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Board Diversity Requirements: Comparison of US and European Law

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Abstract

Corporations are run for the benefit of their shareholders. However, shareholders can be benefitted in a variety of ways, including through a corporate management strategy that considers environmental, social, and corporate governance (ESG) measures in their policy. One ESG policy that has been shown to create more value for shareholders is increasing board diversity. With financial benefits as their justification, US stock exchanges and state governments, along with European governments, have implemented board member diversity quotas concerning gender, racial, and/or ethnic diversity requirements. The US has largely used stock exchanges, with the exception of California laws, in order to require these disclosures, whereas European governments have taken on the challenge themselves. Further, racial and ethnic diversity does not have the same disclosure requirements in Europe as it does in the US.

Table of Contents

I. Introduction

Corporations are supposed to operate for the benefit of their stockholders. This means that the decisions that corporate board of directors make need to ultimately lead, or reasonably be believed to lead, to shareholder benefits, namely by increasing stock price of public companies. The board and officers of a corporation owe fiduciary duties to the shareholders.[1] On August 19, 2019, Business Roundtable released a statement signed by 181 Chief Executive Officers regarding the purpose of a corporation. They stated a commitment to operate their companies for the benefit of all stakeholders in the company, including customers, employees, suppliers, communities, and shareholders.[2] While this statement could be viewed as controversial because corporations are supposed to operate for the benefit of the shareholder, there is another prominent view that the statement is rather meaningless. The view is essentially that the CEO's are agreeing to maximize shareholder value through the benefits they instead to give to other stakeholders. This is because shareholders increasingly have been assigning more value to companies that implement policies that value other stakeholders. The law still requires that companies operate for the benefit of their shareholders.

This occurs because investors are socially conscious and are therefore taking environmental, social, and governance (ESG) factors into account when looking at companies. "Environmental criteria consider how a company performs as a steward of nature. Social criteria examine how it manages relationships with employees, suppliers, customers, and the communities where it operates. Governance deals with a company's leadership, executive pay, audits, internal controls, and shareholder rights."[3] While the 2018 Business Roundtable letter

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[1] Gary Shorter, *Corporate Governance: Board Diversity*, Congressional Research Service (2019).
[2] Business Roundtable Redefines the Purpose of a Corporation to Promote 'An Economy That Serves All Americans', *Business Roundtable*, Aug. 19, 2019.
[3] The Investopedia Team, Environmental, Social, and Governance (ESG) Criteria, Investopedia, Feb. 23, 2022.

largely applies to the "S" in ESG, the other factors are increasingly important to investors as well. However, a focus on aspects such as ESG is not a new development. Over 50 years ago, Milton Friedman wrote about social responsibility of businesses as tied to profits, and this conversation is even more at the forefront today with the quickly changing emphasis on environmental protection.[4] Despite the 2019 letter, some feel as though the "S" and "G" were falling behind the "E" factors in today's discussion.[5] Others, such as the CEO of Blackrock think that the distinction between the terms is not as stark, because, for example, "E" and "S" strongly correlate when low-income communities are most impacted by climate change.[6]

This paper will largely focus on an overlap between the "S" and "G" factors of ESG. There has been a renewed reckoning since 2020 with the truth of American racism and the systemic oppression of racially diverse populations. This movement, spurred by the death of George Floyd, has created a worldwide movement for equality. Investors are very concerned with addressing this in corporate America, and have turned largely toward diversity requirements, or at least metrics, in companies to help effect change and to provide opportunities where they were previously denied.

Investors are not the only ones demanding this change, as this paper will explore a series of regulations and laws promoting board diversity. Congressional and policy interests have also been sparked into this topic over the last decade or so.[7] These diversity requirements for underrepresented minorities have largely followed a push for gender diversity on corporate

[4] Milton Friedman, The Social Responsibility of Business is to Increase its Profits, The New York Times Magazine, Sep. 13, 1970.
[5] John Hale & Lisa Woll, Let's Not Leave Behind the S & G in ESG, Morning Star, Apr. 22, 2021.
[6] *Id.*
[7] Shorter (2019).

boards. Both underrepresented minority directors and gender diversity for directors will be discussed in this paper to give a full reflection on the state of board diversity requirements.

