

# Legal and Market Initiatives to Increase Diversity in Corporations—A Cross-Jurisdictional Analysis

*Akshaya Kamalnath\**

## ABSTRACT

This Article will critically examine various legal and market initiatives to increase diversity in corporations, with the aim of assessing their effectiveness. The initiatives explored in this Article include quota laws in Europe (including recent amendments in France and Germany which introduce quotas for executive director positions) and California; disclosure laws in the U.S., Nasdaq, and U.K.; and initiatives by institutional investors. The main argument this Article makes is that both quotas and quantitative disclosures do not provide the right incentives for corporations to make genuine efforts to improve diversity. The alternative this Article proposes is not to simply leave matters as is, but rather for all those involved in the diversity project—legislators, investors, and the general public—to steer the discourse towards long-term and sustained change. One way to push corporations in this direction is to encourage qualitative disclosures which will incentivise innovative and firm-specific solutions.

## CONTENTS

INTRODUCTION.....	116
I. QUOTA LAWS—COSTS OUTWEIGH BENEFITS.....	117
<i>A. European Experiences with Gender Quotas</i> .....	118
<i>B. California—Looking Beyond Gender</i> .....	123
<i>C. The Report Card on Quotas</i> .....	127
II. DISCLOSURE LAWS AND MARKET INITIATIVES .....	132
<i>A. U.S.—The “Comply and Explain” Rule</i> .....	133

---

\* Associate Professor, the Australian National University College of Law. I am grateful to Leonid Sirota and Kim Krawiec for comments on earlier drafts. I am also thankful to the editorial team for their fantastic work on this paper. A version of this paper appears as a chapter in my book *The Corporate Diversity Jigsaw*, Cambridge University Press (2022).

<i>B. Nasdaq’s “Comply or Explain” Rule</i> .....	136
<i>C. UK—Principles-Based Disclosure Against the Backdrop of Targets</i> .....	138
<i>D. Market Initiatives</i> .....	144
<i>E. The Report Card on Disclosure Measures</i> .....	146
III. INCENTIVISING FIRM-SPECIFIC SOLUTIONS .....	148
CONCLUSION .....	152
TABLE 1: DIVERSITY MEASURES .....	153

#### INTRODUCTION

*A snowball started to roll in 2002 in Norway. The conditions were conducive to the formation of the snowball . . . . The snowball is now rolling with increasing speed and size to the rest of the world, and many countries have followed Norway’s example.*

– Morten Huse<sup>1</sup>

The snowball that Huse is referring to is that of legal reforms in the form of quotas (minimum number of positions allocated to a group) aimed at diversifying the boardroom in terms of gender alone. While Norway was indeed the first country to introduce legislation on board gender diversity, and this slowly spread to other countries, the broader board diversity discussion (which included race) in the U.S. preceded the discussion in Norway.<sup>2</sup> In as early as the 1940s, calls for women directors were already starting to take place.<sup>3</sup> By the 1990s, leading commentators had linked the discussion of board independence to that of diversity of race

---

1. SILKE MACHOLD, MORTEN HUSE, KATRIN HANSEN & MARINA BROGI, GETTING WOMAN ON TO CORPORATE BOARDS: A SNOWBALL STARTING IN NORWAY 24 (2013) (citing quotation selected from Morten Huse’s commentary in “Concluding Remarks on Part I”).

2. In the U.S., the Conference Board (an organisation consisting of senior executives from all industries, aiming to explore ideas of business policy and practice) had published a study to show that board diversity could increase shareholder value in 1999. *See, e.g.*, D. JEANNE PATTERSON & CAROLYN KAY BRANCATO, BOARD DIVERSITY IN U.S. CORPORATIONS: BEST PRACTICES FOR BROADENING THE PROFILE OF CORPORATE BOARDS, CONF. BD. (1999), <https://www.conference-board.org/publications/publicationdetail.cfm?publicationid=411>; *see also* Jill Fisch, *Are There Too Many Cooks in the Corporate Kitchen?*, 2 FORDHAM J. CORP. & FIN. L. 67, 82 (1997).

3. *See* Sarah C. Haan, *Corporate Governance and the Feminization of Capital* (Dec. 1, 2020) (unpublished draft) (on file with author and SSRN), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3740608](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3740608). These calls for diversity are tied to more women becoming stockholders during this time.

and gender.<sup>4</sup> Following the financial crisis, board diversity gained more attention internationally, and the U.S. Securities Exchange Commission (SEC) introduced some amendments to the pre-existing disclosure requirements in 2010.<sup>5</sup> It is not clear whether the developments in Norway and other European countries, which imposed mandatory gender quotas on corporate boards, had any bearing on the initial SEC requirement. However, it is likely that these international developments were more influential in the aftermath of #MeToo when the SEC disclosure requirements were amended and California introduced board quotas to improve diversity.<sup>6</sup> Internationally, some countries like the U.K. and Australia have used disclosure requirements (i.e. asking companies to disclose their diversity policy and the number of women on their boards) rather than quotas.<sup>7</sup> As this Article will later explain, these disclosure rules, together with external pressure, serve as aspirational quotas. Market players like institutional investors and stock exchanges have also jumped into the fray with diversity requirements for company boards.<sup>8</sup>

This Article will critically examine these measures with the aim of assessing their effectiveness. It will also examine the curious issue of industry voices publicly supporting these types of laws and regulations while their actions suggest otherwise. The main argument this Article makes here is that both quotas and quantitative disclosures do not provide the right incentives for corporations to make genuine efforts to improve diversity. The alternative that this Article proposes is not to simply leave matters as is, but rather for all those involved in the diversity project to steer the discourse towards long-term and sustained change, taking all the pieces of the diversity jigsaw into consideration. One way to push corporations in this direction is to encourage qualitative disclosures which will incentivise innovative and firm-specific solutions.

### I. QUOTA LAWS—COSTS OUTWEIGH BENEFITS

Quotas are a blunt tool because they essentially require all corporations of a certain type or size (depending on the legislation in

---

4. See Fisch, *supra* note 2. In a panel discussion on corporate law reforms held at Fordham law school, Reverend Dr. Andy Smith, the director of an activist investor firm, said in the context of some corporate misconduct, that the question was not only one of independence but also one of diversity. *Id.* The term “diversity” for him encompassed not just gender diversity but also race diversity. *See id.*

5. See Proxy Disclosure Enhancements, Release Nos. 33-9089; 34-61175, 74 Fed. Reg. 68333 (Dec. 23, 2009).

6. Darren Rosenblum, *California Dreaming*, 99 B.U. L. REV. 1435, 1437 (2019).

7. See *infra* Section II.C for a discussion on disclosure requirements in the U.K. See generally Alice Klettner, *Corporate Governance Codes and Gender Diversity: Management-Based Regulation in Action*, 39 UNIV. NEW S. WALES L.J. 715 (2016), for a discussion on disclosure requirements in Australia.

8. See *infra* Section II.D.

question) to appoint a certain number of diverse people.<sup>9</sup> This Section studies the experience of some European countries and that of California and concludes that the costs of such rigid measures outweigh their benefits.

#### *A. European Experiences with Gender Quotas*

Norway was the trailblazer in setting up gender quotas for company boards.<sup>10</sup> Its law requires a representation of at least 40% for each gender on boards of public limited companies.<sup>11</sup> This requirement was introduced in a phased manner with an initial window of two years being allowed for voluntary compliance by companies.<sup>12</sup> After this two-year period, companies that failed to comply with the requirement could be dissolved by the court after being given sufficient notice.<sup>13</sup> A hard quota such as this is bound to ensure that the number of women on corporate boards will drastically improve. And it did.<sup>14</sup> However, when we look deeper, the story is more complicated, but it might offer valuable lessons for other countries seeking to take this path.

Apparently, firms complied with the law by appointing the same set of women who had made it to leadership positions, resulting in what has become known in Norway as the “golden skirts,” in reference to the few women who were hired by multiple boards.<sup>15</sup> Thus, the quota did not result in ensuring that more women were able to overcome the barriers to reaching board positions. Rather, it merely resulted in the same few women being appointed to many boards. This is despite the fact that the Norwegian government set up a database of female directorial candidates for corporations to consider.<sup>16</sup> It is unclear whether companies did not consider the women on the database to be board-ready. Still, knowingly appointing a person who is already sitting on multiple boards and who is thus time-poor, means that the director is not being appointed for their

---

9. See *infra* Sections I.A–I.C for examples of quota laws.

10. See generally AAGOTH STORVIK & MARI TEIGEN, INT’L POL’Y ANALYSIS, WOMEN ON BOARD: THE NORWEGIAN EXPERIENCE (2010).

11. Norwegian Public Limited Liability Companies Act, 1997 (Act No. 45 § 6-11a) (Nor.).

12. *Id.* § 5-23.

13. *Id.* §§ 16-15(2), 16-16(1).

14. STORVIK & TEIGEN, *supra* note 10, at 3 (“Since its introduction in 2003, the number of »women on board« has reached 40 per cent as required by law.”).

15. See Morten Huse, The “Golden Skirts”: Changes in Board Composition Following Gender Quotas on Corporate Boards 4–5 (2011) (on file with author and ANZAM). See generally Marianne Bertrand, Sandra E Black, Sissel Jensen & Adriana Lleras-Muney, *Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labour Market Outcomes in Norway*, 86 REV. ECON. STUD. 191 (2019).

16. See Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q.J. ECON. 137, 145 (2011).

potential contributions. This tells us that the companies subject to the quota had engaged in what is called “check-the-box compliance,” meaning that they were uninterested in embracing the spirit of the law.<sup>17</sup> In fact, when we look at how the law was initially received, we see that some public companies chose to convert into private companies rather than comply with the new measure.<sup>18</sup> Judging by the nature of compliance by those firms that did remain subject to the law, we can conclude that the idea behind it had not been accepted.

Apart from simply raising the percentage of women directors, another expectation from any measures to improve the number of women (or other types of diversity) on the board is that it should translate into a higher number of women (or diverse members) in the firm’s C-Suite and workforce more generally. This did not happen in Norway.<sup>19</sup> Professor Aaron Dhir explains based on interviews of Norwegian directors he conducted prior to 2015, that some women had to leave management positions for directorships because of the quota law.<sup>20</sup> However, since the trend has continued since then, new women executives have not been appointed.<sup>21</sup> It is not clear whether the female board members failed to champion female candidates for C-Suite jobs and women-friendly policies in the firm, or if their efforts failed for other reasons. In any case, championing diversity comes with costs for diverse people, in terms of how they are perceived by their employees,<sup>22</sup> peers and bosses.<sup>23</sup> Not only this, people within a minority group often (although not always) report experiencing conflicts from within the group, possibly because they are pitted against each other.<sup>24</sup> Irrespective of whether or not these dynamics were at play in Norway, they are useful to note as possible factors in other

---

17. Kiersten Barnet, *Why Quotas Alone Won't Make Boards (or Companies) More Diverse*, FAST CO. (June 12, 2018), <https://www.fastcompany.com/90276540/why-quotas-alone-wont-make-boards-more-diverse> (“On a larger scale, mandated regulations for diversity and inclusion risk causing complacency across private firms tempted to check a box, instead of taking an opportunity to be leaders in driving wide-reaching change.”).

18. Beate Sjøfjell, *Gender Diversity in the Boardroom and Its Impacts: Is the Example of Norway a Way Forward?*, 20 DEAKIN L. REV. 26, 28 (2011).

19. See, e.g., Bertrand, Black, Jensen & Lleras-Muney, *supra* note 15.

20. See AARON DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 162–69 (2015).

21. *Id.*

22. For instance, when Indra Nooyi was the CEO of PepsiCo, it was apparently assumed that any Indian American person hired at the company was a contact of Nooyi.

23. JOAN C. WILLIAMS, BIAS INTERRUPTED: CREATING INCLUSION FOR REAL AND FOR GOOD 138 (2021) (ebook). (A study found that “[d]iversity champions were seen as less competent when they hired someone like themselves . . . except when the champions were white men.”).

