



Shareholder Suits Demand More Progress on Diversity

Your board has women and underrepresented minorities. Yet you may still be targeted by a new wave of shareholder derivative suits pressing companies to take aggressive actions to further promote diversity and inclusion.

In a striking illustration of today's significant and increasing focus on diversity and inclusion in corporate America, at least 12 public companies recently have been sued by their own shareholders, who accuse directors and officers of failing to diversify their boards and C-suites and comply with anti-discrimination laws. The suits also typically allege that the companies falsely touted their commitment to diversity. The claims are cast as derivative suits, in which a shareholder seeks to bring claims on behalf of the corporation. The companies sued have spanned a wide range of industries, from Big Tech to health care and retail.

These suits warrant particular attention because:

- Companies with women and/or minorities on boards and senior executive teams have been sued.
- The remedies sought are ones rarely, if ever, pursued in shareholder derivative suits, such as the replacement of specific board

members, the disgorgement of some directors' fees and the filling of a set percentage of new employee positions with members of certain demographic groups.

- Because derivative suits are brought by shareholders in the company's name, directors and executives frequently are named individually as defendants based on allegations that they violated their fiduciary duties to the company.

To date, there has been only one court ruling in these cases (see our March 31, 2021, client alert "[California District Court Dismisses Derivative Suit Against Facebook Board Members and Executives Challenging Alleged Lack of Diversity](#)"), so it is too early to gauge their full impact. But they highlight the need for boards to consider sound diversity and inclusion policies, document them appropriately and portray them accurately in public statements.

What the Plaintiffs Demand

Some of the complaints appear to be framed to garner maximum press attention. One calls management of the target company “one of the oldest and most egregious ‘Old Boys’ Club’ in Silicon Valley,” and another alleges that the company’s CEO “wants Blacks to be seen but not heard.”

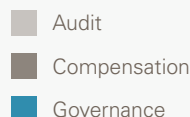


Some suits demand the removal of directors and would force some to repay their fees for serving. Others would mandate hiring fixed percentages of underrepresented minorities.

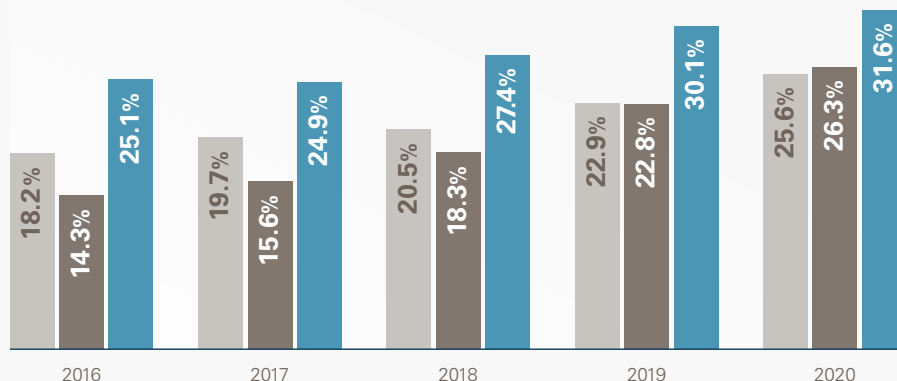
The suits aim to force specific changes at the companies themselves and, in some cases, to require them to contribute to or participate in diversity and inclusion efforts outside the corporation. Some of the more unusual forms of relief sought include:

- Replacement of the board chairman
- Resignation of at least three current directors and “a resolution to replace such directors with two Black persons and one other minority”
- Return of all director defendants’ compensation, including any stock grants, to be donated to “an acceptable charity or organization whose efforts include the advancement of Black people and minorities in corporate America”
- “Creation of a \$1 billion fund to hire Black and minority employees”
- Investment of “\$100 million in economic and social justice programs for the African American community designed to address historical racial disparities”
- Financing of “100 education scholarships valued at \$100,000 each for K-12 African-American students annually at partner schools located in the communities in which the company does business”
- Publication of annual reports containing detailed information about hiring, advancement, promotion and pay equity of all minorities at the company
- Filling of “15% of all new positions in the United States with African-Americans”
- Mandatory annual training for directors and executives on “diversity, affirmative action, anti-discrimination and anti-harassment”
- Replacement of the company’s auditor for allegedly “failing to point out ... that the company lacks an effective system of internal controls to ensure [it] is not discriminating against minorities and is complying with its stated goals and initiatives.”

Women Are Leading More Key Board Committees



Source: Equilar Board Factbook
Figures for Equilar 500
(largest U.S. companies by revenue)



Expect More Shareholder Demands

The plaintiffs generally have not exercised their rights as shareholders to inspect the company's books and records before filing suit. As a result, the complaints have contained few details about the boards' internal processes and deliberations, and are vulnerable if defendants move to dismiss them. Indeed, one suit was dismissed on several grounds, but the court gave the plaintiff the opportunity to refile it to correct the shortcomings, some of which might have been addressed if the plaintiffs had first requested and reviewed company records. Accordingly, we predict there will be more shareholder demands to inspect corporate books and records so future complaints can include more particularized allegations.

What To Do: Preventive Measures

In addition to employing effective diversity and inclusion policies, companies can minimize the risks of these sorts of derivative suits by taking certain actions, including:

- **Considering diverse candidates in board refreshment.** New or newly open board seats can create opportunities to diversify the board.
- **Documenting board or committee discussions on diversity and inclusion.** Engage in and memorialize board discussions on diversity and inclusion, and consider setting appropriate goals and measuring progress toward them. Documentation of these discussions can be provided in response to share-

holder requests and may persuade plaintiffs' lawyers that a claim would not be successful.

– **Monitoring public disclosures on commitments to diversity.**

Boards and companies may wish to disclose the efforts and commitments they make, but they should avoid overly aspirational statements that could later be cast as false or misleading.

- **Recognizing that prior allegations of racial or gender discrimination can be cited in a derivative suit.** Prior governmental enforcement actions, civil suits and settlements have been cited in some derivative complaints as evidence that directors have breached their fiduciary duties to ensure compliance with anti-discrimination laws and have endorsed false or misleading statements about their companies' policies and conduct.

(See other practical suggestions in "[The Search for Board Diversity: Practical Tips, Statistics on Progress.](#)")

Conclusion

Supporting diversity and inclusion has become a priority in the business world, and companies and their boards are under great scrutiny with respect to their commitments to these goals. As we noted, even some companies with relatively diverse boards and senior management have been sued. Companies should consider taking steps to help reduce the risk of a suit and facilitate the defense of any that are filed.

Authors

Jessie Liu / Washington, D.C.

Susan Saltzstein / New York

Tansy Woan / New York

This article is from Skadden's *The Informed Board*.

[View past editions](#) / [You can find all *Informed Board* articles here.](#)

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

One Manhattan West / New York, NY 10001 / 212.735.3000