the Corporate Governance advisor

July/August 2020 • Volume 28, Number 4

BOARD DIVERSITY

Accelerating Gender Diversity on Boards: Reviewing Legislative Action

By Stewart M. Landefeld, Evelyn Cruz Sroufe, Allison C. Handy, and Christopher Wassman

Diversity may be the hardest thing for a society to live with and perhaps the most dangerous thing for a society to be without.
— William Sloan Coffin, Jr.[1]

For the past generation, mainstream public companies in America have slowly increased the gender and racial diversity of their boards of directors to better reflect the faces of the American consumer and the shareholder base. Diversity on the boards of larger U.S. public companies has been a sign of success in the effort to show inclusion in corporate leadership: in 2019, almost half of the open board spots at S&P 500 companies went to women, and all S&P 500 companies had at least one female director.[2]

And by 2019, women made up about 26% of S&P 500 corporate directors, up from just

Continued on page 2

Stewart M. Landefeld, Evelyn Cruz Sroufe and Allison C. Handy are Partners; and Christopher Wassman an Associate at Perkins Coie LLP in Seattle, WA. *They gratefully acknowledge the review and contributions of Tom Killalea, Prof. Charles R. T. O'Kelley, and Laura J. Peterson.*

Wolters Kluwer

CONTENTS

16% of directors in 2009.[3] While the largest U.S. public companies have dramatically increased their board diversity, the pace of change for many smaller companies has lagged by comparison. As of the fourth quarter of 2019, the percentage of women on Russell 3000 boards was at 21.5%, with 7.7% of Russell 3000 companies having no female directors.[4]

Eight states have now taken legislative action seeking to increase the speed of board diversification.[5] State legislatures have taken three approaches: statutes mandating gender diversity on corporate boards; laws mandating disclosure of board diversity; and resolutions advising corporations to increase diversity on their boards. Years ahead of these state legislative efforts, private players have successfully used other means to increase the number of diverse directors. For example, institutional investors and proxy advisory firms are increasingly adopting voting policies encouraging board diversity.

One such investor, State Street Global Advisors, has indicated that it will vote against a company's nominating and governance committee members if gender diversity criteria are not met.[6] Additionally, private groups have developed an ever-growing pool of strong board candidates through a blend of identifying potential directors, educating them on corporate governance and the requirements of board service, and then connecting these qualified candidates to public company boards.

Overview of Statutory Approaches

In adopting various statutory approaches aimed at increasing gender diversity on corporate boards, state legislatures have cited a number of reasons, including (a) the belief that increasing the representation of women on corporate boards will improve the performance of those boards, and (b) the concern that, without a legislative impetus, progress in increasing gender diversity will simply be too slow.[7] In Washington state, supporters of a gender diversity bill reviewed their recommended approach with various groups, including the national organization, 2020 Women on Boards, which advocates for increasing the number of women on corporate boards to 20% by 2020.

State legislative actions to promote greater gender diversity on boards of directors have largely followed three main approaches:

California: Senate Bill 826

In 2018, California became the first state to mandate gender diversity on corporate boards through enactment of Senate Bill 826. The bill applied to publicly[8] held corporations with principal executive offices located in California, whether or not the company was incorporated in the state.[9] By the end of the 2019 calendar year, each subject corporation was required to have at least one female[10] director on its board of directors. By the end of 2021, subject corporations must have at least:

Gender Diversity Legislation

Legislative Approach	Diversity Mandates	Disclosure Mandates	Advisory Resolutions
States	California	Illinois	Colorado
	Washington	Maryland	Illinois *(passed prior to disclosure mandate)*
		New York	Maryland *(passed in the same bill as disclosure mandate)*
			Massachusetts
			Pennsylvania

- One female director for a four-person board
- Two female directors for a five-person board, and
- Three female directors for a board of six or more directors.

Covered corporations are subject to a fine of $100,000 for failing to provide board member information to the California Secretary of State and to fines ranging from $100,000 for a first offense to $300,000 for repeated offenses if they fail to comply with the substantive gender representation requirements.

Opponents of the bill, such as the California Chamber of Commerce, argued that it would violate the equal protection provisions of both the U.S. and California Constitutions by creating a gender classification that could result in reverse discrimination against males.[11] Some also argued that the bill, by exclusively promoting the representation of women, undermined broader efforts to diversify corporate boards ethnically and racially.

