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Sonja S. Carlson

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Sonja S. Carlson[1]

INTRODUCTION

> What's the point in pouring a fortune into educating girls, and then watching them exceed boys at almost every level, if, when it comes to appointing business leaders in top companies, these are drawn from just half the population – friends who have been recruited on fishing and hunting trips or from within a small circle of acquaintances?
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> *—Ansgar Gabrielsen, Former Minister of Trade and Industry, Norway*[2]

While women comprise nearly half of the American labor force,[3] looking to the corporate boardrooms of America's *Fortune* 500 companies,[4] a mere

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[1] Sonja Carlson is a 2013 JD candidate at Seattle University School of Law, where she serves as the Adolf A. Berle, Jr. Scholar for the Berle Center on Corporations, Law and Society. She received her BA in Economics from Columbia University in 2004. A special thanks to Dean Mark Niles, Professor Charles O'Kelley, Mr. Bob Menanteaux, and R.G. Carlson Phillips for their support and encouragement.

[2] Nicki Gilmour, *Why Accountability Is What Matters: Achieving Critical Mass with Targets or Quotas*, GLASS HAMMER (Jan. 21, 2010, 6:00 AM), http://www.theglasshammer.com/news/2010/01/21/why-accountability-is-what-matters-achieving-critical-mass-with-targets-or-quotas/ (quoting Ansgar Gabrielsen, former Norwegian politician for the Conservative Party who, as Minister of Trade and Industry, drafted the legislation mandating quotas for gender diversity on corporate boards).

[3] BUREAU OF LABOR STATISTICS, WOMEN IN THE LABOR FORCE: A DATABOOK 1 (2011), *available at* http://www.bls.gov/cps/wlf-intro-2011.pdf (women comprised 47 percent of the American labor force in 2010).

[4] "*Fortune* magazine's ranking of the top 500 U.S. incorporated companies filing financial statements . . . is based on each company's gross annual revenue. Included in the list are public companies, private companies, and cooperatives that file a 10-K with the SEC, and mutual insurance companies that file with state regulators." NANCY M. CARTER & HARVEY M. WAGNER, THE BOTTOM LINE: CORPORATE PERFORMANCE AND

16.1 percent of directors are women.[5] In both 2010 and 2011, less than one-fifth of *Fortune* 500 companies had 25 percent or more women directors.[6] Just three companies in the Standard & Poor's 500 Index (S&P 500)—Avon Products, Estée Lauder, and Macy's—have boards in which women hold more than 40 percent of the seats.[7] Furthermore, women hold a mere 2.6 percent of board chairmanships.[8] Forty-seven, or 9.4 percent, of S&P 500 companies have no female directors at all, including Discovery Communications, Inc., co-owner of Oprah Winfrey's OWN cable channel, and retailer Urban Outfitters, Inc.[9]

Such statistics are particularly noteworthy given that the board of directors is so central to a corporation's strategic leadership that it is considered "the epicenter of U.S. corporate governance."[10] While

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WOMEN'S REPRESENTATION ON BOARDS (2004–2008) 3 (2011), *available at* http://www.catalyst.org/file/445/the_bottom_line_corporate_performance_and_women's_representation_on_boards_(2004–2008).pdf (citing *Fortune 500: FAQ Definitions and Explanations*, CNNMONEY (May 3, 2010), http://money.cnn.com/magazines/fortune/fortune500/2010/faq/).

[5] CATALYST, STATISTICAL OVERVIEW OF WOMEN IN THE WORKPLACE (Dec. 14, 2011), *available at* http://www.catalyst.org/publication/219/statistical-overview-of-women-in-the-workplace [hereinafter STATISTICAL OVERVIEW] (citing BUREAU OF LABOR STATISTICS, CURRENT POPULATION SURVEY, Table 3: Employment Status of the Civilian Noninstitutional Population by Age, Sex, and Race, Annual Averages 2010 (2011) [hereinafter POPULATION SURVEY]). *See also* CATALYST, WOMEN IN U.S. INFORMATION (Mar. 6, 2012), *available at* http://www.catalyst.org/publication/496/women-in-us-information [hereinafter WOMEN IN U.S.] (Data from 2011 also reveals that women constitute only 12.2 percent of executive officers and 3.3 percent of CEOs.).

[6] RACHEL SOARES ET AL., CATALYST CENSUS: FORTUNE 500 WOMEN BOARD DIRECTORS 1 (2011), *available at* http://www.catalyst.org/file/533/2011_fortune_500_census_wbd.pdf.

[7] Joel Stonington, *Boys-Only Boards: Where the Women Aren't at the Top*, BLOOMBERG BUSINESSWEEK, June 27, 2011, http://www.msnbc.msn.com/id/43526947/ns/business-us_business/t/boys-only-boards-where-women-arent-top/from/toolbar#.TvotapgW994.

[8] *Id.* (citing Catalyst statistics).

[9] Jeff Green, *Women Lose Out on U.S. Boards as Europeans Get Quota Help*, BLOOMBERG, June 16, 2011, http://www.bloomberg.com/news/2011-06-16/women-losing-out-on-u-s-boards-as-europe-gets-help-from-quotas.html?cmpid=msnbc.

[10] JONATHAN R. MACEY, CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN 51 (2008).

boardroom diversity[11] has been a topic of discussion for some time, in recent years it has been the focus of increasing attention from both companies and governments.[12]

Broadly speaking, arguments for increased gender diversity fall into one of two categories: ethical or economic.[13] Ethical arguments present the lack of women directors in terms of the immorality of gender discrimination, advocating for increased gender diversity in order to "achieve a more equitable outcome for society."[14] In contrast, economic arguments are "based on the proposition that firms which fail to select the most able candidates for the board of directors damage their financial performance"—the so-called "business case" for gender diversity.[15]

Building on contemporary discourse regarding the desirability of meaningful gender diversity in the boardroom, this article suggests that the US Securities and Exchange Commission (SEC) ought to introduce a more robust version of its diversity-related 2010 Proxy Disclosure Enhancements[16] to better address gender diversity. Such an amended disclosure requirement would (1) define "diversity" to explicitly include gender diversity, (2) require corporations to have a diversity policy in place and to disclose such policy to shareholders, and (3) potentially require a nonbinding "say-on-diversity" shareholder vote.

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[11] While "boardroom diversity" can be used to refer to a broad range of characteristics, such as ethnicity, gender, age, professional experience, and geography, this article uses the term to refer specifically to gender diversity in the boardroom.

[12] *See, e.g.*, DELOITTE GLOBAL CENTER FOR CORPORATE GOVERNANCE, WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE 1 (2011) (on file with author) (reviewing the approaches of numerous countries to boardroom diversity, which include everything "from voluntary initiatives, to 'comply or explain' initiatives aligned with local corporate governance codes, to required disclosure about diversity policies, to legal requirements with specific quotas") [hereinafter DELOITTE GLOBAL].

[13] Kevin Campbell & Antonio Mínguez-Vera, *Gender Diversity in the Boardroom and Firm Financial Performance*, 83 J. BUS. ETHICS 435, 439 (2008).

[14] *Id.*

[15] *Id.*

[16] *See* Corporate Governance, 17 C.F.R. § 229.407(c)(1–2) (2012).

Part I examines the available rationales in support of gender diversity, focusing primarily on the business rationale because it is directly linked to the dominant model of corporate governance: shareholder primacy. Included is a discussion highlighting the importance of achieving a "critical mass" of women directors, as well as the drawbacks of "tokenistic" appointments. Part II summarizes regulations aimed at boardroom gender diversity in the international context and examines the SEC's 2010 Proxy Disclosure Enhancements. Part III analyzes the scope of the SEC's regulatory authority and, in light of the advantages of increased gender diversity in the boardroom, suggests a more robust version of the 2010 Proxy Disclosure Enhancements. Finally, Part IV engages in a preliminary investigation of the potentially positive labor market effects that stem from gender diversity in the boardroom, suggesting that this is an area for further research.

I. THE BUSINESS RATIONALE FOR GENDER DIVERSITY IN THE BOARDROOM: FROM TOKEN TO CRITICAL MASS

Delaware, the leading authority on matters of corporate law, mandates that "[t]he business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors."[17] While there are numerous corporate governance models, the dominant model today is that of shareholder primacy—the central role of the board of directors is shareholder wealth maximization.[18] The shareholder primacy norm is

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[17] DEL. CODE ANN. tit. 8, § 141(a) (2012).

[18] *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998).

> Although the shareholder primacy norm has had myriad formulations over time, the one most often quoted by modern scholars comes from the well-known case *Dodge v. Ford Motor Co.*:
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> > A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised

generally assumed to be "a major factor considered by boards of directors of publicly traded corporations in making ordinary business decisions."[19] To the extent that the board's obligation to maximize shareholder wealth supersedes or excludes any broader social responsibility—a view espoused by the late Nobel Prize-winning economist, Milton Friedman—a business rationale must justify corporate conduct.[20]

Numerous empirical studies have linked greater gender diversity on corporate boards to stronger financial performance.[21] InterOrganization Network (ION), an organization advocating for the advancement of women in the business world,[22] contends that "board diversity is no longer a 'soft issue,' but rather is a solid business strategy that leads to a return on equity,

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> in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

Id. (quoting Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919)).

[19] *Id. See also* Stephen M. Bainbridge, *Participatory Management Within a Theory of the Firm,* 21 J. CORP. L. 657, 717 (1996) ("the shareholder wealth maximization norm . . . has been fully internalized by American managers").

[20] Thomas Lee Hazen, *Diversity on Corporate Boards: Limits of the Business Case and the Connection Between Supporting Rationales and the Appropriate Response of the Law*, 89 N.C. L. REV. 887, 889–90 (2011) (citing Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, §6 (Magazine), at 32) (Thomas Lee Hazen's article "explores the limits of the business case, some of the alternative rationales for increasing diversity on corporate boards, and the extent to which those rationales provide a basis for the law mandating or encouraging increased diversity.").

[21] *See, e.g.*, CARTER & WAGNER*, supra* note 4.

[22] *About Us: Charged for Boardroom Change*, INTERORGANIZATION NETWORK, http://www.ionwomen.org/about-us/ (last visited Mar. 31, 2012).

> Formed in 2004, the InterOrganizationNetwork (ION) consists of 14 regional organizations in the United States representing more than 10,000 women in business across a wide range of industries. Through ION, these women combine their energies in advocating the advancement of women to positions of power in the business world, especially to boards of directors and executive suites.

Id.

return on sales, and return on invested capital."[23] According to a recent report from the Deloitte Global Center for Corporate Governance, including individuals with a diversity of backgrounds on corporate boards could "improve these boards' functioning [because] harnessing strength from a variety of backgrounds, experiences, and perspectives allows boards to bring a more diverse perspective to problems."[24]

A. Business Rationale

More diverse boards tend to be more highly qualified than less diverse boards.[25] At least in part, this is because greater gender diversity implies that the available "talent pool" was more broadly considered during selection processes.[26] Given corporate governance's focus on wealth maximization, it is unsurprising that selecting "the most able managers and [making them] accountable to investors" is believed to result in "good" corporate governance structures.[27]

While this article does not attempt a comprehensive review of the ongoing debate surrounding gender diversity in the boardroom, it does endeavor to discuss some of the key arguments supporting the "business case" for increased gender diversity in the boardroom. Specifically,

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[23] Tina Vasquez, *SEC Changes Help Women in the Boardroom*, GLASS HAMMER, Feb. 2, 2010, http://www.theglasshammer.com/news/2010/02/02/sec-changes-help-women-in-the-boardroom/.

[24] DELOITTE GLOBAL, *supra* note 12.

[25] *See, e.g.*, FEEDBACK STATEMENT: GENDER DIVERSITY ON BOARDS, THE FINANCIAL REPORTING COUNCIL LIMITED 1, 1 (2011), *available at* http://www.frc.org.uk/getattachment/ade9464e-2195-4ce7-b99d-dabaec94e870/Feedback-Statement-Gender-Diversity-on-Boards.aspx [hereinafter FEEDBACK STATEMENT]; *id.* at 4 ("low percentages of women on boards may demonstrate a failure to make full use of the talent pool").

[26] *See id.* at 4 ("low percentages of women on boards may demonstrate a failure to make full use of the talent pool").

[27] Claude Francoeur, Réal Labelle & Bernard Sinclair-Desgagné, *Gender Diversity in Corporate Governance and Top Management*, 81 J. BUS. ETHICS 83, 84 (2008) (quoting Tirole, *Corporate Governance*, 69 ECONOMETRICA 1, 2 (2001) (1999 Presidential address to the Econometric Society) (internal quotation marks omitted)).

corporations with diverse boards may enjoy enhanced profitability because greater gender diversity leads to better decision-making,[28] improved performance of monitoring functions,[29] and stronger market penetration.[30]

The dangers that stem from homogenous boards (i.e., boards with low levels of gender diversity) were highlighted by the 2008 financial crisis. Angela Knight, chief executive officer of the British Bankers' Association, reflected on these issues: "If boards all look the same, will they end up making the same kinds of decisions? After the banking crisis, the question was asked whether there would have been so much groupthink if there had been broader [female] representation on boards."[31] Richard A. Bennett[32] suggests, "[d]uring the financial crisis, we saw examples of boards that were composed of members who were too similar in background and that too often may breed 'groupthink'. Those boards would have benefited from

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28 *See, e.g.*, Campbell & Mínguez-Vera, *supra* note 13, at 440 ("it is argued that diversity can enhance problem-solving as the variety of perspectives that emerges from a more diverse board means that more alternatives are evaluated.").

