



BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM

THIRD EDITION

PAUL

HASTINGS



BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM

THIRD EDITION


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* New for 2013

** Updated for 2013

For our complete report, which includes research from 35 countries, go to
www.paulhastings.com/genderparity

A photograph of an office interior. In the foreground, several black leather office chairs are arranged around a desk. In the background, a woman with dark hair, wearing a light-colored trench coat, stands by a large window, looking out. The room is dimly lit, with bright light coming from the window. A red rectangular box is overlaid on the left side of the image, containing white text.

**"For us it's about talent...
getting and keeping the
best talent. It's about
creating a culture where
we can have innovative,
creative solutions for
our clients and our
customers, and it's
about making sure that
diversity and inclusion
are differentiators to
grow the business."**

Dr. Rohini Anand
Global Chief Diversity Officer, Sodexo

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Executive Summary

Paul Hastings is pleased to present the third edition of “Breaking the Glass Ceiling: Women in the Boardroom,” a comprehensive, global survey of the way different countries address the issue of gender parity on corporate boards. This edition is a supplement to our full 2012 report, and provides updates to jurisdictions with notable developments over the past 12 months, as well as five new jurisdictions: Austria, Denmark, Finland, India, and Sweden.

Given the dynamism and evolution of this issue, we have developed an interactive website dedicated to providing the most current information and developments on the issue of diversity on corporate boards. Included are details about the legislative, regulatory, and private sector developments and trends impacting the representation of women on boards in countries around the world. In addition, there are interviews with corporate executives and directors as well as individuals who are making strides in addressing this issue – whether at their own companies, within their industries, or as a thought leader. We are honored to share the insights of three women who have been, and are today, pioneers in their own right and have lent their voices and efforts to address this issue:

- **Dr. Rohini Anand** – Senior Vice President and Global Chief Diversity Officer at Sodexo (40% of Sodexo board members are women)
- **Judy Hope** – Professor at Georgetown University Law Center and a Director on several boards, including Union Pacific, General Mills, and Russell Reynolds. Ms. Hope is a former Director of IBM and former partner at Paul Hastings
- **Dr. Jane Shaw** – Director of McKesson Corporation, former Director at OfficeMax, and former Chair of Intel

They collectively cover the topics of (i) educating boards on the business imperative in establishing and maintaining diverse boards, (ii) strategies to open vacancies on corporate boards, (iii) building the pipeline of diverse candidates, and (iv) establishing networks of board-ready diverse candidates. We encourage you to access the full report and interviews at www.paulhastings/genderparity. We will continually update the site with new developments and additional interviews and are hopeful this compendium of information ignites discussion and debate as well as action.

Year in Review

Europe continues to be a leader on this issue. In the past year, we saw tangible progress as well as continued debate about the best approaches for promoting greater representation of women on corporate boards. 2013 showed the highest year-on-year change recorded to date in the average number of women on boards of large corporations in European Union Member States, in part due to mandatory quotas. However, several EU countries have pursued strategies other than mandatory quotas to address the gap. Austria, Denmark, Finland, the United Kingdom, and Sweden favor legislation and corporate codes that allow companies to set their own targets and policies. Recent amendments to the UK's corporate governance code more explicitly reference gender as a factor in making board appointments. The changes also require that companies report publicly on their board member selection process, diversity, and gender policy as well as measurable objectives for implementing and gauging progress. In Germany, the debate over fixed quotas continues within the government and no legislation addressing gender parity is expected this year.

The United States and Canada continue to exhibit only marginal growth in the percentage of women on boards since the 2012 report. However, in the United States, there has been renewed attention and discourse in the public domain regarding the lack of women in the highest echelons of corporate leadership following several op-eds and most notably, Sheryl Sandberg's book *Lean In: Women, Work and the Will to Lead*. Notably, much of the discourse has centered on private sector initiatives, rather than mandatory quotas or other legislative solutions.

In Australia, new legislation has bolstered reporting requirements: private companies with 80 or more employees must report annually regarding specific gender equality indicators. The legislation includes potential sanctions such as naming non-compliant companies in national newspapers and jeopardizing such companies' eligibility for government contracting. In New Zealand, the proposed NZSX/NZDX Listing Rules regarding diversity have been enacted, requiring listed companies to provide a breakdown of the gender composition of their directors and officers.

Legislative efforts to increase representation of women on boards of public and private companies in China have begun to bear results. Since 2012, over 50 cities in Mainland China have adopted local rules implementing the 2011 legislation,

although the majority are limited to state-owned entities. One city in particular, Changji (located in Xinjiang Province), adopted a goal of 18% female board representation by 2015 and 25% by 2020 – the first time a specific target for female representation has been proposed under the 2011 legislation. Although the issue of gender equality at the board level has not yet received significant attention in public discourse in India thus far, the Indian government is taking initiative to address the disparity. The lower house of the Indian Parliament recently passed a bill that is expected to become law, which would require a certain class of companies (which have not yet been determined) to have at least one woman director.

A Variety of Strategies to Fit Local Dynamics

The 2013 report continues to highlight the variety of approaches taken in various countries to increase the number of women on corporate boards. We continue to see countries implementing legislative measures, including quotas, voluntary targets, and reporting requirements. In a number of countries, corporate governance codes and stock exchange listing rules require disclosure and recommend gender diversity as a selection criterion for directors. Overall, there appears to be significant interest from both public and private sectors in building a pipeline of future women directors.

“I think what is required in the proxy disclosure could be strengthened and companies could be held more accountable for meeting the goals that they’re asked to disclose... We pay attention to what we measure. I think the best way to go in the United States, whether it’s the stock exchange listing requirements or the SEC’s disclosure requirement, is if they require companies to disclose what their targets are and then hold them accountable for the progress they’re making.”

Dr. Jane Shaw
Director at McKesson

Legislative Mandates Continue to Spur Results... and Debate

Based on the data to date, legislative quotas still seem to be the most effective measure to immediately increase numbers. In November 2012, the European Union (EU) revitalized the debate on quotas by proposing a temporary mandatory quota (valid until 2028) with the goal of attaining 40% representation of the underrepresented sex in non-executive board member positions in listed companies by 2020 (there is an exception for small- and medium-sized enterprises). As of January 2013, 21 of 27 national parliaments have approved the proposed EU directive, with the Czech Republic, Denmark, the Netherlands, Poland, Sweden, and the UK as the main opponents.

Notably, the EU directive also included a “flexi quota” provision which provides voluntary implementation by listed companies of self-regulatory targets for more equitable representation of both genders for executive board member positions and annual reporting of the progress made in achieving the target. Similarly, certain countries have implemented non-binding quotas or targets for female representation on boards that companies can voluntarily follow. Denmark appears to have developed a middle ground between quotas and non-binding measures. New regulations enacted on April 1, 2013 require large Danish companies to set target figures for equal representation on boards and develop policies to increase the percentage of women in senior management. Equal representation is defined as at least 40% of the underrepresented gender of either board members elected at a general meeting or in upper management. Large Danish companies are required to establish policies and set targets or face fines; however, there is no fine or legal obligation to reach the target figures.

Leveraging Self-Regulation through Corporate Governance Codes and Listing Rules

In many countries, corporate governance codes and stock exchange listing requirements have been an effective way to promote gender diversity and potentially create greater opportunities for women board members. Listing requirements and corporate governance codes include direct references to gender or diversity among possible

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selection criteria for board members, and require companies to disclose in annual reports whether they maintain a diversity policy or, in some cases, the gender composition of their boards.

Both Australia and Finland are examples of where these measures have been successful. Finland's corporate governance code provides that both genders be represented on the board on a "comply or explain" basis. As of 2013, 23% of board members of listed Finnish companies are women. However, there is still room for improvement: only 4.2% of chairpersons and only 16% of executive management team leaders of listed companies in Finland are women.

Other corporate governance or listing requirement provisions may indirectly help increase the number of female representatives on boards by creating greater turnover and leading to greater access for women. For example, the Companies Bill anticipated in India restricts the number of company boards on which an individual can serve as director.

"If the company's management and board work well together, management will not want [the board] to change very much and will extend terms. Another reason there is such a small percentage of women on boards is because the retirement age is being extended. You used to have to retire at age 60, 61, or 65. Now most boards will allow you to serve until age 75. So people tend to have longer terms and boards don't turn over. ... I served as Audit Chair of Union Pacific for 16 years, longer than anyone else in that position in the history of the company. But there is a new Audit Chair who is doing a good job, and I think turnover is good."

Judy Hope

Professor at Georgetown University Law Center and Director on several boards, including Union Pacific, General Mills and Russell Reynolds

Ms. Hope and Dr. Shaw commented on the tension between ensuring the continuity and quality of the board when new members join, and the need to have turnover to create more seats for diverse candidates, including women. In raising the question of what the right tenure period would be, Dr. Shaw notes that it takes time for a new board member to really understand the business of the company. Having climbed the learning curve, boards then want the director to serve for a reasonable period of time.

The Private Sector Remains Critical

In many countries, industry associations, business schools, and non-governmental organizations continue to advocate for and develop initiatives to increase representation of women on corporate boards. For example, the Finland Chamber of Commerce organizes a mentoring program for women executives and the Finnish Business and Policy Forum published a best practices guide on strategies to assist women to advance in business. Finnish universities host educational programs to encourage women to take on business management and executive positions. Additionally, the Finnish Ministry of Social Affairs and Health is engaged in a multitude of programs to promote gender equality in society and to promote social change through influencing attitudes and subliminal perceptions regarding women's suitability for business. Finally, the Finnish Ombudsman for Equality monitors the development and addresses issues of concern for gender equality in the Finnish social arena.

Industry groups also continue to develop voluntary codes of conduct to promote gender diversity on corporate boards. In New Zealand, the 25 Percent Group, a group committed to achieving 25 percent female participation in private

sector boards by 2015, recently launched a new Voluntary Code of Practice for Board Recruitment which provides best practice guidance in achieving diversity in board recruitment processes.

Companies have themselves taken the initiative to implement strategies to increase representation of women on boards and in building the pipeline. According to Dr. Anand, company leadership can set a strong tone by publically stating its commitments and targets, and then by holding their employees accountable for achieving those targets. At Sodexo, teams are held accountable for promoting diversity through the performance management process and by linking the company's diversity scorecard and diversity performance measures to employee incentives.

“We’ve seen the benefits at Sodexo. We continue to grow, we meet our profitability targets, we’ve gone into different areas, we’ve developed new lines of business. And all of this only comes when you have that culture that permeates from the top. Making those sorts of connections and examples are the benefit of diverse boards, both... factually but also emotionally, for leadership.”

Dr. Rohini Anand

Global Chief Diversity Officer, Sodexo

Dr. Anand points to several initiatives implemented at Sodexo aimed at removing barriers that prevent women from moving into leadership positions and ensuring that there is a pipeline of future women leaders. Examples include formal and informal mentoring and sponsorship programs, flexible work arrangements (for both men and women), ensuring that women can transition back into the workforce without losing their seniority, and providing women access to networks. Fundamentally, Dr. Anand notes the importance of ensuring that the work culture is accepting of the different leadership styles that women bring to the workplace, rather than looking at leadership in a one-dimensional manner.

Strategies for Aspiring Board Members

In addition to legislation, corporate governance codes, and initiatives by the private sector, there are strategies that women globally can implement to better position themselves as candidates for board membership. Ms. Hope and Dr. Shaw, both experienced board members, outlined several ways in which women can get on corporate boards.

- **Develop Skills and Expertise:**
 - Dr. Shaw noted that “the qualifications for sitting on a board will come from your career history... and what skills the particular board is looking for.” The experience does not have to be in the same industry. Dr. Shaw was invited to join the Intel board because many of the issues she had dealt with on the board of a pharmaceutical company mirrored those being encountered at Intel.
 - Ms. Hope mentioned that CEOs want women candidates, but “they also want a director that has the experience they need at that time.” One of the things that helped Ms. Hope most in being attractive for board service was her experience in government service.
- **Serve on Non-Profit Boards:** Women can get relevant experience for for-profit board service by serving on non-profit boards, particularly with regard to teamwork, committee service, addressing issues related to compensation and audit, and financial matters.

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- **Express Interest:** According to Dr. Shaw women need to let it be known that they are interested in serving on a board and should actively promote themselves for these positions.
- **Be Strategic:** Don't restrict yourself to the obvious. As Dr. Shaw notes, there may be an opportunity to serve on the board of a subsidiary of a parent company, for instance.
- **Networks and Sponsors:** Dr. Shaw states that women need good sponsors who can use their connections to help place them on boards and/or use their networks to get their names put forward as potential board candidates. Dr. Shaw was recruited to her first corporate board because a then-sitting director recommended her. Assess your network, expand it if necessary, and then use it.

For more advice and details on Dr. Shaw and Ms. Hope's experiences as directors, as well as Dr. Anand's insights, please see the full interviews at www.paulhastings/genderparity.

