

WOMEN ON CORPORATE BOARDS: NON-QUOTA INITIATIVES TO INCREASING BOARD GENDER DIVERSITY IN THE U.S.

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ABSTRACT: Board diversity, identified as one of the top ten governance trends of the 2013 proxy season, remains a priority for corporations to address. Gender diversity is viewed as a crucial element of a diverse board. Although trends indicate that women are joining boards at an increasing rate, the majority of corporate boards are still overwhelmingly male. The author analyzes both quota and non-quota initiatives to enhance the number of women in the boardroom. Initiatives recommended to increase board gender diversity in the United States include softer forms of short-term goal setting, targeting, and disclosure, and a long-term focus on increasing the pipeline of qualified female board candidates.

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INTRODUCTION

A renewed public interest in the corporate governance practices of publicly traded corporations both in the United States and in most developed countries comes in the wake of the most recent financial crisis. Particularly, weaknesses in corporate governance structures at companies and banks have been cited as reasons for the excessive risk taking, skewed incentive compensation for senior managers, and predominance of board culture that values short-term gains over sustained, long-term performance.² In light of these recent events, corporate governance, while not a new concept, has become a near-household term, recognized by the public as affecting overall economic well-being.

All corporations work within a governance framework. This framework is set by law, by the corporation's charter documents, by the owners, and by the expectations of those that they serve. The corporate governance framework differs by country, largely due to the interplay involvement with a particular country's rules and institutions but also as it relates to both history and culture.³ It is important to understand that the corporate governance framework also continuously changes shape and develops through time. Thus, the focus of corporate governance issues can be identified over time. Over the past 20 or so years, corporate

2 E.g. Stijn Claessens and Burcin Yurtoglu, International Finance Corporation, *Corporate Governance and Development - An Update*, 2012; Rushworth M. Kidder, Minority Business Roundtable, *Diversity on Corporate Boards*; Lisa M. Fairfax, The Conference Board, *Revisiting Justifications for Board Diversity*, 2011.

3 Stijn Claessens and Sir Adrian Cadbury, International Finance Corporation, *Corporate Governance and Development*, 2003 .

governance issues in the U.S. appear to have been mainly two-fold in focus: on shareholders and stakeholders and on corporate scandals.

The question left to be answered asks what the focus of corporate governance will be over the next 20 or so years. The issue of gender diversity in the boardroom may very well be that primary focus of corporate governance moving forward. Identified as one of the top 10 governance trends of the 2013 proxy season, board diversity remains a priority for corporations to address, and gender diversity is viewed as a critical component of a diverse board.⁴ Gender diversity, many scholars argue, is a tool in strengthening overall corporate governance.⁵

This ethical issue of gender diversity on boards is currently being faced by publicly traded companies worldwide. American companies are being challenged to compete globally, and the competition for talent is only continuing to intensify.⁶ With women representing roughly half the population, half of college students, and half the workforce, it is no surprise that companies must search for talent from a combined collection of both men and women in order that they will not find themselves at a complete

4 KEY DEVELOPMENTS OF THE 2013 PROXY SEASON, 5 (Ernst & Young LLP 2013).

5 E.g. Susan Bloch, *Why We Need More Women in the Boardroom*, HUFFINGTON POST, 2013; Nanette Fondas, *Women on Boards of Directors: Gender Bias or Power Threat?*, in WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES (Ronald J. Burke & Mary C. Mattis eds., Kulwer Academic Publishers, 2000).

6 AVERIL LEIMON, FRANCOIS MASCOVICI, & HELEN GOODIER, COACHING WOMEN TO LEAD 8 (Routledge, 2011).

competitive disadvantage.⁷

Interestingly, the debate over more women on boards is quickly moving from “why” to “how.” Leaders are addressing this issue globally and, due to the wide range of corporate and political cultures, varying solutions have been recommended. Many European nations support quotas to improve the gender balance on corporate boards. Alternatively, initiatives recommended to increase the number of women on boards in the United States include softer forms of short-term goal setting, targeting, and disclosure and a long-term focus on increasing the pipeline of qualified female board candidates.

STATISTICS ON WOMEN IN THE BOARDROOM

Unfortunately, the achievement of gender diversity is not at the top of, or even on, the strategic agenda of many companies. The lack of focus on increasing gender diversity is mirrored by the slow pace at which advancement has been made. Ernst & Young has analyzed the trends of female directors at U.S. corporations from 2006 to 2012. The study shows that while the rate at which women are joining U.S. boards is increasing, this pace is not one which will result in a significant strengthening of board gender diversity in the short-term. In six years, the proportion of board seats filled by women rose from 11 to 14 percent at S&P 1500 companies and from 14 to 17 percent at S&P 500 companies.⁸ An

⁷ Lisa Quest, *Getting More Women in the Boardroom: Should the U.S. Use Mandatory Quotas Like Europe?* At 2.1 (Forbes, 2011).

⁸ GETTING ON BOARD: WOMEN JOIN BOARDS AT HIGHER RATES, THOUGH PROGRESS COMES SLOWLY, 2 (Ernst & Young LLP 2012).