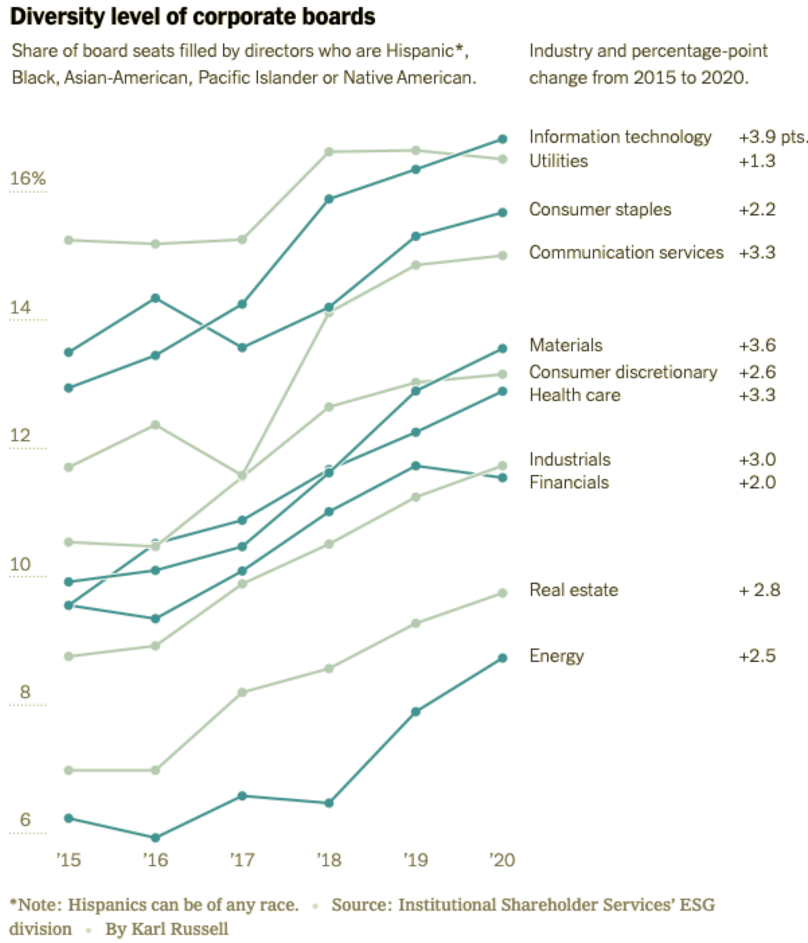
Although concerns about systematic racism in the US have spread to Europe, this paper will demonstrate that Europe's recent push for diverse boards largely excludes racial and ethnic diversity. Europe is much more focused on increasing gender diversity. Law makers and other regulators have heard gender equity concerns from the public and many countries in the European Union have stepped in to insure this happens, while the US push has largely been led by stock exchanges or local governments.

II. Corporate Board Diversity

In the US, approximately 20% of board members among the largest 3,000 companies are women.[8] A slightly higher 29% of board members in the S&P 500 are women.[9] This number has been steadily growing due in large part to the regulations that will be described below. Additionally, while underrepresented ethnic and racial minorities make up about 40% of the US population, they only make up about 12.5% of board members. Graph 1 below demonstrates the growth that has occurred in this area over the course of 5 years.

Graph 1

[8] Lily Jamal, *A Push To Get More Women On Corporate Boards Gains Momentum*, NPR, Mar. 5, 2020.
[9] Leslie P. Norton, Women Were 29% of U.S. Board Directors in 2020, Up From 19% in 2014, Barron's, July 21, 2021.



As Graph 1 illustrates, diversity on board varies greatly by industry, as some industries are slower to make a shift than others. Along those same lines, different parts of the world are more progressed in their acceptance of women and minorities on their corporate boards. In the European Union (EU), 23.3% of board members of the largest companies are women,[10] which is certainly behind the S&P 500 numbers overall. However, the numbers are better for all European Union companies with 35% of women on boards.[11]

[10] Vêra Jourová, Commissioner for Justice, Consumers, and Gender Equality, *Gender Balance on Corporate Boards: Europe is Cracking the Glass Ceiling (Fact Sheet)*, European Commission, July 2016.
[11] Achieving Gender Equality In Decision-Making, European Women on Boards, https://europeanwomenonboards.eu/.

Most notably however, there is a lack of any significant data on racial or ethnic diversity for European boards specifically. This data gap will be further explained when board diversity requirements for the EU are examined below.

