May 2, 2011

Women on Corporate Boards of Directors - A Global Snapshot

douglas m branson, University of Pittsburgh

Available at: https://works.bepress.com/douglas_branson/3/
Introduction. I am part of a study group which includes management and law teachers from Norway, France, the UK (2), the U.S., Australia and New Zealand. We interview women who already are company directors, along with company chairpersons and representatives of “adjective” organizations interested in the subject (in the U.S., Catalyst, Inc., or WomenCorporateDirectors (WCD), for instance).

In 2010, at the New South Wales State Library in Sydney, Australia, the group interviewed 16 women who serve as directors of publicly held companies, 5 company chairmen, and 4 representatives from adjective organizations. The goal is to repeat the process in several countries, developing a comparative model of pathways for women to the corporate board.

* W. Edward Sell Chair in Law, University of Pittsburgh. Professor Branson wishes to thank Ryan Heck, Bryce Holzer, Lillian Lin, Dorine Rouillon, Sebastiaan Schijf, Michelle Webster, Adrienne Lee Kwan Ying, and other students in his Diversity in Corporate Governance Seminar, School of Law, University of Washington, Fall, 2010. Professor Branson is the author of NO SEAT AT THE TABLE – HOW GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM (NYU 2007) and THE LAST MALE BASTION – GENDER AND THE CEO SUITE AT AMERICA’S PUBLIC COMPANIES (Routledge 2010).
In the process, each of the group members reported on the progress that is occurring, or not occurring, in her part of the world. For example, two leading experts, Dr. Susan Vinnicombe\(^3\) and Dr. Ruth Sealy,\(^4\) from the School of Management at Cranfield University, in the United Kingdom (UK), described what a headline issue women on corporate boards has become throughout much of the European Union. Agnes Bolso,\(^5\) Professor of Interdisciplinary Studies, from the University of Trondhiem, augmented our knowledge of what had occurred in Norway (the enactment of a quota law).

Arguments abound for increase of diversity in every profession or calling—law practice, medicine, academe, law enforcement, firefighting, and more. One drumbeat, persistent from the early 1990s, has been for an increase in diversity candidates for publicly held corporations’ boards of directors, most particularly for an increase in women on boards.

Benefits to corporations coming from an increase in women directors include the following:

\(^3\) See, e.g., SUSAN VINNICOMBE, WOMEN ON CORPORATE BOARDS – INSTITUTIONAL RESEARCH AND PRACTICE (w. R. Burke et al)(2009).

\(^4\) See, e.g., Ruth Sealy, “A Qualitative Examination of the Importance of Female Role Models in the Investment Banking Industry” (unpublished research thesis, on file, School of Management, Cranfield University).

\(^5\) AGNES BOLSO, POWER, PRIVILEGE, MEANING & MANAGEMENT – GENDER IN THE BOARDROOM (NFR 2010).
• First, provision of a positive role models for other women in the middle and lower ranks of corporate organizations would result. Over 50% of the middle managers in Corporate America are women, while only 2.2% of the CEOs in the Fortune 500 are female.

• Second, boardroom diversity benefit aids in avoidance of “groupthink,” the complacency which lead to monumental governance failures at Enron and WorldCom. The presence of women, as well as other minorities, aids in the proliferation of perspectives and viewpoints on corporate boards, leading to better assessments of risk, less rubberstamping of CEOs decisions.

• Third, “market reciprocity,” means that companies which sell goods and services to the public send positive signals to consumers who might purchase their products. Women account for well over 70 percent of the purchasing power in our economy. The presence of women in a

---

6 See, e.g., Barbara Black, *Stalled Gender Diversity and Corporate Boards*, School of Law, University of Dayton, Feb 25, 2011 (women occupy 51.4% of middle management positions). Catalyst WCB % of women in middle management


10 See Black, *supra* note , at (76% of the purchasing power).
corporation’s senior management would filter out to and sway potential purchasers.

- Fourth, increasingly corporations will function in a diverse world. Their governance and the makeup of their boards should reflect that, including as directors more women and persons of color.\textsuperscript{11}

Other scholars have written extensively about why diversity, including the presence of increased numbers of women directors, is necessary.\textsuperscript{12} Thus article takes the case for women on boards as a given, turning quickly to a review of the progress and programs contributing to that progress as they have occurred around the world.\textsuperscript{13}

\textsuperscript{11} Demographers forecast that non-white will be a majority in the U.S. by 2028 and that the proportion of the population that is white will continue slowly to decrease thereafter (47% by 2050). See Jeffery Passel & D’Vera Cohen, Pew Research Center, Pew Foundation, U.S. Population Predictions 2005-2050 (Fe. 11, 2005).

