Skadden

The Informed Board

Winter 2025

Boards face a multitude of challenges, and opportunities, with the change in administrations. As we describe in the latest issue of *The Informed Board*, the new administration is forcing companies to reexamine their approaches to diversity with the threat of aggressive enforcement suits. But we expect to see a return to pre-Biden administration norms in antitrust.

Meanwhile, with new laws in the U.S., EU and elsewhere, directors are having to spend more time on supply chain vulnerabilities and risks. Throughout all this change, boards are also reexamining the pros and cons of various approaches to self-assessments.

In our podcast, veteran activist Ted White of Legion Partners tells what he looks for in targeting companies, and how boards should — and should not — respond to an activist.

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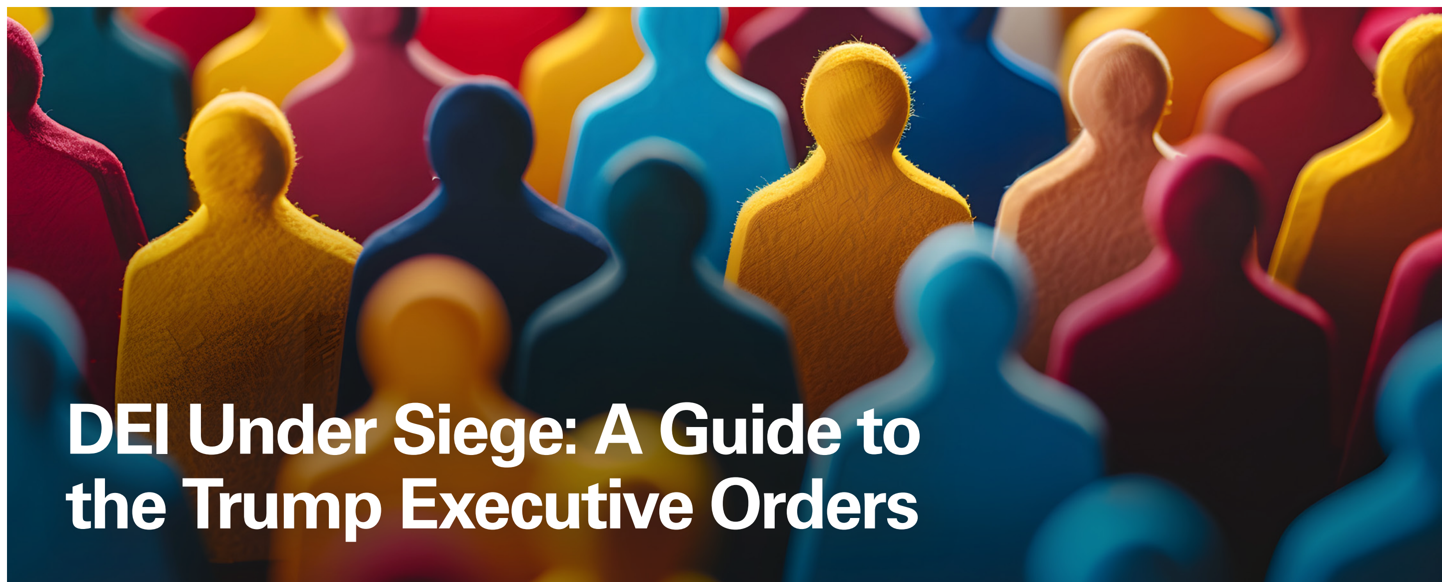


DEI Under Siege: A Guide to the Trump Executive Orders

- The new administration's effort to eliminate most DEI programs extends beyond the federal government to major corporations, foundations, non-profits, professional organizations and educational institutions.
- Aggressive enforcement appears likely, as government departments have been instructed to identify nine potential private sector targets for enforcement actions.
- Any recipient of government funding will be required to sign documents opening itself up to criminal prosecution if it maintains unlawful DEI programs.
- A recent Department of Justice memo did allow, however, that "educational, cultural, or historical observances ... that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination" are not prohibited.

In the first few days of the second Trump Administration, the President signed three executive orders (EOs) seeking to end diversity, equity and inclusion (DEI) programs in the public and private sectors, declaring DEI programs "illegal and immoral."

