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A QUEST TO INCREASE WOMEN IN CORPORATE BOARD LEADERSHIP: COMPARING THE LAW IN NORWAY AND THE U.S.

Angela R. Foster[†]

Abstract: Gender imbalance is a persistent problem on corporate boards the world over. Women are severely underrepresented in these important leadership positions within public companies. Norway took a big swing at inequality in 2003 by enacting a quota law requiring at least 40% representation of each gender on boards of directors of public companies. Norway now has the highest percentage of women serving on corporate boards. Through Securities and Exchange Commission regulations, the United States enacted a diversity disclosure rule that requires public companies to divulge their policy regarding gender in board hiring. The disclosure rule has proven ineffectual, and at the current rate of change, it will take 70 years for women to gain equal seats on U.S. corporate boards.

Many stereotypes about women in the workplace persist, making it difficult for women to climb to the top of the corporate hierarchy. A closer look at the barriers to women's success reveals that advocates of gender equality on corporate boards may need to change tactics in the U.S. and advocate for stronger government intervention in the private sphere in order to achieve change more quickly. Short of imposing a quota, which is highly unlikely in the United States, what can advocates learn from the advancements made in Norway?

I. INTRODUCTION: THE PERSISTENT PROBLEM OF GENDER IMBALANCE ON CORPORATE BOARDS

Women, worldwide, are severely underrepresented on corporate boards of directors. Women hold only 12% of board seats globally, and only 4% of companies are chaired by women.¹ Nearly one-fifth of the world's 200 largest companies have no woman directors at all.² Around the globe,

[†] The author would like to thank Professor Melissa Durkee for her time, wisdom, and insight.

¹ Press Release, Deloitte, Women joining but not leading boardrooms globally (June 10, 2015) (<https://www2.deloitte.com/global/en/pages/about-deloitte/articles/women-joining-not-leading-boardrooms-press-release.html#>); *see also* DELOITTE, WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE (4th ed. 2015), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Risk/gx-cg-women-in-the-board-room-a-global-perspective4.pdf>.

² BIZ DIVAS & KHAITAN & CO., WOMEN ON BOARDS: A POLICY, PROCESS AND IMPLEMENTATION ROADMAP 2 (2014), http://bizdivas.in/wp-content/uploads/2014/09/women_on_boardV3-PRINT.pdf.

corporate boards lack gender diversity, with the exception of those countries that have mandated gender quotas.³

The question of who gets appointed to boards of directors of publicly traded corporations is an important one because boards affect the lives of millions of employees and consumers.⁴ Boards shape companies' financial and operational policies, and as recent history has shown, scandal or poor judgment on boards of directors at large companies can have enormous costs for the global economy and society at large.⁵ In addition to being highly influential, board positions are among the most highly paid and prestigious positions in the business world.⁶

In the United States, recent studies indicate that although gender diversity has increased a small amount on public company boards, directors do not reflect the demographics of the U.S. population or the labor force.⁷ Similarly, in the United States 19.2% of corporate board seats are held by women.⁸ At current rates of change in the U.S., it will take almost seventy years before women's representation on corporate boards is equal with men's.⁹

In contrast, Norway, Sweden, and Finland all have quota laws and have the highest percentages of women on boards at 40.9%, 27% and 26.8% respectively.¹⁰ As of 2013, women held only 13.7% of board seats in the

³ Deborah L. Rhode & Amanda K. Packel, *Diversity On Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 379 (2014).

⁴ *Id.* at 378.

⁵ *Id.*

⁶ Angelo Young, *India Women's Rights: Nearly A Third of India's Big Companies Could Miss Deadline To Appoint Women To Corporate Boards*, INT'L BUS. TIMES, Mar. 16, 2015, <http://www.ibtimes.com/india-womens-rights-nearly-third-indias-big-companies-could-miss-deadline-appoint-1848206>; Seletha R. Butler, "Financial Expert": *A Subtle Blow to the Pool and Current Pipeline of Women on Corporate Boards*, 14 GEO. J. GENDER & L. 1, 20 (2013) [hereinafter, Butler, *Financial Expert*].

⁷ Regina F. Burch, *Worldview Diversity in the Boardroom: A Law and Social Equity Rationale*, 42 LOY. U. CHI. L.J. 585, 597 (2011).

⁸ Catalyst Inc., *2014 Catalyst Census: Women Board Directors*, 1, 1 (2014), <http://www.catalyst.org/knowledge/2014-catalyst-census-women-board-directors> [hereinafter 2014 Catalyst Census].

⁹ Rhode & Packel, *supra* note 3 at 381.

¹⁰ AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 3 (2015).

largest publicly listed companies in the European Union, which itself does not impose any quota requirement.¹¹

The current worldwide gender disparity on boards of directors indicates that the most respected and high-paying positions in the corporate world are not open to women. Attention to gender equality in the workplace and on boards is important because work is the avenue by which men and women alike attain the most basic necessities they need to live.¹² Gender biases that systematically disadvantage women permeate corporate culture, reducing women's access to sustaining and meaningful work.¹³ The availability of meaningful, fairly compensated work, or lack thereof, has broad impacts, influencing whether women are educated, where and with whom they live, whether they have children, or whether they work at all.¹⁴ Equality for women means having at least "as much" structural access to power as the dominant group has.¹⁵

As women struggle for equal representation in corporate workplaces, the private sector has consistently fought the idea that governments have an affirmative duty to promote gender equality on boards of directors. The role of the state in helping to equalize opportunities in private spheres such as the workplace is greatly debated.

Government intervention strategies can range from "weak" to "radical."¹⁶ In working to increase gender diversity on boards of directors in publicly traded companies governments have used a range of strategies from "comply and explain" disclosure requirements (as seen in the U.S.) to strict

¹¹ Fawn Lee, Note, *Show Me The Money: Using the Business Case Rationale to Justify Gender Targets in the EU*, 36 *FORDHAM INT'L L.J.* 1471, 1473 (2013).

¹² Meredith Render, *The Man, The State and You: The Role of the State in Regulating Gender Hierarchies*, 14 *AM. U.J. GENDER SOC. POL'Y & L.* 73, 108 (2006).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 104.

¹⁶ Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 *BERKELEY BUS. L.J.* 55, 71 (2009) (characterizing Norway's intervention into the private sector by way of the quota law as "radical" and characterizing more moderate intervention as "soft." Here I have used "weak").

quota systems (as seen in Norway).¹⁷ The United States exemplifies a “weak,” disclosure-based intervention style while Norway has adopted a “radical” intervention strategy, requiring that corporate boards of public companies maintain near gender parity on their boards or risk dissolution.¹⁸

This comment provides an overview of American and Norwegian laws regarding diversity on boards of directors and discusses ways that Norway’s successful quota law might influence the policy discourse in the United States. Part II of this paper looks to scholarship from the corporate business sector and the social sciences to provide an in-depth discussion of the barriers to entry that women face in entering corporate leadership, including the many ways that gender discrimination is institutionalized within the business sector’s policies and procedures. Part III will discuss the social political climate that has led to weak regulatory intervention in the United States through a disclosure-based board diversity rule. Part IV will discuss the quota law in Norway and some of the social and political aspects of Norwegian society that led to this radical but effective government intervention. Lastly, this Comment will discuss lessons that American advocates of gender equality on boards can take from Norway’s successful transition to near-gender parity on public boards of directors.

II. BARRIERS TO ENTRY

The continued disparity between the percentage of women in the workforce and their low representation on boards of directors indicates that women are experiencing significant barriers that are keeping them from advancing.¹⁹ Additionally, the mere passage of time will not eliminate these barriers.²⁰ A variety of unseen factors are impeding the upward mobility of women in corporations, such as lack of mentorship, role models, and sponsors; pay disparities that make it less worthwhile for women to work in

¹⁷ Douglas M. Branson, *Initiatives to Place Women on Corporate Boards of Directors—A Global Snapshot*, 37 J. CORP. L. 793, 802–03 (2012); Deborah L. Rhode and Amanda K. Packel, *Diversity On Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 418 (2014).

¹⁸ See Rosenblum, *supra* note **Error! Bookmark not defined.**, at 71–72.

¹⁹ Lisa M. Fairfax, *Women and the “New” Corporate Governance: Clogs in the Pipeline, The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579, 580 (2006).

