

CONCURRENCE IN SENATE AMENDMENTS

AB 979 (Holden, et al.)

As Amended August 20, 2020

Majority vote

SUMMARY:

Requires each publicly held corporation whose principal executive offices are located in California to have a minimum number of directors from underrepresented communities on its board of directors, as specified.

The Senate Amendments:

Delete the Assembly version of this bill and replace with the following:

- 1) Defines "director from an underrepresented community" as an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender.
- 2) Defines "publicly held corporation" as a corporation with outstanding shares listed on a major United States stock exchange.
- 3) By the end of calendar year 2021, requires each publicly held corporation whose principal executive offices are located in California to have a minimum of one director from an underrepresented community on its board. Clarifies that a corporation may increase the number of directors on its board to comply with this requirement.
- 4) By the end of calendar year 2022, requires each publicly held corporation whose principal executive offices are located in California to comply with the following:
 - a) If its number of directors is nine or more, the corporation shall have a minimum of three directors from underrepresented communities.
 - b) If its number of directors is more than four but fewer than nine, the corporation shall have a minimum of two directors from underrepresented communities.
 - c) If its number of directors is four or fewer, the corporation shall have a minimum of one director from an underrepresented community.
- 5) Requires the Secretary of State to report on corporations subject to the requirements summarized in 3) and 4), above, and those corporations' compliance with the requirements.
- 6) Authorizes the Secretary of State to impose fines for violations of the requirements in 3) and 4), above, as specified.
- 7) Makes findings and declarations regarding the lack of racial and ethnic diversity on corporate boards of directors and the benefits of more equitable representation on corporate boards.

Existing Law:

Establishes nearly identical requirements as this bill related to the representation of women on corporate boards.

COMMENTS:

As stated in the findings and declarations of the bill, according to 2018 data from Deloitte and the Alliance for Board Diversity, the percentages of Fortune 500 company board seats held by people identified as African American/Black, Hispanic/Latino(a), and Asian/Pacific Islander were 8.6%, 3.8%, and 3.7%, respectively.¹ The same study showed that 84% of board seats were held by people identified as white, which over-represents the group's share of the general population by 22 percentage points.

This relative lack of diversity may have consequences that negatively affect all stakeholders in a corporation, including workers, customers, and investors. Workers from communities that are not represented on the board may find limited opportunities for advancement through the executive ranks, as boards hire CEOs who look like themselves and CEOs surround themselves with other executives who also look like them. With a lack of diversity throughout the board and senior management, customers or potential customers from underrepresented communities may find that products or services offered by the corporation do not consider the preferences of their communities. A failure to capitalize on a diverse range of consumer preferences harms investors who would benefit from higher returns if corporations were meeting their full potential.

The lack of diversity in corporate America is not a product of happenstance; rather, it is a product of systemic discrimination and bias that affects so many facets of our society – housing, education, criminal justice, and employment. This bill seeks to remedy one specific discriminatory outcome by ensuring that corporate boards meet a minimum standard of diversity.

This bill is modeled after SB 826 (Jackson), Chapter 954, Statutes of 2018, which established similar requirements related to the representation of women on corporate boards. As that measure advanced through the Legislature, a variety of business groups opposed the bill and argued that provisions of the bill violated the California and United States (U.S.) Constitutions. Specific concerns focused on alleged violations of the Equal Protections clauses in both constitutions and the so-called "internal affairs doctrine" which emanates from the Commerce Clause of the U.S. Constitution. Subsequent to its enactment, the 2018 law has been challenged at least twice with one case being dismissed due to the plaintiff's lacking standing and the other case remains pending. If this bill is enacted, the pending lawsuit against the 2018 law will not directly affect the legitimacy of the contents of this bill, but the outcome in that case could set a precedent that would apply to a complaint alleging a similar constitutional violation related to this bill.

According to the Author:

Since the beginning of recent social unrest, corporations have publicly messaged their support for diversity and Black lives. However, critics have pointed out this public support does not translate to diversity within a company and will not lead to long-term structural change. AB 979 will serve as a springboard to: address the ethnic pay gap, facilitate employment and outreach opportunities, promote board diversification, establish pipeline creation and upward mobility of diverse technical talent, and retention of that talent through company culture and development.