\textsuperscript{12} See, e.g., THE LAST MALE BASTION at 121-27 (Chapter 10: “Why Women?”). One case for women on boards that has not been made, despite the release by Catalyst of studies to the contrary, is the business case, that is, that the existence of diversity or the presence of several women on a corporate board enhances corporate performance. The better researched and reasoned studies conclude that board composition, of any kind, has no demonstrable correlation to business success. The latest “study of studies,” or mega-study, again reaching that conclusion, is James A. Fanto, Lawrence M. Solan & John M. Darley Justifying Board Diversity, 89 North Carolina L. Rev. (2011). An earlier study, reaching a similar conclusion is Sanjai Bhagat & Bernard Black, The Uncertain Relationship Between Board Composition and Firm Performance, 54 Bus. Law. 921 (1999).

\textsuperscript{13} Full treatment of the pros and cons of increased female representation on corporate boards is beyond the scope of this article. As pointed out in the text, extensive treatments are contained elsewhere. See, e.g., NO SEAT AT THE TABLE at 96-102. See also Lisa M. Fairfax, supra note ; Lissa Broome & Kimberly Krawiec, Signaling Through Board Diversity: Is Anyone Listening?, 77 U. Cin. L. Rev. 431 (2008); Donald J. Polden, Forty Years After Title VII: Creating An Atmosphere Conducive to Diversity in the Corporate Boardroom, 36 U. Mem. L. Rev. 67 (2005); Steven A. Ramirez, Games CEOs Play and Interest Convergence Theory: Why Diversity Lags in America’s Corporate Boardrooms and What to Do About It, 61 Wash. & Lee L. Rev. 1583 (2004). Cf. Jayne M. Barnard, More Women on Corporate Boards? Not So Fast, 13 Wm. & Mary Women & L. J. 703 (2007).
Statistics and Comparative Statistics. The statistics indicating the number of women on corporate boards and the interest in the issue vary widely throughout the world and from country to country. Norway, which passed its controversial quota law in 2003, mandates that 40% of a public company’s directors be women by 2008, a goal which was achieved.\textsuperscript{14} According to Catalyst, Inc., in the U.S., the proportion of women on boards of large publicly held companies stands at 15.7%, but with the proportion stagnant, from 2004 onward.\textsuperscript{15} Portugal has the fewest females on corporate boards of publicly held corporations, accounting for just .6%.\textsuperscript{16}

Overall the European average is 11.7% but, again, the numbers vary widely. After Norway, the highest five are: Sweden (28.2%), Finland (26%), Netherlands (20.9%), Denmark (14%), and the UK (11.5%).\textsuperscript{17} Besides Portugal, the laggards are Italy (3.6%), Luxembourg (6%), and Germany (7%).\textsuperscript{18}

\textsuperscript{14} See generally Darren Rosenblum, Feminizing Capital: A Corporate Imperative, 6 Berkeley Bus. L. J. 55 (2010); Lublin
\textsuperscript{16} European PWN Board Women Corporate Monitor, 2010 Annual Report, at Annex 3, Percentage of Female Board Members by Country in EU.
\textsuperscript{17} Id.
\textsuperscript{18} Id.
On the Pacific Rim, Australia leads among the countries from which statistics are available, with 10.6%.\textsuperscript{19} New Zealand follows with 9.3%.\textsuperscript{20} Other numbers in the queue include Hong Kong (8.9%),\textsuperscript{21} Peoples Republic of China (7.2%, although one has doubts about the statistic’s reliability),\textsuperscript{22} and Japan (approximately 1.4%).\textsuperscript{23}

**Counting Errors.** German reports 7% of directors as women but that is on supervisory boards.\textsuperscript{24} Germany law requires a two tiered board structure, with a relatively large supervisory board and a relatively small managing board,\textsuperscript{25} as corporate laws provide in several countries with very large populations (China, Indonesia)\textsuperscript{26} and some smaller nations as well (Slovenia, Netherlands).\textsuperscript{27}

\textsuperscript{19} Staff, “Women Groomed in the Art of Smashing the Glass Ceiling,” THE AUSTRALIAN, Feb. 25, 2011.
\textsuperscript{22} Michelle Webster, Women on Corporate Boards in Japan, China and Hong Kong: Their Roles and Prospects at 8 (Research Paper, Diversity in Corporate Governance Seminar, School of Law, University of Washington, Fall, 2010)(on file with the author), citing Catalyst, Inc., Women in the Labor Force in China (2010).
\textsuperscript{23} Id. at 2 (as of late 2009, 17 women held board positions in Japan, out of 1,198 postions in the top 100 corporations). See also Governance Metrics International, “Women on Boards: A Statistical Review by Country, Supersector and Sector,” March 11, 2010, at 4.
\textsuperscript{24} European PWN Women Corporate Monitor, supra note 16.
\textsuperscript{26} See, e.g., LEB JING, CORPORATE GOVERNANCE AND FINANCIAL REFORM IN CHINA’S TRANSITION ECONOMY at (2009); Benny S. Tabalujan, Why Indonesia Corporate Governance Failed – Conjectures Concerning Legal Cultures, 15 Columb. J. Asian L. 141 (2002).
\textsuperscript{27} See, e.g., Rado Bohinc & Stephan Bainbridge, Corporate Governance in Post-Privatized Slovenia, 49 Am. J. Comp. L. 49 (2001).
Mark Twain wrote that “there are three kinds of lies: lies, damned lies, and statistics.” 28 At best, the Germany statistic is a half-truth. On managing boards (Vorstand), the more exclusive circle in the German system (where “the rubber meets the road”) less than 2% of directors are women.29 The 7% figure, which is for directors on supervisory boards (Aufsichstrat), seems misleading.

