

# Corporate Board Diversity

A Practical Guidance® Practice Note by  
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This practice note discusses the importance of corporate board gender and racial diversity. Among other things, this practice note surveys state legislation on corporate board diversity and offers best practices for employers on how to create such diversity.

In particular, this practice note discusses:

- Historical Background of Gender Diversity on Corporate Boards
- Historical Background of Racial Diversity on Corporate Boards
- State Legislation on Corporate Board Diversity
- Best Practices on Corporate Board Diversity

For more guidance on workplace diversity, see [Workplace Diversity, LGBTQ, and Racial and Social Justice Resource Kit](#). For more guidance on ESG, see [Environmental, Social, and Governance \(ESG\) Resource Kit](#).

For tracking of recent legal developments on diversity and inclusion issues and other key federal, state, and local Labor & Employment legal developments, see [Labor & Employment Key Legal Development Tracker \(Current\)](#).

## Historical Background of Gender Diversity on Corporate Boards

### The #MeToo Movement

Activist Tarana Burke began using the #MeToo hashtag in 2006 to raise awareness about women who had been sexually abused. Eleven years later, actress Alyssa Milano posted a viral tweet: “If you’ve been sexually harassed or assaulted write ‘me too’ as a reply to this tweet.” Milano’s tweet was shared over 200,000 times, sparking a global movement in the United States against sexual harassment and abuse. Gurbinder Gill, Imran Rahman-Jones, [Me Too Founder Tarana Burke: Movement is Not Over](#), BBC (July 9, 2020). Along with Burke, Milano, and many others who spoke up about sexual abuse and harassment in the #MeToo movement in the United States, powerful #MeToo movements grew around the globe.

The Swedish #MeToo movement began in 2017 following the high-profile case of Jean-Claude Arnault, where 18 women came forward with allegations of sexual misconduct that had taken place over a period of 20 years, leading to the cancellation of Arnault’s 2018 Nobel Prize in literature. Meighan Stone, Rachel Vogelstein, [Celebrating #MeToo’s Global Impact](#), FOREIGN POLICY (Mar. 7, 2019); Catherine Edwards, [Sweden in Focus: One Year On, What did #MeToo Achieve in Sweden](#), THE LOCAL se (Dec. 10, 2018).

In South Korea, the #MeToo movement began in 2018 with a televised interview of the lawyer Seo Ji-hyun, who took the unprecedented step of publicly accusing her former boss of sexual misconduct. “Her courage inspired hundreds of others to step forward, leading to the sudden resignation of several Korean sports figures, literary elites, and politicians.” Meighan Stone, Rachel Vogelstein, [Celebrating #MeToo's Global Impact](#), FOREIGN POLICY (Mar. 7, 2019); Choe Sang-Hun, [Ex-Prosecutor in South Korea #MeToo Case Is Sentenced to 2 Years in Prison](#), THE N.Y. TIMES (Jan. 23, 2019).

In Pakistan, Khadija Siddiqi, a law student, was stabbed 23 times in 2016 by a fellow classmate after spurning his advances. Her attacker was later acquitted, bringing widespread attention to a court system that routinely excused perpetrators of violence against women. After the acquittal, more than two million supporters used the hashtag #JusticeforKhadija to champion Siddiqi's case on social media, ultimately helping her win her appeal. Meighan Stone, Rachel Vogelstein, [Celebrating #MeToo's Global Impact](#), FOREIGN POLICY (Mar. 7, 2019).

In India, large scores of women have also come out with stories of sexual harassment and demanded accountability for sexual violence or harassment. Furkan Latif Khan, [India's #MeToo Movement, One Year On](#), NPR (July 29, 2019). Similar #MeToo movements began in many other countries, including Morocco, Egypt, China, Senegal, and Austria, to name a few. Meighan Stone, Rachel Vogelstein, [Celebrating #MeToo's Global Impact](#), FOREIGN POLICY (Mar. 7, 2019).

As the #MeToo movement has continued to take flight around the globe, it has also impacted workplaces worldwide. Among the impacts of the #MeToo movement on different facets of life, companies have shifted to:

- Focusing on issues of workplace harassment by adding anti-harassment policies to corporate codes of conduct
- Establishing new procedures for addressing allegations –and–
- Enhancing employee training on topics including sexual harassment and corporate culture

David A. Katz, Laura A. McIntosh, [Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Sept. 28, 2018).

## Current Landscape of Gender Diversity on Corporate Boards

The #MeToo movement has also impacted the composition of corporate boards. As many as 17 states exceeded having 20% women directors by 2019, compared to just 4% in 2018, and 1% in 2017. [2020 Women on Boards Gender Diversity Index \(2020\)](#) (last visited Feb. 22, 2021).

Female representation among new S&P 500 directors more than doubled in the last decade, increasing from 21% in 2010 to 47% in 2020. In 2020, 28% of all directors were women, compared to 16% of all directors in 2010. Julie Daum, Lauren McCarthy, Ann Yerger, [Key Takeaways–2020 Board Index](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Jan. 26, 2021). In 2021, 36% of S&P 500 boards had three female directors and another 36%—compared with 28% in 2020—had four or more. [2020 U.S. Spencer Stuart Board Index, Spencer Stuart \(2020\)](#).

This increasing rate of new female directors has been consistent across market segments. Subodh Mishra, [U.S. Board Diversity Trends in 2019](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (June 18, 2019).

Due to efforts to increase the placement of women on boards, the number of women directors worldwide continues to grow at a fast rate. In 2017, Russell 1000 company boards were 19.6% women, followed by 21.3% women in 2018, and 24.3% women in 2019. In 2020, more than one-third (38.5%) of boards around the world had at least three women, up from 36.2% in 2019. Milhomem, C. (2020), [Women on boards: 2020 progress report](#), MSCI.

Despite this increase in the number of women directors worldwide, there remains much room for improvement. Only 3% of all women directors currently hold leadership roles, while 14% of all male directors hold leadership roles, making it 4.67 times more likely for men to serve as a board leader or board chair than women. The average female committee member has held 1.08 committee chair roles over her career, whereas the average male committee member has held 1.24. [A Few Good Women Gender Inclusion in Public Company Board Leadership](#), DILIGENT INSTITUTE (2020).