24. *Id.* at 140. Williams says both women and people of colour face these issues and provides a telling extract from one of her interviewees. “There is a definite white boys club here. And even some of the women that were able to make it, they have the attitude of ‘suck it up buttercup. I went through it too, so you have to go through it.’” *Id.*

countries that consider quota laws at the board level. In Norway, this lack of impact on firm diversity more generally again suggests that merely the letter of the law had been complied with.<sup>25</sup> There was no push to conceptualise and give effect to innovative strategies to enhance diversity beyond the board.

This inertia regarding gender issues might suggest that there was no social pressure like in the U.S. after #MeToo hit. Indeed, although #MeToo spread to Norway with stories of sexual harassment in politics and media companies breaking, the movement did not gain as much traction, with members of the older generation terming it a “witch hunt.”<sup>26</sup> Further, while #BLM did have an echo in Norway in the form of anti-racism protests, this has not led to responses from companies in the way that we saw in the U.S.<sup>27</sup> So far, it remains that the focus on firm diversity in Norway has been limited to increasing the representation of women on corporate boards.

After Norway, other European countries like France, Belgium, Italy, Germany, and Spain introduced quotas for women on corporate boards.<sup>28</sup> Interestingly, Spain, which imposed a 40% gender quota but did not impose a penalty for non-compliance, did not see a substantial increase in female board directors.<sup>29</sup> In fact, as little as 9% of the firms subject to the requirement complied with it.<sup>30</sup> This is reminiscent of Norwegian firms being reluctant to comply with the quota in the period before it became mandatory. At the end of the two-year period before Norway’s quota became mandatory, only about 15.5% of the directors on all public companies were women and this was much lower than what the

---

25. Barnet, *supra* note 17 (“In Norway’s example, the percentage of women in C-suite and senior leadership positions has not risen in tandem [with the increase in number of women in boards].”).

26. Mette Wiggen, *Scandinavia’s #MeToo Problem*, FAIR OBSERVER (Dec. 10, 2019), [https://www.fairobserver.com/360\\_analysis/scandinavia-gender-equality-me-too-movement-norway-sweden-finland-news-73651/](https://www.fairobserver.com/360_analysis/scandinavia-gender-equality-me-too-movement-norway-sweden-finland-news-73651/) [<https://perma.cc/MQT2-HKBR>].

27. David Nickel, *Norway Fears Coronavirus Return As Anti-Racism Protest Fills Oslo Streets*, FORBES (June 6, 2020), <https://www.forbes.com/sites/davidnikel/2020/06/06/norway-fears-coronavirus-return-as-anti-racism-protest-fills-oslo-streets/?sh=5fee47e0504c> [<https://perma.cc/KK74-3DYV>]; see also “Climate Before Cash”: How Young Norwegians Are Driving Change in the Country’s Oil Industry, NBC NEWS (Apr. 12, 2019), <https://www.nbcnews.com/business/energy/climate-cash-how-young-norwegians-are-driving-change-country-s-n993761> [<https://perma.cc/F83N-L7T3>].

28. For a discussion of the varying levels of enforcement measures in each of these countries, see Heike Mensi-Klarbach & Cathrine Seierstad, *Gender Quotas on Corporate Boards: Similarities and Differences in Quota Scenarios*, 17 EUR. MGMT. REV. 615, 623–25 (2020).

29. See *id.* at 620–22; see also C.E., B.O.E. n. 71, Mar. 23, 2007.

30. See Ruth Mateos de Cabo, Siri Terjesen, Lorenzo Escot & Ricardo Gimeno, *Do “Soft Law” Board Gender Quotas Work? Evidence from a Natural Experiment*, 37 EUR. MGMT. J. 611, 611 (2019).

government had intended.<sup>31</sup> Clearly, only a hard quota induced compliance, albeit with the letter rather than the spirit of the law.

In most of the other countries, the number of women directors increased just like it did in Norway.<sup>32</sup> But again, there is no evidence to show that there were more women appointed to the C-Suite or in the rest of the workforce because of such quotas. C-Suite diversity is perhaps even more useful than board diversity for the company and for its workforce's benefit from diversity.

With a view to addressing the lack of women in the C-Suite, Germany, which has a two-tier board system (consisting of the management board and the supervisory board), has imposed a gender quota on the management board.<sup>33</sup> The law requires companies, who have a management board consisting of more than four seats, to fill at least one of these seats with a woman.<sup>34</sup> This is the equivalent of trying to impose a quota on executive directors in a unitary board system (which is what US and other common law countries have). Under Section 76 (4) of the German Stock Corporation Act, these companies were previously only required to set their own targets for the proportion of women on the management board, although a target of zero was also permissible.<sup>35</sup> This quota for management boards is in addition to Germany's 30% quota for women on the supervisory board which has been a requirement since 2015.<sup>36</sup> While a focus on executive directors might have more of an impact than rules only applicable to non-executive board positions, it is too early to tell if this will bring changes to company culture and eventually to

---

31. Sjøfjell, *supra* note 18, at 28.

32. See Helena Vieira, *Quotas Have Led to More Women on Corporate Boards in Europe*, LONDON SCH. OF ECON. & POL. SCI.: BUS. REV. (Sept. 30, 2016), <https://blogs.lse.ac.uk/businessreview/2016/09/30/quotas-have-led-to-more-women-on-corporate-boards-in-europe/> [<https://perma.cc/H2FK-MJCP>].

33. See Jenny Gesley, *Germany: Second Law Establishing Gender Quotas to Increase Number of Women in Company Leadership Positions Enters Into Force*, LIBR. OF CONG. (2021), <https://www.loc.gov/item/global-legal-monitor/2021-09-12/germany-second-law-establishing-gender-quotas-to-increase-number-of-women-in-company-leadership-positions-enters-into-force/> [<https://perma.cc/JD4P-9VKS>] (summary of the Second Leadership Positions Act, 2021 (Ger.), which would make amendments to the Stock Corporation Act, 1965 (Ger.)).

34. *Id.*

35. See *Aktriengesetz* [Law Amending Basic Law], May 10, 2016, BGBl I at 1142, § 76(4) (Ger.), translation at [http://www.gesetze-im-internet.de/englisch\\_aktg/index.html](http://www.gesetze-im-internet.de/englisch_aktg/index.html) (German Stock Corporation Act).

36. See Wendy Zeldin, *Germany: Gender Quotas for Large Companies and for Federal Bodies*, LIBR. OF CONG. (Mar. 17, 2015), <https://www.loc.gov/item/global-legal-monitor/2015-03-17/germany-gender-quotas-for-large-companies-and-for-federal-bodies/> [<https://perma.cc/5SXP-Q62T>] (summary of Germany's Act on Equal Participation of Women and Men regarding Leadership Positions within the Sectors of Private Economy and Public Service, 2015). This change is now reflected in § 96 of the German Stock Corporation Act. See *Aktriengesetz* [Law Amending Basic Law], May 10, 2016, BGBl I at 1142, § 96.

workforce diversity. Only if these changes are brought about will the quota have been a success if one were to assess the requirement from the perspective of addressing the root of the problem.

Like Germany, France first imposed a quota in 2011 for women on the board of directors or the supervisory board in the case of companies that have opted for the dual board model via what is known as the Copé-Zimmerman law.<sup>37</sup> Then, finding that the increased percentage of women on directors did not have any trickle-down impact on management positions, France proposed a bill to impose similar quotas for women in senior management positions in 2021.<sup>38</sup> Known as the Rixain-Castaner bill, this will require companies with more than 1,000 employees to have 30% representation of each sex in positions of “senior managers and members of management bodies” by 2027 and 40% by 2030.<sup>39</sup> In addition to this, companies subject to the Rixain-Castaner bill are also required to annually publish the proportion of women and men in senior management positions.<sup>40</sup> Thus, the bill seems to be employing a mix of quota and disclosure requirements to ensure that companies are compliant. Here too, the success of the bill, once it becomes law, will depend on whether it can address the causes of the problem. Further, one is left to wonder what the solution will be if diversity in management positions is unable to have trickle-down effects to the rest of the workforce. Will there be quotas at every level?

The industry reactions to the new quota for management boards in Germany and France have been mixed. In Germany, Hiltrud Werner, a Volkswagen AG board member, was of the view that the quota was long overdue.<sup>41</sup> However, another company, MTU Aero Engines AG, said that the law “encroaches considerably on companies’ freedom of decision” but then also added that the requirement is “a building block towards promoting women to management positions and encourages us to

---

37. Loi 2011-103 du 27 janvier 2011 relative à la représentation équilibrée des femmes et des hommes au sein des conseils d’administration et de surveillance et à l’égalité [Law 2011-103 of January, 27, 2011 on the Balanced Representation of Women and Men on Boards of Directors and Supervisory Boards and on Professional Equality, JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAIS [J.O.] [OFFICIAL GAZETTE OF FRANCE], Aug. 6, 2014, p. 1680. For a discussion of the law, see also Véronique Magnier & Darren Rosenblum, *Quotas and the Transatlantic Divergence of Corporate Governance*, 34 NW. J. INT’L L. & BUS. 249, 255 (2014).

38. Proposition de loi visant à accélérer l’égalité économique et professionnelle art. 7 [Proposal for Law to Accelerate Economic and Professional Equality], ASSEMBLÉE NATIONALE [NATIONAL ASSEMBLY], Mar. 23, 2021 (Fr.).

39. *Id.*

40. *Id.*

41. See Kim Richters & Dieter Holger, *Germany Readies Quota for Women Board Members*, WALL ST. J. (Mar. 16, 2021), [https://www.wsj.com/articles/germany-readies-quota-for-women-board-members-11615887001?mod=searchresults\\_pos14&page=1](https://www.wsj.com/articles/germany-readies-quota-for-women-board-members-11615887001?mod=searchresults_pos14&page=1) [<https://perma.cc/86Q7-F673>].



strengthen the measures we have already implemented.”<sup>42</sup> This double-speak is interesting and something that resonates in the U.S. too, as will be discussed later in this article. In France, Geoffroy Roux de Bézieux, head of the bosses’ union (Medef), seems to echo MTU Aero Engines AG, minus the double-speak, when he said that there was no need for an extension to the Copé-Zimmermann law and that the Rixain-Castaner bill was interfering with company decisions.<sup>43</sup>

### *B. California—Looking Beyond Gender*

Although the U.S. has taken the route of requiring companies to voluntarily disclose diversity information, one state, California, has recently introduced board quotas.<sup>44</sup> The impact of #MeToo, particularly in Hollywood, might have provided the necessary push to overcome the quota hesitancy, although there is no real evidence to prove that that was the cause.<sup>45</sup> The state initially introduced a gender quota and then followed it up with a quota for racial minorities.

A bill, which was passed in 2018, set out a requirement for companies with principal executive offices in California to appoint at least one woman director by the end of 2019.<sup>46</sup> The requirement would then increase by the end of 2021 for companies with five or more directors.<sup>47</sup> Companies with six or more board members would need to appoint at least three women directors, those with five board positions would need to appoint two women directors.<sup>48</sup> Non-compliance would result in monetary penalties (\$100,000 for the first violation and \$300,000 for each subsequent violation) and the fact of non-compliance being made public.<sup>49</sup> Out of 625 affected companies, only 282 reported that they had complied by the end of 2019.<sup>50</sup> However, no fines were levied because regulations

---

42. *Id.*

43. Alison Hird, *French MPs Approve Quotas for More Women in Corporate Management*, RADIO FR. INT’L (May 13, 2021), <https://www.rfi.fr/en/france/20210513-french-mps-approve-quotas-for-more-women-in-corporate-management> [https://perma.cc/DWB6-ZBSR].

44. Anna Lee, *California Senate Votes for Board Gender Quotas*, GLASS LEWIS (Jul. 3, 2018), <https://www.glasslewis.com/california-senate-votes-for-board-gender-quotas/> [https://perma.cc/794H-USRV].

45. *But see* Joan MacLeod Heminway, *Me, Too and #MeToo: Women in Congress and the Boardroom*, 87 GEO. WASH. L. REV. 1079, 1088 (2019) (Heminway says that such a causal relationship between the social movements and the quota law might be in the eye of the beholder.).

46. S.B. 826, 2017–18 Leg. Sess. (Cal. 2018) (This Bill would amend the California Corporations Code.).

47. *Id.*

48. *Id.*

49. *Id.* at 301.3(e)(1)(B)–(C).