The orders apply, first, to federal government DEI programs and policies, and to federal contractors and grant recipients, but the new administration has served notice that it plans to target large private sector organizations more generally, including major corporations, foundations, non-profits, professional organizations and educational institutions. One of the orders specifically instructs the attorney general to require each federal agency to identify nine large potential enforcement targets.

What follows is a primer on the law, the three orders and a related policy statement issued by the new attorney general.

The Law Before the Inauguration

DEI programs were already under increased scrutiny before President Trump was reelected following two 2023 Supreme Court decisions involving admissions programs at Harvard College and the University of North Carolina, cases referred to together as *SFFA* for the shorthand of the plaintiff. The Supreme Court held that race could no longer be considered as a plus-factor in admissions, finding that that violates the Equal Protection Clause of the 14th Amendment.

Though the court's holding applied only to higher education admissions, plaintiffs challenging DEI programs in the employment context under the Equal Protection Clause and Title VI of the Civil Rights Act have relied on *SFFA*.

In addition to the impact of the *SFFA* cases, a 2024 Supreme Court case (*Muldrow*) lowered the degree of

harm an employee must show to maintain a discrimination claim under Title VII of the Civil Rights Act. Specifically, an employee need only show "some" harm with respect to a term or condition of employment rather than "significant" harm.

The Trump Executive Orders

1. Termination of Federal DEI Programs Generally

The first EO (14151), titled "Ending Radical and Wasteful Government DEI Programs and Preferencing," requires the termination of all "discriminatory programs, including illegal [DEI] and [DEIA] mandates, policies, programs, preferences and activities in the Federal Government, under whatever name they appear." It requires that federal agencies, departments or commission heads terminate all (i) DEI offices and positions, (ii) "equity" plans, actions, initiatives or programs and "equity-related" grants or contracts, and (iii) DEI or DEIA "performance requirements for employees, contractors or grantees."

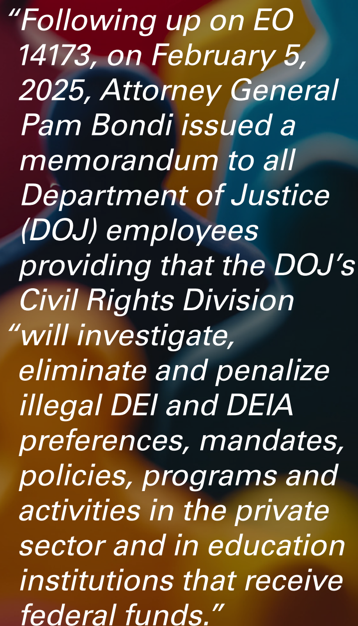
2. Termination of Gender Identity Policies

The second order (14168), "Defending Women from Gender Ideology Extremism," defines "sex" as an individual's "immutable biological classification as either male or female," removing any concept of "gender identity." This order directs agencies to remove all statements, policies, regulations or other documents or forms of communications that "inculcate gender ideology" and prohibits use of federal funds to promote gender ideology. The order also instructs the attorney general to issue guidance to (i) clarify that Title VII does not require gender identity-based access to single-sex spaces and (ii) ensure the "freedom to express the binary nature of sex" and right to single-sex spaces. Agencies with enforcement responsibilities are instructed to prioritize investigations and litigation to enforce the EO.

3. Deterrence of Private Sector DEI Policies and Programs

The third EO (14173), "Ending Illegal Discrimination and Restoring Merit-Based Opportunity," requires executive departments and agencies to terminate "all discriminatory and illegal preferences, mandates, policies, programs, activities, guidance, regulations, enforcement actions, consent orders and requirements."

In a major change, the order rescinds Executive Order 11246, issued in 1965 by President Johnson, which required federal contractors to develop and implement affirmative action plans to identify and address underrepresentation based on sex or race. Under President Trump's EO 14173, any receipt of federal funding will now require the recipient to



agree that its compliance with federal anti-discrimination laws is material to the government's payment decisions under the False Claims Act (*i.e.*, opening up the recipient to criminal prosecution under that law if it violates federal anti-discrimination laws) and to certify that the recipient does not operate any illegal DEI programs.