29 *See, e.g.*, *id.* at 435.

30 *See, e.g.*, Stonington, *supra* note 7.

> 'It makes no sense not to have diversity on the board,' says [Aída] Alvarez. At Walmart, she says, it's sound business to have women on the board, not least because more than half the customers and employees are women. The large public company doesn't exist, Alvarez says, that doesn't have women as end users or investors.

Id. (Dr. Aída Álvarez is a director on the boards of Walmart and Union Bank; she formerly served as an administrator for the US Small Business Administration); Campbell & Mínguez-Vera, *supra* note 13, at 439–40 ("it is argued that greater diversity promotes a better understanding of the marketplace by matching the diversity of a firm's directors to the diversity of its potential customers and employees, thereby increasing its ability to penetrate markets").

31 Dalia Fahmy, *Women on Board; A U.K. Initiative Puts a Spotlight on the Dearth of Female Directors and Gets Corporate Executives To Commit To Hard Targets for Improvement*, U.S. BANKER, Mar. 2011, at 32.

32 Richard A. Bennett is Executive Chairman of GovernanceMetrics International (GMI), a global leader in corporate governance research and risk rating. *About GMI*, GOVERNANCEMETRICS INTERNATIONAL, http://www.gmiratings.com/about.aspx (last visited May 27, 2012).

having a more dynamic and broad-ranging composition."[33] Others have proposed that "critical mass"[34] is itself a business strategy that can be employed to combat the type of "groupthink" that contributed to the 2008 financial crisis.[35]

Assuming that increased gender diversity can be equated with an increased variety of perspectives—a proposition related to the ensuing discussion of "critical mass"—then such an increase in gender diversity means a concomitant increase in the range of alternatives evaluated during a board's decision-making process.[36] Evaluating a broader range of ideas implies that boards will both make more informed decisions, and, in at least some instances, reach substantively better decisions based on ideas that had previously gone unconsidered. Gender diversity in the boardroom can aid in the fulfillment of directors' fiduciary duties because considering a diversity of perspectives during the decision-making process can help a corporation achieve optimal long-term and risk-adjusted returns.[37]

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[33] Press Announcement, GovernanceMetrics International, GMI Launches Diverse Director Database (Sept. 26, 2011), *available at* http://www3.gmiratings.com/wp-content/themes/gmi/images/pdf/1753gmipr3d.pdf (quoting Richard A. Bennett, Executive Chairman, GMI); *see also* FEEDBACK STATEMENT *supra* note 25 (suggesting that "a lack of gender diversity around the board table may weaken the board by encouraging 'group think'").

[34] Critical mass theory, as articulated by Rosabeth Moss Kanter and Mark Granovetter, suggests that "the nature of group interactions depends upon size. When the size of the subgroup reaches a certain threshold, or critical mass, the subgroup's degree of influence increases. In other words . . . when the minority group reaches critical mass, a qualitative change will take place in the nature of group interactions." Mariateresa Torchia, Andrew Calabrò & Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. BUS. ETHICS 299, 302 (2011). *See generally* ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1977); Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOC. 1420 (1978).

[35] Gilmour, *supra* note 2.

[36] *See, e.g.*, Campbell & Mínguez-Vera, *supra* note 13, at 440 ("it is argued that diversity can enhance problem-solving as the variety of perspectives that emerges from a more diverse board means that more alternatives are evaluated.").

[37] Press Announcement, *supra* note 33 (quoting Richard A. Bennett, Executive Chairman, GMI).

Having a robust decision-making process can also facilitate a board's ability to adeptly perform its monitoring role.[38] Such role represents an important control mechanism in corporate governance.[39] The board's role as monitor of executive management derives from agency theory.[40] Within legal scholarship, agency theory dominates discourse on the role of the board of directors.[41] Assuming rational, self-interested actors, the separation of ownership from control inherent in the modern corporate form necessarily implies that management (i.e., agent) will not always act in the best interest of shareholders (i.e., principal).[42] Adolf A. Berle and Gardiner C. Means underscored the dangers that stem from the separation of ownership and control.[43] They theorized that the potentially adverse effects for shareholders could be reduced if boards attempted to minimize agency costs by monitoring management.[44] Notably, some scholars highlight a link between women directors and overall board independence, suggesting that diverse boards may result in more effective monitoring because "women are more inclined to ask questions that would not be asked by male directors."[45]

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[38] Campbell & Mínguez-Vera, *supra* note 13, at 435.

[39] *Id.*

[40] Nicola Faith Sharpe, *Process Over Structure: An Organizational Behavior Approach To Improving Corporate Boards*, 85 S. CAL. L. REV. 261, 269–70 (2012).

[41] *Id.* (Two other important theories of the role of the board of directors are the "resource dependency theory" and the "stewardship theory.").

[42] *Id.* at 270–72.

[43] *Id.* at 270 (citing ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 121 (1932)).

[44] *Id.* at 270 (citing BERLE & MEANS, *supra* note 43). Agency costs are defined as "the sum of the monitoring and bonding costs, plus any residual loss, incurred to prevent shirking by agents." STEPHEN M. BAINBRIDGE, CORPORATION LAW AND ECONOMICS 35–36 (2002) (citing Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976)).

[45] Campbell & Mínguez-Vera, *supra* note 13, at 440 (citing David Carter, Betty J. Simkins & W. Gary Simpson, *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33 (2003)) (noting, however, that Carter et al. also "point out that a fresh perspective may not necessarily result in more effective monitoring if female board members are marginalised and conclude that there is no *a priori* reason to expect greater gender diversity to enhance board monitoring").

Finally, from a broader perspective, as a corporation's percentage of female directors becomes more proportionate to its percentage of female customers and employees, the corporation is better able to understand the marketplace.[46] An improved marketplace understanding can facilitate a corporation's market penetration,[47] thereby increasing corporate profits and shareholder wealth. In considering public feedback to proposed amendments to the UK Corporate Governance Code, the Financial Reporting Council (FRC)[48] stated that boards with no, or very few, female directors "may be weak in terms of connectivity with, or understanding of customers and workforce."[49] On this side of the Atlantic, Aída M. Álvarez, a director on Walmart's board, expressed a similar viewpoint: because women constitute over half of Walmart's customers and employees, in terms of sound business policy, it simply "makes no sense not to have diversity on the board."[50] Furthermore, gender diversity in the boardroom is a broadly applicable business policy because all large public companies have female end-users or investors.[51]

B. The Statistics

The limited extent of female representation in the boardroom has made it difficult for researchers to conclusively determine the effects of boardroom diversity.[52] In the United States, for example, it has been difficult to find

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46 *Id.* at 439–40.
47 *Id.*
48 As the United Kingdom's independent regulator, the FRC is responsible for "promoting high quality corporate governance and reporting to foster investment." *About the FRC*, FINANCIAL REPORTING COUNCIL, http://www.frc.org.uk/about/ (last visited June 4, 2012).
49 FEEDBACK STATEMENT, *supra* note 25, at 4.
50 Stonington, *supra* note 7 (quoting Álvarez).
51 *Id.* (summarizing Álvarez's statement).
52 *See, e.g.*, Charlotte Villiers, *Achieving Gender Balance in the Boardroom: Is it Time for Legislative Action in the UK?*, 30 LEGAL STUD. 533, 545 (2010) ("The effect of diversity has not been fully tested because diversity has not yet been solidly achieved, so much of the business case is therefore speculative.").

adequately sized samples of corporations with varying levels of boardroom diversity. Empirical findings have tended to be mixed: a causal relationship between gender diversity and firm performance has not been consistently identifiable.[53] A number of recent studies, however, have not only convincingly established a strong correlation between increased gender diversity and enhanced financial performance, but have also made a colorable case for a causal relationship.[54]

A recent Catalyst[55] study found a statistically significant correlation between *Fortune* 500 companies' financial performance and higher levels of gender diversity in the boardroom.[56] Looking to the companies' percentages of women on corporate boards (WOCB),[57] the study compared

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[53] *See e.g.*, Katharine T. Bartlett, *Showcasing: The Positive Spin*, 89 N.C. L. REV. 1055, 1077 (2011) ("The research with respect to the effects of diversity in corporate boardrooms is . . . mixed and inconclusive."); *see also* Lissa Lamkin Broome, John M. Conley & Kimberly D. Krawiec, *Does Critical Mass Matter? Views from the Boardroom*, 34 SEATTLE U. L. REV. 1049, 1079–80 (2011) (suggesting that while increased gender diversity could "enhance opportunities for collaboration and support . . . other scenarios are plausible," especially in light of some women directors' apparent embrace of their "first and only" status); Lisa M. Fairfax, *Board Diversity Re-visited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 861–64 (2011) (finding that while many empirical studies have found a positive correlation between boardroom diversity and improved financial performance, other studies suggest that there is no causal link, and at least one study has suggested a negative correlation); James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C. L. REV. 901, 902–03 (2011) (noting the inherent difficulties in designing empirical studies that measure the effects of boardroom diversity on firm performance, emphasizing the "impossibly long: causal chain between board composition and shareholder value").

[54] *See, e.g.*, Campbell & Mínguez-Vera, *supra* note 13; *see also* Claude Francoeur, Réal Labelle & Bernard Sinclair-Desgagné, *Gender Diversity in Corporate Governance and Top Management*, 81 J. BUS. ETHICS 83, 83–84 (2008) (such firms experienced "returns of 0.17% monthly, intuitively amounting to a 6% return over a 3-year period").

[55] "Founded in 1962, Catalyst is the leading nonprofit membership organization expanding opportunities for women and business." *About Us*, CATALYST, INC., http://www.catalyst.org/page/59/about-us (last visited June 4, 2012).

[56] CARTER & WAGNER, *supra* note 4, at 1.

[57] For usage of the term "WOCB," see, e.g., Siri Terjesen, Ruth Sealy & Val Singh, *Women Directors on Corporate Boards: A Review and Research Agenda*, 17 CORP. GOVERNANCE: INT'L REV. 320 (2009).

the bottom quartile companies with the top quartile companies.[58] It found that companies in the top quartile outperformed companies in the bottom quartile in two of the three performance measures—return on sales and return on invested capital.[59] Return on sales for companies in the top quartile was 16 percent greater than for companies in the bottom quartile; return on invested capital for companies in the top quartile was 26 percent greater than for companies in the bottom quartile.[60]

Of even greater note, companies with three or more women directors outperformed companies with no women directors at rather astonishing rates.[61] Over a five-year period, Catalyst found that companies whose boards had at least three women directors had a return on sales 84 percent greater, a return on invested capital 60 percent greater, and a return on equity 46 percent greater than companies with no women directors.[62] Similarly, a 2002 Canadian study found significant differences between boards with three or more women and all-male boards in terms of nonfinancial performance measures, such as customer and employee satisfaction, and corporate social responsibility.[63]

Utilizing robust methodology, a recent Spanish study reiterates the importance of the male-to-female director ratio, while also rebutting a key criticism of much of the existing empirical data: the lack of established

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[58] *Id.*

[59] *Id.*

[60] *Id.* (The study found no statistically significant difference in return on equity between the two groups of companies.)

[61] *Id.*

[62] The study evaluated financial performance from 2005 to 2009. In order to be placed into either the "at least three women directors" or "zero women directors" category, each company needed to have maintained such levels of female representation for at least four of the five years at issue. *Id.* at 2.