50. Cydney S. Posner, *New Report on California Board Gender Diversity Mandate*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 18, 2020), <https://corp.gov.law.harvard.edu/2020/03/18/new-report-on-california-board-gender-diversity-mandate/> [https://perma.cc/NT37-ARBC].

regarding this are yet to be adopted. Even when fines are levied, as Professor Jesse Fried notes, these amounts would be less than the cost of appointing new board members.<sup>51</sup> It is not clear that naming and shaming will be effective either. On the contrary, one study found that there was a negative share price reaction to the gender quota law.<sup>52</sup> However, the study also found that female board nominees got more votes than male nominees both before and after the gender quota law.<sup>53</sup> This apparent paradox meant that the negative share price reaction was in fact a reflection of “the concern that the board will sub-optimally replace high quality male directors with new female directors.”<sup>54</sup> In other words, the reaction was to the forced intervention rather than a lack of confidence in the ability of female directors.

California, however, did not stop at a gender quota. In 2020, the state passed a bill to impose a quota for “underrepresented communities” to the same companies targeted by the previous bill.<sup>55</sup> The term was defined to mean anyone who self-identified as “Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual or transgender.”<sup>56</sup> This bill would require companies to hire at least one director from the underrepresented communities by the end of 2021, and three (if they have more than nine directors on the board) or two directors (if they have between four and nine directors on the board) by the end of 2022.<sup>57</sup> Monetary penalties would apply for non-compliance of this quota, as was the case for non-compliance with the gender quota.<sup>58</sup>

The term “underrepresented communities” has been questioned in terms of how the categories of communities were chosen. For example, one commentator asked why people of Middle Eastern origin cannot be included when Asians have been included.<sup>59</sup> Such questions are bound to

---

51. See Jesse M. Fried, *Will Nasdaq's Diversity Rules Harm Investors?* 16 (Eur. Corp. Governance Inst., Working Paper No. 579/2021, 2021).

52. Marina Gertsberg, Johanna Mollerstrom & Michaela Pagel, *Gender Quotas and Support for Women in Board Elections 2* (GMU Working Paper in Econ. No. 21-04, 2021).

53. See *id.* at 12.

54. *Id.* at 19–20.

55. AB-979, 2019–2020 Leg. Sess. (Cal. 2020) (fully titled as: Corporations: Boards of Directors: Underrepresented Communities). *But see* Harold R. Jones, *California Superior Court Finds AB 979 Is Unconstitutional*, NAT'L L. REV. (Apr. 6, 2022), <https://www.natlawreview.com/article/california-superior-court-finds-ab-979-unconstitutional> [<https://perma.cc/9U75-LZV4>].

56. Cal. AB97 § 301.4(c)(1).

57. *Id.* § 301.4(b)(1)(3).

58. *Id.* § 301.4(d).

59. David A. Bell, Dawn Belt & Jennifer J. Hitchcock, *New Law Requires Diversity on Boards of California-Based Companies*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 10, 2020), <https://corpgov.law.harvard.edu/2020/10/10/new-law-requires-diversity-on-boards-of-california-based-companies/> [<https://perma.cc/RM4V-JRP8>].

arise whenever an attempt is made to define something as broad as underrepresentation. However, when some types of diversity get left out, the purpose of the law is defeated. Ultimately, it is good to see policy makers view facets of diversity beyond gender, but a blunt tool like the quota will require us to commit to a definition of diversity which might prove troublesome. There have been a few constitutional challenges of the quotas from some organizations, but companies have mostly refrained. This reticence to challenge the law may be partly because of pressure from institutional investors and partly because it would appear to go against #MeToo and BLM, which companies publicly supported. Eventually, a County Superior Court in Los Angeles, California, provided summary judgment, upholding a challenge to the California board diversity quota law.<sup>60</sup> Even beyond the architecture of the quota itself and constitutional issues, the official reasoning provided for the law is problematic because it makes claims about women directors and racial minority directors being able to increase firm profits. Not only are such claims resting on flimsy evidence,<sup>61</sup> but they are also harmful to the very women and minority individuals that the law seems to be aiming to help.<sup>62</sup>

The initial bill to introduce the quota for women specifically mentioned that many technology companies in California went public without having any women on their boards.<sup>63</sup> However, since technology companies in the United States have fewer women entering the workforce to begin with, it might then be worth asking whether the board should have gender parity or simply reflect the demographics of the rest of the company.<sup>64</sup>

The bigger problem that probably needs to be addressed in the technology sector is that many companies reportedly have a work culture hostile to women and this makes it difficult to retain women in the

---

60. See Trial Order, *Crest v. Padilla*, No. 20 STCV 37513 (Cal. Super. Apr. 1, 2022), 2022 WL 1073294.

61. The studies only show correlation between women/racial minorities and higher profits but no evidence that women/racial minorities were the cause of such rise in profits. Krawiec makes these arguments regarding Bill S.B. 826, 20182019 Less. Sess. (Cal 2018). See Kimberly Krawiec, *Board Diversity in the News Again* (Sept. 1, 2018), <http://kimberlykrawiec.org/board-diversity-in-the-news-again/> [<https://perma.cc/WNX3-6F2S>].

62. See generally Akshaya Kamalnath, *California's Proposed Quota for Women on Corporate Boards*, OXFORD BUS. L. BLOG (Sept. 24, 2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/09/californias-proposed-quota-women-corporate-boards> [<https://perma.cc/M62D-VG4F>].

63. Cal. S.B. 826 § 1(f)(3).

64. Susan Pinker, *Why Aren't There More Women in Science and Technology?*, WALL ST. J. (Mar. 1, 2018), <https://www.wsj.com/articles/why-arent-there-more-women-in-science-and-technology-1519918657> [<https://perma.cc/Q8MC-7VD6>].

workforce.<sup>65</sup> An example of this problem is the work culture at Uber, which became a matter of public discussion when an employee published a blog post about issues of sexual harassment at the company.<sup>66</sup> A more recent example of this problem is the culture at Activision Blizzard, a video game company whose employees staged a walk-out in July 2021 in protest against widespread harassment and discrimination and an alleged rape which came to light when a lawsuit was filed.<sup>67</sup> These problems cannot be addressed by mandating a quota at the top. Further, details coming to light later about Activision Blizzard seem to point to a governance issue, i.e., the CEO not reporting serious issues of harassment to the board of directors.<sup>68</sup> Simply increasing the number of diverse members on the board of companies like Activision Blizzard through quota law would not have helped address the issue of CEO monitoring. Even if one makes the claim that a diverse board would have monitored the CEO better and ensured that relevant information was transmitted to the board, that is a deeper issue that needs to be examined. Not all diverse board members bring diverse perspectives; and even when they do, not all of them are psychologically independent of the CEO. Therefore, the solution to CEO monitoring should go beyond simple board diversity quotas. One possible solution to manage this problem would be to have a higher number of diverse executives among the management team. Diversity in the management team might act as a necessary check against rogue CEOs.

Finally, while the board and management may create and put in place risk management systems, the impact of such frameworks on corporate culture should also be scrutinized when assessing a firm's commitment to diversity. Ensuring a firm culture that does not allow wrong-doing, including harassment and discrimination, is probably more important than asking companies to hire a minimum number of women directors. An

---

65. Infographic of data from Women in Tech survey, ELEPHANT IN THE VALLEY, <https://www.elephantinthevalley.com/> [<https://perma.cc/U8LW-2YYP>].

66. Akshaya Kamalnath, *Corporate Diversity 2.0: Lessons from Silicon Valley's Missteps*, 20 OR. REV. INT'L L., 113, 150–64 (2018).

67. Zoe Schiffer, *Activision Blizzard Employees Walk Out of Work to Protest Rampant Sexism and Discrimination*, VERGE, (Jul. 28, 2021), <https://www.theverge.com/2021/7/28/22598410/activision-blizzard-employee-walk-out-protest-sexism-discrimination-lawsuit> [<https://perma.cc/LHH2-6NNW>]. The California Department of Fair Employment and Housing brought a lawsuit against the company alleging that “the company had a pervasive ‘frat boy’ culture where female employees were constantly harassed, discriminated against, and underpaid.” *Id.*

68. Kirsten Grind, Ben Fritz & Sarah E. Needleman, *Activision CEO Bobby Kotick Knew for Years About Sexual-Misconduct Allegations at Videogame Giant*, WALL ST. J. (Nov. 16, 2021), <https://www.wsj.com/articles/activision-videogames-bobby-kotick-sexual-misconduct-allegations-11637075680>.

emphasis on culture will help diversify the sector more organically than simply hiring diverse candidates at the top.

### *C. The Report Card on Quotas*

While it is too early to tell how California's board quotas will play out, it would seem from the European experiences that the number of diverse board members will increase, provided that the penalties are enforced.<sup>69</sup> Otherwise, we might have a situation of poor compliance like in Spain.<sup>70</sup> However, the European experience would also suggest that improved board diversity will not result in improved diversity in the C-Suite and the wider workforce.<sup>71</sup> However, the quota imposed by California might fare better than its European counterpart because there is more ostensible support for the underlying issues driving diversity quotas from both firms and other market participants in the aftermath of #MeToo and BLM. However, if firms merely support social causes outwardly, without sincere intent, the quota law might incentivise them to simply do the minimum required to comply, especially once the social movements lose momentum.

There are also other issues with using quotas as a regulatory tool. Requiring quotas can lead to "token appointments". The phrase token appointments describes the phenomenon where women are appointed merely to fulfill the legal requirement, rather than for the value they bring.<sup>72</sup> This is reflected in the golden skirts in Norway. Such over-extended female directors might not have enough time to contribute substantially on every board they are part of. Another manifestation of token appointments occurs when women who are related to existing directors or members of the top management are hired as directors just to fulfill the quota requirements. These token appointments have been observed in France<sup>73</sup> and India (which has a form of gender quota for

---

69. See Mensi-Klarbach & Seierstad, *supra* note 28, at 624.

70. *Id.*

71. See, e.g., Agata Maida & Andrea Weber, *Gender Quota on Corporate Boards in Italy Had No Spillover Effects*, INST. LAB. ECON.: IZA NEWSROOM (Feb. 4, 2019), <https://newsroom.iza.org/en/archive/research/gender-quota-on-corporate-boards-in-italy-had-no-spillover-effects/> [<https://perma.cc/74MR-EXZG>].

72. Akshaya Kamalnath, *Diversity Quotas Will Only Lead to Token Appointments, Doing More Harm Than Good*, THE CONVERSATION (Feb. 25, 2020), <https://theconversation.com/diversity-quotas-will-only-lead-to-token-appointments-doing-more-harm-than-good-132244> [<https://perma.cc/VQ3Q-JJQV>].

73. See Rosenblum, *supra* note 6, at 1454. Professor Rosenblum interviewed current and former corporate board members from the largest and most actively traded companies listed on France's stock exchange in 2011 when the Copé-Zimmerman law was introduced. See *id.* Some of their interviewees said that smaller firms might comply with the quota by appointing "marionettes," i.e., "a female relative or paramour," so as to pay a smaller salary than other women would demand as a result of the quota. *Id.*

corporate boards and has a sizeable number of family-owned firms).<sup>74</sup> A more subtle manifestation of tokenism has also been observed—one where women directors are not appointed to key board committees such as in the audit, nomination, and compensation committees.<sup>75</sup> As Christie Ford said, “[b]right-line rules are the easiest to game and the hardest to tailor properly to any given situation.”<sup>76</sup> Quotas are definitely bright-line rules that corporations game by making token appointments.<sup>77</sup> Because companies are unique and face a variety of different issues, any regulation, like requiring a quota that is incapable of addressing every scenario, might lead to unintended consequences.<sup>78</sup>

A significant unintended consequence of diversity quota rules are the stigmatisation of women or other individuals who are their beneficiaries.<sup>79</sup> The fact that these directors, even well-qualified ones, were appointed as a result of quota laws, might result in a negative perception by their peers.<sup>80</sup> Further, colleagues who are not the beneficiaries of the quota law might view the measure as unfair, which could also have negative impacts on workplace collaboration, particularly with individuals appointed as a

---

74. Because companies mostly appointed family members to comply with the quota requirement, a new listing rule was introduced which required at least one woman director who is also an independent director to be appointed to the board. See Akshaya Kamalnath & Annick Masselot, *Corporate Board Gender Diversity in the Shadow of the Controlling Shareholder—An Indian Perspective*, 19 OXFORD U. COMMONWEALTH L.J. 179, 180 (2019).

75. Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L.J. 145, 178 (2019) (“Females are more likely than their male colleagues to serve on the Corporate Governance and Compensation committees and less likely than males to serve on the Audit Committee after controlling for Age and Industry.”); see also Ruth V. Aguilera, Venkat Kuppaswamy & Rahul Anand, *What Happened When India Mandated Gender Diversity on Boards*, HARV. BUS. REV. (Feb. 5, 2021), <https://hbr.org/2021/02/what-happened-when-india-mandated-gender-diversity-on-boards> [<https://perma.cc/5CKZ-8YGH>]. In India, after the listing rules made it clear that listed companies should have at least one independent director who is a woman, companies appointed qualified members who were not related to the family of the controlling shareholders. *Id.* However, these women directors were not appointed to important board committees. *Id.*

76. CHRISTIE FORD, INNOVATION AND THE STATE: FINANCE, REGULATION, AND JUSTICE 26 (2017).

77. See *id.*

78. See Edmans, *infra* note 190, at 14.

79. This is true for quotas of any sort. In India, where there are quotas for various castes and religions in educational institutions and public sector jobs, the term quota has taken on a negative connotation. A great illustration of this is a dialogue from an Indian movie, titled 83, which shows the journey of the Indian cricket team that was very much an underdog in the 1983 cricket world cup. 83 (Kabir Khan Films 2021). When the team surprises everyone by qualifying for the finals, a news article calls it a fluke. *Id.* Some of the team members are irritated by this and discuss the article internally. *Id.* One team member angrily says in that discussion that they have won the required number of games to qualify, rather than qualifying through a quota. *Id.* The dialogue is indicative of the negative connotation that quotas bring with them.

80. See Lisa M. Leslie, David M. Mayer & David A. Kravitz, *The Stigma of Affirmative Action: A Stereotyping-Based Theory and Meta-Analytic Test of the Consequences for Performance*, 57 ACAD. MGMT. J. 964, 964 (2013).

result of the quota.<sup>81</sup> This is unfortunate because research suggests that supportive colleagues, particularly from the dominant groups (men, whites, able-bodied, etc.) can generate feelings of inclusion for members of minority groups.<sup>82</sup> Further, researchers have identified mentoring and networking as two ways in which women have been able to overcome barriers to upward mobility and gain leadership positions.<sup>83</sup> However, resentment generated by a quota law might discourage dominant group members from championing women or racial minority colleagues through mentoring or networking.

An unfortunate yet comic unintended consequence of quota law recently took place in the public sector of France. It was reported in December 2020 that the mayor of Paris, Anne Hidalgo, was fined 90 thousand euros (roughly \$94,200) for appointing eleven women out of sixteen upper management open positions in the city government because it violated the 40% quota for the “underrepresented sex.”<sup>84</sup> In this situation, the underrepresented category became men, rather than women, thus giving rise to what Hidalgo called an “absurd and unfair” fine.<sup>85</sup> Of course, the fine was justified in terms of what the law required, but it also seems curious to penalise the mayor for appointments that improved women’s representation in leadership positions, especially at a point in time when women are still held down by the glass ceiling. Further, one could argue that the eleven women might have been the most meritorious candidates. My argument here is not that men should be underrepresented, but rather that the quota is an instrument that is too blunt to avoid adverse consequences to equality within corporations. Although this story from France is not from the corporate world, it may well have been, considering that hard quotas are being imposed there, as well as in many other jurisdictions.

In the private enterprise world, there would also be an argument that if an entrepreneur decides to create a company with only women on the

---

81. *Id.* at 964, 977.

82. See Charlotte E. Moser & Nyla R. Branscombe, *Male Allies at Work: Gender-Equality Supportive Men Reduce Negative Underrepresentation Effects Among Women*, 13 SOC. PSYCH. & PERSONALITY SCI. 372 (2021).

83. Cindy A. Schipani, Terry M. Dworkin, Angel Kwolek-Folland, Virginia Maurer & Marina v.N. Whitman, *Women and the New Corporate Governance: Pathways for Obtaining Positions of Corporate Leadership*, 65 MD. L. REV. 504, 509, 534 (2006).

84. Darren Rosenblum, *When the State Levies Fines on Feminism*, FORBES (Dec. 17, 2020), <https://www.forbes.com/sites/darrenrosenblum/2020/12/17/when-the-state-should-levy-fines-on-feminism/?sh=1356f2ce25b8> [<https://perma.cc/4999-UPC4>].

85. *Anne Hidalgo Denounces an “Absurd and Unfair” Fine*, HUFFPOST (Dec. 15, 2020), [https://www.huffingtonpost.fr/entry/anne-hidalgo-invite-les-femmes-a-venir-avec-elle-regler-lamende-pour-non-respect-de-la-parite\\_fr\\_5fd8ba45c5b663c37599d8b4](https://www.huffingtonpost.fr/entry/anne-hidalgo-invite-les-femmes-a-venir-avec-elle-regler-lamende-pour-non-respect-de-la-parite_fr_5fd8ba45c5b663c37599d8b4) [<https://perma.cc/AV7B-X5HE>].

board or in C-Suite, they should be able to do it. Ultimately, the broader goal of improving equality within the firm is not achievable through the quota route. This is best illustrated by the metaphor of a track race used by Neeka Choobineh.<sup>86</sup> She asks us to imagine a track race where men and women start at the same point, but only women encounter obstacles along the path thus causing some to get tired and leave the race, while men run straight ahead.<sup>87</sup> Then she brings the quota solution into this track race: “Every so often, a referee drives next to the running competitors in a golf cart, picks up a few women who are still in the process of completing the race, places them in the passenger’s seat, and drives them to the finish line.”<sup>88</sup>

Even though the referees might think that this ensures equality, Choobineh points out that the male athletes who do not win an award might feel cheated because they have run the whole race while the women have been dropped off by the golf cart.<sup>89</sup> Not only this, those men who do win an award, might look down on the women who win because they did not run the full race.<sup>90</sup> Further, Choobineh rightly concludes that the golf cart policy (or quota) “simply places women at the finish line, thereby entrenching the focus on gender rather than ensuring that the track & field abilities of both men and women are equally measured in the race.”<sup>91</sup> This metaphor really helps draw attention to the fact that quota laws do not address the problems that give rise to inequality in the workplace, but instead makes a cosmetic fix at the top of the corporation which in fact gives rise to further problems like tokenism and resentment against women or whichever group is eligible to benefit from the quota.

To be able to address the actual obstacles on the track hampering women, the more general barriers like care obligations society imposed on women, toxic work cultures that may drive women to leave the company, and discrimination because of conscious or unconscious bias should be addressed. While some of these inequalities may be addressed by corporations, the external issues like the social expectations of care-giving placed on women are to be solved by forces external to the corporation. As Ernest Lim argues on the issue of gender diversity in corporate boards, quotas will not solve the root of the problem: systemic and structural

---

86. Neeka Choobineh, *Gender Quotas for Corporate Boards: A Holistic Analysis* (2016) (published B.S. thesis, Wharton School of the University of Pennsylvania) (on file at University of Pennsylvania Libraries).

87. *Id.* at 33.

88. *Id.*

89. *Id.* at 34.

90. *Id.*

91. *Id.*



disadvantages that women face.<sup>92</sup> He further adds that these should be addressed by the state.<sup>93</sup> Choudhury also notes that there has to be some state responsibility to solve the structural problems faced by women.<sup>94</sup> Simply requiring companies to appoint more women on their boards is not enough to solve them.<sup>95</sup>

As far as bias and discrimination within the firm is concerned, corporations can attempt to address these issues within the workforce. However, this cannot be achieved through quotas. As Leanne Fuith rightly says, “The difficulty lies in attempting to legislate the hearts and minds of individuals in a society that has long viewed women as secondary.”<sup>96</sup> The difficulty also exists for discrimination and bias for reasons other than gender—race, national origin, disability, etc. For instance, recall the story of Shefaly Yogendra who said that as an immigrant and a person of Indian origin in U.K., she often found that recruitment firms did not believe her resume.<sup>97</sup> There is also research that shows that people who speak English with certain accents find it difficult to obtain senior executive positions.<sup>98</sup> Fuith hits the nail on the head when she says that “[c]orporations are less likely to authentically and fully embrace the issue of gender and other types of diversity on their corporate boards when they are forced to do so.”<sup>99</sup> This is consistent with the post-quota law developments in Germany

---

92. ERNEST LIM, SUSTAINABILITY AND CORPORATE MECHANISMS IN ASIA 113–14 (2020); *see also* Barnali Choudhury, *New Rationales for Women on Boards*, 34 OXFORD J.L. STUDIES 511, 520 (2014).

93. LIM, *supra* note 92; *see also* Choudhury, *supra* note 92, at 542 (“It is therefore time for the government to take on a greater role in this matter as issues of equality are too important to be left solely in the hands of business.”).

94. Choudhury, *supra* note 92, at 541.

95. *Id.*

96. Leanne Fuith, *Achieving Diversity on Corporate Boards: Engagement and Education; Not Legislation*, 45 MITCHELL HAMLINE L. REV. 112, 132 (2019) Quoting Martin Luther King, Jr., who described the need for civil rights legislation while acknowledging its limitations:

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

*Id.* (footnote omitted).

97. *See* LaToya Harding, “People Didn’t Believe My CV” Says Board Director, BBC NEWS (June 16, 2021), <https://www.bbc.com/news/business-57486592> [<https://perma.cc/MN5F-NLVT>].

98. *See* Laura Huang, Marcia Frideger & Jone L. Pearce, *Political Skill: Explaining the Effects of Nonnative Accent on Managerial Hiring and Entrepreneurial Investment Decisions*, 98 J. APPLIED PSYCH. 1005, 1014 (2013) (“Nonnative accent, not race, best explained executive hiring recommendations and new venture funding.”).

99. Fuith, *supra* note 96, at 133.

and France, where firms did the bare minimum of appointing the required number of directors without internalising the idea of enhancing opportunities for women.<sup>100</sup> As a result, there were no trickle-down effects of the law to management positions and new quotas needed to be imposed for management positions.<sup>101</sup>

Another important point Choobineh makes, and one that is often overlooked, is that the golf cart solution may crowd out potentially qualified men for the awards.<sup>102</sup> This sounds like an unfair argument considering that qualified women are left out of top positions because of the obstacles they face, until we recall the example from France discussed above where it seems like the appointment of women leaders was questioned. These sorts of outcomes are bound to create resentments across identity groups. This is detrimental to the very individuals that the quota is supposed to help. Further, there is no way to cover all types of underrepresented groups in a quota law. When the quota does not cover certain groups within the broad category meant to be addressed, as we see in the California quota, which only includes some groups within “underrepresented groups,” or when the quota is only targeted at one group (as in the case of gender quotas), then other disadvantaged people will continue to be left out.

Beyond equality issues, the benefits of diversity in terms of improved team outcomes and decisions throughout the company are not gained if board quotas do not translate into diversity across the entire firm. Even at the board, if the quota simply brings in more insiders—whether those holding multiple directorships or family members of members of the management team—to the table, it is unlikely to result in much cognitive diversity. Further, any diverse thinking that these candidates bring, by virtue of their identity as women or other minority status, can only provide results if the board and CEO are genuinely interested in hearing and considering their views, not just considering them as tokens.

For all the above reasons, quotas are not useful and might result in unintended negative consequences. The snowball needs to be stopped.