Two potential bases to challenge the California statute have been articulated: (a) the broad argument that the statute violates the equal protection clauses of the U.S. and California Constitutions by using express gender classifications, triggering strict judicial review of the alleged constitutional violation, and (b) the narrower argument, based upon the commerce clause of the U.S. Constitution, that issues such as the election of directors are matters of internal corporate affairs that should be governed by the laws of the state of incorporation,[12] so that the California statute should not apply to a corporation incorporated in another state.

For example, the election of the board of directors of a corporation formed in Delaware is generally governed by the Delaware general corporation law. For a Delaware corporation that is a "covered corporation" under California Senate Bill 826, the election of the directors would be governed by both Delaware law and California law. To avoid this conflict, opponents argue that the election is a matter of the "internal affairs" of a Delaware corporation, and that Senate Bill 826 should be disregarded.[13]

If the internal affairs argument should prevail, California corporations incorporated in Delaware or other states would not be subject to Senate Bill 826, leaving a much smaller pool of California-incorporated companies subject to the statute.[14] If the equal protection arguments should prevail, the statute would be entirely invalidated.[15]

Lawsuits were promptly filed challenging Senate Bill 826. In *Robin Crest, et al. v. Alex Padilla*,[16] Judicial Watch, a conservative foundation, sued in Los Angeles County Superior Court on behalf of three California taxpayers, seeking: (a) to declare illegal any expenditure of taxpayer funds and taxpayer-financed resources to enforce Senate Bill 826 because the statute violates federal and state equal protection provisions, and (b) to enjoin the Secretary of State (Mr. Padilla) from making such expenditures. This case is still pending trial at the time of writing.

A second lawsuit challenging the statute, *Meland v. Padilla*[17] filed in federal district court, was recently dismissed. Plaintiff was a shareholder of a publicly held corporation incorporated in Delaware but domiciled in California. Like the plaintiffs in *Robin Crest*, he argued that Senate Bill 826 contained a sex-based classification that "harms shareholder voting rights and violates the Fourteenth Amendment."[18] The court found, however, that the plaintiff did not have standing to sue, based both upon the constitutional requirements of Article III of the U. S. Constitution and upon nonconstitutional prudential considerations.

Article III of the U.S. Constitution requires that a "plaintiff must have suffered an injury in fact [, that is] fairly traceable to the challenged action of the defendant [and] that it must be likely [to] be redressed by a favorable [judicial] decision."[19] The court noted that Senate Bill 826 imposed compliance and penalties on the *corporation*, not on its shareholders. As a shareholder,

Mr. Meland was free to vote as he wished for any candidate for the board. Furthermore, the court took judicial notice of the fact that the corporation had already appointed a woman to its board and was, therefore, in compliance with the statute, so no penalty would be imposed on the corporation.

The prudential standing considerations required the court to examine "whether the plaintiff is asserting her own rights or the rights of third parties."[20] Because the plaintiff's claim asserted injury to the corporation, under either California or Delaware law it was derivative. Accordingly, the plaintiff failed both prongs of the standing argument and his claims were dismissed.[21] The court, therefore, did not reach the substance of his constitutional arguments.

Although it is possible that a corporation subject to Senate Bill 826 could sue on its own behalf and meet the standing requirements for an equal protection challenge to the law, it is increasingly unlikely that the board of directors of a publicly held corporation would choose to be identified as opposing a gender equality requirement. Investor sentiment, as evidenced by the positions of proxy advisors and institutional investors, is strongly in favor of greater gender equality on corporate boards as discussed further below.[22] Accordingly, and perhaps unsurprisingly, a recent report by KPMG found that 96% of California publicly held companies are complying with Senate Bill 826.[23]

Washington: Senate Bill 6037

Earlier this year, Washington became the second state to mandate gender diversity on corporate boards when Governor Jay Inslee signed Senate Bill 6037 into law.[24] Senate Bill 6037 requires at least 25% of the board of directors of public companies formed under the Washington Business Corporation Act (WBCA) to be women, or the company must provide a board diversity discussion and analysis to its shareholders. The drafters, including the Washington State Bar Association's Corporate Act Revision Committee, avoided some of the challenges of California's Senate Bill 826. Senate Bill 6037 will apply to a "public company," defined as a Washington corporation that has a class of shares registered with the U.S. Securities and Exchange Commission (SEC) under applicable statutes.[25]

The heart of Senate Bill 6037 is the requirement for women to represent 25% or more of a public company's board:

> Beginning no later than January 1, 2022, each public company must have a gender-diverse board of directors or that public company must comply with the requirements in subsection (2) of this section [requiring a "Diversity Discussion and Analysis"]. For purposes of this section, a public company is deemed to have a gender-diverse board of directors if, for at least two hundred seventy days of the fiscal year preceding the applicable annual meeting of shareholders, individuals who self-identify as women comprise at least twenty-five percent of the directors serving on the board of directors.