[63] Terjesen et al., *supra* note 57, at 329 (one such difference was that such boards "are significantly more active in promoting nonfinancial performance measures such as customer satisfaction, employee satisfaction, and gender representation, as well as considering measures of innovation and corporate social responsibility") (citing DAVID A.H. BROWN, DEBRA L. BROWN & VANESSA ANASTASOPOULOS, WOMEN ON BOARDS: NOT JUST THE RIGHT THING BUT THE 'BRIGHT' THING, REPORT 341–402 (2002)).

causality.[64] The two researchers, Kevin Campbell and Antonio Mínguez-Vera, found that board diversity[65] positively and significantly impacts firm value.[66] Notably, "the positive relationship observed between gender diversity and firm value *is due to the presence of female directors affecting firm performance* rather than the opposite."[67] Utilizing panel data methodology, Campbell and Mínguez-Vera were able to control for unobservable heterogeneity in the data, something that most published studies have failed to take into account.[68] By employing a causality test, they were able to account for possible endogeneity in the relationship between gender diversity and firm performance.[69] Their findings suggest that the effect of firm value on board diversity is insignificant.[70] Improved firm performance is due to increased gender diversity.[71]

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64 *See* Campbell & Mínguez-Vera, *supra* note 13.
65 Board diversity is defined as "the mixture of men and women." *Id.* at 446.
66 *Id.* at 446–47 (2008) (Campbell and Mínguez-Vera measure board diversity using the percentage of women, as well as the Blau and Shannon indices).
67 *Id.* (emphasis added).
68 *Id.*

> The sample for the panel data analysis comprises non-financial firms listed on the continuous market in Madrid during the period from January 1995 to December 2000. Due to some limitations in the availability of the data, the sample comprises 68 companies and 408 observations. The identities of the directors and the dates on which they were appointed were obtained from the register of directors of the Spanish Stock Exchange Commission (CNMV), which provides details of the dates of appointment and termination of the posts of each member of the board of directors of listed companies. From the register of directors we also calculated the number of board members. The accounting data were obtained from the SABI database [System of Analysis of Iberian Balance Sheets, provided by Bureau Van Dijk]. Finally, the number of shares and the share prices were obtained from the annual Madrid stock exchange list.

Id. at 441.
69 *Id.* at 436.
70 *Id.* at 446.
71 *Id.*

A number of other studies have leveraged "critical mass" theory[72] in order to more objectively analyze the benefits flowing from boardroom diversity when women directors assume more than tokenistic roles. Pax World Management President and CEO, Joe Keefe, explained that many companies have viewed the issue of gender diversity in terms of box checking: "We have one woman on our board now, so we can check that box off; we have quote unquote gender diversity."[73] Such an approach is problematic because, as Rosabeth M. Kanter's classic study of tokenism and critical mass suggests, in the context of a male-dominated corporate environment, women have slim chance of being able to exert their influence until they constitute a significant minority group.[74] Recent scholarship has reiterated concerns about tokenistic appointments. Campbell and Mínguez-Vera explain that "a fresh perspective may not necessarily result in more effective monitoring if female board members are marginalised . . . ."[75] Once women have reached a critical mass, however, they can "begin to effect organizational changes."[76]

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[72] Torchia et al., *supra* note 34.
[73] Stonington, *supra* note 7.
[74] Torchia et al., *supra* note 34 (citing KANTER, *supra* note 34).
[75] Campbell & Mínguez-Vera, *supra* note 13, at 440 (citing David Carter, Betty J. Simkins & W. Gary Simpson, *Corporate Governance, Board Diversity, and Firm Value*, 38 FIN. REV. 33 (2003)).

> Carter et al. (2003) consider the link between board diversity and firm value in the context of agency theory, as outlined by Fama and Jensen (1983), and consider whether gender diversity enhances the board as a mechanism to control and monitor managers. They suggest that greater diversity may increase the independence of the board as women are more inclined to ask questions that would not be asked by male directors. However, they also point out that a fresh perspective may not necessarily result in more effective monitoring if female board members are marginalised and conclude that there is no a priori reason to expect greater gender diversity to enhance board monitoring.

Id.
[76] Torchia et al., *supra* note 34 (citing KANTER, *supra* note 34).

Tokenistic appointments hinder the ability of token directors to contribute their talents and expertise to the board in a meaningful manner for a variety of reasons. Specifically, the negative consequences of tokenism include visibility, polarization, and assimilation.[77] First, in terms of visibility, because the token individual finds herself being watched with high frequency, she perceives great pressure to perform.[78] Second, polarization suggests that the token individual may experience extreme social isolation as members of the dominant group heighten their boundaries because they feel threatened.[79] Finally, in terms of assimilation, the dominant group may force the token individual into a stereotypically defined minority group, with the unfortunate result of eliding any differences amongst members of such minority group.[80]

In order to realize the arguably positive economic effects of gender diversity in the boardroom, and in light of the potentially negative consequences of tokenism, attaining a critical mass of women directors in the boardroom is of primary importance. A well-regarded study by Sumru Erkut, Vicki W. Kramer, and Alison M. Konrad explored the dimensions of numerical representation in the boardroom, comparing groups of one, two, and three women.[81] The study found that three or more women directors are able to establish a critical mass, creating "normalization" where gender is no longer a barrier to communication, and where women directors are more likely to feel comfortable, supported, and freer to raise issues and actively

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[77] *Id.* at 310.
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] Terjesen et al., *supra* note 57, at 322–23 (citing Sumru Erkut, Vicki W. Kramer & Alison M. Konrad, *Critical Mass: Does the Number of Women on a Corporate Board Make a Difference?*, *in* WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL RESEARCH AND PRACTICE 350–66 (Susan Vinnicombe et al. eds., 2008)).

participate.[82] When such a critical mass is present, "diversity becomes not a 'woman's issue,' but a group responsibility."[83]

In a 2011 study, Mariateresa Torchia, Andrew Calabrò, and Morten Huse sampled approximately three hundred Norwegian firms in order to analyze gender diversity in the boardroom and its contribution to firm innovation.[84] Recognizing the variety of ways to measure the effects of gender diversity (e.g., male-to-female ratios, presence of women, and number of women), the study focused on the number of women directors and, drawing on critical mass theory, analyzed boards with one, two, or at least three women.[85] The results suggest that "attaining critical mass – going from one or two women (a few tokens) to at least three women (consistent minority) – makes it possible to enhance the level of firm innovation."[86] Focusing specifically on firm "organizational innovation," which refers to "the creation or adoption of an idea or behaviour that is new to the organization,"[87] rather than on general measures of firm performance, the study found that "[o]nce the number of women directors increases from a few tokens (one woman, two women) to a consistent minority ('at least three women'), they are able to effectively influence the level of organizational innovation."[88]

The results of this Norwegian-firm study are consistent with prior critical mass studies,[89] and suggest that having at least three women directors brings

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[82] *Id.* (citing Erkut et al., *supra* note 81).
[83] *Id.* at 328. (citing Erkut et al., *supra* note 81).
[84] Torchia et al., *supra* note 34, at 300.
[85] *Id.* at 304.
[86] *Id.* at 300.
[87] *Id.* at 303 (citing Richard L. Daft, *A Dual-Core Model of Organizational Innovation*, 21 ACAD. MGMT. J. 193 (1978); Fariborz Damanpour, *Organizational Complexity and Innovation: Developing and Testing Multiple Contingency Models*, 42 MGMT. SCI. 693 (1996); Fariborz Damanpour, & William M. Evan, *Organizational Innovation and Performance: The Problem of Organizational Lag*, 29 ADMIN. SCI. Q. 392 (1984)).
[88] *Id.* at 311.
[89] *Id.* (citing Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31 (1955); Rod Bond, *Group Size and Conformity*, 8 GROUP PROCESSES & INTERGROUP REL. 331

boards to a place of gender diversity in which genuine majority-minority interactions and processes occur, "thereby enabling the overall board to take high-quality decisions."[90] In contrast, because one or two women directors remain tokens, and because they are likely to conform to the majority's viewpoints, they do not appear to influence the level of organizational innovation.[91]

In another recent study, three professors at HEC Montréal, a well-regarded Canadian business school, sought to compare firm performance using a model that controlled for each firm's associated risk level (something that most prior studies had failed to do).[92] Risk level is particularly important in this line of research because women are "often appointed to leadership positions under problematic organizational circumstances"—a situation suggestive of a "glass cliff" in which women leaders are exposed to high risk of failure and criticism.[93] Looking to female director and officer representation, the Canadian study indicates that when

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(2005); Charlan J. Nemeth & Joel Wachtler, *Creative Problem Solving as a Result of Majority and Minority Influence*, 13 EUR. J. SOC. PSYCHOL. 45 (1983); Sarah Tanford & Steven Penrod, *Social Influence Model: A Formal Integration of Research on Majority and Minority Influence Processes*, 95 PSYCHOL. BULL. 189 (1984)).

[90] *Id.*

[91] *Id.* at 308 (such findings are "in line with previous studies showing that if an individual is faced with the unanimous opinion of a group, that person is likely to conform to the unanimous 'majority' opinion"); *see, e.g.*, Solomon E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgment*, *in* GROUPS, LEADERSHIP AND MEN 177–90 (Harold S. Guetzkow ed., 1951); *see also* Solomon E. Asch, *Opinions and Social Pressure*, 193 SCI. AM. 31 (1955).

[92] Francoeur et al., *supra* note 54 ("[W]hereas previous works used either raw stock returns or accounting ratios, we apply the Fama and French . . . valuation framework, in order to take risk levels into account when comparing firm performances."); *see* Eugene F. Fama & Kenneth R. French, *The Cross-Section of Expected Stock Returns*, 47 J. FIN. 427 (1992); *see also* Eugene F. Fama & Kenneth R. French, *Common Risk Factors in the Returns on Stocks and Bonds*, 33 J. FIN. ECON. 3 (1993).

[93] Francoeur et al., *supra* note 54, at 84, 93 (citing Michelle K. Ryan & S. Alexander Haslam, *What Lies Beyond the Glass Ceiling?*, 14 HUM. RESOURCE MGMT. INT'L DIG. 3 (2006); Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Evidence that Women Are Over-Represented in Precarious Leadership Positions*, 16 BRIT. J. OF MGMT. 81 (2005)).

firms operate in complex environments, such firms generate "positive and significant abnormal returns" when they have a high proportion of women in leadership roles.[94]

Interestingly, because the Canadian study relied on data from 2001 to 2004 in computing average female representation over a two-year period,[95] and because the average levels of female representation have increased, today, the same study might generate even more dramatic empirical results today. The *Fortune* 500 corporations that were deemed "high percentage firms" had a median of 15.4 percent women directors and 20.0 percent women officers.[96] Today, amongst *Fortune* 500 corporations, an average of 16.1 percent of directors are women.[97] Drawing on Torchia et al.'s critical mass-oriented study,[98] recent increases in levels of gender diversity in the boardroom suggest that corporations with a critical mass of female directors may be able to achieve returns substantially larger than those suggested by the Canadian study.

C. Why the Lack of Gender Diversity?

If gender diversity in the boardroom is indeed sound business policy, one has to wonder why there is so little of it. And, assuming diversity's desirability, what should be done to encourage it?

In general terms, both individual and organizational factors contribute to the lack of gender diversity on corporate boards.[99] Research on individual factors, such as gender-related demographic characteristics, behavior patterns and types of interaction, and professional experience and

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94 *Id.* at 83–84 (firms operating in complex environments experienced "returns of 0.17% monthly, intuitively amounting to a 6% return over a 3-year period").
95 *Id.* at 86–87.
96 *Id.* at 88.
97 STATISTICAL OVERVIEW, *supra* note 5 (citing POPULATION SURVEY, *supra* note 5).
98 *See* Torchia et al., *supra* note 34.
99 Villiers, *supra* note 52, at 537 (citing Amy J. Hillman, Christine Shropshire & Albert A. Cannella, Jr., *Organizational Predictors of Women on Corporate Boards*, 50 ACAD. MGMT. J. 941 (2007)).

connections "can yield insight into how specific women advance into the boardroom, but . . . cannot answer the question of why some firms have female directors and others do not."[100] Organizational characteristics, in contrast, can help in understanding the nature of the conditions in which a board is likely to have a higher level of gender diversity.[101]

Organizational factors relate to the structures of workplace interactions and the nature of everyday decision-making.[102] Reflecting on low levels of women in positions of power, many have suggested the existence of a "glass ceiling." Professor Charlotte Villiers analyzed the low level of women directors in the United Kingdom: "the fact that half the workforce is comprised of women but only around 14% of directors in the largest companies are women indicates that a glass ceiling exists, preventing women from progressing to the top of their careers."[103] Professor Susan Sturm suggests, "the glass ceiling remains a barrier for women . . . largely because of patterns of interaction, informal norms, networking, training, mentoring, and evaluation, as well as the absence of systematic efforts to address bias produced by these patterns."[104]

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[100] Hillman et al., *supra* note 99, at 941.

> Women are increasing in number among corporations' boards of directors, yet their representation is far from uniform across firms. In this study, we adopted a resource dependence theory lens to identify organizational predictors of women on boards. We tested our hypotheses using panel data from the 1,000 U.S. firms that were largest in terms of sales between 1990 and 2003. We found that organizational size, industry type, firm diversification strategy, and network effects (linkages to other boards with women directors) significantly impact the likelihood of female representation on boards of directors.

Id.

[101] *Id.*

[102] Villiers, *supra* note 52, at 537 (citing Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 469 (2001)).

[103] *Id.* at 536–37.

[104] *Id.* at 537 (quoting Sturm, *supra* note 102).

