.S. Equal Employment Opportunity Commission (EEOC) a breakdown of employees by race, ethnicity and gender according to various employment categories, including senior management (defined as within two reporting levels of the CEO).¹ An example of EEO-1 Report disclosure by Microsoft Corporation can be found [here](#) and its full diversity and inclusion report, can be found [here](#).

Acknowledging that some companies may resist disclosing the Report because they believe the mandated categories do not align with their particular organizational structure, the NYC Comptroller expressed the view that the requested disclosure would provide, among other things:

- standardized, quantitative, relevant and comparable employment data across companies and industries, so that investors can assess the representation and progress of employees of color and women at various levels of the organization;
- specific data on senior management diversity; and
- particularized data that will allow investors to assess the representation and progress of specific racial and ethnic groups by gender on a year-over-year basis, rather than simply by percentage representation.

To the extent there is widespread adoption, the NYC Comptroller believes that disclosure of EEO-1 Report data could enable boards of directors to benchmark their company's own data to those of its peers, thereby facilitating the board's oversight of human capital management.

The NYC Comptroller also *encourages* CEOs to voluntarily include certain pay data broken out for different job categories by race, ethnicity and gender by job category. An example of this disclosure can be found [here](#) posted by Intel Corporation.

Recipients of the letter that are not responsive to NYC Comptroller by August 30, 2020 should anticipate receiving a shareholder proposal or opposition against director nominees. According to the NYC Comptroller's [2019 Shareowner Initiatives Postseason Report](#), in 2018 and 2019, the NYC Comptroller submitted a shareholder proposal to Applied Materials, Inc. calling for the adoption of a policy to disclose its EEO-1 Report. The proposal received 43.83% shareholder support in 2018 and was withdrawn in 2019 because the company "asked for more time to evaluate how its jobs categories align with the EEO-1 job categories, and how it can best disclose such information that makes sense not only to the public, but also its employees." The NYC Comptroller submitted a similar proposal to The Charles Schwab Corporation each year since 2017, with growing support reaching 42.6% in 2020.

We are also aware of companies having recently received a similar request for disclosure of EEO-1 Report data from Calvert Research & Development. Calvert indicated that it is making the request of "many of the largest companies in the U.S." Calvert stated that it will consider submitting shareholder proposals to those companies who fail to commit to full disclosure and will factor diversity reporting into director voting in 2021.

Board Accountability Project 3.0 Results: "Rooney Rule" Initiative

The NYC Comptroller recently published results of this initiative, available [here](#). The NYC Comptroller submitted shareholder proposals to 18 of the 56 companies (typically where the shareholder deadline had not passed). Illustrating the effectiveness of the shareholder proposal process, 14 of the 18 companies adopted board and CEO diversity search policies resulting in the withdrawal of the proposal. Shareholder proposals went to a vote at three companies, receiving 53%, 24% and 12% of votes cast respectively. The NYC Comptroller noted that one company adopted a policy governing director searches but not CEO searches, which the NYC Comptroller considered insufficient to withdraw its proposal.

Notably, one company submitted a [No-Action Letter](#) to the Securities and Exchange Commission (SEC) seeking relief to exclude the NYC Comptroller's proposal from its proxy materials based on "substantial implementation" under Rule 14a-8(i)(10). The company expressed that, in response to the NYC Comptroller's request, it had already adopted a policy that addressed director searches. Regarding CEO searches, however, the company noted that it was the company's historic practice "to cultivate leaders internally and promote from within for the CEO position." Expounding on its internal diversity and inclusive executive programs and councils, the company stated that the essential objective of the shareholder proposal would "be more effectively accomplished through the company's internal diversity and inclusion programs." In other words, as the company stated, a separate diversity policy for external CEO candidates was not pertinent because the company historically promotes from within. Without issuing a written response, the SEC staff concurred with the company that Rule 14a-8(i)(10) provided a basis to exclude the proposal.