August 2013 mid-year update shows a slight increase in these figures: the proportion of board seats filled by women at S&P 1500 companies is now 15 percent. At S&P 500 companies, 18 percent of directors are female.⁹

Notwithstanding this growth, 26 percent of S&P 1500 companies had no female directors in 2012, 36 percent had only one female director, and 27 percent had only two female directors. Evidence shows that a strong majority of the U.S. boards with no women in 2006 have not added a woman since. Of the companies with no female directors on their boards in 2006, 62 percent remain entirely male. However, it is encouraging that a larger increase in gender diversity has occurred among boards that already had at least one female director serving. This trend indicates that these organizations recognize the positive impact that gender diversity has on board function and corporate performance. Roughly 60 percent of the companies that added a female director already had at least one woman on the board.¹⁰

The data presents another silver lining: women are joining boards at an increasing rate. In 2011, women comprised 18 percent of new board members in the U.S.; this figure has risen to 21 percent in the year 2012. Although the trends are certainly pointing in the right direction, the majority of boards are still overwhelmingly male. Only 4 percent of U.S. companies have passed the “tipping point of three” in which at least one third of the board

9 GETTING ON BOARD: 2013 MID-YEAR UPDATE, 1, (Ernst & Young LLP 2013).

10 Ernst & Young LLP, *supra* note 7, at 3.

is female.¹¹

The figures are similar in Europe where, as of January 2012, women account for just 13.7 percent of directors of the largest publicly traded companies in EU member states.¹² Although the numbers vary across the member states, as some have taken greater steps to increase gender diversity on boards than others, such overall slow progress in the total women on corporate boards has motivated leaders in Europe and around the globe to examine both the barriers women face and the possible expedients to resolve this issue of boardroom diversity.

THE “WHY” OF WOMEN IN THE BOARDROOM

It is necessary to understand why more women should assume non-executive director positions before the initiatives being taken to increase female directorship can be discussed at length. How successful getting women on boards will be depends upon why the organization is taking the initiative. According to Groysberg and Bell, organizations have three major approaches to diversity. The first perspective is that diversity exists in the population at large, thus the organization wants diversity on its board as a matter of fairness and to admonish discrimination. The second is to gain greater access to desirable customer bases

11 Ernst & Young, *supra* note 7 at 3-4. (Incidentally, there is a movement of advocates called the Thirty Percent Coalition that is pushing public company boards in the U.S. to achieve 30 percent female representation by the end of 2015. This group of leaders believes in the power of collaborate effort to achieve gender diversity across public boardrooms.)

12 DELOITTE, WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE 15 (Boardroom Diversity Review, 2013).

and markets, i.e., female consumers. The third and, according to Groysberg and Bell, most effective approach is when the company seeks board diversity in order to gain access to and learn from new perspectives. When this last approach is the goal of the corporation, diversity produces the greatest impact as it is integrated into all practices and informs all discussions and decisions.¹³

Essentially, corporations must view a lack of board diversity as both a business issue and a talent resource issue, not merely a women's issue.¹⁴ Increasing the number of women in the boardroom is obviously a "women's issue" in that it is an issue of direct concern to women. However, it should not be exclusively a "women's issue" in the sense that it should not be the responsibility of women to "solve." Often a female is assigned the role of organizing an analysis of the topic and drafting proposals to increase diversity. When all-male leadership acts this way, it is as if they are leaning down from above the glass ceiling to ask the women below why they are not making it to the top, which unconsciously communicates to these women that women are responsible for the lack of women at the top.¹⁵

The business case for increasing board diversity is clear: women are successful both at the collegiate level and in their early careers, but it has been observed that as women progress through

13 E.g. Boris Groysberg & Deborah Bell, *The Women Who Become Board Members*, HARVARD BUSINESS REVIEW, 3 (July 2013); Groysberg & Bell, *Dysfunction in the Boardroom: Understanding the Persistent Gender Gap at the Highest Levels*, HARVARD BUSINESS REVIEW 92 (2013).

14 Tim Smedley, 'Glacial' Rate of Progress Brings Calls for Quotas, FINANCIAL TIMES 1 (19 September, 2013).

15 AVIVAH WITTENBERG-COX & ALISON MAITLAND, WHY WOMEN MEAN BUSINESS 163-164 (John Wiley & Sons, Ltd, 2009).

a corporation, attrition rates increase, and at a rate higher than that of their male counterparts.¹⁶ This phenomenon decreases the pool of women available for the highest levels of corporate management and, particularly, for board of director positions. The underrepresentation of women on corporate boards indicates that companies are missing out by not being able to draw from the widest possible range of talent – and evidence shows that the competition for this source of talent is global.¹⁷

Studies have found a number of benefits associated with an increase in women at the board table. By increasing the appointment of female directors, board thinking can be transformed in a way that impacts key decisions and processes as well as day-to-day business activities. Findings generally show that more female directors are associated with increased institutional capacities, more strategic protocols and organization, and improved intra-board communication as well as overall management style.¹⁸

Gender diversity on the board creates a forum in which there are different views and ways of thinking, which allows companies to identify and address issues and solve problems in a unique way.¹⁹

In relation to the aforementioned improved overall management style, gender diversity in the boardroom has been found to improve

16 COMMITTEE FOR ECONOMIC DEVELOPMENT, FULFILLING THE PROMISE: HOW MORE WOMEN ON CORPORATE BOARDS WOULD MAKE AMERICA AND AMERICAN COMPANIES MORE COMPETITIVE 12-13 (2012).

17 *Id.* at 13.