Some contend that there are insufficient numbers of "board-ready" women who possess the requisite qualifications and experience.[105] This may be partly due to the manner in which directors are recruited. Oftentimes, prior boardroom or senior management experience constitutes the main selection criteria.[106] Furthermore, traditional recruitment practices are frequently informal and leverage personal networks, which means "many directors have been selected from relatively narrow pools of people sharing common experiences, career patterns and backgrounds."[107] Such recruitment practices perpetuate the homogeneity, continuing what some refer to as "white middle-class male dominance."[108]

By expanding traditional, narrow recruitment strategies, boards could facilitate increased gender diversity. A number of elite schools, including those that follow, have developed director databases comprised of highly qualified women interested in pursuing directorships: Kellogg School of Management, Northwestern University: Center for Executive Women;[109] University of North Carolina School of Law: Director Diversity Initiative;[110] and Stanford Graduate School of Business: Stanford Women

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[105] Amanda Stevens & Alina Humphreys, *Merit Demands Quotas: Statistics Suggest It Makes Good Business Sense To Have Legislated Quotas for Women on Company Boards*, 85 LAW INST. J. 83 (2011) (advocating for the implementation of quotas in Australia, both because companies with female directors perform better and because the severe underutilization of female human capital is inefficient and inequitable).
[106] LAURA TYSON, THE TYSON REPORT ON THE RECRUITMENT AND DEVELOPMENT OF NON-EXECUTIVE DIRECTORS: A REPORT COMMISSIONED BY THE DEPARTMENT OF TRADE & INDUSTRY FOLLOWING THE PUBLICATION OF THE HIGGS REVIEW OF THE ROLE AND EFFECTIVENESS OF NON-EXECUTIVE DIRECTORS IN JANUARY 2003 5 (2003), *available at* http://www.london.edu/facultyandresearch/research/docs/TysonReport.pdf.
[107] *Id.* at 6.
[108] Villiers, *supra* note 52, at 539 (citing TYSON, *supra* note 106).
[109] *Database of Women Directors*, KELLOGG SCH. MGMT.: CENTER FOR EXECUTIVE WOMEN, http://www.kellogg.northwestern.edu/research/cew/resources.htm (last visited Aug. 6, 2012).
[110] *The Director Diversity Initiative*, U. N. C. SCH. L., https://ddi.law.unc.edu/default.aspx (last visited Aug. 6, 2012).

on Boards Initiative.[111] The Stanford initiative's homepage states, "The demand for women to serve on corporate boards has never been greater, yet those responsible for recruiting new corporate directors claim there aren't enough qualified women to fill the spots."[112] The schools that sponsor these initiatives hope to facilitate increased boardroom diversity by matching qualified candidates with corporations in search of potential directors.[113]

Finally, the lack of gender diversity in the boardroom may stem largely from the fact that directors do not generally find existing board composition to be problematic.[114] In fact, some have argued in favor of homogenous groups, citing their ability to efficiently reach decisions.[115] PricewaterhouseCoopers LLP's (PwC) 2010 survey of corporate directors revealed that, when asked about the nominating or governance committee's "ability to create a board with a balance of needed skills and diversity," nearly three-quarters of directors responded that such committees were "effective" or "very effective."[116] Only 5 percent of directors gave negative ratings to committees' effectiveness on these matters.[117] The remaining 20 percent of directors surveyed were neutral on the matter.[118] Nevertheless, less than one-fifth of *Fortune* 500 companies have 25 percent or more

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[111] *Corporate Boards: Stanford Women on Boards Initiative*, STANFORD GRADUATE SCH. BUS., http://alumni.gsb.stanford.edu/women/corpboards/index.html (last visited Aug. 6, 2012).
[112] *Id.*
[113] *See, e.g.*, *Database of Women Directors*, *supra* note 109; *see also The Director Diversity Initiative*, *supra* note 110; *Corporate Boards: Stanford Women on Boards Initiative*, *supra* note 111.
[114] PRICEWATERHOUSECOOPERS LLP, ANNUAL CORPORATE DIRECTORS SURVEY: THE 2010 RESULTS 15 (2010), *available at* http://www.pwc.com/us/en/corporate-governance/assets/annual-corporate-directors-survey-2010.pdf.
[115] *See, e.g.*, John A. Wagner III, J.L. Stimpert & Edward I. Fubara, *Board Composition and Organizational Performance: Two Studies of Insider/Outsider Effects*, 35 J. MGMT. STUD. 655, 667 (1998) (finding that greater board homogeneity was positively correlated with higher firm performance).
[116] *Id.*
[117] *Id.*
[118] *Id.*

women directors.[119] One clear implication of this data is that a majority of existing directors simply do not view the need for increased gender diversity in the boardroom as imperative.

II. BOARDROOM DIVERSITY: CONSTRUCTING AN EFFECTIVE REGULATORY RESPONSE

Transatlantic dialogue is a longstanding phenomenon, and one that has become increasingly pertinent within the realm of financial regulation.[120] In 2002, for example, the SEC and the European Commission launched the US-EU Financial Markets Dialogue, which aims "to enhance understanding of each other's system of regulation, and explore areas of regulatory cooperation and convergence in the development of high-quality regulation."[121] Reflecting on the range of international responses to boardroom gender diversity can facilitate the United States' ability to effectively develop its own approach.

In 2005, Norway became the first country to mandate gender diversity on corporate boards.[122] Other nations have since followed suit, introducing a range of regulatory and legislative initiatives aimed at achieving greater gender diversity in the boardroom. While governmental involvement has been quite limited in the United States, the SEC took an initial regulatory

[119] RACHEL SOARES, ET AL., CATALYST CENSUS: FORTUNE 500 WOMEN BOARD DIRECTORS 1 (2011), *available at* http://www.catalyst.org/file/533/2011_fortune_500_census_wbd.pdf.

[120] "The global economic significance of capital markets and their intensifying interdependence have led U.S. and EU policymakers to recognise the need for structured dialogue and cooperation with a view to ensuring efficient and credible solutions that guarantee effective investor protection and a high level of business efficiency." KERN ALEXANDER, ET AL., A REPORT ON THE TRANSATLANTIC FINANCIAL SERVICES REGULATORY DIALOGUE 5 (2007).

[121] *SEC Participation in Bilateral Dialogues with Foreign Regulatory Authorities*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/offices/oia/oia_bilateraldialogs.shtml#us-eu (last visited Aug. 6, 2012).

[122] DELOITTE GLOBAL, *supra* note 12, at 14.

step into the realm of boardroom diversity by introducing enhanced disclosure requirements in 2009.[123]

A. Examples from Abroad

1. Hard Regulations

With Norway leading the way, a number of other European countries (including France, Italy, the Netherlands, and Spain) have followed suit, legislating various quota requirements—some mandatory, some requiring companies to "comply or explain"—in order to achieve gender diversity in the boardroom.[124]

a) Norway—Quotas

Ansgar Gabrielsen, the conservative trade minister who drafted the Norwegian gender diversity legislation, was motivated by the "business case" to institute mandatory quotas.[125] Described as "an archetypal alpha-male businessman,"[126] Gabrielsen explained his support of the quota requirement: "To me, the law was not about getting equality between the sexes, it was about the fact that diversity is a value in itself, that it creates wealth."[127] After more than two decades of women and men attending university in equal numbers, and with so many professionally experienced women, Gabrielsen did not think that the dearth of women directors made sense; in fact, such qualified women represented a valuable, underutilized resource in terms of human capital.[128]

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[123] Corporate Governance, 17 C.F.R. § 229.407(c)(1–2) (2012).
[124] *See id.*
[125] DELOITTE GLOBAL, *supra* note 12, at 14.
[126] *Id.*
[127] Gwladys Fouché, *A Woman's Place Is . . . On the Board*, GUARDIAN, Aug. 10, 2005, http://www.guardian.co.uk/business/2005/aug/10/workandcareers.genderissues.
[128] *Id.*

While the Norwegian law is commonly thought to require that the boards of publicly held corporations be comprised of at least 40 percent women,[129] the legislation is actually crafted in gender-neutral language and is substantially more nuanced than reference to a "40 percent rule" suggests. The overarching theme is that each gender shall have significant representation in the boardroom. This goal dovetails nicely with critical mass theory and helps to ensure that women directors are able to bring their added value to the boardroom rather than fall victim to tokenism.

In 2005, the Norwegian Public Limited Liabilities Companies Act was amended to state the following:

- If the board of directors has two or three members, both sexes shall be represented;
- If the board of directors has four or five members, each sex shall be represented by at least two directors;
- If the board of directors has six to eight members, each sex shall be represented by at least three directors;
- If the board of directors has nine members, each sex shall be represented by at least four directors;
- If the board of directors has more than nine members, each sex shall be represented by at least 40 percent directors.[130]

Public companies had until January 1, 2008, to meet the requirements, with noncompliance resulting in dissolution.[131] While no company has yet been dissolved for such noncompliance, some companies have opted to delist and go private.[132] Of the approximately five hundred companies

[129] *See, e.g.*, Terjesen et al., *supra* note 57, at 321 ("[T]he Norwegian government requires that boards of directors of publicly held firms be comprised of at least 40 per cent women . . . .").
[130] DELOITTE GLOBAL, *supra* note 12, at 14 ("Disclosure of the state of diversity within the company is also required under the Norwegian Accounting Act.").
[131] *Id.*
[132] *Id.*

affected by the law, about one hundred companies opted to delist; however, according to Norwegian business leaders, the choice to delist was mainly a result of other legislative requirements that became effective during a similar time period, rather than a direct result of the quota requirement.[133]

b) France—Quotas Plus "Comply or Explain"

In 2008, the French amended their constitution in order to permit the use of quotas with respect to gender diversity on corporate boards.[134] In January 2011, the Assemblée Nationale and Sénat agreed upon legislation aimed at increasing female representation on boards. Similar to the Norwegian law, the French law requires at least 40 percent representation of each gender on boards.[135] As of May 2012, the law had not yet been enacted in the Journal Officiel.[136] The French law is actually more expansive than the Norwegian law in that it targets not only public companies, but also non-listed companies that have revenues or total assets over 50 million Euros or that have employed five hundred or more persons for three consecutive years.[137]

Anticipating such legislation, in 2010, AFEP-MEDEF (the French Private Companies Association and French Business Confederation) amended its corporate governance code to reflect the 40 percent requirement.[138] While compliance with AFEP-MEDEF's code is not mandatory, if a company fails to comply, it must explain such noncompliance in its annual report.[139]

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[133] Claire Braund, *Looking at the Big Picture on Gender Diversity*, WOMENONBOARDS: THE NEXT GENERATION OF DIRECTORS, http://www.womenonboards.org.au/pubs/articles/norway_bigpicture.htm (last visited Aug. 6, 2012) (the Norwegian business leaders expressing this view were those in attendance at the October 2010 Boardroom Impact Conference in Oslo, Norway).
[134] DELOITTE GLOBAL, *supra* note 12, at 9.
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*

2. Soft Regulations

Other countries (including Australia, Germany, and the United Kingdom) have opted for a "soft" regulatory approach, instituting primarily disclosure-oriented gender diversity regulations and requiring companies to "comply or explain."[140]

a) Australia

In June 2010, the Australian government reissued its corporate governance code.[141] It now contains recommendations related to gender diversity.[142] Public companies (defined as those listed on the Australian Securities Exchange) are required to do the following:

- Adopt and publicly disclose a diversity policy;
- Establish measurable objectives for achieving gender diversity and assess annually both the objectives and progress towards achieving them;
- Disclose in each annual report the measurable objectives for achieving gender diversity and progress towards achieving them;
- Disclose in each annual report the proportion of women employees in the whole organisation, in senior executive positions, on the board;
- Disclose the mix of skills and diversity for which the board is looking to achieve in membership of the board.[143]

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[140] *See id.* at 6, 18, 23. Professor Marc T. Moore's discussion of the "soft" and "comply or explain" regulatory approaches aids in contextualizing the use of such approaches today. Marc T. Moore, *The End of "Comply or Explain" in UK Corporate Governance?*, 60 N. IR. LEGAL Q. 85 (2009).
[141] DELOITTE GLOBAL, *supra* note 12, at 6.
[142] *Id.*
[143] *Id.*

While compliance with the new recommendations is not mandatory, companies who choose not to comply must explain their noncompliance in each annual report.[144]

b) The United Kingdom

In 2010, the FRC reissued the UK Corporate Governance Code.[145] It included a new provision requiring that "[t]he search for board candidates should be conducted, and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender."[146] Companies must either comply with the provisions or provide an explanation for their noncompliance.[147]

The FRC's interest in increased gender diversity originates in concerns about "board effectiveness" when gender diversity is low or nonexistent. Low levels of gender diversity not only contribute to the FRC's wariness of "group think," but also cause the FRC to be concerned that companies' behavior is inefficient with respect to (1) utilization of the available talent pool, (2) comprehension of customers and employees, and (3) encouragement of female employees seeking professional advancement.[148] Nonetheless, the FRC is opposed to setting minimum gender diversity targets as part of the UK Corporate Governance Code: "No matter how it [is] qualified, embedding a specific figure would inevitably by viewed as a quota."[149] Nor does the FRC believe that companies ought to focus solely on gender diversity to the exclusion of other diversity considerations.[150] In

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[144] *Id.* (Australia's Corporate Governance is known as the "ASX Corporate Governance Council Corporate Governance Principles and Recommendations").
[145] *Id.* at 16.
[146] *Id.*
[147] *Id.* Furthermore, while the Equality Act 2010 "gives the government power to make regulations requiring disclosure of the gender pay gap," the government's present tactic is to work with companies towards increased voluntary disclosure of compensation rather than to enforce mandatory disclosure. *Id.*
[148] FEEDBACK STATEMENT, *supra* note 25, at 4.
[149] *Id.*
[150] *Id.*

this respect, the FRC seeks to pursue an arguably holistic conception of "diversity."