For guidance on ESG, MeToo, and Black Lives Matter corporate governance issues, see [ESG, MeToo, and Black Lives Matter: Key Corporate Governance and Workplace Issues](#).

# Historical Background of Racial Diversity on Corporate Boards

## Lack of Racial Diversity in Corporate Leadership and on Corporate Boards

The lack of racial diversity in corporate leadership and on corporate boards has persisted over many years. As of 2020, white people held more than 82.6% of the total number of board seats in the Fortune 500 in each industry. [Alliance for Board Diversity Report](#), LEAP (last visited Feb. 22, 2021).

Across all industries, African Americans held the largest percentage of board seats among all minorities, but only hold:

- 8% of board seats in consumer services
- 8.4% of board seats in energy, resources, and industrials
- 9.6% in financial services
- 10.1% in life sciences and healthcare –and–
- 7.8% in technology, media, and telecommunications

[The Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards \(Missing Pieces Report\)](#), DELOITTE (2018).

The numbers are even lower for Asian Americans, who held only:

- 3.5% of board seats in consumer services
- 2.6% of board seats in energy, resources, and industrials
- 3.3% in financial services
- 4% in life sciences and healthcare –and–
- 6.9% in technology, media, and telecommunications

[The Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards \(Missing Pieces Report\)](#), DELOITTE (2018).

Similarly, Hispanics and Latinx held only:

- 3.9% of board seats in consumer services
- 3.8% of board seats in energy, resources, and industrials
- 3.5% in financial services
- 3.4% in life sciences and healthcare –and–
- 3.9% in technology, media, and telecommunications

[The Missing Pieces Report: The 2018 Board Diversity Census of Women and Minorities on Fortune 500 Boards \(Missing Pieces Report\)](#), DELOITTE (2018).

While progress has been made to increase diversity in boardrooms, it is noteworthy that no Fortune 500 corporate board consists of “a representative sample of the demographics of the United States, with the benchmarks of 50% women, 13% African American/Black, 18% Hispanic/Latino(a), and 6% Asian per the most recent (July 2019) United States Census Bureau,” “Population Estimates Quick Facts.” Alliance for Board Diversity Report, [Missing Pieces Report: The Board Diversity Census of Women and Minorities on Fortune 500 Boards](#), Deloitte, 6th edition.

For more guidance on workplace diversity, see [Workplace Diversity, LGBTQ, and Racial and Social Justice Resource Kit – Workplace Diversity and Inclusion](#).

## Rising Demand for Racial Diversity on Corporate Boards

The global response to the death of George Floyd at the hands of police officers on May 25, 2020, shed light on the need to address racial inequity in all facets of life, including in the workplace. The activism sparked by ongoing Black Lives Matter (BLM) protests placed pressure on corporate leaders to show visible progress in increasing Black representation in their companies. Helen Chan, Julie DiMauro, [Black Lives Matter Movement Turns Up Heat For Boards to Walk the Talk of Racial Diversity](#), THE ETHICAL CORPORATION MAGAZINE (Oct. 5, 2020).

Although addressing issues of inclusion and diversity may have been difficult during the COVID-19 pandemic for companies that were looking for ways to cut spending during a time of economic downturn, many companies realized that the same approach to hiring, company leadership, and workplace culture would inevitably result in the same lack of diversity. Mark Williams, [Companies Promise More Diversity After George Floyd, But Will Change Happen This Time?](#), THE COLUMBIA DISPATCH (Dec. 26, 2020).

There has been a push for boards to expand the diversity of perspectives around the board table to include more women, racial, and ethnic minorities, individuals who identify as LGBTQ+, younger executives, and leaders with the skill sets for emerging business challenges. [2020 U.S. Spencer Stuart Board Index](#), SPENCER STUART (2020).

## Current Landscape of Racial Diversity on Corporate Boards

Companies have made visible efforts to increase racial diversity on corporate boards. Subodh Mishra, [U.S. Board Diversity Trends in 2019](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (June 18, 2019); [2020 U.S. Spencer Stuart Board Index](#), SPENCER STUART

(2020) (last visited Feb. 22, 2021). In 2019, there was a record number of ethnic minorities joining boards as new members, with more than one-in-five new directorships being occupied by non-Caucasian nominees at S&P 500 companies. Subodh Mishra, [U.S. Board Diversity Trends in 2019](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (June 18, 2019).

The number of Black appointees to Russell 3000 corporate boards surged in the wake of Floyd's death, with companies such as Procter & Gamble, Pinterest, PepsiCo, Target, and UPS adding Black corporate board of directors. Within five months after Floyd's death, Russell 3000 companies appointed 130 Black board members, an increase of approximately 70% compared with the number of Black directors appointed in the preceding five months. Leslie P. Norton, [The Number of Black Board Members Surged After George Floyd's Death](#), BARRONS (Oct. 27, 2020). By 2020, 97% of the top 200 S&P 500 companies had minority directors, defined as Black/African American, Hispanic/Latinx, and Asian directors, on their boards, an increase of 93% over last year and 89% a decade ago. Twenty percent of directors in the top 200 companies were minority executives in 2020, which is up from 19% in 2019 and 15% in 2010. [2020 U.S. Spencer Stuart Board Index](#), SPENCER STUART (2020) (last visited Feb. 22, 2021). This year, 402 S&P 500 companies mentioned diversity, equity, and inclusion efforts in their annual 10-Ks, a 458% jump from the 72 companies who mentioned diversity, equity, and inclusion efforts in 2020. Andrew Ramona, [S&P 500 Opens Up on Diversity After Floyd as Investors Seek More](#) (Feb. 11, 2022).