18 Peninah Thomson & Jacey Graham, A WOMAN'S PLACE IS IN THE BOARDROOM, 119 (2005).

19 Susan Bloch, *Why We Need More Women in the Boardroom*, HUFFINGTON POST 1, 2013

employee motivation.²⁰ Female directors tend to pay attention to “soft” management issues that all-male boards often disregard. Male directors generally agree that their female counterparts are more deeply aware of social dynamics and that their focus is more in line with human issues.²¹ This social awareness and human focus of female directors is also an advantage to improving customer satisfaction and corporate brand image as a whole. A study shows that boards with female directors are more likely to take into consideration the long-term, societal perspectives of all stakeholders which, in turn, improves corporate brand image.²² According to the European Commission, 69 percent of companies that have implemented a diversity program noted an improvement in their brand image.²³

Furthermore, an increase in the number of female directors has been associated with improved corporate governance and, specifically, an amplified discussion of “tough issues.” Studies show that boards with a greater proportion of women are less inclined to let CEOs dominate. A small number of female directors have the power to influence a board’s execution of the governance function. Scholars propose several factors that may cause this enhanced governance performance. First, female directors must overcome many barriers to achieve directorships and, there-

20 Anne Sweigart, *Women on Board for Change: The Norway Model of Boardroom Quotas As a Tool for Progress in the United States and Canada*, NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS, 81, 90 (2012).

21 Thomson, *supra* note 17 at 119.

22 CED, *supra* note 15 at 13-14.

23 MCKINSEY & COMPANY, WOMEN MATTER: GENDER DIVERSITY, A CORPORATE PERFORMANCE DRIVER 10-11 (2007).

fore, are highly motivated and prepared. The result is that these women hold higher expectations of a director's responsibility. In addition, they bring to the board different perspectives as a result of diverse personal and professional backgrounds. Not surprisingly, female directors are typically outsiders and, consequently, this causes them to more likely be objective and independent.²⁴ As "outsiders," these women are often less afraid to take on the "tough issues" that board directors face. It can be the case that a group of highly cohesive individuals (i.e. an all-male board) falls into groupthink and often conflict avoidance.²⁵

Another study shows that this tendency of female directors to talk about conflict-inducing issues is related to the concept of liminality. Liminal persons are "those in transition between out-group and in-group status."²⁶ This study suggests that once a woman achieves a seat at the table, her experiences in overcoming barriers in a male-dominated field cause her to be better equipped to address the difficult issues that her male colleagues have been known to avoid due to "corporate hierarchy and male loyalty norms."²⁷ Both characteristics and skill help these barrier-breaking women to take advantage of their liminal status on

24 Nanette Fondas, *Women on Boards of Directors: Gender Bias or Power Threat?*, in *WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES* 172-173 (Ronald J. Burke & Mary C. Mattis eds., Kulwer Academic Publishers, 2000).

25 Nancy McInerney-Lacombe, Diana Bilimoria & Paul F. Salipante, *Championing the Discussion of Tough Issues: How Women Corporate Directors Contribute to Board Deliberations*, in *WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL RESEARCH AND PRACTICE* 123, 123-124 (Susan Vinnicombe et. al eds. Edward Elgar Publishing, Inc, 2008).

26 *Id.*

27 *Id.*

boards.²⁸ (It is important to note, however, that if women progress from liminality to full inclusion, they too may be more resistant to new ideas and more reluctant to upset the norms of the group by championing the discussion of tough issues.²⁹)

In addition to the benefits described above, capital markets and investors are increasingly inspecting gender diversity and including gender quality ratings as a part of their criteria.³⁰ For example, investment funds such as CalPERS in the U.S. and Amazone in Europe include gender diversity as an investment criterion. Rating agencies such as Core Rating, Innovest, and Vigeo are now developing tools to measure gender diversity.³¹

Ernst & Young reports that directors who have a diversity of expertise, skill sets, and experience strengthen board quality and consequently the corporation's bottom line.³² Based on an analysis of the world's 290 largest companies, sales and earnings at companies with at least one female director are significantly higher than at companies with no women on the board.³³ A study performed by Nancy Carter and Harvey Wagner found that companies with the most female directors (19-44 percent) significantly outperformed those with the least (0-9 percent) by 16 percent

28 *Id.* at 135-137.

29 *Id.* at 137 (The authors of this study assert that the likelihood of this scenario will need to be further investigated by future research that examines the incidence, nature, and conditions of the special contributions that women make as liminal members on the board).

30 Sweigart, *supra* note 19 at 90.

31 McKinsey & Company, *supra* note 22, at 11.

32 Ernst & Young, *supra* note 7, at 2.

33 Viviane Reding, *The Tug-of-War over the Women Quota*, European Commission (Munich, 2012).

on return on sales, 26 percent on return on invested capital, and 53 percent on return on equity.³⁴ Therefore, from both a qualitative and quantitative standpoint, it is crucial that boards are made up of a diverse group of high caliber directors in order to compete in the global economy.

BARRIERS WOMEN FACE: WHY HAS GROWTH BEEN SO SLOW?

When asked about the lack of gender diversity in the boardroom, Nancy Green, a director at Hallmark Cards, responded: “I don’t think it’s a conspiracy to not have women.”³⁵ Agreeing that it is not a conspiracy, then what is to “blame” for the slow growth of women in the boardroom? Men and women differ in their perspectives regarding delays to this growth. In a 2012 survey, 45 percent of male directors said that the reason why the number of female directors has barely changed is a lack of qualified candidates or a “leaky pipeline,” but only 18 percent of female board members agreed.³⁶ Male directors often think that there are not enough qualified businesswomen. Meanwhile, female directors believe that the many barriers, biases, and other challenges faced from boards and nominating committees make it extremely difficult for qualified women to break into the networks and actually attain board directorship positions.³⁷

34 E.g. Catalyst. *Why Diversity Matters*, <http://www.catalyst.org/issues/diversity-matters>; Joanna Barsh & Lareina Yee, *Unlocking the Full Potential of Women in the U.S. Economy*, THE WALL STREET JOURNAL 5 (2011).