In May 2011, the FRC issued a consultation document considering two proposed amendments to the revised UK Corporate Governance Code (which had gone into effect June 2010).[151] After reviewing the public's responses, the FRC stated its intention to implement both amendments, effective October 2012.[152] The provision covering board appointments will require that "a separate section of the annual report . . . include a description of the board's policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives."[153] The section entitled "Evaluation" will specify "[board] diversity, including gender," as one of the factors for consideration as part of the evaluation of board effectiveness.[154]

B. The United States

1. The SEC's Diversity Disclosure Requirement

In 2009, the SEC enacted a diversity disclosure requirement.[155] The text of the requirement reads as follows:

> Describe the nominating committee's process for identifying and evaluating nominees for director, including nominees recommended by security holders, and any differences in the manner in which the nominating committee evaluates nominees for director based on whether the nominee is recommended by a security holder, 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

[151] *Id.* at 1.
[152] *Id.* at 2.
[153] *Id.* at 5.
[154] *Id.* at 6.
[155] Corporate Governance, 17 C.F.R. § 229.407(c)(1–2) (2012).

> implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy . . . .[156]

The new rule, which went into effect on February 28, 2010, is designed "to assess a company's commitment to developing and maintaining a diverse board."[157] Public companies are required to disclose the following in their proxy statements: "whether diversity is a factor in considering candidates for nomination to the board of directors; how diversity is considered in that process, and; [sic] how the company assesses the effectiveness of its policy for considering diversity [if the company has such a policy]."[158] The SEC, however, purposefully opted to leave the term "diversity" undefined;[159] hence, "companies may develop and disclose their own standards and address matters such as diverse business experience."[160]

The SEC's adoptive release explicates the rationale for adopting the diversity disclosure requirement.[161] Such rationale rests largely on the "business case" for board diversity.[162] In adopting the amendment, the SEC

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[156] Corporate Governance, 17 C.F.R. § 229.407(c)(2)(vi) (2011) (emphasis added).
[157] Luis A. Aguilar, Comm'r, U.S. Sec. & Exch. Comm'n, The SEC and Corporate Governance—An Overview in the Wake of Dodd-Frank, Speech at the New America Alliance Latino Economic Forum (Nov. 18, 2010), *available at* http://www.sec.gov/news/speech/2010/spch111810laa.htm.
[158] *Id.*
[159] Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,344 (Dec. 23, 2009).

> We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate. As a result we have not defined diversity in the amendments.

Id.
[160] Practising Law Institute, *Selected Recent Developments in U.S. Securities Laws and Corporate Finance, as of August 25, 2010*, 1849 PLI/Corp 453, 513 (2010).
[161] Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343–44 (Dec. 23, 2009).
[162] *See* Fairfax, *supra* note 53, at 872–73.

voiced its agreement with members of the public who had commented in favor of the proposed amendment requiring additional disclosure of board diversity: "We agree that it is useful for investors to understand how the board considers and addresses diversity, as well as the board's assessment of the implementation of its diversity policy, if any."[163]

Commenters had noted that board diversity information was important to investors,[164] and that it would enable investors to make better-informed decisions with respect to voting and investing.[165] They had also noted "a meaningful relationship between diverse boards and improved corporate financial performance," as well as the fact that such diverse boards can more effectively recruit and retain employees.[166] The financial performance comment is particularly demonstrative of the influence of the business rationale on the SEC's decision to adopt the diversity disclosure requirement.[167] Professor Lisa Fairfax emphasizes that "enhance[d] board quality and decision making[] [are] two key components of the business rationale."[168] Additionally, she notes that in recognizing that the disclosure requirements may encourage boards to conduct more extensive director searches and to consider a wider range of criteria in their selection

[163] Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343 (Dec. 23, 2009).
[164] *Id.* at 68,343 n.116 (citing letters from Board of Directors Network, Boston Common Asset Management, CalPERS, CalSTRS, Calvert, Council of Urban Professionals, Ernst & Young LLP (E&Y), Greenlining Institute, Hispanic Association on Corporate Responsibility, Interfaith Center on Corporate Responsibility, InterOrganization Network, Latino Business Chamber of Greater Los Angeles, Pax World Management Corporation, Prout Group, Inc., RiskMetrics, Sisters of Charity BVM, Sisters of St. Joseph Carondelet, and Trillium Asset Management Corporation).
[165] *Id.* at 68,343.
[166] *Id.*; *see, e.g.*, Comment Letter from Ilene H. Lang, President and CEO, Catalyst, to Elizabeth M. Murphy, Secretary, U.S. Sec. & Exch. Comm'n (Sept. 15, 2009), *available at* http://www.sec.gov/comments/s7-13-09/s71309-100.pdf; *see also* Comment Letter from Lisa N. Woll, CEO, Social Investment Forum, to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n (Sept. 14, 2009), *available at* http://www.sec.gov/comments/s7-13-09/s71309-55.pdf.
[167] Fairfax, *supra* note 53, at 872–73.
[168] *Id.* at 872.

process,[169] "the SEC acknowledged that the rule could prompt more corporations to embrace diversity procedures."[170]

2. Reactions to the Requirement: Shortcomings?

Less than one year after the rule went into effect, SEC Commissioner Luis Aguilar reflected on the kind of information that companies had chosen to provide pursuant to the diversity disclosure requirement.[171] He expressed dissatisfaction with the substantial number of companies that had provided only abstract disclosure, such as a statement indicating that "diversity was something considered as part of an informal policy," rather than a "discussion of any concrete steps taken to give real meaning to its efforts to create a diverse board."[172] He further noted that, "[b]y leaving out the steps taken and how those efforts are evaluated, these companies . . . deprive[] investors of information they have demanded."[173]

The SEC's failure to define diversity has been an important aspect of the developing debate. In some ways, leaving "diversity" as an ambiguous term is a politically acceptable approach—perhaps even an advantageous one—as it focuses attention on the business advantages of increased diversity while indirectly addressing the issue of gender equality.[174] At the same time, however, because there are different types of diversity and because each company may define "diversity" as it chooses, the current regulation leaves ample room for corporations to avoid addressing boardroom diversity in a meaningful fashion. Furthermore, given that there is no explicit requirement that companies address gender diversity in particular,

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[169] *See* Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,355 (Dec. 23, 2009).
[170] Fairfax, *supra* note 53, at 872–73.
[171] Aguilar, *supra* note 157.
[172] *Id.*
[173] *Id.*
[174] *But see* Villiers, *supra* note 52, at 556–57 (arguing that it is problematic to view diversity "as the solution to the continuing problem of discrimination" because "diversity itself does not necessarily eradicate discrimination"—in other words, acceptance of diversity does not alone signal the obsolesce of discriminatory stances).

even those companies that do value a diverse board may choose to focus on other types of diversity, thereby neglecting gender diversity altogether.

In its annual survey of corporate directors, PwC focused a number of questions on the SEC's new disclosure requirements, as well as on the importance of gender diversity in the boardroom in general.[175] Overall, directors believed that the disclosure rules were of little value to investors in terms of defining "board diversity."[176] On a scale of 1 to 5, with 1 being "extremely valuable" and 5 being "not at all valuable," the mean response was 3.6.[177] In a comment letter to the SEC, Professors Lissa Broome and Thomas Hazen wrote that the SEC should "require disclosure of how diversity is defined by the nominating committee."[178] They suggested that requiring such a definition would better address the concerns and interests of many shareholders, including large institutional investors, who have been "actively urging corporate boards to consider constructing a diverse board when making directors nominations."[179] Furthermore, Professors Broom and Hazen argued that the SEC ought to "require director nominees and continuing directors to self-report their gender, and race and ethnicity under the EEO [Equal Employment Opportunity] categories," noting that many organizations focused on developing boardroom diversity "spend countless hours trying to divine this information (with or without the cooperation of the companies) so that board . . . diversity may be measured."[180]

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[175] PRICEWATERHOUSECOOPERS LLP, *supra* note 114. Using a service provider, 10,000 directors from the top 2,000 companies (according to revenue) were randomly selected to receive the questionnaire; 1,110 directors completed the survey. *Id.* at 35.
[176] *Id.* at 2.
[177] *Id.*
[178] Comment Letter from Lissa Lamkin Broome & Thomas Lee Hazen, Professors of Law, Univ. of N.C., to Elizabeth M. Murphy, Sec'y, U.S. Sec. & Exch. Comm'n 1 (Sept. 15, 2009), *available at* http://www.sec.gov/comments/s7-13-09/s71309-65.pdf (addressing whether we should "amend Item 407(c)(2)(V) to require disclosure of any additional factors that a nominating committee considers when selecting someone for a position on the board, such as diversity").
[179] *Id.* at 2.
[180] *Id.*

There is at least some evidence to suggest that corporations have not taken a serious view of the diversity disclosure requirement. PwC's survey revealed that a vast majority of directors—more than three-quarters of those surveyed—responded "no" when asked whether "the discussion about the new proxy disclosure rule on director and nominee experience, qualifications, attributes or skills cause [their] board[s] to re-think the mix of directors currently on the board."[181] This suggests that a more robust disclosure requirement may be needed to encourage corporate boards to employ procedures that could increase boardroom diversity.

Furthermore, from 2010 to 2011 there was little change in directors' perceptions of the difficulty involved in achieving gender diversity: slightly over half of directors believed that it was either somewhat difficult or very difficult; about one-third of directors thought that it was not at all difficult; and around 15 percent stated that gender diversity was simply not an attribute for which they were looking.[182] For those directors who believe that achieving gender diversity is a difficult task, leveraging the assistance of some of the numerous organizations encouraging boardroom diversity would be helpful. A short list of such organizations includes Catalyst, ION, Forum for Women Entrepreneurs & Executives, Director Diversity Initiative, and the Alliance for Board Diversity,[183] as well as the director databases developed by a number of elite schools.[184]

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181 PRICEWATERHOUSECOOPERS LLP, *supra* note 114, at 5.

182 *See* PRICEWATERHOUSECOOPERS LLP, ANNUAL CORPORATE DIRECTORS SURVEY 2011 FINDINGS: BOARDS RESPOND TO STAKEHOLDER CONCERNS 18 (2011), *available at* http://www.pwc.com/en_US/us/corporate-governance/assets/annual-corporate-director-survey-2011.pdf; PRICEWATERHOUSECOOPERS LLP, *supra* note 114, at 24.

183 Comment Letter from Broome & Hazen, *supra* note 178, at 2.

184 *See, e.g.*, *Database of Women Directors*, *supra* note 109; *The Director Diversity Initiative*, *supra* note 110; *Corporate Boards: Stanford Women on Boards Initiative*, *supra* note 111.

III. THE DESIRABILITY OF A MORE ROBUST REGULATION

In light of the business advantages of increased gender diversity in the boardroom and the apparent shortcomings of the SEC's enhanced proxy disclosure requirements, more robust requirements targeting gender diversity appear desirable.

A. An Enhanced Regulation to Foster Meaningful Gender Diversity

Given that a critical mass of women directors is essential to reaping the benefits of boardroom diversity, there is strong incentive for the SEC to enact a more robust diversity disclosure requirement. Commissioner Aguilar's expressed disappointment in the type of disclosure provided by corporations, and the fact that such minimal disclosure fails to provide investors with relevant information,[185] highlights the fact that the existing requirements may not be sufficient to foster the desired "meaningful relationship between diverse boards and improved corporate financial performance."[186]

In the last ten years, two important pieces of federal legislation have brought increased aspects of internal corporate governance under the SEC's purview.[187] In 2002, Sarbanes-Oxley (SOX) introduced the requirement of a board of independent directors on the audit committee, while, in 2010, Dodd-Frank added a requirement that boards have a compensation committee and that such committee be composed of independent directors.[188] Much of policymakers' motivation for such requirements was

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[185] *See* Aguilar, *supra* note 157.
[186] Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343–44 (Dec. 23, 2009); *see, e.g.*, Comment Letter from Lang, *supra* note 159; Comment Letter from Woll, *supra* note 159.
[186] Fairfax, *supra* note 53, at 872–73.
[187] CHARLES R. T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS: CASES AND MATERIALS 218 (6th ed. Supp. 2011–2012).
[188] *Id.* (Additionally, stock exchanges require that boards "have an overall majority of independent directors and that the nominating/governance committee, as well as the audit and compensation committee . . . be made up of independent directors.").

their belief that "independence on corporate boards is important to good corporate governance."[189] Professor Hazen has suggested, hypothetically, that if the business case for increased gender diversity was empirically strong enough, there might be an argument that the SEC "should require diversity on boards, just as publicly held corporations must have a significant number of independent directors."[190] This is not yet the reality. Furthermore, European-style quotas tend to run counter to American antidiscrimination laws[191] and the prevalent American viewpoint that the "operational flexibility and dynamism" associated with lower levels of market regulation are beneficial in economic terms.[192] It is, therefore, unlikely that the time has arrived when quota requirements would be able to garner widespread support.