While this paper will discuss the relevant laws or stock exchange policies used to promote board diversity, it is critical to note that most of the advances in board diversity are being propelled by industry itself. Many companies are declining to work with other companies that are not diverse. For example, in January 2020, the CEO of Goldman Sachs, David Solomon, announced that they would not be taking any company public that did not have at least one diverse board member.[12] In 2021, this increased to two minimum diverse board members. Solomon's reasoning for the new policy is as follows:

> This decision is rooted first and foremost in our conviction that companies with diverse leadership perform better. Consider this: since 2016, US companies that have gone public with at least one female board director outperformed companies that do not, one year post-IPO. But in addition to the real commercial benefits, it's clear that changing the stereotypes associated with corporate decision-making will have many positive effects for society as a whole.[13]

Diversity in corporate governance decisions is important for many reasons, not least of which are equity and improving shareholder value. Normatively, creating diverse environments is important because it provides equal opportunity for all, especially those previously least likely to get a seat at the table. Additionally, studies have shown that increased board diversity can help

[12] David Solomon, Diverse Leadership Is Needed More Than Ever – Here's What We're Doing, LinkedIn, Jan. 23, 2020, https://www.linkedin.com/pulse/diverse-leadership-needed-more-than-ever-heres-what-were-m-solomon/.
[13] *Id*.

to increase company performance.[14] While reasoning for this correlation may vary, there are a few widely accepted beliefs for this connection. First, corporate diversity allows the company to understand a more diverse marketplace, particularly as markets expand. Second, variable demographic ideas tend to inspire creativity and innovation at the corporate leadership level. Third, a diverse group has better problem-solving skills and are better able to avoid the phenomena of "group-think," where a group of similar backgrounds are less likely to disagree with each other, therefore leaving ideas half-tested. Lastly, firms with diverse leadership at higher levels tend to inspire performance from diverse employees, which improves overall company performance and decreases costly turnover.[15]

It is important to note that not everyone necessarily agrees with the importance of having a diverse board of directors. For example, in a law review article titled *The Danger of Difference: Tensions in Directors' Views of Corporate Board Diversity*, the authors take a much more skeptical approach.[16] Here, they start by noting that most directors and officers think that board diversity is important. "But… it is very difficult for our respondents to provide examples from their experience of when board diversity has made a tangible difference. We have heard abundant stories about when other kinds of diversity–what might be called functional diversity: different business backgrounds and skills, for example–have made a difference in how effectively boards do their work. But pressing respondents for comparable stories about demographic diversity has yielded very little beyond awkward silences."[17] This is only one

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[14] See generally David A. Carter, et. al., *Corporate Governance, Board Diversity, and Firm Value*, 38 The Financial Review 33 (2003).
[15] *Id*.
[16] Kimberly D. Krawiec, John M. Conley & Lissa L. Broome, *The Danger of Difference: Tensions in Directors' Views of Corporate Board Diversity*, 2013 U. ILL. L. REV. 919 (2013).
[17] *Id*. at 920.

example of the many opinions that counter the idea that diverse boards of directors actually help to promulgate fiduciary duties.

III. Diversity Laws for Corporate Boards of Directors

a. United States

The U.S. has no federal diversity requirements for corporate boards. Other corporate governance issues are largely run through the states, and usually that state in which a company is incorporate will govern the rules for the Board of Directors. However, when it comes to public companies, the Securities and Exchange Commission (SEC) plays a very large regulatory role. The SEC, however, has chosen not to play a role in establishing any quotas for board diversity requirements. Instead, it has left this regulation up to the stock exchanges on which public companies list. The SEC still must approve these listing rules before than can take effect for the exchanges.

However, the SEC has stepped into this space to require the disclosure of certain information. In 2009, the SEC promulgated rules requiring the disclosure of whether or how the nominating committee of a board considers diversity when identifying potential candidates.[18] However, companies were able to navigate around this requirement by using various definitions of diversity. Therefore, in 2019 the SEC updated the disclosure requirement to include "that when making a decision about nominating a particular person to be a director, to the extent that a board considers that person's self-identified diversity characteristics such as race, religion, and gender, the [SEC's] expectation was that 'the company's discussion required by [the disclosure regulation] would include, but not necessarily be limited to, identifying those characteristics and

[18] Shorter (2019).

how they were considered.'"[19] More recently, states like California have decided to step into this role as well, which do not require SEC approval, and will be discussed below.

i. NASDAQ

The Nasdaq Stock Market (Nasdaq) is one of the major American Stock exchanges and has been the most significant exchange in terms of encouraging board diversity. On December 1, 2020, Nasdaq filed a proposal for the new rule with the SEC.[20] This rule, Rule 5605(f): Diverse Board Representation, under Rule 5605(f)(2) would require that companies listed on the Nasdaq to have at least two diverse directors, including one self-identified female director and one director who self-identifies as an underrepresented minority or as LGBTQ+. "'Underrepresented Minority'" means an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities."[21] "'LGBTQ+' means an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community."[22]

Rule 5606(f)(2) can alternatively be satisfied through disclosure, as described in Rule 5606(f)(3). This rule gives the option for "Alternative Public Disclosure" if a company does not meet these diversity requirements. For this disclosure, a listed company must specify which Rule 5606(f)(2) requirements are applicable and explain its reasons for not having met the

