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Achieving Diversity on Corporate Boards: Engagement and Education; Not Legislation

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**ACHIEVING DIVERSITY ON CORPORATE BOARDS:
ENGAGEMENT AND EDUCATION; NOT LEGISLATION**

Leanne Fuith†

I.	INTRODUCTION.....	113
II.	CALIFORNIA’S APPROACH.....	114
III.	THE CALIFORNIA LANDSCAPE	116
IV.	MANY ARE NOT GETTING THE MESSAGE	117
V.	CALIFORNIA’S LAW MAY BE UNCONSTITUTIONAL.....	120
VI.	CALIFORNIA’S LAW RAISES ADDITIONAL BUSINESS AND POLICY CONCERNS	122
VII.	GENDER PARITY ON CORPORATE BOARDS HAS SEEN SOME SUCCESS INTERNATIONALLY	123
VIII.	THE CASE FOR DIVERSITY IN THE BOARDROOM.....	125
IX.	THE NATIONAL LANDSCAPE	126
X.	WHAT DOES THIS MEAN FOR MINNESOTA?	128
XI.	LEGISLATED EFFORTS TO DIVERSIFY THE CORPORATE BOARDROOM ARE IMPERFECT	130
	A. <i>Legislated Gender Quotas May Signal That Women Are Less Effective Than Men In The Boardroom</i>	130
	B. <i>Legislated Gender Quotas Have Not Addressed Intersectional Diversity.....</i>	130
	C. <i>Legislated Gender Quotas May Be Viewed as Box-Checking Measures.....</i>	131
	D. <i>Legislated Gender Quotas Do Not Achieve Necessary Critical Mass.....</i>	131
XII.	EDUCATION AND ENGAGEMENT – NOT LEGISLATION – IS THE KEY TO CORPORATE BOARDROOM DIVERSITY	132
	A. <i>Shareholder Activism and Financial Pressure</i>	133
	B. <i>Company-Sponsored Mentoring and Succession Planning for Women.....</i>	135

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C. Companies Should Invest in Intentionally Removing Barriers to Women's Advancement.....	137
XIII. CONCLUSION.....	138

I. INTRODUCTION

In September 2018, California became the first state to enact a law requiring publicly traded companies with principal executive offices in their state to have at least one woman on the board of directors by the end of 2019.¹ The law is the first of its kind on either the state or federal level mandating female representation in corporate boardrooms. Since its introduction, the law has faced criticism.²

Champions of the law assert that it is a critical next step in accelerating the elevation of women into corporate leadership positions.³ Critics assert that it is, at best, a confusing and burdensome law that merely checks the box on diversity and that, at worst, it is unconstitutional and likely to have unintended consequences on corporate diversity efforts overall.⁴

While California is the first in the United States to attempt to regulate gender parity in the boardroom, a handful of states have adopted non-binding resolutions that try to achieve the same purpose.⁵ Countries outside the United States, that do not contend with the same equal-protection limitations, including Norway, France, and Germany, have found success in regulating the representation of women on corporate boards.⁶

1. See Laurel Wamsley, *California Becomes 1st State To Require Women On Corporate Boards*, NAT'L PUB. RADIO (Oct. 1, 2018, 4:47 PM), <https://www.npr.org/2018/10/01/653318005/california-becomes-1st-state-to-require-women-on-corporate-boards> [<https://perma.cc/BH9X-WZR4>] (describing a new California law requiring publicly traded companies in California to require a female member on the board of directors); see also CAL. CORP. CODE § 301.3 (2017).

2. *Id.*

3. *Id.*

4. *Id.*

5. See Iris Hentze, *Gender Diversity on Corporate Boards: What Will 2019 Bring?*, NAT'L CONF. ST. LEGISLATURES (Jan. 4, 2019), <http://www.ncsl.org/blog/2019/01/04/gender-diversity-on-corporate-boards-what-will-2019-bring.aspx> [<https://perma.cc/GH3B-LEMP>] (noting that Massachusetts, Illinois, and Pennsylvania have adopted legislation encouraging businesses to increase gender diversity on their boards).

6. See Alison Smale & Claire Cain Miller, *Germany Sets Gender Quota in Boardrooms*, N.Y. TIMES (Mar. 6, 2015),

The case for diversity in the boardroom is clear. Companies are financially stronger, more innovative, and better attuned to the needs of their consumer base when they have a diverse set of interests represented in the organization and in the boardroom.⁷ The “why” is debated far less than the “how.” Yet, despite widespread acknowledgement that diversity at all levels of management benefits organizations, businesses in the United States still struggle to implement diversity in their boardrooms.

Achieving boardroom diversity in ways that are authentically embraced by corporations, as well as by their leaders, employees, and shareholders, is complicated. Legislation, like the recently passed California law, is not the only answer, although it may be a good first step. The long-term solution, however, is much broader and more holistic.

United States corporations, including those in California and Minnesota, must proactively provide leadership training, mentorship, and sponsorship to advance women and other diverse candidates into their leadership ranks in ways that authentically and sustainably recognize the contributions of women and other diverse candidates in those spaces. United States corporations must also be creative and innovative in acknowledging their own shortcomings and eliminating the barriers that women and diverse candidates experience in accessing those training, mentorship, and sponsorship opportunities.

II. CALIFORNIA’S APPROACH

On September 30, 2018, California became the first state to require publicly-traded companies to have at least one woman on their board of directors.⁸ Corporations with shares listed on a major United States stock exchange and with principal executive offices located in California,

<https://www.nytimes.com/2015/03/07/world/europe/german-law-requires-more-women-on-corporate-boards.html> [<https://perma.cc/JKE4-M7FH>].

7. See Anna Powers, *A Study Finds That Diverse Companies Produce 19% More Revenue*, FORBES (June 27, 2018, 10:15PM), <https://www.forbes.com/sites/annapowers/2018/06/27/a-study-finds-that-diverse-companies-produce-19-more-revenue/#440acd1c506f> [<https://perma.cc/D6TC-GCNV>] (“A recent study by the Boston Consulting Group (BCG) has found that diversity increases the bottom line for companies.”).

8. See Wamsley, *supra* note 2. The law was approved by California Governor Jerry Brown on September 30, 2018, just days after the controversial Brett Kavanaugh Supreme Court nomination hearings that featured allegations of sexual assault against Kavanaugh by Christine Blasey Ford. See *id.*

according to the corporation's U.S. Securities and Exchange Commission 10-K form, must comply with the new law by the end of 2019.⁹ Notably, the law, codified as California Corporations Code Section 301.3 ("Section 301.3", hereinafter), also applies to corporations not incorporated in California, providing that foreign corporations meet those same requirements.¹⁰

Under Section 301.3, all California corporations that meet the requirements are required to have a minimum of one female director on their boards by the close of the 2019 calendar year.¹¹ To achieve this goal, Section 301.3 provides that a corporation may increase the overall number of director seats on its board.¹² Corporations are not required to either implicitly or explicitly remove male board members in order to make room for female board members and comply with the law.¹³

Under Section 301.3, the requirements for California corporations in subsequent years grow even more stringent for companies with larger boards of directors. By the close of 2021, if a California corporation has five directors on its board, two of those directors must be women.¹⁴ If a California corporation has six or more directors on its board, three of those directors must be women.¹⁵

Section 301.3 also empowers the California Secretary of State to publish reports on its website documenting which California corporations are in compliance with the new rule.¹⁶ The Statute grants the California Secretary of State the authority to impose substantial fines on those California corporations in violation of the new requirements.¹⁷ The California Secretary of State may impose a fine of \$100,000 upon a California corporation for a first violation and a fine of \$300,000 for

9. CAL. CORP. CODE § 301.3 (West, Westlaw through Ch. 4 of 2019 Reg. Sess.).

10. *Id.*

11. *Id.*

12. *Id.*

13. See *2020 Women On Boards Reports Half Of Russell 3000 Companies Lack Women Directors On Boards, IPOs Fare Worse*, 2020 WOMEN ON BOARDS (Nov. 8, 2018), <https://www.2020wob.com/about/press/release/2020-women-boards-reports-half-russell-3000-companies-lack-women-directors-board> [<https://perma.cc/WP4K-TJLD>] (noting that sixty-three percent of the Russell 3000 companies that added women in 2017 and 2018 did so by adding board seats rather than replacing men).