Nonetheless, there are numerous ways in which the existing requirement could be strengthened to encourage genuine gender diversity. First, the SEC ought to define "diversity," and in that definition specifically include gender diversity. Second, the SEC ought to require corporations to have a diversity policy and to disclose that policy. Third, the SEC ought to consider

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[189] Hazen, *supra* note 20, at 893.
[190] *Id.* at 892–93.
[191] *See, e.g.*, *id.* at 893 ("In addition, a social justice rationale for board diversity may encourage corporations to increase diversity, but it is not so strong as to have convinced policy makers to apply the antidiscrimination laws to corporate boards.").
[192] Moore, *supra* note 140, at 85.

> [T]he history of corporate and financial regulation in the UK can best be depicted as an ongoing contest between: on the one hand, institutional investors and boards favouring the preservation of operational flexibility and dynamism; and, on the other, a democratic state striving to ensure the public accountability of a sector whose activities have profound (albeit seldom understood) implications for the country's "real" economy and society.

Id. While Professor Moore's discussion centers on the history of corporate and financial regulation in the UK, he notes that a similar analysis is applicable with respect to the development of systems of corporate and financial regulation in the United States, and refers readers to David Skeel's book. *Id.*; *see* DAVID SKEEL, ICARUS IN THE BOARDROOM: THE FUNDAMENTAL FLAWS IN CORPORATE AMERICA AND WHERE THEY CAME FROM (2005).

introducing a nonbinding "say-on-diversity" requirement similar to Dodd-Frank's "say-on-pay" requirement.

1. The SEC Should Define "Diversity" to Include "Gender Diversity"

As previously discussed, the failure to define "diversity" robs investors of the meaningful information that they desire.[193] Moreover, leaving the term undefined also implies a failure to hold corporate boards accountable for their efforts to further diversity in the boardroom. From Professor Hazen's point of view, the SEC's failure to define diversity is "potentially devastating" to the disclosure requirement.[194] He says that such failure "could limit significantly the ability of the SEC's new rule to alter the status quo with respect to racial and gender diversity on boards."[195]

Specifically, the SEC regulation undoubtedly needs to articulate "gender" within the definition of "diversity." Recent developments in the United Kingdom suggest the desirability of explicitly defining gender diversity as part of board diversity. With respect to both evaluation of board effectiveness and description of diversity policies, the FRC has amended the revised UK Corporate Governance Code to employ the phrase, "diversity, including gender."[196] While there was some debate over whether to narrow

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193 Hazen, *supra* note 20, at 896 (citing Comment Letter from Broome & Hazen, *supra* note 178).
194 Fairfax, *supra* note 53, at 874–75.
195 *Id.*
196 FEEDBACK STATEMENT, *supra* note 25, at 5–6. The revised provision B.2.4 will read:

> A separate section of the annual report should describe the work of the nomination committee, including the process it has used in relation to board appointments. *<u>This section should include a description of the board's policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives</u>*. An explanation should be given if neither an external search consultancy nor open advertising has been used in the appointment of a chairman or a non-executive director.

Id. The new supporting principle B.6 will read: "Evaluation of the board should consider the balance of skills, experience, independence and knowledge of the company on the or broaden this definition of "diversity," the FRC ultimately decided that while "companies should not focus purely on gender at the expense of other aspects of diversity[,] . . . adding specific reference to other aspects of diversity could result in the Code provision becoming a long, unhelpful, list of such attributes."[197] The wording of the current SEC disclosure requirement could easily be amended in a similar fashion, replacing "diversity" with "diversity, including gender."

2. The SEC Should Require a Diversity Policy and Disclosure of Such Policy

Companies are not currently required to have a diversity policy in place.[198] Professor Fairfax points out that "the lack of such a requirement undermines the rule's ability to influence adoption of diversity policies."[199] The rule requires policy-related disclosure only if a board has chosen (of its own volition) to institute a diversity policy; in such cases, the board must describe how the policy is implemented and how the board assesses its effectiveness.[200] Somewhat surprisingly, there is no requirement that the board disclose the policy itself.[201] The board is only required to disclose "whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for directors."[202]

The existing policy-related disclosure requirement may actually discourage, rather than encourage, corporations from developing a policy. Somewhat perversely, if a corporation does not have a written policy, it

board, *its diversity, including gender*, how the board works together as a unit, and other factors relevant to its effectiveness." *Id.*

[197] *Id.* at 4.

[198] Corporate Governance, 17 C.F.R. § 229.407(c)(1–2) (2012).

[199] Fairfax, *supra* note 52, at 875. (Professor Fairfax, nonetheless, acknowledges that "it may be inappropriate for the SEC to require corporations to consider diversity in their board structure.").

[200] Corporate Governance, 17 C.F.R. § 229.407(c)(1–2) (2012).

[201] *Id.*

[202] *Id.*

need not make any disclosures. If it does have a policy, however, it must go to the trouble of explaining the policy, and expose itself to criticism about the implementation or effectiveness of the policy. In contrast, the UK Corporate Governance Code requires companies to have a diversity policy in place.[203] The SEC's requirement would be more effective if it were amended to require companies to have a diversity policy and to disclose it.

Finally, given that corporations would be required to have diversity policies, there is uncertainty regarding the substantive content of such policies. There is an argument to be made for the SEC setting out some key elements for inclusion in corporations' diversity policies—such oversight might help ensure effectiveness. Nonetheless, there is also a real danger that setting requirements or targets would unduly infringe upon a board's ability to effectively direct and manage corporate operations, a domain that has traditionally been left to state law. In the United Kingdom, the FRC declined to set measurable objectives (i.e., a series of targets) for either to overall diversity or gender diversity per se.[204] In its feedback statement, the FRC specified that, instead, "boards should report on what steps they are taking to achieve the diversity necessary to maximise the effectiveness of the board, and as part of that what consideration they have given to gender balance."[205]

3. The SEC Should Consider Introducing a Nonbinding "Say-on-Diversity" Shareholder Vote

Perhaps a preferable way to hold boards accountable for the substance of their diversity policies would be to implement a nonbinding "say-on-diversity" vote, similar to Dodd-Frank's nonbinding shareholder "say-on-

[203] FEEDBACK STATEMENT, *supra* note 25, at 5–6.
[204] *Id.* at 4.
[205] *Id.* (The UK Corporate Governance Code does, however, employ a "comply or explain" approach with regard to whether the board used either an external search consultancy or open advertising in appointing a chairman or non-executive director.).

pay" vote.[206] Dodd-Frank requires enhanced disclosure with respect to executive compensation.[207] Section 14A of the Securities Exchange Act (SEA) now mandates that boards elicit a nonbinding shareholder vote on executive compensation at least once every three years.[208] While these votes are advisory only, "companies typically adjust their pay practices after defeat or in response to pressure from institutional shareholders and proxy advising firms, such as Institutional Shareholder Services."[209]

Reflecting on the first year of mandatory say-on-pay, experts concur that both shareholders and corporations take these advisory votes seriously.[210] According to Patrick Quick, a partner at Foley & Lardner LLP, say-on-pay votes are "real votes that shareholders take very seriously, and [shareholders] will look closely at how public companies respond to what is communicated in the say-on-pay votes."[211] A recent study conducted by The Conference Board, NASDAQ, and the Rock Center for Corporate Governance at Stanford University clearly demonstrates that "companies do respond to the SOP [say-on-pay] policies adopted by proxy advisory firms. . . . All areas of the compensation program are affected, including disclosure, guidelines, and plan structure and design—although the degree to which these areas are affected varies considerably."[212]

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206 *See generally* Practising Law Institute, *supra* note 160.

207 O'KELLEY & THOMPSON, *supra* note 187, at 218.

208 *Id.*

209 *Id.* (citing Joann S. Lublin, *Pay Starts to Bend to Advisory Votes*, WALL ST. J., July 29, 2011, at C3).

210 *See, e.g.*, *Talking Points: Say-on-Pay Best Practices in 2012*, BOARDMEMBER.COM (Jan. 17, 2012), https://www.boardmember.com/Article_Details.aspx?id=7227; *see also* Elizabeth Pfeuti, *Say-on-Pay Votes Are 'Working'*, AICIO (Mar. 29, 2012, 7:32 AM), http://www.ai-cio.com/channel/NEWSMAKERS/Say-on-Pay_Votes_Are_'Working'.html; Charles Nathan, James D.C. Barrall & Alice Chung, *Say on Pay 2011: Proxy Advisors on Course for Hegemony*, N.Y. L. J., Nov. 28, 2011, *available at* http://www.lw.com/upload/pubContent/_pdf/pub4467_1.pdf.

211 *Talking Points*, *supra* note 210, at 1.

212 DAVID F. LARCKER, ALLAN L. MCCALL & BRIAN TAYAN, THE INFLUENCE OF PROXY ADVISORY FIRM VOTING RECOMMENDATIONS ON SAY-ON-PAY VOTES AND EXECUTIVE

With regard to best practices, Quick suggests that corporations ought to include a description of their pay for performance policy.[213] This is particularly important considering that, while the large majority of say-on-pay votes were positive, at least nine lawsuits have been filed that "alleg[e] breach of fiduciary duty in cases where a board of directors approved an executive compensation package that was rejected by the shareholders in an advisory vote."[214] Of these lawsuits, one US district court has upheld a claim grounded in a negative say-on-pay vote at the pleading stages.[215] The failure to clearly describe their compensation schemes left companies vulnerable to allegations that they inaccurately deemed their compensation schemes as pay for performance.[216] Even if much, or all, of the say-on-pay litigation is ultimately unsuccessful, the mere prospect of litigation, and the concomitant potential for shareholder alienation, encourages companies to

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COMPENSATION DECISIONS 6 (2012), *available at* https://www.conference-board.org/retrievefile.cfm?filename=TCB-DN-V4N5-12.pdf&type=subsite.

[213] *Talking Points*, *supra* note 210, at 2.

[214] Michael J. McNamara, *Occupying the Boardroom: Increasing Government Regulation and Growing Public Anger*, *in* EMPLOYMENT LAW: TOP LAWYERS ON TRENDS AND KEY STRATEGIES FOR THE UPCOMING YEAR 2–4 (Aspatore rev. ed. 2012). "While Dodd-Frank explicitly provides that 'say on pay' votes are non-binding and do not create or imply any change or addition to the fiduciary duties of an issuer or its board of directors, companies that underestimate the importance of such votes do so at their own peril." *Id.* at 2.

[215] *Id.* at 3.

> In *NECA-IBEW Pension Fund v. Cox, et al.*, No. 11-CV-0451, 2011 WL 4383368 (S.D. Ohio Sept. 20, 2011), a federal judge in Ohio denied a motion to dismiss a 'say on pay' complaint alleging breach of fiduciary duty. . . . The Court found that the plaintiffs had adequately alleged that he directors of the company approved the pay plan in violation of the company's pay for performance policy, that the pay plan was not in the best interests of the shareholders, and therefore constituted an abuse of discretion sufficient at he pleading stage to overcome the presumption of the business judgment rule. The specific evidence the Court pointed to as support for the claim that the compensation policy was not in the best interests of the shareholders was the negative advisory vote.

Id.

[216] *Talking Points*, *supra* note 210, at 2.

take measures to secure favorable shareholder votes on executive compensation packages.[217]

The apparent efficacy of say-on-pay votes in influencing corporate executive compensation policies provides strong support for the proposition that a say-on-diversity requirement would help make companies accountable to shareholders in terms of their commitment to meaningful gender diversity in the boardroom. A say-on-diversity vote would help address concerns that the existing disclosure requirements fail to ensure that shareholders, particularly large and influential ones, are provided with the information they desire in order to make effective and informed decisions about financial investments.[218] Importantly, given the dominance of the shareholder primacy model, such an approach would empower shareholders without running the risk of overregulation by the federal government into a domain better left either to the forces of market self-regulation or to the states.

