

## **Proxy Analysis Shows Diversity of Diversity – Part 1**

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After the SEC announced its “diversity” requirements for director candidates at public companies on December 16, 2009, corporate counsel and compliance officers went back to wordsmith and rewrite proxy materials. A brief survey of selected proxy filings from April 2010 indicates an underwhelming response to the SEC’s charter. If advocates of social policy were hoping that the SEC requirements would open the door to their own BFFs (best friends forever), they were sorely mistaken.

We are seeing more specific inclusion criteria covering individual skills and abilities, experience and qualities as well as for the board as a whole. We are seeing more “naught” statements: the Nominating Committee does NOT have any specific minimum criteria; there are NOT any specific policies covering diversity; does NOT discriminate as to any specific diversity criteria; and does consider candidates WITHOUT regard to any prospective bias.

We took a snapshot of the proxy statements filed during April 2010 by CBeyond, Continental Airlines, Raytheon, Leap Wireless, Stanley Black & Decker, Cheesecake Factory, East West Bancorp, Talbots’ and American Airlines. No specific selection criteria were used: just a collection of recognized names from the SEC Edgar “most recent filings” list.

**CBeyond** described their Nominating and Corporate Governance committee’s selection criteria and interpretation of “diversity” to mean experience, professional skill, geographic representation and background. The Committee has the same standards for any nominee, regardless of whether recommended internally or by shareholders: “In considering whether to recommend any candidate for inclusion in the Board’s slate of recommended director nominees, including candidates recommended by shareholders, the Nominating and Corporate Governance Committee will apply the criteria set forth in CBeyond’s Corporate Governance Guidelines.”

Specific skills include independent thinking and questioning, as well as experience relevant to CBeyond’s current corporate position: “These criteria include the ability to make independent analytical inquiries, experience relevant to the success of a publicly-traded company, experience in the Company’s industry and with relevant social policy concerns, understanding of the Company’s business on a technical level, other board service and educational and professional background.”

Personal integrity of the candidate is foremost: “Each candidate nominee must also possess fundamental qualities of intelligence, honesty, good judgment, high ethics and standards of integrity, fairness and responsibility.”

CBeyond defines “diversity” in terms of competencies: “Our Corporate Governance Guidelines specify that the value of diversity on the Board should be considered by the Nominating and Corporate Governance Committee in the director identification and nomination process. The Committee seeks nominees with a broad diversity of experience, professions, skills, geographic representation and backgrounds.”

As to the “naughts,” CBeyond states that it does not use specific diversity selection criteria, but rather looks to the composition of “the whole board:” “The Committee does not assign specific weights to particular criteria and no particular criterion is necessarily applicable to all prospective nominees. CBeyond believes that the backgrounds and qualifications of the directors, considered as a group, should provide a significant composite mix of experience, knowledge and abilities that will allow the Board to fulfill its responsibilities.”

CBeyond does not discriminate in identifying candidates and does not even identify gender as an considered category: “Nominees are not discriminated against on the basis of race, religion, national origin, sexual orientation, disability or any other basis proscribed by law.”

**Continental Airlines** says that it has no diversity policy, then itemizes the specific diversity criteria that the board does consider: “While our board does not have a specific diversity policy, due to the global and complex nature of our business, the board believes it is important to consider diversity of race, ethnicity, gender, age, education, cultural background and professional experiences in evaluating board candidates.”

**Raytheon** focuses on experience, expertise and business judgment in defining “diversity:” “The Governance and Nominating Committee’s frame of reference for considering director candidates is set forth in the Board Selection section of the Governance Principles which identifies diversity of experience, expertise and business judgment as key objectives.”

Raytheon does not discriminate: “director candidate should be chosen without regard to gender, race, religion, age, sexual orientation or national origin.”

The “whole board composition” is an important criterion: “The Committee seeks to have a balanced, engaged and collegial board whose members possess the skills and background necessary to ensure that stockholder value is maximized in a manner consistent with all legal requirements and the highest ethical standards.”

**Leap Wireless** lists specific director qualifications including “a variety of perspectives and skills derived from high quality business and professional experience.” After integrity, experiences are key:

- personal and professional integrity, ethics and values;
- experience in corporate management, such as serving as an officer or former officer of a publicly held company, and a general understanding of marketing, finance and other elements relevant to the success of a publicly traded company in today’s business environment;
- experience in our industry;
- experience as a board member of another publicly held company;
- academic expertise in an area of our operations; and
- practical and mature business judgment, including the ability to make independent analytical inquiries.

Other than the above, “The Nominating and Corporate Governance Committee has no stated minimum criteria for director nominees.” Each candidate is considered in the context of his/her contribution to “the Board as a whole with the objective of assembling a group that can best contribute to the success of our business and represent stockholder interests through the exercise of sound judgment, using its diversity of perspectives, skills and experiences.”

**Stanley Black & Decker** defines “diversity” as the ability of directors to “best serve the needs of the company and its stockholders.” The company has no “specific minimum qualifications,” although it does apply the same evaluation criteria to internally- or shareholder-recommended candidates and to sitting board members: “. . . the Corporate Governance Committee considers an individual candidate’s personal and professional responsibilities and experiences, the then-current composition of the Board, and the challenges and needs of the Company in an effort to ensure that the Board, at any time, is comprised of a diverse group of members who, individually and collectively, best serve the needs of the Company and its stockholders.”