U.S. sources take Catalyst numbers (15.7 % in 2010) as accurate.30 Catalyst consistently fudges the number upward by reporting the number of directorships held by women as the number of women directors. Actually, the latter number (actual female bodies) is smaller.31

Why? Because of the prevalence among women of “trophy” directors in the U.S., women serving on 4, 5, 6 or 7 boards of directors.32 Trophy director status is an almost non-existent phenomenon among male directors, most of whom are CEOs, many of whose boards limit their outside involvement to one other board or no

29 Paper from Hengeler Mueller
31 See, e.g., NO SEAT AT THE TABLE at 97: Advocacy groups such as Catalyst, Inc., broadcast statistics about women’s increased presence in business that seem misleading .... Catalyst, as well as journalists and others, report that 11.2 percent (in 1999-2000) or 13.6 percent (in 2004) of directors are women. What the statistics really say is that women hold 11.2 or 13.6 percent of the board seats, not that 11.2 or 13.6 of the directors are women.
32 Trophy directors are “those who hold seats on four, five, or even a greater number of corporate boards of directors.” NO SEAT AT THE TABLE at 97.
other boards at all. Thus, in 2006, the last year in which I combed through
*Fortune 500* proxy statements, Susan Bayh (wife of ex-senator Evan Bayh), sat on
8 boards. Women such as Barbara Bowles, Shirley Jackson, Bonnie Hill and Jackie
Ward sat on 7 boards each. The leading women trophy directors in 2001, Anne
McLaughlin Korologos and Jackie Ward, each sat on nine publicly held
corporations’ boards of directors. The fastest growing segment of U.S. board
members was women trophy directors: the number rising from 19 to
approximately 80 just between 2001 and 2006. U.S. public companies appoint
the same women over and over.

Other countries commit the same counting error as Catalyst does in
compiling statistics but the error is of less moment because those countries have
fewer trophy directors. Australia, for instance, as of 2008, had only 8 women who
held 3 directorships and 16 who held 2 in the ASX (Australian Stock Exchange)
200. Thus in Australia the number of directorships held by women is not

---

34 NO SEAT AT THE TABLE at 99-100.
35 NO SEAT AT THE TABLE at 89.
36 *Id.* at 97.
significantly greater than the total number of women directors, despite the
statistics’ failure differentiate between the two.\textsuperscript{37}

A more accurate number for the U.S. might be 12.2\% rather than Catalyst’s
15.2\%. That is the number at which Governance Metrics International pegged the
U.S. in March 2010.\textsuperscript{38}

\textit{Trends.} At previously noted, the increase of women on corporate boards
has been a hot button issue in Europe. There have been increases as a result.
Between 2004 and 2010, among others, the following mid-range countries
showed marked increases: Austria (7\% to 13.5\%), France (7\% to 12.5\%), Belgium
(3\% to 12 \%), and Spain (3.5\% to 12\%).\textsuperscript{39}

On the other side of the world, similar to the U.S., Australia virtually flat-
lined from 2004 to 2010, at 8.5\%.\textsuperscript{40} Suddenly, the issue of women on corporate
boards moved from back to front burner. From April, 2010, to March, 2011, the
number jumped from 8.5\% to 11.2\%.\textsuperscript{41} Much of this increase may be due to an
Australian Institute of Company Directors (AICD) mentoring sponsorship program

\textsuperscript{37} Frances Anderson, \textit{Women Directors on Corporate Boards in Australia} at 7 (2008, Research Paper, School of
Law, University of Melbourne)(on file with the author).
\textsuperscript{38} Governance Metrics, Int’l, \textit{Women on Boards: A Statistical Review by Country, Supersector and Sector}.
\textsuperscript{39} PWN Board Women Corporate Monitor, \textit{supra} note  \textsuperscript{38}.
\textsuperscript{40} Australian Institute of Company Directors, “Gender Diversity on Boards – Statistics” (2010).
\textsuperscript{41} Elizabeth Proust, “Time Has Failed Women: A Quota May Insure Equal Rights,” The National Times (Australia),
March 14, 2011.
aimed not only at producing women able to contribute as board members but on actually placing them on public company boards, discussed below.\textsuperscript{42}

