

Washington State to Require Gender Diversity on Public Company Boards or Board Diversity Disclosure

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Effective as of June 11, 2020, the Washington State legislature has amended the Washington Business Corporation Act (“WBCA”) to require public companies to either have a gender-diverse board of directors by January 1, 2022 or comply with new board diversity disclosure requirements. A public company will be deemed to have a gender-diverse board of directors if, for at least 270 days of the fiscal year preceding the applicable annual meeting, individuals who self-identify as women comprised at least 25% of the directors serving on the board.

If a Washington public company does not have a gender-diverse board of directors beginning January 1, 2022, the company must deliver to its shareholders a board diversity discussion and analysis no fewer than 10 nor more than 60 days before its annual meeting. The board diversity discussion and analysis must either be included in the company’s definitive proxy statement filed with the SEC or posted on the company’s website or another electronic network.

The board diversity discussion and analysis must include information regarding the company’s approach to developing and maintaining diversity on its board of directors, including, among other things a discussion of:

- how the board, or an appropriate committee, 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 it did not, why not;
- any policy adopted by the board, or an appropriate committee, relating to identifying and nominating members of any diverse groups for election as directors, and if it does not have such a policy, the reasons why it does not; and
- the mechanisms used to refresh the board, such as term limits and mandatory retirement age policies for its directors, and if the company does not use any such mechanisms, the reasons why it does not.

While these disclosure requirements go beyond the SEC’s current proxy statement requirements relating to board diversity, some companies are already including this type of information in their proxy statements.

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As noted above, in order to meet the 25% threshold of board members that self-identify as women by January 1, 2022, a Washington public company must have the requisite number of self-identified women directors on the board for at least 270 days in the prior fiscal year. For example, for a Washington public company with a December 31 fiscal year end and an eight person board, at least 2 women directors must serve at least 270 days during 2021. So, if in order to meet the 25% threshold by January 1, 2022 a company wanted to nominate additional women for election as directors at its annual shareholders meeting in 2021, the meeting would be required to be held by April 6, 2021, or the women would need to be appointed to fill vacancies on the board by that date. On the other hand, if at the beginning of the fiscal year 25% of a company's directors self-identify as women and the board then desires to expand the number of directors on the board to add someone who does not self-identify as a woman (which will lower the percentage of women on the board), in order to meet the 25% threshold the board could not be expanded until September 28th.

These new requirements do not apply to public companies:

- that do not have shares listed on a national securities exchange;
- that qualify as an “emerging growth company” or “smaller reporting company”;
- 50% or more of the voting shares of which are held by a person or group of persons;
- of which the articles of incorporation authorize the election of all or a specified number of directors by one or more separate voting groups; or
- that is not required by the WBCA or any national securities exchange to hold an annual meeting.

The exclusive remedy for a public company's failure to comply with these requirements is that a shareholder may, after notice to the company, apply for a court order to require the company to furnish the board diversity discussion and analysis to shareholders.

Whether or not a company's board meets the threshold percentage for gender diversity, we recommend that board or nominating committee of a Washington public company review the disclosure requirements imposed by the WBCA amendment and consider whether it desires to adopt or amend a diversity policy in response to such potential disclosure requirements.