Conclusion

The discussion on gender parity is being addressed in a number of ways in different countries, including legislation, governance codes, and private sector initiatives. Although the debate over the best way to close the gap continues, there appears to be a strong consensus in many countries regarding the need for building a pipeline to increase the pool of women candidates for board seats, as well as to establish new and/or publicize existing networks of board-ready women.

Many developing countries, like India, are in the initial stages of building that pipeline, challenging cultural and social norms, as well as a low female literacy rate, that create obstacles to advancement. Other countries have closed the gap in certain spheres and not in others – for example, in Sweden there is significant gender diversity in the political sphere (45%), but the economic sphere continues to lag behind. Overall, there is significant room for improvement, and hopefully the ideas and strategies summarized in this edition will advance the discussion on how to move forward.

We welcome your feedback on the 2013 report. It is our hope that this edition sparks ideas and discussions about possible strategies and initiatives. We will continue to add new jurisdictions, in addition to updating the countries covered to date. We look forward to reporting on future efforts to increase women's participation on corporate boards globally in the upcoming year.

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Scan to hear more from those leading the way





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AUSTRIA

Austria - New for 2013

Sandra Mueller, Counsel
Bettina Knoetzi, Partner
WOLF THEISS Rechtsanwälte GmbH

As a result of the initiatives launched at the European level, the promotion of boardroom diversity was also put on the agenda by the Austrian Government. And, as in other countries, it led to an ongoing debate about whether mandatory quotas are required to ensure a better gender balance on boards or whether self-regulation and/or "soft law" measures are more appropriate.

The Austrian Federal Minister for Women and Civil Service, Gabriele Heinisch-Hosek, considers the introduction of mandatory quotas as a necessary measure to speed up the process of promoting women to board positions.¹ Her position is in line with the developments in countries with legislative quotas, such as Norway and Finland, where the proportion of women on the boards has substantially increased over the last years.² In contrast, the Austrian Federal Minister of Economic Affairs, Reinhold Mitterlehner, promotes the right of private companies to choose their own manpower. Pointing out that the shareholders bear the full commercial risk of a company, he argues that any interference by the state through quotas or promotion plans may potentially lead to economic disadvantages, particularly in light of the current difficult economic climate.

In 2011, the Austrian Government adopted a gender diversity quota for state-owned companies. This resulted in a noticeable increase in the average percentage of women on supervisory boards of such companies, amounting to 33% as of February 2013.³ Meanwhile, the percentage of women on boards of private companies, in particular those listed on a stock exchange, still lags substantially behind.

State-Owned Companies

In March 2011, the Austrian Federal Government set an example by voluntarily imposing a 25% gender diversity quota on supervisory boards of companies in which the state owns 50% or above. The deadline for implementation is December 31, 2013. By 2018, the quota will increase to 35%.

The 25% quota currently applies to 55 companies, of which 44 are fully owned by the state. For the time being, there are no sanctions imposed for failing to implement the quota. After 2018, statutory measures can be initiated if the 35% quota has not yet been reached. Nevertheless, the initiative resulted in a sound increase of female participation in state companies. In the years 2007/2008, the percentage of women in supervisory boards of state-owned companies was only 16.1%. That number is expected to increase on average to 33% in 2013.

Corporate Governance Code and Corporate Law

Unlike for state-owned companies, the Austrian Federal Government has abstained so far from enacting a mandatory gender quota law for publicly listed companies, but rather relied on "soft law" when addressing the issue of gender balance on boards in the private sector.

The Austrian Code of Corporate Governance,⁴ the commitment to which is mandatory for all stock exchange-listed companies, requires that when appointing the members of a supervisory board, the general meeting of shareholders shall, *inter alia*, pay reasonable attention to diversity with respect to the representation of both genders.⁵ However, the

1 <http://diepresse.com/home/politik/innenpolitik/1265142/HeinischHosek>.

2 http://ec.europa.eu/justice/gender-equality/files/womenonboards/factsheet-general-2_en.pdf.

3 Progress Report of the Minister for Women and Civil Service of February 28, 2013, GZ BKA-F140.200/0049-II/1/2013.

4 http://www.wienerboerse.at/corporate/pdf/CG%20Kodex%20deutsch_Juli_2012_v2.pdf.

5 Rule 52 of the Austrian Corporate Governance Code.

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Code does not specify what is meant by the term “reasonable”. In 2012, this rule was changed from a C-rule (“comply or explain” rule) to an L-rule (legal requirement) as a result of a change in the Austrian Stock Corporation Act (see further below).

The Austrian Commercial Code furthermore required listed companies to disclose in their annual corporate governance reports which measures have been initiated for the promotion of women to supervisory and management boards and to other executive positions.⁶ In practice, however, these reports fall behind expectations and one out of eight top Austrian companies tends to disregard this provision completely.⁷

As of 2012, the Austrian Stock Corporation Act (*Aktiengesetz*) requires that the general meeting of shareholders must consider a balanced composition of the supervisory board. The criteria that have to be taken into consideration are the professional and personal competences and skills of the designated members, as well as the representation of men and women. However, there is no requirement that each gender has to be represented or that a certain mandatory quota has to be fulfilled; this provision is thus open to interpretation. The wording of the law suggests that professional qualification is ranked above gender diversity.

The recent change in the law has opened up a discussion on whether shareholders’ resolutions can be challenged on the basis of insufficient gender diversity. For various reasons, however, this is generally rejected. The main reason is that the legislators (intentionally) did not include insufficient gender diversity among the reasons on the basis of which shareholders’ resolutions can be challenged. Additionally, the criterion of gender diversity is listed among other criteria, such as age and internationality, without any ranking or priority.

The report of the Austrian Chamber of Labor of 2013 shows that despite the legislative changes, only modest progress has been made in 2012. Compared to state-owned companies, the percentage of women in boardrooms of listed companies is still very low, with only 3.3% on management boards and 11.6% on supervisory boards. Hence, hardly any increase may be observed since the introduction of the legislative initiatives.

A few non-listed companies committed themselves voluntarily to take steps to increase the representation of women on their boards. The progress has been modest – only a marginal increase in the percentage of women on corporate boards can be observed. By January 2013, of the top 200 Austrian companies, only 5.6% of management boards and 13.5% of supervisory boards were women.⁸ One possible explanation is that the percentage of women in boardrooms was substantially low from the start and, therefore, the momentum required to increase that percentage is slowly building. Furthermore, this topic is closely linked to the sociopolitical question of whether framework conditions need to be further improved to enable women to take advantage of the required quotas and to fulfill managerial roles in the corporate environment.

Conclusion

Despite requirements in the Corporate Governance Code and corporate law today, the representation of women on boards of privately-owned, and in particular, exchange-listed companies, is still behind that of state-owned companies in Austria. It remains to be seen how the Austrian Government will react to that fact and whether further legislative measures will be enacted both at the national and the European level to achieve a better gender balance on boards.

6 Section 243b para 2 of the Austrian Commercial Code (*Unternehmensgesetzbuch*).

7 Report of the Austrian Chamber of Labor of 2013.

8 Report of the Austrian Chamber of Labor of 2013..



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DENMARK

Denmark - New for 2013

Marianne Philip
Partner, Kromann Reumert
Vice-Chairman, Danish Corporate Governance Committee

In Denmark, the gender composition of corporate boards has been the object of public attention for several years, with a number of different initiatives implemented to increase the share of women in boardrooms and in management in general. Until April 2013, however, all of these initiatives were "soft law" and not legislative.

In May 2013, 7.9 percent of the board members in listed companies elected by the general meeting were women. In February 2013, the percentage of women elected by the general meeting was 7.24 percent. Thus, there were virtually no changes during the spring 2013 season.

Danish Corporate Governance Recommendations

The Danish Corporate Governance Recommendations, which apply primarily to Danish listed companies, were first published in 2001. Several amendments to the recommendations have been made since then, with the current version of the Corporate Governance Recommendations published in May 2013.

In August 2011, the recommendation on management diversity was supported by a recommendation to set objectives for diversity at all management levels in companies. It was explicitly recommended that diversity, not just gender, be taken into consideration when boards of directors are assessing their composition and nominating new candidates. The recommendation is not only directed at board diversity, but also at increasing the pipeline through focus on diversity in the various levels of management. Companies are recommended to prepare plans of action describing the focus areas and to report on the objectives set. In connection with the presentation of their annual reports, it is recommended that companies account for their objectives and the status of meeting their objectives. The recommendation relates to diversity in general, i.e., not only gender, but also, among other criteria, age and international experience.

The recommendations are not mandatory. The soft law approach gives individual companies the flexibility to organize their governance optimally. Under the "comply or explain" approach, the individual company decides whether and to what extent it wishes to comply with the recommendations. If a company fails to comply with a recommendation, it must explain why and describe the approach it follows, including what it does instead.

Other Soft Law Initiatives

In Danish politics, gender equality has been a centre of attention for several years. When the current government took office in October 2011, the government specifically mentioned in its platform that it would initiate a dialogue with representatives from the industry with a view to ensuring more women in boardrooms.

In 2007, the Department for Equal Rights, a section of the Ministry of Employment, introduced a soft law initiative called "Charter for Women in Management." The purpose of this initiative was that Danish companies and organisations, on a voluntarily basis, could adopt the Charter and thereby commit to prepare a report describing how the company or organisation in question intended to fulfil the obligations stipulated in the charter. Among other things, these obligations required the companies or organisations to draw up a strategy, set target figures for the proportion of women in management, and lay down recruitment procedures and career development plans in order to make sure that female management talent is visible. In 2012, the number of companies and organisations that had adopted the Charter reached 110. The Charter was discontinued in January 2013 with the introduction of the legislation described under New Danish Legislation below.

Another soft law initiative was "Operation Chain Reaction." The purpose of this initiative was to strengthen the competitiveness of Danish companies by increasing the number of women serving on their boards. Launched in 2010, the initiative comprised the introduction of "Recommendations for More Women on Company Boards," a set of guidelines prepared by prominent members of the Danish business sector and the Danish Minister of Equality.

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As had been the case with the Charter for Women in Management, Operation Chain Reaction was founded on the principle of voluntariness. By adopting Operation Chain Reaction, the companies committed themselves to making special and active efforts to train and recruit female candidates to their boards. In 2012, only 55 companies had adopted Operation Chain Reaction.

New Danish Legislation

As the expected effects of the different soft law initiatives failed to materialise, the Danish Parliament decided to address the issue through legislation, thereby not only covering listed companies, but all Danish companies of a certain size. The new rules are based on a form of soft law approach requiring the companies to set targets for the proportion of the underrepresented gender on their boards and in management, thereby taking the same approach that the Committee on Corporate Governance has taken in its recommendation on gender diversity.

On 14 December 2012, the Danish Parliament adopted a bill in pursuit of equal representation of men and women in the management of large Danish companies. The new regulation came into force on 1 April 2013. The act implements a model for creating equal access for men and women to boards and other management levels in private and public companies. The purpose of the rules is to create actual progress and to increase the share of women on boards and in management in large Danish companies, seeking to achieve an equal proportion of men and women on boards and in management in general. Equal proportion is defined in the preparatory work as at least 40 percent of the underrepresented gender of either the board members elected at the general meeting or at the managerial levels below the board of directors.

The new rules cover not only listed companies, but all Danish companies of a certain size, i.e., approximately the 1,100 largest Danish private companies as well as all public companies/organisations. The rules will influence both the board of directors in the form of requirements for setting target figures (see Board of Directors) and the other management levels in the form of a requirement to prepare a policy to increase the proportion of women in management in general, i.e., at all managerial levels below the board of directors (see Other Management Levels).

The new rules cover listed companies, large commercial enterprises and foundations, a number of financial undertakings, state-owned public limited companies, and all other public organisations. Large enterprises will be covered if exceeding two of the following criteria in two consecutive financial years:

- Balance sheet total of DKK 143 million;
- Revenue of DKK 286 million; or
- Average number of employees of 250.

Board of Directors

If a company/organisation does not have an equal proportion of men and women serving on its board of directors (i.e., one of the two genders represents less than 40 percent of the board members elected by the general meeting), the board of directors must set a target figure for the proportion of the underrepresented gender on the board. The determination of the target figure must consist of two elements: i) a proportion (target figure); and ii) a time horizon within which the company/organisation will endeavour to realise the said target figure. As a general rule, the time horizon may not exceed four years. There are no requirements in regard to the proportion (i.e., no quotas). However, it follows from the preparatory work and comments to the bill that the target figure must be ambitious while at the same time realistic. Moreover, pursuant to the Danish Equal Rights Act, the target figures set in state-owned public limited companies ought to be at least 33 percent, whereas the target figures set in all other public companies/organisations ought to be at least 40 percent. The phrase *ought to be* means that the public companies/organisations comprised by the Danish Equal Rights Act must endeavour to reach the stipulated target figures, but there is no legal obligation to do so.