## II. DISCLOSURE LAWS AND MARKET INITIATIVES

Can sunlight do better than the snowball? Disclosure requirements are often justified by the famous quote “[s]unlight is said to be the best of disinfectants,” referring to the fact that making information public, which was once private, will allow interested parties, like investors, to see an

---

100. See discussion *supra* Section I.A.

101. *Id.*

102. Choobineh, *supra* note 86, at 34.

issue and demand change.<sup>103</sup> In time, corporate disclosures, particularly those regarding social and sustainability issues, have become a source of information for other stakeholders.<sup>104</sup> While prescriptive laws like the ones imposing quotas incentivise compliance in name only, the idea with disclosure requirements is that they force companies to pay attention to the issue and the reputational impact of the diversity information that will be disclosed is supposed to incentivise better behaviour. Further, they allow companies more flexibility to tailor programs to suit their needs. The “softness” of such laws might also ensure buy-in from firms in that they would understand and try to give effect to the spirit of the law, improving opportunities and work conditions for diverse employees.

However, as this Article discusses in this section, disclosure laws about diversity, coupled with various external pressures, take on the form of aspirational quotas and thus also come with some of the costs of actual quotas. Furthermore, not all disclosure laws are equal. Some may genuinely be aimed at encouraging corporate involvement and creativity in solving their lack of diversity, while others may act as a warning for corporations to either voluntarily comply with the minimum expectation (for instance, appoint 30% women on their boards) or expect mandatory legislation in this regard. As Rosenblum notes, the *fear* of legislation may prove nearly as powerful as legislation itself.<sup>105</sup> I would add that if companies respond to the threat of quotas as if there was a quota law, then such threats will also give rise to the costs of quotas.

This section will discuss the diversity disclosure requirements in the United States.

#### *A. U.S.—The “Comply and Explain” Rule*

The Securities Exchange Act of 1934 requires that shareholders of a company whose securities are listed on a national stock exchange receive a proxy statement prior to a shareholder meeting, whether an annual or special meeting.<sup>106</sup> The information contained in the statement must be filed with the Securities Exchange Commission (SEC) before soliciting a shareholder vote on the election of directors and the approval of other

---

103. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* 92 (1914).

104. See Varottil Umakanth, *A Dose of Sunlight Therapy: Using Corporate and Securities Laws to Treat Climate Change* 7 (Indian Yearbook Int’l L. & Pol’y Working Paper, 2009), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1570346](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1570346); see also Ann M. Lipton, *Not Everything Is about Investors: The Case for Mandatory Stakeholder Disclosure*, 37 *YALE J. ON REGUL.* 499 (2020).

105. Rosenblum, *supra* note 6, at 1452.

106. 15 U.S.C. § 78n (1934).

corporate action.<sup>107</sup> Companies are required to disclose required information in the proxy statement.<sup>108</sup>

After the financial crisis of 2008, certain additions were made to these disclosure requirements and the law was amended accordingly.<sup>109</sup> Following this amendment, listed companies, beginning in February 2010, are required to disclose their diversity policy for nomination of directors, if they have one in place, and describe its implementation in their annual proxy and information statements.<sup>110</sup> The relevant portion of the law states that companies are to disclose a range of details regarding their director nomination process. The item corresponding to diversity states as follows:

Describe the nominating committee's process for identifying and evaluating nominees for director . . . and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.<sup>111</sup>

Thus, the disclosure about diversity is with reference to whether diversity is a consideration for the company in the nomination process. Where such a diversity policy exists, the rule also requires companies to disclose its implementation and its effectiveness as assessed by the nomination committee of the board.<sup>112</sup> Thus, while there is no requirement to explain why there is not a diversity policy in place, if the company does not have one, more detailed disclosures are required where the company does have a diversity policy. In other words, it is a "comply and explain" rule. Lisa Fairfax has rightly noted that the need to explain the implementation and effectiveness of the diversity policy where one exists would incentivise companies to adopt policies that would yield results.<sup>113</sup> Conversely, firms that are uninterested in focusing on diversity will not adopt a diversity policy. The voluntary nature of this would prevent greenwashing, provided that there were no external pressures to show a commitment to diversity.

---

107. *Id.*

108. *Id.*

109. Proxy Disclosure Enhancements, Release Nos. 33-9089; 34-61175, 74 Fed. Reg. 68,333 (Dec. 23, 2009).

110. Corporate Governance, 17 C.F.R. § 229.407(c)(2)(vi).

111. *Id.*

112. *Id.*

113. Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story*, 89 N.C. L. REV. 855, 874 (2011).

Significantly, the rule does not define the term “diversity” and it is up to companies to explain how they understand the term. In its proposal, the SEC anticipated that companies might define diversity in different ways.<sup>114</sup> While some might define diversity in terms of demographic aspects like race, gender, and nationality, other companies might define it in terms of diversity of viewpoint, educational qualifications, and professional experience.<sup>115</sup> The proposal document explains that “companies should be allowed to define diversity in ways that they consider appropriate,” and thus the SEC specifically chose not to define the term.<sup>116</sup> This is a useful approach because it avoids the pitfalls of providing a definition which excludes some categories, as seen in the California provision. Further, it allows each company to identify the aspects of diversity that are most relevant to its operations and workforce.

Aaron Dhir, in a content analysis of proxy disclosures on diversity published in 2015, found that firms mainly defined diversity to mean non-identity based factors like prior experience rather than identity-based factors like race or gender.<sup>117</sup> However, the number of firms that used gender as one of the definitions of diversity has gradually climbed.<sup>118</sup> Yaron Nili’s study considered data up to 2016, which predates the #MeToo and BLM movements.<sup>119</sup> We can infer from this that companies originally did not consider gender diversity to be very important but gradually began to as awareness and investor pressure grew. In any case, the SEC seems to have intended a broader idea of diversity. It alluded to the link between board diversity and independence when it stated that while looking for diverse candidates, boards might be forced to look outside of their existing networks and that the resulting board might be more independent.<sup>120</sup> Further, it stated that where the company was in need of more independence, the result of a more diverse and thus independent board would be improved governance.<sup>121</sup> It is explained that such improved governance might be the result of the availability of different viewpoints.<sup>122</sup>

---

114. Proxy Disclosure Enhancements, Release Nos. 33-9089; 34-61175, 74 Fed. Reg. 68,333, at 68,344, 68,357 (Dec. 23, 2009).

115. *Id.*

116. *Id.*

117. DHIR, *supra* note 20, at 270.

118. See Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 INDIANA L.J. 145, 185 (2019).

119. *See id.*

120. Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,343.

121. *Id.* at 68,355.

122. *Id.*

In his 2019 article, Yili criticised the fact that very few firms even defined diversity.<sup>123</sup> However, he noted that some firms did meaningfully engage with diversity through a well framed policy and subsequently with changes to board composition. Since Yili’s focus on the article was gender, those are the examples he provides. In any case, the nature of soft law (which is what the disclosure rule is) is that it brings about gradual change as companies learn from the disclosures of their peers and through investor engagement, and engagement by other kinds of audiences.<sup>124</sup> Indeed, large institutional investors began to pressure companies specifically on gender diversity by 2017. More on that in the Section on market initiatives below.

### *B. Nasdaq’s “Comply or Explain” Rule*

In August 2021, the U.S. SEC approved a listing rule applicable to companies that are listed on the Nasdaq Stock Exchange.<sup>125</sup> Although this rule is in the form of a disclosure rule, it is quite a different animal from the SEC diversity disclosure rule both because of its content and because of the way in which it is structured.

The rule requires Nasdaq-listed companies (with some exceptions) to have at least two directors who are “diverse”, including at least one director who self-identifies as female and at least one director who self-identifies as an “underrepresented minority or LGBTQ+”.<sup>126</sup> The term “diverse” is defined quite differently from the way this book defines it. Per the Nasdaq rule, it means “an individual who self-identifies in one or more of the following categories: (i) Female, (ii) Underrepresented Minority, or (iii) LGBTQ+”.<sup>127</sup> Then “underrepresented minority” is in turn defined as “someone who self-identifies as one of 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.”<sup>128</sup> Clearly there is no place for viewpoint diversity, or age diversity, or experiential diversity in this definition. Also, the definition of “underrepresented minority” can be attacked with the same argument as in the California law by asking why Arabs or some other category of people are not included.<sup>129</sup> Non-compliant companies must explain the reasons

---

123. See Nili, *supra* note 118, at 185–86.

124. See Fairfax, *supra* note 113, at 873.

125. Self-Regulatory Organizations, Exchange Act Release No. 34-92590, 86 Fed. Reg. 44,424 (Aug. 12, 2021) (release approving SR-NASDAQ-2020-081 and SR-NASDAQ-2020-082).

126. *Id.* at 44,424–25.

127. *Id.* at n.24.

128. *Id.* at n.18.

129. See generally David E. Bernstein, *The Modern American Law of Race*, 94 S. CAL. L. REV. 171 (2021) for a discussion of how racial and ethnic minorities in the United States were categories for various purposes. (“The few records that exist suggest that (1) even the bureaucrats who made the

for their non-compliance.<sup>130</sup> Not only this, such companies are then provided with a network of diverse (as defined in the Nasdaq rule) and board-ready candidates to recruit from.<sup>131</sup> Such requirements differ from the SEC diversity disclosure rule inasmuch as there is a clear stipulation of what diversity means and specification of the target number of diverse (as defined by the rule) directors to be appointed.

Structurally, it is different from the SEC's "comply *and* explain" rule because the Nasdaq rule requires companies to either comply *or* explain reasons for non-compliance. This makes the rule an aspirational quota. I use this phrase because the specified target then becomes the number that investors and activists will ask for and will take away the focus from other innovative diversity related measures that a company might want to pursue. Additionally, the option to explain rather than comply is illusory because firms will hesitate to signal a disinterest in diversity, especially in the wake of #MeToo and BLM.<sup>132</sup>

Critics have raised concerns about the Nasdaq rule pushing more companies to avoid going public, or about the rule harming investors if one expects the negative stock price reaction to the California gender quota to be replicated here as well.<sup>133</sup> The constitutional validity of the Nasdaq rule has also been challenged (as was the case with the California quota) by some think-tanks and the issue is yet to be ruled upon.<sup>134</sup> Again, here too it is not corporations that are challenging the rule, because they would most likely be hesitant to publicly show their displeasure with any rule about diversity. Finally, Professor Jesse Fried has criticised Nasdaq for selectively relying on studies or parts of studies where the outcome appears to support its proposed regulation and ignoring other studies where it is not.<sup>135</sup> This has unfortunately been a common problem with law and policy discussions on the issue of diversity even beyond Nasdaq.<sup>136</sup> In light of the California quota and the Nasdaq rule, the importance of the policy rationale informing law and regulation become clear. Had the discussions delved more into the specific problems faced by diverse

---

decisions were unable to articulate why certain groups were included and others were not, or why they included or excluded groups with particular cultural backgrounds or countries of origin." *Id.* at 242.

130. *See* Self-Regulatory Organizations, 86 Fed. Reg. at 44,426.

131. *Id.*

132. Fried, *supra* note 51, at 7.

133. *Id.*; *see also* Andrew Ackerman, *Nasdaq's Plan for Diversity on Corporate Boards Is Decried by Senate Republicans*, WALL ST. J. (Feb. 12, 2021), <https://www.wsj.com/articles/nasdaq-plan-for-diversity-on-corporate-boards-is-decried-by-senate-republicans-11613160390>.

134. Tracy Thomas, *NASDAQ Board Diversity Regulations Challenged in Court*, GENDER & THE L. BLOG (Oct. 27, 2021), [https://lawprofessors.typepad.com/gender\\_law/2021/10/nasdaq-board-diversity-regulations-challenged-in-court.html](https://lawprofessors.typepad.com/gender_law/2021/10/nasdaq-board-diversity-regulations-challenged-in-court.html) [<https://perma.cc/SH32-T759>].

135. *See generally* Fried, *supra* note 51.

136. *See* Edmans, *infra* note 190.

candidates, the rules might have been less rigid and possibly attempted to address issues of bias, lack of access to networks, bullying, harassment, etc. Thus, at the moment, the Nasdaq rule fails to properly achieve its desired mission.

