

## Updates

September 17, 2020

### Is Your Board Gender Diverse Yet? Washington Public Companies Reminded of Upcoming Board Diversity Requirement



When the Women on Corporate Boards Act (Section 1 of [Substitute Senate Bill 6037](#)) became effective on June 11, 2020, Washington became the second state (after California) to affirmatively address gender diversity on public company boards of directors in its corporate statute. The act, which added [Section 23B.08.120](#) to the Washington Business Corporation Act (WBCA), takes a "comply or explain" approach to gender diversity: a company subject to Section 23B.08.120 must have a "gender-diverse board" or provide shareholders a "board diversity discussion and analysis."

### **The Gender Diversity Requirement and When It Applies**

To be considered gender diverse, at least 25% of a company's board must self-identify as women. However, companies should be aware that the gender diversity threshold must be met for at least 270 days of the fiscal year preceding the applicable annual meeting of shareholders. Although the requirement to comply or explain technically does not go into effect until January 1, 2022, (i.e., a company must first meet the threshold for the fiscal year preceding its annual meeting in 2022) the 270-day requirement effectively forces companies to be compliant sooner than that. How soon depends on when a company's fiscal year ends:

#### **Fiscal Year End Date By Which Company Must Have Gender-Diverse Board\***

December 31	April 5, 2021
September 30	January 3, 2021
June 30	October 3, 2021

\*Assumes a company holds its annual meeting more than three but less than six months after fiscal year end. A June 30 FYE company that holds its annual meeting more than six months after fiscal year end (e.g., a January 2022 annual meeting for its June 30, 2021 FYE) would need to be compliant by October 3, 2020.

Because Section 23B.08.120 requires subject companies to comply or explain on an annual basis, a company could have a gender-diverse board one year, thereby avoiding the disclosure requirement discussed below, but not the following year due to changes in the composition of its board of directors (in which case it would be subject to the disclosure requirement).

## **Board Diversity Discussion and Analysis**

A company that fails to meet the gender diversity requirement for the relevant period must provide shareholders a board diversity discussion and analysis that includes information about "the public company's approach to developing and maintaining diversity on its board of directors." The discussion must address:

- How the board or a board committee considered the representation of any "diverse groups" in identifying and nominating candidates for election as directors in connection with the *last* annual meeting.
  - If the board or committee did not consider such representation, the discussion should explain why it did not.
- Any policy adopted by the board or a committee relating to identifying and nominating members of diverse groups for election to the board.
  - If such a policy does not exist, the discussion should explain why it does not.
- Mechanisms of board refreshment, such as term limits and mandatory retirement age policies.
  - If no such mechanisms exist, the discussion should explain why it does not.

Section 23B.08.120 uses gender diversity as an indicator of a company's broader commitment to board diversity. If a company is required to provide a board diversity discussion and analysis, it must focus on a more comprehensive conception of diversity. "Diverse groups" is defined to mean "women, racial minorities, and historically underrepresented groups." Any board diversity discussion and analysis that may be required should take that broader concept of diversity into consideration.

If a company is required to provide shareholders a board diversity discussion and analysis, it can do so in one of two ways:

- It can post the required disclosure on its website.
- It can include the required disclosure in the proxy statement for the relevant annual meeting.

The Securities and Exchange Commission's proxy rules (Schedule 14A, Item 7 and Regulation S-K Item 407(c)(vi)) already require some board diversity-focused disclosures in annual proxy statements, although those requirements are not particularly robust. While some public companies nevertheless include extensive diversity-related disclosures in their proxy statements, others provide only the bare minimum needed to satisfy the SEC's requirements. A Washington public company that is subject to Section 23B.08.120 but fails to satisfy the gender-diversity requirement for any particular year will need to make sure the board diversity disclosures in its annual proxy statement address the board diversity discussion and analysis requirements now imposed by the WBCA (or post compliant disclosures on its website).

## Who Is Subject to the Requirements?

Generally, the new requirements apply to corporations *incorporated in Washington* that are "public companies." A public company is a corporation that has a class of securities registered with the 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. However, Section 23B.08.120 provides a number of important exceptions. The following companies are not subject to the act:

- An "emerging growth company" as defined in Exchange Act Rule 12b-2.
- "Smaller reporting companies" as those terms are defined in Exchange Act Rule 12b-2.
- A controlled company (i.e., more than 50% of the outstanding voting power is held by a person or group).
- A company whose articles authorize the election of all or a specified number of directors by one or more separate voting group.
- A company that is not required by the WBCA or the rules of a national securities exchange to hold an annual meeting of shareholders.

Unlike California's board diversity law, the Washington board diversity statute does not apply to foreign corporations headquartered in the state.

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