For all privately-owned companies and state-owned public limited companies, any failure to set a target figure will be punishable by fine. For all other public organisations, any failure to set a target figure will result in a reprimand from the relevant minister. It is important to emphasize that there are no legal implications if the target figure is in fact not ambitious or not met.

Other Management Levels

If a company/organisation does not have an equal proportion of men and women at the management levels below the board of directors (i.e., one of the two genders is represented by less than 40 percent at the other management levels) and if the company/organisation has more than 50 employees, the company/organisation must prepare a policy to increase the proportion of the underrepresented gender in management in general and also at management levels below the board of directors. The intention behind the duty to prepare a policy is to seek to increase the pipeline of women who possess the necessary competences to be elected to boards by focusing on gender diversity at the managerial levels.

The new rules grant the covered companies/organisations full flexibility in relation to the form, content, and implementation of the policy. However, a number of examples of potential initiatives are given in a set of guidelines issued by the Danish Business Authority. Among these are recruitment procedures that contribute to increased visibility of female talent, including career development plans and mentor/networking schemes.

Any failure to prepare a policy will be punishable by fine, but there are no consequences if the targets set out in the policy are in fact not met.

Duty to Report

The new rules entail a duty for the affected companies/organisations to report on their target figures and policies, if any. In connection with the presentation of their annual report, privately-owned companies and state-owned public limited companies must account for the status of meeting their target figure and for their policy. They must also provide a description of the policy, how the policy has been implemented, and an assessment of what has been achieved during the past year. If the target figure set by the company has not been met, then the company must explain the reasons. For public organisations, similar obligations apply, provided, however, that the reporting must be made to the relevant minister instead of in the annual reports.

Companies/organisations that have an equal proportion of the two genders at the board of directors and/or an equal proportion at the management levels below the board of directors and therefore have not prepared a policy, must report on such equal proportion.

Companies reporting as part of the UN's Global Compact are exempt from the general duty to report on the target figure and the policy, as they are required to address these issues in their reporting under the UN Global Compact rules.

The duty to report takes effect for financial years starting on 1 January 2013 or later. For most companies, the first reporting must therefore take place in connection with the presentation of the 2013 annual report in the spring of 2014.

Any failure to comply with the reporting requirements of the Danish Financial Statements Act will be punishable by fine, but there are no consequences if the targets set out are not met.

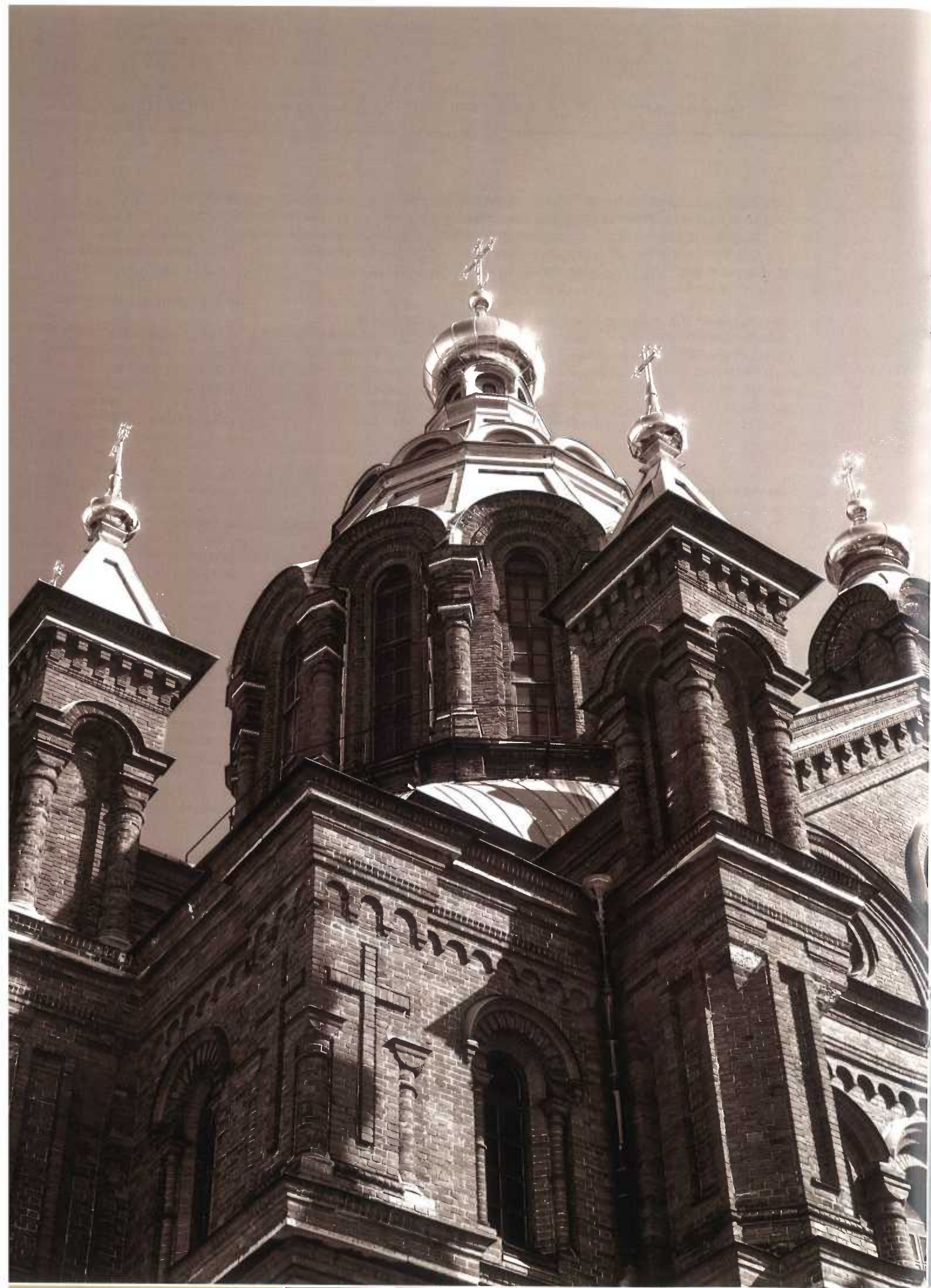
Conclusion

Even though the Corporate Governance Recommendations setting objectives for gender diversity on all management levels have become law and therefore are not limited to listed companies, the new rules only apply to approximately the 1,100 largest Danish private companies and all public organisations. The Danish business landscape, however, is characterized by a large number of small and medium-sized companies. These companies are not covered by the new rules and thus there will be no legal obligation to harvest female talent within these companies. Consequently, from a general perspective, the new rules may have a limited impact.

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The rules are mandatory in the sense that the covered companies must set target figures and prepare a policy if the composition of the board of directors and the other management levels are not equal (i.e., either gender represents less than 40 percent). It is also important to note that the new rules are flexible in the sense that no quotas are set. However, given the fact that companies are subject to a reporting duty, and the target figures/policy, therefore, to some extent, will become publicly known, it has been argued that the rules do in fact introduce a form of quotas through the back door.

In general, however, the new rules have been well received by the industry.



BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM

FINLAND

Finland - New for 2013

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Finland is generally considered to be one of the forerunners in gender equality.¹ When it comes to the number of women on the boards of listed companies, Finland lists among the top in the EU. The number of female board members in listed companies has tripled during the last ten years. In 2013, 23 percent of board members in all Finnish listed companies are women. The number has increased slightly from 22 percent in 2012. The number of women in board positions varies, however, in accordance with the size of the company: while in large cap companies² one third (31%) of board members are women (28% in 2012), the share of female board members is smaller in mid cap (23% in both 2013 and 2012) and small cap companies (18% in 2013 and 16% in 2012).³

Despite the positive developments in Finland, there is still a long way to go to achieve full gender parity on the boards of listed companies. The number of male board members is still significantly higher than the number of female board members. Further, women rarely hold the highest position on the board. In 2012, only five women acted as the chairperson of the board of a Finnish listed company, representing only 4.2% of the total number of chairpersons.⁴

With regard to other top positions in listed companies, the number of women in executive management teams and other executive positions is even lower than the number of women on boards. In 2012, there was only one female CEO in all of the listed companies in Finland. Only 16% of the executive management team members, including CEOs, in listed companies were women in 2012 (19% excluding CEOs).⁵ It is also common that the responsibility of women in executive management teams is within administration, reflecting the stereotype of operational business being the domain of men. In 2012, 36 out of 350 directors for business operations, excluding CEOs, were women, which is 9.3%. If CEOs are factored in, the percentage of women among directors for business operations is 7.3. Women with responsibility over business operations are more common in the fields of activity generally dominated by women such as the service sector.

Corporate Governance Code

There are no statutory quotas for the private sector in Finland and the number of female board members is mainly governed by recommendations based on self-regulation. In listed companies, self-regulation is based on the Corporate Governance Code (the CG Code) issued by the Finnish Securities Market Association and the related application guidelines.

1 E.g., Finland granted women the right to vote as early as 1906, and currently 43 percent of the Members of Parliament are women. Ten out of 19 ministers in the Finnish Government are women. Each year since 2006, Finland has ranked as one of the top three countries in the Global Gender Gap Index issued by the World Economic Forum. In 2012, Finland ranked second in the index after Iceland.

2 Large cap companies are defined as listed companies with a market value of at least EUR 1,000 million. Companies with a market value of EUR 150 million or more are categorized as mid cap companies, whereas companies with a market value below that are small cap. See Finland Chamber of Commerce's report "The Glass Ceiling is Cracking – Self-regulation Beats Quotas" (2012), page 3, available at http://naisjohtajat.fi/files/2012/05/THE-GLASS-CEILING-IS-CRACKING_Self-regulation-Beats-Quotas_finncham.pdf. Accessed on 31 May 2013.

3 Leena Linnainmaa's (President of the Finland Chamber of Commerce) presentation in World Chambers Congress in Doha, Qatar, dated 24 April 2013, available at <http://www.slideshare.net/K3FIN/doha-women-executives-2013>; Finland Chamber of Commerce's Press Release dated 3 May 2013, available at <http://kauppakamari.fi/2013/05/03/naisten-osuus-porssiyhtioiden-hallituksissa-kasvaa-ya/>. Accessed on 31 May 2013.

4 The Glass Ceiling is Cracking – Self-regulation Beats Quotas, Finland Chamber of Commerce 2012 http://naisjohtajat.fi/files/2012/05/THE-GLASS-CEILING-IS-CRACKING_Self-regulation-Beats-Quotas_finncham.pdf. Page 19. Accessed on 31 May 2013.

5 The Glass Ceiling is Cracking – Self-regulation Beats Quotas, Finland Chamber of Commerce 2012 http://naisjohtajat.fi/files/2012/05/THE-GLASS-CEILING-IS-CRACKING_Self-regulation-Beats-Quotas_finncham.pdf. Pages 21 – 24.

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The CG Code states that “both genders shall be represented on the board.”⁶ Listed companies must follow the CG Code on a “comply or explain” basis, meaning that they must specify and explain the basis for each deviation on their website and in their annual Corporate Governance Statement.⁷ The application guidelines for the CG Code state that it is not sufficient to explain that a suitable female director could not be found or that the Annual General Meeting decided on the composition of the Board of Directors differently from the recommendation.⁸ The Finnish Securities Market Association has found, however, that an exception concerning the gender composition of boards is among the most common deviations made by listed companies. The Securities Market Association has further found that the explanations given by companies are too general in nature and not sufficiently informative.⁹

To date, the self-regulatory approach has proven to function well with regard to gender parity in listed companies. Since the updated CG Code was issued in 2008, the percentage of listed companies with an all-male board of directors has fallen from close to 50 percent in 2008 to only 13 percent in 2013.¹⁰

In regard to private companies, the Finland Chamber of Commerce issued a Statement for Improving Corporate Governance of Unlisted Companies in January 2006 which recommends that major companies comply with the Recommendation for Listed Companies to the appropriate extent. The statement includes an Agenda for Improving Corporate Governance of Unlisted Companies, i.e., companies not considered able to implement the Corporate Governance Code for Listed Companies, but that would like to improve their operations in conformity with good corporate governance principles. The Agenda includes a recommendation according to which “the board members’ age and the representation of both genders are factors to consider when deciding the composition of the board.”¹¹

Statutory Quotas in the Public Sector

While there are no statutory quotas for the private sector in Finland, the Finnish Act on Equality between Women and Men sets out statutory gender quota requirements for public sector governing bodies.¹² Governing entities of the state and municipalities, as well as all management or administrative entities or entities consisting of elected officials applying public authority, are required by law to have a minimum of 40 percent of the underrepresented gender among its members. Entities which are not included in public administration, but which carry out tasks assigned to them by public authorities and thus apply a certain level of public authority, such as state-owned companies, are required to appoint men and women to their governing bodies in an “equitable proportion.” In practice, the aim is to reach a minimum of 40 percent representation of the underrepresented gender.

