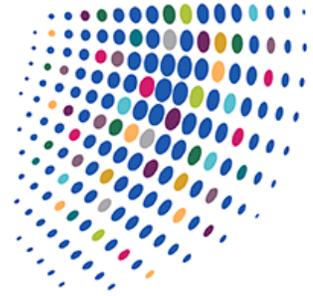


Alerts & Publications



California Law Mandating Representation of “Underrepresented Communities” on Public Company Boards Passes California’s State Legislature

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On August 30, 2020, the California state legislature passed [Assembly Bill 979](#) (AB 979), which would amend the California Corporations Code to require each publicly held corporation having its principal executive offices in the state of California to include individuals from “underrepresented communities” on their board of directors. Enactment of AB 979 is subject to Governor Gavin Newsom’s signature by September 30, 2020.

If signed into law, AB 979 will require each publicly held corporation (whether domestic or foreign) having its principal executive offices in the state of California to have at least one director from an “underrepresented community” on its board of directors by December 31, 2021. The requirements become more stringent on December 31, 2022, when each California-headquartered publicly held corporation must have at least the following number of directors from an underrepresented community on its board of directors:

- three directors if the company’s board has nine or more directors;
- two directors if the company’s board has more than four but fewer than nine directors; or
- one director if the company’s board has four or fewer directors.

A “director from 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. A “publicly held” company is one with outstanding shares listed on a major United States stock exchange and the company’s principal executive offices will be determined according to the company’s Form 10-K filed with the SEC.

Under the law, a director from an underrepresented community serving on a company’s board of directors for any portion of an applicable year would be counted towards the law’s requirements for that year.

AB 979 expressly permits companies to increase the size of their board of directors to accommodate adding directors. Companies should review their bylaws and charter documents to determine the necessary actions to increase the size of the board, if needed, and fill the related vacancies.

If enacted, AB 979 would permit the California Secretary of State to impose fines for violations of the law. A company that does not comply by the specified compliance date could be subject to a \$100,000 fine for the first violation and a \$300,000 fine for a violation in any subsequent year. AB 979 would also permit the California Secretary of State to impose a \$100,000 fine on any company subject to the requirement that fails to timely file board member information with the California Secretary of State.

AB 979 provides that no later than March 1, 2022, and each following year, the California Secretary of State will publish a report on its website which will include information on the number of companies in compliance with the requirements of AB 979 during at least one point during the preceding calendar year, the number of companies moving their headquarters to or from California during the preceding year and the number of public companies that were subject to the requirements of AB 979 during the preceding year, but are no longer publicly traded.

Potential Challenges to AB 979

AB 979 is modeled after SB 826, which was signed into law on September 30, 2018, by then-Governor Brown and mandates each publicly held corporation having its principal executive offices in the state of California to have at least one female director on its board of directors by December 31, 2019 and at least (i) three female directors on its board of directors (if it has six or more directors), (ii) two female directors on its board of directors (if it has five directors), and (iii) one female director on its board of directors (if its board size is less than five directors) by December 31, 2021.

SB 826 is currently the subject of two lawsuits. The first lawsuit, which was filed in California state court in August 2019 by Judicial Watch on behalf of three California taxpayers, seeks to enjoin the California Secretary of State from expending taxpayer funds and taxpayer-financed resources to enforce or carry out the provisions of SB 826 on the basis that the express gender classification mandated by the law is illegal under the California constitution. In June 2020, the plaintiffs survived a challenge for lack of standing and the lawsuit is currently scheduled for trial in mid-2021. The second lawsuit, which is currently being appealed to the Ninth Circuit after being dismissed in April 2020 for lack of standing, was initially filed in federal court in August 2019 by the Pacific Legal Foundation on behalf of a shareholder of a California-headquartered public company, and seeks a declaratory judgment and injunction on the basis that SB 826's gender mandate is a sex-based classification that violates the equal protection clause of the US constitution. AB 979 may face similar legal challenges if Governor Newsom signs the bill into law and may also be challenged under the internal affairs doctrine.

Regardless of whether AB 979 ultimately becomes law or legal challenges to SB 826 or AB 979, if enacted, ultimately do not succeed, we expect that private-ordering efforts seeking to enhance corporate board diversity will continue. Institutional shareholders, proxy advisors, and other governance activists are continuing their focus on board diversity and will be looking for progress at companies that, in their view, lack sufficient board diversity.

This memorandum is a summary for general information and discussion only and may be considered an advertisement for certain purposes. It is not a full analysis of the matters presented, may not be relied upon as legal advice, and does not purport to represent the views of our clients or the Firm. John-Paul Motley, an O'Melveny partner licensed to practice law in California, Shelly Heyduk, an O'Melveny partner licensed to practice law in California, and Su Lian Lu, an O'Melveny senior counsel licensed to practice law in California, contributed to the content of this newsletter. The views expressed in this newsletter are the views of the authors except as otherwise noted.

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