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PERSPECTIVE

Gender mandate for corporate boards: a year in review

By Jen Rubin

California's groundbreaking gender parity law for public company boards has now been in effect for its first full year. While several legal challenges have been mounted against it, the law appears to be having a beneficial impact on a wider movement toward gender and other diversity on corporate boards.

Corporation Code Sections 301.3 and 2115.5, which became effective in 2019, mandates that public companies with a principal executive office in California either meet certain minimum gender representation goals on their boards or face state-imposed fines. Public companies subject to the law were obligated to elect at least one female director to their boards by Dec. 31, 2019, either by filling an open seat or by adding a seat. The addition of one or two more women directors, depending upon the size of the public company's board, is required by Dec. 31, 2021. Companies face penalties of $100,000 for a first violation and up to $300,000 for each subsequent violation.

Earlier this month, the California secretary of state published an updated compliance report for the period through Dec. 31, 2019 that, while suggesting movement toward voluntary compliance with the mandate, by its terms concedes a gap in data, which reflects on the report's accuracy. The report, for example, relies upon a search of EDGAR for corporations reporting principal executive offices in California as well as corporate disclosure statements filed with the secretary of state's office pursuant to the Corporation Code. But the information in the report may not reflect currently accurate data because of the differing reporting periods for these governmental records. For example, the secretary of state reports that 625 corporations listed California as the location of their principal executive office for the year 2019, but only 330 companies filed a corporate disclosure statement. Those records, however, may not account for companies moving out of California, ceasing operations, or are no longer publicly traded.

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It would also appear from an examination of the secretary of state's report that many of the subject companies listed as either not reporting at all or reporting but not meeting the gender mandate may not reflect accurate information. Several other companies the report lists as "non-reporting" likewise appear to be in facial compliance with the law (e.g., Zynga, Inc., Boingo Wireless, Ebay, Facebook, Netflix, all of whom have a sufficient number of female board members). Other companies listed as reporting, but reporting no female board members, also appear to be in current compliance with the law, some amply so (e.g., Adamis Pharmaceuticals, B. Riley Financial, Maxim Integrated Products). So it would appear that the gap in data in the report (which the secretary of state concedes), which may be a function of timing and other matters, compels further refinement before conclusions are reached. At the very least, caution dictates that before relying upon the report to reach a conclusion regarding a board's gender makeup, consulting public company filings (such as a proxy) or even anecdotal reference to the company's website is in order.

The secretary of state has not yet initiated any regulatory actions to date to ensure compliance, but three private litigants have mounted legal attacks on the law. Two of the cases are taxpayer-based challenges asserting that the law violates the California Constitution's prohibition against sex-based classifications. *Colebrook v. Alex Padilla*, BCV 19- 103234 (Kern County) and *Crest v. Alex Padilla*, 19STCV27561 (Los Angeles County). The third case, filed by an individual shareholder of California- based OSI Systems, Inc. in the U.S. District Court for the Eastern District of California, asserts that the gender mandate impacted the individual shareholder's right to vote as a shareholder for board candidates of his choice because of the "threat that the corporation will be fined if he votes without regard to sex." *Meland v. Alex Padilla*, 19CV02288 (JAM). At the time this case was filed, the OSI Systems, Inc. board was all male. However, prior to its December 2019 proxy meeting to consider board elections, the OSI Systems, Inc. board nominating committee presented a female candidate for election — a candidate who then drew the highest number of shareholder votes at the company's annual meeting and who now sits on the board of OSI Systems.

While the board gender mandate continues to engender spirited discussion inside and outside of corporate board rooms, a few matters seem clear. First, the majority of existing board members polled do not believe that quotas will materially advance diversity of corporate boards, perhaps a fallout from "diversity fatigue" that some board members report. But it would also appear that pressure from shareholders, particularly institutional shareholders, as well as from consumers and employees, may organically effectuate change without statutory compulsion. If corporate constituents demand corporate leadership that more completely and accurately reflects the world at large, then that worthy desire may overtake the statutory compulsion to achieve the same result. ■

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