Corporate Governance and Gender Equality: A Study of Comply-or-Explain Disclosure Regulation

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ABSTRACT

In 2020, the Nasdaq Stock Market filed a proposal with the U.S. Securities and Exchange Commission seeking permission to adopt a board diversity-related disclosure requirement for its listed companies. In 2021, the SEC approved the proposal, thus entrenching Nasdaq's position as the most significant stock exchange to date to mandate listing rules that reflect the intention of diversifying corporate boardrooms. Nasdaq's movement into the diversity space is not the first attempt to address homogeneous boards in the U.S. In 2009, the SEC adopted a rule requiring publicly traded firms to report on whether they consider diversity in identifying director nominees. More recently, the state of California introduced mandated quotas. Between these two approaches—the light touch of the SEC's "pure disclosure" approach and the heavy hand of California's quota approach—Nasdaq's new listing rule reflects a principles-based philosophy that is operationalized through a "comply-or-explain" formulation. It requires listed companies to state whether they adhere to a particular standard of behavior ("comply") and, if not, they must provide reasons for their lack of compliance ("explain").

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Despite its increasing popularity, little is known about how comply-or-explain regimes work in practice. This Article attempts to fill that gap and to inform real-time policy conversations by providing lessons from the initial years of another jurisdiction's experiment with this very approach. Comply-or-explain disclosure requirements with respect to gender diversity on corporate boards have existed in Canada since 2014. We discuss the initial findings from our on-going project to analyze the effects of Canada's regulation. Our qualitative content analysis of the texts of Canadian corporate disclosures involves a four-year period and entails over 3,000 firm-year observations.

At a time when international regulators and private actors are contemplating, developing, and refining economic governance tools with the intention of diversifying corporate governance systems, comply-or-explain holds great promise. But if it is to realize its full potential, certain implementation-based issues should be considered. We show that comply-or-explain's effectiveness can be compromised when firms avoid measures that would result in enhanced organizational learning by presenting weak explanations for non-compliance. Without appropriate engagement by oversight bodies, comply-or-explain runs the risk of giving firms too much discretion to define what it means to comply and compliance, while following the letter of the law, may simply be performative.

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INTRODUCTION

In late 2020, the Nasdaq Stock Market (Nasdaq) filed a proposal with the U.S. Securities and Exchange Commission (SEC) seeking the regulatory agency's permission to adopt a board diversity-related disclosure requirement for its listed companies.[1] In August 2021, the SEC approved the proposal,[2] thus entrenching Nasdaq's position as the most significant stock exchange to date to mandate listing rules that reflect the intention of diversifying corporate boardrooms.

Nasdaq's bold intervention, described by one commentator as being of a piece with its "reputation for being the hip securities exchange,"[3] immediately drew headlines in the nation's leading media outlets[4] and quickly became the subject of controversy.[5] While lauded by some as

1. *See* The Nasdaq Stock Mkt. LLC, Proposed Rule Change (Form 19B-4) (Dec. 1, 2020) [hereinafter Nasdaq Proposed Rule Change]; Press Release, Nasdaq, Nasdaq to Advance Diversity Through New Proposed Listing Requirements (Dec. 1, 2020), www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01 [https://perma.cc/9TM6-HKNQ].

2. *See* Press Release, Nasdaq, Statement from Nasdaq on SEC's Approval of Board Diversity Disclosure Listing Rule (Aug. 6, 2021), www.nasdaq.com/press-release/statement-from-nasdaq-on-secs-approval-of-board-diversity-disclosure-listing-rule [https://perma.cc/7V93-7NLG]; Securities Exchange Act Release No. 34-92590 (Aug. 6, 2021), www.sec.gov/rules/sro/nasdaq/2021/34-92590.pdf [https://perma.cc/3AVA-NQQX] [hereinafter SEC Approval Order].

3. Lina Angelici, *Nasdaq's Board Diversity Rule: The "Hip" Exchange Does It Again*, SEC. EDGE (Nov. 16, 2021), www.thesecuritiesedge.com/2021/11/nasdaqs-board-diversity-rule-the-hip-exchange-does-it-again [https://perma.cc/SZ9P-C9H4].

4. *See, e.g.*, Jazmin Goodwin, *Nasdaq's Plan to Boost Diversity on Corporate Boards Gets SEC Approval*, CNN (Aug. 9, 2021), www.cnn.com/2021/08/06/success/nasdaq-sec-approval-board-diversity/index.html [https://perma.cc/B3GT-LQ43]; Alexander Osipovich, *Nasdaq's Board-Diversity Proposal Wins SEC Approval*, WALL ST. J. (Aug. 06, 2021), www.wsj.com/articles/nasdaqs-board-diversity-proposal-faces-sec-decision-11628242202; Kori Hale, *Nasdaq Secures SEC Approval to Increase Board Diversity*, FORBES (Aug. 18, 2021), www.forbes.com/sites/korihale/2021/08/18/nasdaq-secures-sec-approval-to-increase-board-diversity/?sh=4ad163731296 [https://perma.cc/PQZ3-5UKU].

5. *See, e.g.*, Jesse Fried, *Nasdaq Wants New Diversity Rules, But Diversifying Boards Does Not Mean Better Performance*, USA TODAY (May 2, 2021), www.usatoday.com/story/opinion/2021/05/02/nasdaqs-arguments-diversity-and-effect-financial-performance-column/7278956002 [https://perma.cc/6M4J-4HGC]. *Cf. The Complexion of U.S. Boardrooms Is Very Slowly Changing for the Better*, WASH. POST (Jan. 23, 2022), www.washingtonpost.com/opinions/2022/01/23/complexion-us-boardrooms-is-very-slowly-changing-better [https://perma.cc/LNL6-DJXY].

having the potential to "prompt changes that prove revolutionary, for companies and investors alike,"[6] one critic described the exchange as "tipping its hat to the social justice movement."[7] Soon afterwards, opponents of the exchange's initiative launched a court challenge to the rule, with the attorneys general of seventeen states supporting the challenge in an amicus brief.[8] At the time of this writing, the litigation is unfolding before the United States Court of Appeals for the Fifth Circuit.[9]

Nasdaq's controversial movement into the diversity space is not the first regulatory attempt to address homogeneous boards in the United States.[10] In 2009, the SEC adopted a rule requiring publicly traded firms to report on whether they consider diversity in identifying director nominees and, if so, how they consider it. The rule also requires firms that have adopted a diversity policy to describe how they implement the policy and assess its effectiveness.[11] The SEC rule reflects a "pure disclosure" approach in that it simply requires the reporting issuer to provide information but does not require an explanation or any particular standard of behavior. More recently, the State of California made significant waves with its efforts to diversify corporate governance regimes through the use of mandated quotas.[12] In contrast to the SEC and Nasdaq strategies, the quota approach directly regulates the conduct of corporations by requiring that corporate boards maintain particular levels of diversity or absorb

6. *See* Darren Rosenblum, John Livingstone, Anat Alon-Beck & Michal Agmon-Gonnen, *The Attack on Nasdaq's Board Diversity Rule*, CLS BLUE SKY BLOG (Sept. 13, 2022), https://clsbluesky.law.columbia.edu/2022/09/13/the-attack-on-nasdaqs-board-diversity-rule/ [https://perma.cc/DMV6-3PBG].

7. Jesse M. Fried, *Will Nasdaq's Diversity Rules Harm Investors?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 8, 2021), www.corpgov.law.harvard.edu/2021/04/08/will-nasdaqs-diversity-rules-harm-investors [https://perma.cc/DW7M-8X4Y].

8. Amicus Brief of the States of Arizona et al., All. for Fair Bd. Recruitment v. SEC, 2021 WL 6336444 (5th Cir. Dec. 27, 2021) (No. 21-60626) (Amicus Brief of the States of Arizona, Alabama, Alaska, Arkansas, Florida, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, Texas and Utah in Support of the Petitioner) [hereinafter States Amicus Brief].

9. *Id.*

10. Of course, Nasdaq is a private body and companies that list with it do so of their own volition. Any suggestion in this Article that Nasdaq plays a regulatory function should not be read literally but in the broadest possible way; in other words, it is a private actor that enters into contractual relationships with listed firms and, in doing so, sets out listing standards that simply have a regulatory flavor.

11. Though the rule does not define the term "diversity." *See* Proxy Disclosure Enhancements, Securities Act Release No 33-9089 (Dec. 16, 2009) at 115–16. For a study of the rule's efficacy, *see* AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY (2015).

12. *See* An Act to Amend Section 301.3 of, and to Add Sections 301.4 and 2115.6 to, the Corporations Code, Relating to Corporations, A.B. 979, 2019–2020 Reg. Sess. (Cal. 2020) (enacted). For an analysis of the California quota approach, see Darren Rosenblum, *California Dreaming?*, 99 B.U. L. REV. 1435 (2019).

monetary penalties. While California's mandate-based approach has been effective in quickly increasing representation levels among corporate boards, it has also been the subject of constitutional challenge and of vigorous critique along numerous dimensions. For example, some opponents characterize it as having the potential to "undermine the progress women are making *without* government mandates" and to "undermine many future gains women make by casting doubt on whether a woman is being hired based on her merit or to meet a quota."[13] More generally, quota-based measures are seen as being in tension with traditional "Anglo-American market discourse."[14]

Between these two approaches—i.e., the light touch of the SEC's "pure disclosure" approach and the heavy hand of California's quota approach—Nasdaq's new listing rule reflects a principles-based philosophy that is operationalized through a "comply-or-explain" formulation. It requires listed companies to publicly disclose information about the composition of their boards; most notably, they must state whether they adhere to a particular standard of diversity-related behavior ("comply") and, if not, they must provide reasons for their lack of compliance ("explain"). Prior to receiving the SEC's approval, Nasdaq took pains to frame its proposed rule as following a "disclosure-based framework" instead of a "mandate."[15] Disclosure-based requirements attempt to move beyond top-down punitive models, focusing instead on the internal capacity of corporations for self-regulation. The theory is that disclosure will foster behavioral change by eliminating informational asymmetries between firms and stakeholders through ensuring transparency and encouraging intra-organizational self-reflection.

Commentators have praised the comply-or-explain method as generally the preferable regulatory device with respect to issues of corporate governance and, more specifically, diverse representation on corporate boards. That said, U.S. securities regulation has been slow to

13. Anastasia Boden, *Setting Quotas on Women in the Boardroom Is Probably Unconstitutional. It Also Doesn't Work*, L.A. TIMES (July 8, 2019), https://www.latimes.com/opinion/op-ed/la-oe-boden-quotas-women-corporate-boards-unconstitutional-20190708-story.html [https://perma.cc/HAW4-S52Y] (emphasis in original).

14. Janne Tienari, Charlotte Holgersson, Susan Mariläinen & Pia Höök, *Gender, Management and Market Discourse: The Case of Gender Quotas in the Swedish and Finnish Media*, 16 GENDER WORK & ORG. 501, 502 (2009). This Article provides a discussion of gender-based quotas in the context of the different forms that market discourse can take.

15. Cydney S. Posner, *SEC Approves Nasdaq 'Comply-or-Explain' Proposal for Board Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 26, 2021), www.corpgov.law.harvard.edu/2021/08/26/sec-approves-nasdaq-comply-or-explain-proposal-for-board-diversity [https://perma.cc/6JZX-896Z].

adopt comply-or-explain-based rules.[16] What is more, despite its international popularity, little is known about how comply-or-explain regimes work in practice.

This Article attempts to fill that gap and to inform real-time policy conversations by providing lessons from the initial years of another jurisdiction's experiment with this very approach. We analyze the implementation in Canada of comply-or-explain for diversity on boards to offer insights into the effectiveness of comply-or-explain within the context of its growing global acceptance as the preferable approach to corporate governance issues.