### ***Investor Companies Requiring Board Diversity***

Activist investors are continuing to pressure companies to change their board composition, and state legislators are pushing for progress on diversity. [2020 U.S. Spencer Stuart Board Index](#), SPENCER STUART (2020) (last visited Feb. 22, 2021). Major institutional investors are pressing boards to increase gender diversity and, more recently, racial and ethnic diversity. [2020 U.S. Spencer Stuart Board Index](#), SPENCER STUART (2020) (last visited Feb. 22, 2021). In fact, several state and local pension funds and other socially responsible investors have been engaged in letter-writing campaigns calling on companies to increase disclosure of director diversity and alluding to the possibility of negative votes at companies lacking board diversity. Marc Gerber, [US Corporate Governance: The Ascension of ESG](#), SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES (Jan. 28, 2021).

In March 2018, BlackRock issued a statement setting forth a list of discussion points on which it intended to engage with boards that year to promote board accountability, including the role of the board in overseeing the company's strategy "to create a healthy culture and prevent unwanted behaviors," diversity in board and workforce composition, and potentially linking human capital management performance metrics to executive compensation. David A. Katz, Laura A. McIntosh, [Corporate Governance Update: Shareholder Activism Is the Next Phase of #MeToo](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Sept. 28, 2018).

BlackRock Chairman and CEO Larry Fink later issued a 2021 annual letter to CEOs where he expressed the importance of diversity. Mr. Fink wrote that the lack of diversity within organizations was a weakness that indicated that the company was "less likely to hire the best talent, less likely to reflect the needs of its customers and the communities where it operates, and less likely to outperform." Mr. Fink also expressed the importance of building a "more inclusive capitalism" and the future expectation that sustainability reports will include disclosures on talent strategy that "fully reflect[s] your long-term plans to improve diversity, equity, and inclusion, as appropriate by region." [Larry Fink's Annual Letter 2021: Tell Us How You Are Moving to Net-Zero](#), LEXOLOGY (Jan. 27, 2021).

Other investment companies have also issued public statements to call for boardroom diversity. For example, Vanguard Investment issued a statement in December 2020 encouraging boards to consider "deliberately expanding in service of gender diversity" and expressing the expectation of "formerly homogeneous boards becoming increasingly diverse and better reflecting the employee and customer composition of the companies they help lead." [Vanguard Investment Stewardship Insights](#) (Dec. 2020); Marc Gerber, [US Corporate Governance: The Ascension of ESG](#), SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES (Jan. 28, 2021). State Street also expressed that it would seek to understand boards' approaches to overseeing matters such as the companies' approaches to diversity. Marc Gerber, [US Corporate Governance: The Ascension of ESG](#), SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES (Jan. 28, 2021).

Goldman Sachs Asset Management recently announced that beginning in March 2022, it expects companies in the S&P 500 and the UK's FTSE 100 to have at least one director from an underrepresented ethnic minority group. [Goldman](#)

[Sachs Asset Management Updates Its Proxy Voting Policies To Increase Ethnic And Gender Diversity Expectations For Public Company Boards](#) (Dec. 2, 2021).

The Nasdaq Stock Market has also joined in on the push for board diversity. On August 6, 2021, the SEC approved Nasdaq's board diversity rules, which Nasdaq described as "a disclosure standard designed to encourage a minimum board diversity objective for companies and provide stakeholders with consistent, comparable disclosures concerning a company's current board composition." Nasdaq Listing Rule 5605(f)(2) requires Nasdaq-listed companies, subject to certain exceptions, to have or explain why they do not have, at least two "Diverse" board members, "including (i) at least one Diverse director who self-identifies as Female; and (ii) at least one Diverse director who self-identifies as an Underrepresented Minority or LGBTQ+." Foreign issuers and smaller reporting companies can satisfy the diversity requirement with two female directors, and companies with five or fewer directors can satisfy the diversity requirement with at least one diverse director. The rule defines "Diverse" as a director who "self-identifies as: (i) Female, (ii) an Underrepresented Minority, or (iii) LGBTQ+." "Female" is defined as a person who "self-identifies her gender as a woman, regardless of her sex at birth." "Underrepresented Minority" is defined as a person who "self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities."

"LGBTQ+" means an individual who "self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community."

Additionally, Nasdaq Listing Rule 5606 requires companies listed on Nasdaq on or prior to August 6, 2021, to report board level diversity statistics in the company's proxy statement or its information statement (or if the company does not file a proxy, its Form 10-K or 20-F), or on the company's website by August 8, 2021. If a company fails to satisfy the diversity standard, it must provide the reasons for its noncompliance. Nasdaq will verify compliance, but will not review the substance of the explanation. Companies who fail to comply with the rules will be issued, subject to the cure period, a Staff Delisting Determination Letter for noncompliance.

Nasdaq's board diversity rules are not without their challenges. A lawsuit was filed in the U.S. Court of Appeals for the Fifth Circuit, challenging Nasdaq's rules as violations under the Equal Protection Clause of the U.S. Constitution and federal anti-discrimination laws. *Alliance for Fair Bd. Recruitment v. SEC*, Case: 21-60626 (5th Cir. 2021).

## **Importance of Diversity on Corporate Boards Looking Forward**

### ***Corporate Board Diversity Laws Have Been Spreading Nationwide***

The #MeToo and Black Lives Matter movements have sparked large-scale changes in the composition of corporate boards, including the enactment of legislation. While some states mandate strict quotas, other states have adopted a softer approach by urging diversity efforts through disclosure requirements. Jaelyn Jaeger, [Emerging State Board Diversity Laws Encourage Proactive Approach](#), COMPLIANCE WEEK (Nov. 3, 2020). Corporations are being pressed by increasingly impatient investors and consumers to take tangible actions to address racial injustice and gender inequity in America. Helen Chan, Julie DiMauro, [Black Lives Matter Movement Turns Up Heat For Boards to Walk the Talk of Racial Diversity](#), THE ETHICAL CORPORATION MAGAZINE (Oct. 5, 2020). Investors posit that diverse perspectives lead to better decision-making, thus reducing risk and improving company resiliency. Marc Gerber, [US Corporate Governance: The Ascension of ESG](#), SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES (Jan. 28, 2021).