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[19] *Id.*
[20] David A. Bell, et. al., *SEC Adopts Nasdaq Rules on Board Diversity*, Harvard Law School Forum on Corporate Governance, Mar. 21, 2022, https://corpgov.law.harvard.edu/2021/08/19/sec-adopts-nasdaq-rules-on-board-diversity/.
[21] Rule 5606(f)(2)(B)(ii), *Corporate Governance Requirements*, The NASDAQ Stock Market.
[22] *Id.*

requirements. This disclosure must then be "provided in advance of the Company's next annual meeting of shareholders."[23]

Rule 5606(f) has several exceptions, including those that were added on February 26, 2021, when the proposal was amended to lessen the stringency of some of the initial requirements. For example, companies with five or fewer board members are only required to have one diverse board member (or otherwise disclose). There is also a "phase-in period" for companies that are newly listed before they are required to meet the diversity numbers or provide disclosure. Lastly, and most relevant to this paper's later discussion, Foreign Issuers must, or disclose why it doesn't, have two diverse board members, one of which is female, though no specification is made for other minority groups.[24] This means that the board could have two female directors and still satisfy the requirement, rather than needing an Underrepresented Minority or LGBTQ+ director.

ii. NYSE

The New York Stock Exchange (NYSE) has taken a very different approach from Nasdaq and California, as discussed below. In 2019, they named an "NYSE Board Advisory Council" made up of more than twenty[25] CEOs of listed companies.[26] Their goal is to "address the critical need for inclusive leadership by connecting diverse candidates with companies seeking new directors."[27] This council would not prescribe any minimum diversity requirements or require any disclosures from companies. Rather, the idea was to "use personal networks of those CEOs to identify [diverse] board candidates. The members of the Council would both educate and

[23] *Id.*
[24] *Id.*
[25] Originally, nineteen.
[26] Stewart Landefeld, *Board Diversity: A Comparison Between the NYSE & Nasdaq Now*, Public Chatter, Nov. 1, 2021.
[27] Initiative to Advance Board Diversity, The New York Stock Exchange, https://www.nyse.com/boardadvisory/about-the-council.

advocate for those identified candidates and introduce them through a series of proposed events to NYSE-listed companies."[28]

iii. California (SB 826)

In 2018, California signed Senate Bill 826 (SB 826) into law.[29] This law, called Women on Boards, is aimed at advancing "equitable gender representation on California corporate boards."[30] This law requires that all public companies headquartered within the state meet a minimum number of females on their Board of Directors.[31] All boards would be required to have one female director. If the board has five directors, then there must be two female directors. If the board has six or more directors, then at least three of them must be female.[32] Markedly, there was a time period for phasing in these higher number requirements, but that phased approach is now complete, so these are the requirements as they stand in 2022.

SB 826 is distinguishable from the US stock exchange requirements in a few different ways. First and probably most significantly, it is a state law and not a listing requirement. While it only applies to public companies, it still seems to have a very broad reach because it applies to companies that are not incorporated within the state. Many of the large public companies that are headquartered in California are incorporated in Delaware.[33] This large reach has led to some backlash and legal battles which will be discussed below.

Next, SB 826 contains fines for violations with no disclosure option. A violation occurs for "each director seat required by this section to be held by a female, which is not held by a female during at least a portion of a calendar year."[34] The first violation incurs a fine of $100,000

[28] Landefeld (2021).
[29] Women on Boards, California Secretary of State, https://www.sos.ca.gov/business-programs/women-boards.
[30] *Id.*
[31] CA Senate Bill No. 826, Chapter 954, Corporations – Board of Directors.
[32] *Id.*
[33] Delaware is the most common state in which to incorporate a company.
[34] CA Senate Bill No. 826, Chapter 954, Corporations – Board of Directors.

and each subsequent violation incurs a $300,000 fine.[35] Fine values are not predetermined for stock exchange violation. It is also very significant that there are no disclosure options, meaning they cannot opt to have no women on the board and simply file a disclosure to avoid being in violation with the law. Therefore, this law has more bite than the exchange listing requirements.

iv. California (AB 979)

More recently than the passing of SB 826, in 2020, California signed Assembly Bill No. 979 (AB 979) into law.[36] This bill follows a very similar structure to SB 826, but instead of mandating gender diversity for corporate boards headquartered in California, it mandates a minimum number of directors "from an underrepresented community."[37] This means "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaskan Native, or who self-identifies as gay, lesbian, bisexual, or transgender."[38] The number requirements vary slightly from SB 826. A board with four or fewer directors is required to have one director from an underrepresented community, while a board with five to nine directors is required to have two, and a board with nine or more directors must have three.[39]