The order also requires the heads of agencies to take action to encourage the private sector to end any illegal DEI preferences, mandates, policies, programs or activities. Specifically, the order directs the attorney general to submit a proposed strategic enforcement plan, which, among other things, shall identify:

- "[T]he most egregious and discriminatory DEI practitioners in each sector of concern."
- Strategies for ending "illegal DEI discrimination and preferences."
- A plan with "specific steps and measures to deter DEI programs or principles."

Under that third mandate, the attorney general is instructed to require each government agency to:

> "identify 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."

4. Department of Justice Enforcement Policy

Following up on EO 14173, on February 5, 2025, Attorney General Pam Bondi issued a memorandum to all Department of Justice (DOJ) employees providing that the DOJ's Civil Rights Division "will investigate, eliminate and penalize illegal DEI and DEIA preferences, mandates, policies, programs and activities in the private sector and in education institutions that receive federal funds."

The memorandum instructs the Civil Rights Division and the Office of Legal Policy to submit a report including proposals for criminal investigations and up to nine civil compliance investigations, and potential litigation activities in support of the new policies.

A footnote, however, provides an important qualification that creates some room for some private DEI programs: It states that the memorandum "encompasses programs, initiatives, or policies that discriminate, exclude, or divide individuals based on race and sex," but that the law "does not prohibit educational, cultural, or historical observances ... that celebrate diversity, recognize historical contributions, and promote awareness without engaging in exclusion or discrimination."

Conclusion

Against this backdrop, with the prospect of high-profile civil and possible criminal enforcement actions, employers should carefully review their DEI programs and initiatives, along with their public filings and statements about DEI, and corporate governance documents, including board committee charters.

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Now More Than Ever, Supply Chains Demand the Attention of Multinationals' Boards

- New laws in major jurisdictions make it vital that companies examine their supply chains closely for legal vulnerabilities. This entails due diligence on environmental and human rights issues, and compliance with new import controls and national security-based restrictions.
- Three new EU laws, which will apply to many non-EU multinationals as well as businesses based in Europe, have the broadest reach. They will require companies to have a deep understanding of both their upstream and downstream chains for human rights and environmental and sustainability impacts.
- The U.S. import and export laws on forced labor and technology can complicate dealings with China.
- Many of these laws allow for large fines and a key EU law authorizes private individuals and organizations to sue companies for failing to perform due diligence.

The economic disruptions of the pandemic elevated supply chain issues on board agendas. A spate of new supply chain-related laws in major jurisdictions make the topic even more critical today. Expanding due diligence laws, import controls, national security-based restrictions and anti-money-laundering regimes are making it critical for boards to understand the potential legal vulnerabilities of their companies' supply chains. This area can be expected to become a key component of the board's overall risk oversight function, with failures to engage in such oversight subject to challenge.

The most sweeping legal change is the EU's new Corporate Sustainability Due Diligence Directive (CS3D), which will soon apply to many multinationals, imposing unprecedented obligations on companies to understand their suppliers and customers, and the impact of those relations. Moreover, new tariffs and the other legal changes could prompt companies to alter their supply chains, potentially exposing them to new risks.

With all the new duties and restrictions, the risk of governmental investigations and litigation continues to grow.

The Backdrop

Considerations go beyond the purely financial, with geopolitical and climate risks increasingly at the forefront of thinking. Terms such as "reshoring," "near-shoring," and "friend-shoring" have become part of many politicians' and directors' lexicons.

By now, multinationals are familiar with conducting diligence to mitigate economic sanctions, export controls and corruption risks. But today there are the added components of human rights, national security and environmental regulations, which explicitly or implicitly regulate supply chains. Since a relevant portion of these new obligations will come into effect in

2027, companies must prepare now to meet their obligations and implement the relevant controls.

The EU's Corporate Sustainability Due Diligence Directive Will Require Deep Supply Chain Diligence

The most comprehensive example of supply-chain regulation is the EU CS3D. The CS3D mandates that EU and non-EU companies with substantial business in the EU review their entire upstream and downstream chains of activities and address adverse human rights and environmental impacts, which may entail having to terminate contracts.