Not all public companies formed under the WBCA must comply with these gender diversity requirements. Senate Bill 6037 has five core exceptions:

- *Unlisted companies*. A company that has shares registered under Sections 12 or 15 of the Securities Exchange Act of 1934, or Section 8 of the Investment Company Act of 1940, but that does not have outstanding shares of any class or series listed on a U.S. national securities exchange.

- *An "emerging growth company" or a "smaller reporting company."* A business as defined in SEC regulations[26] that is subject to a lighter regulatory burden while it is small. This exception will generally exempt emerging companies, for some period of time following its initial public offering, and small public companies.

- *A controlled company.* A partial subsidiary of, or a company controlled by, another entity or group of persons. A controller may be another public company, a private equity investor, or another person or group that holds or controls over 50% of the voting power of the controlled company.

- *Companies with voting groups designating directors*. A company whose articles of incorporation, by designating classes or series of shares, authorize voting groups to elect all or a set number of directors.[27]

- *Companies without an annual meeting.* A company that is not required to hold an annual meeting of shareholders (under Washington or U.S. law).

Trap for the Unwary. Senate Bill 6037 contains a small trap for the unwary, when complying during the initial year, 2022. The 25% requirement applies in connection with annual meetings held on and after January 1, 2022, but is first measured in the fiscal year preceding the applicable annual meeting. The first test for a public company with a calendar fiscal year will be to measure whether the board, for 270 out of 2021's 365 days, included at least 25% women.

For example, if a company at its May 2020 annual meeting did not elect a board consisting of at least 25% female directors, it will have difficulty achieving this 25% mandate for 2021. The company will need to make a calculation and potentially add women to the board prior to March 31, 2021. That would likely be before its 2021 annual meeting. If that company does not have 25% women on the board by March 31, 2021, it will not be deemed compliant when measured on January 1, 2022.

Disclosure is an alternative, with a "Diversity Discussion and Analysis." If the public company does not have a gender-diverse board by January 1, 2022 (as measured in the prior fiscal year), then it must publish (on its website or in its proxy or information statement) a board diversity discussion and analysis, which must include information regarding the public company's approach to developing and maintaining diversity on its board of directors. The diversity discussion and analysis must address diversity more broadly than just inclusion of women, covering other diverse groups including racial minorities and historically underrepresented groups.

While the Washington statute avoids the internal affairs argument that can be made against California's Senate Bill 826, it may be subject to the same equal protection arguments as were made in *Meland v. Padilla*. A shareholder seeking to make those arguments, however, would have to overcome the same standing hurdles that faced the plaintiff in *Meland v. Padilla*. Like Senate Bill 826, the Washington statute imposes obligations on the corporation, not on its shareholders.

Perhaps most importantly, while a Washington corporation could sue in its own right, corporate shareholders, the public company governance community, and the current public zeitgeist all strongly favor diversity on boards. There is no reason to believe that Washington corporations are any more willing than California-headquartered corporations to publicly oppose a gender equality statute.

Disclosure Requirements

Rather than mandate board representation based on gender, some states have opted to mandate public disclosures to spur greater diversity on corporate boards. These laws require certain corporations to report to the state on the composition of their boards in order to allow state agencies to publish reports regarding board diversity. Implementing disclosure mandates has been seen as a more measured approach than the diversity requirements imposed by California and Washington.

Illinois. In 2019 Illinois considered a bill[28] that followed the diversity mandate approach of California. The Illinois bill went a step further, however, by including racial—as well as

gender—mandates. The bill would have required public companies incorporated in or with principal offices in Illinois to have at least one female director, one African American director, and one Latino director on their board by the end of 2020. The version of the bill that passed the Senate dropped the diversity mandates in favor of requiring disclosure regarding gender and minority diversity.

