# CORPORATE DIVERSITY AND INCLUSION INITIATIVES: CAN FAILURE LEAD TO LITIGATION?

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In light of recent racial-justice protests, many companies have shared their diversity and inclusion initiatives and policies to help address the underrepresentation of women and minorities in corporate leadership positions. In doing so, however, many companies have also found themselves subject to litigation for failing to enact meaningful change. Following a similar pattern, Qualcomm was recently named in a shareholder derivative lawsuit for failing to follow through on its diversity initiatives. The action against Qualcomm mirrors lawsuits filed against other companies such as Oracle and Facebook, where shareholders are demanding accountability in a company's diversity and inclusion policies among its senior leadership and board members.

## The Qualcomm Lawsuit

On July 17, 2020, a shareholder of Qualcomm filed a shareholder derivative lawsuit against the company's board of directors and officers for violations of the Exchange Act and breaches of fiduciary duty. The lawsuit alleges that the Board violated their duties to the company and shareholders by failing to follow through on their diversity and inclusion objectives despite repeatedly making statements discussing the importance of diversity. According to the lawsuit, the company made various public statements claiming to have policies that "demanded" diversity and inclusion at the company, yet none of the company's board members or senior directors are African-American. Furthermore, only 1.5% of the company's workforce is African-American. The complaint highlights the company's alleged failure to make progress in increasing the hiring of African-Americans since 2017.

The Qualcomm suit is the third diversity lawsuit filed in July by the firm Bottini & Bottini, Inc. and it likely will not be the last. According to the Plaintiff's lawyer, the firm intends to pursue similar diversity inaction claims against other companies.

In recent years, lack of diversity on corporate boards has also gained attention from state legislators. Several states have noted the growing importance of diversity in company leadership, including California.

  

## How Can an Organization Differentiate Itself at your next Directors and Officers Renewal?

The directors and officers insurance marketplace demands organizations set themselves apart from their peers as we enter another season of significant increases in premium and retention. The new lawsuits are leading underwriters to examine the makeup of an organization's senior management and board of directors at the time of the renewal. Organizations should be prepared to highlight their diversity and inclusion initiatives, including any changes in the future as a response to the current environment. Examples to provide the underwriter community include the following:

1. Identify your organization's Chief Diversity Officer if possible.
2. Detail your organization's diversity and inclusion training.
3. Identify female/minority representation at the Board/senior management level.
4. Discuss awards received for diversity and inclusion efforts.
5. Provide an employee breakdown.
6. Discuss initiatives to hire and promote more diverse candidates.

Contact Beecher Carlson to be your advocate for your next renewal.

"In recent years and without any near abatement, underwriters of Directors and Officers' insurance have become more familiarized with the use of derivative litigation by the plaintiff bar to assert a remedy for alleged lapses or shortcomings in corporate governance and compliance. Notable settlements pervade headlines and new and unique underlying events emerge to prompt the plaintiff to file. With this backdrop, the underwriting due diligence process has evolved beyond a slant toward financial and operational analysis toward attempted analysis of a company's culture – culture that is set at the top, by the board and senior management. Underwriters vet the charters, codes, policies and processes and read codes of conduct, corporate social responsibility reports, committee charters, commitments and contingencies in an effort to understand the preventative measures a company deploys to mitigate risk. But at end of the day, the highly-qualified board that is nominated to govern is also responsible for avoiding or mitigating risk the company faces—and there is ample study and evidence that diverse opinion within that governing body leads to a more sound and trusted result.

While we can appreciate that our respective Insureds have invested, often significantly, in diversity and inclusion commitments, it is fair in this current environment to attempt to better understand how the company is monitoring and measuring their success and advancement in these initiatives, beyond the implementation.

Underwriters value the time arranged by our broker partners to meet with Insured management—a critical aide in this diligence process to enable visibility into the culture and not just the controls. We expect that there will be more forthcoming disclosure by our Insured partners publicly and in the meeting forums around strides made in measuring success in diversity and inclusion and in evolving board composition."

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