WOMEN IN CORPORATE GOVERNANCE: A CINDERELLA[1] STORY

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I. INTRODUCTION AND SUMMARY

Worldwide, the number of women on corporate boards is disproportionately low when compared to their representation in the workplace.[3] In countries without legislation enforcing quotas, the rate of increase in women's board representation has been quite slow.[4] With conflicting evidence as to whether female representation on boards improves

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[1] Cinderella is a fairy tale with many versions dating from at least the eighteenth century. All versions reviewed had the following elements: (1) Cinderella, a virtuous and long-suffering young woman, was mistreated by her stepmother and stepsisters; (2) a fairy godmother provided her with appropriate attire and transportation to attend the king's ball and subsequent events, with warnings that all of the clothing, attendants, and transport would be returned to commonplace items and creatures at midnight; (3) Cinderella left hastily without revealing her whereabouts or name to observe this enforced curfew and consequently, the prince who fell in love with her searched the kingdom with the one glass slipper she left behind to establish her identity by shoe size; (4) after penetrating various subterfuges, the prince found Cinderella; and (5) Cinderella and the prince lived happily ever after. The title reference alludes to elements (1), (4), and (5). Michael N. Salda, *The Cinderella Project,* U. OF S. MISS., Version 1.2 (Oct. 2005), http://www.usm.edu/english/fairytales/cinderella/cinderella.html.

[2] From 1993–2011, Ms. Woryk was employed as in-house counsel and then Human Resources Vice President to a London-based company. Her duties included advising the board of directors with regard to corporate social responsibility strategy, initiatives, and performance. The opinions given here are her opinions.

[3] Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 291–92 (2009).

[4] *See* Susan Vinnicombe OBE et al., *The Female FTSE Board Report 2010: Opening up the Appointment Process*, CRANFIELD UNIV. SCH. OF MGMT., 3 (2010), http://www.som.cranfield.ac.uk/som/dinamic-content/research/documents/FemaleFTSEReport2010.pdf; *Women in the boardroom: A global perspective*, DELOITTE (Jan. 2011), http://www.corpgov.deloitte.com/binary/com.epicentric.contentmanagement.servlet.ContentDeliveryServlet/NwNor/Page%20Copy/Home/Women%20in%20the%20Boardroom%20-%20November%202011.pdf; Marleen A. O'Connor, Symposium, *Women and the "New" Corporate Governance, Women Executives in Gladiator Corporate Cultures: The Behavioral Dynamics of Gender, Ego, and Power,* 65 MD. L. REV. 465, 469–70 (2006).

profitability,[5] corporations are unlikely to work actively to enlarge female board membership. Ratings agencies, institutional investors, and companies have not widely adopted gender-balanced boards as a Corporate Social Responsibility ("CSR") priority.[6] Nevertheless, long-term technological, cultural, economic, and demographic trends may accelerate representation.[7]

II. CURRENT STATUS AND CATALYSTS FOR CHANGE

Women hold half of the managerial positions in large corporations in the United States,[8] yet occupied only 14.8% of Fortune 500 board seats as of 2007.[9] When one reviews the broader group of public companies rated by GovernanceMetrics International, the U.S. percentage as of 2011 was 12.3%.[10] The aggregate percentage of women on boards in industrialized countries is set forth below:[11]

Australasia				
	Australia	10.9%	New Zealand	12.0%
Asia				
	Hong Kong	9.4%	Japan	0.9%
	Singapore	7.3%		

[5] Adams & Ferreira, *supra* note 3, at 292 ("[F]irms perform worse the greater is the gender diversity of the board."); Rohini Pande & Deanna Ford, *Gender Quotas and Female Leadership: A Review*, 1 (Apr. 7, 2011) (unpublished Background Paper for the World Development Report on Gender), *available at* http://www.hks.harvard.edu/fs/rpande/papers/Gender%20Quotas%20-%20 April%202011.pdf ("While female entry on boards is correlated with changing management practices, this change appears to adversely influence short-run profits."). *But see* Judy B. Rosener, *The Business Case for Having More Women on Boards,* WOMEN ON BOARD MENTORING PROGRAM, 2 (May 2003), *available at* http://www.womenonboard.ca/docs/The-Business-Case.pdf ("Fortune 500 companies with the highest percentage of female directors outperformed competitors with the lowest female representation."); O'Connor, *supra* note 4, at 476 ("[T]he business case is unlikely to bring about changes because it is empirically fragile."); Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?* 8 (Rock Ctr. for Corp. Governance, Working Paper Series No. 89, 2010) ("In sum, the empirical research on the effect of board diversity on firm performance is inconclusive, and the results are highly dependent on methodology."); *but see also Women Matter: Gender Diversity, a Corporate Performance Driver*, MCKINSEY & CO., 1 (2007), http://www.mckinsey.com/locations/swiss/news_publications/pdf/women_matter_english.pdf ("The study suggests that the companies where women are most strongly represented at board or top-management level are also the companies that perform best.") [hereinafter *Women Matter*].