By contrast with Australia and Europe, on the currency meter, U.S. attention to the issue of women on boards has flagged, moving from front to back burner, with the numbers virtually unchanged since 2004 (a maximum variation of .05 since that year).\textsuperscript{43} Some observers attribute this stall to “diversity fatigue,” as U.S. boards and managements have been under severe pressure to add women, African American, Hispanic and other diversity group members to their numbers.\textsuperscript{44} Others mention as a reason for diversity fatigue the necessity for directors and managements to deal with the financial and business implosion of 2007-09 from which companies have yet fully to emerge.\textsuperscript{45} Most recently, however, the literature reflects a renewed interest (academic at least) in women as corporate directors.\textsuperscript{46}

\textsuperscript{42} Id. See also notes & accompanying text infra.


\textsuperscript{44} See, e.g., Judith Dobrzyski, “Female CEOs Still a Rare Sight.” Chicago Tribune, March 28, 2007, at 21 (“diversity fatigue” plagues efforts to put more women on boards and in executive positions).

\textsuperscript{45} See, e.g., Susan Vinnicombe et al, “The Female FSTE Report 2010 “(12.5 \% figure in the UK represents “barely perceptible change”).

Looking Beyond Upticks and Other Trends. At least six reasons exist for increases of women on corporate boards (upticks) where they have occurred around the world: (1) quota laws; (2) certificate and pledge programs; (3) soft law “comply or explain” requirements of stock exchanges;\(^\text{47}\) (4) mentoring and education programs; (5) renewed pressure by institutional investors; and (6) hard law, governmental agency requirements for plenary disclosure.\(^\text{48}\)

Other planks in any corporation’s program, which I discuss in my book No Seat at the Table – How Governance and Law Keep Women Out of the Boardroom, are to add a committed woman director (not a “queen bee” director) to the governance or nominating committee,\(^\text{49}\) a committee which virtually all corporate boards have, and earnestly to seek to increase the number of women directors on the board from 1 or 2 to at least 3. But the more recent trends include:

\(^{47}\) “Soft law ... often finds its source in items that are not law-related at all, or only tangentially so, such as statements of good practices, stock exchange requirements that corporations disclose corporate governance requirements, and an emphasis on structure and process, particularly at the board of directors level ...” Douglas M. Branson, Teaching Comparative Corporate Governance: The Significance of “Soft Law” and International Institutions, 34 Ga. L. Rev. 669, 670 (2000).

\(^{48}\) Hard law includes “substantive commands (‘do’s’ and ‘don’ts’)” from the parliament, legislature or authoritative regulatory agency. Branson, supra note, at 670.

\(^{49}\) NO SEAT AT THE TABLE at 181. Queen bee is the stereotypical label applied to a woman who appear to relish being the only woman in management, at their management level, in a department, division or subsidiary, on the board of directors, and so on, and who takes no steps, or actively foils, women from below her who seek advancement. Id. at 676. See also CAROL GALLAGHER, GOING TO THE TOP at 108-09 (2000).
Quota Laws. Parliaments in Italy, the Netherlands and Belgium have laws under consideration.\textsuperscript{50} Norway, the first to act, adopted its quota statute in 2005, ordering full compliance by 2008 and setting the level at 40%.\textsuperscript{51} Spain, the second to act, ordered achievement of the 40% level by 2016, a significant jump from the 5% level which prevailed in Spain at the time of the law’s adoption.\textsuperscript{52} The Spanish statute, though, is largely aspirational while the Norwegian law has severe penalties. Norwegian companies which do not comply are not only subject to delisting on the stock exchange but to outright dissolution.\textsuperscript{53}

France, the third nation to act, adopted a 40% quota law early in 2011.\textsuperscript{54} Looking northward to Norway, which adopted its law in 2005, a deputy of the Assemblee Nationale (Marie-Jo Zimmerman) introduced a 20% quota bill in 2006.\textsuperscript{55} Thereafter the notion of gender parity, at least in corporate governance, had to negotiate a twisting route.

