

TYPES NOT MAPPED YET September 04, 2020 | TTR not mapped yet | Emily Wang Murphy

# Diversity-related derivative actions are on the rise, and Corporate America is on edge

In the last few years, calls for diversity and inclusion in Corporate America have steadily grown. In large part, companies around the country have expressed a desire to address the racial inequalities in their companies. Nonetheless, [reports of such efforts](#) indicate that a significant amount of work remains to be done in this area.

Today, renewed—and resounding—calls for change are reaching a new level. The death of George Floyd and the ensuing protests have once again shined the spotlight on systemic racism and increased diversity efforts throughout the United States and, specifically, the responsibility of Corporate America to drive change. With a myriad of companies [announcing](#) a commitment to the fight for social justice and racial equality, it remains to be seen how and when meaningful change will be achieved.

If Boards of Directors wait too long, however, they risk stockholders taking matters into their own hands in an effort to align diversity and inclusion goals with factual implementation of those goals. That is precisely what happened to QUALCOMM Incorporated, a Fortune 500 corporation. In July, a class of investors brought a derivative suit against Qualcomm, claiming that Qualcomm and its Board had violated the securities laws and that the directors had breached their fiduciary duties through their flawed diversity initiatives. These derivative actions seem to be the beginning of a “new” approach to hold Boards and companies accountable for the accuracy of potentially overly ambitious statements regarding diversity.

The plaintiffs alleged stark differences between Qualcomm’s public statements regarding diversity and its actual diversity initiatives and results. Specifically, the below actions were alleged to support the substantive allegations set forth in the complaint:

- The Board’s approval of bold and inaccurate statements on the company’s website about substantial progress towards diversity and inclusion in its workplace and on the Board; and
- The CEO’s repeated false public statements of the success of its diversity efforts.

Among other causes of action, the complaint alleges that Qualcomm’s Board of Directors violated Section 14(A) of the Securities Act of 1934, as amended, by knowingly filing proxy statements that were false and misleading. In particular, the complaint alleges that there were disparities and conflicts between the proxy statement and Qualcomm’s corporate governance principles that were materially misleading. Further, the complaint alleges that the making of misleading statements in Qualcomm’s proxy statements, including material omissions, were an “essential link” in stockholders following the Company’s recommendation to approve the annual meeting agenda items including re-election of the members of the Board and approval of the “say-on-pay” vote.

A large majority of Qualcomm’s Board and executive leadership team is white and male, and minorities and women are disproportionately underrepresented in both areas. The complaint noted that African American diversity in Qualcomm’s workforce was particularly lacking, as just 1.5% of its workforce is comprised of African Americans - even though African Americans make up over 13% of the U.S. population.

It is still early in the litigation and unclear whether these types of derivative actions will be successful. Nevertheless, these derivative actions bring negative publicity to companies that could adversely impact the company’s voting results at its stockholders’ annual meetings and damage its reputation. In addition to the PR headache, defending these lawsuits are likely to be a drain on company resources during the pandemic - an already challenging time financially for American businesses.



When in doubt, companies should consider following the often-repeated mantra: “**under-promise and over-deliver.**” Public companies should carefully review their SEC filings with regard to statements on diversity, and temper well-intentioned enthusiasm for diversity and inclusion with appropriate disclaimers when issuing public statements.

Given the uncertainty surrounding these emerging issues, be sure to consult with a qualified attorney regarding public statements on diversity in order to minimize risk of potential claims.

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