[6] Review of 2010 questionnaires by Institutional Voting Information Service, RREV Proxy Advisory Services, and Experts in Responsible Investment Services show much interest in board composition, but no specific questions regarding member gender as a measure of corporate responsibility (on file with author). Email from Julie McDowell, Head of Sustainable and Responsible Inv., Standard Life Invs. Ltd., to author (May 16, 2011, 3:39 PM) (on file with author).

[7] *See* KAY S. HYMOWITZ, MANNING UP: HOW THE RISE OF WOMEN HAS TURNED MEN INTO BOYS *passim* (2011); *Women in America: Indicators of Social and Economic Well-Being*, THE WHITE HOUSE, *available at* http://www.whitehouse.gov/administration/eop/cwg/data-on-women (last visited Jan. 20, 2012) [hereinafter *Women in America*].

[8] O'Connor, *supra* note 4, at 466.

[9] Adams & Ferreira, *supra* note 3, at 291.

[10] *2011 Women on Boards Report*, GOVERNANCEMETRICS INT'L, 10 (Mar. 8, 2011), http://www2.gmiratings.com/product_documents/377women_on_boards_2011.pdf.

[11] *Id.*

Europe

Austria	7.5%	Italy	3.7%
Belgium	7.7%	Netherlands	14.0%
France	12.7%	Portugal	2.3%
Germany	11.2%	Spain	9.3%
Greece	8.8%	Switzerland	8.7%
Ireland	9.5%	United Kingdom	9.1%

Scandinavia

Denmark	13.9%	Norway	35.6%
Finland	24.5%	Sweden	27.3%

U.S./Canada

Canada	12.9%	United States	12.3%

For non-Scandinavian companies in industrialized economies, the range is 0.9% (Japan) to 14% (Netherlands).[12] In the Scandinavian countries, where (as will be discussed below) legislation dictates gender composition of boards, the range is from 13.9% (Denmark) to 35.6% (Norway).[13] For FTSE[14] companies in the United Kingdom, the number of female directorships has risen only 5% (to 12%) in ten years and the Equality and Human Rights Commission estimated that if the trend continues, equally balanced boards are seventy-five years away.[15] In the United States, in 2001, women held 11.6% of board seats in Fortune 500 companies;[16] the increase to 15.7% female board members by 2010[17] shows

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12 *Id.*

13 *Id.*

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> The FTSE Group (pronounced "footsie") computes tens of thousands of indices of market performance daily. The most famous stock index of the FTSE Group is the FTSE 100, first calculated in 1984, which consists of the 100 largest companies by market capitalization on the London Stock Exchange. The composition of the FTSE 100 is reviewed quarterly. The FTSE Group formed as an independent company in 1995 from what was originally a joint venture of the Financial Times and the London Stock Exchange. Formerly a UK-centric organization, the FTSE Group's indices now cover markets worldwide . . . .

FTSE, INVESTOR GLOSSARY, http://www.investorglossary.com/ftse.htm (last visited July 25, 2011).

15 Sarah Arnott, *Revealed: The Gender Gap in British Business*, THE INDEP., (Aug. 14, 2010), *available at* http://www.independent.co.uk/news/business/news/revealed-the-gender-gap-in-british-business-2052374.html.

16 Douglas M. Branson, *No Seat at the Table: How Corporate Governance and Law Keep Women Out of the Boardroom* 89 (Univ. Pittsburgh Sch. of Law Legal Studies Research Paper Series, Working Paper No. 2007-11, Nov. 2007).

17 Lissa L. Broome, Wachovia Professor of Banking Law and Director of the Center for Banking and Finance, UNC Sch. of Law, Corporate Board Diversity Speech at the University of Dayton School of Law Symposium, Perspectives on Gender & Business Ethics: Women in Corporate Governance (Feb. 25, 2011).

progress, but a long way to go before equality. McKinsey & Company's database of six European nations, Brazil, Russia, India, and China ("BRIC countries") as of 2010, showed continuing underrepresentation "despite some improvements in a few countries."[18]

A 2011 survey of twenty-two countries in emerging economies throughout the Americas, Asia, Europe, the Middle East, and Africa reflects an aggregate percentage range from 0% (Morocco and Peru) to 16.4% (South Africa):[19]

Americas			
Brazil	5.1%	Mexico	6.8%
Chile	1.9%	Peru	0.0%
Colombia	8.5%		
Asia			
China	8.5%	Philippines	11.6%
India	4.8%	South Korea	1.9%
Indonesia	4.5%	Taiwan	6.1%
Malaysia	6.3%	Thailand	8.7%
Europe			
Czech Rep.	8.3%	Poland	10.8%
Hungary	6.1%	Russia	5.9%
Middle East & Africa			
Egypt	6.7%	South Africa	16.4%
Israel	13.4%	Turkey	10.8%
Morocco	0%		

During the last decade worldwide, only Scandinavia shows marked change.[20] Certainly, the disparity between the percentage of women in the workforce and those in board seats is significant. While a study of Fortune 500 companies from 1997 through 2001 showed increasing female representation on boards, women will not achieve 50% of board seats in Fortune 500 companies until 2081 if the 2001 rate continues.[21]

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[18] *Women at the top of corporations: Making it happen,* MCKINSEY & CO., 2 (2010), www.mckinsey.com/locations/swiss/newspublications/pdf/women_matter_2010_4.pdf.

