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Expert Analysis

Measures to Increase Gender Diversity On Corporate Boards Gain Traction

By **Doreen E. Lilienfeld**

On Aug. 26, 2013, the California State Senate passed Senate Concurrent Resolution (SCR) 62,[1] which calls for greater representation of women on corporate boards, with a 30-6 vote. Although this resolution does not require corporations to take action, it encourages publicly traded corporations in California with fewer than five board seats to have at least one female director, those with five to eight board seats to have at least two female directors, and those with nine or more director seats to have at least three female directors. It also sets the goal that all publicly traded corporations in the state have at least one woman by 2016. This issue became a front-page headline when Twitter filed for its initial public offering and revealed that its seven-member board was exclusively composed of men. Twitter has named Marjorie Scardino—the former CEO of Pearson—to its board in December 2013.

The resolution cited a number of studies demonstrating positive correlations between gender diversity on boards and improvements in corporate governance and financial performance. One of the largest studies, which was conducted by the Credit Suisse Research Institute and covered 2,360 companies worldwide from 2006 to 2012, found that companies with a market capitalization of more than $10 billion that have at least one female director outperformed peer companies with all-male boards by 26 percent.[2] In addition, the Credit Suisse study found that companies with at least one female director averaged higher net income growth, lower net debt-to-equity ratio, and faster reduction in debt compared to companies with no female directors.

Other studies cited in the resolution found that diversity on corporate boards is associated with more effective corporate governance and improved financial value.[3] Most recently, a study from the University of British Columbia's school of business in the Journal of Corporate Finance concluded that companies pay less for acquisitions if they have more women sitting on their boards, indicating that women are less inclined to chase risky deals and tend to demand more for the company's money.

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Yet, despite evidence showing that greater gender diversity on boards may be beneficial to corporations, women continue to hold a low number of board seats. In 2013, women held approximately 21 percent of board seats of the 100 largest U.S. public companies listed on NYSE or NASDAQ, and only two of those companies have boards comprised of at least 40 percent women.[4] Since larger companies tend to have more diverse boards, this percentage decreases when smaller companies are taken into account: While 16.9 percent of directors in the S&P 500 are women, the percentage is 13.5 percent in the S&P Midcaps and 11.3 percent in the S&P Smallcaps.[5]

Worldwide, women hold 11 percent of board seats at the largest companies. In addition, female representation on corporate boards has increased only incrementally over the past several years. From 2004 to 2012, the percentage of female directors at Fortune 100 companies increased from 16.9 percent to 19.7 percent.[6]

Initiatives and Advocacy

SCR 62 is part of a larger effort, both in the United States and globally, to increase gender diversity on corporate boards. The United States has tended to favor government action that, like SCR 62, encourages board diversity rather than mandating companies to take specific actions. A rule adopted by the Securities and Exchange Commission in 2009 requires public companies to disclose in their annual proxies whether and how board or nominating committees take diversity into account in identifying board nominees.[7] SEC Commissioner Luis Aguilar, who has spoken often about the need for greater diversity on boards, has indicated that this disclosure rule is only a first step. Because it does not define "diversity," the vagueness of the rule has allowed companies to provide disclosures that do not address racial or gender diversity.[8]

Scott Stringer, the newly elected New York City comptroller, has floated plans to increase female board representation by appointing a "chief diversity officer" to the comptroller's office, sponsoring shareholder initiatives calling for greater diversity, and working with pension funds and other investors to

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put pressure on companies to increase the number of women directors.

In addition to government initiatives, industry and non-profit organizations have been formed to advocate for greater gender diversity on boards. One such group, the "Thirty Percent Coalition," which is comprised of senior business executives, national women's organizations, institutional investors, corporate governance experts and board members, has taken action by sending letters to large public companies with no female board members and, in some cases, filing shareholder resolutions asking companies to commit to greater gender diversity on their boards.

Another group, "2020 Women on Boards," campaigns to reach 20 percent representation by women on U.S. corporate boards by 2020.

Quota Laws

In contrast to the voluntary approach taken in the United States, several countries, most of them in Europe, have passed quota laws requiring a minimum percentage of women on public company boards. In 2003, Norway was the first country to pass such a law, mandating that public companies achieve 40 percent representation of women on their boards within five years. Non-compliant companies risked fines or even dissolution. Since then, Belgium, France, Italy, the Netherlands and Spain have passed similar laws.

The sanctions imposed on companies that do not meet the quota vary from country to country and include fines, suspension of director benefits and compensation, or public disclosure explaining why the target was not reached. In some countries, such as Spain, there is no specific penalty for non-compliance, although gender diversity is taken into account in awarding public subsidies and state contracts.

Most recently, in November of 2013, the new coalition government in Germany announced its plans to require German listed companies to fill 30 percent of their supervisory board seats with women starting in 2016, and to set and publish individual binding targets to increase female representation in top management by 2015. In Germany, women currently fill just north of 17 percent of positions on supervisory boards, and only 6 percent of management boards.