The definition of diversity in both California bills is notably different from that of Nasdaq Rule 5605(f). California passed these laws first, which perhaps explains why the gender diversity requirement came into effect before the underrepresented community requirement. Nasdaq implemented this rule after both California bills were introduced, which might have allowed them to have the foresight to adopt both measures at the same time. From a structural

[35] *Id*.
[36] CA Assembly Bill No. 979, Chapter 316, Corporations: boards of directors: underrepresented communities.
[37] *Id*.
[38] *Id*.
[39] *Id*.

perspective, this has a big effect. To comply with California law, a Board with nine directors could have three women who are also from underrepresented communities or LGBT and satisfy both SB 826 and AB 979. On the other hand, Rule 5606(f) requires two diverse directors, so one person could not fulfill both requirements. However, because California requires larger numbers of diverse board members in the first place, this distinction is unlikely to have a large effect.

It is also notable that aside from the structure of the law, Nasdaq has a textually more expansive definition of diversity. It includes people of "Two or More Races or Ethnicities" in the mix, as well as those that identify more generally as a "member of the queer community." AB 979 fails to explicitly include either of these groups. While this may be a problem in the text, it is unlikely to be a cause for concern in practice. For instance, it seems unfathomable that California would even attempt to fine a company that otherwise satisfies the requirement through counting a queer person as diverse. In practice, it seems only logical that the more expansive definition available in Rule 5606(f) will also apply in California law.

b. European Union

As previously mentioned, EU numbers on board diversity tend to focus exclusively on gender, with the exception for nationality discussed below. In Europe and the European Union more specifically, it is common for governments to be involved with implementing board diversity requirements, rather than for these requirements to be implemented by stock exchanges as seen in the US, with the exception of California. Instead, the European stock exchanges seem to utilize indexes to highlight investor preference for diverse companies. For example, the largest European Union stock exchange Euronext, which is headquartered in Paris, has gone this route.[40] The Euronext Eurozone Diversity & Governance 40 EW is an index that is designed to show

[40] *Euronext Eurozone Diversity & Governance 40 EW*, Euronext: Index Rule Book, 21-01 (June 2021).

price level trends while focusing on diversity and governance measures.[41] These indexes rely on the investors placing a very real financial advantage on companies that value diversity in their directors as well as other ESG measures. This investor pressure could very well be the key driver in improving diversity numbers. However, various European government entities have chosen to step in as well.

i. European Governments Intervention

In 2010, the European Commission created the Strategy for Equality between Women and Men.[42] This strategy noted a lack of equality in decision-making at all levels, and specifically noted that "[w]omen represent only one in ten board members of the largest publicly listed companies in the EU."[43] The strategy said it would address this by considering targeted initiatives to create gender equality in decision-making at the highest levels.[44] The first "initiative," with a rather broad interpretation of the word, was created in 2011. This was the "Women on Board Pledge for Europe" which was a voluntary pledge that companies could make.[45] This effort proved to be largely unsuccessful.[46]

After the failure of the voluntary pledge, the European Commission decided to take a different approach. In 2012, they submitted a proposal for a directive for gender balance on boards for companies listed on public stock exchanges.[47] "The proposal set the aim of a minimum of 40% of non-executive members of the under-represented sex on company boards, to

[41] *Id*.
[42] Strategy for equality between women and men, COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS, Brussels, 21.9.2010, Com 491.
[43] *Id*.
[44] *Id*.
[45] *Women on Boards in Europe from A Snail's Pace to a Giant Leap?: EWL Report on Progress, Gaps and Good Practice*, European Women's Lobby (Feb. 2012).
[46] Jourová (2016).
[47] *Gender Balance on Boards*, Legislative Train (Feb. 2022), https://www.europarl.europa.eu/legislative-train/theme-area-of-justice-and-fundamental-rights/file-gender-balance-on-boards.

be achieved by 2020 in the private sector and by 2018 in public-sector companies."[48] The proposal also described the ways companies should make board appointment decisions. They should "make appointments on the basis of pre-established, clear and neutral criteria. If candidates were equally qualified, advantage would be given to the under-represented sex."[49] If companies did not reach the 40% goal, then they would have to follow a series of procedures, penalties, and disclosures in an effort to get there eventually.[50] While this proposal was adopted by the European Parliament in 2013, one can see that the 40% mark has certainly not been reached. This is because countries are sovereign and can decide what laws from the European Commission they chose to implement.