35 Jeff Green, *The Boardroom is Still the Boys’ Room*, BLOOMBERG BUSINESSWEEK, at 2:2 (2012).

36 *Id.* at 1

37 Boris Groysberg & Deborah Bell, *The Women Who Become Board Members*, HARVARD BUSINESS REVIEW, 2 (July 2013);

INEXPERIENCED VS. UNQUALIFIED

These differing perspectives can be attributed to how male and female directors answer the “qualifications question.” Men tend to view inexperience as a fixed and disqualifying trait. On the other hand, women see inexperience as a manageable fact that can be addressed through learning and development.³⁸ Women do not equate “inexperienced candidates” with “unqualified candidates.” This cognitive disconnect between male and female directors helps to explain what the men consider to be a lack of board-ready women.

IMBEDDED MINDSETS

Along with this disparity comes what some scholars consider to be the ultimate barrier women face: imbedded mindsets. These entrenched beliefs can be institutional as well as individual, and are a powerful force that limits opportunity for many women even today. These beliefs are rooted in the corporate culture that has evolved over decades and, not surprisingly, reflects the values, motivations, and views of the historically male majority. These mentalities often lead to the assumption that women cannot handle certain positions.³⁹ For example, when women are evaluated for promotions, they are judged primarily on performance, while

38 Groysberg & Bell, *Dysfunction in the Boardroom: Understanding the Persistent Gender Gap at the Highest Levels*, HARVARD BUSINESS REVIEW 95 (2013).

39 Joanna Barsh & Lareina Yee, *Unlocking the Full Potential of Women in the U.S. Economy*, THE WALL STREET JOURNAL 4 (2011).

men are often promoted based upon their potential.⁴⁰ No matter how comprehensive the diversity program, it cannot by itself eradicate these imbedded mindsets. There is a need for systematic, organizational change to overcome this barrier that women face in achieving director positions.⁴¹

MOTHERHOOD

Undoubtedly, when discussing the barriers that women face in attaining board seats, one must consider the role that motherhood plays throughout the progression of a woman's career. Referred to as the "double burden" syndrome, it is important to recognize the difficult task that motherhood imposes on working women.⁴² Balancing work and domestic responsibilities is no easy feat. Undoubtedly, becoming a mother alters the vision that these women have of their world, giving different meaning and purpose to their work. While research shows that most working mothers who return to the workforce do so because they want to, having children does change the way these women view their work.⁴³ On the other hand, it is not uncommon for women to leave employment for an extended time during childrearing years. Unfortunately, early- and mid-career development can be strongly impacted by this decision, which places these mothers behind their colleagues

40 *Id.* at 6.

41 *Id.* at 4.

42 GEORGES DESVAUX, SANDRINE DEVILLARD & SANDRA SNACIER-SULTAN, *WOMEN MATTER 2010: WOMEN AT THE TOP OF CORPORATIONS - MAKING IT HAPPEN 6* (McKinsey & Co., 2010).

43 Leimon, Mascovici & Goodier, *supra* note 5, at 30.

in terms of later advancement and even board achievement.⁴⁴ In the U.S., 62 percent of women perceive family obligations as an obstacle to promotion.⁴⁵

Also, many mothers may work part-time or turn down promotion in order to maintain a better work-life balance.⁴⁶ But the concern for having a life outside of work affects all groups within the workforce, not just mothers. Research shows that attitudes among fathers, mothers, and childless workers are converging: 50 percent of fathers with one child and 55 percent of women without children say that they will not accept a new position that results in a reduction of work-life balance.⁴⁷

RETICENCE

Interestingly, female respondents to a global survey identify another barrier affecting the slow growth of women in the boardroom: the reticence of women to advocate for themselves. Many women shy away from promoting themselves and as a result hinder their achievement in the corporate world.⁴⁸ The beliefs many women have about themselves may stop them from even striving for advancement. Research shows that many women have a tendency to wait to fill in more skills or just wait to be asked rather than jumping at an opportunity to advance.⁴⁹ These limiting beliefs are causing women to stand in their own way, creating an

44 CED, *supra* note 15, at 15.

45 McKinsey & Company, *supra* note 22, at 8.

46 CED, *supra* note 15, at 15.

47 Barsh & Yee, *supra* note 26, at 6.

48 Desvaux, Devillard & Snacier-Sultan, *supra* note 29, at 6.

49 Barsh and Yee, *supra* note 26, at 4.

additional, personal barrier to their own success.

