

**GENDER DIVERSITY
CALIFORNIA'S NEW MANDATE FOR
CORPORATE BOARDS**

November 13, 2018

Introduction

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Introduction

- Push for greater gender diversity on corporate boards is not a new thing
 - Norway in 2003 mandated 40% seats held by women
- Despite this, progress has been slow
 - 26% of Russell 3000 companies based in California have no women directors
 - Remaining 74% of companies based in California, women represent 15.5% of directors
 - Los Angeles, Orange County and San Diego Counties: ~12% women directors
 - Silicon Valley: ~16% women directors
 - San Francisco: ~21% women directors
- Corporate boards would be well advised to address this issue as a matter of best governance

Overview of SB 826

- Signed into law in September 2018
- California is the first state with such a requirement
- Applies to public companies that are either:
 - Incorporated in California
 - Headquartered in California
- Mandates that public companies include a minimum number of female directors
- Effective as of the end of 2019, expanded as of the end of 2021

Required Female Directors

- All public companies must have at least one female director by the end of 2019
- No later than the end of 2021:
 - At least 3 female directors if Board has 6 or more directors
 - At least 2 female directors if Board has 5 directors
 - At least 1 female director if 4 or fewer directors
- The number of female directors never has to exceed 3 Board size
- Does not require kicking men off the Board

Subject Companies

- Public company means any company “listed on a major U.S. stock exchange”
- “Headquartered in California” is based on the address on company’s 10-K
- Vague aspects of law
 - “Major securities exchange” is not defined
 - Not all public companies file a form 10-K (such as foreign private issuers)
 - Headquartered may not be the same as having a sizable presence
- Examples Companies: Skechers USA, WageWorks, PCM

Penalties

- Failure to comply with the diversity requirements will require a \$100,000 fine for the first violation and \$300,000 for subsequent violations.
- Listed on a public website for lack of compliance
 - Compliance listing is by calendar year
 - Will also include the number of California public companies that move their HQs out of California

Potential Legal Challenges

- Equal Protection Clause
- Internal Affairs Doctrine
- California Labor Code

Equal Protection Clause

- Constitutional: Explicit gender classification makes a constitutional challenge inevitable
 - Opposition to the bill: “SB 826 violates the equal protection clauses of the U.S. Constitution (Commerce and Full Faith and Credit Clause) and the California Constitution, as well as the Civil Rights Law (Civil Code Section 51).”
- Doesn't address the problem to refer to 'women':
 - Only one aspect of diversity considered
 - Potential displacement of otherwise diverse members based solely on gender
 - Not just filling a role but adding value. Holiday directors.

Internal Affairs Doctrine

- Applies regardless of state of incorporation
- Internal affairs of a corporation should be governed by the laws of the state of its incorporation
 - 2115 remains on the books despite *Vantage Point Ventures v Examen*: Delaware incorporated, Delaware law
 - 2115: Exception for companies listed on national securities exchange. 3 factor test ensures no other state has a greater business connection.

California Labor Code

- Unruh Civil Rights Act (California Civil Code Section 51): Protects from discrimination by business establishments in California because of age, ancestry, color, disability, national origin, race, religion, sex and sexual orientation.
- Statute provides that a woman includes an individual who identifies as a woman regardless of gender identity on birth certificate. Risk of gender discrimination claims for transgendered individuals.