*C. UK—Principles-Based Disclosure Against the  
Backdrop of Targets*

In the UK, diversity disclosures are required (in a comply or explain format) by the Corporate Governance Code of 2018 (UK Code). The UK Code sets out the recognised corporate governance standards for companies listed in the UK.<sup>137</sup> Companies in the UK that have premium listing<sup>138</sup> on the London Stock Exchange (LSE) have to report on how they applied the principles set out in the UK Code.<sup>139</sup> Hence, it is known as principles-based disclosure. At the outset, the UK Code emphasises the following:

The ability of investors to evaluate the approach to governance is important. Reporting should cover the application of the Principles in the context of the particular circumstances of the company and how the board has set the company's purpose and strategy, met objectives and achieved outcomes through the decisions it has taken.<sup>140</sup>

Further, explaining the rationale for such a principles-based approach rather than rigid requirements, the UK Code says that its approach is meant to offer flexibility and that companies should use it wisely.<sup>141</sup>

The principles in the UK Code are categorised into five main heads: 1) board leadership and company purpose; 2) division of responsibilities; 3) composition, succession, and evaluation; 4) audit, risk and internal control; and 5) remuneration.<sup>142</sup> While the principles most relevant to diversity are contained in the third category, there are other principles in the UK Code that are of relevance.

Before getting into the details of the requirements set by the UK Code, it is worth noting that the UK Code's definition of diversity is perhaps the most in line with how this article conceives of diversity because it seeks to promote "diversity of gender, social and ethnic

---

137. FIN. REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE 3 (2018), <https://www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF> [<https://perma.cc/5F98-PTGZ>] [hereinafter UK CODE].

138. As per 2010 changes to the Financial Services Authority (FSA), only voting equity shares can have premium listing. See generally Listing Rules Sourcebook (Amendment No 4) Instrument 2010, FSA 2010/7 (UK).

139. UK CODE, *supra* note 137.

140. *Id.* at 2.

141. *Id.* at 1.

142. *Id.* at 1, 4, 6, 8, 10.



backgrounds, cognitive and personal strengths.”<sup>143</sup> As such, the UK Code’s diversity definition goes beyond gender when considering demographic diversity, and at the same time avoids the California and Nasdaq rules’ common pitfall of trying to exhaustively define the term “underrepresented minority.” Even more significantly, it expressly mentions cognitive diversity.

Interestingly, in the UK Code, diversity is not meant to be an overriding consideration, but rather to be considered within the context of merit. Thus, it seems to be a matter of favouring diverse candidates who are equally meritorious.<sup>144</sup> The principle outlining this process, Principle J, in its entirety reads:

Appointments to the board should be subject to a formal, rigorous and transparent procedure, and an effective succession plan should be maintained for board and senior management. Both appointments and succession plans should be based on merit and objective criteria and, within this context, should promote diversity of gender, social and ethnic backgrounds, cognitive and personal strengths.<sup>145</sup>

The provisions of the UK Code that explain how this principle can be given effect to focus on the appointment process and say that the “board should establish a nomination committee to lead the process for appointments, ensure plans are in place for orderly succession to both the board and senior management positions, and oversee the development of a diverse pipeline for succession.”<sup>146</sup> Further, to ensure that the members of the nomination committee do not just appoint their friends or the friends of other board members, the provisions note that the board should use “open advertising and/or an external search consultancy” for the appointment of non-executive directors and the board chair.<sup>147</sup> Additionally, where an external search consultancy is used, the board should identify the agency in its annual report “alongside a statement about any other connection it has with the company or individual directors” to ensure that the search process is not indirectly captured.<sup>148</sup>

Principle K goes on to add that the “board and its committees should have a combination of skills, experience and knowledge.”<sup>149</sup> Clearly, there is a further emphasis on other facets of diversity here. Additionally, it says

---

143. *Id.* at 8 (Principle J).

144. The framing of this principle clarifies that diversity will not be at the cost of merit. *See id.* Of course, it depends on how companies implement this principle. Token hires (to satisfy targets or virtue-signal) may not consider merit.

145. *Id.*

146. *Id.* (Provision 17).

147. *Id.* (Provision 20).

148. *Id.* (Provision 20).

149. *Id.* (Principle K).

that board membership should regularly be refreshed.<sup>150</sup> This is significant because regular refreshment can drive both diversity and independence on the board.<sup>151</sup> The provisions giving effect to this principle set out that all directors should be up for re-election annually.<sup>152</sup> During this, the board should set out “the specific reasons why their contribution is . . . important to the company’s long-term sustainable success” in the papers accompanying the resolutions to elect each director.<sup>153</sup> The focus then moves on from appointment and board refreshment to evaluation of directors.<sup>154</sup> The evaluation process, whether internal or external, is meant for the board to be able to engage with its strengths and weaknesses. Although this is not explicitly stated, diversity should be one aspect against which the review should be conducted.

The diversity-related disclosure that is required from the company, based on the principles discussed so far, in essence consists of four things. First, companies should disclose their appointments process and approach to succession planning as well as how both of these supports developing a diverse pipeline. Thus, even though the emphasis is on board appointments, the requirement to discuss how the approach will develop a pipeline would mean that companies also address issues relevant to all levels, including those below that of the board.

Second, the companies should disclose their “policy on diversity and inclusion, its objectives and linkage to company strategy, how it has been implemented and progress on achieving the objectives.”<sup>155</sup> This implies that companies should not only focus on numbers, but also focus on ensuring that diverse employees feel included. It is relevant to note here that the introduction of the UK Code states that “a company’s culture should promote integrity and openness, value diversity and be responsive to the views of shareholders and wider stakeholders.”<sup>156</sup> Altogether, the UK Code seems to emphasize thinking about the impact of company culture on employees, particularly on those who can be categorised as diverse.

---

150. *Id.* (Principle K).

151. See Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. 211, 221 (2019) (Term limits maintain the pool of institutional knowledge on boards but rotate members to ensure new perspectives and independent thinking.).

152. UK CODE, *supra* note 137, at 8 (Provision 18).

153. *Id.* (Provision 18).

154. *Id.* at 9 (Provision 21).

155. *Id.* (Provision 23).

156. *Id.* at 1.

Third, companies are required to disclose the gender balance of those in the senior management (i.e., executives just below the board level) and their direct reports.<sup>157</sup>

Finally, the fourth diversity-related requirement is that companies should disclose details of board evaluations, including “the outcomes and actions taken, and how it has or will influence board composition[.]”<sup>158</sup> While this final requirement does not directly mention diversity, it seems to be inviting investors to engage with issues relating to board performance and refreshment. While refreshment would open the door for new candidates including diverse ones being hired, evaluation of board composition allows for reflection in diversity issues.

Overall, the principles-based framework and the disclosure requirements seem to be well-considered and broad. However, these disclosure requirements are complicated by gender and ethnicity diversity targets set by various government committees in the UK. For gender diversity, the Davies Report, published in 2011, set a target of 25% women on boards of FTSE 100 companies by 2015, and this was successfully achieved.<sup>159</sup> This target was increased by the Davies Review in 2015, to 33% women on boards of FTSE 350 companies.<sup>160</sup> Alongside the increase, the 2015 report also encouraged companies to focus on the percentage of women at the executive level.<sup>161</sup> Since then, the issue of gender diversity in senior leadership positions has been addressed by the Hampton-Alexander Reports, the latest of which calls for 33% women on boards and in senior leadership positions of all companies.<sup>162</sup>

Ethnic diversity has been addressed by the Parker Review Committee, which in 2017 recommended that “each FTSE 100 company should have at least one director of colour by 2021; and each FTSE 250

---

157. *Id.* at 9 (Provision 23).

158. *Id.* (Provision 23).

159. DEP’T OF BUS., INNOVATION & SKILLS, LORD DAVIES REPORT—WOMEN ON BOARDS 2011, at 4 (UK), <https://internationalwim.org/wp-content/uploads/2020/06/Lord-Davies-women-on-boards.pdf> [<https://perma.cc/G5GT-MEYA>].

160. DEP’T OF BUS., INNOVATION & SKILLS, IMPROVING THE GENDER BALANCE ON BRITISH BOARDS: WOMEN ON BOARDS DAVIES REVIEW FIVE YEAR SUMMARY 7 (2015), [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/482059/BIS-15-585-women-on-boards-davies-review-5-year-summary-october-2015.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/482059/BIS-15-585-women-on-boards-davies-review-5-year-summary-october-2015.pdf) [<https://perma.cc/9QNN-XT9A>].

161. *Id.*

162. DEP’T OF BUS., ENERGY & INDUS. STRATEGY, HAMPTON-ALEXANDER REVIEW FTSE WOMEN LEADERS: IMPROVING GENDER BALANCE—5 YEAR SUMMARY REPORT 11 (2021), [https://ftsewomenleaders.com/wp-content/uploads/2021/02/HA-REPORT-2021\\_FINAL.pdf](https://ftsewomenleaders.com/wp-content/uploads/2021/02/HA-REPORT-2021_FINAL.pdf) [<https://perma.cc/UV6R-V7WN>].

Board should have at least one director of colour by 2024”.<sup>163</sup> In line with the UK Code’s focus on the appointment process, the Parker Review Committee also recommended that FTSE 100 and FTSE 250 companies should “identify and present qualified people of colour to be considered for Board appointment when vacancies occur.”<sup>164</sup> This recommendation is similar to the Rooney Rule (from American football), which many scholars on both sides of the Atlantic have recommended. The rule required teams seeking a coach to interview at least one minority applicant for the position.<sup>165</sup> Barnali Choudhuri has argued that, although this sort of rule may look like a quota, it is not one because it simply ensures that the minority candidate gets an interview rather than requiring there to be a given number of minority coaches.<sup>166</sup> While highly recommended, the Rooney Rule is not without its flaws, and employers can easily go through the motions of interviewing diverse candidates without having any intention of hiring them. In any case, what the Parker Review committee sets forth is a target rather than a rule with sanctions attached to it. There are also recommendations about developing the pipeline for people of colour internally via mentorship and other programs.<sup>167</sup> In 2020, the same committee conducted a survey and updated their 2017 recommendations accordingly.<sup>168</sup> A key message from the update was an exhortation to companies that did not respond to the survey to take the reporting recommendations seriously.<sup>169</sup>

This sort of pressure from a government committee on certain targets is bound to focus companies on meeting those, which may pull focus away from other firm-specific efforts. Indeed, Eleanore Hickman notes that a majority of the companies “referred to at least one of the three key diversity reports (i.e., the Davies Review, the Hampton-Alexander Review and the Parker Report)” in their diversity disclosures.<sup>170</sup> Although

---

163. PARKER REV. COMM., A REPORT INTO THE ETHNIC DIVERSITY OF UK BOARDS 48 (2017), [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_uk/news/2020/02/ey-parker-review-2017-report-final.pdf](https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2017-report-final.pdf) [<https://perma.cc/G2TV-3BPQ>] [hereinafter REPORT INTO UK BOARDS].

164. *Id.* at 10.

165. See, e.g., *The Rooney Rule*, NFL FOOTBALL OPERATIONS, <https://operations.nfl.com/inside-football-ops/diversity-inclusion/the-rooney-rule/> [<https://perma.cc/E29Z-27BS>].

166. Barnali Choudhuri, *Gender Diversity on Boards: Beyond Quotas*, 26 EUR. BUS. L. REV. 229, 241.

167. REPORT INTO UK BOARDS, *supra* note 163, at 11.

168. PARKER REV. COMM., ETHNIC DIVERSITY ENRICHING BUSINESS LEADERSHIP: AN UPDATE REPORT FROM THE PARKER REVIEW 60 (2020), [https://assets.ey.com/content/dam/ey-sites/ey-com/en\\_uk/news/2020/02/ey-parker-review-2020-report-final.pdf](https://assets.ey.com/content/dam/ey-sites/ey-com/en_uk/news/2020/02/ey-parker-review-2020-report-final.pdf) [<https://perma.cc/N2QZ-X2PT>] [hereinafter ETHNIC DIVERSITY ENRICHING].

169. *Id.*

170. Eleanore Hickman, *Diversity, Merit and Power in the C-Suite of the FTSE100* at 305–306 (2019) (Ph.D. dissertation, University College London) (on file with the University College London Library Services), <https://discovery.ucl.ac.uk/id/eprint/10089815/>.

