

Will SB 826 Solve the Underlying Issue?

By David Feirstein, J.D. Candidate 2021 | October 10, 2018

White males [continue to dominate](#) corporate boardrooms, reflecting a “boys club only” mentality at the top of corporations. When signing [SB 826](#), Governor Brown stipulated it is the “[high time](#)” that corporate boards begin including women, who constitute more than half of the American population. To promote gender equality within the corporate boardroom, California’s bill requires that publicly traded companies with their principal executive office located in California engage in a two-step process. First, these companies must have at least one woman on their respective boards by the end of 2019. Second, by the end of 2021, these companies must have either two female board members if their board is comprised of five members or three female board members if their board is comprised of six or more members. Failure to comply with either requirement will result in fines.

SB 826 seeks to solve the issue of male-dominated boardrooms, but it does not properly address why they are lopsided in the first place. Because shareholders elect the board, could the reason for this unequal representation be that shareholders are biased against women? This rationale may possibly be the answer because the investing community happens to also be heavily male-dominated in both the [financial industry](#) and [among individual investors](#). However, I wager that the real issue is that nominating committees, which are usually comprised of the chairman, deputy chairman, and the Chief Executive Officer, only present shareholders with male nominees.

Aside from the bill’s [practicability and legal obstacles](#), including the internal affairs doctrine and equal protection clauses of the federal and California state constitutions, the bill’s larger problem is that it favors equality of outcome over equality of opportunity.

Equality of outcome would be a fifty-fifty distribution of women and men within corporate boardrooms. Many equality of outcome proponents insist that such a requirement would pave the way for a more equal opportunity, but they fail to recognize that such a requirement precludes equal opportunity. Under a typical nomination process, the nominating committee could nominate a pool of two women and twenty men. In the case of a five-person boardroom, the bill would necessitate that the two women be automatically chosen whether the shareholders elect them or not. This scenario circumvents the democratic role shareholders play in electing board members based on merit.

A better recommendation would utilize shareholder activism and ride the coattails of increasing awareness of gender inequalities. Nomination processes should be more transparent, and if quotas are to be used, they should be restricted to the board nominee pool, which would create more diverse selection pools for shareholders to freely elect whom they see fit. This preliminary framework would allow women a more equal opportunity to become elected based on their merit.



While the bill certainly has its drawbacks, it still represents an unprecedented move in the U.S., follows suit [with other European countries](#), and brings more awareness to an ongoing social issue that has plagued our country for too long.