²⁰ *Id.*

high demand and highly demanding positions; and an unwillingness among managers to give women responsibility commensurate with their male colleagues.²¹

Board appointments may be influenced by overt racism and sexism, but unconscious biases are more common.²² While overt discrimination is less common than it used to be, discrimination continues as a result of institutions in the workplace, including “corporate culture, informal norms, networking, training, mentoring and evaluation.”²³

A survey of the relevant literature shows that the most common barriers to women’s advancement in corporate leadership are, (A) in-group bias that causes current leaders to promote subordinates who they perceive to be like them, (B) androcentric values in the workplace and negative assumptions about women’s competence, (C) lack of access to corporate management and executive-level leadership experience, and (D) continued reliance on the prevalent but ineffectual “business case” argument.

A. *In-Group Bias Among Current Corporate Board Members Causes Boards Not to Seriously Consider Woman Candidates*

One barrier to entry for women is “in-group” bias, which is the preference that individuals feel for others who are like them in important respects such as race, ethnicity, and gender.²⁴ In-group bias is particularly demonstrated by groups that enjoy social privilege²⁵ and in settings where selections are highly subjective, such as board appointments.²⁶ Furthermore, in-group bias often keeps women out of the informal networks of mentorship

²¹ DHIR, *supra* note 10, at 29; Render, *supra* note 12, at 74.

²² DHIR, *supra* note 10, at 54.

²³ Render, *supra* note 12, at 89 (using the term “second generation” discrimination to describe the less overt forms of workplace discrimination that are more common in the modern workplace) (quoting Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 420 (2004)).

²⁴ Rhode & Packel, *supra* note 3, at 404; *see also* McKinsey & Co., *Women Matter*, 17 (2012), https://www.mckinsey.de/files/mckinsey_women_matter_2012.pdf (stating that people “feel more comfortable promoting those who behave and think most like themselves—in other words, men—and fail to appreciate different leadership styles”).

²⁵ *See* DHIR, *supra* note 10, at 50–51.

²⁶ Rhode & Packel, *supra* note 3, at 405.

that can lead to board appointments.²⁷ Board members tend to choose candidates who are within the board nominating committee's or company CEO's "circle of acquaintance," and those committees and acquaintanceships do not include many qualified women.²⁸ For example, one executive at a large European corporation told researchers that he believed people within his company felt "the top jobs somehow belonged to men."²⁹

The supposed lack of qualified woman candidates for board positions is actually a problem of implicit cognitive biases coupled with the fact that the networks of existing directors are limited and impede entry of outsiders.³⁰ It is illustrative, for example, that male and female directors explain the lack of women on corporate boards differently.³¹ Men tend to attribute the gender imbalance to a "pool problem," citing lack of women in executive-level positions as the reason that fewer women are on boards.³² On the other hand, women directors are more likely to explain the lack of female directors as a function of established male networks and the influence of those informal networks on board appointments.³³

The board nomination process can be particularly "clubby" with all-male executive committees or male CEOs looking to nominate friends and associates who are also predominately male.³⁴ For this reason, getting more women into entry-level and middle management-level positions alone will not necessarily get them into the most competitive leadership positions—men in power still overlook capable women because they are looking for candidates who look like them.³⁵

²⁷ *Id.*

²⁸ Burch, *supra* note 7, at 601.

²⁹ McKinsey & Co., *supra* note 24, at 17.

³⁰ DHIR, *supra* note 10, at 10.

³¹ *Id.* at 38.

³² *Id.*

³³ *Id.*

³⁴ Tamara S. Smallman, Note, *The Glass Boardroom: The SEC's Role In Cracking The Door Open So Women May Enter*, 2013 COLUM. BUS. L. REV. 801, 808 (2013).

³⁵ McKinsey & Co., *supra* note 24, at 19.

In-group bias continues to negatively impact women even if they succeed in making it to the top. For example, in one study, almost half of female respondents who held upper management positions in Fortune 1000 companies reported exclusion from informal networks of communication while only about 20 percent of male respondents cited such exclusion.³⁶

Proactive companies can combat the effects of in-group bias. For instance, one diversified European company studied by McKinsey & Co. uses a strategy to increase gender diversity on its board wherein the company leadership devotes an entire session in its succession planning process to discussing only female candidates.³⁷ The goal of the strategy is to force the leadership to consider high-performing women and to develop an environment in which women can contribute and succeed “rather than coming up with reasons why it will be hard for them to do so.”³⁸

B. Androcentric Values in the Workplace and Negative Assumptions About Women’s Competence Stall Women’s Professional Advancement

Androcentrism is the institutionalized pattern of cultural value that privileges traits associated with masculinity, while devaluing feminine traits.³⁹ Pervasively institutionalized through law, policy, and standard professional practices, androcentric value patterns “structure broad swaths of social interaction,”⁴⁰ including the private business sector. Institutionalized androcentrism causes women to suffer gender-specific forms of “status subordination,” including “sexual harassment, sexual assault, and domestic violence; trivializing, objectifying, and demeaning stereotypical depictions in the media; disparagement in everyday life; exclusion or marginalization in public spheres and deliberative bodies; and denial of the full rights of equal

³⁶ Katherine Giscombe, *Women in Corporate Leadership: Status and Prospects*, in *WOMEN AND LEADERSHIP: THE STATE OF PLAY AND STRATEGIES FOR CHANGE* 383, 389 (Barbara Kelleman & Deborah L. Rhode eds., 2007).

³⁷ McKinsey & Co., *supra* note 24, at 19.

³⁸ *Id.*

³⁹ NANCY FRASER, *FORTUNES OF FEMINISM: FROM STATE-MANAGED CAPITALISM TO NEOLIBERAL CRISIS* 162 (2013).

⁴⁰ *Id.*

protection and citizenship.”⁴¹ Some forms of status subordination, such as sexual harassment, trivialization, or stereotypical depictions, are common within the workplace.⁴²

Corporate culture and practices assume that women are less capable and that their work is less valuable. Historically, gender has been an underlying organizing principle of the division of labor—defining who performs paid “productive” and unpaid “reproductive” labor.⁴³ A division within paid labor also occurred along gendered lines: historically, higher paid professions, such as manufacturing and professional occupations like lawyering or business have been reserved exclusively for men while lower paying domestic or service occupations have been filled by women.⁴⁴

Women’s labor is still consistently undervalued. In fact, a recent study shows that when women move into occupations formerly dominated by men, those jobs begin to pay less.⁴⁵ Another recent study, conducted by American and British researchers analyzing data regarding 4,600 Australian workers from more than 800 employers showed that men and women asked for pay increases at the same rate.⁴⁶ A lack of assertiveness in negotiating for higher pay is often cited as a reason that women make less money than men for similar work. This theory “‘places some of the responsibility for the existence of gender differentials upon female employees and the choices they make,’ rather than structural biases.”⁴⁷ These findings directly refute that theory and show that there is an element of gender bias working against women.⁴⁸ These results occur because employers place a lower value on work done by women.⁴⁹ The lasting legacy of gender as an organizing

⁴¹ *Id.* at 162–63.

⁴² *Id.*

⁴³ *Id.* at 162.

⁴⁴ *Id.*

⁴⁵ Claire Cain Miller, *As Women Take Over a Male-Dominated Field, the Pay Drops*, N.Y. TIMES (Mar. 18, 2016), http://www.nytimes.com/2016/03/20/upshot/as-women-take-over-a-male-dominated-field-the-pay-drops.html?_r=0.