14. CAL. CORP. CODE § 301.3(b)(2).

15. *Id.* § 301.3(b)(1).

16. *Id.* § 301.3(d)(1)-(3).

17. *Id.* § 301.3(e)(1)(a)-(c).

subsequent violations.¹⁸ There is an additional \$100,000 fine for failure to timely file board member information.¹⁹ Provided that a female director has held a seat on the covered corporation's board of directors for "at least a portion of the year," the covered corporation will not be subject to fines.²⁰

A total of 761 publicly traded companies are headquartered in California, all of which will have to comply with the law—some as early as by the end of 2019.²¹ The list includes organizations such as Apple and Facebook, both of which have boards that do not currently include enough female members to comply with the law's 2021 requirements.²²

III. THE CALIFORNIA LANDSCAPE

Considered one of the more progressive states of the United States, California still struggles with gender parity in its work force. In California, 26% (or 117) of its 445 publicly traded companies in the Russell 3000 index have no women on their boards of directors.²³ Of California's publicly traded companies, only 12% (or 54) have three or more female directors on their boards.²⁴ Among the remaining companies, women hold a small minority (only 15.5%) of the board seats.²⁵ By comparison, women nationwide hold 17.7% of board seats

18. *Id.* § 301.3(e)(1)(b), (c).

19. *Id.* § 301.3(e)(1)(a).

20. *Id.* § 301.3(e)(2).

21. See Richard Vernon Smith, *California Mandates Female Representation On Public Company Boards*, FORBES (Oct. 1, 2018, 12:04PM), <https://www.forbes.com/sites/allbusiness/2018/10/01/california-mandates-female-representation-public-company-boards/#56ae0de71775> [<https://perma.cc/R2NA-RXHW>] ("With the 2019 proxy season just a few short months away, qualifying public companies currently lacking any female directors will need to move quickly to avoid being non-compliant by the end of next year.")

22. See Teresa L. Johnson, Diem-Mi Lu & Kit Reynolds, *Arnold and Porter United States: Hurdles Ahead For California's Female Director Mandate*, MONDAQ (Oct. 11, 2018), <http://www.mondaq.com/unitedstates/x/744692/Corporate+Governance/Hurdles+Ahead+For+Californias+Female+Director+Mandate> [<https://perma.cc/W4DR-XYZ6>] (describing covered corporation requirements under the new law, the controversy surrounding it, and potential challenges it may face).

23. See Wamsley, *supra* note 2.

24. *Id.*

25. See Sonny Santistevan, *California to Mandate Gender Diversity in the Boardroom*, CYBERVISTA (Sept. 11, 2018), <https://www.cybervista.net/california-to->

in companies on the Russell 3000 Index and 19.8% of board seats for Fortune 1000 companies.²⁶

The problem is more profound with smaller companies. Smaller companies are more likely to lack female leadership at the highest levels. Among the fifty California-based companies with the lowest revenues only 8.4% of the director seats are held by women, and nearly half, or 48%, of these companies have no women directors.²⁷ In contrast, 23.5% of the director seats in the fifty-largest California companies are held by women and all fifty of those companies have at least one woman director.²⁸ The numbers are similar on a national scale.²⁹

IV. MANY ARE NOT GETTING THE MESSAGE

California's law attempts to resolve a long-standing and widespread problem with women in leadership in California and across the country. Women make up more than half the workforce, but women—and other minorities—are still underrepresented in corporate boardrooms where decisions are being made.³⁰ The failure to make greater progress towards a solution is disappointing and has tested the patience of business leaders and women everywhere.

mandate-gender-diversity-in-the-boardroom/ [https://perma.cc/QT89-QZEZ] (“[A]s of June 2017, among the 446 publicly traded companies included in the Russell 3000 index and headquartered in California, representing nearly \$5 trillion in market capitalization, women directors held 566 seats, or 15.5 percent of seats, while men held 3,089 seats, or 84.5 percent of seats.”).

26. See 2020 WOMEN ON BOARDS, GENDER DIVERSITY INDEX, 4, https://www.2020wob.com/sites/default/files/2020WOB_GDI_Report_2018_FINAL.pdf [https://perma.cc/EF2R-4MMV]; see also James Chen, *Russell 3000 Index*, INVESTOPEDIA (June 22, 2019), https://www.investopedia.com/terms/r/russell_3000.asp [https://perma.cc/KQD8-VHBZ] noting that the Russell 3000 Index measures the performance of the 3,000 largest publicly held companies incorporated in America.

27. See S.B. 826 § 1(e)(4), 2018 Leg., Reg. Sess. (Cal. 2018), https://leginfo.ca.gov/faces/billCompareClient.xhtml?bill_id=2017201805B826 [https://perma.cc/4NHH-YST8].

28. *Id.*

29. See 2020 WOMEN ON BOARDS, *supra* note 27, at 3 (“In 2018, the percentage of women in the largest R100 companies [was] 25.3%; in the smaller R2001-3000 companies it is 13.0%, demonstrating that smaller companies are less diverse.”).

30. *Quick Take: Women in the Workforce—Global*, CATALYST (Oct. 31, 2018), <https://www.catalyst.org/research/women-in-the-workforce-global/> [https://perma.cc/PGS2-GADX].

The bill that ultimately came to be Section 301.3 was sponsored by state Senators Hannah-Beth Jackson and Toni Atkins.³¹ In a floor speech about the bill in August 2018, Senator Jackson stated, “We are not going to ask any more. We are tired of being nice. We're tired of being polite. We are going to require this because it's going to benefit the economy. It's going to benefit each of these companies.”³²

Approval of the California law was one of the final acts of California Governor Jerry Brown, as his tenure as the longest-serving governor of the state of California was ending, in late 2018.³³ Adding fuel to the already fiery MeToo movement, Governor Brown's approval of the law took place against the backdrop of the controversial United States Supreme Court confirmation process of Justice Brett Kavanaugh, who was alleged to have sexually assaulted Dr. Christine Blasey-Ford more than thirty years ago.³⁴

Section 301.3 was passed within days of the Kavanaugh confirmation hearings with Governor Brown noting for the members of the California State Senate:

[R]ecent events in Washington, D.C.—and beyond—make it crystal clear that many are not getting the message. As far back as 1866, and before women were even allowed to vote, corporations have been considered persons within the meaning of the Fourteenth Amendment. . . . Given all the special privileges that corporations have enjoyed for so long, it's high time corporate boards include the people who constitute more than half the “persons” in America.³⁵

In proposing Section 301.3, the California legislature declared that more women directors serving on boards of directors of publicly held corporations would boost the California economy, improve opportunities for women in the workplace, and ensure that public companies performed more effectively.³⁶ The legislature conceded,

31. See Wamsley, *supra* note 2.

32. *Id.*

33. *Id.*

34. *Id.*

35. Letter from California Governor Edmund G. Brown Jr. to Members of the California State Senate (Sept. 30, 2018), <https://www.gov.ca.gov/wp-content/uploads/2018/09/SB-826-signing-message.pdf> [<https://perma.cc/CD6D-7SKF>].