Under the bill, by no later than January 1, 2021, publicly held domestic or foreign corporations with their principal executive offices in Illinois are required to disclose the diversity of their boards and executive officer ranks, along with their plans to promote director and officer diversity, in their annual reports filed with the Illinois Secretary of State. The bill—signed into law in August 2019[29]—also requires the University of Illinois to publish an annual report card on Illinois companies' diversity.

New York. Taking a similar approach to Illinois, New York enacted the Women on Corporate Boards Study law in 2019.[30] The legislation applies more broadly than the Illinois legislation, requiring that domestic corporations and foreign corporations authorized to do business in New York report the number of female directors on their board and the total number of board members. After the law goes into effect on June 27, 2020, companies must provide this information about their directors as part of their routine filing statements.[31]

The N.Y. Department of State must also publish a study by February 1, 2022, and every four years thereafter, including the number of female directors and the total number of directors that constitute the board of each corporation, an analysis of the change in the number of female directors compared to prior years and the collective percentage of female directors on all such boards.

Maryland. Maryland enacted similar legislation in May 2019 titled Gender Diversity in the Boardroom.[32] Effective as of October 1, 2019, the Maryland law requires any tax-exempt domestic nonstock corporation with an operating budget over $5 million or any company with total sales exceeding $5 million registered or qualified to do business in the state to report the number of female board members and total number of members of their boards.

However, privately held companies are excluded from the reporting requirement if at least 75% of the company's shareholders are family members. The law also requires the Maryland Comptroller to publish a report for the Maryland General Assembly regarding the percentage of female representation on boards and make the report publicly available.

Advisory Resolutions

Several other states have focused their legislative efforts on passing nonbinding resolutions encouraging companies to increase gender diversity in their leadership ranks.

Colorado. Colorado passed a resolution in 2017 encouraging public companies in that state with nine or more board members to have at least three female board members, companies with five to eight board members to have two female board members, and companies with fewer than five seats to have at least one female on their board by the end of 2020.[33] Given this resolution's purpose of promoting gender equality more generally, the legislature did not clarify whether the resolution applied only to public companies with principal offices in Colorado or to all companies doing business in the state.

Illinois. Prior to enacting its diversity disclosure mandate, Illinois passed a nonbinding resolution similar to Colorado's resolution encouraging every publicly held corporation in Illinois with nine or more board members to have at least three female board members, those with five to eight board members to have two female board members, and those with fewer than five seats to have at least one female on their board by 2018.[34] Similar to the Colorado legislature, the Illinois legislature did not clarify whether this applied only to public companies

with principal offices in Illinois or to all companies doing business in the state.

Massachusetts. Massachusetts adopted a resolution encouraging all companies doing business in the state, both publicly traded and privately held, to disclose the number of female board members and total board members, and—similar to Illinois—encouraging all such corporate boards with nine or more board members to have at least three female board members and all boards with fewer than nine members to have a minimum of two female directors by the end of 2018. Additionally, the resolution advises all companies doing business in the state, both publicly traded and privately held, to adopt policies designed to increase gender diversity for the leadership ranks of all corporate boards.[35]

Pennsylvania. In 2017, Pennsylvania passed a resolution encouraging public, private and nonprofit companies doing business in Pennsylvania to increase female representation on their boards to at least 30% by 2020 and measure progress toward a goal of equal gender representation in leadership positions on an annual basis.[36]

Maryland. As part of the bill enacting Maryland's disclosure mandate discussed above,[37] the legislature also urged that by December 31, 2022, all nonprofit, privately held and publicly traded companies doing business in Maryland to have a minimum of 30% female directors and measure progress toward a goal of equal gender representation in leadership positions on an annual basis.[38]

Nonlegislative Drivers of Board Diversity

In addition to broader cultural changes, a number of organized efforts have been constructive in increasing board diversity. First, a variety of groups, including regional efforts such as OnBoarding Women, and leading national campaigns such as 2020 Women on Boards and the Athena Alliance, have combined identification of board candidates with education of women who stand out as potential public company directors, thus providing a strong pool of candidates for public company nominating and governance committees.[39]