⁴⁶ Jamiles Lartey, *Women ask for pay increases as often as men but receive them less, study says*, THE GUARDIAN (Sept. 5, 2016), <https://www.theguardian.com/world/2016/sep/05/gender-wage-gap-women-pay-raise-men-study>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Miller, *supra* note 45.

principal in employment lingers, and the result is a continuing economic structure that generates gender-specific forms of distributive economic injustice.⁵⁰

Within the context of high-paid professions, such as business management, men are often presumed to be competent, and women conversely are often presumed to be incompetent.⁵¹ This presumption of male competence or natural male leadership ability is institutionalized through management literature, which implicitly links men and masculinity with leadership and authority.⁵² Because of the androcentric workplace values that privilege masculinity and result in bias that women are less competent, women have to work harder to achieve the same recognition.⁵³ For example, in one Harvard Business School experiment, MBA students were given two case studies, which were identical except that in one the CEO was named John and in the other the CEO was named Jane.⁵⁴ Students rated the CEO named Jane negatively compared to their ratings of the CEO named John.⁵⁵ The students' reaction shows a clear gender stereotype that men are more competent business leaders than women.⁵⁶ Another study, by Thomas-Hunt and Phillips, "suggests that women [in workgroups] are often penalized when they possess the same expertise that men have."⁵⁷ Additionally, although recent studies show that individuals with stellar interpersonal skills are more effective leaders, individuals who display stereotypically masculine leadership styles are more likely to be appointed to corporate leadership positions.⁵⁸

⁵⁰ FRASER, *supra* note 39, at 162.

⁵¹ Rhode & Packel, *supra* note 3, at 406; DHIR, *supra* note 10, at 50.

⁵² Giscombe, *supra* note 36, at 391.

⁵³ Rhode & Packel, *supra* note 3, at 406.

⁵⁴ *Id.* at 407.

⁵⁵ *Id.*

⁵⁶ CREDIT SUISSE RESEARCH INSTITUTE, GENDER DIVERSITY AND CORPORATE PERFORMANCE 28 (2012), http://www.calstrs.com/sites/main/files/file-attachments/csri_gender_diversity_and_corporate_performance.pdf.

⁵⁷ DHIR, *supra* note 10, at 50 (citing Melissa C. Thomas-Hunt & Katherine W. Phillips, *When What You Know Is Not Enough: Expertise and Gender Dynamics in Task Groups*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 1585, 1594 (2004)).

⁵⁸ Giscombe, *supra* note 36, at 391.

The androcentric ordering of gendered preference has remained a static element in the workplace despite the popularity of diversity as a supposed new priority.⁵⁹ The desirability of gender diversity affords advancement opportunities to a small percentage of women who happen to have characteristics that are closer to androcentric ideals.⁶⁰ A few women achieve positions of power while most women remain in positions of relatively low pay, respect, and responsibility.⁶¹ Considering the fact that only 19% of board seats on corporate boards of U.S. public companies are filled by women, it is clear that the current emphasis on diversity is only benefitting a small percentage of women rather than creating real change in the institutions that are keeping women out of leadership positions.⁶² For over 40 years Title VII has mandated gender-integrated workplaces in the United States, but women continue to inhabit a markedly subordinate sphere in the workplace.⁶³

C. *Lack of Access to Executive Level Experience Keeps Women Off of Boards*

As a result of in-group bias, entrenched androcentric values, and other conscious and unconscious biases, women are not getting opportunities to fill top leadership positions within corporations. The most commonly stated reason for underrepresentation of women on corporate boards is that women lack leadership experience in the upper echelons of corporate management.⁶⁴ The typical qualifications desired in directors include financial expertise, executive-level industry experience, knowledge or training regarding corporate governance, and independence (non-affiliation with the corporation).⁶⁵ Many public company boards consist mostly of current or retired CEOs of other public companies.⁶⁶

⁵⁹ Render, *supra* note 12, at 90.

⁶⁰ *Id.* at 90–91.

⁶¹ *Id.* at 91.

⁶² 2014 Catalyst Census, *supra* note 8.

⁶³ *Id.* at 77.

⁶⁴ Rhode & Packel, *supra* note 3, at 402.

⁶⁵ Burch, *supra* note 7, at 600.

⁶⁶ Butler, *Financial Expert*, *supra* note 6, at 31.

There are far fewer women in the ranks of executive-level corporate management, which makes it difficult for women to gain executive-level industry experience.⁶⁷ Women in the United States graduate from college and professional programs at higher rates than men,⁶⁸ but women make up only 3.5% of Fortune 1000 CEOs and 14.6% of Fortune 500 executive officers.⁶⁹ Similarly, research in Europe shows that in many of the largest 500 corporations, women are recruited in numbers that are comparable to their male counterparts, but women become increasingly underrepresented as they move higher up the organization.⁷⁰

Women may be given fewer opportunities to do high-profile projects in upper management because of stereotypical beliefs about women's abilities and interests, such as the assumption that women do not want jobs or tasks that require "significant time away from the family."⁷¹ One example of this is that hiring committees often look for director candidates who have international experience.⁷² Because of the assumption that women with families find it more difficult than men with families to relocate or travel for extended periods, women are often not even considered for international assignments.⁷³ Despite this persistent stereotype that women are not interested in ambitious projects that might require significant time away from the family, research shows that women in top management positions in the United States have ambition equal to that of their male counterparts.⁷⁴ In a 2004 study by Catalyst of top management in Fortune 500 companies, majorities of both women and men wanted to be CEO of an

⁶⁷ *Id.*

⁶⁸ Render, *supra* note 12, at 76 n.3 (statistics relating to gender of law school graduates and attorneys who make partner); Matt Egan, *Still missing: Female business leaders*, CNN MONEY (Mar. 24, 2015, 1:49 PM ET), <http://money.cnn.com/2015/03/24/investing/female-ceo-pipeline-leadership/>.

⁶⁹ Rhode & Packel, *supra* note 3, at 403.

⁷⁰ MCKINSEY & CO., *supra* note 29, at 7.

⁷¹ Giscombe, *supra* note 36, at 388, 391; *see also* MCKINSEY & CO., *supra* note 29, at 17.

⁷² Boris Groysberg & Deborah Bell, *Dysfunction in the Boardroom: Understanding the Persistent Gender Gap at the Highest Levels*, HARV. BUS. REV., June 2013, at 88, 91.

⁷³ *Id.*

⁷⁴ Giscombe, *supra* note 36, at 386 (This finding is echoed in a more recent study of 1400 international executives, in all major regions, which found that women's aspirations to rise into top leadership positions are nearly equal to men's. Just under 80% of women in top or middle management positions aspire to move up to top leadership positions while just over 80% of men do. *See* MCKINSEY & CO., *supra* note 24).

organization.⁷⁵ Assumptions about women's priorities and ambition, rather than women's actual priorities and ambition, keep hiring committees from considering women for positions that could be key to advancing their careers to director level.

Less diversity among senior executives leads to less diversity among potential board candidates where executive-level industry experience is often viewed as a prerequisite.⁷⁶ One study of 1,000 corporate directors found that male directors more often define "qualified" as having prior executive-level experience.⁷⁷ About half of male Fortune 500 directors are CEOs or former CEOs.⁷⁸ This standard is, however, seemingly more harshly applied to women.⁷⁹ For instance, "vastly more men currently serve [as directors] without CEO experience."⁸⁰ This shows that in order to become board members, women must attain a higher level of preparedness. That CEO experience is a "pre-requisite" to board service is much more true for women than men.

D. The Business Case for Greater Gender Diversity On Boards Is Not Enough To Overcome Other Barriers

The business case for gender diversity—that is, the correlation between gender diversity in leadership and positive corporate financial performance—is contested at best.⁸¹ The slow growth of gender parity indicates that the business case alone is not enough to cause businesses to

⁷⁵ *Id.*

⁷⁶ Burch, *supra* note 7, at 600.

⁷⁷ DHIR, *supra* note 10, at 39.

⁷⁸ Rhode & Packel, *supra* note 3, at 402.

⁷⁹ CATALYST, THE "THINK DIRECTOR, THINK CEO" MYTH: FORTUNE 500 COMPANIES (2012), http://www.catalyst.org/system/files/The_Think_Director_Think_CEO_Myth_Fortune_500_Companies.pdf.

⁸⁰ *Id.* In an ethnographic study of around 300 female directors and 100 male directors, 68% of women had CEO experience while only 51% of men did. Groysberg & Bell, *supra* note 72, at 90 (noting also that there are vastly more men than women serving as directors, which may partially account for the disparity).