Legislative Developments

The proposed EU directive on gender quotas for boards of listed companies has been much debated in public discussion lately. Consultations collected by the Ministry of Justice show that defenders of the directive mostly represent civil organizations promoting women's rights as well as labor unions. The opponents of statutory quotas

6 Recommendation 9 of the Finnish Corporate Governance Code 2010, at <http://cgfinland.fi/files/2012/01/finnish-cg-code-2010.pdf>. Accessed on 31 May 2013.

7 Recommendation 54 of the Finnish Corporate Governance Code 2010, at <http://cgfinland.fi/files/2012/01/finnish-cg-code-2010.pdf>.

8 Guideline: comply or explain: Departure from the Recommendations of the Finnish Corporate Governance Code, Securities Market Association 20 Jan 2012: http://cgfinland.fi/files/2012/01/Guideline_comply-or-explain_en.pdf. Accessed on 31 May 2013.

9 Guideline: comply or explain: Departure from the Recommendations of the Finnish Corporate Governance Code, Securities Market Association 20 Jan 2012, page 3, at http://cgfinland.fi/files/2012/01/Guideline_comply-or-explain_en.pdf.

10 The Glass Ceiling is Cracking – Self-regulation Beats Quotas, Finland Chamber of Commerce 10/2012 http://halsjohtajat.fi/files/2012/05/THE-GLASS-CEILING-IS-CRACKING_Self-regulation-Beats-Quotas_finncham.pdf, p. 10.

11 Chapter “Board of Directors” in Recommendation Improving Corporate Governance of Unlisted Companies at <http://kauppakamari.fi/wp-content/uploads/2012/04/Improving-corporate-governance-of-unlisted-companies.pdf>. Accessed on 31 May 2013.

12 Section 4a of the Finnish Act on Equality between Women and Men (609/1986), unofficial translation: <http://www.finlex.fi/en/laki/kaannokset/1986/en19860609?search%5Btype%5D=pika&search%5Bpika%5D=609%2F1986>. Accessed on 31 May 2013. The Act is currently subject to amendments in connection with the reform of Finnish non-discrimination legislation. Amendments will mainly extend the application of the Act also to gender minorities instead of being limited to “equality between men and women.”

consist of organizations representing the business sector as well as certain women's interest groups. One of the main arguments against imposing statutory quotas is that they can make an appointment seem as only a means to comply with legislation and, in effect, deprive skilled women of professional acknowledgement. This would work as a detriment to demonstrating the benefits of including accomplished women on boards.¹³

The Finnish Government is interested in improving gender parity in listed companies' boards, even with legislative measures if necessary. The Government Action Plan for Gender Equality 2012-2015 states, *inter alia*, that if sufficient improvement is not noted, legislative measures will be undertaken to ensure a more equal gender representation on the boards of listed companies, taking into account the 40 percent quota which is currently applied in the public sector. An evaluation of whether improvements have been sufficient will be conducted in June 2014.¹⁴

Other Measures to Improve Gender Parity

Business organizations are active in promoting gender parity also through other measures. For instance, the Finland Chamber of Commerce organizes a mentoring program for women executives in order to assist women in developing experience and confidence in preparation for leadership positions. The Finnish Business and Policy Forum EVA, on the other hand, has published best practices on how to get women to the top in the business world.¹⁵

Furthermore, Finnish universities and other education facilities have issued educational programs to encourage women to take on business management and executive positions. Also, the Finnish Ministry of Social Affairs and Health is engaged in a multitude of programs to promote gender equality in society and to promote social change through influencing attitudes and subliminal perceptions regarding women's suitability for business. Measures include mainstreaming of gender perspectives in impact assessments in decision making, ensuring equal pay, and various forms of international cooperation. The Finnish Ombudsman for Equality monitors the development and addresses issues of concern for gender equality in the Finnish social arena.

Conclusion

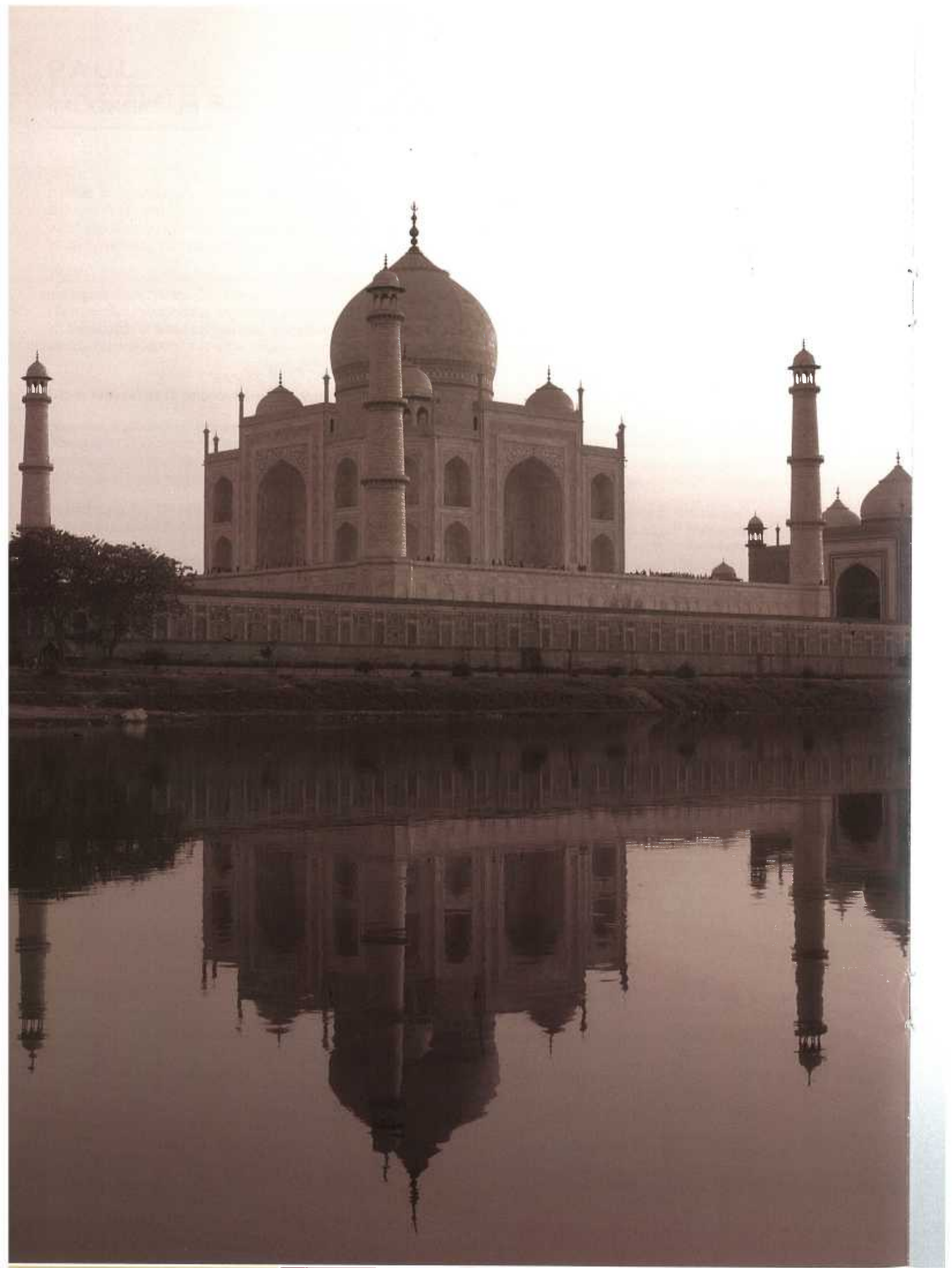
The Finnish model of self-regulation has achieved significant developments while avoiding some of the potential detrimental effects of quotas imposed by law. This can be used as an example of successful implementation of gender parity recommendations based on a corporate governance code. However, it should be noted that in order to fully attain gender parity in the boards of listed companies, the companies themselves need to be active and willing to voluntarily comply with the recommendation. The yield that self-regulation will have in Finland is yet to be seen. It has been established that the CG Code has led to a substantial fall in the number of companies with all-male boards and that it has encouraged companies to appoint women as board members. However, it is up to the listed companies to implement the recommendation and to prove that the aim of 40 percent can be achieved quickly enough to avoid the need for statutory quotas.

13 See U-letter on the consultation regarding the directive proposal dated 22 January 2013, available at http://oikeusministerio.fi/material/attachments/om/valmistella/lakihankkeet/yhtiooikeus/6EZWqa0H9/Yhteenveto_15.1.2013_jarjestetysta_kuulemisesta_ja_lausuntopalautteesta.pdf. Accessed on 31 May 2013.

14 See Government Action Plan for Gender Equality 2012-2015, p. 21-22, available at http://www.stm.fi/c/document_library/get_file?folderId=5197397&name=DLFE-24302.pdf. Accessed on 31 May 2013.

15 See The Finnish Business and Policy Forum EVA's "Women to the top – recommendations," dated 24 September 2007, available at http://www.eva.fi/wp-content/uploads/files/2155_Tolmenpidesuosituksset_english.pdf. Accessed on 31 May 2013.

BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM



BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM

INDIA

India - New for 2013

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Women form a significant part of the workforce in India and yet, like other Asian countries, their representation in executive positions in the corporate sector, especially at the boardroom level, is abysmal. Despite a growing consciousness on gender equality, this issue has yet to catch the public eye in India. There is very little political or social discourse on providing impetus to women's participation in corporate governance and the issue is not a priority item on the national governance agenda.

Studies suggest that the number of women on corporate boards in India is around 5.3 percent.¹ Of the 1,112 directorships of companies listed on the Bombay Stock Exchange, a mere 59 are held by women.² Further, many of them occupy their positions by virtue of their kinship, owing to the predominance of family-owned businesses in India, and not by virtue of their professional capabilities. Therefore, these women directors have little say in the shaping of the board's decision making or in the management of the company.

The reasons for this disparity are manifold, but they predominantly revolve around cultural perceptions and social norms prevalent in India. Women have historically been associated with the roles of domiciliary support while men are the bread winners. With time, these gender roles have subtly evolved into stereotypes, resulting in clear prejudice against women looking to rise up the corporate ladder. Gender disparity in boardrooms is also, to a large extent, attributable to the current sex ratio and the low female literacy rate,³ both of which have their roots in the stereotypical perception of women in Indian society. These gender roles also account for women losing out mid-career due to marital and maternal obligations. The perceptions and norms do not merely impact the mindset of the society at large, but also have a trickle-down effect on institutions that are relatively insulated from them. For instance, most multinational companies bringing international practices to India face challenges due to the small pool of talented women candidates to choose from for boardroom and senior managerial positions.

While this 'glass ceiling effect' seems like a global phenomenon, the rigid cultural perceptions and social norms in the Indian society make this more of an impediment here than elsewhere.

Constitutional and Legal Framework

The Indian Constitution has been more progressive in the treatment of women than many other national constitutions, including providing an equal right to vote for women long before the right was available in some developed countries. It also enshrines principles of gender equality and makes it incumbent on the State to adopt affirmative measures to ensure equality of status and opportunity of women. Ever since the adoption of the Indian Constitution, the Indian government has taken various measures toward empowering women and providing impetus to the representation of women in public life. These measures include a quota for women in local governing bodies, legislative reform of the personal laws, etc.

India has also demonstrated its earnestness in fulfilling its international obligations regarding women's rights. India was one of the first countries to sign the Convention on Eliminating All Forms of Discrimination Against Women (known as CEDAW), following which a number of policy and legislative reforms have been adopted by the government for the emancipation of women. However, the implementation of these policy and legislative measures continues to remain a challenge. In pursuit of its obligations under CEDAW, the government is currently considering enacting an exhaustive legislation providing for remedy, redressal, and penal action against discriminatory practices.⁴

1 GMI Ratings' 2013 Women on Boards Survey available at http://www.fortefoundation.org/site/DocServer/GMIRatings_WOB_042013.pdf?docID=19201.

2 Standard Chartered Bank: Women on Corporate Boards in India available at http://www.communitybusiness.org/images/cb/publications/2010/WOB_India.pdf

3 Sex ratio in India in accordance with Census of India, 2011 is 943 females for every 1000 males and the female literacy rate is around 55.97% available at http://www.censusindia.gov.in/2011census/hlo/PCA_Highlights/pca_highlights_file/India/5Figures_at_glance.pdf.

4 Combined second and third periodic report of India on CEDAW available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/572/16/PDF/N0557216.pdf?OpenElement>.

BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM

With a male dominated workplace and increasing numbers of women joining the workforce, workplace sexual harassment has emerged as a major problem encountered by women in India. The Supreme Court of India took note of this issue as early as 1997, when a landmark judgment⁵ laid down the policy to be adopted by employers to combat this issue. However, the directions of the Supreme Court received an apathetic response from employers, including the public sector enterprises, and the level of compliance with these guidelines was disappointing. In view of the growing demand from civil society organizations and social media for detailed legislation on the subject, the Indian Parliament recently passed the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013. The legislation seeks to prevent and redress grievances pertaining to sexual harassment in the workplace. Despite the fact that the introduction of the legislation has received criticism from various quarters for being too little and too late, it is definitely a positive step that will go a long way in improving work conditions and ensuring a safe and healthy work environment for women.