Second, institutional shareholders are playing a larger role in the push for greater diversity on boards. Leading shareholders, such as Vanguard and BlackRock, Inc., have policies encouraging progress on diversity, while others, such as State Street Global Advisors, have stated they will vote against directors for companies that do not meet their gender diversity criteria.[40] For example, while BlackRock, Inc., acknowledges that "diversity has multiple dimensions," it encourages companies "to have at least two women directors on their board."[41] Finally, proxy advisory firms ISS and Glass Lewis have both included statements in their policies that they would recommend votes against the election of the nominating committee chair of an all-male board, barring certain mitigating factors.[42]

Third, other key market participants have weighed in favor of gender diversity. For example, Goldman Sachs recently announced that it will take companies public only if there is "at least one diverse board candidate, with a focus on women . . . And we're going to move towards 2021 requesting two."[43] While many investor efforts discussed above have focused on large public companies, Goldman Sachs' announcement has the potential to create change in a population of emerging companies that have so far been less subject to these investor pressures.

While larger S&P 500 companies have been more affected by these non-legislative drivers, small to mid-sized companies are often not on the radar for shareholder advisory groups like ISS and Glass Lewis, and their stock may be less likely to be held by institutions such as BlackRock, Inc., State Street Global Advisors or other large institutional holders. This can insulate these companies from certain pressures to conform on gender diversity.

In addition, CEOs and nominating and governance committees of smaller companies may

be more likely to rely on people they know in their circle of acquaintances to fill board seats, sometimes in order to avoid incurring search firm fees.[44] These different pressures may explain why small and mid-sized companies have experienced different levels of progress on board gender diversity.

Finally, other governance trends are beginning to create more opportunities for women to join corporate boards. Institutional investors and shareholder advisors oppose "overboarding" in which directors take on so many board seats that they become at risk of not competently serving on all.[45] Although board policies such as age or term limits can result in more board turnover, these advocates have generally favored rigorous board evaluation processes as a better means of effecting board refreshment.[46] More directors reducing the number of boards on which they serve or rotating off of corporate boards will create more open seats that are available to be filled by women.

Future Statutory Changes

As states consider gender diversity mandates, we suggest that they carefully consider the pros and cons of the California and Washington models, particularly the lessons incorporated into Washington's mandate with the benefit of observing California's effort. Key considerations for drafters include:

1. Avoid hard quotas with numbers in favor of minimum percentages;

2. Favor "comply or explain", a model successfully used for years by the SEC over monetary penalties;

3. Clarify that the statute does not change the fundamental corporate law board duties of directors; and

4. Specify that noncompliance will not impact the validity of corporate actions.

One Practical Step

There is one practical step that board leaders can take right now. Nominating and governance committee chairs can lead the effort to look for diverse candidates outside the ranks of CEOs. Though the ranks of female CEOs at major companies are still fairly slim, there are many extremely qualified women in other public company executive roles. Nominating and governance chairs can add gender diversity to the board while also filling out other key director characteristics, including expertise in areas such as finance, technology, marketing, or a specific industry.

Conclusion

Social forces have led to more diverse boards of directors. But achieving greater diversity, including gender diversity, remains a work in progress for many corporate boards. While successful models have developed to encourage gender diversity, two states have adopted statutes that mandate numbers or percentages of women on boards. Other states may follow. The drafters of those statutes will find lessons from the case law developing around California Senate Bill 826, and the careful drafting of Washington Senate Bill 6037. And the most important impetus for change may still come from other societal forces and private actors who continue to provide deep and diverse pools of competent candidates for directors of American public companies.

Notes

1. William Sloane Coffin, "The Heart Is a Little to the Left: Essays on Public Morality" at 69–70 (Dartmouth Coll. Press, 1999).

2. 2019 U.S. Spencer Stewart Board Index, at 1 (2019); Vanessa Fuhrmans, The Last All-Male Board on the S&P 500 is No Longer, Wall St. J. (July 24, 2019, 5:20 PM), *https://www.wsj.com/articles/the-last-all-male-board-on-the-s-p-500-is-no-longer-11564003203*.

3. *Id.*

4. Q4 2019 Gender Diversity Index, Equilar Board Edge (Mar. 9, 2020).

5. *See* discussion *infra* Overview of Statutory Approaches.

6. Summary of Material Changes to State Street Global Advisors' 2020 Proxy Voting and Engagement Guidelines, State Street Global Advisors 2 (Mar. 2020), *https://www.ssga.com/library-content/pdfs/global/proxy-voting-and-engagement-guidelines.pdf*.