36. See generally S.B. 826 § 1(c), 2018 Leg., Reg. Sess. (Cal. 2018) (discussing the economic value of having women on boards of directors).

however, that it may take forty or fifty years to achieve gender parity absent more proactive measures being taken.³⁷

In support of Section 301.3, the California legislature affirmed the notion that companies fared much better when more women held leadership positions.³⁸ For example, the legislature observed that United States companies that began the five-year period from 2011 to 2016 with three or more female directors reported earnings per share that were forty-five percent higher than companies with no female directors at the beginning of the period.³⁹

Further, the legislature cited to a 2014 Credit Suisse study that found that companies with at least one woman on the board had an average return on equity (ROE) of 12.2%, compared to 10.1% for companies with no female directors.⁴⁰ A companion study demonstrated that women on boards improved business performance for key metrics, including stock performance and that companies with women on their boards tend to be somewhat risk averse and carry less debt on average.⁴¹ Finally, a 2012 report from the University of California, Berkeley found that companies with more women on their boards are more likely to “create a sustainable future by, among other things, instituting strong governance structures with a high level of transparency.”⁴²

Ultimately, both the research supporting Section 301.3 as it moved through the legislature and the abysmal statistics about the present role of women in leadership demonstrated that California businesses—and United States businesses—are not getting the message about the value that women deliver in leadership. The proposed California regulation

37. See *id.* § 1(f) (“If measures are not taken to proactively increase the numbers of women serving on corporate boards, studies have shown that it will take decades, as many as 40 or 50 years, to achieve gender parity among directors.”). These estimates are supported by a 2015 study conducted by the United States Government Accountability Office and the 2017 Equality Gender Diversity Index (GDI). *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* The referenced Credit Suisse study further showed that “[f]or companies with a market capitalization of more than \$10 billion, those with women directors on boards outperformed shares of comparable businesses with all-male boards by 26 percent.” *Id.*

42. See Cydney Poser, *BlackRock Advocates that at Least Two Women be on Each Company Board*, COOLEY PUBCO. (May 2, 2019 4:15 PM) <https://cooleypubco.com/2018/02/06/blackrock-advocates-that-at-least-two-women-be-on-each-company-board/> [<https://perma.cc/6Q8Q-TS9A>].

received the necessary votes and was signed into law by Governor Jerry Brown, despite possible concerns about its enforceability and implementation.

V. CALIFORNIA'S LAW MAY BE UNCONSTITUTIONAL

Although championed by women's groups and business leaders, Section 301.3 requiring publicly traded companies to have at least one woman on their board of directors is likely to face legal challenges because it is potentially unconstitutional under two different legal theories.

First, Section 301.3 may violate both Article 1 of the California Constitution, which prohibits the disqualification of a person from employment based on their sex, and the Equal Protection Clause and Fourteenth Amendment of the United States Constitution because it creates a designation for gender only and is therefore, facially discriminating based on sex.⁴³ Under federal law, gender classifications, like Section 301.3, are subject to intermediate scrutiny and must show that the law is "substantially related" to an important or a compelling state interest and has an "exceedingly persuasive justification."⁴⁴ There must be a close fit between the discriminatory policy and the interest it advances to prevent the state from engaging in any more sex discrimination than is necessary to achieve the objective.⁴⁵ Notably, the California Constitution applies the higher standard of strict scrutiny to gender classifications requiring such classifications to serve a compelling governmental interest and the means chosen to be narrowly tailored to serving that interest.⁴⁶

Section 301.3 attempts to remedy the long-standing issue of exclusion of women from corporate leadership. While the problem that Section 301.3 seeks to address would likely be considered an important or compelling state interest that justifies a gender classification, the

43. See Wamsley, *supra* note 2.

44. See Ilya Somin, *California's Unconstitutional Gender Quotas for Corporate Boards*, VOLOKH CONSPIRACY (Oct. 4, 2018, 3:58PM), <https://reason.com/2018/10/04/californias-unconstitutional-gender-quot> [<https://perma.cc/T84X-4MEY>]; see also *United States v. Virginia*, 518 U.S. 515, 531 (1996) ("Parties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action."); *Connerly v. State Personnel Bd.*, 112 Cal. Rptr. 2d 5, 25 (2001) (applying strict scrutiny under the California Constitution).

45. *Id.*

46. *Connerly*, 112 Cal. Rptr. at 25-27.

means by which Section 301.3 attempts to legislate such a change may be difficult to support under the standards of both the Equal Protection Clause and the California Constitution.⁴⁷ Heightened scrutiny will apply even if Section 301.3 is well-intentioned and not motivated by prejudice or by a desire to make one gender inferior to the other.⁴⁸ Under heightened scrutiny, the state of California would need to demonstrate it had a good reason for implementing Section 301.3 and that there is not a better way of achieving the same goal.⁴⁹ If challenged, the use of a quota system, as implemented by the state of California through Section 301.3, may not be the least restrictive means of achieving the important interest of remedying past discrimination.

The second constitutional question raised by Section 301.3 is, because Section 301.3 applies to companies organized outside of California, whether it may violate the dormant commerce clause and the internal affairs doctrine which requires that the internal affairs of a company be under the regulatory purview of only one jurisdiction.⁵⁰ The internal affairs doctrine, a conflict-of-laws principle developed through case law under the commerce clause, recognizes that only a corporation's state of incorporation should have the authority to regulate its internal affairs, including the composition and election of its board of directors.⁵¹

47. *Id.*; see also Jayne Juvan & Chaz Weber, *An Unconstitutional Mandate? California's Gender-Based Board Law and Its Uncertain Legal Future*, BUS. L. TODAY (Nov. 27, 2018), <https://businesslawtoday.org/2018/11/unconstitutional-mandate-californias-gender-based-board-law-uncertain-legal-future/> [<https://perma.cc/U8SY-JHBE>] (noting that “[t]he act may apply both too narrowly (to the small subset of companies that are both publicly traded and headquartered in California) and too broadly (without consideration for whether a firm has previously engaged in discriminatory conduct or whether an industry may naturally attract more men or women) to survive scrutiny”).

48. See Juvan & Weber, *supra* note 49 (“Any law that discriminates based on sex must survive a heightened version of intermediate scrutiny.”).

49. See Wamsley, *supra* note 2 (“[T]he bill specifically creates a classification based on gender, and therefore it raises questions of equal protection under both the U.S. Constitution and the California Constitution. When the government legislates on the basis of gender, courts typically subject that legislation to a heightened scrutiny. This basically means the government has to prove it has a really good reason for doing what it is doing, and that there [sic] isn’t a better way of accomplishing that goal.”); see also Letter from California Governor Edmund G. Brown Jr., *supra* note 36 (providing Governor Jerry Brown’s justification for California’s actions in enacting Section 301.3).