BARRIERS WOMEN FACE ON THE BOARD

Do not be mistaken, the barriers that women face do not stop once they achieve a seat at the board table. These board women, sometimes referred to as “survivors” because they were able to make their way up the corporate ladder despite the barriers, can face intense scrutiny from the other directors. Board dynamics can kill all of the benefits of diversity that they bring with them if the diverse individuals are not integrated properly, if the board is not a real team.⁵⁰

Many board women have stated that they were not treated as full members of the group, citing that male directors seem oblivious to the fact that they may create hostile board cultures. In fact, 87 percent of female directors reported facing gender-related hurdles once on the board. There are four common types of obstacles that women say they face: one, they are not being heard and listened to, two, they are not being accepted as equals or as part of the “in” group, three, they find it difficult to establish credibility, and four, they feel that they are seen as the “voice of women,” stereotyped by expectations of women’s behavior. However, the majority of male directors (56 percent) disagree, believing female directors do not face any hurdles not also faced by their male counterparts.⁵¹ The men who do agree that women face additional hurdles on the board claim “limited access to and acceptance on

50 Groyberg & Bell, *supra* note 34, at 3.

51 Groyberg & Bell, *supra* note 35, at 94.

boards because of weaker networks and the old boys' club" as the number one obstacle that women face.⁵² So, it is clear that bringing in qualified female directors is not the end-all; it is essential that women be fully integrated onto their boards.

TIPPING POINT

The number of women on a board also plays a role in leveraging diversity. It was mentioned above that only 4 percent of U.S. companies have passed the "tipping point of three" in which at least one third of the board is female. The tipping point of three can also be used in a different context, referring to three women on a board of any size.⁵³ Jan Babiak, a member of the "first and only club," cites what it is like to be the first and only woman in the boardroom. The lone woman is largely an irritation to the men in the room because she disrupts the boys' club; she is resented by the men who have to behave slightly differently with a woman in the room. Also, the single female board director is faced with the burden, and the stereotype, of representing all of womankind.⁵⁴

According to Babiak, a second woman on the board poses a unique set of difficulties. When there are two women, she feels that there is a societal need for them to support each other, wheth-

52 *Id.* at 95.

53 THE GENDER EQUALITY PROJECT. GENDER IMBALANCE IN CORPORATE BOARDS IN THE EU (2011). (Varying objectives have been recommended as the "tipping point" to gender diversity in the boardroom. Determining the minimum goal for the underrepresented sex on corporate boards requires an understanding of the critical mass. The most common objectives for corporate boards to benefit from gender diversity are 30 percent representation or 3 women on a board of any size. These are considered the critical mass in that, at such a point, there are enough women to change the dynamics of the group.)

54 Interview with Jan Babiak at Lipscomb University (21 June 2012).

er or not they agree, and avoid what may appear to be a “catfight” to the men in the room. When there are three female directors, however, then someone can disagree. The actions of the room move toward the societal norm.⁵⁵ Studies show that three or more women on the board create an environment where women are no longer seen as outsiders and are more able to influence both the content and process of board discussions; they are more comfortable raising a variety of issues which, in turn, benefits the board.⁵⁶ Also, Babiak addresses that, at this point, there begin to be diversions of thinking among the women. Because, just as any one man does not represent all men, any one woman does not represent all women.⁵⁷

STEREOTYPES

Regardless of whether or not the tipping point of three has been reached, women face a number of stereotypes on corporate boards of directors. One such stereotype is referred to as the “Iron Maiden” phenomenon. This situation occurs when the minority woman or women on the board insist on being fully included in the group but, at the same time, cut off all sexual innuendoes and resist behaving as the boys do. She will be distanced by the male majority and regarded as a “bully broad” whether or not that is the

55 *Id.*

56 Sumru Erkut, Vicki W. Kramer & Alison M. Konrad, *Critical Mass: Does the Number of Women on a Corporate Board Make a Difference?* WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL RESEARCH AND PRACTICE 222, 228 (Susan Vinnicombe, et al., eds., Edward Elgar Publishing Limited, 2008).

57 Babiak, *supra* note 51.

reality of the situation.⁵⁸

On another note, the “Queen Bee” stereotype has been used to classify a number of female directors. This typecast is specific to situations in which there is only one woman on the board. A woman is classified as a Queen Bee when she tries to exclude other women from achieving the same level or status that she holds. The first and only female board director may treat other women coldly due to insecurity and perhaps a warped sense of competition. These actions have been referred to as “women’s cruelty to women.”⁵⁹

These stereotypes that female directors encounter affect how women as a whole are viewed even when being considered for directorships. Many scholars and world leaders believe the barriers women face both in achieving and after achievement of board positions are too crippling to the significant advancement of women in the boardroom at this time. They suggest quotas to improve the growth rate of female appointment to the board.

QUOTAS ON WOMEN IN THE BOARDROOM

Recent support for quotas to enhance the number of women on the boards of corporations comes primarily from Europe. Gender diversity is considered a founding principle of the European Union and as such the European Commission has taken steps to address gender equality. In 2006, the European Commission issued

58 DOUGLAS M BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* 66-67 (NYU Press 2007).

59 *Id.* at 67.

its first “Strategy for Equality between Women and Men.” The Commission issued the Second Strategy in 2010, which explicitly includes the issue of women on corporate boards of directors, making the issue a matter of high priority. Shortly thereafter, in April 2011, the Commission issued a Green Paper on Corporate Governance in which parties were invited to comment on a number of items, including the issue of women on corporate boards of directors. All respondents were in favor of more diverse boards, but few were in favor of strong measures such as mandatory quotas; these parties preferred self-regulation. Viviane Reding, EU Justice Commissioner, answered this response by calling on publicly listed companies to sign the “Women on the Board Pledge for Europe.” However, one year later, a progress report showed that only 24 public companies had signed the pledge and voluntarily adopted measures to increase the representation of women on the board.⁶⁰ As a result, Reding proposed a quota on November 14, 2012 that would have forced public companies in the EU to appoint women to 40 percent of their non-executive board seats by 2020, or risk tough sanctions.⁶¹ This original proposal was seen as too inflexible and faced fervent opposition from many leaders, especially those in the United Kingdom and Germany.