More states are enacting legislation to diversify boards. In 2018, California became the first state to pass a board diversity law, though it is currently facing court challenges. California was followed by Illinois, which passed a law in August 2019 requiring companies to make additional disclosure on board diversity. Other states, including Hawaii, Massachusetts, Michigan, and New Jersey, are in the process of drafting similar laws to be effective in upcoming years. See, e.g., Richa Joshi, [Truvalue Labs, Board Diversity: No Longer Optional](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Oct. 11, 2020).

### ***Significance of Widespread Diversity Laws for Corporate Boards and Corporations***

There remains a strong need to diversify boards to add new perspectives and diversity of thought to companies. Andrew Ross Sorkin, [A Hidden Hurdle in Efforts to Diversify Boardrooms](#), THE N.Y. TIMES (Feb. 16, 2021). Although 59% of new directors at S&P 500 companies in 2020 were women or ethnic and racial minorities, the pace of progress in diversifying boardrooms has remained slow because of the limited turnover. Andrew Ross Sorkin, [A Hidden Hurdle in Efforts to Diversify Boardrooms](#), THE N.Y. TIMES (Feb. 16, 2021).

There appears to be a direct correlation between a company's financial performance and board diversity. Indeed, McKinsey reported that companies with board

diversity are 33% more likely to have greater financial returns than those without such diversity, and Boston Consulting Group reported that “companies with above-average diversity at the management level generate 19% higher innovation revenues than companies with below-average diversity.” Richa Joshi, [Truvalue Labs, Board Diversity: No Longer Optional](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Oct. 11, 2020); Rocio Lorenzo, Nicole Voigt, Miki Tsusaka, Matt Krentz, and Katie Abouzahr, [How Diverse Leadership Teams Boost Innovation](#), BOSTON CONSULTING GROUP (Jan. 23, 2018). Therefore, it is incumbent on states to continue to pass legislation to expand the diversity of perspectives around the board table to include more women, racial, and ethnic minorities, younger executives, and leaders with diverse skill sets for emerging business challenges. [2020 U.S. Spencer Stuart Board Index](#), SPENCER STUART (2020).

## State Legislation on Corporate Board Diversity

The following sections provide an overview of enacted and proposed state legislation to diversify corporate boards.

### Survey of Enacted State Legislation on Corporate Board Diversity

#### *California*

In September 2018, California became the first state to pass legislation that mandated female representation on corporate boards. Senate Bill 826 mandated all public companies with executive offices in the state to have at least one woman on their boards by December 2019. Richa Joshi, [Truvalue Labs, Board Diversity: No Longer Optional](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Oct. 11, 2020).

Under Senate Bill 826 (codified at Cal Corp Code § 301.3):

- A corporation with more than six directors is required to have a minimum of three female directors
- If its number of directors is five, the corporation shall have a minimum of two female directors –and–
- If its number of directors is four or fewer, the corporation shall have a minimum of one female director

There is a \$100,000 fine for the first violation of the woman quota and \$300,000 for subsequent violations, with each seat that is not filled by a woman constituting a separate violation.

Christopher J. Riley, [An Equal Protection Defense of SB 826](#), CALIF. L. REV. BLOG (JULY 2020); Teal N. Trujillo,

[Do We Need to Secure a Place at the Table for Women? An Analysis of the Legality of California Law SB-826](#), 45 J. LEGIS. 324 (2018); Jacqueline Concilla, [A Glimmer of Hope for California’s “Well-Intentioned” Attempt to Put More Women in the Boardroom](#), 93 S. Cal. L. Rev. 603 (Mar. 2020); Lauren Kim, [Mandating Women: Defending SB 826 and Female Quotas in the Corporate Workplace](#), 53 Loy. L.A. L. Rev. 685 (2020).

Following the announcement of Senate Bill 826, California companies added 68 new women on their boards. Richa Joshi, [Truvalue Labs, Board Diversity: No Longer Optional](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Oct. 11, 2020). According to the [California Partners Project](#), 440 women must be added in 2022 in order to comply with California law.

However, after Senate Bill 826 was first enacted, 47% of the companies did not disclose their diversity data as per the law. Out of the 330 companies that submitted a report, 48 did not comply and had all male boards. Richa Joshi, [Truvalue Labs, Board Diversity: No Longer Optional](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Oct. 11, 2020).

In September 2020, California also signed 2019 AB 979 into law (codified at Cal Corp Code § 301.3, and adding Cal Corp Code §§ 301.4 and 2115.6), requiring publicly held corporations headquartered in California to have at least one director from an underrepresented community on its board of directors by the end of the 2021 calendar year and upwards of three directors from an underrepresented community on its board of directors by the end of the 2022 calendar year. The law imposes penalties for each violation, with the first violation carrying a maximum \$100,000 penalty and second or subsequent violations carrying a \$300,000 penalty for each violation. Saijel Kishan, [California Lawmakers Approve Racial Quotas for Corporate Boards](#), BLOOMBERG (Aug. 31, 2020); Courtney Murray, Eric Talley, [Racial Diversity and Corporate Governance: Assessing California’s New Board Diversity Mandate](#), THE COLUMBIA LAW SCHOOL BLUE SKY BLOG (Oct. 28, 2020).

#### *New York*

On December 30, 2019, New York passed S.7195, the “Women on Corporate Boards Study,” to examine the effectiveness of provisions relating to women on corporate boards. Teri Wilford Wood, Anna Broccolo, [New York Enacts Legislation Related to Board Diversity](#), THE NATIONAL LAW REVIEW (Jan. 17, 2020). Under the law, the New York State Department of State must release a report, on or before February 1, 2022, and every four years thereafter,

setting forth (1) the number of female directors and the total number of directors that constitute the board of each company, (2) an analysis of the change in the number of female directors from previous years, and (3) the aggregate percentage of female directors on all boards. Joseph B. Cartafalsa, Jessica R. Schild, [New York Enacts 'Women on Corporate Boards Study'](#), OGLETREE DEAKINS (Jan. 10, 2020). The inaugural report indicates that from June 27, 2020, through December 31, 2021, of the 40,428 biennial statements filed, the total number of women directors was 78,642. Accordingly, 26.04% of directors serving on the boards of such corporations were women. Report: [Women on Corporate Boards Pursuant to the Women on Corporate Board Study Act for submission to Governor Temporary President of the Senate and Speaker of the Assembly](#) (Feb. 1, 2022).