Stanley’s selection criteria is one of the most detailed: “. . . the desired attributes of individual directors, are: integrity and demonstrated high ethical standards; experience with business administration processes and principles; the ability to express opinions, raise difficult questions, and make informed, independent judgments; knowledge, experience, and skills in at least one specialty area (such as accounting or finance, corporate management, marketing, manufacturing, technology, information systems, international business, or legal or governmental affairs); the ability to devote sufficient time to prepare for and attend Board meetings; willingness and ability to work with other members of the Board in an open and constructive manner; the ability to communicate clearly and persuasively; and diversity with respect to other characteristics, which may include, at any time, gender, ethnic background, geographic origin, or personal, educational and professional experience.”

**Cheesecake Factory** offers more general selection and evaluation criteria: “In evaluating nominations, the Governance Committee will seek to achieve a balance of different capabilities and overall diversity in the areas of personal and professional experiences and backgrounds, financial, managerial and operational knowledge; variety of opinions and perspectives; and other differentiating characteristics with the goal of seeking and selecting candidates who will enhance the Board’s ability to adequately perform its responsibilities.”

**East West Bancorp** includes reputation as a key selection criterion along with experience relevant to the firm: “The Board seeks directors with strong reputations and experience in areas relevant to the strategy and operations of the Company’s businesses, particularly industries and growth segments that the Company serves, as well as key geographic markets where it operates.”

Experience from firms of a comparable size and complexity is desirable: “Each of the nominees . . . holds or has held senior executive positions in large, complex organizations and has operating experience that meets this objective, as described below. In these positions, they have also gained experience in core management skills, such as strategic and financial planning, corporate governance, risk management, and leadership development. “

East West returns to the reputational criteria later: “The Board also believes that each of the nominees has other key attributes that are important to an effective board: integrity and demonstrated high ethical standards; sound judgment; analytical skills; the ability to engage management and each other in a constructive and collaborative fashion; diversity of origin, background, experience, and thought; and the commitment to devote significant time and energy to service on the Board and its Committees.”

**Talbots’** emphasizes the “naughts,” disallowing consideration of specific criteria even though mentioning diversity more than others: “While the Board has not adopted a formal diversity policy with regard to the selection of director nominees and identifies qualified potential candidates without regard to any candidate’s race, religion, gender, national origin or other protected category, diversity is one of the factors considered by the Committee in identifying director nominees. The Committee recognizes that individual candidates have unique strengths, and no one factor or qualification outweighs all others.”

Talbot’s is interested primarily in the impact of the candidate on the “Board as a whole:” “As part of the director identification process, the Committee evaluates how a particular candidate would contribute to and strengthen the overall balance of the Board’s perspectives, backgrounds, knowledge, experience, skill sets and expertise in substantive matters pertaining to the Company’s business, thereby strengthening the diversity of the Board. In terms of personal diversity, the Committee seeks directors who are committed to ensuring that the organization as a whole values diversity and will increase the diversity of the Board in all respects.”

The SEC requirement that, if boards consider diversity, then they ought to assess their performance, is addressed in the annual board evaluation: “On an annual basis, as part of its self-assessment, the Committee and the Board review the overall functioning of the Board.”

**American Airlines** is unique in that it has a Diversity Committee specifically chartered, not merely with selection of a diverse array of board candidates or directors, but it also “reviews risks related to our diversity policies and practices in several areas, and meets frequently with members of management to support this role, including our Senior Vice President of Human Resources and our Vice President of Diversity and Leadership Strategies.”

The Diversity Committee “considers each director nominee’s contribution to the diversity of the Board. In doing so, the committee considers diversity in the broadest sense, taking into account race, gender, geographic residence and professional background.”

Even so, American has ended up with a rather specific quota of diversity candidates: “a Board with two Hispanic members, one Asian member, one African American member, and two female members. In addition, our Board members come from diverse geographical locations and have diverse professional backgrounds, including banking and financial services, education, real estate, consulting, media, government, philanthropic, public policy, investment banking, private equity and transportation.”

American also uses its annual board self-evaluation to assess the company’s performance with regard to their stated diversity policies: “On an annual basis, the committee reviews with the Board its assessment of the skills and characteristics appropriate for outside Board members. The

goal of this assessment is to determine if the needs of the Board, including diversity, are being met by the current members of the Board.”

American has specific risk areas relating to “diversity and inclusion:”

- Equal employment opportunities policies.
- Hiring practices
- Employee retention issues
- Corporate procurement decisions, including our Supplier Diversity Program
- Work environment.
- Monitoring and overseeing the development and implementation of diversity policies, programs and procedures to ensure that they are appropriate to, and assist in the fulfillment of our responsibilities to our internal and external minority constituencies.
- Exploring a wide spectrum of our operations to help us promote our diversity efforts.

While one would think the domain of the Diversity Committee would be all-encompassing, we would still have to ask if this entity and its charter – had it been in place at Wal Mart when Betty Dukes was seeking management leadership opportunities at the firm – would have prevented the largest prospective class action law suit in the history of the modern corporation.

Generally, Nominating Committees are re-affirming their established evaluation and selection criteria, avoiding mention of specific considerations that might be deemed arbitrary, while re-emphasizing core competencies, skills, expertise and the capacity of candidates to meld well into a profoundly collaborative unit.

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