In Part I, we outline the new Nasdaq rule, in part discussing the public reaction to its promulgation as well as situating this intervention within current debates in regulatory theory more broadly. In Part II, we draw on the extant literature to examine comply-or-explain more directly and to bring to light the strengths and limitations of this regulatory mechanism. We then build on and contribute to the literature by locating our discussion within recent developments in Canada. In Part III, we provide an overview of Canada's recent use of comply-or-explain diversity disclosure regulation. Disclosure requirements with respect to gender diversity on corporate boards have existed in Canada since 2014. Then, in Parts IV and V, we discuss the initial findings from our on-going project to analyze the effects of Canada's experiment by diving specifically into the disclosures of those firms subject to the Ontario Securities Commission (OSC) regulation and evaluating whether this principles-based approach is sufficient to influence corporate behavior and foster diversity in corporate leadership. Our qualitative content analysis of the texts of the corporate disclosures involves a four-year period and entails a total of over 3,000 firm-year observations.

At a time when international regulators and private bodies such as stock exchanges are contemplating, developing, and refining economic governance tools with the intention of diversifying corporate governance systems, comply-or-explain holds great promise. The positions advanced by the petitioners in the litigation challenging the Nasdaq rule and their arguments that, for example, the SEC has exceeded its regulatory authority and the Nasdaq rule has the effect of compelling speech contrary to the First Amendment do not accurately reflect the nature of the rule itself.[17]

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16. For the application of comply-or-explain in the context of codes of ethics for senior financial officers, see Sarbanes-Oxley Act of 2002 § 406(a)–(b), 15 U.S.C. § 7264 (2002). For a comply-or-explain rule relating to disclosure of the ratio between CEO compensation and employees, see Dodd-Frank Act of 2010, Pub. Law 111-203, § 953(b), 124 Stat. 1376, 1904 (2010).

17. For a summary of the challengers' arguments, see Cydney S. Posner, *Fifth Circuit Hears Oral Argument on Challenge to Nasdaq Board Diversity Rules—Will the Rules Survive?*, COOLEY

As argued by amici curiae, "[t]he petitioners distort the reality of the rule and the commercial context in which it operates" and "misunderstand the SEC's role in approving Nasdaq's rule."[18]

Further, as we have found in our studies of quota-based systems elsewhere,[19] quotas are certainly a more robust and effective form of regulatory change;[20] however, it is also the case that quotas present implementation challenges, in addition to issues of political and legal viability. And while comply-or-explain rules, unlike quotas, will not ensure that specific representation levels are achieved within specific timeframes, these rules afford corporations, regulators, and stock exchanges like Nasdaq the benefit of flexibility and the possibility of deep institutional learning.

Quotas and comply-or-explain disclosure rules both represent important paths forward and may be viewed as complementing each other in a manner that combines the forces of heavy and light regulatory touches. But if comply-or-explain is to realize its full potential, certain implementation-based issues should be considered. We show that comply-or-explain's effectiveness can be compromised due to firms' efforts to avoid measures that would result in enhanced organizational learning, such as establishing their own internal targets, by instead presenting thin, weak, or otherwise suboptimal explanations for non-compliance. Indeed, we argue that the explanations provided may run the risk of perpetuating the kinds of retrogressive attitudes and norms that the law hopes to remedy. Further, we contend that even the fact of compliance should not necessarily be equated with success.

While comply-or-explain's flexibility allows firms to tailor their approach to their own context and situation in a way that a formal prescriptive approach would not, balance is key. Without some degree of appropriate regulatory participation, comply-or-explain runs the risk of giving firms too much discretion to define what it means to comply, and compliance, while following the letter of the law, may simply be performative. It is here that regulatory engagement can be helpful in shaping the normative dimensions of comply-or-explain rules and in

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PUBCO (Sept. 8, 2022), www.cooleypubco.com/2022/09/08/oral-argument-nasdaq-board-diversity [https://perma.cc/8Z22-VLY3].

18. Brief of Nonpartisan Group of Academics and Practitioners in the Field of Corporate Governance as Amici Curaie in Support of Intervenor Nasdaq Stock Market, L.L.C., Investors and Investment Advisers as Amici Curaie in Support of Respondent at 3–4, All. for Fair Bd. Recruitment v. SEC, 2022 WL 634343 (5th Cir. Feb. 25, 2022) (No. 21-60626) [hereinafter Nonpartisan Brief].

19. *See* DHIR, *supra* note 11.

20. *See, e.g.*, Aaron Dhir & Sarah Kaplan, *Women in the Boardroom: Has the Time for Quotas Arrived?*, GLOBE & MAIL (Oct. 6, 2017), www.theglobeandmail.com/report-on-business/rob-commentary/women-in-the-boardroomhas-the-time-for-quotas-arrived/article36517480 [https://perma.cc/4NXT-UTGD].

promoting increased diversity in corporate leadership. We recommend that oversight bodies—either individually or in partnership with civil society groups, academic centers, or others—must play an active role in: (1) monitoring and reviewing corporate disclosures; (2) providing non-binding interpretative guidance to issuers on how their reporting can be improved; (3) offering educational resources and constructive dialogue to issuers aimed at enhancing their understanding of the substantive topic at issue; (4) verifying that disclosures conform with actual corporate practices; and (5) designing disclosures systems in a manner that facilitates stakeholder access. Establishing an infrastructure that best facilitates the success of comply-or-explain is particularly important given that pure disclosure provisions have proven anemic,[21] and the quota-based path faces serious constitutional hurdles in the U.S.[22]

The challenges that we identify may not pertain to all comply-or-explain rules or may apply to different rules with differing levels of significance. In that sense, this Article is not "about" the Nasdaq rule—nor about any other specific comply-or-explain rule recently promulgated. We discuss the Nasdaq rule in the Sections that follow simply to frame our discussion of comply-or-explain diversity disclosures more generally and use it as a jumping off point for a discussion of our continuing study of Canada's experience with comply-or-explain. We report on the preliminary lessons learned in Canada in order to inform ongoing policy conversations with the hope that regulatory bodies and private actors working in this space will take advantage of these insights as their regimes mature and they contemplate next steps.[23]

I. THE NASDAQ RULE AND THEORIES OF REGULATION

A. Nasdaq's New Listing Rule

When Nasdaq filed the proposal for its new listing rule, it stated that the proposal was aimed at providing stakeholders with a better understanding of companies' current board composition and enhancing investor confidence that listed companies are considering diversity in their selection processes.[24] The new requirements are found under Rule 5605(f)

21. *See* DHIR, *supra* note 10.

22. Crest v. Padilla, No. 19-STCV-27561, slip op. at 23 (Cal. Sup. Ct. May 13, 2022) (finding that California's gender quota violates the California Constitution's Equal Protection Clause). This decision is under appeal.

23. For an example of a proposal to implement a comply-or-explain approach to diversity in a foreign jurisdiction, see Yaru Chia, *Board Diversity In Singapore*, 27 SING. ACAD. L.J. 304 (2015).

24. Nasdaq, Proposal Release, *supra* note 1.

and Rule 5606 of Nasdaq's Rulebook.[25] Rule 5605(f)(2) requires that a company "must have, or explain why it does not have, at least two members of its board of directors who are diverse," including at least one director who self-identifies as a woman, and one who self-identifies as an Underrepresented Minority or LGBTQ+.[26] The companies exempt from this rule are outlined in Rule 5605(f)(4) and companies subject to slightly altered versions of the rule are described as foreign issuers,[27] smaller reporting companies,[28] and companies with smaller boards.[29] In the case where a company chooses to explain rather than comply with the recommendation of having two diverse directors, they must explain why. This disclosure must be provided and filed ahead of the company's next annual meeting.[30]

In addition to the recommendation that companies have at least two diverse directors, all firms falling under the rule's purview are required to disclose board-level diversity statistics using a "Board Diversity Matrix" or a similar format under Rule 5606(a).[31] Companies are required to disclose diversity statistics in a searchable format.[32] Generally, the disclosure must include the following: the number of directors based on gender identity including those who chose not to disclose their gender; the

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25. *Rulebook: Nasdaq 5600 Series: Corporate Governance Requirements,* NASDAQ https://listingcenter.nasdaq.com/rulebook/arvar-5600-series [https://perma.cc/V9G7-VJK5] [hereinafter *Rulebook*].

26. *Id.* In § 5605(f)(1), "underrepresented minority" is defined as "an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities." *Id.*

27. *Id.* (describing § 5605(f)(2)(b)).

28. *Id.* (describing § 5605(f)(2)(c)). A "smaller reporting issuer" is defined as an issuer that is not an investment company, an asset-backed issuer under the *Securities Exchange Act*, or a majority-owned subsidiary of a parent that is not a smaller reporting company; and either (1) had a public float of less than $250 million (USD) or (2) had annual revenues of less than $100 million (USD) and either (i) no public float or (ii) a public float less than $700 million (USD). *Id. See also* 17 C.F.R. § 240.12b-2 (2022).

29. *Rulebook*, *supra* note 25, § 5605(f)(2)(d). Here, a "smaller board" means a board of directors with five or fewer members. *Id.*

30. *Id.* (describing § 5605(f)(3)). Companies are given considerable flexibility as they are allowed to provide their disclosure in "(a) any proxy statement or any information statement (or, if the Company does not file a proxy, in its Form 10-K or 20-F); or (b) on the Company's website" *Id.* If a company chooses to disclose the information on its website, it must also submit the disclosure concurrently with the filing of its proxy statements (or Forms 10-k or 20-F) and submit the URL link to the disclosure to the Nasdaq Listing Center, within one business day after posting. *Id.*

31. *Id.* (describing § 5606(a)).

32. Nasdaq provides little guidance on the meaning of "searchable," but as an example, they note that "[i]f a company uses a graphic or image format [for their Board Diversity Matrix], Nasdaq encourages the company to also include the same information as searchable text or in a searchable table . . . included, for example, together with the related graphic." BOARD DIVERSITY MATRIX INSTRUCTIONS ¶ 7 (Feb. 18, 2022), listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Matrix.pdf [https://perma.cc/3ESV-2UA2].

number of directors based on race and ethnicity; the number of directors self-identifying as LGBTQ+; and the number of directors who did not disclose their demographic background.[33] Per Rule 5606(b), disclosure of the statistics is to be provided in the same manner as that of the recommendation that a company's board include two diverse directors.[34]

The new listing rule adopts a comply-or-explain approach to board diversity, requiring Nasdaq-listed companies to publicly disclose information about the composition of their boards, but by no means compelling them to meet the outlined recommendation so long as an explanation is provided. That is, the inclusion of at least two diverse board members is a "recommended objective" which, if not met, would only require the company to provide a reason. Providing this explanation—which could provide as much or as little detail as the corporation desires—would allow the firm to comply with the listing requirement. Further, Nasdaq, in their initial proposal, clarified that they would not be assessing the substance of explanations, just verifying that one is provided.[35]

In February 2021, Nasdaq's Chief Legal and Regulatory Officer wrote to the SEC to address the 200 letters the regulator received during the notice-and-comment period for the proposal.[36] A majority of the letters were supportive of the proposal with the most frequent comments being that it enhances corporate governance, takes a non-mandated business-driven approach, advances board diversity, facilitates transparency, reflects core values of both those commenting and their clients, enhances corporate performance, facilitates decision making, and promotes investor confidence.[37] SEC commissioners also voiced support following the proposal's approval. SEC Chair Gary Gensler, for example, pointed to the benefits of increased transparency and stated that the "rules will allow investors to gain a better understanding of Nasdaq-listed companies' approach to board diversity, while ensuring that those companies have the flexibility to make decisions that best serve their shareholders."[38]

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33. For an example of the recommended diversity matrix, see *Rulebook*, *supra* note 25, § 5606(a); *see also* MATRIX INSTRUCTIONS, *supra* note 32.

34. *Rulebook*, *supra* note 25, § 5606(b); Posner, *supra* note 15.

35. Nasdaq Proposal, *supra* note 1, at 63.

36. Nasdaq Amendment Letter from John A. Zecca, Chief Legal & Regulatory Officer, Sec. & Exch. Comm'n, to Vanessa A. Countryman, Secretary, Sec. & Exch. Comm'n (Feb. 26, 2021), www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8425992-229601.pdf [https://perma.cc/CEF8-DBDA] [hereinafter Nasdaq Amendment Letter].

37. *Id.* at 2.

