

Presenting a live 90-minute webinar with interactive Q&A

California AB 979 and Other State Laws on Board Diversity: Corporate Governance and Requirements for Directors from Underrepresented Groups

Penalties, Legal Challenges, Disclosures, and Enforcement

THURSDAY, MARCH 18, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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California AB 979 and Other State Laws on Board Diversity

March 18, 2021

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Agenda

- California Requirements for Board Diversity
- Current Trends in Other States and Other New Developments
- Pending Legislation to Watch
- Professional Diversity Qualifications for Consideration
- Recommendations and Considerations





**California AB 979
– Mandating
Board Diversity**

Recent History - California SB 826 (2018)

- Initial requirement:
 - No later than 12-31-19, a **publicly held** corporation with **principal executive offices in California** must have, on its board of directors, a minimum of one female director from an underrepresented community
- “Female” means an individual who **self-identifies** her gender as a woman
- A corporation may increase the size of its board to comply

California AB 979 (2020)

- Initial requirement:
 - No later than 12-31-21, a **publicly held** corporation with **principal executive offices in California** must have, on its board of directors, a minimum of one director from an underrepresented community
- “Underrepresented community” means an individual who **self-identifies** as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or gay, lesbian, bisexual, or transgender
- A corporation may increase the size of its board to comply

CA SB 826 Requirements (2018)

Board Size	Required Female Directors	Deadline
Any	One	December 31, 2019
5	Two	December 31, 2021
6 or more	Three	December 31, 2021

CA AB 979 Requirements (2020)

Board Size	Required Directors from underrepresented Communities	Deadline
Any	One	December 31, 2021
5 to 8	Two	December 31, 2022
9 or more	Three	December 31, 2022

CA AB 979 – Secretary of State Disclosures

- The new law requires that, on or before specified dates, the Secretary of State publish various reports on its website documenting, among other things:
 - the number of corporations in compliance with the bill's provisions
 - the number that have moved their headquarters in or out of California, and
 - the number no longer publicly traded

AB 979 Penalties

- ❖ **First Violation:** \$100,000
- ❖ **Second and Subsequent Violations:** \$300,000
- ❖ A fine may be assessed for each board seat that is not held by a director from an underrepresented community, as required by AB 979, during the calendar year



Legal Challenges to SB 826 (2018)

- SB 826 challenged as unconstitutional under the equal protection provisions of the Fourteenth Amendment in federal court
- *Meland v. Padilla* (E.D. Ca) Case No. 2:19-cv-02288-JAM-AC
- Dismissed by the district court for a lack of standing by the shareholder plaintiff and has been appealed to the Ninth Circuit
- Appeal is currently pending; oral arguments were heard last week

Legal Challenges to SB 826 (2018)

- *Crest v. Alex Padilla* filed in LASC involves a claim by taxpayers that the law's female directors requirement constitutes an unconstitutional quota
- California Secretary of State's initial attempt to defeat the challenge at the pleading stage in October 2019 was overruled by the court in June 2020
- Trial set for October 2021

Legal Challenges to AB 979

- *Crest v. Alex Padilla II* filed in LASC involves a claim by taxpayers that the law's requirement for racially diverse directors constitutes an unconstitutional quota
- Claims nearly identical to *Crest v. Alex Padilla*
- Other constitutional claims expected
- Equal Protection (14th Amendment)
- CA Constitutional Claims



**Mandating Board
Diversity &
Disclosing Board
Diversity –
A Growing Trend
in CA & Beyond**

IL Board Gender/Race/Ethnicity Diversity Disclosure Law

- Under HB 3394, enacted in 2019, no later than January 1, 2021, an **Illinois-headquartered publicly listed** corporation must include the following information in its annual report filed with the Illinois Secretary of State:
 - data on specific qualifications, skills and experience the corporation considers for its directors, director nominees and executive officers.
 - the **self-identified** gender of each of its directors
 - whether any of its directors **self-identifies** as one of the following races or ethnicities: American Indian or Alaska Native, Asian, Black or African American, Hispanic or Latino and Native Hawaiian or Other Pacific Islander

IL Board Gender/Race/Ethnicity Diversity Disclosure Law

- No later than January 1, 2021, an Illinois-headquartered publicly listed corporation must also include in its annual report filed with the Secretary of State:
 - a description of the corporation’s **process** for identifying and evaluating director nominees and for identifying and appointing executive officers, including in both cases **whether and how demographic diversity is considered**
 - a description of the corporation’s **policies and practices** for promoting diversity, equity and inclusion among its board of directors and executive officers.

NY Board Gender Diversity Disclosure Law

- New York S4278 “The Women on Corporate Boards Study Act” – went into effect June 2020
- Law requires all public and private for-profit business **corporations authorized to do business** in New York State – not just publicly listed companies – to file with the NY Department of State:
 - **Statement** setting forth company’s number of directors on its board and how many of those directors are women.
 - Corporations must provide this information on their **biennial filings** with the secretary of state as required under Section 408 of the Business Corporation Law.