With the view to reform various provisions of the existing law, especially relating to corporate governance, the lower house of the Indian Parliament has recently passed the Companies Bill, 2012 (Companies Bill) and it is soon expected to become law. As part of the measures to improve corporate governance, a provision regarding mandatory appointment of women directors was introduced in the Companies Bill. The provision requires certain prescribed classes of companies (which are yet to be identified by the government) to have at least one woman director on their board of directors. While the Parliamentary Standing Committee on Finance expressed its concern regarding practicality of the provision, especially due to the limited talent pool, the Securities and Exchange Board of India (the Indian capital markets regulator) has lauded the government's effort in introducing a quota for women on corporate boards. The government's response has so far been progressive and the government has made it clear that provisions such as these "*will make the companies more alive to giving salience to the female gender in the realm of corporate governance.*"⁶ While it remains to be seen what classes of companies are brought within the ambit of this provision, it is expected that the majority of listed companies will be covered. A possible challenge then would be to identify a sufficient number of women capable of occupying boardroom positions allocated for women directors.

Apart from the proposed provisions in the Companies Bill, there is hardly any requirement under the Indian regulatory framework providing impetus to the participation of women in corporate governance. However, certain measures in the current law, such as the restriction on the number of boards an individual can be appointed to, go a long way in attracting a fresh talent pool, thus providing greater access and opportunity for women directors.

Conclusion

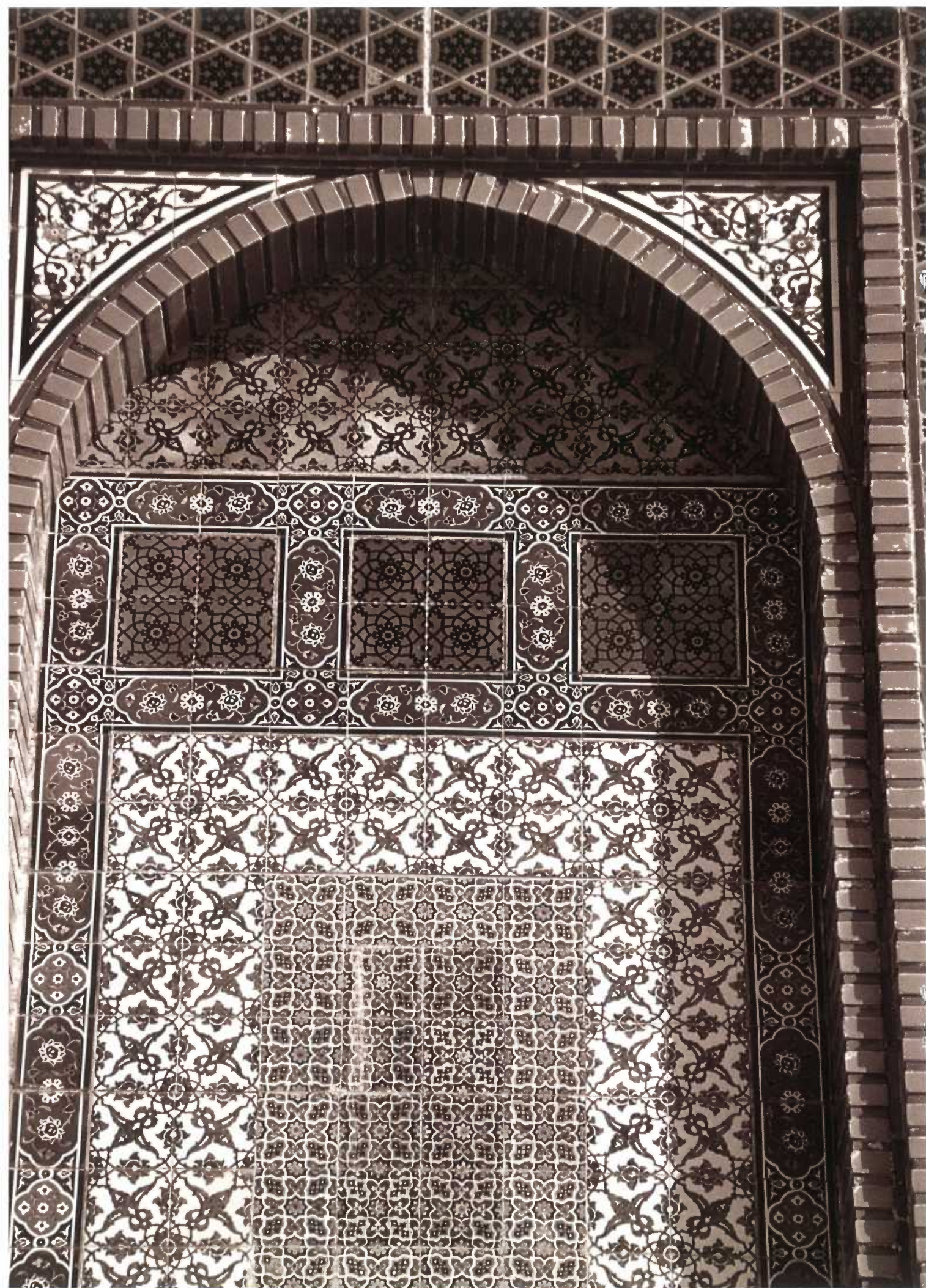
Recent cases of sexual violence against women have provoked nationwide protests and have prompted the government to introduce legislative and policy reforms on a spectrum of issues relating to the safety of women, especially in the work environment. However, the implementation and enforcement of these reforms continue to be the primary challenge in improving the living and working conditions of women in the society.

In the Indian context, quotas for women in employment appear to be the most effective way to overcome the cultural and social barriers. While the mandatory quota for women on corporate boards will compel corporate houses to look out for potential women candidates for their boardroom positions, it is imperative that they realize the need to harness the economic productivity of women and ensure that implementation of the policy is not reduced to mere lip service. In spite of a strong glass ceiling effect, in recent years, India has seen considerable growth in the emergence of women entrepreneurs. According to a study by EMI Partners International, 11 percent of large Indian corporations have women CEOs as compared to 3 percent in Fortune 500 companies in the US.⁷ Statistics in the emerging sectors, such as banking and finance, have been particularly remarkable presumably because of the stable and favorable working conditions for women offered by these sectors. Success stories of women occupying top positions in the corporate sector will certainly inspire women seeking to break the glass ceiling and reach the apex of the corporate pyramid.

5 Vishaka v. State of Rajasthan AIR 1997 SC 3011

6 Parliamentary Standing Committee Report on Companies Bill, 2011 available at http://www.taxmann.com/TaxmannFlashes/flashst29-6-12_CPT_3.htm?aa=.

7 EMA Partners International, Gender Splits available at <http://www.ema-partners.com/articles/gender-split>



BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM

ISRAEL

Israel - Updated for 2013

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In 1951, a mere three years after the establishment of the State of Israel, the Israeli Parliament (the “Knesset”) enacted the Women’s Equal Rights Law whose mission was to ensure full and complete equality between men and women and to uproot any legal discrimination against women.¹

In 1988, the Equal Employment Opportunities Law was enacted, which prohibits employers from discriminating between their employees or those seeking employment based on a number of characteristics, among which are gender, sexual orientation, family status, pregnancy, and age.²

Government Companies

Although the issue of gender parity in general, and on corporate boards in particular, was not specifically addressed in the above legislation, it has been the subject of public debate in Israel over the last two decades. In 1993, an amendment to the Government Companies Law was adopted, which required that the board of directors of a government company must have “adequate representation” of both genders and that, until such adequate representation is reached, the government ministers will appoint, to the extent possible under the circumstances, directors from the gender that is underrepresented.³ A government company is defined as a company in which the State holds more than 50% of the voting rights in the general assembly or has the right to appoint more than half of the directors. Each government company is under the responsibility of a specific minister and under the supervision of the Government Companies Authority (GCA).

While “adequate representation” was not defined in the 1993 amendment, a 2007 government resolution clarified that adequate representation means 50% (the “Resolution”).⁴ It further stated that if the appointing minister demonstrated to the satisfaction of the GCA and the Authority for the Advancement of the Status of Women (the “Authority”) that no suitable woman was identified to serve as a director of a government company following an active search, then the GCA can approve the appointment of a man to the position even though women comprise less than 50% of the directors on the board of that company. The Authority, which was established in 1998 as part of the Prime Minister’s Office, was set up to advance the status of women in Israel, to promote gender parity, and to coordinate between governmental and non-governmental bodies acting to promote the status of women. Among other things, the Authority assists the ministers in locating suitable women candidates to serve as directors of government companies.

According to a procedure formulated by the GCA and the Authority in July 2007, when reviewing the questionnaire of a candidate for a director’s position in a government company, the GCA review committee needs to check the percentage of women on the relevant board. If such percentage is below 50%, then the GCA review committee must draw the minister’s attention to that fact and to the legal requirement, and must delay review of the candidate application until either the minister puts forward another candidate from the opposite gender or the minister provides a written statement to the satisfaction of the GCA and the Authority as to why a candidate from the other gender cannot be put forward.

Based on a report prepared by the Knesset’s research and information center (the “Report”)⁵, since passage of the 1993 amendment to the Government Companies Law, there has been a sharp increase in the representation of women

1 Women’s Equal Rights Law 5711-1951.

2 Equal Employment Opportunity Act 5748-1988, Section 2.

3 Government Companies Law 5735-1975, Section 18A.

4 Government Resolution No. 1362 dated March 11, 2007.

5 Adequate Representation of Women on the Boards of Government and Public Companies (May 16, 2010)

BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM

on the boards of government companies (as a percentage of total directors), from 7% in 1993, to 29% in 1997, to 37.8% in 2000, and to 44% in 2010.

As of May 2010, 72% of the 106 government companies surveyed in the Report met the adequate representation standard, and another 6% of the companies were about to meet the standard after completing pending appointment procedures. Moreover, in nearly a quarter of the companies, there were more women directors than men. Of the remaining companies, half were missing just one woman on the board to meet the legal requirement.

Clearly, the Resolution has had a positive impact on gender parity on the boards of government-held companies. In addition, according to the Report, since the government resolution was passed, no minister has asked the Authority to grant a waiver from the requirement to appoint a female director. The Report stated, however, that only 3 of the 36 government companies' chairpersons were women, and that only two women were serving as CEOs of government companies.

In April 2010, the Authority established a database of female candidates for director positions in government companies, which is aimed to assist ministers, CEOs, and the Authority in locating suitable candidates.

Public Companies

Unlike government companies, there is no legal requirement in Israel for gender parity on the boards of public companies, although the issue of diversity and inclusion has received heightened attention in recent years. However, the Companies Law requires a public company to appoint at least two outside directors and, where all the board members are of one gender, the appointed outside director must be of the opposite gender.⁶ Outside directors are appointed by the general assembly, and it is required that at least a majority of the disinterested shareholders attending the meeting vote in their favor of, and no more than 2% of the total number of disinterested shareholders vote against, their appointment.

There have been recent, unsuccessful efforts to address this disparity. In 2010, a legislative proposal was submitted that sought to require public companies to provide adequate gender representation on their boards in accordance with the Norwegian model (generally, between 40-50% depending on the size of the board). However, that proposal did not win the endorsement of the government.

According to the Report, quoting information provided by the Israeli Securities Authority, in April 2010 approximately 82% of public companies that are registered only in Israel have at least one woman director, with 42% of public companies having up to 19% of their directors women. In 25% of public companies, women comprise 20-29% of their directors, and in 15% of public companies women represent more than 30% of the directors (although in only 4% of public companies did women comprise at least half of the directors). The Report notes that 16.9% of directors in public companies are women, a slight increase from 15.7% in 2007. Of those female directors, 41% were outside directors (compared to 21% amongst men). In most public companies where there are outside female directors, there are no other women on the board.

The Tel Aviv 100 Public Companies

A 2013 report by Catalyst, which is published annually, provided information on the representation of women on the boards and in management of the 100 largest publicly listed companies on the Tel Aviv Stock Exchange (the "Tel Aviv 100").⁷ According to that report, only 3% of the companies have a woman as chairperson of the board (compared to 5% in the previous year) and just 7.9% of the CEOs were women (a significant increase compared to 4.5% in 2011). Overall, women comprised 16.6% of the total number of board members, a very slight increase over the 16.5% in the previous year.