If shareholders were dissatisfied with the board's policies, they could also choose to encourage the board to adopt discrete measures such as "the criteria used when recruiting directors, or the steps taken to develop senior executive talent,"[219] or how the nominating committee's consideration of diversity has impacted its recruitment process.[220]

Notably, in its 2010 report on corporate governance policy, Institutional Shareholder Services, Inc., recommended votes in favor of shareholder proposals requesting "reports on efforts to diversify the board" and, on a case-by-case basis, in favor of proposals requesting increases in "the

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[217] *See id.*
[218] *See* Comment Letter from Broome & Hazen, *supra* note 178, at 2.
[219] *Boardroom Diversity*, GOVERNANCE NEWSL., June 2011, at 3 (identifying key elements that the FRC considered including in the Corporate Governance Code's diversity provisions).
[220] Comment Letter from Broome & Hazen, *supra* note 178, at 1.

representation of women and minorities on the board."[221] Such recommendations support the notion that shareholders can effectively hold corporations accountable for implementing meaningful policies aimed at promoting gender diversity in the boardroom.

B. Would It Hold Up?

Given the current trend of increased regulation by the SEC (e.g., SOX and Dodd-Frank), the SEC would arguably be acting well within its scope of authority if it adopted a more robust regulation, as described in the preceding section. Nonetheless, particularly in light of the 2008 financial crisis, it is quite informative to take a step back and consider the SEC's origins and its mandate in order to contextualize the present day nature of the SEC's authority as relevant to regulation of boardroom composition.

1. The Creation of the SEC: "All We Ask of Them Is to Tell the Truth"[222]

In the wake of the Wall Street Crash of 1929, Congress enacted the Securities Act of 1933 and the SEA of 1934.[223] In a February 1934 message to the Senate, President Franklin D. Roosevelt underscored the need for federal regulation in order to eliminate securities market abuses:

> [O]utside the field of legitimate investment naked speculation has been made far too easy for those who could and for those who could not afford to gamble. . . . I therefore recommend to the

[221] Practising Law Institute, *supra* note 160, at 524–25 (citing ISS's *U.S. Corporate Governance Policy: 2010 Updates*). ISS is a leading provider of corporate governance solutions to the financial community. *See About ISS*, ISSGOVERNANCE.COM, http://www.issgovernance.com/about (last visited Aug. 6, 2012).

[222] H.R. 9323, 78 CONG. REC. 8160–8203 (May 7, 1934) (statement of Sen. Duncan U. Fletcher), *reprinted in* 4 LEGISLATIVE HISTORY OF THE SECURITIES ACT OF 1933 AND SECURITIES EXCHANGE ACT OF 1934 (1973) [hereinafter 4 LEGISLATIVE HISTORY].

[223] *The Laws that Govern the Securities Industry*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/laws.shtml (last visited Aug. 6, 2012) (Today, the SEA requires that all companies with "more than $10 million in assets whose securities are held by more than 500 owners must file annual and other periodic reports.").

> Congress the enactment of [the SEA] . . . for the protection of investors, for the safeguarding of values, and, so far as it may be possible, for the elimination of unnecessary, unwise, and destructive speculation.[224]

Today, the importance of protecting the national welfare is reflected in the SEA's introductory paragraph: because transactions in securities "are effected with a national public interest . . . it [is] necessary to provide for regulation and control of such transactions and of practices and matters related thereto . . . ."[225] In general terms, the SEA identifies and prohibits certain types of conduct within the securities industry, including corporate reporting, proxy solicitations, tender offers, insider trading, and registration of exchanges, associations, and others.[226] Importantly, the SEA also created the SEC, vesting it with broad enforcement and regulatory authority.[227]

Initially, the SEA was to be administered by the Federal Trade Commission (FTC); however, the Senate ultimately prevailed in its desire to establish an independent commission.[228] Senate discussions on this matter underscore the pioneering aims of the SEA and the marked importance of the commission responsible for enforcement of such broad aims. Describing the Senate Committee on Banking and Currency's rationale for recommending an independent commission, Committee Chairman Duncan U. Fletcher[229] reported that those representing the exchanges argued that the

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[224] 78 CONG. REC. 2264–2272 (Feb. 9, 1934) (statement of Pres. Franklin D. Roosevelt), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 222.
[225] S.E.A. 1934, § 2 (2012), *available at* http://www.sec.gov/about/laws/sea34.pdf; *see also* Moore, *supra* note 140, at 85.
[226] *The Laws that Govern the Securities Industry*, *supra* note 223.
[227] *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/whatwedo.shtml (last visited Aug. 6, 2012).
[228] 78 CONG. REC. 10,248–10,269 (June 1, 1934), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 222; *see also The Laws that Govern the Securities Industry*, *supra* note 223 ("With this Act, Congress created the Securities and Exchange Commission.").
[229] Duncan U. Fletcher served as a Florida Senator with the Democratic Party from 1909 until his death in 1936. *Fletcher, Duncan Upshaw*, BIOGUIDE.CONGRESS.GOV, http://bioguide.congress.gov/scripts/biodisplay.pl?index=F000200 (last visited Aug. 6,

administration of the SEA "ought to be handled by people who have knowledge of transactions involving the distribution and issuance of securities, and so forth," and that the FTC lacked such experience.[230] Senator Alben W. Barkley added that the Committee on Banking and Currency was also motivated by the "public attention [that] would always be focused upon [a] separate commission," while, if administered by the FTC, enforcement of the SEA "would have to be a sort of lean-to under the Commissions' original activities."[231] Hence, the SEC was seen as advantageous not only because of the expertise of its commissioners, but also because of the degree to which the public would be able to hold such a free-standing commission accountable to its mandate.[232]

While the SEA was aimed at correcting abuses, restoring confidence, and establishing "an efficient, adequate, open, and free market for the purchase and sale of securities," the associated mandatory disclosure of "all material facts . . . essential to give the investor an adequate opportunity to evaluate his investment" initially evoked some degree of criticism.[233] Critics argued that corporations were being put to "enormous expense and trouble," and that the federal government was "inquiring into affairs into which [it had] no business to examine."[234] Senator Fletcher powerfully countered such critiques: "What right have brokers to appeal to the public to buy their

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2012). He chaired the Committee on Banking and Currency from 1932 until 1936, *id.*, serving as Vice Chairman and then Chairman of the "Pecora Committee." *Subcommittee on Senate Resolutions 84 and 234 (The Pecora Committee)*, SENATE.GOV, http://www.senate.gov/artandhistory/history/common/investigations/Pecora.htm (last visited Aug. 6, 2012). The Pecora Committee was charged with investigating the causes of the Wall Street Crash of 1929. *Id.* It initiated the reform process that led to passage of the Securities Act of 1922 and the SEA of 1934, which is also referred to as the "Fletcher-Rayburn bill." *Id.*

[230] H.R. 9323, 78 CONG. REC. 8160–8203 (May 7, 1934), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 222.

[231] *Id.*

[232] *See id.*

[233] H.R. 9323, 78 CONG. REC. 8160–8203 (May 7, 1934) (statement of Sen. Duncan U. Fletcher), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 222.

[234] *Id.*

securities if they are not willing to tell the truth about those securities? That is the whole proposition, and all we ask of them is to tell the truth."[235]

2. The SEC's Present-Day Authority: Corporate Governance

As is the case with all agencies, the SEC's rulemaking power is limited by its mandate.[236] The US Supreme Court has specified that SEC rules "cannot exceed the power granted the Commission by Congress."[237] Furthermore, while courts have typically upheld disclosure-related regulations, which are generally considered to be procedural matters, they have been reticent to uphold laws that directly implicate substantive matters, which have typically been governed by state corporate law.[238] Over the last twenty years, there appears to have been an increasing struggle to define the scope of the SEC's rulemaking authority.[239]

In *Business Roundtable v. Securities and Exchange Commission*, the US Court of Appeals for the DC Circuit invalidated a SEC rule barring self-regulatory organizations (SROs)[240] from listing corporations that took corporate action that had "the effect of nullifying, restricting or disparately reducing the per share voting rights of [existing common stockholders]."[241] The court reasoned that the SEA "cannot be understood to include regulation of an issue that is so far beyond matters of disclosure (such as are regulated under section 14 of the SEA), and of the management and

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[235] H.R. 9323, 78 CONG. REC. 8160–8203 (May 7, 1934), *reprinted in* 4 LEGISLATIVE HISTORY, *supra* note 222.
[236] Timothy De Lizza, *Incoherency of American Corporate Governance and the Need for Federal Standards*, 34 FORDHAM URB. L.J. 1111, 1135 (2007).
[237] *Id.* (quoting Santa Fe Indus. Inc. v. Green, 430 U.S. 462, 473 (1977)) (internal quotation marks omitted).
[238] *Id.* (noting, however, that the distinction between "procedural" and "substantive" law is "an increasingly outmoded view").
[239] *Id.*
[240] SROs include national securities exchanges and national securities associations. Bus. Roundtable v. Sec. Exch. Comm'n, 905 F.2d 406, 407 (D.C. Cir. 1990).
[241] *Id.* (quoting Voting Rights Listing Standards; Disenfranchisement Rule, 53 Fed. Reg. 26,376, 26,394 (1988) ("Final Rule"), codified at 17 C.F.R. § 240.19c-4 (1990)).

practices of self-regulatory organizations, and that is concededly a part of corporate governance traditionally left to the states."[242] Professor Roberta S. Karmel explains that Congress gave the SEC power over voting procedure, rather than substantive control of voting power, because "Congress believed that so long as investors received enough information, shareholder voting could work . . . ."[243] Nonetheless, in *Business Roundtable*, the court acknowledged the existence of a "murky area between substance and procedure."[244]

Recent developments in federal regulation of corporate governance matters, including SOX and Dodd-Frank, can be seen as increasing the SEC's regulatory power in such murky areas. Courts today may be wary of interpreting the SEC's mandate narrowly given that SOX "has preempted state law relating to certain aspects of executive compensation and has broadened the SEC's overall powers."[245] Professor Karmel views SOX as a major increase in the scope of the SEC's regulatory power: "The SEC now has the leverage to impose its model of corporate governance-a board of independent directors serving as a check on the CEO; a regulated CFO; and auditors and attorneys who must divide their allegiance to their clients with an allegiance to the SEC-on SEC registered corporations."[246]

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[242] *Id.* at 408.
[243] Roberta S. Karmel, *Realizing the Dream of William O. Douglas—The Securities and Exchange Commission Takes Charge of Corporate Governance*, 30 DEL. J. CORP. L. 79, 128 (2005). Roberta S. Karmel is the Centennial Professor of Law at Brooklyn Law School, and a former SEC Commissioner and New York Stock Exchange Director; she has published widely on securities regulation and international securities law. *Roberta Carmel*, BROOKLYN LAW SCHOOL, http://www.brooklaw.edu/faculty/directory/facultymember/biography.aspx?id=roberta.karmel (last visited Aug. 6, 2012).
[244] *Bus. Roundtable*, 905 F.2d at 411.
[245] De Lizza, *supra* note 236, at 1137.
[246] Karmel, *supra* note 243, at 143 (Arguing, in part, that "the SEC is an agency with a very long institutional memory that has always acquired more power in response to crisis and scandal, and the future use it may make of the additional power it has acquired pursuant to Sarbanes-Oxley is unknown.").

Dodd-Frank involved additional corporate law changes, introducing more matters of internal corporate governance into federal law.[247] While SOX required independent directors on the audit committee, Dodd-Frank added a requirement that boards have a compensation committee, and that such committee be composed of independent directors.[248] With respect to executive compensation, enhanced disclosure is required as is a nonbinding shareholder "say-on-pay" vote.[249] Another Dodd-Frank provision requires public companies to disclose split jobs, employing a "comply or explain" approach.[250]

To date, the courts have struck down a single SEC rule—Rule 14a-11—promulgated pursuant to Dodd-Frank "authorization."[251] Dodd-Frank authorizes SEC rules "requiring public companies to include nominees submitted by shareholders."[252] Rule 14a-11 required companies to include in their proxy materials "the name of a person or persons nominated by a [qualifying] shareholder or group of shareholders for election to the board of directors."[253] In adopting Rule 14a-11, the SEC concluded that the rule "could create potential benefits of improved board and company performance and shareholder value sufficient to justify [its] potential costs."[254] The US Court of Appeals for the DC Circuit, however, found that the SEC's promulgation of Rule 14a-11 was "arbitrary and capricious and not in accordance with law"; underscoring the SEC's obligation to "consider the effect of a new rule upon 'efficiency, competition, and capital

247 O'KELLEY & THOMPSON, *supra* note 187, at 218.
248 *Id.* (The stock exchanges also require that boards "have an overall majority of independent directors and that the nominating/governance committee, as well as the audit and compensation committee . . . be made up of independent directors.")
249 *Id.*
250 *Id.*
251 *See* Bus. Roundtable v. Sec. Exch. Comm'n, 647 F.3d 1144 (D.C. Cir. 2011).
252 O'KELLEY & THOMPSON, *supra* note 187, at 218.
253 *Bus. Roundtable*, 647 F.3d at 1147 (The rule applied to all companies "subject to the Exchange Act proxy rules, including . . . investment compan[ies] . . . registered under the Investment Act of 1940 (ICA).").
254 *Id.* (quoting 75 Fed. Reg. 56,668, 56,761/1 (2010)) (internal quotation marks omitted).

formation,"[255] the court reasoned that the SEC failed to "apprise itself—and hence the public and Congress—of the economic consequences of a proposed regulation."[256]

Considering the broad reach of SOX and Dodd-Frank, the SEC's current regulatory authority appears to be well supported. While the decision to strike Rule 14a-11 serves as an important reminder that the SEC's authority is not without bounds—arbitrary regulations will be disallowed, and potential economic consequences must be taken into consideration[257]—a nonbinding say-on-diversity shareholder vote would fall well within the established scope of the SEC's regulatory power.