50. See Juvan & Weber, *supra* note 49.

51. *Id.*; see also *McDermott Inc. v. Lewis*, 531 A.2d 206, 215 (Del. 1987)

Instead, Section 301.3 attempts to apply California law to publicly traded foreign organizations that have their headquarters in California but who might be subject to the rules of other jurisdictions. These foreign organizations could be forced to comply with mandates from competing jurisdictions that are inconsistent with the mandates of Section 301.3.

It is interesting to note that if Section 301.3 were found to violate the internal affairs doctrine and apply to only those organizations that were both organized in California and located in California, the list of organizations affected by Section 301.3 would be much smaller—possibly as low as seventy-two organizations—with only one of those being a Fortune 500 company.⁵²

VI. CALIFORNIA'S LAW RAISES ADDITIONAL BUSINESS AND POLICY CONCERNS

In addition to legal concerns, Section 301.3 may also face business and policy concerns. Opponents suggest the regulation is burdensome and will make the board-nominating process difficult as organizations attempt to identify a precise composition of board members that bring the needed subject matter and industry expertise, meet other company or investor requirements, and now also comply with the requirements of Section 301.3. California's Chamber of Commerce and twenty-nine other business groups opposed Section 301.3 noting it would cause "'confusion and ambiguity' that 'will only lead to costly fines as proposed under the bill and potential litigation.'"⁵³

Historically, the state of California has also avoided policies designed to address inequities through regulated gender preferences. In 1996, California voters adopted Proposition 209, which bans the state from giving preferences based on race or gender in the areas of

52. See Joseph Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826*, (Stanford Public Law, Working Paper No. 232, 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791 [<https://perma.cc/C89W-LJRF>].

53. See Patrick McGreevy, *Gov. Jerry Brown Signs Bill Requiring California Corporate Boards to Include Women*, L.A. TIMES (September 30, 2018, 4:00 PM), <https://www.latimes.com/politics/la-pol-ca-governor-women-corporate-boards-20180930-story.html> [<https://perma.cc/5WNS-GQDG>]. See also Letter from California Governor Edmund G. Brown Jr., *supra* note 36 (acknowledging that there may be potential flaws with the act, but arguing that the act is still justified so corporations are held accountable for hiring women).

government employment, education, and contracting.⁵⁴ While Section 301.3 focuses on private corporations and does not involve government provision of jobs or education, California's attempt to regulate a gender preference upon private leadership boards, even though it has been unwilling to apply such preferences to itself, may be viewed negatively—and certainly executed inconsistently.⁵⁵

VII. GENDER PARITY ON CORPORATE BOARDS HAS SEEN SOME SUCCESS INTERNATIONALLY

California's measures are a first-of-their kind in the United States, but European countries began implementing gender quotas more than ten years ago to achieve gender parity on their corporate boards. Norway was the first to do so in 2003, when it instituted quotas requiring women to make up 40% of directors at selected companies.⁵⁶ As of 2013, the composition of the boards of Norway's public companies included 41% women, a number significantly higher than the United States.⁵⁷ It is worth noting that although Norway has seen success with gender quotas on corporate boards, the quotas seem not to have impacted the way women move into leadership within the organizations, as men still hold the majority of the senior management and executive positions within Norwegian organizations.⁵⁸

Other countries soon followed Norway's lead, including France (a 40 percent female board representation quota), Germany (a 30 percent female board representation quota), and India (a quota of one female

54. See Vikram David Amar & Jason Mazzone, *Is California's Mandate That Public Companies Include Women on Their Boards of Directors Constitutional?*, JUSTIA (Oct. 5, 2018) <https://verdict.justia.com/2018/10/05/is-californias-mandate-that-public-companies-include-women-on-their-boards-of-directors-constitutional> [<https://perma.cc/K2YQ-Q2NU>].

55. *Id.*

56. See Smale & Miller, *supra* note 7; see also *Ten Years on from Norway's Quota for Women on Corporate Boards*, ECONOMIST (Feb. 17, 2018), <https://www.economist.com/business/2018/02/17/ten-years-on-from-norways-quota-for-women-on-corporate-boards> [<https://perma.cc/RR3F-AH9F>] [hereinafter *Norway's Quota*].

57. See *Norway's Quota*, *supra* note 58.

58. See Schumpeter, *A Nordic Mystery*, ECONOMIST (November 2014), <https://www.economist.com/business/2014/11/15/a-nordic-mystery> [<https://perma.cc/2XWU-59TV>] (finding that only 6% of Norwegian listed firms had a female chief executive officer in 2013 and noting that "there may be more women sitting round the table at board meetings, but the person who runs the show is almost always a man.")

director on each board).⁵⁹ In Spain in 2007, a law introducing gender parity for electoral office also encompassed the goal of gender parity on corporate boards to be achieved by 2015.⁶⁰ In 2010, Iceland took a unique approach adopting legislation applicable to publicly-owned and publicly-limited companies with more than fifty employees and setting a goal of ensuring that *each* sex makes up at least 40 percent of boards by 2013.⁶¹ Today, at least ten countries have established quotas for female representation on publicly-traded corporate and/or state-owned enterprise boards of directors; fifteen other countries have introduced non-binding gender quotas in their corporate governance codes; and countless other countries' leaders are debating, developing, and approving legislation around gender quotas in board.⁶²

Early efforts to improve gender parity on corporate boards around the world seem to be having a favorable effect. In a study of nearly 7,000 companies in sixty countries, women held 15% of all board seats globally in 2017, up from 12% of board seats in 2015.⁶³ While the global number of board seats held by women has only increased 3% in two years, the percentage of women on boards rose nearly 5% in both Canada (to 20.5%) and the UK (to 20.3%).⁶⁴

It has been noted that, in each of these countries that have implemented gender quotas, "business leaders protested when the idea [of a quota] was floated," but "the worst fears have not been realised [sic]."⁶⁵ While gender quotas have seen some success, mandatory board quotas implemented in some European countries did not lead to the improvement in corporate governance or performance some had expected. Furthermore, several studies merely show a correlation

59. See *Norway's Quota*, *supra* note 58.

60. *Id.*

61. *Id.*

62. Nina Smith, *Gender Quotas on Boards of Directors*, IZA WORLD OF LABOR (May 3, 2019), <https://wol.iza.org/articles/gender-quotas-on-boards-of-directors/long> [<https://perma.cc/SSJ6-NFVA>]; see also Siri Terjesen, Ruth Aguilera, and Ruth Lorenz, *Legislating a Woman's Seat on the Board: Institutional Factors Driving Gender Quotas for Boards of Directors*, *Journal of Business Ethics* (January 2014)

63. See DELOITTE GLOBAL CENTER FOR CORPORATE GOVERNANCE, *WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE* (5th ed. 2017), <https://www2.deloitte.com/global/en/pages/risk/articles/women-in-the-boardroom5th-edition.html> [<https://perma.cc/39KF-CQDC>].