38. Gary Gensler, *Statement on the Commission's Approval of Nasdaq's Proposal for Disclosure About Board Diversity and Proposal for Board Recruiting Service*, U.S. SEC. & EXCHANGE COMM'N (Aug. 6, 2021), www.sec.gov/news/public-statement/gensler-statement-nasdaq-proposal-disclosure-board-diversity-080621 [https://perma.cc/4UFK-H9QR].

Nasdaq also made sure to directly address some of the arguments submitted against the new rule. In response to concerns that smaller boards may face unequal constraints when attempting to meet the two-director objective, Nasdaq amended the proposal to set a lower objective of one diverse board member for smaller boards.[39] Another concern voiced by commenters including Guess & Co. Corporation, Judicial Watch, Inc., and the Independent Women's Forum[40] was that the proposed Nasdaq rule would be a *de facto* quota. Nasdaq firmly rejected this position, clarifying that the explanation mechanism of the comply-or-explain rule allows a company to "choose to disclose as much, or as little, insight into the company's circumstances or diversity philosophy as the company determines."[41]

One of the more prominent critiques of the new listing rule, advanced by Professor Jesse Fried, questioned whether there is evidence supporting a link between board diversity and company performance.[42] In reply, Nasdaq stated that it relied on empirical evidence it gathered from "two dozen academic studies . . . using data from the U.S. and other countries, spanning more than two decades" in addition to "a dozen empirical studies by investors, corporate governance organizations, consultants and financial institutions."[43] Nevertheless, even after the SEC's approval, Commissioner Peirce of the SEC provided a lengthy statement in opposition to the approval, in part arguing that Nasdaq provided insufficient evidence and relied on studies that only established correlation and not causation. She noted that "this type of anecdotal support for the rule is insufficient to meet the Exchange's burden to show that its Proposal is consistent with the Act."[44] Despite Commissioner Pierce's dissent, Nasdaq's proposal was approved by a 3-to-2 vote along party lines.[45]

The SEC's approval decision made clear that a self-regulatory organization like Nasdaq is free to make changes to its rules or propose new rules by filing a proposal with the SEC.[46] The SEC emphasized that

39. Nasdaq Amendment Letter, *supra* note 36, at 4–5; *see also Rulebook*, *supra* note 25 (describing requirement for smaller boards under Rule 5606(f)(2)(D)).

40. Nasdaq Amendment Letter, *supra* note 36, at 6 n.34.

41. *Id.* at 8.

42. Fried, *supra* note 7.

43. Nasdaq Amendment Letter, *supra* note 36, at 8.

44. Hester M. Peirce, *Statement on the Commission's Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, to Adopt Listing Rules Related to Board Diversity Submitted by the Nasdaq Stock Market LLC*, U.S. SEC. & EXCH. COMM'N (Aug. 6, 2021), www.sec.gov/news/public-statement/peirce-nasdaq-diversity-statement-080621 [https://perma.cc/MKX5-AWZQ].

45. *Final Commission Votes for Agency Proceedings: Calendar Year 2021*, U.S. SEC. & EXCH. COMM'N (May 25, 2022), www.sec.gov/about/commission-votes/annual/commission-votes-ap-2021.xml [https://perma.cc/8DMG-FSEY].

46. SEC Approval Order, *supra* note 2, at 1.

under section 19(b)(2)(C)(i) of the Securities Exchange Act,[47] it "shall approve" a proposal if it finds that the proposal is consistent with the requirements of the Act.[48] The SEC does not have authority to make changes to submitted proposals or disapprove them simply on the ground that it would have preferred some alternative approach.[49] Upon finding that Nasdaq's proposal met the statutory requirements, the SEC held that the changes were then *required* to be approved.[50] Key to its finding is the clarification that the Act provides the standards for approving rules proposed by self-regulated organizations and mere approval of such proposals does not amount to rulemaking by the Commission itself.[51]

Despite the SEC's clarification about the scope of its authority, the significant social changes driving the new disclosure requirement resulted in heavy scrutiny of the approval decision. At the time of writing, the approval has resulted in two legal challenges.[52] The Alliance for Fair Board Recruitment (the Alliance) brought the first lawsuit by way of a petition for review in California.[53] The Alliance filed its Opening Brief on November 22, 2021, challenging the SEC decision on three grounds: (1) its alleged violation of the Fifth Amendment's equal-protection principles; (2) its alleged violation of the First Amendment's free-speech clause; and (3) the SEC's alleged lack of statutory authority with respect to its issuance of the decision.[54] The Alliance argued that board members who do not meet the "preferred demographics" as specified in the adopted definition of diversity may face discrimination in efforts to meet the targets set out by Nasdaq, simultaneously stigmatizing those who *do* fit the "preferred demographics."[55] In addition to targeting the actual rules, the Alliance also argues that the SEC exceeded its jurisdiction to promote a rule that it may not have had the legal or statutory right to approve in the first place. On this front, the Alliance argues that the SEC's authority is limited to "material information" and despite the reasons given by the regulator the

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47. 15 U.S.C. § 78s(b)(1).

48. SEC Approval Order, *supra* note 2, at 3.

49. *Id.*

50. *Id.* at 4.

51. *Id.* at 57, 61–62.

52. *See* Andrew Ramonas, *Nasdaq Board-Diversity Regulations Face Another Court Challenge*, BLOOMBERG L. (Oct. 5, 2021), https://news.bloomberglaw.com/securities-law/nasdaq-board-diversity-regulations-face-another-court-challenge [https://perma.cc/DR4X-JBN5].

53. Petition for Review, All. For Fair Bd. Recruitment v. SEC (5th Cir. Aug. 10, 2021) (No. 21-60626).

54. Opening Brief for All. for Fair Bd. Recruitment at 11–12, All. For Fair Bd. Recruitment v. SEC, 2021 WL 5702469 (5th Cir. Nov. 22, 2021) (No. 21-60626) [hereinafter Alliance Brief].

55. *Id.* at 19–20.

"key inquiries for materiality" involve "quantitative considerations" which have not been sufficiently linked to board diversity.[56]

This initial lawsuit has garnered significant support, the most vocal being a group of seventeen Republican states that filed an amicus brief in support of the Alliance's challenge.[57] In a statement on the brief, Texas Attorney General Ken Paxton stated that "[i]t is unconscionable to see discrimination so blatantly put on display by requiring these companies to hire employees based solely on race, sex, and sexuality."[58]

Similar to the Alliance's lawsuit, the National Center for Public Policy Research (the Center) brought a second legal challenge against the SEC for its approval of Nasdaq's proposed rule, this time in the state of Delaware.[59] The Center subsequently filed its opening brief at the US Court of Appeals for the Fifth Court on December 20, 2021.[60] Much, if not all, of the submissions in this opening brief mirror those detailed in the Alliance's lawsuit.

For example, an important observation with respect to both proceedings is the continuous and recurring references to a "quota rule" with little to no differentiation between quotas as a hard mandate and the softer comply-or-explain approach that Nasdaq has chosen.[61] The Alliance's opening brief uses the language of "quotas" to refer to Nasdaq's comply-or-explain approach, more explicitly labelling it a "Quota-or-Explain" rule.[62] The brief does acknowledge that it is not a direct mandate but argues that comply-or-explain rules are, in practice, a mandate rather than a flexible approach, due to "threats of public shaming" for those who choose not to comply.[63] The amicus brief supporting the lawsuit directly

56. *Id.* at 60–61.

57. *See generally* States Amicus Brief, *supra* note 8. The brief mirrors many of the arguments put forward by the Alliance, but the Alliance brief adds that by requiring companies to disclose diversity factors, the Nasdaq rules are unconstitutional in that they constitute compelled speech contrary to the First Amendment. Brief for Alliance, *supra* note 54, at 42–54.

58. Press Release, Ken Paxton, Tx. Att'y Gen., Paxton Joins Amicus Brief Opposing SEC and NASDAQ Quotas for Corporate Board Members Based on Race, Sex, and Sexual Orientation (Dec. 30, 2021), www.texasattorneygeneral.gov/news/releases/535arvar-joins-amicus-brief-opposing-sec-and-nasdaq-quotas-corporate-board-members-based-race-sex-and [https://perma.cc/5XZ9-EPHU].

59. Petition for Review and Motion to Transfer, Nat'l Ctr. For Pub. Pol'y Rsch. V. SEC (3rd Cir. Oct. 5, 2021), www.nclalegal.org/wp-content/uploads/2021/10/SEC-Diversity-Rule-Petition-for-Review-FINAL-w-Exhibits.pdf [https://perma.cc/7P4E-HXQW]. The petition also requests a motion for transfer from the Third Circuit to the Fifth Circuit in order to join "multiple petitions for review . . . filed pertaining to the same order." *Id.* at 2.

60. Opening Brief for Petitioner Nat'l Ctr. For Pub. Pol'y Rsch. At 1, All. for Fair Bd. Recruitment v. SEC, 2021 WL 6139740 (5th Cir. Dec. 20, 2021) (No. 21-60626) [hereinafter Center Brief].

61. States Amicus Brief, *supra* note 8, at 10–11.

62. Alliance Brief, *supra* note 54, at 26, 34.

63. *Id.* at 34.

conflates the two regimes, claiming that Nasdaq is "imposing a fixed-number requirement for (1) women and (2) either racial minorities or self-identified LGBTQ+ members."[64] Similarly the National Center's opening brief also describes Nasdaq's comply-or-explain rules as "Quota Requirements."[65]

Notwithstanding these interventions, on February 2, 2022, seven investment and public interest groups filed an amicus brief *supporting* the SEC's decision to approve the Nasdaq proposal.[66] The intervenors argue that investors believe overall board diversity is a "[m]aterial [b]enefit"[67] and they attempt to demonstrate that the current nomination processes for board members already considers and incorporates board diversity and explanations for a lack thereof.[68] With this context, Nasdaq's rule provides comparability where, currently, investors "lack an efficient and reliable way to *measure* whether [already existing board diversity] policies achieve any overall board diversity" and "lack the means to obtain and evaluate the reasons why non-diverse boards do not have diverse directors."[69] This consistency and comparability between disclosures may be one of the more significant benefits of the Nasdaq rule.[70]

As is clear from these ongoing legal challenges, those opposed to comply-or-explain diversity disclosure rules have adopted the strategy of conflating this regulatory "nudge" with the hard mandate of diversity quotas. And yet, as stated in the introduction, these two regulatory approaches are intended to be distinct as reflected in ongoing debates in regulatory theory. We turn to these debates and distinctions in turn.

B. Current Debates in Regulatory Theory

In the Introduction, we distinguished comply-or-explain models from the prescriptive, hard mandates provided by quotas. This distinction draws on an understanding of regulatory methods as existing on a

64. States Amicus Brief, *supra* note 8, at 7.

65. Center Brief, *supra* 60, at 6, 10–12. Note that the Center's Opening Brief does not make the distinction between comply-or-explain as a model and quotas in the same way that the Alliance's Opening Brief touched on it. *See id.*

66. *See generally* Brief of Invs. & Inv. Advisers as Amici Curiae in Support of Respondent Sec. & Exch. Comm'n, 2022 WL 634347 (5th Cir. Feb. 24, 2022) (No. 21-60626) [hereinafter Investors Amicus Brief].

67. *Id.* at 7–9.

68. *Id.* at 7–13.

69. *Id.* at 24 (emphasis in original).