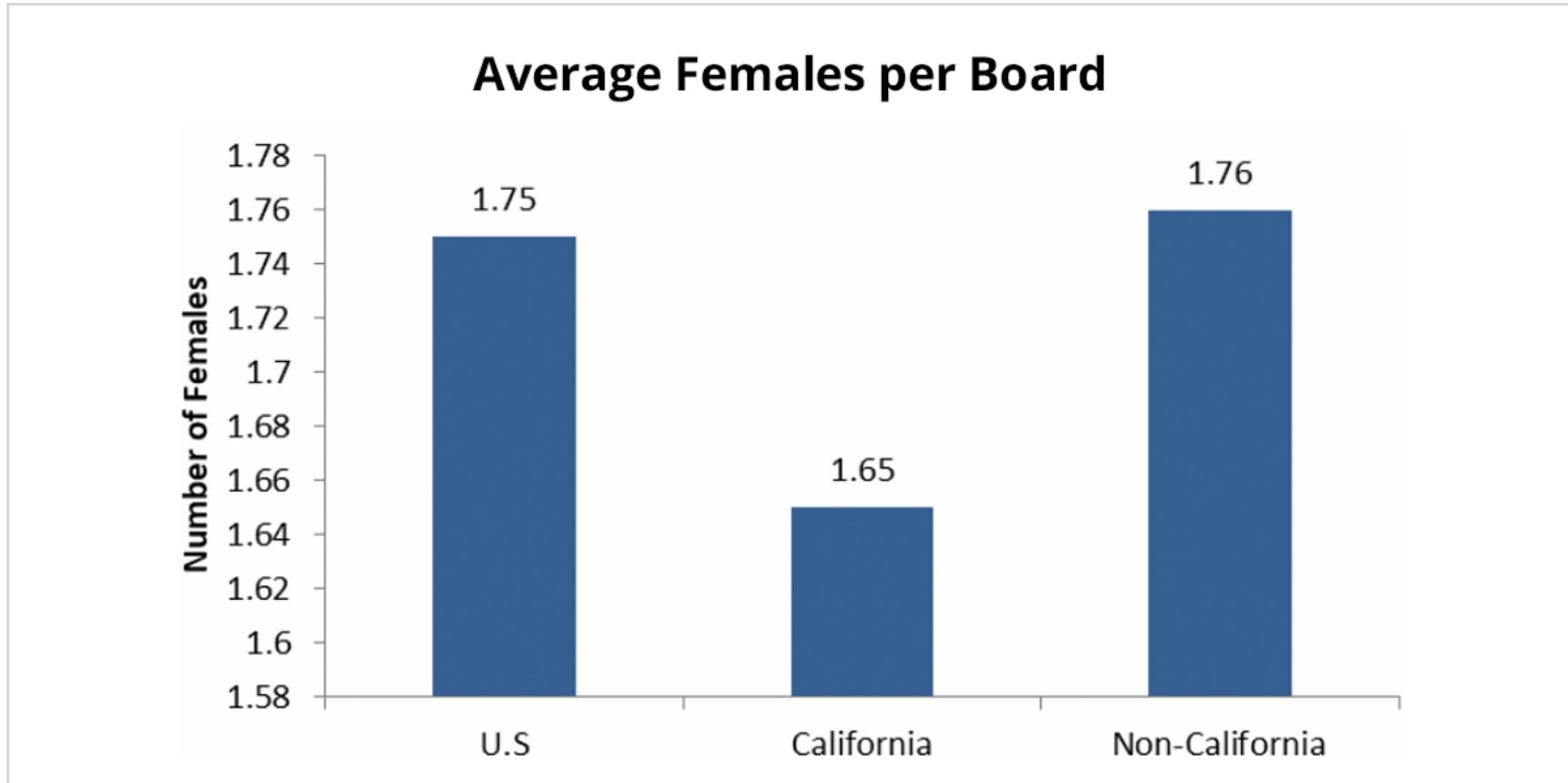
Market Forces

- Institutional investors are now starting to take affirmative action
- Pension funds, activist investors and the press have been pushing for addition of women on Boards.
 - Bloomberg: More than 150 of ~700 companies that State Street targeted for having no women on the Board have since added a female director
 - Forbes: Major index funds like Vanguard and Fidelity are now mandating that companies in their index must have a minimum of 2 women on the Board or they will withhold their vote
 - CalPERS reported that through May 2017 it withheld votes or voted against 438 directors at 141 companies