Due to opposition, a “watered-down” version of the quota

60 PAUL HASTINGS, *BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM* 58-60 (2013). <http://www.paulhastings.com/genderparity/>.

61 E.g. Gemma Varriale, *Women on Board Quota to Threaten Europe Multinationals?*, *INTERNATIONAL FINANCIAL LAW REVIEW* 3 (2012); Spiegel Online, *Closing the Gender Gap: European Commission Calls for Quotas* 2 (14 November 2012). <http://www.spiegel.de/international/europe/european-commission-moves-towards-approving-board-gender-quotas-a-867181.html>.

for women sitting on company boards was proposed in the EU. The new proposal makes the 40 percent quota an objective rather than a binding target and allows member states to determine the type of sanctions to impose on non-compliant corporations, as long as they are both appropriate and dissuasive.⁶² The affected publicly traded companies include those with more than either 250 employees or €50 million in annual revenues.⁶³ In order to become law, the proposal must be approved by the European Parliament and the Council of the European Union.⁶⁴ Although rejected in its original form, the quota could still become law; it is believed that the softer, objective-style quota will help in gaining the political support necessary for it to be passed.⁶⁵

NORWAY

Many European nations support quotas and had already adopted legislation to promote quota-driven gender equality on company boards prior to the EU directive.⁶⁶ In 2006, Norway became the first nation to set targets for board diversity and since 2008 Norway has enforced a gender quota requirement for corporate board directorship. Norway's Companies Act specifies that

62 Danielle Myles, *Will Europe's Women on Boards Quota Work?*, INTERNATIONAL FINANCIAL LAW REVIEW (2012).

63 Gemma Varriale, *Women on Board Quota to Threaten Europe Multinationals?*, INTERNATIONAL FINANCIAL LAW REVIEW 1-2 (2012).

64 Spiegel Online, *Closing the Gender Gap: European Commission Calls for Quotas 2* (14 November 2012). <http://www.spiegel.de/international/europe/european-commission-moves-towards-approving-board-gender-quotas-a-867181.html>.

65 Smedley, *supra* note 13, at 1.

66 *EU Defends Women-on-Boards Plan*, BBC News (14 November 2012).

each sex must be represented by at least 40 percent on the boards of public companies.⁶⁷ A violation of the Act is punishable by dissolution of the corporation.⁶⁸ As a result of the quota, Norway has the greatest number of female directors among the European nations; women make up 42 percent of boards of the largest listed companies in Norway.⁶⁹

After more than five years of implementation, studies vary on the outcome that gender quotas have had on the bottom line of corporations in Norway. Some studies show that the quotas have resulted in marginal increases in company profits, while others show no changes or a slight decline. A University of Michigan study performed by Amy Dittmar and Kenneth Ahern found that the increased number of women on boards in Norway led to a drop in company value.⁷⁰ In the three days following the unanticipated announcement of the new law, firms experienced on average a 2.6 percent drop in company value. Firms with no women on the board experienced a five percent drop in value at that time.⁷¹ Further declines proceeded throughout the year as women were added to corporate boards in compliance with the law. However, the declines do not correlate to the gender of the new board members, according to Dittmar and Ahern. They attribute the lack of

67 Sweigart, *supra* note 19, at 82.

68 *Id.* at 89.

69 Deloitte, *supra* note 11, at 25.

70 Sweigart, *supra* note 19, at 84.

71 (In order to remove the impact of other market trends, Dittmar and Ahern ran differences-in-differences tests of the announcement returns for Norwegian and U.S. firms by gender representation. The results indicate that an average Norwegian firm suffered a substantial market value loss at the announcement, compared to U.S. firms in the same industry.)

experience of these newly appointed directors as the cause of the decline. The women who were appointed to the board in order to meet the quota had less experience in upper management than their male counterparts and the women who had already served as directors.⁷² However, it is ultimately too early to measure the full financial impact of the quotas in Norway.⁷³

Although Norway was the first to take action, many European nations support the use of quotas to increase gender diversity in the boardroom. Other member states that now have national quota legislation include France, Italy, Belgium, Denmark, Portugal, Austria, the Netherlands, Spain, Greece, Finland, and Slovenia.⁷⁴

IMPLICATIONS OF QUOTAS

Although the impact of board diversity quotas on the bottom line of corporations is of significant interest and debate, the social impacts of such quotas are a factor as well. One argument against quotas is that they inevitably give rise to tokenism. Clodagh Hayes, partner with Linklaters in London, maintains that she is fundamentally opposed to quotas because they lead to a suspicion that those women had only been appointed for legal purposes, rather than reasons of merit.⁷⁵

In 1977, Professor Kanter of Harvard University published a book which deals with the effects of tokenism. Her land-

72 Amy Dittmar, *Using Quotas to Raise the Glass Ceiling: The Norway Numbers*, THE NEW YORK TIMES ONLINE (22 March 2010).

