

# California Enacts Law Requiring Public Company Boards to Include Women

October 1, 2018

On September 30, 2018, California Governor Jerry Brown signed a bill, [S.B. 826](#), which will require all NYSE- and Nasdaq-listed public companies with principal executive offices located in California, regardless of the state or jurisdiction of incorporation, to have at least one woman board member by December 31, 2019 and up to three women board members by the end of 2021 depending on the size of board of directors. Specifically, the law requires California-based companies (according to the company's address on its Form 10-K) listed on a major U.S. stock exchange to have a minimum of one female director by December 31, 2019. By December 31, 2021, the applicable minimum number will increase to:

- three female directors, if the company has six or more directors,
- two female directors, if the company has five directors, and
- one female director, if the company has four or fewer directors.

The law defines "female" as "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth." The California Secretary of State is authorized to impose fines of \$100,000 for the first violation and \$300,000 for any subsequent violation. The law provides that a female director need only hold a seat for a portion of the applicable calendar year to not be a violation. The California Secretary of State may also impose a \$100,000 fine for failing to file board member information. The law applies to corporations incorporated under California law as well as corporations incorporated under the laws of other states or jurisdictions, including companies incorporated in Delaware.

S.B. 826 is the latest development in a trend of increasing focus on gender representation and diversity in corporate boardrooms. Earlier in 2013, California Senate Concurrent Resolution 62 urged that, by December 31, 2016, all public companies in California increase the number of women on their boards of directors ranging from one to three, depending upon the size of their boards. This resolution was followed by other U.S. states passing similar resolutions urging more women directors on corporate boards in their states. While California was the first U.S. state to enact a law providing for gender diversity requirements for corporate boards, such laws are more common in Europe. European countries, including Norway, which enacted a law providing for mandatory 40% minimum female representation in 2003, Germany, France, Spain, Iceland and the Netherlands, have enacted similar legislation. Several institutional investors have adopted policies or voting guidelines to ensure that women are represented on corporate boards. Some, like [BlackRock](#) and [State Street Global Advisors](#), have publicly advocated for greater diversity.

Meeting the full requirements of S.B. 826 will not be immediate for many companies. According to a study conducted by [Equilar](#) in 2018, 82% of public companies based in California with annual revenues of over \$5 million will meet the initial 2019 criteria. However, only 21% of such public companies would pass the increased minimum requirement in 2021 if applied today, with 79% possibly subject to fines for not complying unless they take timely action.

Private companies considering IPOs should note that there is no grace period for newly public companies and should address any board composition issues as part of their IPO process. Nearly one-half of the 75 largest IPOs from 2014 to 2016 went public with no women on their boards, according to the law's legislative findings. There are also no thresholds based on overall company size, revenue or metrics other than the number of directors on the board.

Most public companies have bylaws allowing the board of directors to increase the size of the board and to appoint new directors at any time during the calendar year. Newly appointed directors can then generally serve until that directorship is required to be voted on by the stockholders, which may be up to a year or even longer. It is therefore unnecessary for most companies to replace current directors in order to comply, although some boards are structured assuming a certain board size, and those boards may need to consider the dynamics of a larger board.

S.B. 826 was opposed by a coalition of over two dozen business groups led by the California Chamber of Commerce on both policy and legal grounds, according to a [floor analysis of the California Senate](#). The coalition's policy criticism is based around the law's focus on gender to the exclusion of other aspects of diversity and the mandated minimum being too inflexible. Furthermore, the coalition argues that the law violates the equal protection clauses of the U.S. Constitution and the California Constitution as well as the Unruh Civil Rights Law. They also argue that the law conflicts with the "internal affairs" doctrine which provides that the law of the state where a company is incorporated should dictate internal corporate matters, such as any requirements for board composition. This latter issue applies because the law is expressly drafted to apply to companies incorporated under the law of other states, such as Delaware, but that have their principal executive offices in California. Notwithstanding these issues, any legal challenge could possibly take years before a final resolution.

Irrespective of the outcome of any possible legal challenges, companies subject to S.B. 826 or that would be subject following a contemplated IPO should consider its requirements seriously due to the risks of noncompliance ranging from government fines to pressure from investors and negative media attention. Companies currently not in compliance with the 2019 requirements that wish to comply will need to take prompt action to prepare for the 2019 proxy season. Companies that presently comply with the 2019 requirements but not the 2021 requirements should review their corporate governance provisions and processes now to understand what steps will be necessary to comply by the deadline due to the time needed to conduct board searches.

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If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

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|--------------------------|---------------------|--|
| <b>Bruce K. Dallas</b>   | <b>650 752 2022</b> | <a href="mailto:bruce.dallas@davispolk.com">bruce.dallas@davispolk.com</a>     |
| <b>Alan F. Denenberg</b> | <b>650 752 2004</b> | <a href="mailto:alan.denenberg@davispolk.com">alan.denenberg@davispolk.com</a> |
| <b>Stephen Salmon</b>    | <b>650 752 2063</b> | <a href="mailto:stephen.salmon@davispolk.com">stephen.salmon@davispolk.com</a> |
| <b>Sarah K. Solum</b>    | <b>650 752 2011</b> | <a href="mailto:sarah.solum@davispolk.com">sarah.solum@davispolk.com</a>       |
| <b>Ning Chiu</b>         | <b>212 450 4908</b> | <a href="mailto:ning.chiu@davispolk.com">ning.chiu@davispolk.com</a>           |
| <b>Bryan M. Quinn</b>    | <b>650 752 2081</b> | <a href="mailto:bryan.quinn@davispolk.com">bryan.quinn@davispolk.com</a>       |

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