The CS3D comes in addition to the EU Corporate Sustainability Reporting Directive (CSRD), which will require many multinationals to prepare granular reports on the impacts of their upstream and downstream chains, and the EU's Forced Labour Regulation, which will apply to any company supplying goods in the EU. See our Summer 2024 *Informed Board* article "Multinationals Face Challenges as They Prepare To Comply With the EU's Sustainability Reporting Law."

The CS3D and the forced labor rules will come fully into force in 2027, while EU companies will begin filing sustainability reports this year and many non-EU multinationals next year. Companies will need to monitor developments in relation to the CS3D and CSRD closely as they are currently under review by the European Commission and their scope will likely change.

Effective implementation programs to comply with these laws will likely give companies unprecedented insight into their supply chains, which could surface previously unknown risks and issues.

At the same time, legal developments in Australia, Canada, Mexico and the U.K. will also call for additional supply chain oversight, so companies operating globally will face increasing, and often differing, legal obligations regarding their supply chains.

US Laws Add Additional Regulatory Dimensions

The U.S. stance on China creates additional supply chain risks. U.S. Customs and Border Protection has long had the authority to detain merchandise that it reasonably suspects is the product of forced labor. However, since June 2022, companies importing into the U.S. must also take account of the Uyghur Forced Labor Prevention Act of 2021 (UFLPA), which established a rebuttable presumption that all goods made in whole or in part in China's Xinjiang Uyghur Autonomous Region (XUAR) involve the use of forced labor. Inputs as diverse as cotton, polyvinyl chloride, aluminum and gold can taint merchandise if their production traces back to the XUAR.

To minimize the risk of detention or seizure, companies must proactively engage with suppliers, thoroughly map their supply chains and gather documentation for each stage of production.

The U.S. has also ramped up the use of its national security-based authority to prohibit the use of information communication technology or services (ICTS) products that are designed, developed or manufactured in China, Russia or other countries of concern. This power can be used to prohibit classes of transactions, such as the sale of vehicles with automatic driving or other communications technology that is designed or developed in those countries, or can be used to prohibit individual products utilized within U.S. IT infrastructure. These regulations, and their increased use, will raise the risks of putting any product development work in China or other countries of concern, or using ICTS products from companies that do so.

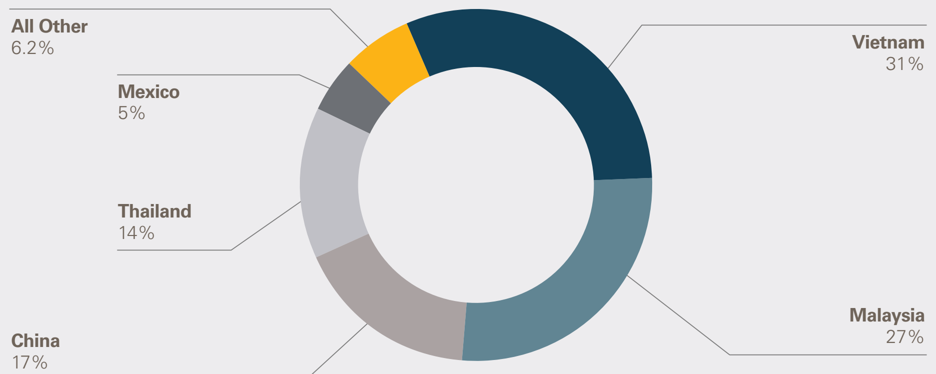
Furthermore, companies must adapt to new tariffs that the Trump administration has promised to impose, including those recently announced on imports from China, Canada and Mexico. Naturally, these may impact companies' decisions about their supply chains. But switching to sources in novel or lesser-known markets or suppliers carries its own risks.

Enforcement and Litigation Risks Grow

Not only have new laws with supply chain implications proliferated, they increasingly have teeth, authorizing governmental enforcement and large fines.