⁸¹ See generally Rhode & Packel, *supra* note 3; Susan Adams, *Women On Boards: Slow Progress And Marginalization, Study Shows*, FORBES (June 11, 2015, 1:57 PM), <https://www.forbes.com/sites/susanadams/2015/06/11/women-on-boards-slow-progress-and-marginalization-study-shows/#7c79f01b3745>; James A. Fanto et al., *Board Diversity and Corporate Performance: Filling in the Gaps: Justifying Board Diversity*, 89 N.C. L. REV. 901 (2011); Lee, *supra* note 11, at 1483–86.

adopt more gender inclusive selection processes for boards of directors. It is hotly contested whether greater gender diversity on boards of directors will cause short or long-term benefits to corporations.

Studies show variable results regarding whether increased numbers of women on boards increases profitability or not. Some empirical evidence suggests that women are more financially risk averse than men and for that reason, commentators have speculated that the presence of at least one woman on a board leads to more accurate financial reporting and more prudent financial decision-making.⁸² Other commentators speculate that board diversity is productive on boards because it generates cognitive conflict because the board members draw on a wide range of perspectives.⁸³ Some studies have shown a positive correlation between board diversity and other measures of good governance such as more board meetings, higher attendance rates, greater participation in decision making, tougher monitoring, and replacement of the CEO when the corporation's stock performs poorly.⁸⁴ Yet another study showed that boards with at least two women paid greater attention to audit and risk oversight than all-male boards.⁸⁵

The non-profit Catalyst, consulting company McKinsey & Co., and financial services company Credit Suisse produced influential research that makes the case that gender diversity in board leadership and management at least correlates with better company performance.⁸⁶ As with anything, however, correlations do not necessarily demonstrate causation and few

⁸² Rhode & Packel, *supra* note 3, at 394.

⁸³ *Id.* at 395–96.

⁸⁴ *Id.* at 400; Fairfax, *supra* note 19, at 590.

⁸⁵ Rhode & Packel, *supra* note 3, at 400–01.

⁸⁶ CREDIT SUISSE RES. INST., *supra* note 56, at 6 (stating that Catalyst's studies show that Fortune 500 companies with more women on their boards tend to be more profitable and the McKinseys' studies show that companies with a higher proportion of women on their boards exhibit a "higher degree of organization, above-average operating margins and higher valuations").

studies have claimed to show that board diversity *leads* to better financial performance.⁸⁷

Empirical evidence on the issue of whether board diversity increases shareholder value is mixed.⁸⁸ Other studies assert that diversity in the boardroom can enhance a corporation's bottom line by helping it reach out to a larger and more diverse base of customers, clients, and employees.⁸⁹ Catalyst's 2004 study of 353 Fortune 500 companies found a link between high representations of women in management (defined as women corporate officers and top earners) and financial performance.⁹⁰ Follow up studies by Catalyst for 2004 through 2008 found a similar link.⁹¹ Catalyst clearly states that its studies should not be taken to show a causal link.⁹²

Despite a potential positive correlation between gender diversity and performance, studies, including the previously cited Credit Suisse report, show that there is no causation between greater gender diversity, profitability, and stock price performance.⁹³ The authors of these studies hypothesize that the appointment of more women to a board is a signal that a corporation is already doing well.⁹⁴ Some studies have claimed that better financial performance positions a corporation to attract a more diverse board, to devote more resources to recruiting diverse directors, or that a completely different factor could be causing the correlation.⁹⁵ Increased diversity may cause boards to be less cohesive and less efficient.⁹⁶ Some studies have also shown that without a critical mass of women on a board of directors, the women who are present may not express their diverse viewpoints.⁹⁷ These

⁸⁷ Rhode & Packel, *supra* note 3, at 387; *see also* CREDIT SUISSE RES. INST., *supra* note 56, at 3 (stating that "it is difficult to demonstrate definitive proof" that gender diversity within corporate management improves corporate performance).

⁸⁸ Rhode & Packel, *supra* note 3, at 383.

⁸⁹ Fairfax, *supra* note 19, at 591.

⁹⁰ CATALYST INC., THE BOTTOM LINE: CONNECTING CORPORATE PERFORMANCE AND GENDER DIVERSITY 1 (2004).

⁹¹ *Id.*

⁹² *Id.*

⁹³ CREDIT SUISSE RES. INST., *supra* note 56, at 6.

⁹⁴ *Id.*

⁹⁵ Rhode & Packel, *supra* note 3, at 387; DHIR, *supra* note 10, at 64.

⁹⁶ Fairfax, *supra* note 19, at 592.

⁹⁷ *Id.* at 593.

studies show that is also possible that any added value from diversity on boards depends on the extent or balance of diverse representation.⁹⁸ Mere presence of diverse voices on boards without efforts to include them in decision-making may prove fruitless, for example.⁹⁹

Scholarship on business law is often divided into two camps: law and economics scholars who prioritize efficiency in the marketplace and scholars from a variety of other perspectives that prioritize justice.¹⁰⁰ Both of these groups seem to recognize that there is a trade-off between efficiency and fairness when it comes to incorporating more gender diversity into corporate boards.¹⁰¹ Because this trade-off exists, it is hard to make the case for diversity in the context of publicly traded corporations where short-term returns matter a lot and diversity initiatives often promise short-term cost for long-term payoffs.¹⁰²

III. THE U.S. GOVERNMENT ATTEMPTS TO INCREASE CORPORATE BOARD GENDER DIVERSITY: WEAK INTERVENTION MODEL

In the United States, public corporations are governed by statutes and regulations at both the state and federal level, which disperses the government's regulatory power over corporations among multiple policy making bodies.¹⁰³ The Securities and Exchange Commission (SEC) has made an attempt at implementing regulations to address diversity in the

⁹⁸ DHIR, *supra* note 10, at 63.

⁹⁹ *Id.*

¹⁰⁰ Barbara Ann White, *Economic Efficiency and the Parameters of Fairness: A Marriage of Marketplace Morals and the Ethic of Care*, 15 CORNELL J.L. & PUB. POL'Y 1, 3 (2005).

¹⁰¹ *Id.*

¹⁰² See Donald C. Langevoort, *Overcoming Resistance to Diversity in the Executive Suite: Grease, Grit, and the Corporate Promotion Tournament*, 61 WASH. & LEE L. REV. 1615, 1618–19 (2004) (“[A]t least certain forms of discrimination are both unlawful and socially illegitimate and hence present threats of potential liability and injury to reputation. Second, human resources demands are such that attracting and motivating a diverse workforce is a competitive imperative. At the same time, however, offsetting economic forces may exist that favor subtle forms of discrimination and hostility to diversity, even if intentional and overt racial or gender-based bias is mostly outdated. In sum, the process of promoting diversity and ending discrimination, whether to avoid liability or simply to remain competitive, is a difficult challenge faced by many firms.”).

¹⁰³ Seletha R. Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61, 67 (2012) [hereinafter Butler, *All on Board!*].

workplace, but such efforts amount to weak and ultimately ineffectual intervention.

Whether and how the United States government should intervene to promote diversity in the workplace is influenced somewhat, by the sensibility of the body politic. For a time leading up to the 1980s, there was strong political momentum in support of government intervention in the private sector to prevent discrimination.¹⁰⁴ In the 1980s, a “conservative political philosophy” took hold in the United States, which elevated the “autonomy and privacy dimensions of individual freedom.”¹⁰⁵ This shift in philosophy emphasized the “autonomy interest” of possible discriminators against the “public value of repairing class-based distributive inequities.”¹⁰⁶ A study of American law review discourse over a recent twenty-five-year period shows that legal scholars discussed “command-and-control” regulatory power as “coercive,” “legalistic,” “uniform,” “costly,” and “ineffective.”¹⁰⁷ In the words of one legal scholar, “Bashing traditional regulation has become something of a national pastime among legal scholars.”¹⁰⁸

Despite the anti-regulation turn taken in American political sentiment, American corporations are subject to both state and federal laws and regulations. The foundational duties of corporate directors are established under state law.¹⁰⁹ For instance, the Corporation Law of Delaware requires that the “business affairs of every corporation [. . .] shall be managed by or under the direction of a board of directors.”¹¹⁰ Furthermore, the directors owe duties of care, loyalty, and good faith to the corporation’s shareholders.¹¹¹ The board of directors plans the direction of the company

¹⁰⁴ Render, *supra* note 12, at 106.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ DHIR, *supra* note 10, at 94–95 (quoting Jodi L. Short, *The Paranoid Style in Regulatory Reform*, 63 HASTINGS L.J. 633, 662 (2012)).