Hickman's inference from this is that most companies are engaging with the diversity issue,<sup>171</sup> my own inference is that the race and gender targets are an important consideration in their diversity agenda. Despite this, a review by Professor Ruth Sealey on behalf of the Financial Reporting Council (FRC) found that about 20–30% of the FTSE 100 companies and 10% of the FTSE 250 companies seemed to have embraced the spirit of the principles by providing rich narratives about their approach to increasing diversity on their boards and within the wider workforce.<sup>172</sup> The report also noted that many of the companies understood “diversity as a much broader concept that encompasses a range of sources of difference, including social and educational background, disability and other ‘protected characteristics.’”<sup>173</sup> Although such broad surveys are not available for more recent disclosures, it has been noted that not many companies have disclosed information regarding appointment of ethnically diverse board members, as the Parker Review Committee recommended.<sup>174</sup>

Unfortunately, UK's market regulator, the Financial Conduct Authority (FCA), is seeking to introduce changes to the listing rules that would in effect require specific disclosures about compliance with gender and diversity targets, similar to Nasdaq's diversity rule. The rule would apply to UK and overseas listed companies that have securities admitted to listing or trading on a regulated market in the UK.<sup>175</sup> The targets sought to be introduced are three-fold. First, at least 40% of the board should consist of women<sup>176</sup> directors. Second, one of the senior board positions like the Chair, CEO, CFO, or the senior independent directors (similar to lead independent director in the U.S.) should be a woman.<sup>177</sup> Third, at least one member of the board should be a non-white ethnic minority person.<sup>178</sup> In addition to these targets, the FCA also proposes to require companies

---

171. *Id.* at 306.

172. FIN. REPORTING COUNCIL, BOARD DIVERSITY REPORTING 2–3 (2018), <https://www.frc.org.uk/getattachment/62202e7d-064c-4026-bd19-f9ac9591fe19/Board-Diversity-Reporting-September-2018.pdf> [<https://perma.cc/2PRE-AEXD>].

173. *Id.* at 3.

174. Maitane Sardon, *U.K. Investment Managers Push for More Diversity on Boards*, WALL ST. J. (Feb. 24, 2021), <https://www.wsj.com/articles/u-k-investment-managers-push-for-more-diversity-on-boards-11614200970> [<https://perma.cc/3HMH-NCBV>] (“Three-quarters of companies in the FTSE 100 index failed to report the ethnic makeup of their boards in last year’s annual meeting season [2020], according to the association.”).

175. Financial Conduct Authority, Diversity and Inclusion on Company Boards and Executive Committee 2021, PS 22/3, CP 21/24, ¶ 1.11 (UK), <https://www.fca.org.uk/publication/policy/ps22-3.pdf>.

176. “Including those self-identifying as women, as opposed to . . . women defined by sex.” *Id.* ¶ 1.18.

177. “[I]ncluding those self-identifying as women.” *Id.* ¶ 1.9.

178. *Id.*

to publish data about “the gender and ethnic diversity on a company’s board and its most senior level executive management” in their annual reports.<sup>179</sup> These requirements ultimately focus on quantitative targets regarding specific types of diversity.

The same criticisms exist for the FCA proposals as for the California and Nasdaq quotas discussed previously. But specifically in the FCA context, these rules take away from the expansive definition of diversity that the UK Code allowed. Further, a big criticism of such aspirational quotas is that they would undo the work of the principles-based disclosure regime that companies have already responded well to.

#### *D. Market Initiatives*

The UK Code specifically states in its introduction that it is the responsibility “of investors and their advisors to assess differing company approaches thoughtfully.”<sup>180</sup> Investors have begun to take on this responsibility as there has been considerable engagement on diversity from not only investors but also the market more generally. In February 2021, the Investment Association (whose members manage \$12 trillion in assets) announced that it would issue warnings to FTSE 350 companies that did not publish information on the ethnic and racial composition of their boards.<sup>181</sup> The Investment Association would also issue warnings to companies that did not have a plan to appoint at least one director from an ethnic minority background by the end of 2022.<sup>182</sup> Thus, investors in the UK are taking an active interest in diversity.

Even in the U.S., investors play an active role in mounting campaigns on corporate governance issues, including on diversity. As early as in 2012, the California State Teachers’ Retirement System (CalSTRS) publicly expressed dissatisfaction when Facebook, Inc. (now Meta, Inc.) for its all-male board.<sup>183</sup> Since then, the pressure has grown exponentially, with the number of board diversity proposals in the U.S. reaching an “all time high” in 2017.<sup>184</sup> This was true even before the #MeToo and BLM movements impacted the corporate sector and also before the California

---

179. *Id.* ¶ 2.18.

180. UK CODE, *supra* note 137, at 1.

181. Sardon, *supra* note 174.

182. *Id.*

183. Matt Stevens, *Facebook’s All-Male Board Criticized by California Pension Fund*, L.A. TIMES (Feb. 7, 2012), <https://www.latimes.com/business/la-xpm-2012-feb-07-la-fi-calsters-facebook-20120207-story.html> [<https://perma.cc/HE2H-T8GR>].

184. Ronald O. Mueller & Elizabeth Ising, *Shareholder Proposal Developments During the 2017 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 12, 2017), <https://corpgov.law.harvard.edu/2017/07/12/shareholder-proposal-developments-during-the-2017-proxy-season/> [<https://perma.cc/2HTF-27BT>].

quota law was introduced. Proxy advisors, which provide research and advice to institutional investors, have also become supportive of the movement.<sup>185</sup> More recently, in February 2020, the investment bank Goldman Sachs announced that starting in July 2020 it would “only underwrite IPOs in the [U.S.] and Europe of private companies that have at least one diverse board member” and at least two diverse board members starting in 2021.<sup>186</sup>

Some, like Joseph Grundfest, argue that investor activism can achieve superior results to legislation.<sup>187</sup> The problem with this approach, however, is that the focus on institutional investors is often limited to whatever has captured public sentiment the most—which was initially gender diversity, and is now racial and ethnic diversity. Companies will usually signal support for these campaigns precisely because of the public support for the campaigns, and the reputational costs of not getting behind whatever the issue of the day is. However, this does not guarantee sustained change. Further, because institutional investor campaigns are often in terms of companies meeting certain numerical targets for women and racial minorities on the board, they crowd out other firm-specific diversity efforts. These efforts include attracting and retaining diverse candidates at various levels in the pipeline and prioritising different facets of diversity. In attempting to meet these numerical targets, corporations lose flexibility to tailor measures to their circumstances, which is one of the goals of using disclosure as a regulatory tool. The flip side is that disclosure requirements can become meaningless in the absence of investor engagement if companies simply engage in check-the-box compliance or alternatively use the reporting as a public relations tool by making selective disclosures.<sup>188</sup>

Because institutional investor activism on social issues is not only guided by law and regulation, but also by the discussion in society, the

---

185. See David A. Bell, Dean Kristy & Ron C. Llewellyn, *Proxy Advisors Update Voting Guidelines for 2022 Focusing on Board Diversity, Climate and ESG Oversight*, FENWICK (Dec. 9, 2021), <https://www.fenwick.com/insights/publications/proxy-advisors-update-voting-guidelines-for-2022-focusing-on-board-diversity-climate-and-esg-oversight> [<https://perma.cc/S2X7-X2WJ>] (For example, “ISS will recommend voting against the chair of the nominating committee (or other directors) where there are no women on a company’s board.”).

186. David Solomon, *Diverse Leadership Is Needed More Than Ever—Here’s What We’re Doing*, Statement to *Goldman Sachs’ Commitment to Board Diversity*, GOLDMAN SACHS (Feb. 4, 2020), <https://www.goldmansachs.com/our-commitments/diversity-and-inclusion/launch-with-gs/pages/commitment-to-diversity.html> [<https://perma.cc/XF3H-QLC3>].

187. Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California’s SB 826*, at 8 (Stanford University Rock Ctr. for Corp. Diversity, Working Paper No. 232, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3248791](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3248791).

188. Barnali Choudhury & Martin Petrin, *Corporate Governance That “Works for Everyone”*: *Promoting Public Policies Through Corporate Governance Mechanisms*, 18 J. CORP. L. STUD., 381, 409–10 (2018).

answer perhaps lies in educating the general public—especially millennials and Gen Zers who are actively participating in these debates—about the various pieces of the diversity jigsaw.<sup>189</sup> An understanding beyond simplistic numerical representation is required for the public to appreciate the unintended consequences of both quotas and aspirational quotas. When the public is better educated and diversity discourse becomes more informed, institutional investors will also tailor their activism accordingly. Regulators, stock exchanges, professional bodies, and consultancies would also do well to look at all the research on the issue (whether it matches their proposals or not) and engage with experts and commenters with different views.

#### *E. The Report Card on Disclosure Measures*

As the discussion above has shown, disclosure measures, coupled with targets and institutional investor pressure, have started to operate like aspirational quotas. These measures also focus particularly on demographic characteristics while ignoring cognitive diversity altogether. One reason why institutional investors and regulators seem to focus on gender and race (and other underrepresented categories in some cases), but not on cognitive diversity, experiential diversity, and so on, is because the former is easy to measure. So while it is easier to have reports about the number of women or racial minorities across companies, it would be more cumbersome to collect and report such overall statistics about cognitive diversity. Instead, one would have to pick ‘best in class’ stories of companies that hired certain candidates and then explain that those candidates would add cognitive diversity because they brought different

---

189. It is not at all clear that institutional investors are motivated by genuine concern for diverse members of the workforce. If they were, they would have practiced what they preached and implemented effective diversity programs and measures for their own employees. Instead, they simply seem to be signaling virtue by promoting issues that seem to have caught the public imagination. See Aziza Kasumov, *BlackRock Under Pressure to Live Up to Its Promises on Diversity*, FIN. TIMES (Mar. 22, 2021), <https://www.ft.com/content/6476e681-4154-43a6-93e4-f5c86ae30dd9>. The article details the experiences of a female Muslim employee who faced harassment and discrimination at BlackRock, along with similar experiences faced by others including a black gay employee, a former employee who was Kenyan, and a Black woman employee. *Id.* Most tellingly, the article quotes a Black employee saying, “as far as the senior leadership of this team is concerned the only reason you’re here is to boost the diversity numbers.” *Id.* Along with making the point about the proponents of market initiatives themselves not cleaning house, this final statement also underscores how counter-productive it is to focus on numbers. *Id.*; see also Attracta Mooney & Madison Darbyshire, *Race and Finance: Asset Managers Fail to Walk the Walk*, FIN. TIMES (Dec. 28, 2021), <https://www.ft.com/content/59d8f7c4-cc9e-41a4-b739-c43c4195d592> (“[A]sset managers are struggling to live up to their professed ideals. Black employees and members of other minority groups remain dramatically under-represented in the sector—particularly in senior roles—and industry executives say it could take years to mount the recruitment efforts needed to make their workforces truly diverse.”).



experiential, or educational backgrounds in comparison to other members of that company's board or management team. Another reason is that gender and race are issues that have captured the public interest in a way that diversity in educational and professional backgrounds have not. The #MeToo and Black Lives Matter movements are obvious examples of how gender and race issues have become prominent in public debates.

However, even as far as gender and race are concerned, the focus is only on numerical representation, even under disclosure rules. As Edmans rightly notes, selectively focusing on some data not only provides an incomplete picture, but also “creates incentives to focus on only the aspects that are reported.”<sup>190</sup> Whether it is driven by hard quotas, or by soft law mechanisms (disclosure requirements) complemented by investor activism, or by social media activism, the focus on percentages and numbers means that other types of diversity issues will be neglected, which means there will be no efforts directed towards removing systemic barriers faced by diverse candidates.

When viewed in isolation, the U.S. SEC disclosure rule and the UK's principles-based disclosure rules have both done well to either not prescribe how firms should define diversity or to provide an expansive definition of diversity. One could argue that these measures alone have not shown measurable change and are therefore not working. But because only gender and racial diversity at the board and senior management levels are being measured, it is difficult to see whether the rules helped bring improvements in diversity at all levels of the workforce, and for all types of diverse candidates. One way that disclosures could provide information about these sorts of measures is if firms provide details about the policies and measures introduced within the company. This will work only if institutional investors who truly care about diversity engage with the qualitative information where firms provide it. In any case, firms would do well to focus on long term issues to avoid future costs.

