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Proxy Season and the Administration's New DEI Order



As part of its campaign promise to target diversity, equity, and inclusion (DEI) programs and practices, the new administration issued a January 21, 2025, Executive Order entitled “Ending Illegal Discrimination and Restoring Merit-Based Opportunity” (the EO). While the new EO primarily takes aim at federal contractor DEI programs by rescinding the nondiscrimination and affirmative action obligations of the long-standing Executive Order 11246, the private sector is also a target.

The EO addresses private employers’ DEI practices by encouraging them to end “illegal” DEI programs and preferences. In addition to this policy goal, the administration outlines a process whereby officials in the U.S. Department of Justice and other agencies will each generate a report listing up to nine “potential civil compliance investigations of publicly traded corporations, large non-profit corporations or associations, foundations with assets of 500 million dollars or more, State and local bar and medical associations, and institutions of higher education with endowments over 1 billion dollars.” Given that the EO charges *each agency* with identifying up to nine for the list, the reach of this specific provision could be multiples of nine.

One way the government may seek to target publicly traded companies could be through combing disclosures in proxy statements and other Securities and Exchange Commission (SEC) filings. Many established practices, including those identified below, have not been found to violate existing law. In addition, many DEI practices form the cornerstone of employers’ compliance practices to avoid costly discrimination lawsuits as well as support the business case for diversity and a corporate culture of inclusion and belonging. However, the administration could seek to push the confines of the law. Some specific items that may raise questions include:

- Numerical targets or goals for racial and gender representation in employee populations.
- Incentive plans that include bonuses or other benefits for meeting diversity targets.
- Board diversity targets or goals.
- Supplier diversity targets and goals that focus on women-owned and ethnic-owned businesses.

- Participation in LGBTQ+ efforts, such as Pride events and the Human Rights Campaign's Corporate Equality Index.
- Company-wide diverse candidate slate mandates.

Public companies should evaluate any risks associated with discussions in proxy statements or other SEC filings. Companies should also consider such risks when addressing these issues in shareholder engagements, including responses to investor letters seeking information regarding DEI practices, discussions during engagement meetings, and shareholder proposals for inclusion in the proxy statement.

Authors

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