NOW & NEXT

DEI Strategic Services Alert

OCTOBER 18, 2022

DEI and shareholder activism: investor pressure for board diversity

By Kamau A. Coar, Stacie B. Collier, Kendal H. Tyre, Rekha Chiruvolu[i]

Shareholders put pressure on companies to increase board diversity

What's the Impact

- In the past several years, racial equity audits have evolved from a tool utilized by a handful of companies to respond to questions about discrimination to a demand for organizations to show the impact of their DEI initiatives.
- Shareholders also have not been afraid to use litigation in their efforts to increase diversity.
- Companies need to be prepared to demonstrate and fully articulate the benefits of DEI to their diverse populations and communities to satisfy increasing shareholder demands.

In our first alert in this series we focused on legislative efforts to create requirements for corporate board diversity. There have been several new state and federal requirements on companies to disclose the diversity on their board, to increase diversity in some cases, and to explain a lack of diversity in others.

Legislators have not been alone in these efforts.

Recent years have also seen an increase in both the number and types of shareholder efforts to put pressure on companies to increase the diverse representation on their boards. This spring, we wrote about the growing trend of shareholders demanding that companies conduct third-party racial equity audits—an independent, objective review of the corporations' effectiveness at combating systemic racism. In the past several years, racial equity audits have evolved from a tool by a handful of companies in response to claims of bias (Airbnb, Facebook) or other crises (Starbucks) to over 50 public companies receiving requests to conduct racial audits in the last two years.

Shareholders also have not been afraid to use litigation in their efforts to increase diversity.

In 2020 and 2021, some of the largest US companies—including Facebook, Oracle, Danaher, Qualcomm, Gap, and NortonLifeLock—all faced lawsuits against their boards for failing to follow through on public statements about diversity. The lawsuits all requested governance changes, disclosures related to workforce diversity, and the creation of funds for hiring people of color. While none of the lawsuits survived the initial pleading stages, they still brought negative attention and highlight the expectations on companies to live up to their diversity, equity, and inclusion (DEI) promises.

More recently, in August 2022 a lawsuit was filed against Starbucks, its officers, and directors by an activist investor, alleging that Starbucks' policies require active discrimination in employment decisions, officer compensation, and supplier contracting. Prior to filing the lawsuit, the plaintiff filed shareholder proposals with Starbucks and several other companies requesting civil rights and non-discrimination audits—very similar to racial equity audits, but instead these proposals asked companies to ensure that the impact of their DEI programs and initiatives did not have an adverse impact on their non-diverse employees, suppliers, and communities.

So what does this mean for you and your organization?

DEI programs represent both a tremendous opportunity and sizeable risk for organizations, and their various stakeholders are taking them to task when their DEI programs do not meet expectations. Companies need to be prepared to demonstrate and fully articulate the benefits of DEI to their diverse populations and communities, and also that the company's investments in DEI are accretive and not harmful to non-diverse communities. This includes a creative mixture of strategy, measurement, disclosure, risk assessment and preparedness, training, and other action items across your DEI programs.

Up next:

Our next alert in this series will focus on how boards can navigate the risks and complexity in overseeing programs designed to increase board and employee diversity.

Nixon Peabody's DEI Strategic Services works with clients to develop inclusive cultures, drive business success, and elevate their brands. Learn more about our three-phased approach to help clients (1) assess current efforts, (2) address challenges, and (3) guide long-term success.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

Kamau A. Coar
312.977.4422
kcoar@nixonpeabody.com

Stacie B. Collier
401.454.1018
sbcollier@nixonpeabody.com

Kendal H. Tyre
202.585.8368
ktyre@nixonpeabody.com

Rekha Chiruvolu
202.585.8605
rchiruvolu@nixonpeabody.com

---

[i] Lark Toney a Legal Intern in Nixon Peabody's Labor & Employment practice, assisted with the preparation of this alert.