\textsuperscript{51} Rosenblum, \textit{supra} note , at \textsuperscript{52} Ley Organic 3/2007, de 22 Marzo, para la Igualdad Efectiva de Mujeres y Hombres.
\textsuperscript{53} Suk at 2; Rosenblum, \textit{supra} note , at .
\textsuperscript{54} Loi no. 2011-103 du 27 janvier 2011 relative a la representation equilibree des femmes et des hommes au sein d’administration et de surveillance et a l’egaliteprofessionnelle
\textsuperscript{55} Marie Jo Zimmerman in 2005
The Conseil Constitutional, a court which renders “advisory” opinions on pending measures, declared the proposed 2006 legislation unconstitutional.\textsuperscript{56}

The court found that the 1999 amendments to the French Constitution only permitted enactment of laws aimed at achieving gender parity in elections for political office. So, the proponents initiated a movement further to amend the French Constitution, which they achieved in 2008. The amendment provides that French laws shall promote equal access to “positions of professional and social responsibility” as well as to elected office.\textsuperscript{57}

In 2009, however, the quota measure’s supporters found that only 8% of directors in France’s largest 100 corporations were women. Further, they bemoaned that in that year French public companies added only 6 new women directors to corporate boards.\textsuperscript{58}

The recently enacted French quota mandate is staged. Public companies boards must have 20% women directors within 3 years of the enactment and 40% within 6 years (2017).\textsuperscript{59}

\textsuperscript{56} Conseil Constitutional, Decision no. 2006-533 du 16 Mars 2006.

\textsuperscript{57} La loi constitutional no. 2008-724 du 23 Julliet 2008 de modernization des institutions do la Ve Republic.

\textsuperscript{58} Report of Madame Brigitte Gresy to the Minister of Labor, June, 2009, at . Today the level of women on boards in France is 11.9%; in 2008 it was 7.6% overall. Cite

\textsuperscript{59} See, e.g., Suk, supra note, at
Sweden, Finland, Germany and the UK have all come out in opposition to quota laws, for various reasons. Sweden (28.2%) and Finland (26%) already have meaningful representation of women on their boards. 60 On the other hand, Germany and the UK have middling to poor and so-so records, respectively, on the issue. Both countries have long traditions of bucking trends and becoming recalcitrant when told what to do.61

Reactions to a quota law vary. In a poll, 71% of French citizens favor the quota law.62 French CEO Laurence Parisot favors such a law: “Improvement without a law is so slow that we cannot stay doing nothing.” 63 Catherine Chouard, President of the French Equal Opportunities and Anti-Discrimination Commissions, joins in: “It is an excellent way to change mentalities. The law will be first step to a ‘new way of life’ in companies.”64

Quota laws also have adverse consequences. In the rush to name females to directorships, for instance, Norwegian companies named one - no doubt very

60 Swedish Opposition
62 Dorine Rouillon, French Boards of Directors: Where Are the Women – Quota Legislation to Increase the Proportion of Women on Boards of Directors, Diversity in Corporate Governance Seminar, University of Washington, Fall Quarter, 2010, at 12 (on file with the author).
64 Id.
capable - woman to 11 corporate boards. No one, not even Superwoman, can serve adequately on more than 3 or perhaps 4 boards, especially in these post Sarbanes-Oxley years, versions of which have been enacted in many countries, let alone on 11 boards. Quota laws produce a surfeit of women trophy directors. Quota laws, especially fast track ones, tend to help produce unqualified, figurehead (token) female directors as well.

Certificate and Pledge Programs. The Dutch 2008 “Talent to the Top” pledge requires public corporations to add women to their boards if they voluntarily subscribe to the pledge. The 110 largest Dutch companies have done so, including many very large household name corporations such as Shell, Phillips, Heineken, Reed Elsevier, and Unilever. These actions, and the follow through which succeeds the pledges, have played a part in raising Dutch corporate boards from approximately 7% women in 2006 to 20.9% in 2010.

In France, Claire de Montaigu, CEO of Leaders Trust, opposes the French quota law, favoring instead a pledge system requiring companies to set objectives

---

66 Another unintended consequence of a quota law is for public companies to go private and thus to go dark rather than to attempt compliance with the law. See, e.g., id. (“[r]ather than comply with the gender law, more than 30 affected companies [in Norway] are going private.”).
for the addition of women directors. An independent organization, an NGO, would solicit the pledges and monitor progress toward the goals the pledges outline.\textsuperscript{69}

The U.S. has its advocates of a similar measure as well. In two luncheon speeches, in November, 2010, Securities and Exchange Commission (SEC) Commissioner Luis Aguilar commended the National Football League’s (NFL’s) Rooney Rule as a model for corporate pledges in the board composition area. “Board Diversity: Why It Matters and How to Improve It” \textsuperscript{70} was his principal address on the subject; “Changing the Dialogue on Diversity to Achieve Results” preceded it by several weeks.\textsuperscript{71} Dan Rooney, a principal owner of the Pittsburgh Steelers Professional Football Club, chaired the NFL Committee on Diversity. The committee drafted and the National Football League adopted the Rooney Rule, which requires each team to pledge to include a minority candidate among the finalists for each coaching vacancy and general manager position and to conduct an on-site interview with that finalist.\textsuperscript{72} Since the rule was adopted in 2003, the

\textsuperscript{69} Cite NGO and pledges Claire de Montaigu, CEO of Leaders Trust
number of black head coaches in the NFL increased from 6% to 22%.\textsuperscript{73}

Commissioner Aguilar stated that “the NFL moved from lip service to action and the results are self-explanatory. Let’s face it – Many corporate boards need their own Rooney Rule.”\textsuperscript{74}

\textit{Comply or Explain Requirements.} The listing rules of several stock exchanges require as part of their agreement with listed companies that the companies “comply” with governance requirements or “explain” why they do not. 