Despite this guidance, there are still many countries in the EU that have not adopted similar rules. Out of the 27 countries in the EU, 19 of them have no quotas in place for board gender diversity.[51] Of the countries that do have quotas of some form in place, they chose to qualify it in a variety of ways. To give a couple of examples, Austria has a 35% quota that only applies to state owned companies.[52] In France, the 40% quota applies to non-executive directors of large listed and unlisted companies.[53] The Netherlands has a 30% target with "comply or explain" requirements, but no punishments, similar to the NASDAQ rules previously discussed.[54] Lastly, Spain has a 40% target that applies to large state owned companies, but has no sanctions and therefore tends to be viewed as more of a recommendation.[55]

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[48] *Id.*
[49] *Id*.
[50] *Id.*
[51] Jourová (2016).
[52] *Id*.
[53] *Id.*
[54] *Id*.
[55] *Id*.

The European Commission has also helped to establish organizations that can work to achieve gender equity in decision-making positions. The European Women on Boards organization is co-funded by the European Union and has a mission to help solve the problem by enhancing networking opportunities for senior women, and providing training and mentoring opportunities.[56] This approach seems to be rather similar to that taken by the NYSE. Both have created groups that are intended to build a broader network that can identify and aid women in breaking into the current structure, without working to update the structure that has not allowed women or other underrepresented groups onto corporate boards in proportionate numbers. While this approach is valuable, it seems to have less impact so far on directing change.

ii. Switzerland

Switzerland is only tangentially impacted by European Union regulations to impact corporate governance. While not a member of the EU, the Swiss financial industry works with EU clients and networks very frequently. Its culture is heavily impacted by that of the surrounding countries, and it can provide some interesting insight into the influence of corporate board diversity regulations. Switzerland is known for its banking industry, one that is extremely male dominated. Furthermore, women only received the right to vote in Switzerland in 1971, many decades later than equally economically developed countries. According to the Gender Diversity Index (GDI), a study completed by the European Women on Boards Organization, Switzerland has a score of 0.43, which is the fourth lowest of all 19 European countries that were studied.[57] The GDI takes into account other senior positions as well, including officers and board committees, which are outside the scope of this paper. Of the 53 companies in the study, only 4

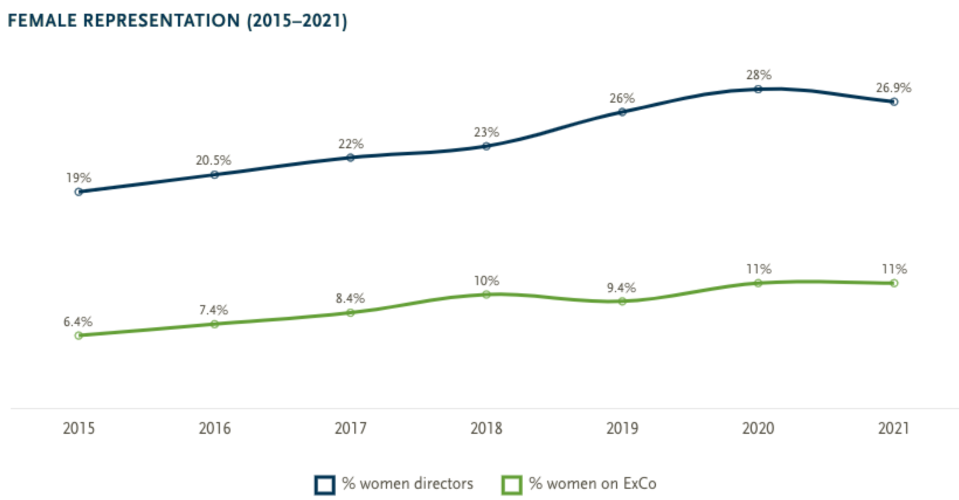
[56] Achieving Gender Equality.
[57] *Women on Boards and in Corporate Leadership Gender Diversity Index 2021*, European Women on Boards, https://europeanwomenonboards.eu/wp-content/uploads/2022/01/Switzerland-Country-report-2021-GDI.pdf.

of them had a female chair of the board and 14 of them had no women at the executive level of the company.

