

## California Enacts Law Requiring Public Company Boards to Include Members of Underrepresented Communities

October 5, 2020

On September 30, 2020, California Governor Gavin Newsom signed [Assembly Bill 979](#), which will require each NYSE and Nasdaq-listed public company with its principal executive offices in California to have at least one director from an “underrepresented community” on its board by December 31, 2021. On December 31, 2022, the minimum will be:

- three directors from underrepresented communities, if the company has nine or more directors,
- two directors from underrepresented communities, if the company has between five and eight directors, and
- one director from an underrepresented community, if the company has four or fewer directors.

The law defines “director from an underrepresented community” 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.” The law applies to corporations incorporated under California law as well as corporations incorporated elsewhere, including Delaware. Approximately 700 public companies currently list California as the location of their headquarters.

Private companies considering an IPO or direct listing should note that the statute does not provide a grace period for newly public companies, and should address any board composition issues as part of their IPO or direct listing process.

The law provides that a director from an underrepresented community need only hold a seat for a portion of a calendar year for the corporation not to be in violation for that year. The California Secretary of State may adopt regulations to implement the law, which may include the ability to impose fines of \$100,000 for the first violation and \$300,000 for any subsequent violation. A \$100,000 fine may also be imposed for failing to file board member information with the California Secretary of State.

Assembly Bill 979 is the latest development in the efforts of California lawmakers to address diversity in corporate boardrooms. The law expands upon California Senate Bill 826, enacted in 2018, which requires the same set of public companies to have at least one female director by December 31, 2019 and at least three female directors (for boards of six or more directors) by December 31, 2021, as discussed in our October 2018 [client memorandum](#). Pending litigation is challenging Senate Bill 826 on constitutional grounds, and Assembly Bill 979 has already resulted in similar litigation. In addition, numerous public companies headquartered in California have yet to comply with the December 31, 2019 gender diversity requirement, although no penalties have been imposed to date. Nonetheless, the new law will undoubtedly shine a brighter spotlight on diversity in the boardroom.

We expect that many public companies headquartered in California will need to add multiple directors in order to comply with both diversity laws. According to the research firm Equilar, 35% of public companies headquartered in California have no ethnic or racial diversity on their boards. Board searches often require substantial lead time and many public companies headquartered in California will be working towards compliance in advance of the deadlines for both diversity laws.

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The law does not excuse compliance for companies, such as those with staggered boards, where the incumbent directors can only be removed for cause; such a company may need to increase the size of its board in order to comply with the new mandate. Public company boards are usually permitted by their governing documents and the laws of the state of incorporation to increase board size at any time, but companies should remain aware that the diversity requirements of Assembly Bill 979 and Senate Bill 826 increase with board size.

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