70. For a generally positive view about the measurability of progress that disclosure provides, see Susan Angele, Annalisa Barrett & Stephen Brown, *Board Disclosure of Race and Ethnicity Gains Traction*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Mar. 2, 2022), https://corpgov.law.harvard.edu/2022/03/02/board-disclosure-of-race-and-ethnicity-gains-traction/ [https://perma.cc/2XSC-H9ZP].

spectrum. On one end exists top-down approaches to regulation that involve states engaging in a command-and-control approach to meet their objectives. On the other end of the spectrum lie responsive and reflexive forms of regulation—often referred to as "soft law" and frequently discussed under the broad umbrella of "new governance."[71] These mechanisms attempt to shift and influence corporate behavior indirectly. While soft law itself may come in different shapes and sizes—and with varying degrees of softness—"soft law is most commonly defined to include hortatory, rather than legally binding, obligations."[72]

As the role of corporations in society becomes increasingly entrenched, debates surrounding the most effective way to regulate the social, environmental, and cultural impacts of corporate activity have become prominent. It is relatively easy to understand the pushback against a top-down approach. One of the foundational critiques of command-and-control regulation is that it provides no incentive for corporations, and private actors generally, to go beyond defined parameters, nor does it adequately address increasingly complex social arrangements.[73] Because mandates may encroach upon closely-held beliefs about the importance of private ordering and economic freedom, prescriptive models of regulation are often met with significant resistance. With this in mind, it should also be understood that soft law has met its own fair share of critiques, particularly because it is often not as effective at meeting objectives as a command-and-control approach.[74]

In a thoughtful article on the merits of soft law, Professor Fenner Stewart takes up the question of the effectiveness of "new governance" and its (over)reliance in the regulation of corporate decision-making.[75] A key point of disagreement in the discourse is "whether the rise of market society is a positive or negative development, and the degree to which

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71. For further discussion of these regulatory models, and a sample of the relevant academic literature, see DHIR, *supra* note 11, at 94–100.

72. Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, 172 (2010).

73. Neil Gunningham, *Regulatory Reform and Reflexive Regulation: Beyond Command and Control*, *in* REFLEXIVE GOVERNANCE FOR GLOBAL PUBLIC GOODS 85, 87 (Eric Brousseau, Tom Dedeurwaerdere & Bernd Siebenhüner eds., 2012).

74. *See, e.g.*, Shuangge Wen, *The Cogs and Wheels of Reflexive Law—Business Disclosure Under the Modern Slavery Act*, 43 J.L. & SOC'Y 327, 339 (2016) ("[P]ractice has indicated that . . . private-ordering systems, including both company-based self-regulation and other governance alternatives, fell short of achieving the desirable regulatory ends.").

75. *See generally* Fenner L. Stewart, *Behind the Cloak of Corporate Social Responsibility: Safeguards for Private Participation Within Institutional Design*, 25 IND. J. GLOB. LEGAL STUD. 233 (2018). Stewart draws particular attention to the construction of the public–private distinction and the importance of cooperation by private actors that is critical for the success of responsive and reflective regulation. *See id.* at 249–54.

markets ought to be used as a tool for social ordering."[76] For example, if we look at how soft law has been applied, much still turns on tying non-financial objectives, like corporate social responsibility and diversity, to profit-maximizing strategy. Correspondingly, in an evaluation of the limits of soft regulation, Professors Jeroen Veldman and Hugh Willmott comment on the reaffirming nature of reflexive law.[77] That is, reflexive governance is premised on "developing fixes within established parameters," thereby reproducing and reinforcing the existing social order.[78] Therefore, it is questionable whether it is possible to change the behavior of corporate actors in a meaningful way using reflexive regulation. In turn, this may all come down to institutional design and regulatory structure.[79]

Disclosure-based policies, by their very nature, are a product of reflexive law and over the last decade the shift towards transparency and social disclosure has gained significant traction. In an article focused on corporate disclosure with respect to modern slavery, Wen refers to mandatory social disclosure laws as "'reflexive' primarily in that [they encourage] commercial organizations to constantly re-examine and improve their practices owing to the effect of social externalities. [This form of regulation] also makes easier participation by those affected by business activities, thereby creating further pressure in favour of responsible business decision making."[80] However, this brings us back to the question above relating to the limitations of relying on private actors to *act* in conjunction with their disclosures. In a market-based society, disclosure does not compel any sort of corrective action and this softer approach is thus more palatable to business as compared to hard mandates; businesses see disclosure as "non-burdensome compared with concrete duties."[81]

Even with the recognition of the potential benefits of increased corporate transparency, it should be noted that a completely voluntary regime would likely be unreliable and generally ineffective as it would provide no consistency or comparability between corporations. This is where comply-or-explain presents a compromise. In a proposal to extend

76. *Id.* at 237.

77. *See generally* Jeroen Veldman & Hugh Willmott, *The Cultural Grammar of Governance: The UK Code of Corporate Governance, Reflexivity, and the Limits of "Soft" Regulation*, 69 HUM. RELS. 581 (2016).

78. *Id.* at 586–87 (citing Galit Ailon, *Mapping the Cultural Grammar of Reflexivity: The Case of the Enron Scandal*, 40 ECON. & SOC'Y 141, 142 (2011)).

79. *See, e.g.*, Stewart, *supra* note 75, at 262–63; *see also* Veldman & Willmott, *supra* note 77, at 596–97. On the general effectiveness of reporting laws and corporate transparency, see generally Radu Mares, *Corporate Transparency Laws: A Hollow Victory?*, 36 NETH. Q. HUM. RTS. 189 (2018).

80. Wen, *supra* note 74, at 344–45.

81. *Id.* at 346.

a comply-or-explain approach to ESG disclosures, Professor Virginia Harper Ho notes that "the fact that comply or explain is neither fully mandatory nor fully voluntary makes it an attractive alternative in contexts where both flexibility and consistency are important."[82] In her article, she directly speaks about an area of disclosure where the complete discretion given to companies has resulted in problems including a lack of comparability and inconsistent interpretations of what information is material. Recall that a very similar justification was in fact used to defend the new Nasdaq rule.[83]

Based on these ongoing debates in regulatory theory, we see how the Nasdaq rule attempts to strike a balance between the softest form of law (e.g., the SEC's current disclosure regime) and prescriptive, hard mandates (e.g., California-style quota regimes).[84] Nasdaq's comply-or-explain approach is arguably situated in the middle point of the overall regulatory spectrum and thus represents a regulatory compromise. A developing literature on the use of comply-or-explain in corporate governance more broadly provides helpful insight as to the actual effectiveness of this compromise and is discussed in the next Part.

II. INTERROGATING COMPLY-OR-EXPLAIN GENERALLY

With respect to diversity as a subset of corporate governance, apart from California, recent interventions show that North America has favored either a middle-ground regulatory approach through the comply-or-explain method (e.g., Canada and Nasdaq) or a softer approach of pure disclosure of diversity practices or boardroom demographic information (e.g., the SEC, New York, Illinois, Maryland).[85] Nasdaq's recent adoption of comply-or-explain may cause other private actors and regulatory bodies to move in this particular direction. Indeed, following their approval of the Nasdaq rule, the SEC hinted that it may strengthen in its own regulation,[86]

82. Virginia Harper Ho, *"Comply or Explain" and the Future of Nonfinancial Reporting*, 21 LEWIS & CLARK L. REV. 317, 330 (2017).

83. *See generally* Investors Amicus Brief, *supra* note 66.

84. *See* An Act to Amend Section 301.3 of, and to Add Sections 301.4 and 2115.6 to, the Corporations Code, Relating to Corporations, A.B. 979, 2019–2020 Reg. Sess. (Cal. 2020) (enacted). For international quota regimes, see for example Norwegian Public Limited Liabilities Corporations Act, Del G:1, Act of 13 June 1997 No. 45, § 6-11a (Nor.).

85. For comply-or-explain approaches, see *Rulebook*, *supra* note 25; Amendment Instrument for National Instrument 58-101 Disclosure of Corporate Governance Practices, 37 OSCB 11035, NI 58-101 (Can. 2014); Canada Business Corporations Regulations, SOR/2019-258 (Can.) (amending SOR/2001-512). For pure disclosure approaches, see Regulation S-K, 17 C.F.R. § 229.407(c)(2)(vi) (2019); S.B. 4278, 2019–2020 Reg. Sess. (N.Y. 2020); H.B. 3394, 101st Gen. Assemb., Reg. Sess. (Ill. 2019); H.B. 1116, 440th Gen. Assemb., Reg. Sess. (Md. 2019).

86. *See* Lydia Beyoud & Andrew Ramonas, *Disability Advocates Seek Inclusion in SEC Board Diversity Rules*, BLOOMBERG L. (Sept. 30, 2021), https://news.bloomberglaw.com/esg/disability-advocates-seek-inclusion-in-sec-board-diversity-rules [https://perma.cc/8WFP-8GQ2]; *see also*

which logically could involve incorporating a comply-or-explain format. This is of a piece with global regulatory developments, as comply-or-explain is popular outside of the U.S. both in the board diversity space and in corporate governance more generally.

With the international movement towards the use of comply-or-explain mechanisms for a wide range of board governance issues, there is now also a growing body of scholarly literature critically engaging with this regulatory format and evaluating its efficacy.[87] Here, the meaning of corporate governance is captured in various corporate governance codes. These codes outline standards and expectations for corporate boards when protecting shareholder investments. Thus, corporate governance captures the mechanisms, processes, and relations used by boards of directors for the operation of the corporation.[88] Most of the scholarship on comply-or-explain as a regulatory regime is based on corporate governance codes; while there are a handful of other areas where the use of this approach has been explored or theorized, the literature in those areas is currently scarce.[89]

The scholarship on the effectiveness of comply-or-explain mechanisms in general can be divided into empirical studies that evaluate the trends and patterns within a particular context wherein a comply-or-explain regime has been applied, and broader scholarship focused on the larger trends and patterns that permeate the regulatory landscape overall. In engaging with this scholarship below, we also provide insight into the specific application of comply-or-explain to diversity.

Sophia Hudson, *Preparing for Potential Updates to HCM & Board Diversity Disclosure Requirements*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 18, 2021), https://corpgov.law.harvard.edu/2021/10/18/preparing-for-potential-updates-to-hcm-board-diversity-disclosure-requirements/ [https://perma.cc/WH2F-YULR] ("While the text of any to-be-proposed . . . corporate board diversity disclosure rules remains unknown, companies can anticipate that forthcoming rules are likely to include more prescriptive requirements than current SEC rules, and will lead to increased SEC oversight and public scrutiny . . . .").

87. *See infra* note 115.

88. *See UK Combined Code*, *infra* note 90.

89. For examples of empirical studies focused on the use of comply-or-explain in other areas, see Dhammika Dharmapala & Vikramaditya Khanna, *The Impact of Mandated Corporate Social Responsibility: Evidence from India's Companies Act of 2013* (U. Chi. Pub. L. & Legal Theory, Working Paper No. 601, 2016); Wen He & Chao Kevin Li, *The Effects of Comply-or-Explain Dividend Regulation in China*, 52 J. CORP. FIN. 53 (2018); Huili Zhang, Rong Li & Zhengfei Lu, *Transparency and Stock Price Informativeness: Evidence from a Natural Experiment in China*, APPLIED ECON. LETTERS 114 (2023); Juliette Senn, *"Comply or Explain" If You Do Not Disclose Environmental Accounting Information: Does New French Regulation Work?*, 7 SUSTAINABILITY ACCT. 113 (2018). On the extension of comply-or-explain to other unexplored areas of regulation, see Ho, *supra* note 82; Haitian Lu, *The "Legalisation" of Corporate Social Responsibility: Hong Kong Experience on ESG Reporting*, 24 ASIA PAC. L. REV. 123 (2016); Arad Reisberg, *The UK Stewardship Code: On the Road to Nowhere?*, 15 J. CORP. L. STUD. 217 (2015).