¹⁰⁸ *Id.* (quoting W.A. BOGART, PERMIT BUT DISCOURAGE: REGULATING EXCESSIVE CONSUMPTION 49–50 (2011)).

¹⁰⁹ Butler, *All on Board!* *supra* note 103, at 67.

¹¹⁰ DEL. CODE. ANN. tit. 8 § 141(a) (2016).

¹¹¹ Butler, *All on Board!* *supra* note 103, at 67.

and monitors and evaluates senior management's implementation of the business plan.¹¹²

A. *Role of Securities and Exchange Commission*

Corporations are subject to federal anti-trust and securities laws that seek to protect consumers and investors. President Franklin D. Roosevelt established the Securities and Exchange Commission (SEC) as a federal agency in response to the great stock market crash of 1929 that led to the Great Depression.¹¹³ The SEC oversees the securities industry and enforces the securities laws that Congress enacts.¹¹⁴ The SEC's mission is to protect investors; to sustain fair, orderly, and efficient capital markets; and to facilitate capital formation.¹¹⁵ The federal securities laws impose an elaborate system of mandatory disclosure rules and periodic reporting rules.¹¹⁶

The goal of disclosure-based systems is to help investors manage risk¹¹⁷ by facilitating "informed investment decisions" and efficient capital markets.¹¹⁸ Despite a broad statutory grant of power, the SEC has sometimes interpreted its mandate narrowly.¹¹⁹ To effectuate informed investing, the federal securities laws require publicly traded firms to report to the SEC on a wide range of internal governance and financial matters quarterly and annually.¹²⁰ Additionally, public companies must submit an annual report containing audited financial statements and other information

¹¹² *Id.*

¹¹³ Butler, *Financial Expert*, *supra* note 6, at 6; JONATHAN G. KATZ, U.S. SECURITIES & EXCHANGE COMMISSION: A ROADMAP FOR TRANSFORMATIONAL REFORM 3 (2011).

¹¹⁴ DHIR, *supra* note 10, at 82.

¹¹⁵ Butler, *Financial Expert*, *supra* note 6, at 6; DHIR, *supra* note 10, at 88.

¹¹⁶ Howell E. Jackson, *Regulation in a Multi-Sector Financial Services Industry: An Exploration Essay*, 77 WASH. U. L.Q. 319, 345 (1999).

¹¹⁷ *Id.*

¹¹⁸ DHIR, *supra* note 10, at 82; 1 AMY L. GOODMAN, CORPORATE GOVERNANCE: LAW AND PRACTICE § 1.03 (2015).

¹¹⁹ MARC L. STEINBERG, SECURITIES REGULATION: LIABILITIES & REMEDIES § 1.02 (2016).

¹²⁰ Alan J. Berkeley, *Memorandum Regarding Responsibilities of Public Companies and Their Officers, Directors and Principal Stockholders*, in ALI-ABA COURSE OF STUDY MATERIALS, COURSE NUMBER SH030: SECURITIES LAW FOR NONSECURITIES LAWYERS (2003).

to shareholders in connection with the corporation's annual proxy solicitation.¹²¹

When Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, it signaled that stronger substantive regulation of public companies and the financial markets might be in store.¹²² The Dodd-Frank Act created the Consumer Financial Protection Bureau, required regulation of derivative markets, and created a council of federal regulators led by the Treasury Secretary.¹²³ However, Congress's appetite for strong intervention was short-lived.¹²⁴ In fact, since the Dodd-Frank moment in 2010, Congress has shifted back to a disclosure-based governance model, enacting disclosure requirements in 2011 and 2012 on topics such as use of "conflict minerals" from the Republic of Congo in a corporation's products; corporate mine operators' health and safety violations; and corporate activities related to Iran.¹²⁵ In all of these cases, the laws require no substantive change in corporate behavior, but rather attempt to effectuate a change in behavior indirectly.¹²⁶

Similarly, the SEC and other federal agencies continue to intervene indirectly rather than directly in corporate governance matters.¹²⁷ Through its federal enforcement authority, the SEC effectuates corporate governance changes through the issuance of reports of investigations, and settled enforcement actions.¹²⁸ Additionally, the SEC has powerful regulatory tools

¹²¹ *Id.*

¹²² See DHIR, *supra* note 10, at 84 ("The economic ordeals of the last ten years have prompted a reevaluation of the federal role in corporate governance, with federal laws such as the Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act leading to more significant federal involvement in regulating contemporary corporate governance than has traditionally been the case."); GOODMAN, *supra* note 118, § 1.03; KATZ, *supra* note 113, at 12.

¹²³ Binyamin Applebaum & David M. Herszenhorn, *Financial Overhaul Signals Shift on Deregulation*, N.Y. TIMES (July 15, 2010), http://www.nytimes.com/2010/07/16/business/16regulate.html?pagewanted=all&_r=0.

¹²⁴ See DHIR, *supra* note 10, at 84 ("The economic ordeals of the last ten years have prompted a reevaluation of the federal role in corporate governance, with federal laws such as the Sarbanes-Oxley Act and the Dodd-Frank Wall Street Reform and Consumer Protection Act leading to more significant federal involvement in regulating contemporary corporate governance than has traditionally been the case."); GOODMAN, *supra* note 118, § 1.03; KATZ, *supra* note 113, at 12.

¹²⁵ DHIR, *supra* note 10, at 84–85.

¹²⁶ *Id.* at 85.

¹²⁷ *Id.* at 84.

¹²⁸ GOODMAN, *supra* note 118, § 1.03.

at its disposal. For instance, the SEC can impose monetary civil penalties for securities law violations.¹²⁹ The SEC also has the power to issue a “stop order” that suspends a corporation’s registration statement and suspends trading in a security for up to ten days.¹³⁰ This remedy is available when the SEC believes that the “public interest and the protection of investors so require.”¹³¹ Finally, the SEC can subject corporations to disciplinary sanctions, including suspension and revocation of registration, for failure to follow requirements.¹³²

B. *The SEC’s Diversity Disclosure Rule: A Weak Intervention*

In the United States, women make up 16% of corporate boards and roughly 14% of corporate executives.¹³³ The SEC, recognizing that gender imbalance on boards is a continuing problem, enacted a disclosure-based diversity initiative in 2009.¹³⁴ The Proxy Disclosure Enhancements Regulation (diversity disclosure rule), which took effect on February 28, 2010,¹³⁵ requires companies to disclose “whether, and if so, how the nominating committee (or the board) considers diversity in identifying nominees for director.”¹³⁶ Furthermore, the company is supposed to disclose how the diversity policy is implemented and how the board assesses the effectiveness of the policy.¹³⁷ As a result, a board of directors that *does* consider diversity in its hiring process must also identify how they consider diversity in identifying candidates.¹³⁸ Prior to 2010, the SEC did not require publicly traded companies to collect or report any information regarding diversity.¹³⁹ The stated purpose of the new diversity disclosure rule was to

¹²⁹ STEINBERG, *supra* note 119, § 12.01.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ BIZ DIVAS & KHAITAN & CO., *supra* note 2, at 2.

¹³⁴ Rhode & Packel, *supra* note 3, at 418.

¹³⁵ Proxy Disclosure Enhancements, Release Nos. 33-9089 & 34-61175, 47 Fed. Reg. 68,334 (Dec. 23, 2009) <http://www.sec.gov/rules/final/2009/33-9089.pdf>.

¹³⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 972, 124 Stat. 1376 (2010); DELOITTE, WOMEN IN THE BOARDROOM, *supra* note 1, at 33; Rhode & Packel, *supra* note 3, at 419.

¹³⁷ Smallman, *supra* note 34, at 812.

¹³⁸ *Id.*

¹³⁹ Burch, *supra* note 7, at 598.