6 The Companies Law 5759-1999, Section 239(d)

7 Catalyst Israel, Leading Women in Business: The 2012 Israeli Census Report for Women Representation in the Tel Aviv 100 Index (March 2013)

Of the Tel Aviv 100, 85% of the companies had at least one woman in management (compared to 82% in 2011), and in one-third of the Tel Aviv 100 women comprise at least a quarter of the management. There was at least one woman director in 91% of the boards of the Tel Aviv 100. The number of boards where at least two women serve as directors remained essentially the same – 31% in 2012 compared to 32% in 2011.

While there was a decrease of 77 seats in the overall number of directors in the Tel Aviv 100, only 12 of those seats were occupied by women. The report further noted that 36% of the women serving as directors act as outside directors compared to 20% of the men, which may be a result of the above-mentioned legislation relating to outside directors. The report noted that Israel ranked 4th in the world in terms of the representation of women on boards of public companies, behind Norway, Sweden, and Finland, all of which have specific legislation mandating the representation of women on boards of public companies.

Private Companies

No legislation has yet been approved for privately-owned companies with respect to gender representation on their board of directors.

Enforcement

In terms of enforcing the legal requirements of female representation on boards of public companies, a March 2011 amendment to the Companies Law entitles the Israeli Securities Authority to impose a financial sanction on a public company that has not appointed an outside director of the other gender in accordance with the legal requirement stated above.⁸

In addition, legal proceedings can also be initiated by individuals or organizations to compel government companies or the State to comply with the above-stated legal requirements. Such was the case in 1994, before the adoption of the Resolution, when the Supreme Court of Israel, sitting as the High Court of Justice, ordered the annulment of the appointment of three male directors to the board of a government company in which no women were represented.⁹

Conclusion

Over the past two decades, there has been remarkable progress in the representation of women on boards of public companies, and government companies in particular, in Israel. This is the result not only of legislation and regulations, but also of advocacy by various non-governmental organizations, which resulted in the issue receiving heightened scrutiny and profile in media coverage. While there is still considerable improvement to be achieved, it is important to note, as stated by the Catalyst report, that Israel is ranked 4th in the world in terms of the representation of women on boards, indicating the great strides that have already been made.

8 The Companies Law, Section 363A(b)(11)

9 H.C. 453/94 *Shdulat Nashim v. the State of Israel*, 48 (5) P.D. 501

BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM



BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM

SPAIN

Spain¹ - Updated for 2013

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Legislative Efforts

The right to equality was proclaimed in Spain in 1978 with the enactment of the Spanish Constitution. Specifically, Article 14 of the Spanish Constitution states that "Spaniards are equal before the Law, thus no discrimination for reasons of birth, race, sex, religion, opinion, or any other condition or circumstance may prevail." The right to equality under the Constitution expressly recognizes the inherent equality between women and men.

A number of regulations were enacted in order to implement the Constitutional mandate articulated in Article 14 with regard to gender parity. Such regulations, although binding, proved to be ineffective, as parity in different areas, especially in labor and business related areas, had not been achieved. Therefore, on March 22, 2007, the Spanish Congress enacted Law 3/2007 on effective equality between women and men (the "Law on Equality"), with the intent to unify these disparate regulations and to establish a single norm for equality and gender parity.

The Law on Equality incorporates into the Spanish regulation several European directives, including Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 and Council Directive 2004/113/EC of 13 December 2004.

The Law on Equality introduces a provision for companies² to establish boards of directors with a "balanced presence" of women and men. A balanced presence is defined, by the Law on Equality, as a maximum presence on a board of each gender of 60 percent and a minimum presence of 40 percent.

Additionally, regional legislation in Spain, such as those in the Autonomous Regions of Galicia and Extremadura, include provisions similar to those set forth in the Law on Equality. Galicia's³ legislation includes the obligation that companies with a corporate address in that region must annually inform the regional administration of the composition of their boards of directors. Upon review of such information, the administration will issue public or private recommendations. The legislation of the Autonomous Region of Extremadura⁴ mandates that regional administrations that hold stakes in private companies must appoint members of their boards in accordance with the "balanced presence" principle.

Companies have a period of eight years from March 24, 2007, the date when the Law on Equality entered into force, to comply with the "balanced presence" legal requirement.

According to the 2013 study of women on boards of directors and decision-making bodies of Spanish companies published by the Cesce Group (the "Cesce Report"), there have been tangible improvements as a result of the above legislation. The Cesce Report found that women represented 29.02 percent of boards of directors and decision-making bodies in 2012; however, this percentage has fallen to 25.94 percent in 2013. Further, the Cesce Report confirms that companies lacking a female presence on their boards of directors are in sectors typically considered to be more male-dominated, such as construction, energy production, and extraction industries. Additionally, according to the Cesce Report, in companies with state ownership, the presence of women on boards has consistently increased from 25.30 percent in 2008, 30.75 percent in 2012, and 32.56 percent in 2013. An interesting trend noted in the Cesce Report is that companies with more than 40 percent women on their boards of directors take on less credit than companies with

1 Ms. García Guijarro and Ms. Calvo Abril have updated the information contained in previous chapters, initially prepared by former attorneys at Watson, Farley & Williams.

2 The provision only refers to companies whose assets are higher than Euro 11,400,000; whose net annual income exceeds Euro 22,800,000; and whose average employee number is over 250.

3 Law 2/2007, of 28 March, on Law on Equality of employment for women.

4 Law 8/2011, of 23 March, on Law of Equality between women and men and against gender violence.

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a lower representation of women directors when compared with the whole business community. In fact, companies with greater than 40 percent women directors assume a credit risk of 70.67 percent versus 84.21 percent assumed by companies with fewer women directors.

The chart below summarizes the percentage of women on boards in 2012 and 2013⁵:

	2012	2013
Women on boards of directors and decision-making bodies (Total figures)	29.02%	25.94%
Women on boards of directors and decision-making bodies in companies with state ownership	30.75%	32.56%

However, it is notable that only 11.23 percent of firms subject to the Law on Equality have more than 40 percent women directors, according to the Cesce Report.

Therefore, although the data mentioned above indicates that the legal requirement has not yet been achieved, companies have until 2015 to adopt the necessary measures to have a more balanced ratio of women on their boards of directors. Moreover, it seems that companies are taking some positive steps toward this goal, although at a slow pace.

The slow progress toward achieving these legal thresholds may be a result of the fact that, contrary to other jurisdictions, there is no statutory penalty for noncompliance in Spain. The Spanish legislature did not include sanctions in the event companies do not adopt the necessary measures by 2015. Currently, companies only need to disclose through their annual accounts⁶ (or by other means imposed by sectoral and regional regulations) the gender composition of their boards of directors.

Instead of encouraging compliance through sanctions, the Law on Equality has attempted to induce companies to develop gender equality policies and plans by creating other incentives, such as an "award" for companies that implement equality policies internally. Such policies include, among others, a balanced presence of women and men on the boards of directors, as well as in the various groups and categories of company employees. In May 2012⁷, this award was given to 30 companies including Acciona Ingeniería, S.A., Banco Bilbao Vizcaya Argentaria, S.A., CaixaBank, S.A. and Ernst & Young, S.L. It is important to highlight that certain Autonomous Regions have also established awards for companies that comply with local equality regulations.

There may be reasons other than the lack of sanctions for the slow implementation of gender parity on corporate boards. In particular, the issue of gender parity on boards of directors, although endorsed by the Spanish legislatures (both national and regional as described above), is still debated among scholars. In general, there are two main views. One on hand, those who defend the benefits of gender parity on boards state that it provides the boards of directors with more talent, increased creativity, and innovation, and that it represents a vision of society that more accurately

⁵ Data provided based upon the Cesce Report 2013.

⁶ Royal Legislative Decree 1/2010, of 2 July, on Law on Capital Companies, states that the report that accompanies the annual accounts shall include information on the gender distribution of the staff of such company, breaking down the categories and levels, which shall include top executives and board members.

⁷ The award to be granted in year 2013 has not yet been decided.

reflects its actual composition. The main counter-arguments articulated by those who are reluctant to implement gender parity policies are that the market responds negatively to the appointment of women in high positions; that it may complicate the decision-making process, and that women tend to be more risk-adverse than men.

Corporate Governance Code

Particularly with regard to listed companies, a complementary effort to the initiatives described above has been made since May 2006 (before the enactment of Law on Equality). Specifically, the Spanish National Stock Exchange Commission ("Comisión Nacional de Mercado de Valores") issued a good governance code (the "Good Governance Code" or the "Code"). This Code sets out recommendations in a variety of areas that listed companies can either follow voluntarily or explain why they are not following. One of those areas is the function and composition of boards of directors.

Based on the principle that boards of directors should reflect a diversity of knowledge, experience, and gender in order to pursue the social interests of a company, Recommendation 15 of the Good Governance Code focuses on the gender composition of boards of directors. The Good Governance Code sees an increased female presence on boards as an ethical, political, and corporate responsibility challenge, as well as a means for increasing efficiency in companies by not disregarding 51 percent of the Spanish population.

Therefore, the Good Governance Code invites listed companies to make an effort in the search for female candidates to cover vacancies on boards. As a consequence, there has been a gradual increase in the number of women on the boards of directors of listed companies. According to the Spanish National Stock Exchange Commission⁸, in 2011 the number of female directors within Spanish IBEX 35 companies amounted to 61 percent, up from 53 percent in 2010 (constituting 12.1 percent of IBEX 35 companies in 2011).

The Good Governance Code specifically recommends that such female candidates should be nominated to cover vacancies of independent directors as opposed to other types of directors. As a result of this recommendation, the annual report on corporate governance of Spanish IBEX 35 companies issued by the Spanish National Stock Exchange shows that 65.6 percent of the women directors are independent, while 27.9 percent represent "dominical" directors who serve on the board as a result of a condition required by a shareholder of the company. Only a mere 3.3 percent of women are executive directors.

Likewise, the Good Governance Code recommends that listed companies with a small number of women directors should explain the reasons for this and describe the initiatives undertaken to correct the situation. The Code places particular emphasis on the selection processes. With that in mind, the Law on Securities Exchange⁹ has, as of March 2011, turned this recommendation into a legal obligation for listed companies by requiring them to provide information in their annual corporate governance reports on the composition of their boards of directors, as well as the degree of compliance with the recommendations of the Good Governance Code.

More recently, on 20 March 2013¹⁰, a Ministerial Order from the Ministry of Economy was passed, which specifically identifies the content and structure of the information to be included in the annual corporate governance reports. Among the content of such information, listed companies must include any effective measures adopted during the year to advance the implementation of the legal mandate for equality between men and women.

Conclusion

The information presented by the Spanish National Stock Exchange Commission shows that the participation of women on boards of directors is still below the 40 percent minimum required by the Law on Equality. Although this

⁸ Annual report on corporate governance of Spanish IBEX 35 companies issued by the Spanish National Stock Exchange for the year 2011.

⁹ Law 24/1988, of 28 July, on Law on Securities Exchange, as amended by Law 2/2011, of 4 March.

¹⁰ Ministerial Order ECC/461/2013, of 20 March, on the content and structure of the annual corporate governance reports, of the annual report on salaries and other means of information of listed companies, the savings banks and other entities that issue securities admitted to trading on official stock markets.

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requirement is not effective until 2015, the 2012 PwC España and Isotés report indicates that at the current rate it is unlikely that the minimum threshold of 40 percent female presence on boards of directors will be achieved by 2015¹¹. If that is the case, it is likely that Spanish legislators will re-analyze the situation and take further actions that might include introducing sanctions for noncompliance by companies, similar to those already implemented in other European countries.

Although the legal requirement has not yet been achieved in Spain, there has been improvement in gender parity on boards of directors and in companies generally since the enactment of the Law on Equality, although the steps that have been taken proceed at a slow pace. More importantly, companies still have until 2015 to adopt the necessary measures to have a more balanced ratio of women on their boards of directors. This deadline may impact companies' director selection processes going forward.

¹¹ Report Women as Leaders in Spain. PwC España and Isotés. 2012.



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SWEDEN

Sweden - New for 2013

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The debate concerning women's rights has been ongoing for many years in Sweden and, like other Nordic countries, it has always been in the forefront of the issue. "Equality politics" took form as an independent political field in the 1970s, tackling issues such as combining work with family life, and equal power and influence for men and women have been a focus ever since. Since the 1990s, more focused work and political efforts have been undertaken in order to increase the number of women represented in different spheres of society. Gender diversity varies within different spheres, and is greater in the political sphere than among decision makers in the business community. Looking at the Swedish parliament, almost 45 percent of the members are women. The level of female participation in politics and in the economic sphere has increased significantly during the past decades.

However, like most countries in Europe, there has in recent years been a large public debate in Sweden regarding the lack of women represented on corporate boards and in senior management positions, particularly in listed companies.

