Michigan Bill Would Require Minimum Number of Female Directors

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A bill introduced in the Michigan Senate would require publicly held corporations with their principal executive offices in Michigan to have a minimum number of female directors. The bill, SB 115, introduced by State Senator Sylvia Santana, closely resembles a similar bill, SB 826, adopted in California in 2018.

If adopted, the bill would require that beginning January 1, 2021, each such corporation would be required to have at least one female director. Beginning January 1, 2023, corporations with boards of six or more members would be required to have at least three female directors; boards of five members would be required to have at least two female directors; and boards of four or fewer would be required to have at least one female director. Nothing in the bill would limit the number of female directors. Six-figure fines would be assessed for failure to comply, and the Department of Licensing and Regulatory Affairs would publish certain information related to compliance. SB 115 has been assigned to the Senate Committee on Economic and Small Business Development.

Whether such legislation would withstand legal challenge remains an open question. Aside from possible equal protection issues, the legislation would conflict with the so-called "internal affairs doctrine." That doctrine posits that the internal affairs of a corporation, such as its formation and governance, are controlled solely by the laws of its state of incorporation, regardless of the location of its operations or facilities. The rationale for the doctrine is that corporations should not be subject to potentially conflicting rules of governance and that shareholders and directors should be able to understand the "rules of the road" governing their duties, obligations and relationships. SB 115 would be applicable to corporations incorporated outside of Michigan, if their principal offices were in the state.

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Is the internal affairs doctrine a constitutional requirement or merely a choice of law rule? The answer is unclear. The Delaware Supreme Court held in VantagePoint Venture Partners 1996 v. Examen, Inc. that it was indeed a constitutional requirement. The case considered Section 2115 of California's corporation law, which imposes portions of that act on foreign corporations having certain contacts with the state. The Delaware Supreme Court refused to apply Section 2115 to a corporation incorporated in Delaware, finding it invalid under the U.S. Constitution. This ruling has no effect outside of Delaware and wouldn't even bind federal courts sitting in Delaware.

The U.S. Supreme Court has not ruled on the question, though in the 1987 case of CTS Corp. v. Dynamics Corp. of Am., the Court noted the internal affairs doctrine in holding Indiana's Control Share Act to be constitutional. The CTS case involved alleged conflict between state corporation and federal securities law, rather than between competing state laws, and so is not directly on point or binding precedent. California SB 826 may be challenged before the Michigan bill proceeds much further, revealing the constitutional fate of such a law.