By taking a proactive approach, the survey is intended to provide corporations with the opportunity to identify where they are lacking in diversity.

S.7195 applies to domestic and foreign corporations "authorized to do business" in New York, where both foreign and domestic corporations, including publicly traded and privately held, are required to report the number of directors appointed to their boards and to report how many directors are female. Teri Wilford Wood, Anna Broccolo, [New York Enacts Legislation Related to Board Diversity](#), THE NATIONAL LAW REVIEW (Jan. 17, 2020).

### **Washington**

Washington passed SSB 6037 on June 11, 2020, requiring gender-diverse boards or providing shareholders with a board diversity discussion and analysis. Under the law, at least 25% of a company's board must self-identify as women and the gender diversity threshold must be met for at least 270 days of the fiscal year preceding the applicable annual meeting of shareholders. Companies failing to meet the gender diversity requirement are required to provide shareholders with a board diversity discussion and analysis containing information regarding their method to developing and maintaining board diversity.

Eric A. DeJong, Perkins Coie, [Is Your Board Diverse Yet? Washington Public Companies Reminded of Upcoming Board Diversity Requirement](#), NEWSTEX BLOG (Sept. 19, 2020).

### **Colorado**

In March 2017, Colorado's legislature passed House Joint Resolution 17-1017, a resolution calling for equitable and diverse gender representation on the boards of publicly held corporations headquartered in Colorado.

The resolution reported the findings from the Women on Colorado Boards: State of the State analysis by the Women's Leadership Foundation, which included a census of the 106 Colorado publicly traded companies plus Fortune 1000 companies on the presence of women on Colorado's corporate boards.

Based on the study, one-third of Colorado companies have already met the resolution's goal for those with nine or more director seats to have a minimum of three women on their boards, companies with five to eight director seats to have a minimum of two women, and those with fewer than five director seats to have a minimum of one woman on their boards by December 2020. The study also found that 12 Colorado public companies have three or more female board members compared to just two in 2011. H.J.R. Res. 17-1017, 114th Cong. (2017); Kourtney Geers, [Colorado Public Companies are Making Progress Getting Women on Boards. See Who's Leading the Pack](#), DENVER BUSINESS JOURNAL (Aug. 12, 2020).

### **Illinois**

In August 2019, Illinois signed into law Public Act 101-0589 (2019 HB 3394), 805 ILCS 5/8.12; 805 ILCS 5/14.05, which aims to encourage diversity on the boards of publicly held corporations with principal offices in Illinois. Patrick J. Rocks, Kathryn Montgomery Moran, [New Illinois Law Requires Corporations to Report Diversity on Corporate Boards](#), JACKSON LEWIS (Aug. 29, 2019).

Public Act 101-0589 requires all public companies with their executive office in Illinois to include diversity information in annual reports. The diversity disclosures must include the self-identified gender of each board member and state whether each member self-identifies as a minority person. "If a director self-identifies as a member of a minority group, the corporation must also disclose the director's race or ethnicity." Anne Sherry, [Illinois' New Board Diversity Law Favors Disclosure Over Quotas](#), WOLTERS KLUWER SECURITIES REGULATION DAILY (Aug. 27, 2019).

Following these corporate disclosures, the University of Illinois will study the information provided and publish a report on its website, including:

- Aggregate data on the demographic characteristics of the boards and executive officers of corporations that filed reports
- Individualized ratings for each corporation –and–
- Strategies for promoting diversity and inclusion among corporate boards

Patrick J. Rocks, Kathryn Montgomery Moran, [New Illinois Law Requires Corporations to Report Diversity on Corporate Boards](#), JACKSON LEWIS (Aug. 29, 2019).

According to the Illinois Corporate Board Diversity, Inclusion, and Representation Report – 2020, 67% of Illinois corporations have two or more female directors while only 35% of them have two or more non-white directors. Richard A. Benton and Eunmi Mun, [Illinois Corporate Board Diversity, Inclusion, and Representation Report – 2020](#), School of Labor and Employment Relations at the University of Illinois at Urbana-Champaign.

## **Maryland**

In October 2019, Maryland's Gender Diversity on Boards bill, SB 911, went into effect, requiring Maryland businesses and certain nonprofits to report the number of women on their boards as part of annual tax forms. The information is collected by Maryland's Department of Assessments and Taxation and shared with the Comptroller of Maryland, who will submit a report to the General Assembly on or before January 1 of each year.

SB 911 is significant because the state has 22.5% fewer board seats held by women in publicly traded companies than the national average. Luwanda Jenkins, [New 'Gender Diversity in the Boardroom' Law Places Maryland Companies on Notice](#), THE DAILY RECORD (Nov. 22, 2019).

Maryland's Department of Assessments and Taxation's 2021 Report on Gender Diversity in the Boardroom reported that 62,909 businesses submitted reports to SDAT and among the entire data.

set, "the average representation of women in the boardroom was 30.64%." [2021 Report on Gender Diversity in the Boardroom](#), Justin H. Hayes, Esq., (Jan. 26, 2021).

## **Survey of Proposed State Legislation on Corporate Board Diversity**

### **Hawaii**

In February 2020, Democratic Senator Karl Rhoads introduced bill SB 2636 and companion bill HB 2720 that would require public corporations with its principal executive offices in Hawaii to have at least one female director on their boards by the end of the year and expand the requirements by the end of 2022. Each board with six or more members would need to have at least three women directors after 2020, while boards with five directors would be required to have a minimum of two women directors. To enforce this legislation, the

state Department of Commerce and Consumer Affairs would have the authority to impose fines of \$100,000 on companies who failed to comply and the fine would rise to \$500,000 for repeat offenders.