64. *Id.*

65. See *Norway's Quota*, *supra* note 58.

between female board representation and subsequent positive corporate outcomes, but not necessarily a direct, causal relationship.⁶⁶

Our international counterparts are also approaching the problem of women's underrepresentation on corporate boards of publicly held companies through softer measures. Many European countries, such as Finland, Sweden, Poland, the Netherlands, and Denmark, are implementing corporate governance codes and charters that companies can sign voluntarily.⁶⁷

Increasingly, legislated gender quotas are being considered in other countries, but it is unlikely that these quotas will completely remedy the problem of gender diversity in the boardroom. Early indications are that quotas are a good start and are useful in establishing responsibility and accountability within organizations and bringing gender representation in management to the forefront of issues. Much more is needed, however, before organizations will authentically embrace the need for diversity in the boardroom and ensure representation at all levels of leadership.

VIII. THE CASE FOR DIVERSITY IN THE BOARDROOM

There is little debate about why diversity in the corporate boardroom is key. Studies, including those cited by the California legislature in support of Section 301.3, show diverse corporate boards result in stronger financial performance, increased innovation, better recognition and understanding of stakeholder needs, and improved decision making, effectiveness of group performance, and workforce motivation and loyalty.⁶⁸

66. See *Are Gender Quotas Good for Business?*, *ECONOMIST* (Sept. 3, 2018), <https://www.economist.com/the-economist-explains/2018/09/03/are-gender-quotas-good-for-business> [<https://perma.cc/A3BC-SH6h>].

67. Tyler Winters & Madhuri Jacobs-Sharma, *Gender Diversity on Corporate Boards: The Competing Perspectives in the U.S. and the EU*, PENNLAW LEGAL SCHOLARSHIP REPOSITORY: COMPARATIVE CORPORATE GOVERNANCE AND FINANCIAL REGULATION (2016), 2, http://scholarship.law.upenn.edu/fisch_2016/13 [<https://perma.cc/5CBR-PDU4>].

68. *Women Make Gains In Minnesota's Corporate Boardrooms*, SAINT CATHERINE UNIV. (Mar. 22, 2017), <https://www.stkate.edu/news-and-events/news/women-make-gains-in-minnesota%E2%80%99s-corporate-boardrooms> [<https://perma.cc/ZS2Z-4WYL>] (quoting ReBecca Koenig Roloff, President of St. Catherine University, based in St. Paul, Minnesota, who states that “[t]he case for leadership diversity in business is clear. It results in stronger financial performance, creative innovation[,] and a greater ability to adapt in an ever-changing, increasingly multicultural environment”).

Additionally, there is strength in numbers. A growing body of research from organizations like Ernst & Young, McKinsey & Company, Credit Suisse, and Dezsó & Ross detail the positive impact that women leaders in an organization have—particularly, once a company has three or more women on its board or the percentage of women on its board exceeds 30 percent.⁶⁹

IX. THE NATIONAL LANDSCAPE

The national landscape surrounding women in leadership of corporate boards is not much better than in California. However, individual states, including Minnesota, seem to be advancing toward gender parity more rapidly.

According to the U.S. Department of Labor, women compose 47% of the workforce in the United States.⁷⁰ The majority of employed women fall into management and professional occupations.⁷¹ Yet, just 5% of the companies on the Standard & Poor's 500, which includes only publicly traded firms, have female CEOs.⁷² Additionally, women who served as chief executive at one company are far less likely than men to go on to be CEO at another company, and less likely to serve on corporate

69. See S.B. 826 § 1(e)(4), 2018 Leg., Reg. Sess. (Cal. 2018) (noting that several studies have concluded that having three women on the board, rather than just one or none, increases the effectiveness of boards). The 2016 McKinsey & Company study “Women Matter” concludes “that companies where women are most strongly represented at board or top-management levels are also the companies that perform the best in profitability, productivity, and workforce engagement” and that “[c]ompanies with three or more women in senior management functions score even more highly, on average, on the organizational performance profile, than companies with no women on boards or in the executive ranks”). *Women Matter: Women Leaders, A Competitive Edge In and After the Crisis*, MCKINSEY & COMPANY (September 2009), https://www.mckinsey.com/~media/McKinsey/Business%20Functions/Organization/Our%20Insights/Women%20matter/Women_matter_dec2009_english.ashx [<https://perma.cc/9DNZ-QB9D>].

70. See U.S. DEP'T OF LABOR: WOMEN'S BUREAU, WOMEN IN THE LABOR FORCE IN 2016, <https://www.dol.gov/wb/stats/NEWSTATS/latest/demographics.htm#two> [<https://perma.cc/M3F5-XKQN>].

71. *Id.*

72. See *Women CEOs of the S&P 500*, CATALYST (Apr. 15, 2019), <https://www.catalyst.org/research/women-ceos-of-the-sp-500/> [<https://perma.cc/LS3V-b8FR>].

boards.⁷³ Further, while 43% of the Russell 3000 companies have 20% or more of their board seats held by women (this is up from 37% in the year prior), a shocking 50% of Russell 3000 companies still have one or no women on their boards.⁷⁴

The drumbeat of diversity on corporate boards is heard throughout all areas of business and industry. It is a concern for organizations at all stages of development. Yet, even newer companies experiencing rapid expansion are not prioritizing diversity at the board level. Throughout 2017, women held just 9.2% of the board seats in the largest twenty-five companies that went public with an initial public offering (IPO) in the same year.⁷⁵ While this was an increase from 8.2% women in 2016, it was still below the four-year average of 9.4%.⁷⁶ In fact, twelve of those twenty-five companies went public in 2017 without any women holding seats on their boards.⁷⁷

And size continues to matter. As noted, smaller companies are less diverse in terms of representation of women on corporate boards. Of the 2835 active Russell 3000 companies, in 2018, women held 17.7% of the board seats (compared to 16% in 2017 when there were 2871 active companies).⁷⁸ Likewise, in 2018, the percentage of women in the largest Russell 100 companies was 25.3%; but in the smaller Russell 2001-Russell 3000 companies women make up only 13% of board seats.⁷⁹

While California is the only state to attempt to legislate gender quotas on corporate boards, other states as well as individual organizations have sought to address gender disparities on corporate boards through corporate commitments like the Parity Pledge, which asks organizations that sign on to commit to considering at least one qualified woman for every open role at the vice president level and higher, including C-suite executives and the board.⁸⁰ It is worth noting that California passed a similar resolution in 2013 urging all public companies based in the state to increase their female board

73. See David Gelles, *Missing: Female C.E.O.s.*, N.Y. TIMES, (Sept. 28, 2018), <https://www.nytimes.com/2018/09/28/us/missing-women-ceos.html> [<https://perma.cc/A53D-226P>].

74. 2020 WOMEN ON BOARDS, *supra* note 27, at 3.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. See Gelles, *supra* note 75.

representation, but the resolution has not yet achieved the gender parity it had set out to.⁸¹

X. WHAT DOES THIS MEAN FOR MINNESOTA?

Unlike California and many of its state counterparts, in recent years Minnesota has seen the most significant growth in the number and percentages of women on corporate boards in its history, but there is still much work to be done, particularly in the area of intersectional diversity—where gender, race, sexual orientation, and other differences meet.