A. Empirical Studies on the Effectiveness of Comply-or-Explain for Corporate Governance

The empirical literature on comply-or-explain governance mechanisms to date mainly examines European contexts. The most prominently studied jurisdiction is the originator of the comply-or-explain approach to corporate governance—the United Kingdom and its Combined Code.[90] Other jurisdictions that have implemented comply-or-explain approaches to corporate governance include many of the European Union countries,[91] Australia,[92] a number of Asian jurisdictions including

90. *See generally* FINANCIAL REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE (2018), www.frc.org.uk/getattachment/88bd8c45-50ea-4841-95b0-d2f4f48069a2/2018-UK-Corporate-Governance-Code-FINAL.PDF [https://perma.cc/8QRG-44PN] [hereinafter *UK Combined Code*]. The UK Combined Code was developed by the Financial Reporting Council (i.e., the independent regulator responsible for regulating auditors, accountants, and actuaries in the UK). All companies with a Premium Listing of equity shares in the UK are required to report how they have applied the Code. *Id.* at 3. The Code focuses on the application of the Principles and reporting on any outcomes achieved. The most recent version of the UK Combined Code is the 2018 iteration, and it has forty-one recommendations. *See generally id.* Each part of the Code is made up of provisions (i.e., the recommended practices that firms are urged to adopt) and principles (i.e., the values underlying the provisions which are meant to encapsulate the "spirit" which firms should strive to meet). *See id.* at 1. There are five parts to the Code: (1) Board Leadership and Company Purpose; (2) Division of Responsibilities; (3) Composition, Succession, and Evaluation; (4) Audit, Risk, and Internal Control; and (5) Remuneration. *See generally id.*

91. *See*, *e.g.*, CORPORATE GOVERNANCE COMMITTEE, THE DUTCH CORPORATE GOVERNANCE CODE (2003), ecgi.global/sites/default/files/codes/documents/cg_code_nl_en.pdf [https://perma.cc/8KKN-CGBN] [hereinafter DUTCH CODE]; DANISH COMMITTEE ON CORPORATE GOVERNANCE, DANISH RECOMMENDATIONS ON CORPORATE GOVERNANCE (2020), https://corporategovernance.dk/sites/default/files/media/anbefalinger_for_god_selskabsledelse_engelsk.pdf [https://perma.cc/3384-ASFV]; SLOVENIAN DIRECTORS' ASSOCIATION & LJUBLJANA STOCK EXCHANGE, SLOVENIAN CORPORATE GOVERNANCE CODE FOR LISTED COMPANIES (2016), www.sdh.si/Data/Documents/asset-management/Slovenian_CG_Code_listed_companies_2016.pdf [https://perma.cc/2XVJ-9HXQ]; BUCHAREST STOCK EXCHANGE, CORPORATE GOVERNANCE CODE (2008), ecgi.global/sites/default/files/codes/documents/bucharest_se_code_jan2009_en.pdf [https://perma.cc/P84D-MQ63]; HANFA & ZAGREB STOCK EXCHANGE, CORPORATE GOVERNANCE CODE (2019), www.hanfa.hr/media/4097/zse_kodeks_eng.pdf [https://perma.cc/4JBE-RDDR] [hereinafter ZAGREB CODE]; *Deutscher Corporate Governance Kodex*, REGIERUNGSKOMMISSION (2020), www.dcgk.de/en/code/archive.html [https://perma.cc/8HNA-89P2]; SWEDISH CORPORATE GOVERNANCE BOARD, THE SWEDISH CORPORATE GOVERNANCE CODE (2020), https://www.bolagsstyrning.se/UserFiles/Koden/2020/SvenskKodBolagsstyrn_justerad_ENG_211220.pdf [https://perma.cc/S47M-ECQ9].

92. *See, e.g.*, ASX CORPORATE GOVERNANCE COUNCIL, PRINCIPLES OF GOOD CORPORATE GOVERNANCE AND BEST PRACTICE RECOMMENDATIONS (2003), https://www.asx.com.au/documents/asx-compliance/principles-and-recommendations-march-2003.pdf [https://perma.cc/M5BQ-6J5Y].

Singapore, Hong Kong, and Thailand,[93] and, as will be further discussed, Canada.[94]

A few general findings can be found throughout these studies. As an initial matter, the nature of comply-or-explain is such that firms may achieve a state of compliance either by embracing the codified standard ("compliance by adoption") or by declining to do so but providing a reason instead ("compliance by explanation"). Distinguishing between these two forms of compliance is necessary to properly communicate and compare, in general terms, how companies are making use of the comply-or-explain regimes in which they participate.

With that in mind, first, empirical studies generally demonstrate relatively high rates of compliance by way of adoption (i.e., adopting the enumerated recommendations). In a seminal study by Professors Sridhar Arcot, Valentina Bruno, and Antoine Faure-Grimaud on the UK Combined Code,[95] the authors found that more than half of companies fully adopted most of the recommendations.[96] Similar findings of substantial compliance were also found in a study by Professor Dirk Akkermans et al. in the Netherlands,[97] by Professor Caspar Rose in Denmark,[98] and by Professors Torbjörn Tagesson and Sven-Olof Yrjö Collin in Sweden.[99] A Romanian study that focused on companies listed on the Bucharest Stock Exchange (BSE) showed that the percentage of companies that provided compliance statements in accordance with the

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93. *See, e.g.*, *Code of Corporate Governance 2018*, SGX GROUP (2018), https://rulebook.sgx.com/rulebook/code-corporate-governance-2018 [https://perma.cc/22SC-PLKD]; *Main Board Listing Rules: Appendices*, HONG KONG EXCHANGE (May 8, 2022), https://www.hkex.com.hk/Listing/Rules-and-Guidance/Listing-Rules-Contingency/Main-Board-Listing-Rules/Appendices?sc_lang=en [https://perma.cc/DGF5-RK37]; STOCK EXCHANGE OF THAILAND, THE PRINCIPLES OF GOOD CORPORATE GOVERNANCE FOR LISTED COMPANIES (2006), ecgi.global/download/file/fid/9653 [https://perma.cc/YXQ2-BM93].

94. *See, e.g.*, Amendment Instrument for National Instrument 58-101 Disclosure of Corporate Governance Practices, 37 OSCB 11035, NI 58-101 (Can. 2014); An Act to amend the Canada Business Corporations Act, the Canada Cooperatives Act, the Canada Not-for-profit Corporations Act and the Competition Act, S.C. 2018 (Can.) (Bill C-25).

95. Sridhar Arcot, Valentina Bruno & Antoine Faure-Grimaud, *Corporate Governance in the UK: Is the Comply or Explain Approach Working?*, 30 INT'L REV. L. & ECON 193 (2010).

96. *Id.* at 193.

97. Dirk Akkermans, Hans van Ees, Niels Hermes, Reggy Hooghiemstra, Gerwin Van der Laan, Theo Postma & Arjen van Witteloostuijn, *Corporate Governance in the Netherlands: An Overview of the Application of the Tabaksblat Code*, 15 CORP. GOVERNANCE 1106, 1106 (2007).

98. Caspar Rose, *Listed Firm's Level of Stakeholder Transparency—The Comply or Explain Evidence from the Danish Corporate Governance Code*, 10 INT'L J. BUS. SCI. & APPLIED MGMT. 1, 1 (2015); *see also* Caspar Rose, *Firm Performance and Comply or Explain Disclosure in Corporate Governance*, 34 EUR. MGMT. J. 202, 202 (2016).

99. Torbjörn Tagesson & Sven-Olof Yrjö Collin, *Corporate Governance Influencing Compliance with the Swedish Code of Corporate Governance*, 13 INT'L J. DISCLOSURE & GOVERNANCE 262, 262 (2016).

BSE Code more than doubled between the Code's first and second year in existence.[100]

While many of these studies found relatively high rates of compliance by adoption, there is concern among the authors regarding the behavior of corporations that opt to comply by way of explanation. The studies found that firms often provided lackluster and overly general explanations, rendering the "explain" function of comply-or-explain ineffective.[101] One study of the UK experience found that a significant number of the explanations provided by companies either provided no justification for not adopting a recommendation (i.e., they simply disclosed that it was not adopted) or justified non adoption based on objections of principle (i.e., they argued that the code or recommendation was inappropriate).[102]

Exacerbating the issue, the UK Combined Code is generally silent on what happens when non-compliance occurs, other than to require an (ambiguously defined) explanation.[103] Indeed, whether in the UK or elsewhere, there is a general lack of guidance on explanations for non-compliance; it is up to the market to judge these explanations and to determine whether they are suitable.[104] A study of Dutch firms found that companies tended to comply with the code or, where they did not comply, they would rely on accepted "boilerplate" arguments to explain their non-compliance.[105]

Despite these particular concerns, there are few situations in which companies do not comply with the provisions recommended and refuse to provide any explanation for such deviation. Of the empirical studies surveyed for this Article the only example of relatively lower rates of

100. Cătălin Nicolae Albu & Maria Mădălina Gîrbină, *Compliance with Corporate Governance Codes in Emerging Economies: How Do Romanian Listed Companies "Comply or Explain"?*, 15 CORP. GOVERNANCE 85, 92 (2015).

101. Arcot, Bruno & Faure-Grimaud, *supra* note 95, at 198. The authors found that when complying by way of explanations, firms would fail to identify specific circumstances that could provide justification for any non-compliance. In consequence, compliance has been adopted by the UK market as a rule, but reporting practices show subjective interpretations of what compliance means. *See id.*

102. David Seidl, Paul Sanderson & John Roberts, *Applying the 'Comply-or-Explain' Principle: Discursive Legitimacy Tactics with Regard to Codes of Corporate Governance*, 17 J. MGMT. & GOVERNANCE 791, 794 (2012).

103. *See* Philip J. Shrives & Niamh M. Brennan, *A Typology for Exploring the Quality of Explanations for Non-Compliance with UK Corporate Governance Regulations*, 47 BRIT. ACCT. REV. 85, 86 (2015); *see also* Philip J. Shrives & Niamh M. Brennan, *Explanations for Corporate Governance Non-Compliance: A Rhetorical Analysis*, 49 CRITICAL PERSPECTIVES ON ACCT. 31, 31 (2017).

104. Arcot, Bruno & Faure-Grimaud, *supra* note 95, at 198.

105. Reggy Hooghiemstra & Hans van Ees, *Uniformity as Response to Soft Law: Evidence from Compliance and Non-Compliance with Dutch Corporate Governance Code*, 5 REGUL. & GOVERNANCE 480, 491–92 (2011).

compliance (by adoption or explanation) was a study conducted in Greece.[106] The author, however, draws attention to unique characteristics of the Greek market, specifically that Greek firms are mainly family-owned and controlled, which, along with the increased costs of adopting practices, are offered by the author as explanations for the low compliance rates.[107] The jurisdiction and the structure of the regime may influence the degree of compliance with some comply-or-explain mechanisms.[108] Where a firmer legal backing exists—e.g., requiring companies to provide some kind of compliance statement—instances of complete non-compliance are more easily prevented or avoided.

With respect to general market patterns, the literature suggests that compliance by way of adoption is associated with the size of the firm. Larger companies demonstrated more compliance by adoption and smaller companies were more likely to deviate from recommendations.[109] In turn, Professors Cătălin Nicolae Albu and Maria Mădălina Gîrbină suggest that a possible reason for the lower compliance of smaller companies is the costliness of complying with corporate governance best practices that have been established with larger firms in mind.[110]

Next, there are no obvious trends across countries in the kinds of recommendations that firms choose not to adopt; though, within each jurisdiction, firms tend not to comply with the same provisions. For example, in the UK, the provisions that firms are less likely to adopt (and instead provide explanations for) include those related to the composition of the board and its committees.[111] This includes recommendations regarding non-executive status, independent board members, etc. In contrast, in the Netherlands, the types of recommendations most frequently deviated from were those related to levels and disclosure of executive compensation and other remuneration matters, as well as

106. *See generally* Michail Nerantzidis, *Measuring the Quality of the 'Comply or Explain' Approach: Evidence from the Implementation of the Greek Corporate Governance Code*, 30 MANAGERIAL AUDITING J. 373 (2015).

107. *Id.* at 387.

108. For example, compare the Dutch Code, DUTCH CODE, *supra* note 91, which has a firm legal backing, to the code as established by the Zagreb Stock Exchange, ZAGREB CODE, *supra* note 91.

109. *See, e.g.*, Akkermans, van Ees, Hermes, Hooghiemstra, Van der Laan, Postma & Witteloostuijin, *supra* note 97, at 1109; Nina K. Cankar, Simon Deakin & Marko Simoneti, *The Reflexive Properties of Corporate Governance Codes: The Reception of the 'Comply-or-Explain' Approach in Slovenia*, 37 J.L. & SOC'Y 501, 524–25 (2010).

