

## AND THE SURVEY SAYS... DFS WANTS YOUR DIVERSITY AND INCLUSION DETAILS

Diversity and Inclusion (or "D&I") continues to be a hot topic within corporate America, with more and more regulators—including the New York State Department of Financial Services ("DFS")—chiming in. Recognizing the intrinsic benefits of a more diverse and inclusive workforce, DFS is adopting the approach seen in several other states by requiring reporting activity on diversity-related statistics from certain DFS-regulated banking institutions and DFS-regulated non-depository financial institutions as well as all entities permitted to conduct virtual currency business. DFS's move to regulate this area follows similar action by Nasdaq, which recently passed a new rule requiring companies to disclose particular board-level diversity statistics and to have at least two diverse board directors—if a company does not meet this latter requirement, the company must provide an explanation. While DFS does not go so far as to mandate certain levels of diversity on boards or at the management level, the reporting requirement alone is likely to encourage financial institutions to take steps to increase diversity, just as DFS intends.

### DFS Initiatives on Diversity and Inclusion

On July 29, 2021, the Superintendent of DFS announced an "*initiative to promote diversity, equity and inclusion in depository and non-depository institutions*" in an industry letter ("**July Letter**"). The July Letter is consistent with prior actions by DFS aimed at NY-regulated insurance companies, which is discussed in a March 16, 2021 Press Release ("**Press Release**") accompanying a circular letter issued by DFS ("**March Circular**"). The Press Release highlighted DFS's "*expectation that insurers make the diversity of their boards and senior management a business priority and key element of their corporate governance, including by fostering a diverse pipeline of future leaders.*" The March Circular essentially

requires that NY domestic and foreign insurers with more than \$100 million in annual NY premiums provide DFS with *"information related to the gender, racial and ethnic composition of their boards and management as of December 31, 2019 and 2020, including information about board tenure and key board and senior management roles."* DFS also announced its intent to publish the data on an aggregate basis in the fall as well as eventually to host a webinar *"focused on diversity, equity and inclusion best practices and addressing specific issues that companies have encountered in their diversity efforts."*

With this recent July Letter, DFS-regulated banking institutions having more than \$100 million in assets, DFS-regulated non-depository financial institutions with more than \$100 million in gross revenue, and all entities *"authorized to engage in virtual currency business activity, including virtual currency licensees and virtual currency trust companies"* ("**DFS-regulated institutions**") will be required to complete a DFS-issued survey by providing information about the *"gender, racial and ethnic makeup"* of the *"boards or equivalent and management as of December 31, 2019 and 2020, including information about board tenure and key board and senior management roles."* Such action is premised on DFS's statutory authority under NY Banking Law §37(3), whereby the Superintendent can require banking organizations to make special reports to the Superintendent as part of DFS's mandate to ensure the stability and growth of the NY financial industry.

DFS plans to collect the data now and later publish the results on an aggregate basis in the first quarter of 2022. DFS adds that it *"strongly encourages"* companies to publicly disclose this information, adding that DFS will consider disclosing the information, perhaps on a disaggregated basis, in the future.

### **Why Now and What it Means and Doesn't Mean: Practical Implications and Potential Issues**

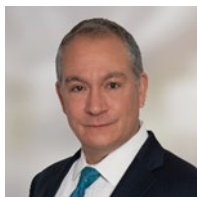
By requiring reporting on diversity statistics for board and management-level employees, DFS, like other regulators and lawmakers in this space, is aspiring to spur actual change in the diversity of boards and management. For now, apart from a regulatory "wrist slap" for failing to complete the DFS-issued survey, there are no direct repercussions for DFS-regulated institutions whose survey responses, by any reasonable or objective standard, fail to reflect diversity. The hope therefore is one of "peer pressure" and reputational pressure – in other words, even with the aggregated reports, it is presumably the customers, shareholders, and employees who will push institutions to at least meet minimum standards.

This recent move by DFS is part of a larger shift nationally regarding diversity and inclusion in the boardroom. In 2018, California passed a law compelling companies to have a certain number of women on boards with the penalty of noncompliance being hefty civil fines. Other states have taken a similar approach to DFS's, such as Illinois and Maryland, in which disclosures about board diversity are required, but no other action is mandated. While the DFS initiative does not go as far as California's law, time will tell if DFS finds that institutions affected by the July Letter (and the March Circular) have not been sufficiently self-motivated to make the necessary changes, thus perhaps requiring more stringent action by DFS.

While DFS-regulated organizations await their copy of the survey, there are a few things to be considering in advance:

- How broadly will DFS expect the information to be reported, i.e., will it be limited to the Board or management of the entity in New York, or expanded to include parent companies of DFS-regulated institutions that are based outside of New York?
- Where information is required for entities outside of New York, have you consulted with your local employment/HR teams to understand what information you can collect and what questions you can or cannot ask under local law?
- To the extent you do not report such information publicly already, is now the time to consider going public with this information and providing context where helpful?
- Context may be key to understanding what information should be reflected to present a fair and accurate picture of your D&I, so consider what information you may want to include. For example, perhaps the current D&I statistics on their face are not where you would want them to be, but compared with where they were several years ago, you can show real progress.
- Given that this will likely be a yearly process, consider how you will collect the information going forward and, as DFS would hope you are doing, factor D&I into Board and management appointments.

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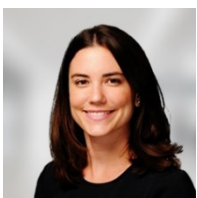
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