Ultimately, if the goal of disclosure is to nudge companies to consider relevant issues, and to allow flexibility in addressing them, then encouraging qualitative disclosures is the best path forward. To complement this, research, discussion, and policy papers—whether they are put out by the government, market players, or academics—should address the many facets of diversity and how it can be addressed at all

---

190. Response Letter to Working Paper DP21/2 on Diversity & Inclusion in the Fin. Sector from Alex Edmans, Professor of Fin., London Bus. Sch., to Fin. Conduct Auth., at 6 (Sept. 30, 2021) (on file with author), <https://alexedmans.com/wp-content/uploads/2021/09/FCA-Diversity.pdf> [hereinafter Edmans Response Letter] Edmans provides examples of bias in favour of good looking people and bias against people with tattoos as examples of issues that fall by the wayside when we exclusively focus on quantitative data. *Id.*

levels of the corporation. Best in class reports should focus on innovative programs that corporations operationalise rather than on whether numerical targets for gender and race diversity are met at the upper levels of the firm.

Another way to assess the effectiveness and suitability of firms' diversity measures is to conduct employee surveys. These surveys can provide first-hand experience of whether diverse members feel included and have opportunities to work and rise up the ladder. This focus will, in turn, incentivise companies to expend resources on impactful measures rather than on cosmetic changes. Shifting the conversation about diversity will eventually shift the focus away from short-term metrics and towards real change that might bear fruit in the long run, both for corporations and for society.

### III. INCENTIVISING FIRM-SPECIFIC SOLUTIONS

The assessment about quotas and disclosures—the two main types of measures used to address diversity in corporations—has been that both types of measures are not useful. The question that arises then is whether there is an alternative regulatory tool. Indeed, I have been asked this at conferences where I have discussed the costs of quotas and disclosure mechanisms. Before casting for an alternative type of regulation, it is apposite to ask if regulation should be the answer, if at all. Irrespective of the type of regulation used, if the effect is that corporations seek to hire diverse candidates merely to comply with the law, then the outcome is not desirable. In a scene from the Netflix show *Superstore*,<sup>191</sup> a retail store manager is called by “corporate.” The manager is asked to apply for an executive role but finds that all the candidates to be interviewed happen to be Latinas.<sup>192</sup> This scene is instructive. Afterwards, the candidate tells her that management probably realised they were missing a colour in the crayon box while another says that she was not above rolling her Rs to get the job.<sup>193</sup> The aforementioned store manager is then shown answering the interviewer intelligently only to be nudged towards her ideas regarding “customers of colour.”<sup>194</sup> We then see the candidate struggling to improvise and throw in phrases like, “as a Latina” and “*cultura*,” with a pronounced accent, and the interviewers immediately sound impressed.<sup>195</sup> Obviously, the show is tongue in cheek, but the scene also has some truth about the reality of today's diversity hiring.

---

191. *Superstore* (Spitzer Holding Co. 2015).

192. *Id.*

193. *See id.*

194. *See id.*

195. *See id.*

Edmans is of the view that regulators might not be best placed solve the diversity problem, not least because it is difficult to measure the different facets of diversity.<sup>196</sup> The present analysis of various regulatory measures in different jurisdictions falling short goes to support Edmans' argument. Even in the absence of regulations, firms may also engage in token hiring of diverse candidates because of social media pressure or investor activism. Fuith, drawing from Martin Luther King Jr.'s work, writes—in the context of board diversity—that the problem of board diversity can be solved by “changing the hearts and minds of corporate leaders, shareholders and employees through education and engagement” because prescriptive laws will not incentivise corporations to “authentically and fully embrace” diversity.<sup>197</sup>

I agree with both Edmans and Fuith on the point that regulators may not be best placed to solve diversity issues within the corporation. However, they can join the effort to educate both corporations and society about diversity. Swati Jena and T. N. Hari rightly note in their book that “[p]opular literature on diversity and inclusion is full of unsubstantiated claims,” and this should be rectified.<sup>198</sup> As the discussion in this Article has shown, regulators have also been promoting spurious claims about diversity. Not only are these claims unsubstantiated by rigorous empirical studies, it has also become anathema to criticise these claims or even the regulations that are introduced based on these claims. This is evident from corporate double-speak, i.e., corporations making statements in support of diversity without following through with relevant measures.<sup>199</sup> The inability to discuss the merits and demerits of diversity related measures is also obvious when firms hesitate to be openly critical of diversity quotas and disclosure requirements (recall statements by firms in Germany and France).<sup>200</sup>

While this uneasiness about discussing diversity frankly has been reinforced in the current climate of social media activism (as evidenced by #MeToo and Black Lives Matter movements),<sup>201</sup> it is certainly not new. In a 2011 publication by Broome, Conley, and Krawiec, they conducted qualitative interviews of women and minority directors. The authors found that that most of their respondents spoke of functional benefits of diversity

---

196. Edmans Response Letter, *supra* note 190, at 5.

197. Fuith, *supra* note 96, at 132–33.

198. SWATI JENA & T. N. HARI, *DIVERSITY BEYOND TOKENISM: WHY BEING POLITICALLY CORRECT DOESN'T HELP ANYONE* 19 (2021) (ebook).

199. See generally Akshaya Kamalnath, *Social Movements, Diversity, and Corporate Short-Termism*, 23 *GEO. J. GENDER & L.* 449 (2022).

200. See *supra* notes 41–43 and accompanying text.

201. For a detailed discussion on social media activism and diversity in corporations, see Kamalnath, *supra* note 199.

rather than the fairness rationale.<sup>202</sup> Even more concerning was the fact that respondents were not able to provide evidence to substantiate the claims about the functional benefits of diversity by means of examples and, in many cases, backed away from the initial claims.<sup>203</sup> Based on this, the authors make an astute observation that diversity seems to evoke “universal acclaim in the abstract” but at the same time, it also seems too dangerous to talk about concretely.<sup>204</sup> They explain this paradox by pointing out that a focus on the functional benefits of diversity would imply that diversity is a proxy for difference. However, such a claim is open to stereotyping and other invidious claims.<sup>205</sup> The authors further explain this as follows:

Everyone in the debate has a vested interest in not walking through that door. Those who are not members of the excluded groups do not want to be heard to say that “they” are all alike, whereas those who are members do not want to point to fundamental differences that might be translated as “less qualified” or “needing assistance.” So we are left with narratives that simultaneously extol difference and express embarrassment with it.<sup>206</sup>

A decade since the publication of that article, it has not become any less dangerous to discuss concrete issues about diversity. Various pieces of the diversity jigsaw (the possible negative consequences of quotas and quantitative targets, the need for a culture that includes diverse candidates, etc.) are still left out of the conversation because of this awkwardness. Ironically, the conversation about diversity must become open enough to tolerate different viewpoints. What is required, then, is responsible and honest discussions on all relevant aspects and perspectives about diversity from the media, academics, and regulators. In such an environment, states could incentivise firm-specific solutions across the corporate hierarchy by promoting a thoughtful consideration of diversity issues relevant to each company and its stakeholders.

Each firm is best placed to identify and assess the problems faced by its workforce and find ways to fix them. This is because the workforce in each company is different, and so are the circumstances of each company. For instance, a company that sells face cream will have to deal with a set of challenges that are very different from a company that creates virtual

---

202. See Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 799–800 (2011).

203. *Id.* at 761.

204. *Id.* at 760–61.

205. See, e.g., Memorandum from James Damore on Google’s Ideological Echo Chamber to Internal Staff at Google LLC (July 2017), <https://s3.documentcloud.org/documents/3914586/Googles-Ideological-Echo-Chamber.pdf>.

206. Broome, Conley & Krawiec, *supra* note 202, at 762.

reality products. Similarly, a company with a young workforce must deal with very different issues from one with a much older demographic as its workforce. A regulator cannot anticipate the issues faced by every type of diverse candidate in every type of company. This is what Frederick Hayek called “the knowledge of the particular circumstances of time and place.”<sup>207</sup> Hayek says about such knowledge:

It is with respect to this [knowledge] that practically every individual [or corporation] has some advantage over all others in that he possesses unique information of which beneficial use might be made, but of which use can be made only if the decisions depending on it are left to him or are made with his active coöperation [sic].<sup>208</sup>

For the present purpose, such knowledge can be called “firm-specific knowledge.” Hayek says that decentralised solutions are more apt where firm-specific knowledge is important.<sup>209</sup> This is extremely relevant for diversity issues. Company management not only have firm-specific knowledge about the demographic that works for them, but they also have the means to gather more information about the specific challenges faced by their employees through surveys and other internal mechanisms.<sup>210</sup> Additionally, the company’s management is able to fashion solutions that best address the twin goals of employee well-being and value-maximization because they have (or can gather) firm-specific knowledge about employee information and firm performance. This approach can lead to social justice innovation within firms while also allowing different firms to compete with each other to provide favourable work conditions for all employees. To an extent, the after-effects of the pandemic are helping firms realise the value of using employee-centric innovation as a means to attract talent.<sup>211</sup>

Only the lightest of involvement from regulators, if at all, is useful. Regulators could encourage companies to provide qualitative disclosures about how they are addressing diversity (as defined by the company) issues in the entire workforce. This can help investors and other stakeholders<sup>212</sup> to scrutinize the nuts and bolts of how different firms

---

207. F. A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 521 (1945).

208. *Id.* at 521–22.

209. *Id.* at 521.

210. This intentional information-gathering is required because “[E]mployees . . . will quite simply know and discover things about which their bosses have no idea.” See Nicolai J. Foss, *The Use of Knowledge in Firms*, 155 J. INSTITUTIONAL & THEORETICAL ECON. 458, 472 (1999).

211. Emma Jacobs, *Family-Friendly Leave Policies Are Key to Staff Retention*, FIN. TIMES (Dec. 5, 2021), <https://www.ft.com/content/b14b4e7a-e87d-4aee-a267-8100661e4b57> [<https://perma.cc/S2EY-Q9T7>].

212. While the aim of the disclosure regime is to inform investors about important issues, various stakeholders have also relied on corporate disclosures especially on issues of public interest, like

address and promote diversity. In turn, this will incentivise companies to assess the needs of their workforce and expend resources to solve them. Prioritising detailed disclosures over numbers will hopefully redirect social media activism towards long-term change. Companies could also learn from peer experiences in terms of how different measures fare, and then adapt them to suit their own workforce needs. However, sole reliance on the information disclosed by firms on the policies and programs undertaken might mean that a number of firms will use it as a public relations exercise. Thus, there have to be other channels of information gathering to prevent greenwashing. Employee surveys are an example and companies like Glassdoor already provide this. Employees themselves are active on social media and so corporate hypocrisy is unlikely to go unnoticed.

#### CONCLUSION

After examining diversity quota legislation, disclosure requirements, and market initiatives geared towards numerical diversity targets, this article has found that none of these tools provide the right incentives to enhance diversity in corporations in the long-term and across all levels of the corporate hierarchy. Instead, this article has argued in favour of incentivising firm specific measures to improve diversity in each corporation. This approach can lead to social justice innovation within firms and also allow different firms to compete with each other to provide favourable work conditions for all employees. The article has further argued that only the lightest of involvement from regulators (i.e. encouraging firms to make qualitative diversity disclosures), if at all, is useful.

---

sustainability and diversity. Consulting firms often digest diversity information about the top firms in different jurisdictions and provide reports for public consumption. These reports are then used by regulators, media, and academics like me. Thus, it is communicated to the public through various channels.

TABLE 1: DIVERSITY MEASURES

Quotas	<ul style="list-style-type: none"> <li>• No flexibility</li> <li>• Does not solve the root of the problem</li> </ul>
Disclosures	<ul style="list-style-type: none"> <li>• Flexible but sometimes works as an aspirational quota or target.</li> <li>• Does not solve the root of the problem.</li> </ul>
Market initiatives	<ul style="list-style-type: none"> <li>• No flexibility when the focus is on numbers. Also work as aspirational quotas.</li> <li>• Does not solve the root of the problem.</li> </ul>
Firm specific solutions	<ul style="list-style-type: none"> <li>• Flexible—companies could decide and take steps that are most appropriate to solve its diversity problems.</li> <li>• There is scope for innovation.</li> <li>• There is also scope for greenwashing.</li> </ul>