110. Albu & Gîrbină, *supra* note 100, at 91; *see also* Hooghiemstra & van Ees, *supra* note 105, at 490–91. For an example that demonstrates why it is generally easier for larger companies to comply with corporate governance codes that employ a comply-or-explain approach, see Michael E. Bradbury, Diandian Ma & Tom Scott, *Explanations for Not Having an Audit Committee in a 'Comply or Explain' Regime*, 29 AUSTL. ACCT. REV. 649, 657 (2019).

111. *See*, *e.g.*, Arcot, Bruno & Faure-Grimaud, *supra* note 95, at 194; Seidl, Sanderson & Roberts, *supra* note 102, at 800; Shrives & Brennan, *supra* note 103, at 92.

recommendations limiting the term of board members.[112] These differences suggest that the degree of deviation from particular recommendations is more subject to cultural differences and what certain markets are willing to accept as "norms."

Lastly, where certain recommendations or practices introduced on a comply-or-explain basis are potentially more costly to implement, firms are less likely to adopt that recommendation and instead will opt for compliance by explanation.[113] However, in these cases, the explanations provided by firms are often non-firm-specific, general, and boilerplate in nature (seemingly not complying with the flexible spirit of the comply-or-explain model). Further, the self-reported nature of compliance with comply-or-explain regimes makes it difficult to determine *actual* compliance from *performative* compliance.[114] This is further exacerbated by the general lack of enforcement and monitoring. This is one of the very issues that this Article attempts to highlight.

B. Broader Critiques of Comply-or-Explain and Its Effectiveness

In addition to empirical studies, there is a growing body of analysis drawing out the broader implications of comply-or-explain as a regulatory mechanism. As a preliminary note, scholars in this area do not explicitly determine whether or not comply-or-explain regimes are actually effective.[115] Such an undertaking would require engaging with the difficulty of defining what "effective" means. Rather, scholars highlight common critiques of the model, including the lack of explanation quality; the prevalence of box-ticking; unfettered discretion and subjectivity; and the lack of monitoring and enforcement.

Consistent with the empirical studies, there is a general understanding that a weakness of comply-or-explain is the failure of companies to properly or effectively use the "explain" function. For example, Professor Andrew Keay notes that comply-or-explain codes give little to no guidance on how a company should explain a failure to implement or adopt a recommendation and the variation in explanations

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112. Hooghiemstra & van Ees, *supra* note 105, at 488; Akkermans, van Ees, Hermes, Hooghiemstra, Van der Laan, Postma & van Witteloostuijn, *supra* note 97, at 1114–15. *See generally* Rients Abma & Mieke Olaerts, *Is the Comply or Explain Principle a Suitable Mechanism for Corporate Governance Throughout the EU?: The Dutch Experience*, 9 EUR. CO. L. 286 (2012).

113. On this phenomenon, see for example Yan Luo & Steven E. Salterio, *Governance Quality in a "Comply or Explain" Governance Disclosure Regime*, 22 CORP. GOVERNANCE 460, 462 (2014).

114. Making this exact point, see for example Björn Fasterling, *Development of Norms Through Compliance Disclosure*, 106 J. BUS. ETHICS 73, 75 (2012).

115. *See, e.g.*, John Roberts, Paul Sanderson, David Seidl & Antonije Krivokapic, *The UK Corporate Governance Code Principle of 'Comply or Explain': Understanding Code Compliance as 'Subjection'*, 56 ABACUS 602, 603 (2020).

makes verification and comparability extremely difficult.[116] Similarly, Professor Irene-Marie Esser states that "in cases of non-compliance, explanations are often inaccurate, very brief, generic and based on the use of boilerplate statements."[117] Notably, however, Professor Esser also draws attention to a jurisdiction where the quality of explanations was high—South Africa. In her study, Professor Esser found that the majority of South African listed companies under the comply-or-explain-style regime applied (or adopted) the recommended principles, and when they indicated a certain principle was not applied (or partially applied), companies *did* provide sufficient explanations.[118] The fundamental difference that was noted with the South Africa example is the framing of the regime as an "*apply*-or-explain" approach. Further, guidelines are provided alongside the principles with respect to how to draft explanations.[119] The framing of the South African approach shifts focus away from compliance and towards the importance of meaningful reporting; however, this approach has not been applied in other comply-or-explain-style jurisdictions.

Consequently, one of the most fundamental critiques of comply-or-explain is the overreliance on compliance and the prevalence of box-ticking. This critique recognizes that the inherent value of comply-or-explain models comes from the flexibility provided to companies to develop governance policies that are the most effective for their needs. However, companies may be exploiting this flexibility to avoid full disclosure rather than to adapt the process to the specific needs of their situation. Professor Bobby Reddy describes the practice of box-ticking as having two parts: (1) companies comply with the letter of the law, but not the spirit; and (2) companies do not utilize the inherent flexibility of the code to implement their optimum firm-specific governance structures by explaining rather than complying.[120] Part of this problem stems from a lack of shareholder engagement. While shareholders are expected to monitor the degree to which explanations are sufficient, they have instead turned

116. Andrew Keay, *Comply or Explain in Corporate Governance Codes: In Need of Greater Regulatory Oversight?*, 34 LEGAL STUD. 279, 291 (2014); *see also* Konstantinos Sergakis, *Deconstruction and Reconstruction of the "Comply or Explain" Principle in EU Capital Markets*, 5 ACCT. ECON. & L. 233, 260 (2015) (highlighting perfunctory explanations that "do not provide any or sufficient explanation with regard to [a firm's] choices").

117. Irene-Marie Esser, *Corporate Governance: Soft Law Regulation and Disclosure—The Cases of the United Kingdom and South Africa*, *in* CORPORATE GOVERNANCE CODES FOR THE 21ST CENTURY: INTERNATIONAL PERSPECTIVES AND CRITICAL ANALYSES 233, 239 (Jean J. du Plessis & Chee Keong Low eds., 2017).

118. *Id.* at 249–52.

119. *Id.* at 252–53.

120. Bobby V. Reddy, *Thinking Outside the Box—Eliminating the Perniciousness of Box-Ticking in the New Corporate Governance Code*, 82 MOD. L. REV. 692, 693 (2019).

to a "comply-or-perform" model, where a firm's compliance with standards and best practices is not scrutinized unless the firm is financially underperforming.[121] That is, "if companies are simply box-ticking and not faithfully applying the principles, fully complying with the provisions will not necessarily improve firm performance."[122]

Professors John Roberts, Paul Sanderson, David Seidl, and Antonije Krivokapic stress that visible compliance with comply-or-explain codes cannot by itself be taken as a reliable proxy for board effectiveness or actual good corporate governance, even if such disclosures are what investors rely on.[123] Where comply-or-explain codes are meant to allow flexibility so that the market can generate its own norms surrounding what constitutes good corporate governance, some corporate governance codes have become increasingly more prescriptive. This makes compliance more of a "box-ticking" exercise rather than encouraging companies to adopt their own practices as justified by meaningful explanations.[124] Where voluntary disclosure of a company's corporate governance efforts usually results in positive reputational gains, these gains may be shifted to the avoidance of reputation losses when disclosure in a comply-or-explain regime is made into a legal obligation.[125]

In conjunction with the phenomenon of box-ticking, the idea of "compliance by adoption" draws attention to the considerable discretion afforded to companies both to define compliance and also to determine what constitutes a sufficient explanation in the event that a company deviates from an enumerated recommendation.[126] Specifically, although companies are expected to provide certain disclosures under a comply-or-explain system, there is a lack of adequate monitoring and verification by shareholders and regulators to ensure that the disclosed information reflects actual practices.[127] In this sense, it may make more sense for disclosure regimes to be used where compliance is easily verifiable or becomes self-evident at the moment of disclosure.

Nevertheless, even if compliance were easily verifiable and explanations were easy to evaluate, the lack of monitoring and oversight by both regulators and shareholders persists. At present, regulators have

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121. *Id.* at 698; *see also* Esser, *supra* note 117, at 240–41; Keay, *supra* note 116, at 284–85.

122. Reddy, *supra* note 120, at 703.

123. Roberts, Sanderson, Seidl & Krivokapic, *supra* note 115, at 603.

124. Wei Lu, *The Value of the "Comply or Explain" Principle*, 580 ADVANCES SOC. SCI. EDUC. & HUMANS. RSCH. 26, 29 (2021).

125. Fasterling, *supra* note 114, at 75.

126. Keay, *supra* note 116, at 284, 291; Sergakis, *supra* note 116, at 262; Esser, *supra* note 117, at 239; *see also* Iain MacNeil & Irene-marié Esser, *The Emergence of 'Comply or Explain' as a Global Model for Corporate Governance Codes*, 33 EUR. BUS. L. REV. 1, 21 (2022).

127. Fasterling, *supra* note 114, at 76–78.

not taken steps to monitor or enforce comply-or-explain codes of corporate governance. This is reflected in the new Nasdaq rule, where the stock exchange has made it clear that it does not intend to oversee the sufficiency of explanations.[128] Rather, the general belief is that the effectiveness of comply-or-explain as a mechanism turns on active shareholder engagement. In theory, shareholders are positioned to be aware of company activities to the extent that they can effectively monitor compliance and seek action from a firm if needed; but in practice, research has shown that they are failing to engage in this monitoring function and instead take a passive role.[129]

Notwithstanding the concerns raised in this growing body of literature, it is important to point out that none of even the most critical articles completely dismiss the comply-or-explain model. Most view it as able to succeed if properly structured and enforced. The debate turns on finding more effective approaches to implementing comply-or-explain structures—ones that use the built-in flexibility and adequately monitor companies to ensure compliance with the spirit of the regime. Overall, both the broader critiques and empirical studies show that comply-or-explain models can be effective. It is this potential that we seize upon in our own work: recognizing the value that comply-or-explain can offer, how can this value best be realized?

C. Comply-or-Explain in the Context of Diversity

Although the most efficient way to achieve board diversity would be through a mandated quota, the comply-or-explain method provides a compromise that is not as prescriptive as a quota but also does not afford as much discretion to the regulated entity as would a pure disclosure model. Thus, where quotas may be perceived by some as too austere for diversification efforts, the use of comply-or-explain is viewed as more palatable and potentially useful.

Despite the existing use of comply-or-explain rules to increase diversity on corporate boards in some jurisdictions (e.g., the United Kingdom and Australia),[130] the effectiveness of these rules has mainly been examined through statistical reports tracking progress on increases in the number of women on boards.

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128. Nasdaq Proposal, *supra* note 1, at 63.

129. Keay, *supra* note 116, at 294, 303. Note, however, that even in cases where shareholders do monitor, they have limited options for enforcement—namely, divesting their shares, exerting pressure, voting, or a derivative action. *See id.* at 288.

130. *See* for example ASX CORPORATE GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS 11 (3d ed. 2014), www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf [https://perma.cc/74NG-7MEH].

One jurisdiction that has seen success using comply-or-explain is Australia. In an empirical study analyzing the Australian Securities Exchange's (ASX) comply-or-explain diversity rule shortly after its inception, Professor Alice Klettner found that the approach yielded significant increases in the number of women on boards.[131] In a 2020 study on increasing the diversity of ASX 300 boards, KPMG announced that the 30% Club of Australia had achieved its objective of having women hold 30% of board seats on the ASX 200.[132] Similarly, according to the Australian Institute of Company Directors, 2022 is the first time in history that there are no all-male boards in the ASX 200.[133] Professor Klettner, however, found that "increases of female board members . . . do not always equate to meaningful change" in management systems and processes.[134] As an example, the increased representation of women on corporate boards has not been mirrored by a similar increase in women's representation in senior management.[135]

Similar trends appear in the United Kingdom, which requires companies to describe the board's policy on diversity, any related measurable objectives, and progress made on those objectives.[136] With this model, there has been a steady increase of women's representation on corporate boards. As of 2021, the first report of the Financial Times Stock Exchange (FTSE) Women Leaders Review found that almost 200 boards (77%) on the FTSE 250 have met or exceeded the target of having 33% women on their boards.[137] The FTSE 250 has reached an all-time high of

131. Alice Klettner, *Corporate Governance Codes and Gender Diversity: Management-Based Regulation in Action*, 39 UNSW L.J. 715, 717 (noting the percentage of women on corporate boards increasing from 8.4% in 2010 to 22.7% in 2016).