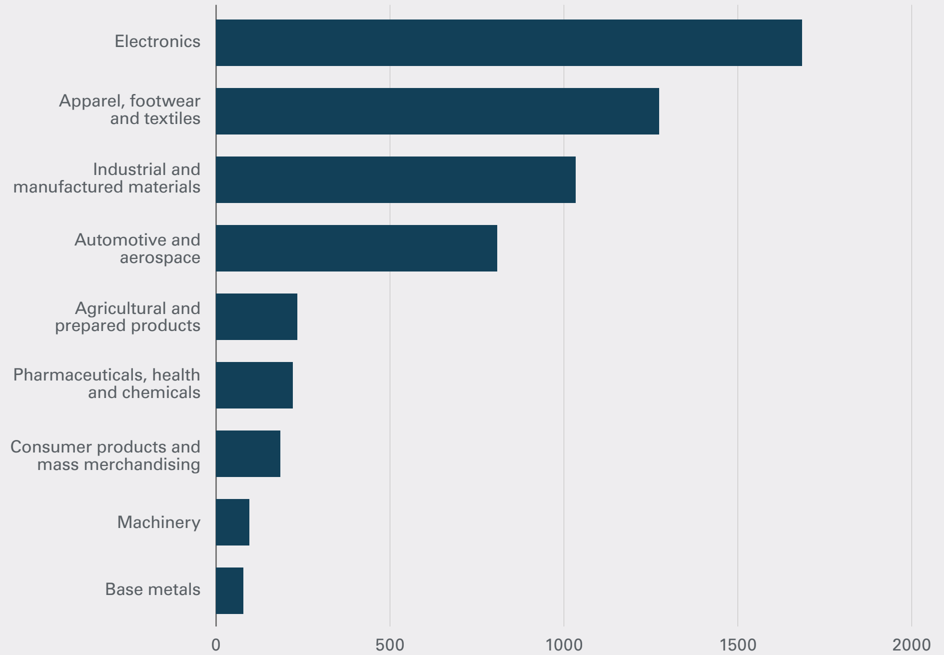
For example, U.S. Customs and Border Protection denied entry to 1,864 out of 4,619 shipments detained under the UFLPA in 2024. More than 70% of the denied shipments by value arrived from Malaysia, Thailand, and Vietnam, demonstrating that the UFLPA extends past China to neighboring countries that may source goods from the XUAR. Indeed, since the UFLPA entered force in June 2022, the majority of shipments detained by CBP by value originate in southeast Asia. *See* chart below.

UFLPA Detained Shipments by Country of Origin (by value)



Source: U.S. Customs and Border Protection. Detained shipments, June 2022-December 2024

UFLPA Detained Shipments by Industry



Source: U.S. Customs and Border Protection. Detained shipments, June 2022-December 2024

Under the CS3D in the EU, national authorities, who will enforce the Directive, will be able to impose maximum fines of at least 5% of the company's net worldwide turnover.

Moreover, the law requires EU member states to ensure that companies can be held liable for certain damages resulting from intentional or negligent failure to prevent or stop adverse impacts in their supply chains — an unprecedented expansion of the scope of civil liability under EU law that significantly increases the litigation risk for companies. In addition, injured parties may be represented by trade unions or NGOs, and claimants will be allowed to seek injunctions, as well as compensation for losses. These measures will likely encourage litigation by activists and litigation funders, who will be able to bring claims (including potentially mass claims/class actions) on behalf of alleged victims.

Conclusion

Finally, the cost of not examining supply chain risks is not just fines or private damages. The ramping up of supply chain-related regulations, enforcement and scrutiny brings with it reputational risks, and can spur shareholder activism and diminish shareholder value for companies that are not prepared to meet new requirements. Already, U.K. companies accused of benefiting from modern slavery face reputationally damaging litigation and Fortune 500 tech and

manufacturing companies are seeing increased scrutiny surrounding minerals they source from suppliers alleged to use forced labor in Africa.

So, while deep due diligence may be time-consuming and costly, the costs to companies of not gearing up to comply with the new expectations could be even greater.

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Trump 2.0 Antitrust Policy Is Likely To Be More Predictable but Not Lax

- Strong antitrust enforcement is expected to continue, but without the use of the novel and untested legal theories that defined the Biden administration approach.
- Regulators are likely to continue to focus on Big Tech.
- The agencies are likely to be more willing to settle and engage in discussions about remedies rather than litigating on an all-or-nothing basis.
- Merger reviews may be more predictable, and the agencies are less likely to use their processes to hold up or disincentivize transactions.
- Antitrust theories may be employed to challenge ESG initiatives.