See, e.g., Akina Keli'i, [Wacky Season at Legislature](#), HAWAII FREE PRESS (Feb. 8, 2020), Honolulu Associated Press, [Bill would require more women on Hawaii corporate boards](#), THE WASHINGTON TIMES (Mar. 2, 2020).

### **Massachusetts**

In 2019, Massachusetts Senator Jason Lewis filed a bill, SB 1879, that would require any public company headquartered in the state to have at least one board member by the end of 2021. Two years from then, boards would be required to have two women if they have five or fewer seats, or three if the boards have six or more seats. Violations would reach as high as \$100,000. Additionally, a bill filed by Senator Patricia Haddad would require appointed state boards and commissions to have both gender and racial and ethnic diversity among their members. One gender couldn't have more than twice the number of members as the other. Moreover, Senator Liz Malia, proposed a bill that would require companies with 100 or more employees to file a report each year detailing race and gender ratios of those in senior ranks.

The state is taking a hard look at gender and racial equity resolutions as its annual Boardroom Gap investigation revealed that at 75 prominent Massachusetts businesses, women only made up 34% of executive ranks and board of director positions. What is more, of the 16 additional public companies in the state reviewed, women composed only 24% of board positions. So far, the bills have advanced out of the State Administration and Regulatory Oversight committee but haven't yet advanced to a full vote. See Grant Welker, [The Boardroom Gap III: Mass. Legislators Eye Laws Requiring Women on Public Company Boards](#), WORCESTER BUSINESS JOURNAL (Feb. 17, 2020); Caitlin Mullen, [Could Massachusetts Follow California's Lead Requiring Women on Boards?](#), BIZWOMAN, THE BUSINESS JOURNAL (Feb. 19, 2020).

### **Michigan**

On February 14, 2019, 2019 SB 115 was introduced in the Senate Committee on Economic and Small Business Development. The bill would set a requirement for one female director for domestic and foreign public corporations with principal executive offices in the state. In light of this proposed bill, women-held board seats at Michigan public companies have hit record highs. By the start of 2020, women held 21% of board seats, compared to just 15% in 2017. Michigan companies added 121 board members

between 2017 and 2019 and 26% were women. See Joan Helwig, [More States Promote Gender Diversity on Corporate Boards: Status Updates](#), COGENCY GLOBAL (June 20, 2019); Dustin Walsh, [Women Inch Closer to Parity in Michigan Boardrooms, but Less So in C-Suite, Report Says](#), CRAIN'S DETROIT (Jan. 26, 2020).

### ***New Jersey***

New Jersey reintroduced board diversity bills S798 and A1982 after the 2019 bills S3469 and A4726 failed to pass. The newly proposed bills require companies with five member boards to have at least two women directors by the end of 2021 and companies with six or more members to have at least three female directors by then. Additionally, all publicly held domestic or foreign corporations with principal executive offices in the state would be required to annually file with the secretary of state a list of all directors, each director's term of service, and how many directors self-identify as women. Civil penalties also include \$100,000 for a first violation and \$300,000 for each subsequent violation. See Joan Helwig, [More States Promote Gender Diversity on Corporate Boards: Status Updates](#), COGENCY GLOBAL (June 20, 2019); Esther Wieldon, [States Float Corporate Board Diversity Bills in Wake of California's New Law](#), S&P GLOBAL (Jan. 30, 2019).

### ***Ohio***

On September 24, 2019, House Concurrent Resolution Number 13 was introduced urging all private and public companies doing business within the state to commit to increasing gender diversity on boards of directors and senior management positions and to set and publish goals by which to measure progress. The resolution, however, does leave open the question of annual reporting. Over the last two years in the state, 40% of new board members elected locally were women. However, in aggregate, women only make up 21.4% of local board seats. See Joan Helwig, [More States Promote Gender Diversity on Corporate Boards: Status Updates](#), COGENCY GLOBAL (June 20, 2019); Dan Shingler, [Female Representation Gains Momentum on Boards of Public Companies](#), CRAIN'S CLEVELAND (Oct. 31, 2020).

### ***Pennsylvania***

On March 6, 2019, Pennsylvania HR 0114 was proposed, which urges but does not require publicly held corporations to have more women serving on boards. The current form of the resolution leaves open the question of annual reporting requirements and has remained pending since

its proposal. In the Pittsburgh region of Pennsylvania, women only account for 24% of seats at public companies. However, that is up from 21% from 2018. See Joan Helwig, [More States Promote Gender Diversity on Corporate Boards: Status Updates](#), COGENCY GLOBAL (June 20, 2019); Joyce Gannon, [Women in Pittsburgh's Boardrooms: the Numbers are Up but Barriers Remain](#), PITTSBURGH POST GAZETTE (Jul. 1, 2019).

## **Future of Corporate Board Diversity Laws**

### ***Potential Constitutional Challenges to Corporate Board Diversity Laws***

Because board diversity statutes impose demographic requirements on the board of directors of publicly traded corporations, there are likely going to be challenges to their constitutionality on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment and the Commerce Clause.

### ***Equal Protection Clause***

Laws involving gender classifications are subject to a heightened level of scrutiny under the equal protection clause. Accordingly, the state must demonstrate that the law serves an important (under intermediate scrutiny) or compelling (under strict scrutiny) state interest, and that it is narrowly tailored to be the least restrictive means of meeting the state's goal. It is unclear whether these statutes will survive such scrutiny if challenged in court. Courts might consider evidence of past discrimination and differences in opportunity to support such laws. That said, it remains to be seen whether a board seat quota system is the least restrictive means of achieving the state's interest. See Creighton R. Meland, Jr., *Should Courts Uphold Corporate Board Diversity Statutes?*, 53 CREIGHTON L. REV. 15 (2019); Ben Taylor, *Why California Senate Bill 826 and Gender Quotas are Unconstitutional: Shareholder Activism as a Better Path to Gender Equality in the Boardroom*, 18 FLA. ST. U. BUS. REV. 117 (2019); Christopher J. Riley, *An Equal Protection Defense of SB 826*, Calif. L. Rev. BLOG (July 2020).