The debate on whether or not to introduce mandatory gender quotas in Sweden is highly controversial and opinions on the way forward diverge. The Swedish Minister for Gender Equality is opposed to mandatory gender quotas and recently stated that a mandatory gender quota is not the best solution to increase the number of women on company boards.¹ The Swedish Minister for Finance, however, does not fully agree. Believing that companies cannot solve the issue on their own, he asserts that Sweden might be forced to introduce mandatory gender quotas.²

The Swedish opposition parties such as the Social Democratic Party have also expressed a more positive attitude toward mandatory gender quotas.³

The Second AP Fund's Annual Female Representation Index

Since 2003, the Second AP Fund (one of the Swedish public pension funds) has annually published "The Female Representation Index." The index is intended to contribute to an objective debate about ways to increase the percentage of women serving on boards and in senior management positions in Swedish listed companies. The aim is to broaden the recruiting base and the diversity of boards and senior management, which according to the Second AP Fund will create better companies and enhance their share value.⁴ According to the 2013 index, the proportion of women on boards of listed companies declined for the second year, from 22.9 percent (2011) to 22.7 percent (2012) and 22.3 percent (2013). The proportion of women represented in the same companies' senior management has on the other hand risen steadily, from 15.3 percent (2011) to 16.3 percent (2012) and to 17.2 percent (2013).

The index from June 2013 states that the positive trend of an increased share of female board members and women in senior management positions is still very slow. If development continues at the current rate, it will take approximately 31 years before the share of female board members reaches 50 percent and 52 years until the share of women in senior management positions reaches 50 percent.⁵

The Swedish Corporate Governance Code

The Swedish Corporate Governance Code (the "Code") was first introduced in 2005 and applies to all listed Swedish

1 Article in the Swedish newspaper Dagens Industri on 19 April 2013.

2 Article in the Swedish newspaper Dagens Industri on 20 April 2013.

3 Article in the Swedish newspaper Dagens Industri on 19 April 2013.

4 AP2 Corporate Governance Report 2011/2012, available at http://www.ap2.se/Global/Agarrapporter/Agarrapport%202012%20_GB_web.pdf.

5 AP 2 Index of Female representation in publicly-quoted companies: boards, executive managements and employees, available at http://www.ap2.se/Global/Kvinnoindex/NIS%20AP2%20Kvinnoindex%202013%20130605_Final%20GB.pdf.

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companies. The aim of the Code is *inter alia* to improve confidence in Swedish listed companies by promoting positive development of corporate governance in these companies. The Code complements legislation and other regulations by specifying a norm for good corporate governance. It is based on the principle of “comply or explain” and companies may thus deviate from individual rules in the Code, provided they report each deviation, describe their own solution, and explain why.

The Code does not contain any requirements concerning the composition of male and female board members. The Code states that *“The board is to have a composition appropriate to the company’s operations, phase of development and other relevant circumstances. The board members elected by the shareholders’ meeting are collectively to exhibit diversity and breadth of qualifications, experience and background. The company is to strive for equal gender distribution on the board.”*⁶ A similar rule can be found in NASDAQ OMX Stockholm’s Rulebook for Issuers where it states that *“the board of directors of the company shall be composed so that it sufficiently reflects the competence and expertise required to govern a listed company and to comply with the obligations of such a company.”*⁷

It can be noted that the Swedish Annual Reports Act requires that the annual report shall contain information regarding the gender breakdown among members of the board of directors, managing director, and other persons in the management of the company.

According to a 2008 amendment to the Code, the nomination committee has to issue a statement when the notice to the shareholders’ meeting is issued, explaining its proposals with regard to the requirements concerning the composition of the board. This new rule was introduced against the background of the debate on gender quotation and the aim was to “force” the nomination committees to address the issue of gender balance in the boards of listed companies.

In May 2012, the Swedish Corporate Governance Board (the “Board”) stated in a response to a questionnaire from the European Commission concerning gender imbalance in corporate boards in the EU that the Board shares the opinion of the European Commission that society needs to improve the gender balance, but that the Board is opposed to the introduction of any mandatory gender quotas for listed companies.⁸ In its response, the Board presents a number of reasons why mandatory gender quotas can be counteractive for companies.

First, the Board is of the opinion that gender balance in the boardroom is not automatically good for the business. Instead, the main concern regarding the composition of the board of directors should be the professional background, experience, and competence of the individual board members.

Second, mandatory gender quotas or any legal requirements concerning the composition of the board of directors of a privately-held company would be a restriction of the owner’s propriety rights. The owners of a company must be able to freely choose the board that they believe will be the best board for the company and its shareholders.

Looking at the development of the number of female board members and the number of women in senior management positions during the past ten years, the development has not been the same. The share of female board members has increased from approximately six to approximately 27 percent, while the share of women in senior management positions has increased from approximately 11 to approximately 16 percent. The Board states that a large gap has been created between the share of female board members and women in senior management positions – the type of positions that make up the main recruitment base for board positions. Taking this development into account, the Board is of the opinion that attention should be directed toward measures aimed at increasing female representation at the highest management levels, which also should lead to higher female board representation.

The Board concludes by stating that Swedish listed companies have come a long way and a reasonable gender balance may be attainable within a not very distant future without mandatory gender quotas.

6 The Swedish Corporate Governance Code, rule 4.1.

7 NASDAQ OMX Stockholm Rulebook for Issuers, rule 2.4.1.

8 The Swedish Corporate Governance Board’s answer to the consultation on gender imbalance in corporate boards in the EU, available at <http://www.corporategovernanceboard.se/media/60401/swedish%20corporate%20governance%20board%20-%20gender%20imbalance%202012-05-28%20pdf.pdf>.

The Confederation of Swedish Enterprise

The Board's view on gender quotas was supported by the Confederation of Swedish Enterprise (the "Confederation"). The Confederation is a non-profit association of member organisations including industry or employer associations, and other business organisations. The Confederation is strongly against mandatory gender quotas and believes that quotas are contradictory to equality since, in their view, special treatment and different rules have never created fairness but rather the opposite.⁹ In the Confederation's answer to the same questionnaire on gender imbalance that the Board answered, the Confederation *inter alia* stated that "*the issue of size and composition of the board should exclusively be an issue of the owners of the company*" and "*statutory quotas for women on corporate boards are an unacceptable intervention in ownership rights.*" The Confederation further stated that quotas are not a sustainable solution for getting more women into leadership positions and interferes with the shareholders' right to choose the team they need to lead the company.¹⁰

The Swedish Government

In its response to the European Parliament's proposal for a directive on improving the gender balance among non-executive directors of companies listed on stock exchanges and related measures that was presented in November 2012,¹¹ the Ministry of Justice stated that Sweden supports the general aim of the proposal to improve gender balance in company boards, but that the proposed actions were too extensive. The proposal *inter alia* included a suggestion to formalise and harmonise the appointment/selection procedure for boards in listed companies.

The Swedish Ministry of Justice expressed *inter alia* that the election of board members at the shareholders' meeting is "free" and that any shareholder has the right to propose a board candidate at the general meeting.

Further, the strong element of trust and the emphasis on individual qualities of board members would not be possible to maintain if the process is to be formalised. Trust, knowledge, and personal qualities are the very essence of the relationship between the owners and the board, and regulating this relationship is a delicate task. Owners appointing a person as their trustee should not be overruled by an authority, in the opinion of the Swedish Ministry of Justice.

The Swedish Ministry of Justice also expressed concerns that the directive in its current draft runs the risk of interfering with the trade unions' right to freely choose and appoint employee representatives.

Conclusion

The Swedish Government has expressed support to improve gender balance on both boards and in senior management of listed companies, but there is presently no legislative proposal concerning the introduction of mandatory gender quotas. Additionally, there is no clear consensus of whether or not mandatory gender quotas should be introduced in the future. The political opposition has expressed a positive attitude, while the ruling politicians seem to be somewhat divided on the issue.

The business community, represented by the Board and the Confederation, is very clear on their opinion and is opposed to the introduction of any mandatory gender quotas for listed companies. As stated above, the Board is of the opinion that a reasonable gender balance may be attainable in Sweden in the near future without the introduction of mandatory gender quotas. This opinion, however, is not completely shared by the Second AP Fund and its Female Representation Index, which states that it will take decades before an even gender balance is reached in Swedish corporate boards and in senior management positions.

Despite diverging opinions, there is a consensus that active measures need to be taken.

9 Information is available on the Confederation of Swedish Enterprise's website, http://www.svensktnaringsliv.se/fragor/kvotering/kvotering-mot-verkar-jamstalldhet_15050.html.

10 The Confederation of Swedish Enterprise's answer to the consultation on gender imbalance in corporate boards in the EU, available at http://ec.europa.eu/justice/newsroom/gender-equality/opinion/files/120528/all/201/243_en.pdf.

11 The European Commission's proposal is available at http://ec.europa.eu/justice/gender-equality/files/womenonboards/directive_quotas_en.pdf.

BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM



BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM

UNITED STATES

United States - Updated for 2013

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In the United States, the issue of gender parity has gained increasing attention in the last decade. Surveys conducted by Catalyst and the Alliance for Board Diversity reveal slightly better representation of women on Fortune 100 boards than Fortune 500 companies.¹ However, overall, there has been minimal growth in the last few years. A Catalyst census comparing 2009 through 2011 figures for the Fortune 500 indicated little change over the three year period. In 2009, of all board seats in the Fortune 500, women held 15.2 percent,² and that number increased slightly to 15.7 percent in 2010,³ 16.1 percent in 2011,⁴ and 16.2 percent in 2012.⁵ This means that, of the board seats available in the Fortune 500, men held roughly 84 to 85 percent of these seats from 2009 to 2012.⁶ The Catalyst report noted that, from 2010 to 2012, "less than one-fifth of companies had 25 percent or more women directors, while about one-tenth had no women serving on their boards."⁷

Another survey by the Alliance for Board Diversity, a non-profit collaboration of four organizations – Catalyst, The Executive Leadership Council, the Hispanic Association on Corporate Responsibility, and Leadership Education for Asian Pacifics, Inc. – found that results from the past six years suggest longer term stagnation. Of the Fortune 100 companies, men held 83.1 percent and 82 percent of board seats in 2004 and 2010, respectively.⁸ So, in six years, women only gained a 1.1 percent presence on boards of directors, an increase that was "not appreciable."⁹

Regulatory Disclosure Required

To address the issue of diversity (including gender diversity) on corporate boards, in 2009 the Securities and Exchange Commission (SEC) approved rules to enhance shareholder information, which went into effect February 28, 2010.¹⁰ Among other requirements, these rules require the management of publicly-held companies to disclose in their annual proxy and information statements their companies' consideration of diversity, which the SEC does not define, in the nominating process for board members. In particular, the rule requires a company to disclose: 1) whether diversity is a factor in considering candidates for nomination to the board of directors; 2) how diversity is considered in that process; and 3) how the company assesses the effectiveness of its policy for considering diversity.¹¹

The SEC implemented a formal comment program to gauge the interest of investors in accessing information on diversity in the boardroom. Numerous individuals and corporations, representing over three trillion dollars in assets,

1 Updated Datasheet: Alliance For Board Diversity Report: Missing Pieces: Women and Minorities on Fortune 500 Boards (Jul. 21, 2011), http://theabd.org/ABD_datasheet.pdf [hereinafter, the "Alliance for Board Diversity Report"].

2 Some boards had more than one woman and some had no women at all.

3 Rachel Soares, 2010 Catalyst Census: Fortune 500 Women Directors, CATALYST, 1, Dec. 2010, available at http://www.catalyst.org/file/413/2010_us_census_women_board_directors_final.pdf [hereinafter, the "2010 Catalyst Census"].

4 Rachel Soares, 2011 Catalyst Census: Fortune 500 Women Directors, CATALYST, 1, Dec. 2011, available at http://www.catalyst.org/file/533/2011_fortune_500_census_wbd.pdf [hereinafter, the "2011 Catalyst Census"].

5 Rachel Soares, 2012 Catalyst Census: Fortune 500 Women Directors, CATALYST, 1, Dec. 2012, available at <http://www.catalyst.org/knowledge/2012-catalyst-census-fortune-500-women-board-directors> [hereinafter, the "2012 Catalyst Census"].

6 2010 Catalyst Census, *supra* note 78, 2011 Catalyst Census, *supra* note 79, and 2012 Catalyst Census, *supra* note 80.

7 2011 Catalyst Census, *supra* note 79 and 2012 Catalyst Census, *supra* note 80.

8 Alliance for Board Diversity Report, *supra* note 76.

9 *Id.*

10 Press Release, U.S. Securities and Exchange Commission, SEC Approves Enhanced Disclosure About Risk, Compensation and Corporate Governance (Dec. 16, 2009), available at <http://www.sec.gov/news/press/2009/2009-268.htm>.

11 Securities and Exchange Commission, Regulation S-K, 17 C.F.R. pt. 229.407(c)(2)(vi) (2010).

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submitted comments to the SEC, 90 percent of which supported the disclosure of information related to race and gender diversity on corporate boards. In light of this show of support, the SEC determined that investors wanted access to this information and finalized the rule.¹²

The SEC rule does not require a commitment to diversity from public companies. Rather, the SEC rule requires that companies disclose whether or not they have a diversity policy with regard to the selection of individuals for their boards.