7. California's legislature, for example, cited numerous independent studies showing that publicly held corporations with women board members perform better overall than corporations with no female board members, and that without proactive measures, it could take as many as 40 to 50 years to achieve gender parity among directors. *See* S.B. 826, 2017-2018 Leg., Reg. Sess. (Cal. 2018).

8. A "publicly held corporation" under Senate Bill 826 is a domestic or foreign corporation "with outstanding shares listed on a major United States stock exchange". *See id.*

9. Based on the corporation's Form 10-K filed with the Securities and Exchange Commission.

10. "Female" is defined in the statute as "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth."

11. *See* Loren Kaye, *Legislating Is Hard When Up Against Reality*, Capital Insider (May 14, 2018), *https://capitolinsider.calchamber.com/2018/05/legislating-is-hard*.

12. *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982); *McDermott Inc. v. Lewis*, 531 A.2d 206, 209 (Del. 1987).

13. *See* Steven Yoder, *Will SB 826 Survive?*, Comstock's Magazine (Mar. 7, 2019), *https://www.comstocksmag.com/article/will-sb-826-survive*.

14. Fewer than 10% of the 761 publicly traded companies headquartered in California. *See* Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826* (Stanford Law Sch. and The Rock Center for Corp. Governance, Paper No. 232, 2018), *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791*.

15. Patricia Brown Holmes, *All Aboard*, Best Lawyers (Apr. 18, 2019, 10:39 AM), *https://www.bestlawyers.com/article/california-s-mandatory-gender-diversity/2379*.

16. L.A. Super. Ct., No. 19STCV27561 (Apr. 17, 2020).

17. No. 2:19-cv-02288-JAM-AC (E.D. Cal. Apr. 20, 2020).

18. *See id.* at 3.

19. *See Lujan v. Defs. of Wildlife,* 504 U.S. 555, 560–61 (1992) (citation omitted). Importantly, standing is not "dispensed in gross," and, accordingly, a plaintiff must demonstrate standing for each claim "he seeks to press and for each form of relief that is sought." *See Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotation marks omitted). Moreover, when there are multiple parties to a lawsuit brought in federal court, "[f]or all relief sought, there must be a litigant with standing, whether that litigant joins the lawsuit as a plaintiff, a coplaintiff, or an intervenor as of right." *See Town of Chester v. Laroe Estates, Inc.*, 581 U.S. ___, No. 16–605, slip. op. at 6 (June 5, 2017).

20. Order at 11, *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC (E.D. Cal. Apr. 20, 2020) (ECF No. 16).

21. Mr. Meland has noted an appeal of the decision to the Ninth Circuit Court of Appeals.

22. *See infra* Nonlegislative Drivers of Board Diversity.

23. J. Jennings Moss, *How California Public Companies Have Done on Board Diversity*, Silicon Valley Business Journal (Feb. 20, 2020, 11:04 AM), *https://www.bizjournals.com/sanjose/news/202%2/20/california-public-companies-women-on-boards-kpmg.html*.

24. S.B. 6037, 66th Leg., Reg. Sess. (Wash. 2020). Senate Bill 6037 was signed on Friday, March 27, 2020, with an effective date of June 11, 2020, and comprises a new section of Chapter 23B.08 (Directors and Officers) of the Washington Business Corporation Act (WBCA).

25. WBCA § 23B.01.400(28).

26. 17 C.F.R. § 240.12b-2.

27. WBCA § 23B.08.040.

28. H.B. 3394, 101st Gen. Assemb., Reg. Sess. (Ill. 2019).

29. Act of August 27, 2019, Pub. Act 101-589, 2019 Ill. Laws 589.

30. Assemb. 6330, 2019 Leg., Reg. Sess. (N. Y. 2019); S. 4278, 2019 Leg., Reg. Sess. (N. Y. 2019).

31. N.Y. Bus. Corp. Law § 408.

32. H.B. 1116, 2019 Leg., 440th Sess. (Md. 2019); S. 911, 2019 Leg., 440th Sess. (Md. 2019).

33. H.R. J. Res. 17-1017, 70th Gen. Assemb., Reg. Sess. (Colo. 2017).

34. H.R. Res. 439, 99th Gen. Assemb., Reg. Sess. (Ill. 2015).

35. S. Res. 1007, 189th Gen. Ct., Reg. Sess. (Mass. 2015).

36. H.R. Res. 273, Gen. Assemb., 2017 Sess. (Pa. 2017).

37. *See supra* Disclosure Requirements.