Nationally, Minnesota is a leader in board diversity. In 2018, four of the top twenty-six states ranked by board diversity exceeded the goal of having 20% of board positions held by women.⁸² Those states were Connecticut, Michigan, Minnesota, and Washington. Minnesota was the only state to exceed the goal in 2017.⁸³

Female representation in corporate boardrooms continues to grow in Minnesota. According to the 2016 Minnesota Census of Women in Corporate Leadership, the percentage of women on the boards of Minnesota's eighty-five largest public companies rose from 15.5% to 19% in 2015.⁸⁴ In addition, the total number of companies in the Minnesota Census that have women directors increased to seventy-one (five more companies than 2015).⁸⁵ This increase occurred despite a decrease in the number of companies in the 2016 study and a resulting decrease in the total available board seats.⁸⁶ The 2016 Minnesota Census specifically recognized nineteen Minnesota companies for their efforts to promote women's leadership on their boards and executive offices—the highest number in the nine-year history of the census.⁸⁷

81. S. Con. Res. 62, 2018 Leg., Reg. Sess. (Cal. 2018).

82. See 2020 WOMEN ON BOARDS, *supra* note 27.

83. *Id.*

84. See *Women Make Gains in Minnesota's Corporate Boardrooms*, *supra* note 70. The 2016 Minnesota Census of Women in Corporate Leadership report is produced by research from The St. Catherine University Master of Arts in Organizational Leadership (MAOL) program and co-authored by Joann Bangs, who is the dean of the School of Business and Professional Studies, and Rebecca Hawthorne, the MAOL program director.

85. *Id.*

86. *Id.*

87. *Id.* The following Minnesota companies were recognized in the 2016 Census: Christopher & Banks, Deluxe Corp., HMN Financial, Inc., Target Corp., Best Buy Co.

While significant advances in gender diversity on corporate boards were made in Minnesota, women of color —still the most underrepresented group in corporate leadership—increased only marginally from 2.7% in 2015 to 3.4% in the 2016 Minnesota Census.⁸⁸ This is particularly unsettling as women of color now make up approximately 20% of the U.S. population.⁸⁹

The outlook in Minnesota is generally favorable in terms of gender diversity on corporate boards, but the needs are still significant. While women are slowly realizing greater representation in Minnesota's corporate boardrooms, the pace at which women are gaining ground remains inconsistent with the overall growth of business and women's representation in the workforce generally. Additionally, while there are more female voices around the table in corporate boardrooms, those voices remain predominantly white. The voices of women of color, women of diverse gender identities and expression, as well as other differences, continue to be missing.⁹⁰ In that absence, there also exists an absence of ideas, innovation, and understanding that reflect the needs of our corporate communities and the constituencies they serve.

There is more work to be done nationally and in Minnesota—and that work needs to occur not just through mandated legislation as in California, but even more importantly and effectively, through direct corporate action and engagement.⁹¹

Inc., Electromed, Inc., Patterson Cos., Inc., Select Comfort Corp., Apogee Enterprises, Inc., Buffalo Wild Wings, Inc., Clearfield, Inc., G&K Services, Inc., H.B. Fuller Co., Medtronic Plc., MTS Systems Corp., New Ulm Telecom, Inc., Tennant Co., U.S. Bancorp, and UnitedHealth Group, Inc.

88. *Id.*

89. *Id.*

90. See Patricia Lenkov, *Why Diversity in the Boardroom Should Include LGBT*, ELLEVATE (2016) <https://www.ellevatenetwork.com/articles/7063-why-diversity-in-the-boardroom-should-include-lgbt> [<https://perma.cc/X279-26LZ>] (finding, among other statistics, that as of August 2014 there were only 176 African Americans on the Standard & Poor's 250 Boards, Hispanics constituted 3.1% of the corporate directors in the Fortune 500, and there were fewer than 10 openly LGBT members on Fortune 500 boards).

91. *Id.*; *Women Make Gains in Minnesota's Corporate Boardrooms*, *supra* note 70 (quoting Rebecca Hawthorne, co-author of the 2016 Minnesota Census: "Although I am heartened by this year's Minnesota Census percentages, I encourage Minnesota companies to take a stand toward gender parity in the workplace and aim for 30% women leaders across their organizations by 2030—not just in their board rooms and senior leadership teams. The Paradigm for Parity Coalition provides a road map for companies to accomplish this through research-based, measurable, corporate actions.").

XI. LEGISLATED EFFORTS TO DIVERSIFY THE CORPORATE BOARDROOM ARE IMPERFECT

Although there is widespread agreement regarding the value of diversity in corporate boardrooms, as a nation, the United States continues to struggle with what measures are the most effective in achieving diversity. Some measures seem heavy handed while others may not be as effective as intended.

A. *Legislated Gender Quotas May Signal That Women Are Less Effective Than Men In The Boardroom*

Laws, such as Section 301.3, that attempt to regulate the role of women in corporate boardrooms, run the risk of sending unintended messages about the effectiveness of women in those settings. Reserving board positions for women may signal that those seats are being reserved because female executives underperform when compared to their male counterparts or that female leadership skills should not be given as much weight as those of men.⁹² In fact, studies show that women add significant value in the corporate boardroom and efforts to legislate their presence may undermine their value.

B. *Legislated Gender Quotas Have Not Addressed Intersectional Diversity*

Many current legislated efforts to diversify corporate boardrooms also miss the mark in terms of the breadth and depth of diversity they invite into corporate boardrooms. For example, Section 301.3 prioritizes only gender diversity. Section 301.3, and some of the international measures like it, have failed to take a more holistic view of diversity which acknowledges the need for other types of diversity in the boardroom, including diversity based on race, gender identity and expression, age, and other attributes. This limited view of diversity results in limited insight into the needs of a corporation's employees and customers. Acknowledgment and understanding of those needs are critical to a corporation's success.

92. See DIVERSITY BEST PRACTICES, DEVELOPING THE NEXT GENERATION OF WOMEN LEADERS, https://www.diversitybestpractices.com/sites/diversitybestpractices.com/files/attachments/2018/04/research_report_developing_the_next_generation_of_women_leaders.pdf [<https://perma.cc/UJZ5-ZAEK>].

C. *Legislated Gender Quotas May Be Viewed as Box-Checking Measures*

Laws that regulate female representation on corporate boards may also be only somewhat effective in addressing the overall gender disparity at the corporate level because they are viewed as simply “checking the box.” While other countries are implementing regulations, calling for as much as 40% gender diversity on corporate boards, the United States appears to exist in a mindset of “one is better than none.” In 2015, Brande Stelling, then-vice president of corporate board services for Catalyst, a not-for-profit that works to advance professional women in the workplace, observed, “I do think we can say it’s no longer acceptable to have zero women on a board of directors . . . I just hope we don’t get stuck at one, and that one becomes the new zero.”⁹³

In fact, the phenomenon of one as the new zero is not just a yet-to-be-recognized fear. In the United States, if one woman already holds one of the top five positions in an executive boardroom, the likelihood of another woman being selected for the remaining four positions goes down 51%.⁹⁴

D. *Legislated Gender Quotas Do Not Achieve Necessary Critical Mass*

Finally, Section 301.3, and other laws like it, may only mandate the addition of single or other small numbers of women to corporate board of directors. Even legislating the presence of women in small numbers is met with criticism that the requirements are burdensome and make the board nominating process difficult.⁹⁵

Yet, research shows that attaining a critical mass of female representation on corporate boards is crucial to the success of these initiatives. For the law to truly achieve its intended effect, corporations need to have at least three women directors on their boards to create an environment where women are not viewed as outsiders and instead, are

93. Kimberly Weisul, *Globally, Women Gain Corporate Board Seats—But Not in the US*, FORTUNE, (Jan. 13, 2015), <http://fortune.com/2015/01/13/catalyst-women-boards-countries-us/> [https://perma.cc/8SSF-JREN].