73 Leimon, Mascovici and Goodier, *supra* note 5, at 189.

74 Reding, *supra* note 30, at 4.

75 Varriale, *supra* note 60, at 1-2.

mark study identifies three consequences of a businesswoman's status as a token: visibility, polarization, and assimilation. Visibility puts pressure on the token as an outcome of intense scrutiny. Polarization makes it challenging for the token to integrate into the group, which could lead to social isolation. The new female director may be alienated from the other board members (both the men and the women who came up "the hard way"). Assimilation results in the stereotyping of token minorities in such a way that the token female is not seen as an individual, but rather a representative of the whole gender.⁷⁶ Therefore, Kantor's research shows that although the token woman does not have to work hard to have her presence noticed, she does have to work hard to have her achievements noticed.⁷⁷

Along with the drawback of tokenism, quotas have led to a phenomenon in which a few of the most qualified women sit on several boards. In Norway, these women have been dubbed the "Golden Skirts." The overall number of female directors in Norway remains stable despite the fact that all publicly listed firms must comply with the 40 percent quota.⁷⁸ Multiple corporations appoint the few "Golden Skirts" to their boards, rather than expanding their pool of candidates.⁷⁹ This may go so far as to create the impression that these women are only halfheartedly involved, which could result in a damaged perception of the role

76 Sweigart, *supra* note 19, at 94-95.

77 Branson, *supra* note 55, at 114.

78 Sweigart, *supra* note 19, at 83.

79 Varriale, *supra* note 60, at 2.

that women have on boards of directors.⁸⁰ Also, sitting on so many boards of directors simultaneously can result in inadequate performance. This issue of “overboarding” is not unique to women. In the 1970s, former U.S. Supreme Court Justice Arthur Goldberg resigned from the eight boards on which he sat explaining that, even with his talents, he could not concurrently perform at the level of sufficiency necessary for good corporate governance.⁸¹

NON-QUOTA INITIATIVES IN THE UK

As was mentioned above, leaders in the U.K. largely oppose the use of quotas in the advancement of women on boards of directors. In a 2011 report, Lord Davies made recommendations to address the imbalance of women and men in the boardroom. Davies encourages a business-led approach to improving the proportion of female directors. He asks that corporations set voluntary targets for the number of women that they aim to have on their boards. This approach requires the cooperation of investors, chairmen and chief executives, and search firms in order to succeed. Governments are to take more of a supporting role.⁸² In an April 2013 update, Davies was pleased to announce that businesses are responding to his earlier voluntary call for change. The FTSE 100 is on a path to achieve 25 percent women on boards by 2015 and 34.4 percent by 2020 as long as the current momentum

80 Sweigart, *supra* note 19, at 92.

81 Branson, *supra* note 55, at 155.

82 Hastings, *supra* note 57, at 108.

is maintained.⁸³

Davies' viewpoint is founded on this principle: "setting down stretching but achievable targets, while putting in place policies (or a route map) to allow you to get there and measuring progress along the way, is a proven method of getting things done." This strategy is a way for the board to show its commitment to the issue while also sending a message to stakeholders that the company takes gender diversity on the board seriously.⁸⁴ Companies in the U.K. are required to report on their diversity policies (including gender). They must report any measurable objectives and progress made against those objectives. Also, a voluntary Code of Conduct for Executive Search Firms is in place. So far 47 search firms are following the Code which signifies their commitment to identifying and recruiting the best female talent for corporate boards. Such non-quota initiatives are in line with the voluntary business-led approach to which the U.K.'s government is committed. Davies states, "In today's tough economic environment business must retain the flexibility to respond to changing circumstances and have the freedom to make decisions." It is his hope that the ability of the government to make real progress in the U.K. will help to show the EU that European level quota legislation is unnecessary for significantly improving board gender diversity.⁸⁵

83 LORD DAVIES OF ABERSOCH, WOMEN ON BOARDS, APRIL 2013 (UK Department for Business, Innovation & Skills, April 2013).

84 *Id.* at 8.

85 *Id.* at 5.

NON-QUOTA INITIATIVES FOR THE U.S.

Corporate leaders in the United States are in search of a voluntary, market-based solution to drive board diversity.⁸⁶ For that reason, initiatives recommended to increase the number of women on boards in the U.S. are modeled after the non-quota initiatives in place in the UK and include softer forms of short-term goal setting, targeting, and disclosure. But first, in order for any initiative to be effectively implemented, the CEO must be wholly committed. As one study points out, “Positive practices stand little chance of developing fully if senior management does not commit to changing the culture of the organization under the sponsorship of the CEO.”⁸⁷ Awakening leadership to the importance of women serving on boards is the first step, and a crucial one at that.

Once the CEO and senior leadership team is, for a lack of better words, on board with the idea, they must define the goals of the company and design a plan to achieve those goals. In all aspects, businesses operate more effectively when they have well-defined goals and accountability for reaching those goals. For this reason, the U.S. should follow the U.K.’s initiative in asking companies to voluntarily adopt and report on stretching, yet clear, targets for the appointments of female directors. By doing so, corporations will be forced to closely examine the issue of board gender diversity and set aspirational targets that they will work to achieve.⁸⁸

In order for corporations to achieve their adopted targets for gender diversity at the board table, change needs to occur in

86 Ernst & Young, *supra* note 7, at 7.

87 Desvaux, Devillard & Snacier-Sultan, *supra* note 29, at 15-16.

88 CED, *supra* note 15, at 17.

the director nomination process as a whole. Research on the selection and appointment process of directors is lacking and, thus, board appointments remain a black box.⁸⁹ Even though the process is largely a mystery, many people suggest two possible paths to take in order to get on a corporate board. The first and most common suggestion is that an individual break into the “right” network. The idea here is that board members and executives rely on their own (mostly white, mostly male) networks to fill empty seats. The second path is to seek a progression of board seats; for example, one may begin on a not-for-profit or community board, which may eventually bring about appointment to a privately held corporate board and ultimately a publicly held corporate board. Both approaches are flawed in that they are lacking in transparency and objective measures.⁹⁰

A small number of boards are beginning to implement a more objective nomination process. These boards select each member based upon the skill sets and attributes that are needed in order for the board to be most effective. When a board is designed in this way rather than through personal networks, it is often times more diverse and better equipped to execute its many functions.⁹¹ The future of director selection should be increasingly objective and focused on the skills of the candidates. Of course, this idea can be difficult to implement when a board reflects competing constituencies.