The Swiss Government has made attempts to improve these numbers and encourage more gender representation on corporate boards. In September 2020, the Swiss Federal Council made a decision that would enter force in the beginning of 2021. This rule required large companies to have 30% women on their board of directors and 20% women on their executive board. This applies to "[c]ompanies that in two consecutive years have a balance sheet of more than 20 million Swiss francs (about US$22 million) or whose sales revenue exceeds 40 million Swiss francs, or that have an annual average of more than 250 full-time positions are required to include information on the gender quota in their annual remuneration report. If the quota is not met, the companies are required to comply or to explain why, and to describe the measures that have been and will be taken to increase the numbers for the underrepresented gender."[58] These requirements however will not be in effect until 2026,[59] so it is yet to be seen how effective they will be at changing board composition. However, what we have seen is that as the goals of 30% and 20% come closer, the growth of women in these positions has slowed, as seen in Graph 2 below.[60]

Graph 2[61]

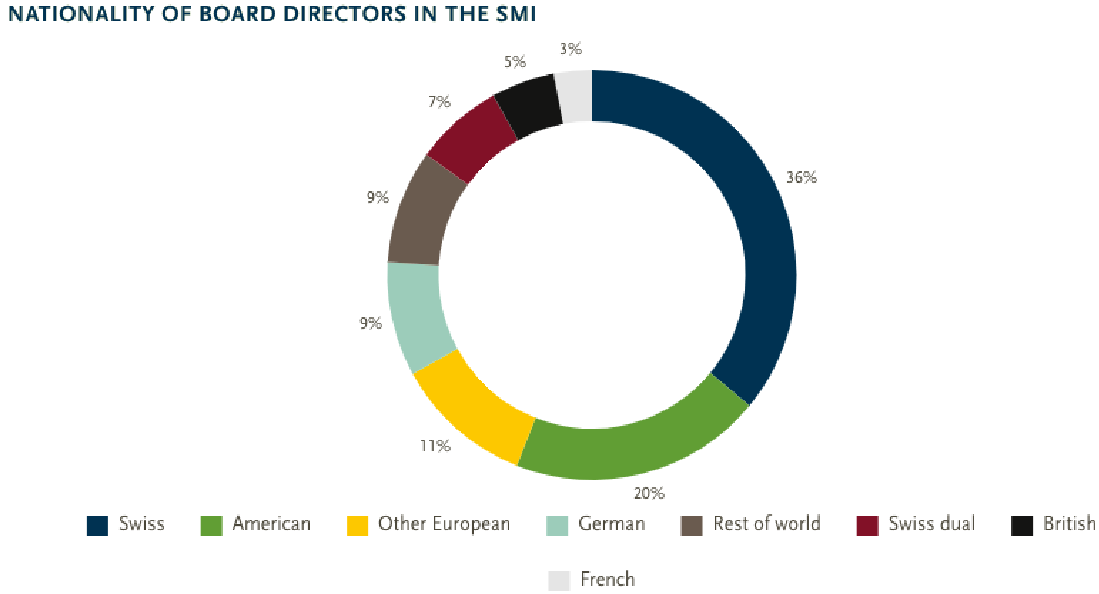
[58] *Switzerland: Gender Quotas for Boards of Large Companies to Take Effect January 1, 2021*, Library of Congress (Sept. 29, 2020).
[59] *Id*.
[60] Diversity: 2021 Switzerland Spencer Stuart Board Index, Spencer Stuart, https://www.spencerstuart.com/research-and-insight/switzerland-board-index/diversity.
[61] *Id*.



Switzerland is also home to the SIX Swiss Exchange, its largest stock exchange.[62] This stock exchange is similar to EuroNext and other European stock exchanges in that it has largely conducted any influence on diversity in corporate governance through indexes. The Spencer Stewart Board Index has reviewed swiss companies on the Swiss Market Index (SMI), the most followed index in the country that is comprised of about 20 of the largest SIX Swiss stocks. As previously noted, there is a data gap in terms of board ethnic and racial diversity in European companies. One of these reasons is because the US and Europe have very different ideas of what it means to be diverse in this manner. Spencer Stuart analyzed foreign directors included in the SMI, and defined foreign investors that have a nationality different from that of the company.[63] Just because their nationality differs, does not mean race or ethnicity does.

Graph 3

[62] SIX Swiss Exchange, SIX, https://www.six-group.com/en/products-services/the-swiss-stock-exchange.html.
[63] Diversity (2021).



Graph 3 above illustrates the findings of Spencer Stuart.[64] They consider the SMI to be highly diverse because 57.9% of directors are foreign.[65] This helps to give a better picture of the sorts of cultural diversity that being discussed for European boards.

In December 2021, I had the opportunity to travel to Switzerland with the University of Chicago on the International Immersion Program Trip. While on the trip, we met with members of various international organizations, corporations, and law firms. While the trip was very enjoyable, I also had the opportunity to witness a relative lack in diversity at the board or even managerial levels of major companies. When I asked about this, most companies would acknowledge that it was something they were working on, but pointed to childcare as the lead problem for this. They said that because childcare was so expensive, once a woman had a child, the costs of the childcare were prohibitive to returning to work. Therefore, there were not enough women available to be elevated to the status of a board member or even a partner in a law firm. It

[64] *Id*.
[65] *Id*.

was also rather unconceivable in a heterosexual relationship that the man would be the one to choose to stay home with the children.