94. See Julia Glen, *Affirmative Action: The Constitutional Approach to Ending Sex Disparities on Corporate Boards*, 101 MINN. L. REV. 2089, 2092 (2017).

95. See Wamsley, *supra* note 2.

able to positively and substantially influence board discussions and decision making.⁹⁶

XII. EDUCATION AND ENGAGEMENT – NOT LEGISLATION – IS THE KEY TO CORPORATE BOARDROOM DIVERSITY

Despite efforts to the contrary, the problem of diversity in our corporate boardrooms persists. As Governor Brown noted when he enacted Section 301.3, the message about the value and power of women and other employees of diverse backgrounds is still missing the mark in the workplace and the corporate boardroom.

The difficulty lies in attempting to legislate the hearts and minds of individuals in a society that has long viewed women as secondary. In a speech to an audience at Western Michigan University in 1963, Dr. Martin Luther King, Jr. described the need for civil rights legislation while acknowledging its limitations:

Now the other myth that gets around is the idea that legislation cannot really solve the problem and that it has no great role to play in this period of social change because you've got to change the heart and you can't change the heart through legislation. You can't legislate morals. The job must be done through education and religion. Well, there's half-truth involved here. Certainly, if the problem is to be solved then in the final sense, hearts must be changed. Religion and education must play a great role in changing the heart. But we must go on to say that while it may be true that morality cannot be legislated, behavior can be regulated. It may be true that the law cannot change the heart but it can restrain the heartless.⁹⁷

Legislation has a place in the effort to diversify corporate boardrooms, but true diversity has not and cannot be effectively legislated. To change the problem with corporate boardroom diversity in its final sense, we must change the hearts and minds of corporate

96. See Maria Teresa Torchia, Andrea Calabrò & Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. BUS. ETHICS 299 (2011); see also Vicki W. Kramer, Alison M. Konrad & Sumru Erkut, *Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance*, WELLESLEY CTRS. FOR WOMEN (2006), <https://www.wcwonline.org/vmfiles/CriticalMassExecSummary.pdf> [<https://perma.cc/6CLJ-QXMA>].

97. Martin Luther King, Jr., Speech at Western Michigan University (Dec. 18, 1963), transcript available at <https://wmich.edu/sites/default/files/attachments/MLK.pdf> [<https://perma.cc/2YV9-LA22>].

leaders, shareholders, and employees through education and engagement. Corporations are less likely to authentically and fully embrace the issue of gender and other types of diversity on their corporate boards when they are forced to do so.

Instead, corporations should be educated on the benefits of diversity in their corporate boardrooms. Corporations should further be incentivized to engage in establishing programs, policies, and procedures that identify diverse leaders within their ranks, create pathways and opportunities for those leaders to emerge, and proactively assess and monitor their overall board composition and pipeline of future directors in ways that will foster gender and other forms of diversity in their corporate boardrooms.⁹⁸

A. *Shareholder Activism and Financial Pressure*

Aside from regulating the presence of women on corporate boards, perhaps one of the best ways to achieve gender diversity in the boardroom is through financial pressure from shareholders and consumers who care whether the companies they invest in and patronize are committed to diversifying their leadership. Corporations are legally bound to represent the interests of their shareholders. As a result, shareholder activism and financial pressure may be more powerful than any government intervention to regulate board makeup. Importantly, in many instances, shareholders may also have the reputation and resources to actively engage with company leadership in developing diverse corporate boards. Shareholders may have experience with and access to diverse networks for recruiting, developing, and retaining emerging leaders. While shareholder activism and financial pressure alone will not fix the problem of diversity on corporate boards, advocates in the United States and internationally are seeing how those measures can be effective in moving corporations in the right direction.⁹⁹ Women in the workforce tend to underestimate

98. See Teresa L. Johnson, *Hurdles Ahead for California's Female Director Mandate*, ARNOLD & PORTER (Oct. 5, 2018), <https://www.arnoldporter.com/en/perspectives/publications/2018/10/hurdles-ahead-for-cas-female-director-mandate> [https://perma.cc/4P8Q-L6BY].

99. See Avivah Wittenberg-Cox, *Shareholder Activism Pivots to Gender*, FORBES (Mar. 7, 2019, 10:29 AM), <https://www.forbes.com/sites/avivahwittenbergcox/2019/03/07/shareholder-activism-pivots-to-gender/#2dbde5b18b93> [https://perma.cc/QTJ8-MJGV].

their own value and lack confidence in their abilities.¹⁰⁰ It can be difficult for women, particularly those early in their careers, to recognize that they have influence and that their value may show up in ways that are different, but equally as important, from men. In terms of women's success in the workplace and advancement into leadership, studies have shown that confidence is even more important than competence.¹⁰¹ Additionally, the confidence gap in women grows smaller with both age and experience.¹⁰²

Corporations that are committed to diversity in their boardrooms should commit to helping women develop confidence in their leadership abilities by helping them construct a pathway to success. By illustrating the skills, attributes, and accomplishments that have led to success for other women in the organization and taking specific action to help additional women develop and achieve their own skills, attributes, and accomplishments, corporations can develop emerging female leaders that are valued by the organization, its shareholders, and customers while simultaneously expanding the strategic depth and breadth of experience of their corporate boards overall. For example, "only 11 percent of Fortune 500 directors have a J.D. [*Juris Doctor*] degree. However, research has confirmed that lawyers, because of their critical and strategic thinking skills, add real value to a board."¹⁰³ One study has

(discussing the introduction of gender activism in the United Kingdom as a means of diversifying corporate boards and addressing the gender pay gap by driving shareholders to vote against or abstain from voting for board members and chairs who fail to make substantial progress on gender diversity issues).

100. See Katty Kay & Claire Shipman, *The Confidence Gap*, ATLANTIC (May 2014), <https://www.theatlantic.com/magazine/archive/2014/05/the-confidence-gap/359815/> [<https://perma.cc/48WZ-C62S>]; see also Jack Zenger, *The Confidence Gap in Men and Women: Why it Matters and How to Overcome It*, FORBES (Apr. 8, 2018, 4:22 PM) <https://www.forbes.com/sites/jackzenger/2018/04/08/the-confidence-gap-in-men-and-women-why-it-matters-and-how-to-overcome-it/#1c86ec153bfa> [<https://perma.cc/8NH2-4N48>] (noting that confidence in women builds with age and experience).

