September 22, 2021
Nasdaq's New Board Diversity Rule: A Clash with State Statutes?

A few weeks ago, my colleague Allison Handy **blogged** about Nasdaq's new board diversity disclosure requirements, now **approved** by the SEC. The new rules are discussed in more depth in our upcoming article in the "Corporate Governance Advisor": "Nasdaq's New Board Diversity Rules—a Booster Rocket for Increased Board Diversity." **Nasdaq's new board diversity rules** will co-exist with state statutes addressing gender and other diversity issues about boards. All current state statutes differ in some respects from the new Nasdaq rules. Some of these statutes are merely advisory, some, like the Nasdaq board diversity rules, impose disclosure requirements, and some statutes actually mandate board diversity. In defending its proposed rules, Nasdaq has repeatedly emphasized that they are not a mandate: they do not require Nasdaq-listed companies to have diverse boards. Instead, they seek to encourage listed companies to diversity their boards by establishing rules for disclosure of their current board diversity (Rule 5606) and setting a diversity objective for boards to meet, with a requirement that, if they fail to meet the objective, they must disclose that fact and the reason for their failure to comply (Rule 5606(f)). Here are some examples of current state board diversity statutes, including two California statutes that are the foremost examples of board diversity mandates:

1. In 2018, California enacted Senate Bill 826 (**SB 826**), which requires publicly held corporations headquartered in California to have up to three female directors, depending on the size of their board, by the end of 2021 or face fines of $100,000 to $300,000. Following passage of SB 826, the representation of women on California-headquartered public company boards has **nearly doubled**, and 98% of such companies have at least one woman on the board. 2. In 2020, California followed with Assembly Bill 979 (**AB 979**), which requires the companies subject to SB 826 to have up to three directors from an "underrepresented community" by the end of 2022 or face the same fines as are levied under SB 826. The constitutionality of both SB 826 and AB 979 is currently being challenged in state and federal courts. 3. Washington's board gender diversity statute, **Senate Bill 6037**, provides that if a subject company fails to meet statutory board gender diversity requirements, it must provide a "Diversity Discussion and Analysis." The analysis must discuss the company's approach to developing and maintaining diversity on its board of directors, and must cover not just women, but racial minorities and other underrepresented groups. 4. The Oregon legislature has been deliberating a **bill** that would combine the elements

of California's SB 826 and AB 979—covering both women and "underrepresented community members," though it appears that the bill may have died in the Senate.

The difficulty for publicly held corporations subject to these state statutes is that they may have to comply with possibly conflicting requirements, including the filing of state reports eliciting different information under different standards. For example, Washington's Diversity Discussion and Analysis is more extensive than the statement called for by Nasdaq Rule 5605(f)(2). Similarly, the proposed Oregon statute would define underrepresented community members to include persons who are Arabic, North African, Middle Eastern, of mixed racial or ethnic heritage, and from low-income backgrounds, in addition to the categories in Nasdaq Rule 5605(f)(1). With the SEC's approval of Nasdaq's new board diversity rules, states that are contemplating adoption of their own board diversity statutes should consider simply creating an exemption from any state diversity statute's mandatory diversity disclosure requirements for publicly held corporations subject to their jurisdiction that are listed on Nasdaq and compliant with Nasdaq Rules 5605(f) and 5606.

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