Enforcement Will Continue, but Under More Traditional Antitrust Theories

The hallmark of Biden-era antitrust enforcement was aggressive merger enforcement based on expansive and often untested views of antitrust law. Under the second Trump administration, companies should not expect enforcement to be lax, but the Department of Justice (DOJ) and Federal Trade Commission (FTC) will likely rely on more traditional interpretations of antitrust law.

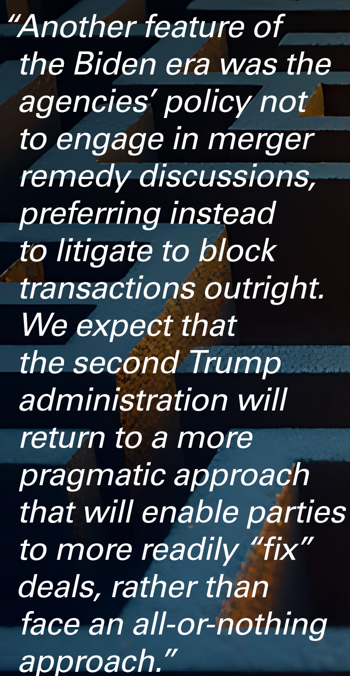
It remains to be seen whether the Trump Administration will formally rescind or modify antitrust guidance documents issued during the Biden Administration, such as the controversial 2023 Merger Guidelines, which lowered the thresholds at which deals could be considered anticompetitive and targeted transactions that would not have been problematic under long-standing doctrine.

A return to more traditional theories may make it easier for companies to predict outcomes.

Continued Focus on the Technology Sector

One theme of President Trump's campaign was a continued focus on antitrust enforcement in the technology sector. Several major enforcement actions against large technology industry companies (some launched under the first Trump Administration) were pending in the courts at the time of the inauguration, including two cases against Google, one against Meta and one against Amazon. The new administration is likely to continue to pursue those cases, but may be more receptive to settlements than was the prior administration.

In addition, on January 30, 2025, the Trump DOJ sued to block the $14 billion acquisition of Juniper Networks



by Hewlett Packard Enterprise, a case that had been investigated during the Biden administration.

The new administration may also seek to use the antitrust laws and investigative powers to counter what it views as free-speech restrictions on online platforms. In a concurring opinion in a FTC matter in December 2024, Commissioner Andrew Ferguson, who President Trump elevated to FTC chair, stated that collusion among online platforms to set shared censorship policies "would be tantamount to an agreement not to compete on contract terms or product quality." Ferguson also called out advertiser boycotts of particular online platforms as a potential antitrust concern. These sentiments reflect the populism that factored significantly into the first Trump administration's approach to antitrust enforcement.

Artificial intelligence (AI) may also come in for scrutiny. The Biden administration launched recent investigations into AI-related markets, including inquiries into leading AI chipmaker Nvidia and the large investments and practices of Big Tech in the AI space, and scrutiny of AI markets under the Trump administration is expected to continue.

However, it is not clear how these antitrust investigations will play out alongside the new administration's executive order promoting U.S.-based AI, and its declaration that it will revoke "certain existing AI policies and directives that act as barriers to American AI innovation, clearing a path for the United States to ... retain global leadership" and will potentially implement tariffs on semiconductors manufactured in Taiwan. Trade and national security policies, as well as global investment trends, will all factor into the competitive landscape for AI and semiconductors and may impact the way antitrust authorities approach these markets.

Greater Openness to Settlement and Remedy Discussions

Another feature of the Biden era was the agencies' policy not to engage in merger remedy discussions, preferring instead to litigate to block transactions outright. We expect that the second Trump administration will return to a more pragmatic approach that will enable parties to more readily "fix" deals, rather than face an all-or-nothing approach.

'Merger Tax' Reduction

Under the Biden administration, companies increasingly saw merger investigations bogged down by the agencies' processes, resulting in delays that sometimes forced the abandonment of transactions. We expect that regulators will be less likely to use procedural delays to achieve outcomes in second Trump administration.

The new administration also may rescind or modify the proposed revisions to the Hart-Scott-Rodino

merger notification requirements published last year. President Trump's January 20, 2025, "Regulatory Freeze Pending Review" executive order did not prevent the new HSR rules from taking effect on February 10, 2025, and they are expected to significantly increase the burden on companies making HSR filings. The rules have been challenged in federal court by the U.S. Chamber of Commerce, but that litigation remains pending. Companies contemplating mergers should monitor whether the FTC implements a freeze and, if so, whether that results in changes to the filing requirements.

