

May 6, 2021

To: Chair Riley and Members of the Senate Committee on Labor and Business  
From: Paloma Sparks, Oregon Business and Industry  
RE: OBI Testimony on HB 3110

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**Chair Smith Warner and Members of the Committee:**

Thank you for the opportunity to testify on this important issue for Oregon Business & Industry members. OBI is Oregon's most comprehensive business association representing over 1,600 businesses that employ over 250,000 people. We represent multiple sectors and serve as the state's Retail and Manufacturing Councils.

First, I would like to start by saying that our members fully support the underlying goal increased diversity on their boards. Having diverse representation within our companies and on our boards are very important to OBI's members. We take this work very seriously and have been prioritizing diversity within our companies and boards.

This legislation applies to an incredibly small number of businesses – fewer than 20 – and all of them have made strides towards enhanced diversity on their boards. Every single one of these businesses has women on their boards and the majority are diverse. These board members bring wide ranges of experiences and expertise in business, technology, energy and design.

Oregon's public companies have increased diversity on our boards because they believe it is the right thing to do, but also because at the end of the day we serve our owners and they have pushed policies to increase diversity. Public companies are highly regulated at the federal level by both law and marketplace rules. The NASDAQ is currently proposing board diversity rules which may end up in conflict with this bill. Public companies have an obligation to abide by the rules and regulations at the federal law. These businesses are already beholden to NASDAQ, NYSE and the SEC. We believe the most important factor in how boards are made up is the will of our shareholders. These companies targeted by this bill are, in fact, *most* likely to have diverse boards.

We are particularly concerned that this concept doesn't take into account the fact that business leadership does not control board membership. Shareholders have many interests, but first and foremost it is the financial health of the business. Companies have a fiduciary duty to our shareholders to maximize their return on investment. That means that directors are chosen based on whether they will further the goal of benefiting shareholders.

Companies are competing for the best talent to serve on our boards to help improve and grow the business. Board members that serve the culture, mission and unique needs of companies are not easy to find. That is why so many companies are investing in talent development among

their own employees, to ensure that we all have a broader and more diverse pool of skilled future board members. But this work takes time.

This bill essentially creates a gender and race quota system on company boards. Such a system violates the Equal Protection clause of the US Constitution and the Privileges and Immunities clause of the Oregon Constitution by requiring businesses to make decisions based purely on gender and race. In analyzing quota systems the Oregon Supreme Court has stated: “the state’s burden ‘is not overcome when other personal characteristics or social roles are assigned to women or men because of their gender and for no other reason. That is exactly the kind of stereotyping which renders the classification suspect in the first place.’” The proponents have stated that “women” bring certain viewpoints to boards which presumes that all women think alike.

The proponents argue that this legislation is just like bills passed in Washington and California but that is simply not true. First, Washington’s law simply requires that companies show how they are planning to improve diversity if they have not already met the goals. Second, California’s law is distinguished from Oregon’s proposal in a crucial way – it *permits* the Secretary of State to assess penalties which they have not chosen to do as far as we know. And California’s law applies to 606 companies, nearly half of which simply chose not to submit required reports for the most recent reporting period. California’s legislation also particularly focused on tech companies as a source of gender imbalance. This legislation would apply to fewer than 20 companies all of whom already have women on their boards. The problem that existed in California, simply does not exist in Oregon.

Finally, there are a very few public companies headquartered in Oregon, far less than we had twenty years ago. Particularly in our more virtual world, businesses have a lot of choices about where to headquarter their operations. The regulatory environment and costs of Oregon have already reduced our desirability as a location. This bill could further disincentivize businesses from locating to or remaining in Oregon. These businesses provide a great benefit to the health of our economy and the desirability of Oregon for other businesses and citizens. Oregon, particularly Portland, is struggling to make it through the damage this past year has brought – we should be encouraging growth rather than discouraging it.

We support the spirit of this concept to grow board diversity but there are better ways to achieve these goals. Oregon should be focused on finding ways to incentivize businesses to be more diverse while supporting their investment in our communities.

Thank you for your consideration.