[19] *2011 Women on Boards Report*, *supra* note 10, at 13.

[20] Rhode & Packel, *supra* note 5, at 1.

[21] Richard A. Bernardi et al., *Does Female Representation on Boards of Directors Associate With Fortune's "100 Best Companies to Work For" List?*, 45 BUS. & SOC'Y 235, 243–44 (2006).

A. Profit Analysis

Proving that boards with women directors result in better financial performance would presumably clear the path for women. Despite many researchers' attempts to make the business case for female representation on boards, results are inconclusive.[22]

A recent economic study concluded that "gender diversity has beneficial effects in companies with weak shareholder rights, where additional board monitoring could enhance firm value, but detrimental effects in companies with strong shareholder rights."[23] While it went on to conclude that attendance at board meetings improves for all members when women are represented,[24] no direct economic benefit was found for all firms. In other studies, women managers scored above men in giving feedback, integrity, motivation, and productivity.[25] While all of these factors are desirable for a quality board, direct proof of improved profitability would be more compelling.

A 53% higher return on equity has been cited for the Fortune 500 companies with the highest percentage of female directors in at least one 2007 study,[26] but other studies reviewing data from a number of countries have come to differing conclusions.[27] A 2010 study found that the companies in European and BRIC countries with the highest share of women on executive boards outperformed companies with no women in these leadership positions, concluding that "[w]hile this link does not demonstrate causality, it does provide a strong factual basis to continue to argue in favor of greater gender diversity in corporate top management."[28] Nevertheless, the low percentage of female representation indicates the research showing such a link has not motivated directors to more proactively seek women for boards.

Interestingly, a theory has been advanced that female directors have no effect on profits but negative effects on stock value because of the gender bias of institutional investors.[29] The neutral effect on profits leads the authors to suggest that "boards don't much matter"[30] in terms of impact on a company's profitability. A more hopeful conclusion is that, as boards increase female representation, this bias will be supplanted by a more

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22 Rhode & Packel, *supra* note 5, at 8.
23 Adams & Ferreira, *supra* note 3, at 292.
24 *Id*. at 297–98.
25 O'Connor, *supra* note 4, at 473–74.
26 Rosener, s*upra* note 5, at 2.
27 *See* Rhode & Packel, *supra* note 5, at 8.
28 *Women at the top of corporations*, *supra* note 18, at 7.
29 Frank Dobbin & Jiwook Jung, *Board Diversity and Corporate Performance: Filling the Gaps: Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?,* 89 N.C. L. REV. 809, 828 (2011).
30 *Id.*

positive perception of women so that stock values do not suffer.

B. Legislation

A law review article by Darren Rosenblum provides a fascinating study of the Norway experience, where, as in other Scandinavian countries, gender diversity is mandated.[31] In 2003, the Norwegian legislature passed a law requiring boards of public companies to have at least 33% to 50% of each gender, with exact percentages varying by board size, but a 40% ratio for boards over ten members.[32] Potentially adverse consequences arose when women directors took up multiple directorships and some companies actually delisted as public companies to avoid meeting the requirement.[33] Further, the European Free Trade Association began an investigation as to whether the Norwegian quota law violated European Union ("EU") law due to reverse discrimination potential.[34]

This investigation is not consistent with recent statements by the EU parliament, which announced on July 6, 2011, that EU businesses must hire women on their executive boards by next year or face the prospect of legislation being introduced in 2012 to require phasing-in a mandatory quota of 40%.[35] The announced goal was for women to make up 30% of top management in the largest listed companies by 2015, and 40% by 2020.[36] Whether the EU will enact such legislation remains to be seen, given the EU member countries' varying positions on this initiative.

In 2011, Italy approved a new law establishing that, as of 2015, 30% of board members of public companies should be women.[37] The French adopted a 2010 quota law requiring that public companies have at least 20% women directors within three years of enactment and 40% by 2017.[38] In 2007, Spain passed a law requiring that public companies appoint women to 40–60% of corporate board seats by 2015.[39] However, this law has been described as "aspirational," i.e., without severe penalty for noncompliance.[40]

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[31] Darren Rosenblum, *Feminizing Capital: A Corporate Imperative,* 6 BERKELEY BUS. L.J. 55, 57 (2009).

[32] *Id.* at 62–63.

[33] *Id.* at 64–65.

[34] *Id.* at 67.

[35] Valentina Pop, *EU Parliament Backs Female Quotas for Top Corporate Jobs*, EUOBSERVER.COM (July 7, 2011, 9:25 AM), http://euobserver.com/18/32598.

[36] *Id.*

[37] Ilaria Cantu, *Italy Introduces Women's Quota*, HENKEL DIVERSITY BLOG (May 3, 2011, 5:21 AM), http://www.henkeldiversity.com/2011/05/03/italy-introduces-womens-quota-italien-fuhrt-frauen quote-ein.html.

[38] Douglas M. Branson, *Women on Boards of Directors: A Global Snapshot* 7 (U. of Pittsburgh Sch. of Law Legal Studies Research Paper Series, Working Paper No. 2011-05, Feb. 2011).