89 Groyberg & Bell, *supra* note 35, at 89.

90 Boris Groyberg & Deborah Bell, *Joining Boards: It's Not Just Who You Know That Matters*, *Harvard Business Review* (16 July 2013). <http://blogs.hbr.org/2013/07/joining-a-board-who-you-know-m/>.

91 *Id.* at 1.

Since search firms play such a large part in the nomination process, their role must be addressed as well. In order to achieve board diversity goals in the short-term, corporations and, subsequently, search firms must expand the search for female directors. They must look beyond former or sitting CEOs since women are underrepresented in that group as well.⁹² By expanding the search criteria, qualified women who lack the CEO credential will be considered. Additionally, the National Football League's "Rooney Rule" could pose a solution. The "Rooney Rule" requires all NFL teams to interview at least one minority when filling a head coaching position; the teams are not required to hire that individual, but they must make a good faith effort when assessing the candidates. In a similar way, companies could require search firms to include a defined proportion of women when considering board director candidates.⁹³

Another issue involving the board nomination process centers on the concept of creating more vacancies for women to have the opportunity to fill. Supporters of such measures as term limits and retirement ages maintain that the increasing pace at which women are being elected to boards will not amount to much in the short-term if very few positions open up each year. Groysberg and Bell see term limits as a way to remove underperforming directors while creating vacancies for women to fill.⁹⁴ However, some U.S. investors are generally averse to mandatory term limits, just as they are to quotas in increasing the number of female

92 Ernst & Young, *supra* note 7, at 4.

93 CED, *supra* note 15, at 15-17.

94 Groysberg & Bell, *supra* note 34, at 2.

directors.⁹⁵

The setting of stretching goals must then be followed by a route map to get there. In the U.S., this targeting may take the form of individual development programs and support for women's networks. Aspirational targets set by corporations will not be met at the board level if diversity is not considered at every level of the organization. Individual development programs address this concern through two channels: skill-building programs aimed at women and encouragement or mandates for senior executives to mentor junior women.⁹⁶ By targeting gifted female employees and mentoring them through aggressive programs, the pool of available and qualified female candidates for board positions will be increased.⁹⁷ Women's networks help by giving women a voice, supporting their development, and creating a way for them to influence and challenge policies and decisions. In addition, the founders, leaders, and active members of women's networks tend to become better known both formally and informally in the company, raising the profile of female leadership.⁹⁸

For a company's plan to be effective, progress against an initiative must be measured. So, in addition to goal setting and targeting, public disclosure in the U.S. may help to increase the number of women in the boardroom. In December 2009, the SEC adopted an amendment to Regulation S-K which provides for disclosure of whether, and if so how, a nominating committee consid-

95 Ernst & Young, *supra* note 8, at 5.

96 Desvaux, Devillard & Snacier-Sultan, *supra* note 29, at 15.

97 CED, *supra* at note 15, at 18-19.

98 Thomson, *supra* note 17, at 173.

ers diversity for director candidates. However, the rule does not have a set definition of diversity.⁹⁹ Ernst & Young analyzed the subject matter of the diversity disclosures of Fortune 100 companies and found that a mere 18 percent of companies specifically and voluntarily disclose the gender/ethnic makeup of the board.¹⁰⁰ The U.S. should consider adopting the U.K. policy in which all publicly traded companies must disclose the number of women who hold senior management positions and are employed throughout the organization as a whole, as well as the number of women who serve on their boards.¹⁰¹ Forced to justify any lack of gender equality, corporations may be more likely to do something about the imbalance in order to avoid embarrassment or criticism.¹⁰²

From a long-term perspective, the underrepresentation of women in the boardroom is considered to be a consequence of women lacking at the top executive levels. Despite the number of qualified women outside of the executive suite, studies show that executive leadership is the qualification most commonly cited by companies when looking for board directors. This is why non-executive boardroom quotas can be viewed as a bad answer to the wrong problem. U.S. companies can increase the number of qualified female board candidates in the long-term by supporting the advancement of women at all levels of the corporation.¹⁰³ There should be a “pipeline” of talented female leaders who make

99 E.g. Ernst & Young LLP, *supra* note 8, at 5; CED, *supra* note 15, at 17.

100 Ernst & Young, *supra* note 8, at 5.

101 Lord Davies, *supra* note 80, at 11.

102 Sweigart, *supra* note 19, at 88-89.

103 Ernst & Young, *supra* note 7, at 5.

it to the upper executive and board levels of a corporation and, once the current “leaky pipeline” is fixed, it will continue to keep flowing, supplying corporations with qualified female board candidates for years to come.¹⁰⁴

104 Varriale, *supra* note 60, at 3.