Use of Antitrust To Challenge ESG Initiatives

The Trump administration's antitrust agenda may also include challenging collaboration on social justice initiatives as potential antitrust violations. Over the past several years, the Republican-led House Judiciary Committee and several Republican state attorneys general have asserted that collaboration among investors to achieve environmental social, and governance (ESG) goals could potentially violate the antitrust laws. Last fall a group of Republican state attorneys general sued several large institutional investors, alleging that they used their shareholdings in publicly-traded coal companies to jointly urge lowering of carbon emissions through reduced output in violation of the antitrust laws.

It remains to be seen whether the Trump Administration will use the antitrust laws to deter collaboration in the ESG space or on other social justice issues. But companies should be mindful of potential antitrust concerns when collaborating on such issues given the administration's opposition to many such initiatives.

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How Best To Measure Your Board's Effectiveness: FAQs

- Board self-assessment processes aimed at improving board performance, composition, culture and processes are common but vary widely in how they are conducted and who is assessed.
- Most S&P 500 companies assess both the full board and committees, and an increasing number evaluate individual directors as well, despite concerns that that might be seen as a way of easing out particular directors.
- Assessments can be conducted via questionnaires, interviews or group discussions, and can be overseen by the governance committee, a lead independent director, or outside counsel or other advisers to ensure anonymity and objectivity.

Most public company boards conduct some type of annual self-assessment. For directors who have served on multiple boards, that is where the commonality ends. Board self-assessment processes can vary widely from company to company in methods, who is being assessed, who is conducting or facilitating the assessment, what is being measured and what (if any) follow up takes place.

At the end of the day, there is no single right approach. A board or a governance committee should, from time to time, consider the many options and determine what self-assessment approach makes sense for a particular board at that particular point in time.

Why conduct a board self-assessment?

For NYSE-listed companies, it's a requirement. The exchange's listing standards provide that the "board should conduct a self-evaluation at least annually to determine whether it and its committees are functioning effectively." But virtually all Nasdaq-listed companies also conduct an annual board self-assessment, suggesting that boards see value in the process and do not regard it as a mere compliance exercise.

In fact, most directors (and many institutional investors) view the board self-assessment process as an important component in driving improvements in board performance. Those improvements might relate to board composition (skills and experiences in the boardroom), board culture (improving the exchange of viewpoints and collaboration) or board processes (for example, improving board materials or using meeting time more effectively).

As described by one non-executive chair interviewed for *The Informed Board* in 2023, "Boards expect management teams to evidence

accountability for their actions, evaluate outcomes and implement improvements. If we require that of management, then as directors we should model those same behaviors and engage in self-reflection and self-improvement."

Who gets assessed?

The possibilities are the full board, board committees and individual directors. Perhaps obviously, every company that conducts a board self-assessment assesses the board as a whole. According to the 2024 SpencerStuart Board Index (2024 SSBI), 95% of S&P 500 boards also assess the functioning and performance of board committees.

Where practice differs significantly is on the topic of individual director assessments. According to 2024 SSBI, approximately 48% of companies utilized individual director assessments, up from 38% a decade ago. Historically, some boards were hesitant to engage in individual director self-assessments, fearing those might hurt board collegiality because they were viewed as a way to identify and weed out underperforming directors. (Some institutional investors may view individual director evaluations as desirable precisely because of that assumption.)

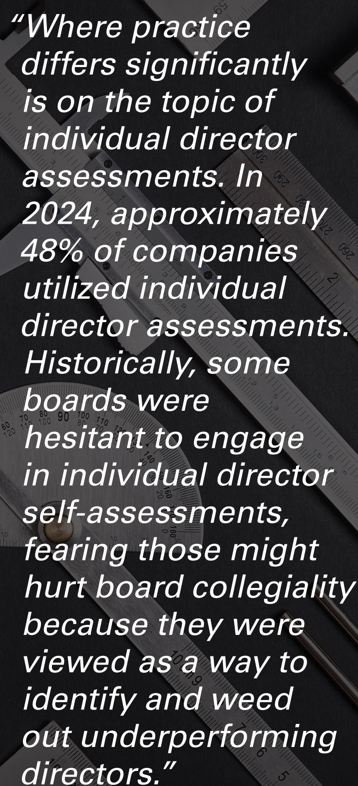
In reality, as the non-executive chair mentioned above said, "[t]hese reviews work best when they are understood as a method of realizing the full potential of every director." At many companies, individual director assessments may take place once every two to three years rather than annually.