“enhance the information provided in annual reports and proxy information statements to better enable shareholders to evaluate the leadership of public companies.”¹⁴⁰

The law has two serious loopholes. First, while disclosure is mandatory, companies are *not* required to have a diversity policy, and those that do not have a diversity policy merely disclose that they do not have a policy in place.¹⁴¹ As discussed below, this does not follow the letter or spirit of the law because companies are supposed to disclose more than the mere existence or non-existence of a diversity policy. Second, companies are allowed to define diversity “in ways that they consider to be appropriate.”¹⁴² Since the diversity disclosure rule does not require boards to disclose board diversity by race, gender, or any other identifying characteristic, the rule has not served to provide investors with meaningful information.¹⁴³

C. *Diversity Disclosure Rule Compliance and Outcome*

While comply-or-explain disclosure approaches may seem more politically palatable than mandatory quotas, their effectiveness is questionable.¹⁴⁴ Comply-or-explain approaches represent a form of decentralized “new governance regulation” wherein the state does not serve as the sole or primary regulator.¹⁴⁵ The state, in such instances, forms one part of a pluralistic regulatory environment where the regulated entity itself, alongside other non-state actors, contributes to the formation of norms and expectations.¹⁴⁶

Many believed that the diversity disclosure rule, which took effect in 2010, would cause companies to add women and other minorities to their

¹⁴⁰ Proxy Disclosure Enhancements, 47 Fed. Reg. at 68, 334.

¹⁴¹ Smallman, *supra* note 34, at 812.

¹⁴² Burch, *supra* note 7, at 598; Rhode & Packel, *supra* note 3, at 419.

¹⁴³ Burch, *supra* note 7, at 599.

¹⁴⁴ Rhode & Packel, *supra* note 3, at 419; DHIR, *supra* note 10, at 20 (stating “the SEC rule as currently formulated may not produce diversity-enhancing results along sociodemographic lines”).

¹⁴⁵ DHIR, *supra* note 10, at 10.

¹⁴⁶ *Id.*

boards of directors, but no such change took place.¹⁴⁷ Fortune 500 corporation proxies from 2012 show that women held an average of 16.6% of board seats on Fortune 500 company boards.¹⁴⁸ This represents an increase of less than 2% from 2009, the year immediately preceding the implementation of the SEC's diversity disclosure rules.¹⁴⁹ Growth of gender diversity on boards stagnated even under the diversity disclosure rule that the SEC thought would spur change.¹⁵⁰

A study of Fortune 50 proxy statements from 2012 showed that many companies did not fully comply with the disclosure rule. Notably, over 60% of companies in the Fortune 50 category failed to comply with the diversity disclosure rule because they failed to disclose some or all of the required information.¹⁵¹ About 10% of Fortune 50 companies completely failed to mention "diversity" in their 2012 proxy.¹⁵² About 12.5% of Fortune 50 companies merely included a statement as to whether "diversity" was considered in their board selection process (6 yes, 1 no).¹⁵³ About half of Fortune 50 companies included a statement about whether and how they considered diversity in board nominations, but they did not include any information about how they implement their diversity policy or assess its success.¹⁵⁴ Only about 25% of Fortune 50 companies fully complied with the SEC diversity disclosure requirements in their 2012 proxy statements.¹⁵⁵

Some companies bypass the diversity disclosure requirement altogether by including a simple statement that the company does not have a fixed policy with regard to seeking diversity among board candidates.¹⁵⁶ However, the SEC's rule does not differentiate between formal or informal

¹⁴⁷ Smallman, *supra* note 34, at 812. An empirical study of the proxies of Fortune 50 corporations in 2012 showed that women held just 20.6%, or 117 out of 451, of the total Fortune 50 board seats. *Id.* at 807. This means that an average of 2.44 female directors per board of about 12 directors. *Id.*

¹⁴⁸ *Id.* at 807.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 808.

¹⁵¹ *Id.* at 817.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 820–21.

¹⁵⁵ *Id.* at 822.

¹⁵⁶ *Id.* at 824–25 (2013); Branson, *supra* note 17, at 813.

policies but rather requires disclosure of any considerations of diversity that are part of the board nominating process.¹⁵⁷ Companies use the words “formal” and “specific” in proxies to reject the existence of an official diversity policy and to justify the company’s failure to elaborate further.¹⁵⁸ Even the SEC Commissioner, Luis Aguilar, has underscored the weaknesses in the current disclosure system, including a lack of compliance by many companies.¹⁵⁹

Allowing companies to define diversity themselves leads to superficial and uninformative diversity disclosures.¹⁶⁰ In 2012, only 43% of the Fortune 50 companies’ proxy statements mentioned “gender” in their descriptions of diversity.¹⁶¹ Since the SEC has provided no guidelines for defining diversity, companies have developed their own criteria. For instance, IBM’s 2012 proxy statement says that the board and hiring committee “focus on ensuring that the Board reflects a diversity of experiences, backgrounds and individuals . . . The Committee recommends candidates based on their business or professional experience, the diversity of their background, and their talents and perspectives.”¹⁶² Ford’s diversity statement is similar, mentioning diversity of “experience in business, government, education and technology, and in areas that are relevant to the company’s global activities.”¹⁶³

Ultimately, these vague, abstract, or misleading diversity statements are unhelpful to shareholders who wish to evaluate whether companies are

¹⁵⁷ Smallman, *supra* note 34, at 825.

¹⁵⁸ *Id.*

¹⁵⁹ Luis A. Aguilar, SEC Comm’r, Keynote Speech at the 2011 Hispanic Ass’n of Corp. Responsibility—Corp. Directors Summit, Wash., D.C.: An Update on Diversity and Financial Literacy (Apr. 30, 2011), <https://www.sec.gov/news/speech/2011/spch043011laa.htm> (statement of Luis A. Aguilar) (“[S]ome companies are failing to disclose important information regarding their board of director diversity policies” based on the false distinction between “formal” and “informal” policy, and “incomplete disclosure regarding the evaluation of the effectiveness of the policy . . . It is important that all companies—not just those with good stories to tell—comply with both prongs of the rule.”).

¹⁶⁰ Smallman, *supra* note 34, at 817.

¹⁶¹ *Id.* at 826.

¹⁶² *Id.* at 826–27 (quoting Int’l Bus. Machs. Corp., Notice of 2012 Annual Meeting and Proxy Statement 8, 13 (2012)).

¹⁶³ *Id.* at 827 (quoting Ford Motor Co., Notice of 2012 Annual Meeting of Shareholders and Proxy Statement 5 (2012)).

implementing policies to improve gender diversity.¹⁶⁴ Most companies do not comply with the current diversity disclosure rule, but even when they do, the disclosures they make are not always helpful. Furthermore, when companies do not comply with the disclosure requirements, the SEC does not enforce the rule.¹⁶⁵

Without a strong mandate from Congress, the SEC is unlikely to enforce or strengthen its promotion or regulation of diversity on corporate boards. Within a regulatory regime that is designed to protect investors from financial risk or fraud, lack of diversity on boards will remain a low priority unless and until it is shown that a lack of diversity causes a financial risk.

IV. NORWEGIAN GOVERNMENT INTERVENTION TO INCREASE CORPORATE BOARD GENDER DIVERSITY: RADICAL INTERVENTION MODEL

Norway was a global trendsetter in 2003 when it became the first developed country to enact a gender quota law applicable to corporate boards of directors of public companies.¹⁶⁶ The quota policy affected approximately 500 public limited liability companies and publicly owned enterprises and dramatically changed the gender balance on Norwegian corporate boards.¹⁶⁷

A. *Overview of Norwegian Corporate Law*

Norwegian corporate law requires the board of directors to fulfill both management and supervisory duties.¹⁶⁸ The Norwegian Limited Liabilities Companies Act (The Norwegian Act) applies to all public limited liability companies, which are known as *allmennaksjeselskap*, or ASA firms, and sets out the basic governance and structural requirements for such firms.¹⁶⁹ The Norwegian Act applies only to public limited liability companies, so

¹⁶⁴ *Id.* at 827–28.

¹⁶⁵ *Id.* at 828.

¹⁶⁶ DELOITTE, *supra* note 1, at 58; BIZ DIVAS AND KHAITAN & CO., *supra* note 2, at 2; Smallman, *supra* note 34, at 829.

¹⁶⁷ BIZ DIVAS AND KHAITAN & CO., *supra* note 2, at 2; NORWAY MISSION TO THE EU, NORWAY'S MIXED-GENDER BOARDROOMS (Aug. 6, 2009), http://www.eu-norway.org/news/gender_rep_boardrooms/.