\textit{The UK Corporate Governance Code} explains:

The “comply or explain” approach has been the trademark of corporate governance in the UK. It has been in operation since the Code’s beginnings .... It is strongly supported by both companies and shareholders and has been admired and imitated internationally.\textsuperscript{75}

In the UK, in 2010, the Council included within the new Governance Code, with which UK public companies must comply or explain their non-compliance, a new diversity statement: “The search for board candidates should be conducted,

\underline{\textsuperscript{73}} Aguilar, \textit{supra} note, at .
\underline{\textsuperscript{74}} Aguilar, \textit{supra} note 59.
\underline{\textsuperscript{75}} Financial Reporting Council, \textit{The UK Corporate Governance Code, Comply or Explain, General Principle 1} (June 2010). The Australian Stock Exchange (ASX) Listing Rules are similar: annual disclosures must include “a statement disclosing the extent to which the entity [listed company] has followed the recommendations set by the ASX Corporate Governance Council.” ASX Listing Rule 4.10.3 (2010).
and appointments made, on merit, against objective criteria and due regard for the benefits of diversity on the board, including gender.”

In 2010, similarly the ASX in Sydney sharpened its pencil with regard to addition of women on corporate boards. Effective January 1, 2011, Australian public corporations must “comply or explain.” “Companies should establish a policy concerning diversity and disclose the policy or a summary of that policy.” Further, “[t]he policy should include requirements for the board to establish measurable objectives for achieving gender diversity for the board to assess annually both the objectives and progress in achieving them.” The Australian guidelines even reach beyond corporate governance to recommend disclosures on the proportion of women in the company’s work force overall and in the ranks of senior management. Most corporations will comply and disclose what steps they have taken, adding to the pressure both to enlarge the pool from which women candidates to the board may be chosen and to name additional women to the board.

---

76 Id., First Supporting Principal to Main Principle B.2 (“Appointments to the Board”), at 13.
78 “Companies should disclose in each annual report the proportion of women employees in the whole corporation, women in senior executive positions and women on the board.” Id., Recommendation 3.4, at 11.
NYSE Euronext (New York Stock Exchange) adopted listing rule 303A in 2005, requiring that a majority of directors be “independent” (non-executive and not “gray insiders,” such as the company’s investment banker or outside lawyer) but has not adopted a “comply or explain” regulation regarding board diversity.\(^7^9\) Possibly most recently too preoccupied with its pending merger proposal from the Deutsche Borse and the spoiler bid from Nasdaq OMX Group,\(^8^0\) the NYSE has done nothing further, including nothing with regard to adopting soft law “comply or explain” regulations on board diversity.

**Mentoring and Education Programs.** One of the adjective organizations interviewed in Sydney (described in the Introduction) was the AICD (Australian Institute of Company Directors) which in March, 2010 had just launched a mentoring program.\(^8^1\) Mentee applicants must attend either the AICD’s “Directors’ Course in Mastering the Boardroom” or its “International Company Director’s Course.”\(^8^2\) Once they have become “ASX 200 board ready,” through attendance at the course, and their experience as lawyers, accountants, corporate

---

\(^7^9\) See NYSE Company Manual §303. Cf. Black, *supra* note , at (NYSE failure to adopt company or explain board diversity regime).

\(^8^0\) See, e.g., Aaron Luccehetti & Jacob Bunge, “NYSE Holders: Let’s Talk to the Nasdaq,” Wall St. J., April 29, 2011, at C-1.

\(^8^1\) AICD Mentoring Program

\(^8^2\) ACID, “ASX Chairmen’s Mentoring Program 2011 Q & As,” at 2 (March 7, 2011).
managers, or in non-profit entities, women candidates join with a mentor. Sixty three women qualified. The mentors are company chairmen, or experienced directors of ASX listed companies.” At the program’s inception, 56 of the chairmen and directors of ASX 200 companies had signed on. They pledged not only to mentor the candidate for a year but at the end of the year to place that woman on a public company board of directors.

I discounted the worth of such a program. I thought that many of the mentor-mentee relationships would fizzle before the allotted year ended. Apparently, I was wrong. Between April 2010, and November, 2010, the percentage of women directors on Australian corporate boards increased 2%, from 8.5% to 10.4%, and has continued to increase thereafter. A recent news article recounted that in 2010, ASE 200 corporations added 59 women to their boards, compared with 10 in 2009. At first blush, the number may still seem small but one must remember that corporate boards are smaller in Australia (5-7-
8 directors) than in the U.S. (10.6 is the approximate average board size) and that the Australian sample is smaller, ASX 200 versus *Fortune 500*.