How is the self-assessment conducted?

Common self-assessment methods include written questionnaires/surveys, group discussions and individual interviews, or some combination of those. Questionnaires and surveys may allow directors a greater sense of anonymity and result in more candid responses. In addition, surveys allow for greater year-over-year comparability. That said, completing a substantially similar questionnaire every year for a number of years can, over time, appear to be a "check-the-box" exercise.

One-on-one interviews (with a lead independent director, governance committee chair or an external party) can allow the interviewer to probe responses to get greater context, but they do take more time to complete. These interviews can also be done in conjunction with questionnaires/surveys, either to further explore the particular director's written response or score, or to probe an area that other directors may have identified as an area for potential change.

A group discussion allows for the potential of a robust dialogue and exchange of viewpoints among board members. Typically a list of questions or topics would be distributed in advance to provide some structure and allow directors to consider their



"Where practice differs significantly is on the topic of individual director assessments. In 2024, approximately 48% of companies utilized individual director assessments. Historically, some boards were hesitant to engage in individual director self-assessments, fearing those might hurt board collegiality because they were viewed as a way to identify and weed out underperforming directors."

views in advance of he discussion. Even when questionnaires/surveys or one-on-one interviews are conducted, those results should be shared with the board or applicable committee so that the full board or relevant committee has an opportunity to discuss the findings and decide on next steps.

Who conducts/leads the self-assessment process?

Typically, the process is overseen by the board's governance committee. As a practical matter, that means the committee will decide on things like whether to utilize a questionnaire, interviews or group discussions, approve the questionnaire if one is being used and decide other process questions.

In terms of leading the process once those decisions are made, it would typically be one or more members of board leadership — an independent chair or the lead independent director and/or the governance committee chair — potentially assisted by the corporate secretary, outside counsel and/or another external advisor/consultant. For example, to preserve director anonymity, completed questionnaires/surveys might go to outside counsel or another external adviser to be aggregated and compiled. One-on-one interviews might be conducted by the independent chair/lead independent director or the governance committee chair — someone who understands the board culture and dynamics — or by an external party to further preserve anonymity. (Even when conducted by another director, typically any comments or views reported back to the board are done without attribution). Where an external party is used, that is generally done on an every two-to-three-year basis rather than annually.

A thoughtfully designed process using outside or inside counsel can help mitigate issues that might arise in subsequent litigation or shareholder books and records demands in the event that critical comments are made about particular board processes or individuals.

Does management participate in the board self-assessment?

Some companies take a "360-degree" approach and elicit management's views the board. For example, do members of the management team think the board asks the right questions, or does the board strike the right balance in exercising its oversight function and being informed versus getting too deep into the weeds? Do members of the management team believe they have sufficient access to board members, or do they have views on how the board could be more helpful or provide greater strategic advice?

What happens after the self-assessment?

It would be the rare board self-assessment that concludes that everything is perfect and nothing should change. Whether it is a conclusion that the board needs to add a director with a particular skillset or experience, needs to change the frequency or length of board meetings, or needs to change some other board or committee process, there is typically something where directors agree a change is necessary. The key is to have an action plan to address those items and then follow up to confirm whether the desired changes were implemented, and whether directors feel the changes addressed the issue or are otherwise working to their satisfaction.

The ultimate goal of the entire self-assessment process, including the implementation of any changes arising out of that process, is for the board to feel that it is a more effective and better performing board of directors.

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Podcast: Is an Activist Targeting Your Company?

Listen to the podcast

Ted White of Legion Partners and Skadden partners Ann Beth Stebbins and Elizabeth Gonzalez-Sussman discuss what draws the attention of activist investors to a company, how activists work with other shareholders and how they gauge the response of management when the activist first approaches a company.

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