¹⁶⁸ Norwegian Public Limited Liability Companies Act, § 6-12(1)

¹⁶⁹ DHIR, *supra* note 10, at 104.

privately held companies are not subject to its requirements.¹⁷⁰ The Norwegian Act specifies that management responsibilities be assigned to a “general manager,” a CEO, who cannot be a member of the board and must follow the board’s direction.¹⁷¹ The “general manager” CEO appoints the rest of the high-level management.¹⁷²

B. Norway’s Radical Intervention in Board Diversity: The Quota

In general, the quota law, which is found in the Section 6-11a of the Norwegian Act, requires 40% representation of the minority gender on the boards of registered public limited liability companies.¹⁷³ The quota law evolved to its current form in three distinct phases. First, under a government-industry agreement, compliance with the 40% quota was voluntary during the two-year period beginning January 1, 2004 and ending December 31, 2005.¹⁷⁴ Under the agreement, if the businesses in the private sector reached the desired gender representation goals by July 1, 2005, the mandatory quota law would not take effect.¹⁷⁵ A Statistics Norway survey showed that at the time the deadline passed, only about 13% of ASA companies had complied with the voluntary quota and only 16% of Norwegian directors were women.¹⁷⁶

Because of this low compliance rate, the rules mandating a 40% gender quota on boards took effect for public limited liability companies on January 1, 2006.¹⁷⁷ This change marked the beginning of the second phase of the quota law. Companies were given a two-year period from January 1, 2006 to December 31, 2007 to comply with the 40% required quota.¹⁷⁸

¹⁷⁰ Norwegian Public Limited Liability Companies Act, § 1-1(1). A public limited liability company is any company: 1) Where none of the members have personal liability for the obligations of the company, undivided or for parts which altogether make up the company’s total obligations; and 2) Which is designated a public limited liability company in its articles of association; and 3) Which is registered as a public limited liability company in the Register of Business Enterprises. *Id.* at § 1-1(2).

¹⁷¹ *Id.* at § 6-13(1).

¹⁷² DIHR, *supra* note 10, at 104.

¹⁷³ NOR. MISSION TO THE EU, *supra* note 167.

¹⁷⁴ DIHR, *supra* note 10, at 104.

¹⁷⁵ NOR. MISSION TO THE EU, *supra* note 167.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

During the transition phase, any new companies seeking to register as public companies would have to comply fully with the 40% quota in order to be registered.¹⁷⁹ As of December 2007, women held 37% of board seats in Norway, up from 6% in 2001 before the law took effect.¹⁸⁰

The third phase of implementation began on January 1, 2008 when the quota officially took effect.¹⁸¹ In its final form, the law requires:

On the board of directors of public limited liability companies, both sexes shall be represented in the following manner:

1. If the board of directors has two or three members, both sexes shall be represented.
2. If the board of directors has four or five members, each sex shall be represented by at least two members.
3. If the board of directors has six to eight members, each sex shall be represented by at least three members.
4. If the board of directors has nine members, each sex shall be represented by at least four members, and if the board of directors has more members, each sex shall represent at least 50 percent of the members of the board.¹⁸²

The law officially requires 33 to 50 percent representation of the minority gender depending on the size of the board of directors. The law protects either women or men as the “minority gender” and requires fairly balanced representation of both genders. As of January 1, 2008, any ASA company that did not comply with the law faced dissolution under the normal enforcement rules provided by The Norwegian Act.¹⁸³

C. Diversity Quota Rule Compliance and Outcome

The cost of non-compliance with the Norwegian gender quota law is high. The Norwegian Act provides for dissolution of a public company by decree of the court if the company “has not reported to the Register of Business Enterprises a board of directors which satisfies the requirements of

¹⁷⁹ *Id.*

¹⁸⁰ Rosenblum, *supra* note 16 at 63.

¹⁸¹ NOR. MISSION TO THE EU, *supra* note 167.

¹⁸² Norwegian Public Limited Liability Companies Act, § 6-11(a)(1).

¹⁸³ NOR. MISSION TO THE EU, *supra* note 167; *see also* Smallman, *supra* note 34, at 829.

provisions issued in or pursuant to statute.”¹⁸⁴ If a company does not comply with the board requirements, the company is given notice and a period of one month to remedy the problem.¹⁸⁵ If after one month, the company has not met the gender quota, the government issues a second notice, this time publicly in the Brønnøysund Register Center’s electronic bulletin for public announcements.¹⁸⁶ The announcement will state that “the conditions for dissolving the company are satisfied, and that the company is allowed a period of four weeks from the electronic announcement to remedy the matter.”¹⁸⁷ Once notice to the company has been announced as required, if the company exceeds the four-week period after the announcement, the Register of Business Enterprises must notify the District Court that the company is non-compliant; thereafter, the court must “without additional notice decide by decree to dissolve the company.”¹⁸⁸ Once the court decides to dissolve the company, the company must be liquidated in accordance with the Bankruptcy Act and the Creditors Recovery Act.¹⁸⁹

One unintended outcome of the quota law was that a portion of public companies chose to delist. Quotas are a “command-and-control” type of regulation that require a hierarchical relationship between the regulator and the regulated.¹⁹⁰ Some companies opted out of that hierarchical relationship and sought other avenues to profitability.¹⁹¹ In fact, up to 40% of Norwegian publicly traded businesses avoided the quota law by converting to private limited companies.¹⁹² Two-thirds of companies that chose to delist indicated that the quota rules were behind the decision.¹⁹³

¹⁸⁴ Norwegian Public Limited Liability Companies Act, § 16-15(1).

¹⁸⁵ *Id.* § 16-16(1).

¹⁸⁶ *Id.* § 16-16(2).

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* § 16-17(1) – (2) Norwegian Public Limited Liability Companies Act § 16-17. There is a small carve-out in Section 16-17(3) where in instances of “major social economic considerations...the King may resolve that the company shall be permitted to continue operations.” *Id.*

¹⁸⁹ *Id.* § 16-18(1).

¹⁹⁰ DHIR, *supra* note 10, at 10.

¹⁹¹ Jill Treanor, *Norway’s Female Boardroom Pioneer Rejects Quotas for Women*, THE GUARDIAN (Jan. 24, 2013, 16:00 EST), <http://www.theguardian.com/business/2013/jan/24/norway-female-boardroom-ibsen-reject-quota>.

¹⁹² *Id.*

¹⁹³ *Id.*

While delisting was an unfortunate choice that some public companies made to avoid the new law, much of the scholarship on the law shows that it has become widely accepted within operating public ASA companies. On the individual level, in a qualitative study of 23 Norwegian company directors covering both men and women of varying experience levels, researcher Aaron Dhir found that while two-thirds of those interviewed were opposed to or indifferent to the law initially, after seeing the quota law in action and experiencing its effects they came to endorse it.¹⁹⁴ The study also showed that directors who might have initially opposed the law because of a general dislike of “governmental meddling in the private sphere” might come to support the law “as a necessary evil in disrupting the closed networks that had previously dominated boardrooms.”¹⁹⁵ Norwegian firms have been forced to broaden their director searches beyond “friends recruiting friends into the boardrooms.”¹⁹⁶ In supporting the mandatory quota, some respondents in the Dhir study indicated that, without it, recruitment based on personal ties and similar backgrounds or characteristics would continue.¹⁹⁷ It appears that the quota law has been effective at combatting in-group bias that is a strong factor in keeping women out of the boardroom. Also of great significance is that the quota law has not had the drastic negative financial impact that many predicted.¹⁹⁸

D. *The Equality Case for Gender Diversity On Boards*

The quota law has, however, “arguably had broader social effects by redistributing power in Norwegian society.” Before the passage of the quota law, Norway was much like the U.S. in that more women were participating in higher education than men and yet at least 50% of publicly held companies had no women on their boards.¹⁹⁹ That important power

¹⁹⁴ DHIR, *supra* note 10 at 115.

¹⁹⁵ *Id.* at 117.

¹⁹⁶ *Id.* at 139.

¹⁹⁷ *Id.*

¹⁹⁸ H.J., *The Spread of Gender Quotas For Company Boards*, THE ECONOMIST, Mar. 25, 2014, <http://www.economist.com/blogs/economist-explains/2014/03/economist-explains-14>.