Similarly, while the SEC does not require that a certain percentage of each board be “independent,” it does require that companies prepare disclosures regarding the independence of their board of directors.¹³ A company must disclose in its proxy statement or Form 10-K the list of directors determined to be independent under applicable stock exchange listing criteria.¹⁴ Any company that has adopted its own definition of independence, whether a listed company or not, must include this definition in the company’s proxy statement once every three years.¹⁵ Though the SEC does not provide its own definition of “independence,” this term is typically defined solely in terms of relationships between a director and the company, rather than including any concept of term limits. Therefore, a director who meets the definition of “independent” can remain in his or her position for a lifetime and never lose the designation as “independent.” There is an emerging recognition that, quite apart from any diversity initiative, such a director may not fulfill the purpose of having independent directors, which is to bring objectivity and perspective that an executive director may not possess. Further, a challenge in trying to increase the number of corporate boards with diverse candidates is that there is modest turnover in board seats, leaving few vacancies to be filled with non-traditional candidates. If vacancies were forced on boards, then boards might begin to consider diverse candidates, including women. Unfortunately, this strategy has not gained cognizable support in the U.S. at this time.

Companies have, for the most part, stated that they do take diversity into consideration when filling board seats. There are, of course, notable exceptions. Berkshire Hathaway indicated in its 2012 proxy statement, as it had previously in both 2010 and 2011, that it does not have a policy regarding diversity in identifying nominees for director, and it affirmatively stated that its nominating committee does not seek diversity. Instead, “the Governance, Compensation, and Nominating Committee looks for individuals who have very high integrity, business savvy, an owner-oriented attitude and a deep genuine interest in the Company.”¹⁶

In contrast, in its 2012 proxy statement, Citigroup stated: “Diversity is among the critical factors that the nomination and governance committee considers when evaluating the composition of the board.”¹⁷ Citigroup went on to explain that of the candidates nominated for election at the 2012 annual meeting, “three nominees are women (25 percent) and three nominees (25 percent) – including the chief executive officer – are Asian, African-American or Hispanic.”¹⁸ This type of disclosure, with concrete numbers, appears to be what the SEC had in mind.

In a November 2010 speech, SEC Commissioner Luis Aguilar reported on the initial review of companies’ 2010 diversity disclosures.¹⁹ He praised companies that provided investors with concrete facts and useful information within the “spirit” of the rule.²⁰ However, he noted that other companies limited their disclosure to “a brief statement indicating that

12 Luis A. Aguilar, Commissioner, Securities and Exchange Comm’n, Board Diversity: Why It Matters and How to Improve It (Nov. 4, 2010), available at <http://www.sec.gov/news/speech/2010/spch110410laa.htm> [hereinafter, “Aguilar 2010”].

13 Item 407 of SEC Regulation S-K.

14 *Id.*

15 *Id.*

16 Berkshire Hathaway Schedule 14A Information, Definitive Notice and Proxy Statement, May 5, 2012, available at <http://www.sec.gov/Archives/edgar/data/1067983/000119312512119819/d280415ddef14a.htm>, at 6.

17 Citigroup Inc., 2012 Proxy Statement, Mar. 8, 2012, available at <http://www.citigroup.com/citi/investor/quarterly/2012/ar12cp.pdf?ieNocache=440>, at 8.

18 *Id.*

19 Aguilar 2010, *supra* note 87.

20 *Id.*

diversity was something considered as part of an informal policy.”²¹ Aguilar reminded companies that the investors, and not just the SEC, had requested information on diversity and therefore the companies should provide information that would be useful to these investors. Aguilar echoed his 2010 comments in February 2013, when he stated that “to truly meet the needs of investors” a proxy statement should state: 1) the candidate and incumbents’ gender, racial, and ethnic background; 2) whether diversity is taken into account in identifying or evaluating potential candidates; 3) how the board defines diversity; and 4) whether or not – and why – the company uses resources specifically to identify and train women and minorities as potential candidates.²² He added that if the board does not have any women, the company should state whether it has considered increasing the size of the board to enhance diversity and, if not, why.²³

In his November 2010 speech, Aguilar noted similarities between statements commonly made about a lack of diversity on boards and a lack of diversity in the NFL.²⁴ He explained that instead of mandating diversity quotas, the NFL implemented the “Rooney Rule,” which requires all NFL teams to interview at least one minority candidate when filling a head coaching position.²⁵ The idea behind this rule, an idea supported by many advocacy groups, is that the problem is not a shortage of qualified women or even a calculated effort to exclude women; rather, it derives from a tradition of hiring board members (or coaches) from an existing pool.²⁶ This habit makes it very difficult for new individuals to break into the field, whether in the NFL or in the boardroom. Though this idea has not yet gained much traction, it would offer a way for women at least to get a foot in the door while precluding the argument, frequently offered against quotas or mandatory requirements, that companies would be forced to hire women for positions for which they are not qualified.²⁷

Private Sector Initiatives

Applying the “Rooney Rule” to the boardroom is not an idea unique to Commissioner Aguilar. Calvert Investments Senior Sustainability Analyst Aditi Mohapatra has also suggested adopting a similar approach to bring more diversity to corporate boards.²⁸ Calvert is an investment management company that manages over \$11.5 billion in assets.²⁹ It selects the companies in which it invests through their financial performance as well as their environmental, social, and governance practices.³⁰ Calvert uses proxy voting as a primary method of effecting change in companies that do not fit its Sustainable and Responsible Investing (SRI) strategy.³¹ Calvert routinely uses these proxy votes to encourage companies to change certain policies, including increasing the representation of women on boards of directors.³²

Once the shareholder resolutions are submitted, often the filer of the resolution and the company will negotiate and agree to specific terms before the resolution is put to a vote; if they agree on these terms, Calvert considers the resolution “successfully withdrawn.”³³ If the filer and the company do not agree, the resolution will be put to a vote. Though most resolutions are not binding on the company, Calvert states that obtaining significant shareholder support

21 *Id.*

22 Luis A. Aguilar, Commissioner, Securities and Exchange Comm’n, Shareholders Need Robust Disclosures to Exercise Their Voting Rights as Investors and Owners (Feb. 20, 2013), available at <http://www.sec.gov/news/speech/2013/spch022013laa.htm>.

23 *Id.*

24 Aguilar 2010, *supra* note 87

25 *Id.*

26 *Id.*

27 *Id.*

28 Aditi Mohapatra, Are there Really Boards with No Women?, FORBES, Aug. 2, 2011, available at <http://www.forbes.com/sites/womensmedia/2011/08/02/are-there-really-boards-with-no-women/>.

29 Calvert Investments, About Us, available at <http://www.calvert.com/about.html>.

30 *Id.*

31 Any shareholder with at least \$2,000 in stock who holds that stock for at least one year is able to file a resolution calling for a company to take a specific action. See, Calvert Investments, Shareholder Advocacy, available at <http://www.calvert.com/nrc/literature/documents/br10059.pdf?litID=BR10059>.

32 *Id.*

33 *Id.*

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for a particular resolution is often enough to influence companies to change their policies.³⁴ Since 2002, Calvert has engaged with hundreds of companies on the issue of board diversity. Through these efforts, Calvert has “successfully withdrawn” 46 resolutions on this issue and 28 female and/or minority candidates have been added to corporate boards.³⁵ In the 2011 proxy season, Calvert filed five resolutions related to board diversity, and three companies altered their selection criteria for board of directors to now include race and gender diversity.³⁶

Corporate Governance Codes

The New York Stock Exchange (NYSE) and NASDAQ have established governance standards by which companies listed on their exchanges must adhere. However, neither the NYSE nor the NASDAQ has enacted any requirements or “best practice” recommendations with regard to diversity, gender, or even length of time individuals should serve on a board, which might encourage the turnover necessary to allow more women to be considered for those roles. NASDAQ’s mandatory Corporate Governance Requirements, found in Rule 5600, do not address diversity at all.³⁷ Rule 5605 defines “independence” of directors, but this is based on directors’ relationships rather than the length of time they have served.³⁸ Section 303A of the NYSE’s Listed Company Manual sets out the Corporate Governance Standards with which companies must comply in order to be listed on the NYSE.³⁹ These standards, like NASDAQ’s rules, require a majority of independent directors and a nominating/governance committee comprised solely of independent directors but make no mention of diversity.⁴⁰ These standards also do not dictate how long directors may serve nor do they mandate that a director loses his or her status as “independent” after serving longer than a specified amount of time.⁴¹ Instead, any such limitations on directors or requirements of diversity must come from the companies themselves.

Media Spotlight on the Issue

The issue of women on corporate boards has been raised in the media on an ever increasing basis in 2012 and 2013, particularly with regard to Sheryl Sandberg’s concept of “lean in.” In 2012, Sandberg, COO of Facebook, published a book titled “Lean In: Women, Work, and the Will to Lead” and has turned this concept into a personal mantra for women hoping to climb the corporate ladder. She has created an online community dedicated to providing inspiration and support for other women looking to “lean in.”⁴² Sandberg’s advice of encouraging women to “sit at the table” is not without its critics, and her book has sparked debate around the country, most notably perhaps in fellow highly accomplished Anne-Marie Slaughter’s article in the *Atlantic Magazine*, “Why Women Still Can’t Have It All.”⁴³ Regardless of one’s opinion on the authors’ statements, it is undeniable that these publications have brought renewed attention to the lack of women in senior management on corporate boards, which can only help the push to increase women’s participation at the highest level of companies.

34 *Id.*

35 Calvert Investments, Board Diversity Remains a Key Focus for Calvert Advocacy (Mar. 7, 2011), available at <http://www.calvert.com/newsArticle.html?article=17603>.

36 Calvert Investments, Shareholder Advocacy, available at <http://www.calvert.com/NRC/literature/documents/BR10059.pdf>.

37 NASDAQ, Corporate Governance Rules & the Interpretive Process, available at https://listingcenter.nasdaqomx.com/Show_Doc.aspx?File=FAQsCorpGov.html.

38 NASDAQ, Corporate Governance Requirements, available at <http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F2%5F8&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F>.

39 NYSE, Listed Company Manual, available at <http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F3&manual=%2F1cm%2Fsections%2F1cm%2Dsections%2F>.

40 *Id.*

41 *Id.*

42 See <http://leanin.org/>.

43 Anne-Marie Slaughter, *The Atlantic*, Why Women Still Can’t Have It All, (Jul./Aug. 2012), available at <http://www.theatlantic.com/magazine/archive/2012/07/why-women-still-cant-have-it-all/309020/>.

Conclusion

Though there appears to be significant support for diversity initiatives in the United States, these efforts remain voluntary. Despite movements toward quotas or similar mandatory requirements in other countries, to date such initiatives have not taken root in the United States. Instead, in addition to firms such as Calvert, several non-profit groups have taken on the role of advocating for more diverse corporate boards, notably the Alliance for Board Diversity, Women Corporate Directors, Catalyst, and 2020 Women on Boards, among others.⁴⁴

This support includes raising awareness, developing networks of women directors to provide information and assistance, collecting data and publishing reports, using proxy voting to change company policies, and recommending diversity requirements in consideration of candidates. While these approaches may not have as immediate an impact, they are less controversial than quotas and, as such, may garner broader-based support for encouraging better gender parity on corporate boards in the United States. However, since implementation of the SEC disclosure rule in 2009 and despite the extraordinary efforts of investor groups such as Calvert and advocacy groups such as those noted above, there has been no appreciable improvement in the number of woman on the boards of listed companies. Recent media attention on the dearth of women in senior management sparked by Sandberg's book may help provide momentum for change. However, if these initiatives do not begin to show results, there may be increasing support for mandatory requirements (such as quotas) or limitations on the definition of what constitutes independence in order to force "corporate America" to focus on this issue and take tangible steps to address the disparity.

44 Catalyst conducts seminal research in this field and routinely publishes reports of progress (or lack thereof). Catalyst, About Us, *available at* <http://www.catalyst.org/page/59/about-us>. The Alliance for Board Diversity supports diversity on boards by offering referrals of qualified candidates and by supporting other similar organizations. The Alliance for Board Diversity, About the Alliance for Board Diversity, *available at* <http://theabd.org/>. 2020 Women on Boards primarily seeks to increase awareness about the issue through the use of social and traditional media. 2020 Women on Boards, About: The Idea, *available at* <http://www.2020wob.com/about/idea>. Women Corporate Directors is a network of women corporate directors that seeks to "leverage local, regional, and global knowledge and perspective from other Directors and boards worldwide." Women Corporate Directors, Overview, *available at* <http://www.womencorporatedirectors.com/displaycommon.cfm?an=1&subarticlenbr=28>. The organization provides a source of advice and expertise for other women directors and helps secure board positions for women. *Id.*

BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM



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For our complete report, which includes research from 35 countries, go to
www.paulhastings.com/genderparity



