
The Washington approach differs from the approaches adopted by other states. Washington created a framework that defines the goal sought to be accomplished and non-monetary consequences for failure to meet the goal. Specifically, Washington has set a threshold for the definition of a “gender-diverse board” and consequences for a company if its board is not gender-diverse by January 1, 2022. The following Q&A describes the Washington approach, key take-ways, and a brief summary of approaches being adopted in other states.

**Who Does the Law Apply To?**

The Washington law applies to public companies which are defined as corporations that have a class of shares registered with the federal securities and exchange commission pursuant to section 12 or 15 of the Securities Exchange Act of 1934, or section 8 of the Investment Company Act of 1940. RCW 23B.01.400(28). The Women on Corporate Boards Act carves out certain public companies from application of the Act, specifically companies that fit within the below categories are exempt:

- Companies without outstanding shares of any class or series of classes on the U.S. national security exchange;

- Companies that are “emerging growth companies” or a “smaller reporting company” as defined in 17 C.F.R. sec. 240.12b-2;

- Companies in which the voting power (i.e., more than 50%) of the company is held by a
person or group of persons;

- Companies in which the articles of incorporation authorize election of all or a specified number of directors by one or more separate voting groups as described in RCW 23B.08.040; or

- Companies not required to hold an annual meeting under the rules of any U.S. national securities exchange or the Washington Business Corporation Act.

**What is a “Gender-Diverse Board”?**

A public company board with at least 25% of the directors serving who self-identify as women is a gender-diverse board. Whether this requirement is met is measured by whether a board of directors met the threshold for at least 275 days of the fiscal year immediately preceding the annual meeting of the shareholders.

**What are the Consequences for Failing to Meet the Gender-Diverse Standard?**

Effective January 1, 2022, a public company that does not have a gender-diverse board must deliver to all of its shareholders entitled to vote at its annual meeting a “board diversity discussion and analysis.” A public company may fulfill this reporting requirement through posting the information on the company’s website or including such information in the company’s proxy statement.

**What Must Be Included in the Board Diversity Discussion and Analysis?**

The “board diversity discussion and analysis” must include the statutory elements described below.

1. A discussion regarding how the board of directors, or an appropriate committee of the board, considered the representation of any diverse groups in identifying and nominating candidates for election as directors in connection with the last annual meeting of shareholders, and if the representation of diverse groups was not considered, then the discussion should explain the reasons it did not;

2. A discussion regarding any policy adopted by the board of directors, or an appropriate committee of the board, relating to identifying and nominating members of any diverse groups for election as directors, and if there is not a policy, then the discussion should explain the reasons it has not adopted a policy; and

3. A discussion of the public company’s use of mechanisms to refresh the membership of the board of directors, such as term limits and mandatory retirement age policies for its directors, and if the public company does not use any such mechanisms, the discussion should explain the reasons it does not.

For purposes of this requirement, “diverse groups” means women, racial minorities, and historically underrepresented groups.

**What Are Key Takeaways of the Washington Law?**
If you are a public company subject to the law it will be important to institute a monitoring mechanism to assess for compliance during the applicable time periods identified in the statute. This is an annual assessment process.

For any year that the company does not meet the threshold, the company should be prepared to meet the reporting requirements. This could include proactively reviewing your board’s process to identify and nominate candidates for directors and determine whether changes to your nomination policy are advisable to further compliance with the legislative goals, including how your board refreshes the membership of its board. You will also want to decide on whether to deliver the information to shareholders individually or through one of the public reporting mechanisms.

**What Happens if the Company Fails to Comply with the Reporting Requirement?**

Any shareholder entitled to vote at the annual meeting may seek a court order from the superior court of the county in which the public company’s registered office is located, requesting the court to compel the public company to produce the required information. Prior to seeking a court order, the shareholder must first provide the company notice.

**How Does Washington’s Law Compare to Similar Laws in Other States?**

The approaches in other states generally fall into three general categories:

1. Resolutions in support of gender representation on corporate boards. For example, the Colorado Legislature adopted a resolution in 2017 encouraging companies with nine or more director seats to have a minimum of three women directors on their board and companies with fewer than five director seats to have a minimum of one woman on their board by the end of 2020.

2. Mandatory reporting requirements that mandate additional information to be included in annual corporate filings. For example, Maryland, New York, and Illinois have taken this approach. Some require the information to be aggregated and made available via reports or studies, others do not.

3. Requirements for a minimum number of female directors with monetary consequences for failing to meet the statutory number of women. The California Legislature took this approach in 2018 and set thresholds for the number of female board members publicly held domestic or foreign corporations must have and instituted monetary penalties for failure to do so. Hawaii, Massachusetts, Michigan and New Jersey have considered similar legislation. The constitutionality of the California law is currently being challenged in two separate law suits.

The current national climate will likely accelerate the enactment of similar laws throughout the nation and therefore all public companies should be monitoring the evolution of these laws closely to begin proactively developing policies to assure stockholders that the company is taking the initiative to ensure a diverse board. For more information, or assistance with your policies, reach out to the contacts above.

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