The countries that impose penalties on non-compliant companies have generally been successful at increasing gender diversity on boards,[9] but these laws remain controversial, even in Europe. In 2012, the European Union Justice Commissioner Viviane Reding proposed a law imposing sanctions on Europe's listed companies that have boards comprised of fewer than 40 percent women. Officials of nine countries signed a letter indicating their opposition to European-wide quotas, arguing that any such measures should be adopted at the national level.[10] In addition, some argue that quotas are not the ideal way to achieve gender diversity; for example, at least one study has indicated that the Norwegian statute had a negative impact on stock prices, operating performance, and the experience level of directors, perhaps due to the short time frame in which companies were required to comply.[11]

Countries that have not addressed gender imbalance on corporate boards through quota laws backed up by effective enforcement mechanisms have not made a great deal of progress in increasing the number of women directors.

However, a survey published in the Harvard Business Review demonstrated that support for quotas among both men and women is higher in countries with quotas than in countries without quotas: 95 percent of women and 43 percent of men in countries with quotas believe they are an effective way to increase gender diversity (as opposed to 48 percent and 23 percent, respectively, in countries without quotas). Although it is still unclear why this is the case, the authors suggest that, once quotas are enacted, both men and women may experience the higher satisfaction levels that tend to be associated with working in groups with greater gender balance, thus eroding some of the initial opposition to quotas.[12]

Countries that have not addressed gender imbalance on corporate boards through quota laws backed up by effective enforcement mechanisms have not made a great deal of progress in increasing the number of women directors, but there is currently no significant political backing for the introduction of European-style quota laws to the United States. It remains to be seen whether pressure from shareholders and the government, without the introduction of legal requirements, will be sufficient to increase the number of female board members in the United States. In Europe, the adoption of quota laws was in part a result of the lack of progress in achieving gender diversity through other means, and it is possible that legislative action may begin to seem more feasible in the United States if corporations fail to increase the number of women directors voluntarily.

1. S. Con. Res. 62, 2013 Leg. Reg. Sess. (Cal. 2013).
2. Heather Perlberg, "Stocks Perform Better If Women Are on Company Board," BLOOMBERG, July 21, 2012, available at http://www.bloomberg.com/news/2012-07-31/women-as-directors-beat-men-only-boards-in-company-stock-return.html.
3. S. Con. Res. 62, 2013 Leg. Reg. Sess. (Cal. 2013) (citing, e.g., Siri Terjesen, Ruth Sealy & Val Singh, Women Directors on Corporate Boards: A Review and Research Agenda, 17 Corp. Governance: An Int'l Rev. 320 (MAY 2009); Vicki W. Kramer, Alison M. Konrad & Sumru Erkut, "Critical Mass on Corporate Boards: Why Three or More Women Enhance Governance" (2006), available at http://www.wcwonline.org/pdf/CriticalMassExecSummary.pdf; Mariateresa Torchia, Andrea Calabrò, and Morten Huse, "Women Directors on Corporate Boards: From Tokenism to Critical Mass," 102 J. Of Bus. Ethics 299 (Feb. 2011)).
4. Shearman & Sterling, 11th Annual Survey of the Largest U.S. Public Companies, Corporate Governance Book 2, 13 (2013).
5. GMI Ratings', 2013 Women on Boards Survey 17 (2013), available at http://info.gmiratings.com/Portals/30022/docs/gmiratings_wob_042013.pdf .
6. Alliance for Board Diversity, "Missing Pieces: Women and Minorities on Fortune 500 Boards 2" (2013), available at http://theabd.org/2012_ABD%20Missing_Pieces_Final_8_15_13.pdf.
7. For instance, Section 342 of the Dodd-Frank Act represents another legislative effort to increase diversity, although it does not specifically target board diversity. Section 342 requires that certain federal regulatory agencies (SEC, FDIC, Federal Reserve Banks and Board, Office of Comptroller of Currency, Dept. of Treasury, National Credit Union Admin., Federal Housing Finance Agency, and Consumer Financial Protection Bureau) each create an Office of Minority and Women Inclusion (OMWI). The OMWIs are responsible for monitoring diversity both within the agencies, at the agencies' contractors and subcontractors, and at the businesses they regulate. In particular, the agencies must take into account the "fair inclusion of women and minorities in the workforce" of potential contractors and subcontractors as part of the review and evaluation of contract proposals. The director of an OMWI may also recommend termination of a contract if he or she finds that the contractor has not "made a good faith effort to include minorities and women in their workforce."
8. Luis A. Aguilar, "Merely Cracking the Glass Ceiling Is Not Enough: Corporate America Needs More Than Just a Few Women in Leadership" (May 22, 2013), available at http://www.sec.gov/News/Speech/Detail/Speech/1365171515760#.Ui0EDD8rqZQ.
9. See GMI Ratings', 2013 Women on Boards Survey 1 (2013), available at http://info.gmiratings.com/Portals/30022/docs/gmiratings_wob_042013.pdf.
10. James Fontanella-Khan, "UK Musters Support to Block EU Women Quota," FIN. TIMES, Sept. 16, 2012, available at www.ft.com/intl/cms/s/0/ed7cac44-fff3-11e1-831d-00144feabdc0.html.
11. Kenneth R. Ahearn & Amy K. Dittmar, "The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation," 127 QUARTERLY J. OF ECON. 137 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1364470.
12. Boris Groysberg & Deborah Bell, Dysfunction in the Boardroom, HARV. BUS. REV., June 2013, available at http://hbr.org/2013/06/dysfunction-in-the-boardroom/.