101. *Id.*

102. *Id.*

103. See Roberta D. Liebenberg, *Wanted: More Women on Corporate Boards. Legal Experience Desired*, BEST LAWYERS: LEGAL INSIGHTS (Feb. 21, 2017, 2:13 PM), <https://www.bestlawyers.com/article/women-corporate-boards/1198> [<https://perma.cc/L9Y4-DN2P>]; see also Liz Fedor, *Breaking Through Minnesota's Glass Ceiling*, TWIN CITIES BUS. (Apr. 1, 2018), <http://tcbmag.com/news/articles/2018/april/breaking-through-minnesota-s-glass-ceiling> [<https://perma.cc/3H68-DFAJ>] ("Athletes figure prominently among the

concluded that having lawyers serve on corporate boards contributes to enhanced firm value (an increase of 9.5%) and a reduction of litigation exposure.¹⁰⁴ Showing female candidates who hold a J.D. degree a pathway to leadership that includes corporate board positions – or providing the resources and flexibility necessary to help emerging female leaders earn a J.D. or other advanced degree – can help women envision themselves in leadership roles that leverage their unique strengths and experiences, and also add value to the corporate board overall.

B. Company-Sponsored Mentoring and Succession Planning for Women

Companies should also prioritize mentoring and succession planning for women in their workforces. Employees want to see individuals who look like them succeeding both inside and outside of their organizations to know they also can aspire to those positions. When studied, 45% of women expressed an interest in becoming a CEO or holding another position in senior management or leadership, and of those women, 69% express a strong determination to achieve that goal.¹⁰⁵

Unfortunately, this is another area where, although the opportunity for women exists, many women are not engaged in these activities. Women comprise nearly half of the U.S. workforce, but their participation in leadership development programs, including mentoring, sponsorships, professional development, career counseling, and succession planning is significantly lacking.¹⁰⁶ Except for career counseling, white and Asian women are more likely to participate in these programs than black women and Latinas.¹⁰⁷ It is interesting to note, in a recent study on women's leadership conducted by KPMG:

- 92% of women said they did not feel confident asking for sponsors;
- 79% of women did not feel confident seeking mentors;

women who have broken through the glass ceiling. Ninety-four percent of women in the C-suite played sports, 52 percent at a university level. Executive women are more likely to have played a sport and to hire other women who also played.”).

104. *Id.*

105. *See* DIVERSITY BEST PRACTICES, *supra* note 94, at 4.

106. *Id.* at 3–4.

107. *Id.* at 3.

- 76% of women did not feel confident asking for access to senior leadership;
- 73% of women did not feel confident pursuing a job opportunity beyond their experience;
- 69% of women did not feel confident asking for a career path plan;
- 56% of women did not feel confident requesting a new role or position; and

Only one-third of working women understand how to leverage and support other female employees in the workplace (even though seven in ten working women acknowledged a personal obligation to do so).¹⁰⁸

A related problem is that when women do find mentors, women of color may be further disadvantaged because women of color are less likely to have mentors who are white. White men continue to hold most of the power within U.S. corporations and have the most significant ability to affect the professional success of the women they are sponsoring. And yet studies show that most executives still choose to mentor individuals of their same gender and race and this has an adverse impact on women of color when it comes to promotion and pay.¹⁰⁹

Women's lack of confidence in advocating for themselves is the most common reason for their lack of participation in leadership development initiatives such as sponsorships and mentoring. Corporations should commit to building diversity on their corporate boards by developing targeted and robust professional development programs that identify emerging women leaders and create opportunities for emerging women leaders to build confidence, receive training in leadership, decision making, critical thinking, and be supported by other leaders of all genders and races, and proactively

108. *Id.* at 4.

109. See Jeff Green, *Managers Pick Mini-Me Proteges of Same Race, Gender*, BLOOMBERG (January 8, 2019 at 8:00am) <https://www.bloomberg.com/news/articles/2019-01-08/managers-pick-mini-me-proteges-of-same-gender-race-in-new-study>; see also Rebecca Greenfield, *The White-Male Mentorship Premium*, BLOOMBERG (August 9, 2019 at 3:00am) (<https://www.bloomberg.com/news/articles/2019-08-09/white-male-mentorship-brings-a-premium-and-it-s-hurting-women>) (noting that black women who have a black sponsor reported making 11.3% less than black women with a white sponsor, and Hispanic women with a Hispanic sponsor make 15.5% less than Hispanic women with a white sponsor).

encourage, and even incentivize emerging women leaders to take advantage of those opportunities.

C. Companies Should Invest in Intentionally Removing Barriers to Women's Advancement

Finally, just making the career path visible and accessible for women and providing opportunities for confidence building, leadership training, and networking is not enough. Corporations must also remove other barriers women often experience to leadership advancement. These barriers may include pay disparities, childcare obligations and expenses, the impact of time taken away from the workplace to care for children or aging parents, and past failures to invest in or identify women for promotion or advancement.¹¹⁰ These are logistically difficult and expensive issues for corporations to address, but they must be dealt with in the form of equal pay for equal work, changed and flexible workplace policies and procedures, and reparations, adjustments, or compensation for past failures.

Perhaps, though, one of the most difficult barriers emerging women leaders must overcome is changing the hearts and minds of men and other organizational leaders who do not yet see the value in having women in the boardroom. Too often, corporations place the responsibility for shifting the perspective of male leadership on the shoulders of women—and other diverse professionals—to prove themselves and to better align their approach to leadership with the notions currently held by the (mostly male) leadership within the organization. This is unsustainable and has the effect of turning women away from leadership opportunities. Men have a critical role in changing this dynamic, but corporations need to first attempt to better understand the experience of their male employees and leaders in conversations surrounding gender diversity and educate them on the organizational issue of fairness to be solved. Corporations need to hear from their male leaders about the cultural norms that are driving male behavior in these discussions, and help their male leaders better understand the problem of gender bias, and how men can benefit from and commit to supporting the notion of fairness for all within the

110. See Janet Burns, *The Results Are In: Women Are Great for Business, But Still Getting Pushed Out*, FORBES (Sept. 22, 2017, 1:41 PM), <https://www.forbes.com/sites/janetwburns/2017/09/22/2016-proved-women-are-great-for-business-yet-still-being-pushed-out/#4e4a3fbf188b> [https://perma.cc/8GM9-GEMD].

organization.¹¹¹ This may be the most challenging work of all, but it is also the most important.

XIII. CONCLUSION

The need for diversity in the corporate boardroom is clear, but achieving boardroom diversity in ways that are authentically embraced by corporations, their leaders, employees, and shareholders is complicated. Legislation, like Section 301.3, alone is not the long-term solution. The final answer is much broader and more holistic and requires hard work and honest reflection and self-evaluation on the part of all members of an organization and, in particular, of those currently in leadership.

Corporations need to educate their leaders, shareholders, and employees about the value of diversity in corporate boardrooms and assess their own reactions and responses to diversifying the organization in an effort to root out bias and implement measures to overcome that bias. Corporations must also be proactive in identifying diverse leaders within their ranks, creating pathways and opportunities for those leaders to emerge, and developing their corporate board composition in ways that will embrace diversity in corporate boardrooms.

111. See Jeanine Prime & Corinne A. Moss-Racusin, *Engaging Men In Gender Initiatives: What Change Agents Need To Know*, CATALYST (2009), https://www.catalyst.org/wp-content/uploads/2019/01/Engaging_Men_In_Gender_Initiatives_What_Change_Agents_Need_To_Know.pdf [<https://perma.cc/7ULA-5YH4>]; see also Center for Women and Business at Bentley University, *Men as Allies: Engaging Men to Advance Women in the Workplace*, CEO Action for Diversity and Inclusion (<https://www.ceoaction.com/media/1434/bentley-cwb-men-as-allies-research-report-spring-2017.pdf>).

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