The NYC Comptroller touted that while many companies already had similar policies governing director searches, the 14 companies that adopted policies in response to engagement with the NYC Comptroller are the first public companies to extend the policy beyond the board to CEO searches. Each CEO search policy is conditioned on the board retaining a third-party search firm or otherwise conducting an "external" CEO search. With respect to director search policies, eight of the 14 companies committed to include diverse candidates in the initial pool of candidates to the extent the board uses a third-party search firm or otherwise conducts an external search and the other six companies committed to requiring its initial list of candidates to include persons reflecting a diversity of race/ethnicity and gender, regardless of whether a third-party search firm is used. The policies adopted by the various companies do not dictate who should be hired, but instead require a diverse set of candidates for consideration.

Acknowledging that some of the targeted companies may already have diverse representation at the board and/or CEO levels, the NYC Comptroller suggested that maintaining a robust diversity search policy would *institutionalize* a board's commitment to realizing -- and maintaining -- racial and gender diversity over the long term.

What to Do Now?

- Companies that received the letter from the NYC Comptroller or Calvert requesting the publication of the EEO-1 Report should share the letter with their boards of directors or the committee with oversight responsibility for corporate governance, human capital or diversity initiatives. These companies should respond with an indication of whether the board of directors or applicable committee will take into consideration the requests made in the letter.
- All companies should anticipate a ratcheting up of pressure for workforce diversity disclosure, including the possibility of receiving a shareholder proposal on the subject in advance of the 2021 proxy season. The board or applicable committee should review the company's publicly available information on workforce diversity and consider whether to enhance such disclosure with additional information about the company's diversity statistics or initiatives to increase diversity within the organization.
- Companies with a lack of board diversity should expect to start seeing meaningful opposition from the NYCRS, institutional investors and proxy advisory firms. The NYCRS Corporate Governance Principles and Proxy Voting Guidelines state that it will oppose the re-election of members of the nominating committee if the board lacks "meaningful gender and racial/ethnic diversity, including but not limited to, any board on which more than 80% of the directors are the same gender." In Annex A, we summarize the voting policies of leading proxy advisory firms and institutional investors regarding diversity disclosure and practices.

- Companies should consider the SEC’s recent guidance regarding disclosure of the self-identification by directors of diverse characteristics as [discussed here](#). The SEC’s guidance provides, among other things, that to the extent the board or nominating committee, in determining the specific experience, qualifications, attributes, or skills, considered self-identified diversity characteristics, it would expect the company’s disclosure to include, but not necessarily be limited to, ‘identifying those characteristics and how they were considered’ (the ‘qualifications’ disclosure required by Item 401 of Regulation S-K). The SEC also expects any description of diversity policies followed by the company under Item 407 of Regulation S-K to include a discussion of how the company considers 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.

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ENDNOTES

ⁱ Generally, all private employers, with certain exceptions, who are subject to Title VII of the Civil Rights Act of 1964 (as amended by the Equal Employment Opportunity Act of 1972) with 100 or more employees are required to submit the EEO-1 Report. Both the EEOC and Office of Federal Contract Compliance Programs use the EEO-1 Report data, among other things, to analyze employment patterns including the representation of minorities and women within companies, industries or regions.



Annex A

Voting Policies of Influential Proxy Advisory Firms and Institutional Investors¹

Set forth in the chart below are the U.S. proxy voting policies relating to board diversity of (i) Institutional Shareholder Services Inc. (“ISS”) and Glass, Lewis & Co. (“Glass Lewis”) and (ii) several of the largest institutional investors.