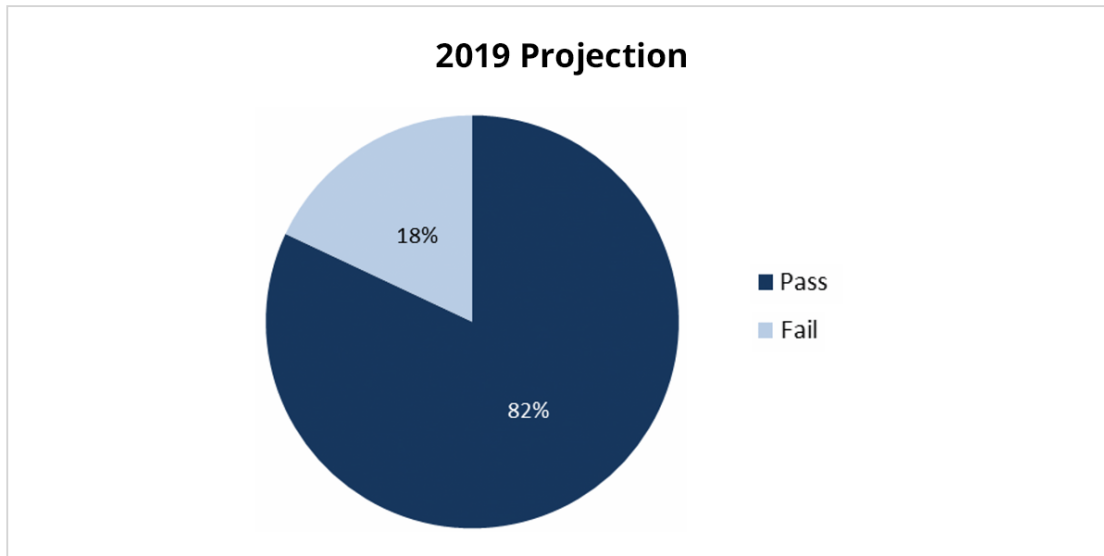
Things to Consider

- If not law → Market Forces, Shareholder Pressure
- Not that easy to implement:
 - Bylaws, stockholder approval
 - Proxy contest
 - No transition time for IPO companies
- Vague / Open Issues
 - Major stock exchange, headquartered
 - No exception for Controlled Companies
- Employment and HR
 - Recruit generally and if possible, select a woman
 - EEO Clause: The Company is committed to equal opportunity for all and to also complying with SB 826
- Opportunity for companies and women

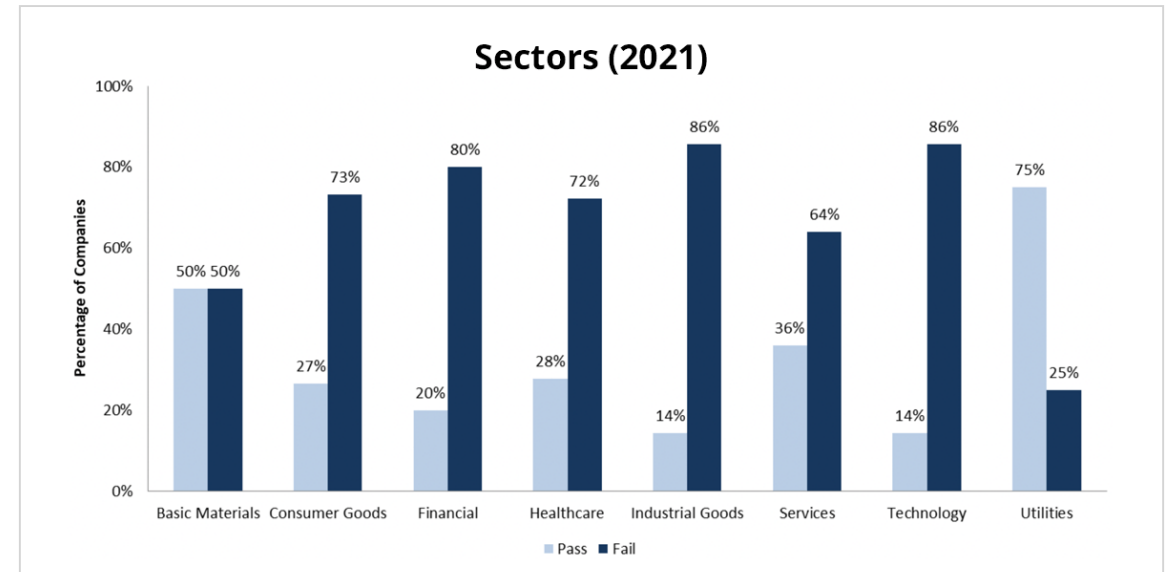
California...the Laggard!



