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Meridian Client Update

Illinois Proposes Law Requiring Gender and Racial Diversity on Boards of Corporations Whose Principal Executive Offices are in Illinois

Illinois is the first state in the nation to propose a law that would require publicly traded corporations to include on their boards at least one female, one African American and one Latino director. The proposed law would solely apply to those publicly traded corporations whose principal executive offices are located in Illinois.

The Illinois House of Representatives (“House”) on March 29, 2019 passed a bill (“House bill”) that would impose gender and racial diversity requirements on boards of directors of publicly traded corporations whose principal executive offices are located in Illinois, irrespective of their state or country of incorporation. On May 3, 2019, the Illinois Senate Commerce and Economic Development Committee introduced an amended version of the House bill (“Senate bill”). The House bill and Senate bill would require subject corporations’ boards of directors to include at least one female and one African American director by December 31, 2020. The Senate bill would also require corporate boards to include at least one Latino director by the same date.¹ Both the House bill and Senate bill impose financial penalties for non-compliance.

The Illinois Senate Assignments Committee will determine whether to refer the Senate bill to another standing committee for further consideration. We anticipate the Illinois legislature will reconcile the House and Senate bills and vote on a final bill later this year.

In September 2018, California became the first state in the nation to enact legislation that requires corporate boards to include a minimum number of female directors (however, California does not mandate racial diversity). Board diversity laws patterned after the California law are pending in the New Jersey and Washington State legislatures. In addition, several states have passed non-binding resolutions that encourage board diversity.

¹ On January 23, 2019, a board diversity bill (SB 76) identical to the California board diversity law was introduced in the Illinois Senate, where the bill currently awaits a committee assignment. See page 2 of this Client Update for a discussion on the California board diversity law (also see Client Update, Vol. 9, Issue 12 (October 8, 2018)). We believe the Senate is more likely to move forward on its bill that imposes both gender and racial diversity requirements on corporate boards rather than on SB 76, which solely imposes gender diversity requirements on corporate boards.

Summary of Enacted and Proposed Board Diversity Laws

The table below summarizes enacted and proposed board diversity laws, including the Illinois Senate bill.

State	Subject Corporations	Diversity Requirement	Fines for Noncompliance	Status of Law/Bill
CA	Domestic and foreign corporations whose principal executive offices are located in California	Based on board size: ² <ul style="list-style-type: none"> Boards with 6 or more members must include at least 3 female members Boards with 5 members must include 2 female members Boards with 4 or fewer members must include 1 female member 	<ul style="list-style-type: none"> First violation: \$100,000 Second violation: \$300,000 Failure to timely report board composition: \$100,000 	Enacted on 9/30/18
NJ	Domestic and foreign corporations whose principal executive offices are located in New Jersey	Same as California	Same as California	Introduced in NJ Senate, referred to Senate Commerce Committee
WA	Corporations subject to the Washington Business Corporation Act	Based on board size: ³ <ul style="list-style-type: none"> Boards with 20 or more members must include at least 30% female members Boards with 10 to 19 members must include 3 female members Boards with 9 or fewer members must include 1 female member 	Same as California, except beginning in 2025 and every five years thereafter fines increase by 10%	Introduced in WA Senate, referred to Law & Justice Committee
IL	Domestic and foreign corporations whose principal executive offices are located in Illinois	Board must include at least: ⁴ <ul style="list-style-type: none"> 1 female director 1 African American director 1 Latino director⁵ 	Same as California, except a subject corporation would be subject to a \$10,000 fine for failure to timely report on board diversity compliance	Waiting assignment to a Senate committee for further consideration

Meridian Comment

Major public companies may view board diversity laws as directionally consistent with their own policies on board diversity and efforts to increase female and racial representation on their boards. However, as we noted in our Client Update on California's board diversity law (see Client Update, Vol. 9, Issue 12, October 8, 2018), some legal experts have expressed doubt as to whether gender quotas would pass constitutional muster or could be lawfully imposed on corporations that are incorporated outside of California. We further noted that then California Governor Jerry Brown observed, "There have been numerous objections to this bill and serious legal concerns have been raised. I don't minimize the potential flaws that indeed may prove fatal to its ultimate implementation."⁶ Certainly, these same legal concerns would apply to Illinois' proposed board diversity legislation.

² California's board diversity law is phased in over three years. A subject corporation's board of directors must include at least one female director by December 31, 2019 and must include a certain number of female directors based on the size of its board by December 31, 2021.

³ Washington's proposed board diversity law would be phased in over three years. Under the proposed law, a subject corporation's board of directors would be required to include at least one female director by December 31, 2020 and would be required to include a specified number of female directors based on the size of its board by December 31, 2022.

⁴ Illinois' Senate bill would require subject corporations to comply with the bill's diversity requirements by December 31, 2020.

⁵ Illinois' House bill would not require subject corporations' board of directors to include a minimum number of Latino members.

⁶ Governor Brown's Signing Statement dated September 30, 2018. Available at <https://www.gov.ca.gov/wp-content/uploads/2018/09/SB-826-signing-message.pdf>.

Although board diversity laws may rest on a precarious legal foundation, we are not aware of any public corporation or business interest group filing suit to block the implementation of the California law or seek its rescission on constitutional or other grounds.

If Illinois joins California in enacting a board diversity law, this could generate momentum in other large states to enact similar legislation, especially given the absence of legal challenges to the California law.

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