NY Board Gender Diversity Disclosure Law

- New York State will issue a report detailing:
 - the **number** of female directors and the total number of directors that constitute the board of each corporation
 - an **analysis of the change** in the number of female directors from previous years and
 - the aggregate **percentage** of female directors on all boards
- The law requires the NY Department of State to publish the report on or before February 1, 2022, and every four years thereafter

MD Board Gender Diversity Disclosure Law

- HB 1116 “Gender Diversity in the Boardroom” – went into effect October 2019
- Requires Maryland businesses, and certain nonprofits, to report the number of women on their boards as part of the Annual Report of Personal Property Tax Form-1 which companies and nonprofits must file annually by April 15 to Maryland’s Department of Assessments and Taxation (SDAT)
- This information will be collected by SDAT and shared with the Comptroller of Maryland who will submit a report to the General Assembly on or before Jan. 1 of each year

WA Board Gender Diversity Law

- SB 6037 “Women on Corporate Boards Act” – became effective June 2020
- Company must have a “gender-diverse board” in which 25% of a company’s board self-identifies as women or provide shareholders a “board diversity discussion and analysis”
- Requirement to comply or explain doesn’t go into effect until January 1, 2022 but gender diversity threshold must be met for at least 270 days of the fiscal year preceding the applicable annual meeting of shareholders

- **WA Board Gender Diversity Law**

- Board diversity discussion and analysis must address:
 - How the board or a board committee **considered** the representation of any “diverse groups” in identifying and nominating candidates for election as directors in connection with the last annual meeting
 - Any **policy** adopted by the board or a committee relating to identifying and nominating members of diverse groups for election to the board
 - **Mechanisms of board refreshment**, such as term limits and mandatory retirement age policies
- Explanations are required if the above did not apply.



*The past year has brought heightened attention to the commitment of public companies to diversity and inclusion. Corporate culture, human capital management, and technology-driven changes to the business landscape have underscored the benefits of enhanced board diversity—**diversity in the boardroom is good corporate governance.** . . .*

Nasdaq Rule 5606



*. . . The benefits to stakeholders of increased diversity are becoming more apparent and include an increased variety of fresh perspectives, improved decision making and oversight, and strengthened internal controls. Nasdaq believes that the heightened focus on corporate board diversity by companies, investors, corporate governance organizations, and legislators demonstrates that **investor confidence is enhanced when boardrooms are comprised of more than one demographic group.***

Nasdaq Rule 5606

Nasdaq Proposal to Adopt Listing Requirements for Board Diversity

- In December 2020, Nasdaq Proposed Rule 5605 “Diverse Board Representation”
- Rule 5605 would require each Nasdaq-listed company, subject to certain exceptions:
 - (A) to have, or explain why it does not have, at least one director who self-identifies as a female, and
 - (B) to have, or explain why it does not have, at least one director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, two or more races or ethnicities, or as LGBTQ+

Nasdaq Proposal to Adopt Listing Requirements for Board Diversity

- Rule 5606 would be operative one year after the Commission approves the proposal (the “Approval Date”).
- A company to provide statistical information regarding its board’s diversity by the later of
 - (1) one calendar year from the Approval Date (the “Effective Date”); or
 - (2) the date the company files its proxy statement or its information statement for its annual meeting of shareholders (or, if the company does not file a proxy or information statement, the date it files its Form 10-K or 20-F) during the calendar year of the Effective Date.



**Mandating Board
Diversity –
Pending
Legislation to
Watch**

State	Required Minimum Number of Diverse Directors & Deadline (where provided)	Penalties (where provided)
HI	By 12/31/2020: 1 Female Director By 12/31/2022: If 6 or more directors; 3 Females If 5 directors; 2 Females If four or fewer directors; 1 Female	First Violation: \$1,000 Subsequent Violations within 10 years: \$5,000
MA	By 12/31/2021: 1 Female Director By 12/31/2022: If 6 or more directors; 3 Females If 5 or fewer directors; 2 Females	Violations: \$100,000
CT	Effective Date Not Yet Provided* Have at least one director from an underrepresented community on board of directors *(Text of Legislation not yet provided)	Not yet provided

State	Required Minimum Number of Diverse Directors & Deadline	Penalties
NJ	By 12/31/2021: Required to have a board of directors that reflects the racial and gender diversity of the State. A corporation will be able to increase the number of directors on its board and use information from the most recent decennial census published by the United States Bureau of the Census.	First Violation: \$100,000 Subsequent Violations: \$300,000



Recommendations and Considerations

Expected Trends

- As goes California...
- Monitor state legislative developments
- Monitor legal challenges

BUT

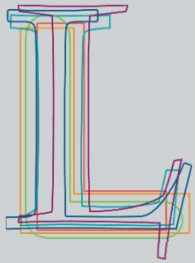
- Clear shift toward encouraging and/or mandating corporate board diversity

Racial, Ethnic, and Gender Diversity... and Beyond

- Minimize unconscious bias related to director selection
 - Lifetime of experience and observation impacts our expectations for directors
 - What has been done before may be impacting what we envision is can be done moving forward
 - Consider ways to intentionally craft qualifications/requirements
 - Identify qualifications that may impact the eligible pool of applicants

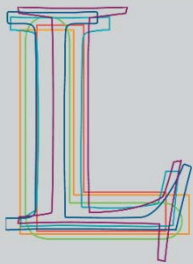
Recommendations for Compliance

- How to comply?
- Expand board searches to include:
 - Recruiters that specialize in diverse talent
 - Diverse professional networks
- Consider developing policies and committees aimed at improving board diversity
- Reconsider qualifications considered necessary for board membership



Questions?

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Thank You!

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