132. KPMG, BUILDING GENDER DIVERSITY ON ASX 300 BOARDS 4 (2020), https://assets.kpmg.com/content/dam/kpmg/au/pdf/2020/building-gender-diversity-asx-300-boards.pdf [https://perma.cc/9SYY-D3FL]. The study revealed that the number of board seats held by women across the ASX dropped to 22% in the ASX 201–300 as compared to 31.8% in the ASX 100. *Id.*

133. AUSTRALIAN INSTITUTE OF COMPANY DIRECTORS, GENDER DIVERSITY PROGRESS REPORT 3 (2022), www.aicd.com.au/content/dam/aicd/pdf/news-media/research/2022/gender-diversity-report-june-2022-web.pdf [https://perma.cc/9CGE-C9ZS]. This report also highlights that of the 300 companies on the ASX 300, more than half have reached a minimum representation of 30% women directors on their boards. *Id.* at 15–17.

134. Klettner, *supra* note 131, at 728. For example, in her study, only 17% of the companies made diversity-related changes to recruitment policies, and only 2% of companies explicitly mentioned linking diversity objectives to their key performance indicators. *Id.* at 731.

135. For a further Australian study on the disparity between the increase of women on boards and the lack of women in senior executive positions, see Jill A Gould, Carol T. Kulik & Shruti R. Sardeshmukh, *Trickle-Down Effect: The Impact of Female Board Members on Executive Gender Diversity*, 57 HUM. RES. MGMT. 931, 931 (2018).

136. *UK Combined Code*, *supra* note 90, at 9.

137. FTSE WOMEN LEADERS, FTSE WOMEN LEADERS REVIEW: ACHIEVING GENDER BALANCE 9 (2022), ftsewomenleaders.com/wp-content/uploads/2022/05/2021_FTSE-Women-Leaders-Review_Final-Reportv1_WA.pdf [https://perma.cc/2K99-8G5V] [hereinafter FTSE REPORT]; *see*

36.8% of all board seats being held by women.[138] Similar to Australia, however, there has not been a similar increase of women's representation in senior executive positions.[139] Recognizing this room for improvement, in April 2022, the Financial Conduct Authority finalized new reporting rules, which include comply-or-explain disclosure relating to companies' progress on predetermined diversity targets.[140] This is in addition to added disclosure relating to each company's numerical data on the gender and ethnic makeup of its board, senior board positions, and executive management.[141] As this new initiative develops, we can expect to see more empirical studies relating to the effectiveness of comply-or-explain in this context.

III. CANADA'S EXPERIMENT WITH COMPLY-OR-EXPLAIN AND DIVERSITY

In the Part that follows, we build on the growing body of scholarship on the utility of comply-or-explain to achieving diversity-related objectives through a qualitative analysis of the Canadian experience. There are only a handful of academic studies that have examined comply-or-explain's effectiveness in diversifying the corporate governance space.[142] As such, our work provides an especially timely contribution, in particular, because we examine the disclosures from every firm subject to a diversity-related comply-or-explain regulation, not just a sample, and we analyze the disclosure texts themselves in order to identify the strategic ways that firms use disclosure-based regulatory mechanisms.

A. Background on the Canadian Regulation

The OSC was the first securities regulator in Canada to take up a discussion of women on boards. The process of developing the regulation

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WOMEN ON BOARDS 7 (2011), assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/31480/11-745-women-on-boards.pdf [https://perma.cc/7RAE-RSNJ] (noting that "[i]n 2009 only 12.2% of directors of FTSE 100 companies were women, and on the boards of FTSE 250 companies the proportion was just 7.3%").

138. FTSE REPORT, *supra* note 137, at 29.

139. For example, "[w]omen in the Chief Executive role remain few and far between, with virtually no progress in a decade." *Id.* at 10.

140. FINANCIAL CONDUCT AUTHORITY, DIVERSITY AND INCLUSION ON COMPANY BOARDS AND EXECUTIVE MANAGEMENT 4 (2022), www.fca.org.uk/publication/policy/ps22-3.pdf [https://perma.cc/N2VB-23PJ].

141. *Id.*

142. For Canadian examples, see Justin Zuccon, *Turning Exceptions into the Rule: Bridging the Gender Gap in Corporate Boardrooms and the C-Suites of Canadian Corporations*, 14 DALHOUSIE J. INTERDISC. MGMT. 1, 2 (2018); Tor-Erik Bakke, Laura Field, Hamed Mahmudi & Aazam Virani, *The Impact of a Principles-Based Approach to Director Gender Diversity Policy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Sept. 24, 2021), https://corpgov.law.harvard.edu/2021/09/24/the-impact-of-a-principles-based-approach-to-director-gender-diversity-policy/ [https://perma.cc/VCB4-2WLU].

started formally on May 2, 2013, when the Ontario provincial government included the following statement in its budget:

> The government strongly supports broader gender diversity on the boards and in senior management of major businesses, not-for-profit firms and other large organizations. In conjunction with others, including the OSC, the government will consider the best way for firms to disclose their approaches to gender diversity, with a view to increasing the participation of women on boards and in senior management.[143]

This then led the Minister of Finance and Minister Responsible for Women's Issues to ask the OSC in June 2013 to conduct a public consultation on gender diversity on boards and specifically on the potential for a "comply or explain" disclosure approach.[144] The consultation included a public roundtable (at which Author Aaron Dhir appeared as an invited expert panelist),[145] a survey of issuers, and the receipt of ninety-two comment letters.

Based on this consultation, the OSC then issued in January 2014 a set of proposed amendments to include disclosures regarding the representation of women on boards and in senior management along with a new request for comments from the public.[146] In July, the securities commissions in other Canadian provinces and territories (Manitoba, New Brunswick, Newfoundland and Labrador, Northwest Territories, Nova Scotia, Nunavut, Québec and Saskatchewan) also sought public comment with the goal of aligning the proposed regulation across these jurisdictions. The proposal outlined the elements that ended up in all important ways unchanged in the final regulation (with the exception of the addition of requirements around disclosing term limits), which the Canadian Securities Administration (CSA) published as an amendment to National Instrument 58-101 *Disclosure of Corporate Governance Practices* and

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143. ONTARIO SECURITIES COMMISSION, OSC STAFF CONSULTATION PAPER 58-401: DISCLOSURE REQUIREMENTS REGARDING WOMEN ON BOARDS AND IN SENIOR MANAGEMENT 3 (2013), https://www.osc.ca/sites/default/files/pdfs/irps/sn_20130730_58-401_disclosure-requirements-women.pdf [https://perma.cc/X5UE-G6WZ].

144. *Id.*

145. *OSC Announces Roundtable to Discuss Women on Boards and in Senior Management and Extension of Comment Period*, ONT. SEC. COMM'N (Sept. 23, 2013), www.osc.ca/en/news-events/news/osc-announces-roundtable-discuss-women-boards-and-senior-management-and-extension [https://perma.cc/GHY4-WLE5].

146. ONTARIO SECURITIES COMMISSION, PROPOSED OSC AMENDMENTS TO FORM 58-101F1 CORPORATE GOVERNANCE DISCLOSURE OF NATIONAL INSTRUMENT 58-101 DISCLOSURE OF CORPORATE GOVERNANCE PRACTICES—PROPOSED DISCLOSURE REQUIREMENTS REGARDING THE REPRESENTATION OF WOMEN ON BOARDS AND IN SENIOR MANAGEMENT 3 (2014), https://www.osc.ca/sites/default/files/pdfs/irps/ni_20140116_58-101_pro-amd-f1.pdf [https://perma.cc/Z4M9-57QB] (supplement to 37 O.S.C. Bull.).

Form 58-101F1 *Corporate Governance Disclosure* in October 2014. The regulation received ministerial approval in Ontario in November to come into effect in December of that same year.[147] It has six components, set out in items 10–15 of Form 58-101F1:

> [Item (10)] Disclose whether or not the issuer has adopted term limits for the directors on its board or other mechanisms of board renewal . . . .
>
> . . . .
>
> [Item (11)(a)] Disclose whether the issuer has adopted a written policy relating to the identification and nomination of women directors.
>
> . . . .
>
> . . . [Item (12)] Disclose whether and, if so, how the board or nominating committee considers the level of representation of women on the board in identifying and nominating candidates for election or re-election to the board.
>
> . . . [Item (13)] Disclose whether and, if so, how the issuer considers the level of representation of women in executive officer positions when making executive officer appointments.
>
> . . . .
>
> [Item (14)(b)] Disclose whether the issuer has adopted a target regarding women on the issuer's board.
>
> . . . .
>
> . . . [Item (15)(a)] Disclose the number and proportion (in percentage terms) of directors on the issuer's board who are women.
>
> (b) Disclose the number and proportion (in percentage terms) of executive officers of the issuer, including all major subsidiaries of the issuer, who are women.[148]

In the case of items 10–14, the regulation includes the "explain" requirement for each. By way of example, for items 10 and 14, term limits and targets, respectively, the regulation provides: "If the issuer has not adopted director term limits or other mechanisms of board renewal,

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147. News Release, Ont. Sec. Comm'n, Notice of Ministerial Approval—Amendments to NI 58-101 Disclosure of Corporate Governance Practices and Form 58-101F1 Corporate Governance Disclosure (Dec. 11, 2014).

148. CANADIAN SECURITIES ADMINISTRATORS, MULTILATERAL CSA NOTICE OF AMENDMENTS TO NATIONAL INSTRUMENT 58-101: DISCLOSURE OF CORPORATE GOVERNANCE PRACTICES 6–7 (2014), https://www.osc.ca/sites/default/files/pdfs/irps/csa_20141014_58-101_noa-national-instrument.pdf [https://perma.cc/BC7M-YSRD].

disclose why it has not done so," and "[i]f the issuer has not adopted a target, disclose why it has not done so."[149] Approximately 800 companies trading on the Toronto Stock Exchange are subject to the regulation annually.[150] These disclosures were to be placed in the annual Information Circular (equivalent to the 10K in the US) though no location or specific form of the disclosure was mandated.

Of note, this regulation did not set quotas in the way that many European jurisdictions and the state of California have done, and indeed it did not, for example, even require firms to set their own targets. Instead, it simply asked firms if they had set targets or to explain why not. This approach was seen as a "Canadian" solution that avoided strict quotas—which were viewed as not giving individual companies enough flexibility—but still created pressure on firms to make improvements in women's representation. The goal was to create conditions conducive to companies making progress by requiring them to disclose their policies, practices and outcomes.[151] Said then OSC Executive Director Maureen Jensen:

> Our experience with other comply and explain regimes is that this will work to generate the discussion and move this issue forward. I think the other methods could be used if we don't get any traction. But we think at this point this is the right choice. . . . And what we are proposing is modest. So it dovetails well with a lot of the basic principles of securities law, which is transparency. You shine a light on things and you encourage a dialogue between the board and investors.[152]

B. Impact of the Canadian Regulation

While heralded at the time of the release of the regulation as a major step forward in nudging firms towards diversity, results have arguably not fully met expectations. In the first year, when the percent of board seats increased from eleven to twelve percent, OSC Executive Director Maureen Jensen said the results were "disappointing," and that "[w]ithout an improvement here, we will never reach 30 per cent female board

149. *Id.*

150. *See* CANADIAN SECURITIES ADMINISTRATORS, CSA MULTILATERAL STAFF NOTICE 58-313: REVIEW OF DISCLOSURE REGARDING WOMEN ON BOARDS AND IN EXECUTIVE OFFICER POSITIONS: YEAR 7 REPORT 3 (2021), https://www.osc.ca/sites/default/files/2021-11/sn_20111104_58-313_women-on-boards.pdf [https://perma.cc/6A9S-HZ5U] [hereinafter CSA STAFF NOTICE YEAR 7 REPORT] ("As of May 31, 2021, approximately 1,692 issuers were listed on the TSX, of which approximately 776 were subject to the disclosure requirements.").