Market Forces are not Working

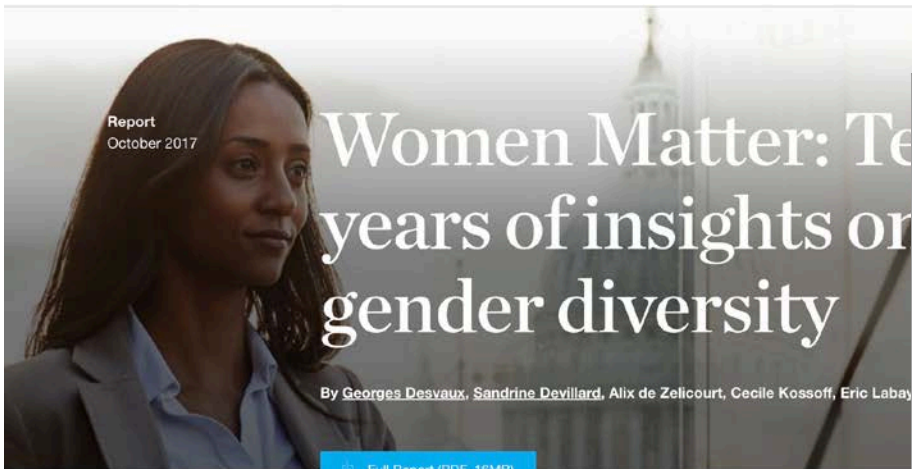


Source: Harvard Law School Forum/Equilar

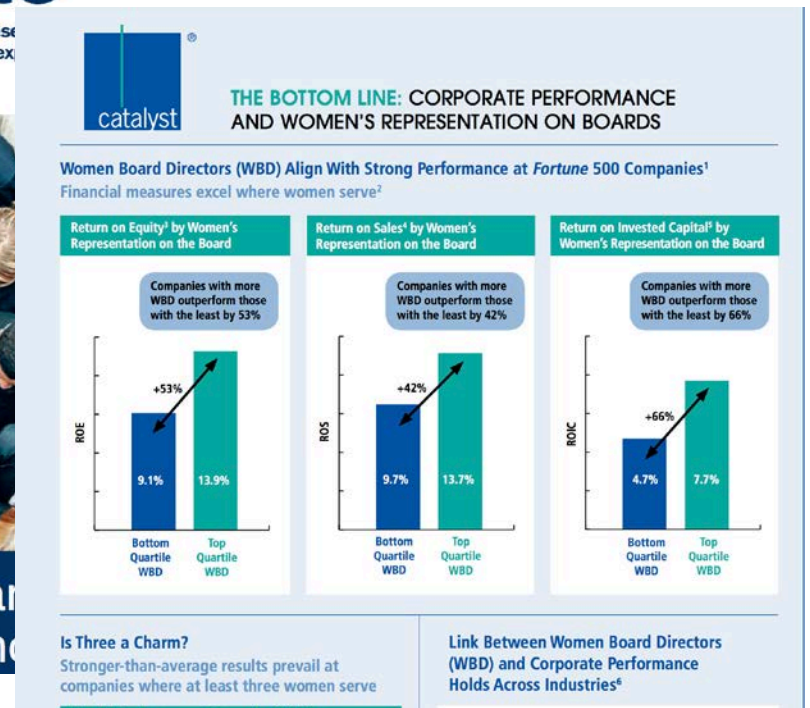


Further evidence that change is needed

- Facts support that having women on boards makes a difference

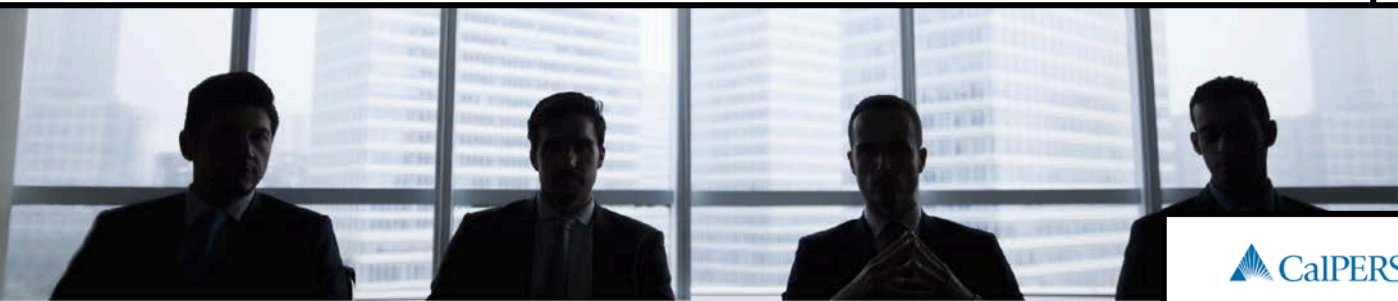


A decade into our research, we highlight key findings—invite 16 global leaders to look at how to increase gender diversity in corporations and imagine the inclusive corporate future.



Shareholders are demanding progress

- It's in investors interest



Markets

BlackRock Is Sick of Excuses for Corporate Boards Lacking Women

By [Emily Chasan](#)

November 2, 2018, 5:49 PM PDT

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1:11

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[BlackRock Inc.](#) isn't buying excuses from companies that say they can't find women to fill diverse slots on boards.