[39] Eric Westervelt, *German Boardrooms Lack Women. Can Quotas Help?*, NAT'L PUB. RADIO (May 17, 2011), http://www.npr.org/2011/05/17/136276792/german-boardrooms-lack-women-can-quotas-help.

[40] Branson, *supra* note 38, at 6.

In the United Kingdom, Lord Davies completed a report at the behest of the Coalition Government to provide recommendations for increasing female board membership in February 2011.[41] Davies noted that only 11% of the responses from stakeholders favored quotas and the vast majority of women who responded were vehemently opposed to a quota requirement.[42] He went on to urge companies to promote women into these positions, and added that there was potential for quotas to be legislated if change was not achieved.[43]

Other European countries, while mandating the reporting of social considerations in investment decisions,[44] do not specifically require female board representation as one of those social considerations. In 2011, the Netherlands and Belgium considered legislating mandated percentages of women on boards of directors, but instead approved non-binding quota proposals.[45] Portugal, with the fewest females on European corporate boards,[46] has not announced any pending legislation. Despite assertions to the contrary,[47] given that Germany, Sweden, Finland, and the UK oppose quotas,[48] it seems doubtful that the EU will spend its political capital on this issue.

Since December 2010, Canada's Senate has had a proposed bill pending which would require that all public companies, financial institutions and state-owned companies adopt a 50% quota to be attained within three years of the passage of the law; however, there is currently insufficient support for its enactment.[49]

The SEC issued a Proxy Disclosure Enhancement Rule, effective February 28, 2010,[50] amending Item 407(c) of Regulation S-K to require that listed companies identify whether diversity is considered in board nominations, with the conclusion that this would improve assessment of board nominating decisions:

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[41] Brian Groom, *Davies Review Seeks More Board Women*, FIN. TIMES (Feb. 20, 2011), http://www.ft.com/cms/s/0/013e85fe-3cff-11e0-bbff-00144feabdc0.html.

[42] *Id.*

[43] *Id.*

[44] Céline Louche & Steven Lydenberg, *Socially Responsible Investment: Differences Between Europe and United States*, 14 (Vlerick Leuven Gent Mgmt. Sch., Working Paper Series No. 2006/22, 2006), *available at* http://www.vlerick.com/en/2472-VLK/version/default/part/AttachmentData/data/vlgms-wp-2006-22.pdf.

[45] Kameliya Encheva, *Belgium and the Netherlands Vote on Non-Binding Quotas*, EUROPEAN WOMEN'S LOBBY (June 3, 2011), http://www.womenlobby.org/spip.php?article1735&lang=en.

[46] *Id.*

[47] Pop, s*upra* note 35.

[48] Branson, *supra* note 38.

[49] Pande & Ford, *supra* note 5, at 36.

[50] Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334 (Dec. 23, 2009) (codified at 17 C.F.R. pts. 229, 239, 240, 249, and 274) (SEC adopting amendments to enhance information regarding proxy solicitations).

> In the Proposing Release, we also requested comment on whether we should amend our rules to require disclosure of additional factors considered by a nominating committee when selecting someone for a board position, such as board diversity. A significant number of commenters responded that disclosure about board diversity was important information to investors. Many of these commenters believed that requiring this disclosure would provide investors with information on corporate culture and governance practices that would enable investors to make more informed voting and investment decisions. Commenters also noted that there appears to be a meaningful relationship between diverse boards and improved corporate financial performance, and that diverse boards can help companies more effectively recruit talent and retain staff. We agree that it is useful for investors to understand how the board considers and addresses diversity, as well as the board's assessment of the implementation of its diversity policy, if any. Consequently, we are adopting amendments to Item 407(c) of Regulation S-K to require disclosure of whether, and if so how, a nominating committee considers diversity in identifying nominees for director. In addition, if the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, disclosure would be required of how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.[51]

The foregoing reasoning would seem to call for the identification of diversity factors that bear critically on corporate performance. However, the SEC specifically declined to define diversity in the amendments:

> We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they

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[51] *Id*. at 68,343–344.

> consider appropriate. As a result we have not defined diversity in the amendments.[52]

"[I]n 1990 the UN Economic and Social Council set a target of 30% female representation in decision-making bodies by 1995";[53] presumably, this was a motivating factor for more than half of the world's countries to implement political gender quotas over the last twenty years.[54] Since the U.S. government has not been motivated to respond to this 1990 guidance for the public sector, it seems unlikely that it will impose the requirement on private entities in the future.

Some research suggests that the Sarbanes-Oxley Act[55] will create more opportunities for female board members:

> By requiring a majority of independent directors, the reforms encourage recruiters to look at a variety of new sources for candidates, increasing the likelihood of women landing seats. Because the majority of current board members are currently men, recruiting from among them is nearly useless because the Sarbanes-Oxley Act makes it harder for members to juggle multiple board assignments.[56]

The authors support their case by pointing out that recruitment of women directors increased since the Act's inception, with searches for women doubling for Catalyst (a non-profit organization with the mission of expanding opportunities for women),[57] in the sixteen months after the Act was signed.[58] Still, the doubled number only amounted to twenty searches.[59] When one reviews the 2011 number of 12.3% board representation of women in the U.S. across a very broad sample of public companies versus the only slightly smaller number of 11.6% for the smaller group of Fortune 500 companies in 2001,[60] it seems that Sarbanes-Oxley has not had a significant impact to date.