¹⁹⁹ NOR. MISSION TO THE EU, *supra* note 167.

dynamics are at stake is reflected in the fact that many firms did not comply when the quota was voluntary.”²⁰⁰

In an official government publication intended to outline the purpose and principles behind the Norwegian gender balance policy, the official government position was that, “reaching a balanced participation is a question of democracy.”²⁰¹ In an official publication, the Norwegian government further clarified:

The Government regards the legislation on women in boards as an important step towards equality between the sexes, a fairer society and a more even distribution of power, and as an important factor in the creation of wealth in society. The legislation will secure women’s influence on decision making processes of great importance for the economy in the society. It is important to make use of all the human resources in our country, not just half of [them].”²⁰²

The acceptance of the quota law may be a reflection of Norway’s political culture and commitment to egalitarianism.²⁰³ Commitment to egalitarianism is demonstrated in both public and private policies.²⁰⁴ For instance, a number of Norway’s influential political parties adopted 40% party gender quotas as early as the 1970s.²⁰⁵ In part because of the voluntary gender quotas undertaken by Norway’s political parties, Norway’s level of women’s political participation consistently ranks near the highest in the world.²⁰⁶ Additionally, Norway has a gender-equal national kindergarten plan, which mandates that all children have equal opportunity to be seen and heard and to participate fully in all activities.²⁰⁷ The focus on Norway’s

²⁰⁰ DHIR, *supra* note 10, at 138.

²⁰¹ NOR. MISSION TO THE EU, *supra* note 167.

²⁰² *Id.*

²⁰³ DHIR, *supra* note 10, at 101.

²⁰⁴ *See generally* Rosenblum, *supra* note 16 at 62

²⁰⁵ DHIR, *supra* note 10, at 114.

²⁰⁶ Rosenblum, *supra* note 16, at 61.

²⁰⁷ DHIR, *supra* note 10, at 115.

national policies is not simply on improving the status of women, but rather on achieving gender equality in general.²⁰⁸

Additionally, unlike the United States, Norway is a signatory of the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW).²⁰⁹ The quota law in Norway represents Norway's respect for CEDAW,²¹⁰ which states that men and women shall have the right to "the same employment opportunities . . . promotion . . . and equal treatment in respect of work of equal value."²¹¹ The quota law "aims to enforce greater levels of gender equality in the fields of family life, private work, public work, and politics to enforce gender balance in economic stewardship."²¹²

Furthermore, in the private sector in Norway, corporate culture tends to be "open and nonhierarchical as well as encouraging of parental leave, flex policies, and work-from-home policies."²¹³ The egalitarian effect of workplace parental leave policies is bolstered by the government sponsored paid parental leave policy, which "requires that the father take a specific number of weeks (ten) and the mother take an equal amount."²¹⁴ After that, the parents may divide the rest of the paid leave period as they choose.²¹⁵ The official purpose of the "paternal quota" is "to encourage fathers to participate more in caring for their infant."²¹⁶ Norwegian men actually rank second only after Danish men in the amount of time they spend performing unpaid work in the home, such as housekeeping and caring for children.²¹⁷

Boards achieve diversity-related outcomes when a critical mass of women, as required by the quota law, serve as directors together.²¹⁸ The

²⁰⁸ Rosenblum, *supra* note 16, at 61.

²⁰⁹ *Id.* at 56 n.11, 66.

²¹⁰ *Id.* at 66.

²¹¹ *Id.*

²¹² *Id.* at 71–72.

²¹³ DHIR, *supra* note 10 at 114.

²¹⁴ *Id.* at 115. Before this change in the law, few men exercised their rights to parental leave; however, after the revision, eight out of ten men take advantage of parental leave. Rosenblum, *supra* note 16 at 61.

²¹⁵ DHIR, *supra* note 10 at 115.

²¹⁶ *Id.*

²¹⁷ *Id.* at 114.

²¹⁸ *Id.* at 18.

quota law in Norway is an attempt to regulate gender inequality by intervening in the market.²¹⁹

V. ANALYSIS

In the history of the modern economy, women have not had a seat at the boardroom table. Around the globe, momentum has been growing for gender diversity and female representation on boards, but the pace of change has been slow. Research shows that myriad intractable, inaccurate assumptions and entrenched gender stereotypes may be a primary cause of the lack of women in corporate leadership. Although business leaders and investors have become aware of the issue and mostly agreed—at least publicly—that more women must be incorporated into the higher ranks of corporate leadership, the slow pace of change shows that more thought must be given to why and how such change will occur.

When we look to Norway, we see that an efficient model for change exists, one that utilizes radical regulatory intervention as a catalyst for change. In less than a decade, Norway transformed its corporate boards from the embodiment of entrenched gender hierarchy to a model of gender integration. The outcome in Norway has been largely positive as directors' experience of the change has helped to dispel some of the entrenched stereotypical thinking about women's career ambitions and abilities.

In the United States, where regulatory intervention in the private business sector typically requires economic justifications, the business case for diversity is not providing adequate motivation for strong intervention. Similarly, leaders in the business community publicly exalt diversity in the workplace, but in evaluating their bottom line, many de-prioritize gender diversity initiatives in favor of other programs in hopes of generating shorter-term financial gains. As former Kodak CEO, Antonio Perez bluntly

²¹⁹ Rosenblum, *supra* note 16, at 61. While the dominant discourse in North America on this topic has been dominated by market-based justifications for diversity, the recent popularity of quota laws in the E.U. shows that in Europe a representation-based rationale is taking hold.

put it: “the real barrier . . . [is that] corporations don't believe that [diversity] is a business imperative.”²²⁰

The Norwegian experience teaches us important lessons. First, other policies and programs to promote gender equality formed a foundation for Norway's rapid transition to near gender equality on boards. Second, incorporating large numbers of women onto Norway's boards of directors did not reap financial disaster.

Advocates for gender parity on boards of directors in the United States should advocate for policies and programs that will normalize gender equality. For example, advocates for equality should petition their representatives in state and federal legislative bodies to enact paid parental leave for mothers and fathers. The existence of required paid parental leave for both mothers and fathers in Norway was noted by scholars and business-people alike as laying a foundation for gender equality in the workplace. The requirement for both parents to take time off to parent an infant shifted the burden of parenting so that it was more shared between men and women. The U.S. currently does not have any mandated paid maternity or paternity leave, but advocates for gender equality should consider the Norway model when advocating for paid parental leave in the United States. Implementing leave policies that are mandated for or at least inclusive of both genders will help change attitudes about women's roles within the workplace and family.

Furthermore, a number of Norway's political parties adopted voluntary 40% gender quotas over the last 40 years. While corporations may ultimately cling to the business rationale, our political organizations are not beholden to such measures. In fact, they are charged with the important work of representing the populace as a whole. Developing avenues for women to flourish in high-powered leadership roles will help lay the foundation for more gender diversity on corporate boards. Those who wish to see change in the gender balance within the leadership at the highest echelons of the corporate world should promote gender parity in political

²²⁰ Rhode & Packel, *supra* note 3, at 400–01.

leadership—another important area where women’s actual performance can begin to tear down the stereotypes about women’s leadership abilities.

Leaders within the corporate world hold a lot of power over this issue, and while change at the director level may seem risky and costly, corporations could make changes to internal policies to great effect. For example, it is time for corporations to divert energy and resources from diversity recruitment, which most are succeeding at, to diverse and inclusive promotion and retention policies. Most large corporations succeed at recruiting women into entry-level positions, but they fail at promotion and retention of women because their internal policies regarding assignment of work, evaluations, and parental leave continue to embed androcentric values and gender stereotypes that devalue women and women’s work. Employees at all levels should demand these changes.

By working for governmental and workplace policy changes on a number of fronts, advocates for gender equality on boards can lay the framework for more radical change. Advocates can increase the rate of change and create more opportunities for the advancement of women onto boards of directors in the United States.

VI. CONCLUSION

While a quota law is not a palatable solution in the U.S., advocates could work to change the discourse around diversity on boards of directors. Working to implement more gender equality policies in less controversial ways will help to set a strong foundation for firmer regulatory intervention on the subject of gender diversity on boards of directors in U.S. public companies.