Institutional Investor/Proxy Advisor	Diversity Disclosure and Practices
ISS	<ul style="list-style-type: none"> • For companies in the Russell 300 or S&P 500 indices, generally will vote against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) at companies where there are no women on the board. <ul style="list-style-type: none"> ○ Will consider mitigating factors (e.g., firm commitment to appoint at least one woman to the board within a year). • Generally recommend a vote for requests for reports on a company’s efforts to diversify the board, except when: <ul style="list-style-type: none"> ○ Gender and racial minority representation on the board is reasonably inclusive in relation to companies of similar size and business. ○ Board already reports on its nominating procedures and gender and racial initiatives on the board and within the company. • Vote case-by-case on proposals asking a company to increase the gender and racial minority representation on its board. Will take into account, among other things: <ul style="list-style-type: none"> ○ With regard to gender and racial diversity: existing diversity on the company’s board and among its executive officers; existing diversity at the company’s peers; established process for board representation; whether the company uses an outside search firm to identify potential director nominees; and recent controversies regarding employment practices. • Generally vote for proposals requesting a company disclose its diversity policies or initiatives, or proposals requesting disclosure of a company’s comprehensive workforce diversity data, including requests for EEO-1 data, unless the company: <ul style="list-style-type: none"> ○ publicly discloses (i) equal opportunity policies and initiatives in a comprehensive manner and (ii) comprehensive workforce diversity data; and has no recent significant EEO-related violations or litigation. • Generally vote for proposals seeking to amend a company’s EEO statement or diversity policies to prohibit discrimination based on sexual orientation and/or gender identity, unless the change would be unduly burdensome. • Generally vote case-by-case on requests for reports on a company's pay data by gender, race, or ethnicity, or a report on a company’s policies and goals to reduce any gender, race, or ethnicity pay gap, taking into account: <ul style="list-style-type: none"> ○ The company's current policies and disclosure related to both its diversity and inclusion policies and practices and its compensation philosophy on fair and equitable compensation practices; ○ Whether the company has been the subject of recent controversy, litigation, or regulatory actions related to gender, race, or ethnicity pay gap issues; and ○ Whether the company's reporting regarding gender, race, or ethnicity pay gap policies or initiatives is lagging its peers.

¹ The information set forth herein was derived from the relevant documents available on the proxy advisory firms’ and investors’ websites as of July 2020.

<p>Glass Lewis</p>	<ul style="list-style-type: none"> • Will consider recommending that shareholders vote against the nominating committee chair when the board has no female directors and has not provided sufficient rationale or disclosed a plan to address the lack of diversity on the board. <ul style="list-style-type: none"> ○ Sufficient rationale may include a disclosed timetable for addressing the lack of diversity on the board and any notable restrictions in place regarding the board’s composition, such as director nomination agreements with significant investors.
<p>BlackRock</p>	<ul style="list-style-type: none"> • Encourages companies to have at least two women directors on their board. • May vote against the nominating / governance committee for an apparent lack of commitment to board effectiveness to the extent that it believes a company has not adequately accounted for diversity in its board composition within a reasonable timeframe. • Encourages boards to disclose their views on: <ul style="list-style-type: none"> ○ The mix of competencies, experience, and other qualities required to effectively oversee and guide management in light of the stated long-term strategy of the company. ○ The process by which candidates are identified and selected, including whether professional firms or other sources outside of incumbent directors’ networks have been engaged to identify and / or assess candidates. ○ The consideration given to board diversity, including, but not limited to, gender, ethnicity, race, age, experience, geographic location, skills, and perspective in the nomination process
<p>Vanguard Group</p>	<ul style="list-style-type: none"> • States many corporate boards lack diversity (including gender and ethnic/racial diversity). • Will vote for a shareholder proposal if the proposal: <ul style="list-style-type: none"> ○ seeks disclosure related to directors’ diversity of personal characteristics (including gender, race/ethnicity, and national origin) or skills and qualifications, and this information is not already disclosed. ○ asks companies to adopt policies designed to ensure appropriate diversity on boards, and appropriate policies do not already exist.
<p>State Street</p>	<ul style="list-style-type: none"> • Starting in in 2020, will vote against the entire slate of incumbent board members on the nominating committee if a company does not have at least one woman on its board, and has not engaged in successful dialogue on State Street’s board gender diversity program for four consecutive years.