C. Corporate Social Responsibility

CSR has been defined as "[a]ctions that appear to further some social good, beyond the interests of the firm and that which is required by law."[61] This is the view of the majority of the business community[62]

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[52] *Id.* at 68,344.
[53] Pande & Ford, *supra* note 5, at 8.
[54] *Id.*
[55] Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002).
[56] Bernardi et al., *supra* note 21, at 238 (citation omitted).
[57] *About Us*, CATALYST, http://www.catalyst.org/page/59/about-us (last visited Sept. 12, 2011).
[58] Bernardi et al., *supra* note 21, at 238–39.
[59] *Id.* at 239.
[60] Branson, *supra* note 16, at 89.
[61] MIKKO H. MANNER, HUMAN BEHAVIOR AND THE CORPORATE SOCIAL RESPONSIBILITY OF FIRM LEADERS 2 (2010) (citation omitted).

although others have defined it more broadly to include all socially beneficial initiatives as well as profitability.[63] Still others suggest that companies ought to choose as priorities only those CSR initiatives that improve the company's profitability, achieve strategic advantage, and have a beneficial impact upon society and upon that particular business.[64] This view, which rewards companies for their efforts and encourages them to undertake[65] CSR efforts in which the company has a particular talent or vested interest in performing (e.g., Toyota developing an engine with low carbon emissions or a mining company with local labor in Africa working to eradicate AIDS among its workers),[66] seems more likely to result in sustainable CSR efforts.

Prior to 2011, my duties for a multinational corporation included providing the metrics required to satisfy institutional and other investors, as well as advising the board of directors on performance, progress, and recommended initiatives. While our working definition of CSR was reporting and recommending socially beneficial actions taken by the corporation, whether or not profitable, we did concentrate on those CSR initiatives that were key to organizational and community reputation and profitability.

The operating companies held by this parent corporation were spread across the globe, were acquired at different times, and were very entrepreneurial in terms of management. However, the common cultural elements were financial and manufacturing expertise, compliance, and safety. Building on those strengths with CSR initiatives that complemented these areas made integration achievable, and safety initiatives in particular fulfilled immediate benefits to our employees and to our profits, ensuring not only workers' compensation costs below those of industry norms, but also that employees came home whole and healthy to their families and communities. Compliance helped avoid the costs associated with governmental investigations and fines and aided the corporate reputation. Manufacturing expertise increased profits while ensuring environmental benefits to the community—efficient manufacturing practice avoided sending excessive waste through the smokestack or waterways. Financial expertise assured proper reporting and educational efforts throughout the facilities, communicating the importance of financial goals, and mandates yielded results in day-to-day operations.

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[62] *Id.*

[63] *Id.* at 2–3.

[64] Michael E. Porter & Mark R. Kramer, *Strategy & Society: The Link Between Competitive Advantage and Corporate Social Responsibility,* HARV. BUS. R., Dec. 2006, at 80.

[65] *Id.* at 89.

[66] *Id.* at 9–10.

Since these were already core to the corporate culture, the only additional burden imposed by CSR was publication to the community of those efforts. Gathering the data and providing reports, which fulfilled requirements of the board, investors, and ratings agencies, was time-consuming but rewarding. Everyone knew the impetus behind the effort and the results were tangible, so those efforts were very sustainable.

Hence, rather than working toward female board representation in leadership positions, CSR efforts were primarily directed towards projects that advanced employee safety, or return to shareholders through improved manufacturing or financial training. My admittedly unscientific theory is that lower female representation for industrial companies results in part from spending more time addressing those physical and safety needs at the base of Maslow's motivational pyramid[67] than companies whose businesses have fewer physical risks.

A great deal of managerial time and attention is expended upon the review of process, equipment, product, and feedstock required to ensure safe production is accomplished in a manufacturing facility. This concern is not misplaced; the U.S. Bureau of Labor Statistics reports an incidence of injuries nearly three times higher for manufacturing (4.3 cases per 100 full-time workers) than for financial activities (1.5 cases for 100 full-time workers),[68] showing a higher degree of risk for industrial activities.

Non-manufacturing companies with fewer inherent safety challenges may have more resources available to review board gender composition, thereby attaining the higher levels of social, esteem, and self-actualization goals on the motivational pyramid.[69] When one examines women on boards by industrial sector, the 2011 percentage of companies with at least three women directors ranged from below 4% for automotive, chemical, and industrial goods and services to a high of approximately 17–20% for banking, insurance, and media,[70] giving some support to this theory. A 2010 McKinsey & Company report reflects corroborating results, with 16% of boards for consumer goods and retail including women, but 10% or less in infrastructure, real estate, transportation, energy, and diversified industries.[71]

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[67] *Maslow's Hierarchy of Needs: Father of Modern Management & Leadership by Employee Motivation*, ABRAHAM MASLOW, http://www.abraham-maslow.com/m_motivation/Hierarchy_of_Needs.asp (last visited Sept. 12, 2011) (stating that the five levels of motivational needs, from most basic to highest aspirations, are as follows: physiological, safety, social, esteem, and self-actualization) [hereinafter *Maslow's Hierarchy*].

