

# New California Law Requires Diversity on Corporate Boards of Directors

Insights

December 9, 2020

With the passage of Senate Bill 826 at the end of September 2018, California became the first state in the U.S. to require public companies incorporated in California or other public companies with their principal executive offices in California (according their Annual Report on Form 10-K) to have specified numbers of women serving on their Boards of Directors. In addition, with the passage of Assembly Bill 979, these same public companies will be required to have at least two members of their Boards of Directors from an “underrepresented community.”

## ***What is the timeline for compliance?***

The timeline for compliance is:

- By the end of the 2021 calendar year, all public companies must have the following number of women serving as directors, based on the size of the Board:
  - If the Board of Directors has six or more members, three women
  - If the Board has five members, two women
  - If the Board has four or fewer members, one woman
- By the end of 2021, all public companies must have one member of an underrepresented community on the Board
- By the end of 2022, all public companies must have two members of underrepresented communities on the Board if the Board size is between four and

nine members, and three if the Board has greater than 9 members

An underrepresented community is defined as “an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.”

Companies that do not comply with this law will face an initial fine of \$100,000, and \$300,000 for each violation thereafter. A violation will be determined on a per seat basis, so for example, if a company has a Board of five members and no women on its Board after 2021, the total fine would be \$600,000 if the company previously violated this law (or \$400,000 if this was the first violation).

### ***Do these laws apply to companies incorporated outside of California?***

Yes, it applies to any “publicly-held corporation,” which means any corporation with outstanding shares listed on a major U.S. stock exchange. They would then apply to a corporation incorporated in Delaware, if its principal executive offices were located in California.

It is not clear if these laws would apply to a foreign corporation with principal executive offices in California who does not list its shares on a major U.S. stock exchange, but rather lists American Depositary Receipts (or ADRs).

It is also not clear if these laws would apply to other types of entities, such as limited partnerships or limited liability companies.

### ***What should public companies do now?***

Given the number of public companies based in California and the time it takes to recruit qualified directors in general, companies should begin the process of recruiting additional qualified candidates.

### ***Is there a grace period for newly-public companies?***

No, therefore companies should plan for complying with these laws.

### ***Will these laws be overturned?***

At the time SB 826 was signed, Governor Brown acknowledged that the law is vulnerable to challenge, particularly from corporations incorporated outside of California. However we cannot predict with certainty the timing or outcome of any

such challenge. Therefore, we believe it prudent to begin the process of identifying and recruiting additional qualified board members.

We also note that regardless of whether this law is upheld, many large and influential institutional investors are strongly encouraging companies to increase the diversity of their boards of directors, including direct outreach campaigns.

### ***Are there any additional reporting obligations?***

The California Secretary of State will send a form annually certifying as to compliance with this requirement.

If you have any questions regarding these new laws, please do not hesitate to reach out to a member of your Gunderson Dettmer team, or to a member of the Public Offerings/Public Companies team.

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