### ***Commerce Clause / Internal Affairs Doctrine***

Challenges to such laws may also be based on the internal affairs doctrine derived from the commerce clause of the U.S. Constitution, which recognizes that only one state—the state of incorporation—should have the authority to regulate a company's internal affairs, including the composition and election of its board of directors. *Edgar v. Mite Corp.*, 457 U.S. 624, 645–46 (1982). Thus, if a company is headquartered in a state with a board gender

or racial diversity mandate, only if the company was incorporated in a different state, that state's laws are what govern.

## Best Practices on Corporate Board Diversity

The following sections contain best practices for companies to diversify their corporate boards.

### How Companies Can Diversify Their Corporate Boards

Companies can take specific steps and strategies to diversify their corporate boards, including:

- Evaluating board performance and diversity and inclusion efforts
- Addressing limitations of the current board candidate pipeline –and–
- Retaining diverse board members

### Evaluating Board Performance and Diversity and Inclusion Efforts

Companies should implement the following to help evaluate their board's performance and diversity and inclusion efforts:

- **Create metrics.** Companies should create metrics to track their progress with diversity and inclusion initiatives. Gaurdie Banister, [How Black Lives Matter In Corporations—This Time Can Be Different](#), CHIEF EXECUTIVE (June 16, 2020). Companies should also ensure that the company's prohibitions against racial harassment and discrimination are emphasized. Dawn Siler-Nixon, Wesley C. Redmond, Jeffrey Douglas, [Employers' Responses to Racial Unrest: a View From the U.S. and Other Countries](#), GLOBAL USA (June 15, 2020).
- **Review diversity policies.** It is also important for companies to regularly review their diversity policies across the organization and create a clear and focused statement on diversity. The board should ensure that leadership at the management level determines whether there are racial or gender barriers to how the company finds, develops, compensates, and promotes its talent. The board should also be aware of expectations of its employees, customers, and communities that the company engages with. See Richard B. Alsop, George A. Casey, Laney Nollengara, [Governance Amid Crisis—How 2020 Changed the Boardroom](#), SHEARMAN AND STERLING LLP.

o For a sample diversity policy, see [Diversity and Inclusion \(D&I\) Policy \(with Acknowledgment\)](#).

- **Diversity factors and recruitment.** Companies should evaluate whether they consider traditional diversity factors, such as gender, race, ethnicity, and LGBTQ+ status, as a plus when recruiting new board members. See David A. Bell, Dawn Belt, and Jennifer J. Hitchcock, [New Law Requires Diversity on Boards of California-Based Companies](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Oct. 10, 2020).
- o For more guidance on recruitment, screening, and hiring, see [Screening and Hiring Resource Kit](#).

### Addressing Limitations of the Current Board Candidate Pipeline

Companies should implement the following to address limitations of the current board candidate pipeline:

- **Assessment processes.** Boards should implement assessment processes to better understand the forward-looking needs in the boardroom and the performance and contributions of the board of directors.
- o For example, boards can strategically position individual directors to take a multiyear view of departures and strategically plan for board openings. [2020 U.S. Spencer Stuart Board Index](#), SPENCER STUART (2020) (last visited Feb. 21, 2021).
- **Engage advisers and recruit diverse directors.** Companies and their executives often rely on their own networks for identifying board members, which limits its pool of candidates. Jeremy Nobile, [A Seat at the Table, but Barely: Racial Diversity in Board Rooms Remains Woefully Poor](#), CRAIN'S CLEVELAND (Oct. 31, 2020). Instead, companies can engage advisers to facilitate individual director assessments and to strategically hire and recruit diverse directors. See [2020 U.S. Spencer Stuart Board Index](#), SPENCER STUART (2020) (last visited Feb. 21, 2021).
- **Expand board searches.** Expand board searches beyond simply CEOs such as CFOs, chief human resource officers, or other senior level candidates. See Chelsa Gurkin, [Strategies to Increase Representation of Women and Minorities –Testimony Before the Committee on Financial Services, House of Representatives](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (June 27, 2019); Gabriel Perna, [Six Tips For Improving Diversity In The Boardroom](#), CORPORATE BOARD MEMBER.
- **Use of mentors.** CEOs can serve as mentors to women and minority candidates and sponsor them for board seats. See Chelsa Gurkin, [Strategies to Increase](#)

[Representation of Women and Minorities –Testimony Before the Committee on Financial Services, House of Representatives](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (June 27, 2019); Gabriel Perna, [Six Tips For Improving Diversity In The Boardroom](#), CORPORATE BOARD MEMBER.

- **Smaller corporate boards.** Smaller corporate boards can consider expanding their board size either permanently or temporarily so that they can include more women and diverse directors. This can work for boards that are smaller in size, that would especially benefit from additional directors with diverse perspectives. See Chelsa Gurkin, [Strategies to Increase Representation of Women and Minorities –Testimony Before the Committee on Financial Services, House of Representatives](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (June 27, 2019); Gabriel Perna, [Six Tips For Improving Diversity In The Boardroom](#), CORPORATE BOARD MEMBER.
- **Form partnerships with diverse organizations.** Companies can form partnerships with diverse organizations and institutions to recruit diverse directors.
  - For example, John Carter, the head of Nationwide Financial, is pushing for more diversity in the financial services industry through a recently formed alliance between the industry and historically Black colleges and universities to draw more talent to financial services. See Mark Williams, [Companies Promise More Diversity After George Floyd, But Will Change Happen This Time?](#), THE COLUMBIA DISPATCH (Dec. 26, 2020).

### *Retaining Diverse Board Members*

There are several strategies to help companies retain diverse board members:

- **Importance of diversity.** CEOs and investors can emphasize the importance of diversity and diverse candidates and encourage boards to prioritize diversity and its benefits so that diverse candidates understand and appreciate the company's top-down approach. See Chelsa Gurkin, [Strategies to Increase Representation of Women and Minorities–Testimony Before the Committee on Financial Services, House of Representatives](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (June 27, 2019).
- **Training.** Companies should conduct trainings for its boards on diversity and inclusion topics such as unconscious bias. See Chelsa Gurkin, [Strategies to](#)

[Increase Representation of Women and Minorities–Testimony Before the Committee on Financial Services, House of Representatives](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (June 27, 2019).