Would a mentoring program yield similar results in the U.S.? As with most other industrialized nations, in Australia non-executive chairs predominate. The ordinary rule in Australia and elsewhere is that a person other than the CEO wears the chairperson hat. Bifurcation of the offices is thought necessary because a board’s highest calling is to hire, monitor, and if necessary remove the CEO. A board may be hamstrung in that effort if the very person charged with convening and leading the board, the chair, is also the same person whose removal is sought, namely, the CEO.

The U.S. is the only developed nation that is markedly different. In fact it is the opposite. In 84% of the *Fortune 1000* the same individual holds both the offices of CEO and Chairperson of the board. Whether two-fisted U.S. corporate CEOs/Chairpersons, or experienced and influential corporate directors, who tend to be extremely busy individuals, would sign on as mentors to women candidates for directorships in any number is an open question. Reluctance of

---

88 In the U.S., there were 5,161 director positions on 496 boards of directors in the 2006 *Fortune 500*, NO SEAT AT THE TABLE at 97 & 88, n. 4, for an average board size of 10.4. In 2007, ASX 200 corporations had 1479 board seats, for an average of 7.4. Anderson, *supra* note .
89 Ramsay & Stapledon, Board Composition in Australia
90 Update statistic and cite for executive chairman in US (Sam Stein to provide). National Assoc. of Corporate Directors, “The Role of Lead Director and Chairman,” , Sherman & Sterling 2009 Study
corporate CEOs to participate may be a large obstacle to adoption of an AIDC-like mentoring program for women here.

There exist other softer mentoring-education programs in the U.S. whose principal aim is to achieve advancement of women onto more corporate boards. Catalyst, which has offices in New York, Toronto and San Jose, conducts programs for women aspirants from time-to-time. Boardroom Bound is a different organization which operates from Washington D.C., doing much the same.91 In 2007, the American Bar Association launched its DirectWomen program, which provides one week’s instruction for 30 women per year, aiming to put women attorneys on corporate boards.92 WomenCorporateDirectors(WCD) is another New York based organization which, inter alia, runs a short course (On Board Bootcamp) for director aspirants.93

Renewed Institutional Investor Pressure. Robert McCord, the treasurer of the Commonwealth of Pennsylvania, together with his proxy advisory firm Glass Lewis LLC, have voted against (withheld authority) from management nominees for board positions at portfolio companies 1,136 times out of a little over 7,000 votes cast over the 2 most recent years (since McCord took office). Anytime

93 Email from Susan Stautberg, President. WomenCorporateDirector, to the author, dated April 4, 2011 (on file with the author). See also www.womencorporate director.com (visited May 2, 2011).
management of a portfolio company is found out not to have in place an initiative for increasing the representation of women on their board McCord or his proxy firm cast a negative or “withhold” vote. McCord advances an economic rationale for his activism: “Women are more likely to ask tough questions, get detailed answers and push for collaborative solutions. ... It has everything to do with economic security.”

Mandatory Disclosure Regimes. With little fanfare, the U.S. SEC’s “Proxy Rule Disclosure and Solicitation Enhancements” amendments took effect on February 28, 2010. The release amends SEC omnibus Regulation SK, the umbrella disclosure regulation which dictates what material public companies must disclose and sometimes in what format they must disclose it, across the breadth of documents corporations file with the SEC (registration statements, tender offer documents, proxy statements, periodic disclosure documents (8Ks, 10Qs and 10Ks)).

With regard to diversity on their boards, U.S. publicly held companies must disclose:

---

95 Id.
97 SEC Regulation SK, 17 C.F.R.§ 240.SK.
1. Whether diversity is a factor in considering candidates for the company’s board of directors;

2. How diversity is considered in the process of selecting board candidates;

3. How the company assess the effectiveness of whatever policy and process it has chosen to adopt.  

One examination of a medium size sample of large corporation proxy statements (the Holtzer study) sorts corporations into four groups.

The first group consists of a large number of companies who gave only the slightest lip service to the new disclosure requirements. These companies disclosed merely that diversity is a factor in choosing board members. They disclosed nothing further, such as how diversity is considered in the selection process and how effective that process has been.