38. H.B. 1116, 2019 Leg., 440th Sess. (Md. 2019); S. 911, 2019 Leg., 440th Sess. (Md. 2019).

39. *See* OnBoarding Women, *https://onboardingwomen.org* (last visited May 22, 2020); 2020 Women on Boards *https://2020wob.com* (last visited May 22, 2020); Athena Alliance *https://athenaalliance.org* (last visited May 22, 2020). In addition, many other organizations are serving as a bridge between board opportunities and board-ready candidates. *See generally* Women in the Boardroom,

https://womenintheboardroom.com (last visited May 22, 2020); theBoardlist, *https://theboardlist.com/home* (last visited May 22, 2020); Him for Her, *https://www.himforher.org* (last visited May 22, 2020).

40. *See* Investment Stewardship 2019 Annual Report, Vanguard 18 (2019), *https://about.vanguard.com/investment-stewardship/perspectives-and-commentary/2019_investment_stewardship_annual_report.pdf*; BlackRock Investment Stewardship: Corporate governance and proxy voting guidelines for U.S. securities, BlackRock 5 (Jan. 2020), *https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf*; Amy Whyte, State Street to Turn Up the Heat on All-Male Boards, Institutional Investor (Sept. 27, 2018), *https://www.institutionalinvestor.com/article/b1b4fh28ys3mr9/State-Street-to-Turn-Up-the-Heat-on-All-Male-Boards*.

41. BlackRock Investment Stewardship: Corporate governance and proxy voting guidelines for U.S. securities, BlackRock 5 (Jan. 2020), *https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf*.

42. *See* ISS Americas Proxy Voting Guidelines Updates for 2020, Institutional Shareholder Services 5 (Nov. 11, 2019), *https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf;* 2019 Proxy Paper Guidelines: An Overview of the Glass Lewis Approach to Proxy Advice United States, Glass Lewis 26 (Oct. 24, 2018), *https://www.glasslewis.com/wp-content/uploads/2018/10/2019_GUIDELINES_UnitedStates.pdf*.

43. Goldman Won't Take Companies Public Without At Least One Diverse Board Candidate, CEO Says, CNBC (Jan. 23, 2020, 5:57 PM), *https://www.cnbc.com/202%½3/goldman-wont-take-companies-public-that-dont-have-at-least-one-diverse-board-candidate-ceo-says.html*.

44. 2020 Women on Boards Gender Diversity Index 2019 Progress of Women Corporate Directors of Russell 3000 Index Companies (Oct. 2019), *https://2020wob.com/wp-content/uploads/2019/10/2020WOB_Gender_Diversity_Index_Report_Oct2019.pdf*.

45. *See* Vanguard Funds Summary of the Proxy Voting Policy for U.S. Portfolio Companies, Vanguard 4 (Apr. 1, 2020), *https://about.vanguard.com/investment-stewardship/portfolio-company-resources/2020_proxy_voting_summary.pdf*. *See also* Andrew R. Brownstein et al., Institutional Investors Signal a Mix of Tougher Standards and Heightened Flexibility for the 2020 Proxy Season, Wachtell, Lipton, Rosen & Katz (Apr. 29, 2020), *https://www.wlrk.com/webdocs/wlrknew/WLRKMemos/WLRK/WLRK.26936.20.pdf*.

46. Proxy Voting Guidelines, Benchmark Policy Recommendations, Institutional Shareholder Services 17 (November 18, 2019), *https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf*; Proxy Paper Guidelines—United States, Glass Lewis 23 (2018), *https://www.glasslewis.com/wp-content/uploads/2016/11/Guidelines_US.pdf*; Environmental, Social & Governance Principles and Proxy Voting Guidelines, New York State Common Retirement Fund 10 (February 2020), *https://www.osc.state.ny.us/pension/proxy-voting-guidelines-2020.pdf*. *But see* Corporate Governance Guidelines, BlackRock 2 (Sept. 26, 2019), *https://s24.q4cdn.com/856567660/files/doc_downloads/governance_documents/CorporateGovernanceGuidelines.pdf* (subject to exceptions, no person 75 or older should be nominated or appointed as a director to a board).