- **Leaders should be prepared to discuss diversity.** To further demonstrate a top-down approach to diversity, company leaders should demonstrate their ongoing commitment to diversity and be prepared to discuss the gender, LGBT, racial, and ethnic makeup of the board as well as their diversity plans and efforts, either in a public forum or in discussions with individual investors. See David A. Bell, Dawn Belt, and Jennifer J. Hitchcock, [New Law Requires Diversity on Boards of California-Based Companies](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Oct. 10, 2020).
- **Continue to mentor.** CEOs and other company leaders can continue to serve as sponsors and mentors to women and minority board members. See Chelsa Gurkin, [Strategies to Increase Representation of Women and Minorities–Testimony Before the Committee on Financial Services, House of Representatives](#), HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (June 27, 2019); Gabriel Perna, [Six Tips For Improving Diversity In The Boardroom](#), CORPORATE BOARD MEMBER.

### *How Diverse Leaders Can Join Corporate Boards*

Individuals with diverse backgrounds can also take steps to increase their opportunities to join corporate boards, including the following:

- **Gain expertise.** Gain deep experience and networking within your industry.
- **Network.** Identify what type of board you would like to join and tap into mentors or colleagues who are on similar boards who can offer industry-specific guidance.
- **Join nonprofit board.** Consider joining a nonprofit board, which can serve as an effective training ground to gain experience in serving as a board member.
- **Tailor resume.** Tailor your resume to the board that you are interested in joining by highlighting relevant experiences.

See, e.g., Kweilin Ellingrud, [Accelerating Board Diversity](#), FORBES (June 26, 2020).

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### Ellen Holloman, Partner, Cadwalader, Wickersham & Taft LLP

Ellen Holloman is a partner in Cadwalader's Global Litigation Group. She focuses her practice on representing financial institutions, corporations and individuals in civil litigation and at trial, and in related regulatory enforcement proceedings and corporate internal investigations. She has extensive experience in securities litigation, including derivative and class action litigation, in contract and post-acquisition disputes, and in employment-related claims, including for enforcement of non-compete, non-disclosure and confidentiality agreements, and in #MeToo situations. Ellen regularly advises companies, boards, special committees and investors in connection with corporate governance matters, including takeover defense and activist contests. She also frequently handles litigation arising from bankruptcy and financial restructuring matters, and has represented secured and unsecured creditors and debtors in Chapter 11 bankruptcy cases and out-of-court restructurings across a wide range of industries, including financial services, energy, shipping, licensing and apparel. Ellen's practice routinely involves matters with complex cross-border intersections, including obtaining large scale overseas discovery under the Hague Convention and other agreements and conducting investigations in response to inquiries under the Foreign Corrupt Practices Act. She also has advised clients on Constitutional law matters, particularly First and Eighth Amendment jurisprudence. In addition to her civil litigation and trial practice, Ellen has significant experience with white-collar criminal defense matters, and has represented clients responding to regulatory inquiries, requests and enforcement proceedings initiated by the U.S. Department of Justice, Securities and Exchange Commission, Federal Trade Commission, Federal Reserve, Federal Energy Regulatory Commission, Consumer Financial Protection Bureau, National Association of Securities Dealers, FINRA, Internal Revenue Service, the Office of the New York State Attorney General, New York Stock Exchange, European Commission, and the UK Serious Frauds Office, among others.

Ellen is active in pro bono engagements and committed to community service. She obtained a full pardon for a Vietnam War-era veteran, who overcame a 30-year period of addiction and homelessness, only to find that a decades-old felony conviction—for "trespassing" while sheltering in an abandoned building in the New England winter—was an obstacle to obtaining gainful employment. Working with the NAACP's Legal Defense Fund, Ellen authored an *amicus curiae* brief submitted to the Supreme Court on behalf of several elite private research universities in *Fisher v. University of Texas*. Her work was cited by the Court. She also has been *amicus curiae* counsel for a citizens tax advocacy group in a challenge to the New York State property tax system. Ellen represents LGBTQ individuals in asylum proceedings and in securing name and gender marker changes. Working with KIND (Kids In Need of Defense), she also represents two children who were separated from their mother at the United States–Mexico border.

Ellen serves on the Board of Trustees for the Center for Employment Opportunities, a non-profit organization dedicated to assisting men and women with criminal convictions with finding employment. She is a member of the Nomination & Governance, Audit, and Development Committees, and sits on the Board's Diversity, Equity and Inclusion Steering Committee. She also serves on the Board of New York Lawyers for the Public Interest, and is a member of the Development Committee. She is a soror of Alpha Kappa Alpha, a member of Cadwalader's Global Diversity Committee, a member of the New York City Bar Association's Women in the Legal Profession and Mergers, Acquisitions and Corporate Control Contests committees, and a member of the Federal Bar Council's Bankruptcy Litigation and Civil Rights committees.

Ellen is a frequent speaker and panelist on litigation, compliance, corporate governance, and diversity and inclusion topics. In 2020, she contributed the inaugural chapter on "Diversity and Inclusion" to the fifth edition of *Commercial Litigation in New York State Courts*, the preeminent treatise on the subject. She also is a Lexis Practice Advisor author and has published articles with *M&A Lawyer* and the *Harvard Law School Forum on Corporate Governance and Financial Regulation*, among others. The New York City Bar Association honored Ellen with the Thurgood Marshall Award in recognition of her representation of post-conviction inmates who are under sentence of capital punishment, and she has received the Award for Conspicuous Service from the New York County Lawyers Association. Ellen has been named a three-time Notable Woman in Law and also a Notable Black Leader by *Crain's New York* and recognized by *Lawdragon* as one of the "500 Leading Lawyers in America."

Prior to joining Cadwalader, Ellen was an associate in the Litigation Department in the New York and London offices of Sullivan & Cromwell LLP and a partner in a New York law firm with an active trial practice in state and federal courts.

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