[68] News Release, U.S. Dep't of Labor, Workplace Injuries and Illnesses – 2009 (October 21, 2010), *available at* http://www.bls.gov/news.release/archives/osh_10212010.htm.

[69] *See id.*; *Maslow's Hierarchy*, *supra* note 67.

[70] *2011 Women on Boards Report*, *supra* note 10, at 18.

[71] *Women at the top of corporations*, *supra* note 18, at 4.

Professor Douglas Branson has commented that in the U.S. there is a bit of diversity fatigue, perhaps due to the economic challenges of 2007 to 2009.[72] Weathering these economic storms was certainly the main priority for my former employer, whose markets were housing and automotive, sectors hit particularly hard in the downturn.

While the profit and legislation research discussed above do not reveal worldwide adoption of gender-diverse boards, the increasing trend toward CSR within this new century[73] leads one to inquire whether gender diversity on boards is a recognized item on the CSR agenda for public companies. Generally, social and financial returns for corporations and investors are important to socially responsible investors from both United States and Europe.[74] However, in my years of communications with the investment community for a London-based company, I do not recall any inquiry specifically seeking information about gender composition of boards.

Nor do I recall such inquiries from rating agencies regarded as most relevant to the company.[75] The reason is perhaps best summed up by Julie McDowell, Head of Socially Responsible Investment for Standard Life Investments Limited, an investment management company that held a significant position in my former employer's stock when it was publicly traded: "In my experience the composition of boards and the presence of women on boards are not generally looked at as a CSR issue."[76]

Ms. McDowell's perspective, as a representative of a company that provides clients with information to ensure successful investing choices, is very illuminating. Board composition is not part of the CSR analysis.

While not a priority item for CSR ratings among institutional investors, are there some industries that recognize board gender equity as a CSR priority? Eurosif's[77] recent research provides an analysis of major Environmental, Social, and Governance (ESG) challenges among the many

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72 Branson, *supra* note 38, at 5.

73 Bryan Horrigan, *21st Century Corporate Social Responsibility Trends—An Emerging Comparative Body of Law and Regulation on Corporate Social Responsibility, Governance, and Sustainability*, 4 MACQUARIE J. BUS. L. 85 (2007), *available at* http://www.austlii.edu.au/au/journals/MqJlBLaw/2007/5.html.

74 *See id.*

75 *See Proxy Voting Services*, INSTITUTIONAL S'HOLDER SERVS. INC., http://www.issgovernance.com/proxy/advisory (last visited Sept. 12, 2011).

76 McDowell, *supra* note 6.

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> Eurosif (the European Sustainable Investment Forum) is a pan-European network and think-tank whose mission is to Develop Sustainability through European Financial Markets. Current Member Affiliates of Eurosif include institutional investors, financial service providers, academic institutes, research associations, trade unions and NGO's. The association is a not-for-profit entity that represents assets totaling over €1 trillion through its affiliate membership.

About Eurosif, EUROSIF, http://www.eurosif.org/about-eurosif (last visited Sept. 15, 2011).

industry sectors[78] comprising their organization do not focus on gender board issues.[79]

The majority of reports reviewed emphasized other human rights issues. In terms of priorities, however, elevating women from management to executive suites does not seem to be advancing significantly as a result of CSR initiatives. The Kinder, Lydenberg, and Domini Index, which screens U.S. companies for social responsibility and publishes results to investors, includes the number of women on boards as a measure of social responsibility.[80] Nonetheless, a September 2010 survey of about 1,500 business leaders worldwide across all industries yielded only a 28% positive response as to whether gender diversity was a top-ten priority for their company.[81] The survey referenced women in all C-level positions (CEO, COO, CFO, etc.), and not just board members, so it is likely that the board-level priority is not a focus in all 28% of the companies with an affirmative response.

D. Cultural & Demographic Trends

The theory that gender imbalance on boards is because there are not enough women in the pipeline has been rejected by some researchers.[82] Even if that used to be so, the last two generations have substantially increased the proportion of qualified female candidates. In addition, cultural shifts reflecting women's gains in education, ability and willingness to delay childbearing, and the changing demands of the economy may converge to encourage gender equality on boards.

The proportion of adult women working or looking for work in the United States rose from 33% in 1950 to 61% in 1999,[83] with the 61% remaining steady during the first decade of this century; meanwhile, the percentage of adult men represented in the labor force (at 75% in 2009) has declined steadily since the 1950s.[84] With nearly doubled participation over the last sixty years, more presence in the workforce must surely lead to more consideration for women, particularly when one considers that, as of 2009, more women than men were in management, professional, and related

[78] *Sector Reports*, EUROSIF, http://www.eurosif.org/research/sector-reports (last visited Sept. 15, 2011). Industries listed: infrastructure, extractives, insurance, automobiles, food production, hotels and tourism, forestry and paper, chemical, real estate, nuclear, shipping, information and communication technologies hardware, and banking. *Id.*

[79] *Id.*

[80] Bernardi et al., *supra* note 21, at 236.