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GOVERNANCE


SSGA plans on increasing efforts to get women on company boards

Money manager will vote against all nominating BY [ROB KOZLOWSKI](#) · SEPTEMBER 27, 2018 8:30 AM

[State Street Global Advisors](#) announced that beginning in 2020 in Australia it will plates of board nies' nominating e companies without at least one woman

to SSGA's gender diversity voting guidelines ntal Europe and Japan. The money f board members for companies that have et Global Advisors' board gender diversity to an SSGA news release.

"Fearless Girl" campaign launched in March rs to boards. Worldwide, of the 1,228 campaign as lacking a single female board

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CalPERS Expands Engagement for Greater Diversity on Corporate Boards to More Than 500 U.S. Companies

August 22, 2017

Communications & Stakeholder Relations
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Brad W. Pacheco, Deputy Executive Officer
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SACRAMENTO, CA - The California Public Employees' Retirement System has sent letters to 504 companies in the Russell 3000 Index regarding diversity on their board of directors. The letters outline the growing evidence that board diversity has a positive economic impact on business performance. CalPERS requested that each company develop and disclose its corporate board diversity policy and implementation plan to address the lack of diversity.

CalPERS has long advocated for increased board disclosure and representation of diverse

Important Drivers of SB826

- Social values matter more now than ever
 - ❑ #MeToo and more
 - ❑ “Embarrassment factor”
- Social media serves as a megaphone
- Diverse boards are expected
 - ❑ Fundamentally its common sense
 - ❑ No one wants to be left behind
 - ❑ There is no legitimate excuse anymore

→ **Boardspan’s mantra: its not a Supply Side Issue!**



Also consider: 1st Derivative Effects

- What if boards don't respond?
 - ❑ Legal adverse impact
 - ❑ Investor adverse impact (Activists or Large Institutions)
 - ❑ Social adverse impact
- With or without the law surviving, the tone has been set
 - ❑ Its contagious – other states considering (MA, ME, NY, etc.)
 - ❑ And other companies are acting (WI, TX, AR, and more)
 - ❑ Awareness: regulators, watchdogs, employees, and customers all care!

What to do about SB826?

▪ Companies/Boards

- Self-assess: does your current composition appropriately consider:
 - a. Your business needs
 - b. The law
 - c. Your investors
 - d. Your employees
 - e. Your customers
 - f. Other constituents

- Are you actively planning for how your board should change over time to best serve your long term business success

- Are you thinking strategically about what capabilities you need on the board and how to ensure that they come with the right diverse perspective to avoid monolithic thinking

What to do about SB826?

▪ Candidates

- ❑ Do you have a clear, succinct Profile that presents your credentials in the best light (don't make others do the work to figure out your capabilities and accomplishments)

- ❑ Have you refined your Pitch to highlight your “super powers” in a manner that is relevant to a board?
 - ❖ Do others know how you can help them?
 - ❖ Do you strike the right tone of confidence and collaboration – both are needed!

- ❑ Have you tapped into your Network?
 - ❖ Do you know who to ask?
 - ❖ Do you know how to make the ask?

Questions?



Contact Information



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Tom represents companies, investment banks and venture capital funds, advising technology industry clients on public offerings, M&A, venture capital and other private finance transactions and corporate governance matters



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Karen focuses her practice on mergers and acquisitions, private equity, venture capital and general corporate matters for technology companies, corporate venture capital and cross border corporate transactions.

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Abby Adlerman

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Abby is CEO of Boardspan, reimagining how boards approach their governance needs and filling a void for Nom & Gov Chairs. Abby has advised hundreds of boards over her career ranging from Fortune 100 to national non-profits to early-stage companies. She spent 15 years on Wall Street advising board & C-suite clients on a range of high-profile financings and M&A transactions. She was then recruited by the recruiters and became part of the leadership team at the global search firm Russell Reynolds, first in the U.S. and then building the Asia-Pacific PE business while living in Singapore.

Abby has served numerous corporate and non-profit boards, and she is a frequent public speaker and voice on a range of boardroom topics. She received her BS in Engineering from Lafayette College and her masters from Yale University, where she is a member of the Entrepreneurship Advisory Board.

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Richard was a securities and corporate attorney at Wilson Sonsini from 1984 to 1996, then left to become a Managing Director at Cowen & Company and Credit Suisse First Boston. In 2003 Richard began a third phase of his career, taking executive roles at a series of technology companies, most recently as Managing Director, at Citi Enterprise Payments and Senior Vice President of Corporate and Business Development at Verifone. Richard has sat on a number of public and private company boards.

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THANK
YOU