A second group of companies more closely approaches but still does not meet the SEC requirements. Above disclosing that diversity is a factor, these companies disclosed how their process encapsulates their commitment. One large company, for example, disclosed that it instructs the executive search firm it

98 SEC Regulation SK, Item 407(c)(2)(vi).
99 Bryce Holzer, Proxy Statement Diversity Disclosure Requirement, Diversity in Corporate Governance Seminar, School of Law, University of Washington, Fall Quarter, 2010 (on file with the author)(analyzing definitive proxy statement (14A) filings by 24 Fortune 500 companies).
100 Id. at 11-12.
101 Id. at 12-13.
regularly hires to give diversity great weight in culling candidate names for the board. Another public company’s proxy statement provided that “the Governance Committee assesses the composition of the board [including its diversity] at least once a year.”102

Third, a minority of corporations met the SEC requirements, at least in their 2010 filings.103 These companies described the racial and gender composition of their boards. One company read diversity broadly (the SEC regulations do not define diversity): its filing examined the race, gender, national origin, and background of its board members. 104

A fourth group, consisting of 2 companies only (of 24), exceeds the SEC requirements for disclosure on board composition and diversity. These companies were found to be “head and shoulders above the rest.”105 They fully articulated their policy. They described their process (instructions to search firms, annual assessment by the full board, etc.). They calculated the results (e.g., “[t]wo nominees are women and five nominees – including the chairman and

102 Id. at 13.
103 Id. at 14 (the companies were Boeing, Microsoft, Weyerhauser, Home Depot, Altaria, Century Aluminum, and Amazon).
104 Id. (Century Aluminum).
105 Id. at 15 (Proctor & Gamble and Citigroup were the companies).
chief executive officer - are Asian, African American or Hispanic”,106 or “of the ten candidates for board vacancies last year, three are women; two are African American; one is Mexican; and one is Indian”).107 Last of all, these companies attempted to elucidate how diversity affects the operation of their business and what they are attempting to achieve.

Viewed charitably, many corporate draftspersons may not have developed a feeling for what the SEC and Regulation SK now require. As the years progress, additional corporations will improve their disclosures. As a result, many reporting companies also will enhance the processes on which they are reporting, with a resulting increase in diversity on boards of directors.

By contrast, viewed less charitably, early reports are that a significant number of companies opt out of the diversity disclosure process altogether by means of a simple one line disclosure, such as “The Company has no fixed policy dealing with the diversity of candidates for election to the board of directors.”108 Brazen corporations may thus short circuit the SEC mandated disclosure requirements, negating altogether the intended effect, or any effect, of the disclosure requirement.

106 Id. at 15 (Citigroup).
107 Id. at 16 (Proctor & Gamble).
108 See Black, supra note, at .
Conclusion. In the U.S., as compared to many other developed countries around the world, the ardor for diversity on publicly held corporations’ boards seems to have cooled. Because the fire has not been re-kindled, the fire’s embers only glow. A countetrend to this stall in the U.S. has been the SEC’s new diversity disclosure requirement, which seems to have sprung from the glowing embers. When most United States corporations fully comply with them, the regulations and the disclosure they produce, scofflaws just discussed aside, may produce a significant increase in diversity on corporate boards, thus re-kindling the fire.

By contrast, a countetrend elsewhere, quota laws and quotas for numbers of women on corporate boards, would seem to have little promise for adoption here. Although some Americans are liberal Democrats, and others are conservative Republicans, and still others are in-between those extremes, all are libertarians, of sorts, or have a libertarian streak running up their back. A law dictating how many of each sex must be on a corporation’s board of directors would be viewed as excessively intrusive, far beyond any legitimate role the government could have in regulation of corporations, by most Americans.

A third initiative, that of mentoring combined with sponsorship, which has produced significant gains in a very short period of time elsewhere, would not
mesh well with the U.S. corporate governance paradigm in which the CEO is also the board chair. Because of the press of her duties as CEO, the American board chair either would not be willing to or could not be effective as the mentor/sponsor. It may be worthwhile to determine if a mentoring program could be successful using persons designated lead directors, or other experienced and influential corporate directors, to substitute for the board chairs. Many corporations’ boards designate a director, usually one conceived of as seasoned and capable, as lead director, with authority to convene the board and chair meetings from which the CEO/Chair is excluded, as for instance a meeting to determine whether the CEO should be removed from office.109

Some scholars detect a waning of the energy devoted to this issue (gender diversity on corporate boards). CEOs deflect requests with a reasonably sounding “it’s just not [or cannot be] on our list of priorities right now.” Other scholars ask “where will the renewed energy and emphasis come from?” Will the emphasis and energy level be sufficient to surmount the sort of backhanded dismissal some CEOs and directors give to the issue?

109 See generally National Association of Corporate Directors, Blue Ribbon Commission on Director Professionalism at (1996).
This article’s purpose has been to show that renewed emphasis, higher energy levels, and new programs and initiatives have in the last few years emerged. A global view of the subject reveals this emergence. That global view and what it shows may also be sufficient to ignite the spark here, returning to the issue some of the heat and the light that seems to have gone missing over the last several years.