[81] *Women at the top of corporations*, *supra* note 18, at 1.

[82] *See, e.g.*, O'Connor, *supra* note 4, at 471–73 (suggesting that male stereotyping and exclusion from informal networks, rather than lack of experience, were barriers to senior leadership positions); *Cf. Women Matter*, *supra* note 5, at 6 (finding that despite the growth of female university graduates the number of women in corporate leadership will remain low over the next 30 years).

[83] *Women in America*, *supra* note 7, at 27.

[84] *Id.*

occupations (51%).[85]

In 1970, 14% of U.S. men had college degrees, and only 8% of women were college graduates.[86] In 2009, the percentage of college graduates among men and women was even, at about 28%.[87] This forty-year history of progress means more women have attained the education level and years of experience suitable for board seats. The average age of males on U.S., Australian, and Canadian boards ranges from fifty-six to sixty-one, with the average age for females at fifty-three to fifty-six.[88]

In 2008, U.S. women actually surpassed men in college degrees awarded.[89] "For non-Hispanic Black, Hispanic, and for non-Hispanic American Indian/Alaskan Native groups, more than 60% of bachelor's and master's degrees were earned by women. For non-Hispanic Whites and non-Hispanic Asians, more than 50% of bachelor's and master's degrees were earned by women."[90] This does not appear to be an anomalous year; more women than men at the ages of twenty-five to thirty-four have a college degree, reversing the norm of forty years ago and before.[91] Nor is this trend of women overtaking men in education a U.S. phenomenon; in lower-middle income countries, women versus men are at an 11:10 ratio in tertiary education, with a ratio of 14:10 in upper-middle-income countries.[92] Another source states that in fifteen out of seventeen of the wealthiest countries, more women than men are graduating from college.[93]

For the U.S., as of 2009, the percentage of people aged twenty-five to thirty-four with at least two years of graduate education stood at 11% for women and 8% or below for men.[94] In 2008, women comprised 59% of graduate school enrollees.[95] While women still earn fewer degrees than men in science and technology, in 2008, they surpassed men in business and management degrees.[96]

Interestingly, the occupations they chose appear to be more recession-proof than men's. Prior to the 1980s, men had a higher unemployment rate; after that, the jobless rates for men and women were about equal until the past four recessions (occurring between 1981 and

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[85] *Id.*
[86] *Id.* at 19.
[87] *Id.*
[88] Siri Terjesen et al., *Women Directors on Corporate Boards: A Review and Research Agenda*, 17 CORP. GOVERNANCE: AN INT'L REV. 320, 324 (May 2009), *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1467-8683.2009.00742.x/pdf.
[89] *Women in America*, *supra* note 7, at 19.
[90] *Id.*
[91] *Id.* at 21.
[92] Pande & Ford, *supra* note 5, at 2.
[93] TIM HARFORD, THE LOGIC OF LIFE: THE RATIONAL ECONOMICS OF AN IRRATIONAL WORLD 84 (2009).
[94] *Women in America*, *supra* note 7, at 22.
[95] *Id.*
[96] *Id.* at 23.

2009), when the jobless rates for men rose to 9.9% when compared to 7.7% for women.[97] The Department of Commerce has opined that this is due to men's employment being more concentrated to "cyclically sensitive occupations, such as manufacturing production and construction."[98]

Without widespread profit, legislative, or CSR motivators, how did the rise of women come to pass? By the 1990s, cultural institutions, marketers, and even governments focused particularly on encouraging young women to pursue independence and career success.[99] In addition to cultural factors, globalization, improved productivity, and digital technology have moved the world economy from manufacturing and toward knowledge and services, to women's advantage.[100] Beginning in the 1960s, a growing number of jobs in the Western world required knowledge and ideas rather than physical strength or manual dexterity; technology, law, design, and finance careers have flourished.[101] By the mid-1990s, knowledge workers made up a third of the U.S. workforce.[102] The very nature of the employment available has given women more opportunities.

In 1970, women held less than 10% of the bachelor's degrees in business, but currently, women are in the majority in this discipline.[103] There has also been a disproportionate increase in women earning degrees in life science, physical sciences, and engineering.[104]

While at the top business schools men still predominate, trends show an increase for women.[105] Since 2005, there has been a 13% increase in women's enrollment in MBA programs, and more women than men are starting businesses.[106]

In addition to jobs requiring less physicality and a culture encouraging girls to compete, medical technology may play a factor. One author suggests the widespread availability of the contraceptive pill beginning in the 1960s made it rational to invest in education for a career with a long training period.[107] And, for every year a woman delays having her first child, her lifetime earnings rise by 10%.[108] At least two generations of women have had the opportunity to observe the success of their sisters who delayed motherhood and therefore prospered.

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97 *Id.* at 30.
98 *Id.*
99 HYMOWITZ, *supra* note 7, at 12.
100 *Id.*
101 *Id.* at 25.
102 *Id.*
103 *Id.* at 53.
104 *Id.*
105 HYMOWITZ*, supra* note 7*,* at 55.
106 *Id.*
107 HARFORD, s*upra* note 93, at 84–85.
108 *Id.* at 84.