IV. ITEM FOR FUTURE RESEARCH: POSITIVE LABOR MARKET EFFECTS?

This section undertakes a preliminary investigation of additional positive labor market benefits that may flow from increased gender diversity in the boardroom. A 2008 study surveying forty-three countries revealed, "countries with a higher representation of women on boards are more likely to have women in senior management and more equal ratios of male-to-female pay."[258] Similarly, the FRC has noted that "boards with no, or very limited, female membership may . . . offer little encouragement to aspiration among female employees."[259]

First, this section discusses the inherent conflict between professional work and childrearing within our economic structure. Second, it considers the possibility that women directors might leverage their capacity for empathy in order to ameliorate such structure. Undoubtedly, the interaction

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[255] *Id.* (quoting 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c)).
[256] *Id.* (quoting Chamber of Commerce of U.S. v. Sec. & Exch. Comm'n, 412 F.3d 133, 1444 (D.C. Cir. 2005)) (internal quotation marks omitted).
[257] *See id.*
[258] Terjesen et al., *supra* note 57, at 324.
[259] FEEDBACK STATEMENT, *supra* note 25.

between boardroom composition, empathy, and economic structure is an area for further research.

A. Worker and Mother: A False Dichotomy of Economics?

Professor Douglas M. Branson writes:

> Corporate America seems to regard child bearing and child rearing as just a lifestyle choice that some women make, just as other women dedicate leisure time to improving their tennis game or to training for a marathon. *Bearing children and raising them well, however, is not just another lifestyle choice. It is the source of human capital, a sufficient supply of which is critical to the society as a whole*.[260]

In terms of workplace equality, it appears that motherhood drastically reduces a woman's prospects of achieving such elusive equality. While childless women earn 90 percent of the pay of men, mothers earn only 60 percent of the pay of fathers.[261] The failure of corporations to retain and promote qualified female employees—what some refer to as women's "opting-out" of the labor market—is costly to each individual and society as whole.[262] At the same time, there is an inherent clash between "our ideals at work" and "our ideals for family life."[263]

In an influential *New York Times* article, "The Opt-Out Revolution," Lisa Belkin points out that many employers do recognize that corporate entities benefit in the long run by offering flexible policies, such as maternity leave and extended part-time work, thereby successfully retaining employees over the course of their long-term careers.[264] Flexibility plays a key role in the

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[260] DOUGLAS M. BRANSON, THE LAST MALE BASTION: GENDER AND THE CEO SUITE IN AMERICA'S PUBLIC COMPANIES 151 (2010) (emphasis added).

[261] Joan Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. GENDER, RACE & JUST. 411, 416 (2002) (citing Bureau of Labor statistics).

[262] ANN CRITTENDEN, THE PRICE OF MOTHERHOOD 39 (2001).

[263] Williams, *supra* note 261, at 417.

[264] Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, Oct. 23, 2003, § 6 (Magazine), at 42, *available at* http://www.nytimes.com/2003/10/26/magazine/26WOMEN.html?pagewanted=all.

attainment of a more balanced labor market in which parents can devote energy to childrearing without sacrificing professional development.[265] While female employees, particularly mothers, would most certainly benefit from more flexible policies, male employees would as well. Interestingly, a study on flexible work schedules revealed that men and women use flexible schedules at approximately the same rates—26.7 percent of women and 28.1 percent of men.[266]

Company surveys reveal that employees generally rate flexible work arrangements and work-life balance as being "extremely important."[267] Furthermore, one study comparing organizations with high and low levels of flexibility reported benefits to organizations with higher levels of flexibility in terms of job engagement, commitment, and satisfaction, as well as employee retention.[268] In spite of the "common sense" of flexible policies, corporations have failed to broadly institute them.[269] Belkin sees the persistence of rigid policies as stemming from the fact that "male managers and supervisors tend to see not the long- but the short-run view."[270]

An additionally problematic piece of the puzzle is that standard measures of economic productivity fail to account for a whole range of activities integral to our day-to-day well-being and to the creation of our next-

[265] *See* BRANSON, *supra* note 260, at 152 (citing CRITTENDEN, *supra* note 262, at 256–74); Joan Williams, Cynthia Thomas Calvert & Holly Green Cooper, *Better on Balance? The Corporate Counsel Work/Life Report*, 10 WM . & MARY J. WOMEN & L. 367, 422–32 (2004)).
[266] CATALYST, WORK-LIFE: PREVALENCE, UTILIZATION, AND BENEFITS 2 (Oct. 29, 2011), (on file with author) (citing Economic News Release, Bureau of Labor Statistics, Workers on Flexible and Shift Schedules in 2004 Summary (July 1, 2005), *available at* http://www.bls.gov/news.release/flex.nr0.htm).
[267] *Id.* at 6.
[268] *Id.* (citing JAMES T. BOND, ELLEN GALINSKY & E. JEFFREY HILL, WHEN WORK WORKS: A STATUS REPORT ON WORKPLACE FLEXIBILITY (2004), *available at* http://familiesandwork.org/3w/research/downloads/status.pdf).
[269] Belkin, *supra* note 264.
[270] *Id.*

generation of human capital. Ann Crittenden, a former *New York Times* reporter, summarizes this dilemma: "Child rearing and household management are considered to have no economic or job-enabling value."[271] Interestingly, the well-known economic measure, Gross National Product (GNP), was not developed until the 1930s,[272] during the same time period in which Congress legislated the SEA and created the SEC.[273] In his 1934 report to Congress, Simon Kuznets, the Nobel Prize-winning statistician responsible for developing GNP, warned that "the welfare of a nation" could "scarcely be inferred" from GNP.[274]

This is an area for further exploration. Ultimately, it is the board of directors that wields the power to set broad company policies, including those related to employment. In this respect, the power of managers and supervisors, which Belkin discusses, is directly circumscribed by corporate policies.[275] One cannot help but ask whether a critical mass of women directors might influence the labor market in ways that would reduce gender-based inequities.

B. The Impact of Women Directors: "Signaling" and Empathy

There has been a good deal of discussion on the "signaling" function of women in positions of leadership.[276] Specifically, with regard to the

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[271] CRITTENDEN, *supra* note 262, at 5.
[272] *Id.* at 66.
[273] In 1934, Congress passed the SEA, which created the SEC. *The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation*, U.S. SEC. & EXCHANGE COMMISSION, http://www.sec.gov/about/whatwedo.shtml (last visited Aug. 7, 2012).
[274] CRITTENDEN, *supra* note 262, at 65–66.
[275] The board of directors wields the power to set such corporate policies. *See* DEL. CODE ANN. tit. 8, § 141(a) (2012) ("The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . .").
[276] *See, e.g.*, Terjesen et al., *supra* note 57, at 324. Some argue that "female board member presence signals that a corporation values the success of its women." *Id.* (citing Diana Bilimoria, *Building the Business Case for Women Corporate Directors*, *in* WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES 25–40 (Ronald J. Burke & Mary C. Mattis eds., 2000)).

corporate arena, studies show that "the more women there are in director positions, the greater the number of women in senior management positions."[277] At least one study has found "a positive relationship between female corporate board members and the following: number of women officers; number of women officers holding line jobs; presence of a critical mass of women officers; women officers with high-ranking or 'clout' titles; and women among the top corporate earners."[278]

There are additional arguments that gender diversity benefits corporations and their shareholders due to inherent or acculturated differences in the genders. It has been suggested, for example, that "diversity increases creativity and innovation as these characteristics are not randomly distributed in the population, but tend to vary systematically with demographic variables such as gender."[279] While such arguments are potentially problematic—either because of their empirical ambiguity or because of their potential for misuse—they may also enable corporations to better leverage the available pool of human capital.

One particularly interesting argument, which stems from psychological literature, relates to women's capacity for empathy. Assuming that women have a comparative advantage in terms of their capacity for empathy, women directors might be inclined to advocate for more flexible corporate employment policies (here, also assuming a critical mass of women directors).

Within the field of psychology, empathy is divided into two groupings: cognitive, which involves "perspective taking,"[280] and emotional, which

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[277] DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 132 (2007) (citing SHEILA WELLINGTON, BE YOUR OWN MENTOR 37 (2001)).

[278] Terjesen et al., *supra* note 57, at 324 (citing Diana Bilimoria, *The Relationship Between Women Directors and Women Corporate Officers*, 18 J. MANAGERIAL ISSUES 47 (2006)).

[279] Campbell & Mínguez-Vera, *supra* note 13, at 440.

[280] María Vicenta Mestre et al., *Are Women More Empathetic than Men? A Longitudinal Study in Adolescence*, 12 SPANISH J. PSYCHOL. 76, 82 (2009).

involves "concern for the other."[281] In other words, "[c]ognitive role-taking consists of a primarily intellectual process and involves social skills and social perceptiveness, whereas emotional empathy consists of a more basic or 'primitive' level of interpersonal process whereby . . . one responds with emotions similar to those of others who are present."[282]

Numerous studies have found that women score higher than men on tests of empathy.[283] A recent Spanish study employed a longitudinal design in an adolescent population to research whether women have a greater "empathic disposition" as compared with men.[284] Girls scored higher both in terms of cognitive and emotional empathy.[285] The study concluded, "sex differences are not just found in the emotional realm of empathy but also in the capacity of understanding the other person's state and situation."[286] Such finding is noteworthy with respect to boardroom diversity because directors' exercise of cognitive empathy might be particularly impactful in shaping corporate employment policies.

To date, there is at least some evidence that women directors "feel that their presence makes the board more sensitive to women's issues."[287] Given such findings on women's "empathic disposition," it would be interesting to pursue further research on how such disposition affects the nature of women's professional accomplishments when women are in positions of power.

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[281] *Id.*
[282] Albert Mehrabian, Andrew L. Young & Sharon Sato, *Emotional Empathy and Associated Individual Differences*, 7 CURRENT PSYCHOL. 221, 221 (1988).
[283] *See, e.g.*, *id.*; *see also* Linda Rueckert & Nicolette Naybar, *Differences in Empathy: The Role of the Right Hemisphere*, 67 BRAIN & COGNITION 162, 165 (2008).
[284] Mestre et al., *supra* note 280, at 76.
[285] *Id.* at 82.
[286] *Id.*
[287] Terjesen et al., *supra* note 57, at 329.

CONCLUSION

This article is intended to spark debate and further research on the topic of gender diversity in the boardroom. Despite significant educational and professional attainment, within the boardrooms of America's *Fortune* 500 companies, women represent a mere 16.1 percent of directors.[288] Just three companies in the S&P 500 Index have boards on which women directors hold more than 40 percent of board seats,[289] while forty-seven companies have no female directors at all.[290]

In leveraging both interdisciplinary research and experiences from abroad, this article has sought to develop a more holistic picture of the factors contributing to the low ratio of women to men on corporate boards. The hope is that such a contextualized discussion of women directors will foster support for increased gender diversity amongst a broad cross section of individuals and organizations.

Focusing on the "business case" for gender diversity in the boardroom, it is apparent that meaningful gender diversity is advantageous in economic terms. Research into critical mass theory suggests that the male-to-female director ratio must be increased significantly in order for corporations, shareholders, and the overall economy to reap the rewards of gender diversity in the boardroom.

Particularly since the 2008 financial crisis, there has been renewed debate and substantially increased SEC regulation focused on the securities market. Building on the SEC's 2010 Proxy Disclosure Enhancements, and considering both the SEC's origins and its present day regulatory role, this article suggests a more robust version of the current disclosure requirements. Such an amended disclosure requirement ought to (1) define

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[288] STATISTICAL OVERVIEW, *supra* note 5 (citing POPULATION SURVEY, *supra* note 5). Furthermore, women constitute only 12.2 percent of executive officers and 3.3 percent of CEOs. WOMEN IN U.S., *supra* note 5.

[289] Stonington, *supra* note 7.

[290] Green, *supra* note 9.

"diversity" to explicitly include gender diversity, (2) require corporations to have a diversity policy in place and to disclose such policy to shareholders, and (3) potentially require a nonbinding "say-on-diversity" shareholder vote. The direct benefits of such an enhanced requirement would include increased corporate accountability to investors and greater likelihood that corporations would realize the increased economic gains associated with gender diversity in the boardroom. Finally, in terms of indirect benefits, there is the possibility that such a requirement could lead to broader societal benefits in terms of positive labor market effects.