Furthermore, I asked about racial and ethnic diversity at various corporations. It became apparent immediately that "diversity" does not necessarily mean the same thing because unless race or ethnicity was specifically mentioned; it was assumed that I was referring to gender. However, once the meaning came across, they did explain that the concept was very different in Europe as discussed above. One white man at a law firm in Zurich explained that he counted as diverse for their numbers because he was German. Clearly, this diversity is not the same as the numbers we measure in the US, as demonstrated by Graph 3 above.

IV. Comparative Findings

a. Gender

Overall, the US and Europe have taken different approaches to promoting gender diversity on corporate boards. The US has largely taken the approach of letting stock exchanges create listing disclosure rules in order to promote diversity on corporate boards, which is then permitted by the SEC. In Europe on the other hand, stock exchanges are generally not as large or powerful, so they tend to have less influence. Instead, most of the requirements, if any, come from government laws. We've seen California begin to adopt this approach, but federalism concerns make this more difficult in the US.

One problem with allowing states to individually create diversity requirements would be the potential for overlapping and conflicting regulation. For example, California's laws apply to all companies that are physically headquartered in the state. Many of these companies are actually incorporated in Delaware. If Delaware were to pass a law with different quotas for incorporated companies, then the corporation would have to comply with whichever rule has the higher standard. On the other hand, if Delaware were to pass a law saying that gender or race/ethnicity was not allowed to be considered for incorporated companies when selecting board members, then the laws would be in conflict. The company would necessarily be in violation of one of the laws. For this reason, and others as well, the California regulations have seen extensive litigation procedures following their implementation. Currently, the cases are in various litigation stages, including on appeal with the Ninth Circuit.[66]

This same concern could arise in Europe if there were to be a conflict between the stock exchanges and country laws. Therefore, when it comes to board diversity requirements, I think it would be best to have one regulator. A discussion of the normative value of these requirements will follow below. However, either the stock exchanges or the government should regulate, but not both. If the cost of regulation and compliance gets too high, there will be too much inefficiency built into the system and stockholders will ultimately be injured. ESG is supposed to benefit the stockholders by creating more value. Inefficient regulations, and in particular overregulation, can decrease that same value.

b. Race/Ethnicity

As mentioned, the concept of racial and ethnic diversity varies greatly between the US and Europe. There are many different factors that contribute to this, not least of all is that Europe tends to be less diverse in this regard. There are larger racial and ethnic minority populations in the US.[67] At the same time, the US does a better job of acknowledging our own systemic racism. Despite many systemic racism deniers within the US and the presence of Black Lives Matter

[66] *Challenges to California's Board Diversity Statutes*, The National Law Review (Mar. 17, 2022).
[67] Max Fisher, *A revealing map of the world's most and least ethnically diverse countries*, The Washington Post (May 16, 2013).

protests in Europe during the summer of 2020, the US as a whole does a better job than Europe acknowledging the systemic racism within.

While it is easy for Europeans to acknowledge and cry out against police brutality in the US, it can be more difficult for them to acknowledge the problems they have at home. This is seen through the lack of diverse ethnicities in leadership positions in Europe and even more so through the lack of data on the subject. By not having the same laws regarding diverse racial and ethnic minorities on corporate boards as they have for women, there is an implicit acknowledgement that it is not as important in their culture. If diverse boards are supposed to help the company by coming up with creative solutions and avoiding group-think, then including racially and ethnically diverse people would be just as important as including women. However, Europe has an often unspoken history of making it hard for immigrants to assimilate and therefore difficult to gain decision-making positions in corporations.

V. Conclusion

The ultimate question is if these regulations to increase board diversity, either through stock exchanges or through local or national governments, are ultimately helping or hurting the cause. One view is that these regulations help open the door for qualified candidates that have previously been prevented from getting a seat at the table. Another view is that if corporations truly do better financially with diverse boards, the market will find a way to adjust for this on its own. While maybe true in the long run, I do not think this is reason for inaction now. If the market naturally corrected in a timely manner, minorities would already have a larger place in boards of directors and executive positions. Regulations from governing bodies are needed to bypass the explicit or implicit bias at existing companies that have prevented minorities from being elevated to these positions sooner. While the strategies implemented in both the United

States and Europe have begun improvements within this area, more needs to be done to normalized diverse candidates on corporate boards of directors.