¹ <https://corpgov.law.harvard.edu/2019/02/05/missing-pieces-report-the-2018-board-diversity-census-of-women-and-minorities-on-fortune-500-boards/>

Arguments in Support:

The California Hispanic Chambers of Commerce writes:

We are pleased to support AB 979 because California company boards of directors do not reflect the diversity of our great state. A recent study by the Latino Corporate Directors Association determined that 233 of the 662 public-company boards in California have no ethnic or racial representation... Latinos, who make up 39.4% of the state of California, are severely underrepresented in the boardroom. Of the 662 public California companies, 571 corporations, or 87%, do not have a Latino on their board... Greater boardroom equity that is inclusive of Latinos will lead to greater results for business and our state. I appreciate your consideration of these views.

Chinese for Affirmative Action writes:

The Missing Pieces Report and multiple other research, document how Asian Americans are often an overlooked group for management and executive level positions and in representation at the corporate board of director's level. The Report demonstrates that Asians/Pacific Islander make up the lowest percentage of underrepresented groups in both Fortune 100 (3.8%) and Fortune 500 (3.7%) board of directors. This persistent lack of representation in corporate boardrooms needs continuous focus, oversight, and change. CAA believes AB 979 creates a cultural shift in California's board seats towards that end.

Arguments in Opposition:

Keith Bishop, a corporate law attorney, is opposed to the bill on grounds that it is unconstitutional and will adversely affect the participation of male and non-binary persons on the boards of directors of publicly held corporations. Observing that the provisions of AB 979 will layer on top of the provisions of SB 826, Mr. Bishop states,

Publicly held corporations will be required to comply with both sets of quotas. Therefore, individuals who self-identify as both female and as African American, Hispanic, or Native American will undoubtedly be preferred as director candidates because they will satisfy both quotas. The easily predictable result of enactment of AB 979 would be a decrease in the over-all number of directors on publicly held company boards who self-identify as male or non-binary and as being from an underrepresented community.

FISCAL COMMENTS:

According to the Senate Appropriations Committee, this bill will result in ongoing costs in the hundreds of thousands of dollars to gather demographic information and compile a report on this data on its internet website.

VOTES:

ASM PUBLIC EMPLOYMENT AND RETIREMENT: 4-1-2

YES: Rodriguez, Cooley, Cooper, Fong
NO: O'Donnell
ABS, ABST OR NV: Voepel, Cervantes

ASM APPROPRIATIONS: 17-0-1

YES: Gonzalez, Bigelow, Bloom, Bonta, Brough, Calderon, Carrillo, Chau, Diep, Eggman, Fong, Gabriel, Eduardo Garcia, Maienschein, Petrie-Norris, Quirk, Robert Rivas
ABS, ABST OR NV: Megan Dahle

ASSEMBLY FLOOR: 73-0-7

YES: Aguiar-Curry, Arambula, Bauer-Kahan, Berman, Bigelow, Bloom, Boerner Horvath, Bonta, Brough, Burke, Calderon, Carrillo, Chau, Chiu, Chu, Cooley, Cooper, Cunningham, Daly, Diep, Eggman, Flora, Fong, Frazier, Friedman, Gabriel, Gallagher, Cristina Garcia, Eduardo Garcia, Gipson, Gloria, Gonzalez, Gray, Grayson, Holden, Irwin, Jones-Sawyer, Kalra, Kamlager, Lackey, Levine, Limón, Low, Maienschein, Mathis, Mayes, McCarty, Medina, Melendez, Mullin, Muratsuchi, Nazarian, O'Donnell, Obernolte, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Smith, Mark Stone, Ting, Voepel, Waldron, Weber, Wicks, Wood
ABS, ABST OR NV: Cervantes, Chen, Choi, Megan Dahle, Kiley, Patterson, Rendon

SENATE FLOOR: 26-8-6

YES: Allen, Archuleta, Atkins, Beall, Bradford, Caballero, Chang, Durazo, Galgiani, Lena Gonzalez, Hertzberg, Hill, Hueso, Hurtado, Jackson, Leyva, McGuire, Mitchell, Monning, Pan, Portantino, Roth, Rubio, Skinner, Umberg, Wiener
NO: Bates, Borgeas, Grove, Melendez, Moorlach, Morrell, Nielsen, Wilk
ABS, ABST OR NV: Dahle, Dodd, Glazer, Jones, Stern, Wieckowski

UPDATED:

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