Provocatively, the question has been asked: "So if women are so great, why aren't they running the place?"[109] The answer, according to at least one author, is that:

> Many experts believe that time is coming, not so much because in the future everyone will be gender-blind, but because the knowledge economy workplace requires a more feminine style of leadership. Modern management theorists look down on the hierarchical arrangements and competitive individualism of yesterday's office. Instead they advise executives to promote a sense of community and teamwork.[110]

The emergence of well-educated and experienced women is juxtaposed with an upcoming talent shortfall projected in Europe by 2040, when a dearth of twenty-four million skilled workers is forecast.[111] The United States and Japan are also facing flattening birth rates;[112] hence, employers and planners are already strategizing for optimization of the skilled workforce. The aging of the workforce in developed countries combined with the rise of rapidly developing economies driving up demand for skilled professionals[113] will, by necessity, increase women's access to the boardroom.

Inevitably, businesses compete for scarce commodities. If employees have their choices of where to work, then they may logically be expected to consider a firm's reputation for providing a quality environment for both men and women. When one reviews *Fortune* magazine's "100 Best Companies to Work For" list, analysis of twenty-seven firms appearing on the list and within the Fortune 500 shows a positive correlation between the number of female directors and the company's appearance on the list.[114] Of the 100 selected for inclusion in the list, 25% of the employee comments noted family-oriented benefits such as flexible scheduling, daycare subsidies and adoption assistance.[115]

If companies perceive a benefit to retaining top female talent, they are likely to implement strategic measures to do so.[116] Not surprisingly, those family-oriented benefits lauded by employees working at companies identified by *Fortune* as quality workplaces, are among the thirteen gender-

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[109] HYMOWITZ, *supra* note 7, at 104.
[110] *Id.*
[111] *Women in America*, *supra* note 7, at 10.
[112] *Confronting the Talent Crunch: 2007*, MANPOWER INC., 3 (2006), http://manpowerblogs.com/holmes/files/hardest_jobs.pdf.
[113] *Not What, Not How, but Who? Western Companies Face a Worldwide Talent Crunch,* WHARTON SCH. OF UNIV. PA. (Sept. 22, 2008), http://knowledge.wharton.upenn.edu/article.cfm?articleid=2056.
[114] Bernardi et al., *supra* note 21, at 235.
[115] *Id.* at 244.
[116] *See Women at the top of corporations*, *supra* note 18, at 13.

diversity measures identified by executives surveyed by McKinsey and Company as key to their strategy of gender diversity.[117]

III. CONCLUSION

The business case for adding women to boards will most likely never emerge as a compelling argument for those unwilling to look at intangibles which cannot be measured directly. Legislative efforts do not currently have the momentum required to create worldwide impacts in the next decade, or to be widely adopted in countries that have not already mandated them.

CSR initiatives for corporations are generally chosen to advance, at least indirectly, the profitable or cultural biases and priorities of the organization. Therefore, voluntary adoption of more gender-diverse boards is unlikely until circumstances make it beneficial. Institutional investors and rating agencies have not acted as effective catalysts to make this a priority. Their focus tends to be more on the corporation's impact to the community as a whole.

The historically slow pace of female representations on boards is, however, likely to quicken. Advanced education has greatly increased the number of women with the ability to take on business and management positions. The changing marketplace, with more jobs requiring expertise in communications and technical knowledge, rather than physical strength, plays into the strengths and skills possessed by educated women. As more women view the financial success of their mentors who have delayed childbearing and advanced in their careers and compensation, they are

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[117] *Id.* at 9.

13 gender-diversity measures identified by McKinsey & Company:

- Options for flexible working conditions (e.g., part-time programs) and or locations (e.g., telecommuting)
- Visible monitoring by the CEO and executive team of progress in gender-diversity programs
- Programs to encourage female networking and role models
- Support programs and facilities to help reconcile work and family life (e.g., childcare, spouse relocation)
- Encouragement or mandates for senior executives to mentor junior women
- Inclusion of gender-diversity indicators in executives' performance reviews
- Skill-building programs aimed specifically at women
- Performance evaluation systems that neutralize the impact of parental leaves or flexible work arrangements
- Indicators of the company's performance in hiring, retaining, promotion and developing women
- Gender-specific hiring goals and programs
- Programs to smooth transitions before, during, and after parental leaves
- Systematic requirement that at least one female candidate be in each promotion pool
- Gender quotas in hiring, retaining, promoting, or developing women

Id.

motivated to structure their lives to achieve career success.

All of the readiness, capability, and motivation described above will be in place at the time there is a talent shortfall in industrialized nations due to flattening birth rates, providing incentive to corporations to abandon lingering bias for competitive advantage. Those factors creating a quality work environment allow the flexibility in working conditions that will permit women to fulfill their biological destiny of raising families without sacrificing their intellectual and earnings potential. The glass ceiling will soon be replaced by a glass slipper, and Cinderella will take her rightful place beside the prince in governance of the realm.