151. Janet McFarland, *OSC Proposes Gender Equity Policy for Boards*, GLOBE & MAIL (July 30, 2013), www.theglobeandmail.com/report-on-business/osc-proposes-gender-equity-policy-for-boards/article13490037/#dashboard/follows [https://perma.cc/GSC6-PX5P].

152. *Id.*

representation [ever].”[153] Further, OSC chairperson Howard Wetston noted that firms seemed to be following the letter of the law but not the spirit of it:

> Even if it may qualify as compliant disclosure, it’s at best technical compliance and certainly does not reflect our overall objective or desired outcome . . . . It’s simply not good enough. This type of disclosure leads us to believe that the boards of these companies are not taking the issue as seriously as we had intended.[154]

Indeed, while there has been further progress in subsequent years, it has continued to be slow. Seven years after the implementation of the regulations (2021), according to the CSA, still only 22% of board seats were held by women (up from 11% in 2015), and only 32% of companies had adopted targets for women on the board (though this was up from 7% in 2015).[155] Further, in 2021, 18% of companies without targets still had no women on their board (though this was down substantially from 51% in 2015).[156]

Perhaps most confounding is the fact that in 2021, with the regulation at the height of its maturity, women were selected to fill only 35% of board vacancies. In other words, men received 65% of these newly available appointments.[157] Though many have claimed that what progress has been made is due to the regulation, a comparison with other jurisdictions with less robust regulations generally suggests this might not be the case. A study of only the top Canadian firms (a sample of the largest firms on the Toronto Stock Exchange (TSX) Composite Index) showed that the implementation of the regulation had a boosting effect on board diversity compared to companies in the U.S.[158] However, examining all of the firms subject to the OSC regulation over the full time period showed that Canadian firms progressed more slowly than comparison firms in the US, for example, both the large companies of the S&P 500 and the perhaps more comparable firms of the Russell 3000 (given that the size of firms covered by the regulation are not all as large as S&P 500 companies).

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153. Alexandra Posadzki, *Women on Canadian Corporate Boards Edges Up 12%, Report Says*, BNN BLOOMBERG (Sept. 28, 2016), www.bnnbloomberg.ca/women-on-canadian-corporate-boards-edges-up-12-report-says-1.575475 [https://perma.cc/6LQS-MSFD].

154. Janet McFarland, *OSC Rebukes Firms for Lack of Action on Gender-Diversity Rules*, GLOBE & MAIL (June 10, 2015), www.theglobeandmail.com/report-on-business/industry-news/the-law-page/osc-blasts-firms-for-lack-of-action-on-gender-diversity-rules/article24902736 [https://perma.cc/NV7L-ESSU].

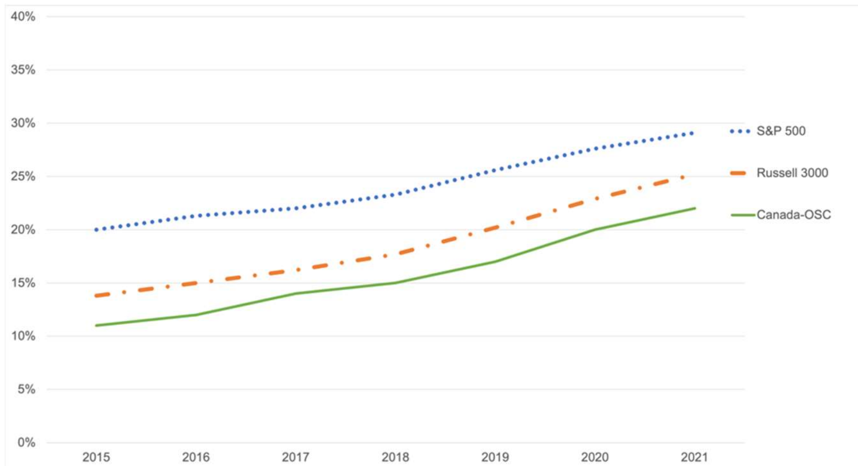
155. CSA STAFF NOTICE YEAR 7 REPORT, *supra* note 150, at 1.

156. *Id.* at 9.

157. *Id.* at 4.

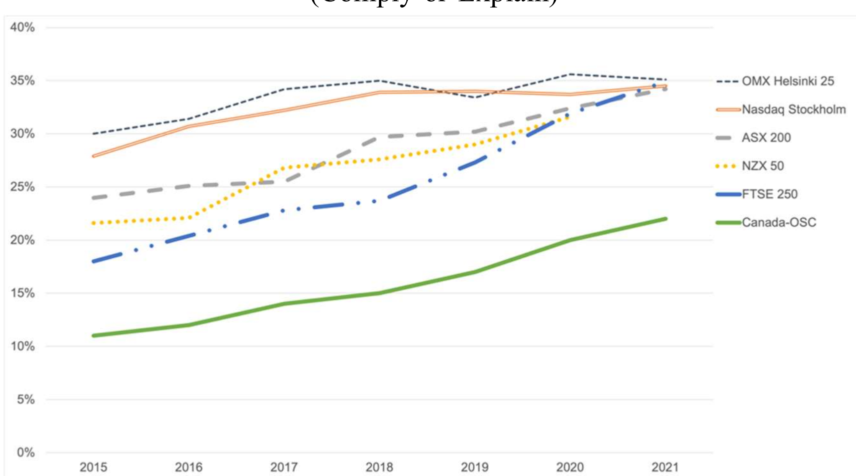
158. Bakke, Field, Mahmudi & Virani, *supra* note 142.

Chart 1: Percent of Women on Boards: S&P 500, Russell 3000 and Canada (Comply-or-Explain)



In addition, comparing Canada with other countries that have similar comply-or-explain regulations, we see that Canada lags quite dramatically while other jurisdictions are coming close to converging at around 35%. While Canada's growth in representation was similar to other jurisdictions (12% annual improvement vs. 11% for the Russel 3000 and 12% for the FTSE 250), it started from a much lower base and thus has not caught up.

Chart 2: Other Comply-or-Explain regimes and Canada (Comply-or-Explain)



And, of course, Canada lags well behind those countries that have implemented quotas such as Norway and France, where boards on average have achieved near gender parity.[159] Indeed, in the State of California, which implemented a gender quota for public firm boards just in 2018, and provided firms with time to come into compliance, women as of 2021 occupied almost 30% of public firm board positions. Put another way, the percentage of women in California holding board appointments has nearly doubled from 15.5% in 2018 to 29% in 2021.[160]

Following the CSA's release of its November 2021 report, thought leaders expressed dismay at the impact of the regulation. Andrew MacDougall of the leading corporate law firm Osler, Hoskin & Harcourt LLP, which produces its own annual analysis of corporate performance under the regulation, commented that, "things are progressing, but definitely not progressing nearly as quickly as we and a lot of other people had hoped for."[161] The CSA staff report also pointed out that the tendency for "explaining" rather than "complying" with the guidelines was associated with poorer diversity performance. They showed charts indicating that issuers with board diversity policies had 25% women on their boards on average versus 16% for those that did not. And, crucially, the issuers with board targets (only 32% of total firms) had an average of 28% women on their boards versus 18% for those that did not.[162]

IV. Our Study and Preliminary Findings

A. Data Collection

Our project, which uses Canada as a case study, aims to deepen the current understanding of the comply-or-explain approach by informing on-going policy conversations in other jurisdictions. First, we draw from annual reports from the CSA who have to date provided seven annual summary analyses of a subset of all disclosures. In addition, law firm Osler, Hoskin & Harcourt LLP produces annual analyses and commentary about the disclosures. Both of these sets of documents provide useful top-line statistics, and the Osler reports also provide high-level summaries of some of the key "explanations" offered by firms.

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159. Deloitte, Progress at a Snail's Pace—Women in the Boardroom: A Global Perspective 14–15 (7th ed. 2022), https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/AtB/deloitte-nl-women-in-the-boardroom-seventh-edition.pdf [https://perma.cc/6U2B-XSKX] (revealing that women occupy 43.2% of board positions in France and 42.4% of positions in Norway).

160. California Partners Project, Mapping Inclusion: Women's Representation on California's Public Company Boards by Region and Industry 1 (2021), https://www.calpartnersproject.org/mappinginclusion [https://perma.cc/MBX7-VW53].

161. Zena Olijnyk, *Progress for Women on Boards, Less for Indigenous, Minorities and Those with Disabilities: Osler*, Can. Law. (Oct. 26, 2021), www.canadianlawyermag.com/practice-areas/corporate-commercial/progress-for-women-on-boards-less-for-indigenous-minorities-and-those-with-disabilities-osler/361119 [https://perma.cc/W6XH-4LDH].

162. CSA Staff Notice Year 7 Report, *supra* note 150, at 9.

Second, to understand in greater detail why comply-or-explain has not moved the needle as much as the crafters of the regulation had intended, we sought to examine the disclosures of all firms subject to the regulation, over the first four years of the regulation's operation, in order to perform a qualitative documentary content analysis. The number of organizations subject to the regulation varies by year due to the entry, delisting, and merging of firms and thus the sample includes 803 in 2015; 756 in 2016; 732 in 2017; and 714 in 2018, for a total of 3,005 firm-year observations. Note that the number of organizations subject to the regulation does not include exchange traded funds, closed-end funds, designated foreign issuers and SEC foreign issuers, which the TSX exempts from disclosures. It should also be noted that while the CSA does perform an analysis of disclosures for each year, it only includes those firms that have fiscal year ends before March 31 and that file their annual reports before July 31 of each year. Thus, a substantial number of firms are not included in the CSA studies, including the larger Canadian banks (148 in 2015, 150 in 2016, 126 in 2017, and 116 in 2018). To ensure that we had a complete list of all firms subject to the regulation, we consulted the list of "stub period" firms published by the CSA in February 2019. With the full list of firms in hand, we downloaded the relevant Information Circular for each firm from the System for Electronic Document Analysis Retrieval (SEDAR) platform maintained by the CSA.

To identify the texts within the often 100+ page long documents, a team of trained MBA and law students read each document closely, searching for each of the sections that corresponded with the six items in the regulation. Discerning which texts applied to each item was not straightforward because the regulation does not specify where and how the disclosures should be made. Further, it is often unclear whether firms had complied with the regulation. Over the course of the work, we encountered many cases where the interpretation was not immediately evident. Through lengthy team meetings, we ascertained to the best of our ability the correct interpretation and recorded the decisions in a coding manual that grew to seventeen pages. Often companies were not fully complete in their disclosures, for example, providing the number but not the percent of women on the board or stating they had a diversity policy but not stating if it was written. In the latter case, we gave firms the benefit of the doubt and assumed the policy was written in order to assure the most conservative estimates of the impact of the regulations. Table 1 lists the data collected.

Table 1: Data collection

Item	Quantitative	Qualitative
10: Term limits	Yes=1/No=0	Description if yes, explanation for why not if no
11: Written policy	Yes=1/No=0	Description if yes, explanation for why not if no
12: Consider level of representation of women when nominating candidates for the board	Yes=1/No=0	Description if yes, explanation for why not if no
13: Consider level of representation of women when nominating candidates for executive officer	Yes=1/No=0	Description if yes, explanation for why not if no
14: Targets	Yes=1/No=0	Description if yes, explanation for why not if no
15: Number and proportion of women on board, in executive leadership	Number and percent of women on board and in executive leadership	

We also engaged a separate set of research assistants to conduct spot checks of the entire dataset to assure consistency and accuracy. Of note, the team coded each company at one time, across all years of available information circulars. Because many companies used similar texts from year to year, this assured that ambiguous texts were coded the same way each time. In comparing our dataset to that of the CSA, we were able to find several instances where our method provided more consistent coding than the CSA approach, which by necessity is conducted annually and thus did not have the benefit of comparing one company's texts across years.

For the results reported below, we focused on a qualitative analysis of the explanations firms made in response to each item of the regulation. This Article is part of a larger study in which we have also used quantitative text analysis procedures to study the systematic impact of different kinds of explanations on subsequent diversity outcomes.[163] For the purposes of this study, we are focusing on the quality of the explanations.

B. Findings

Our findings benefit from data from the CSA, Osler, and our own analyses of the disclosures. Combining these insights together, we find that firms avoid the costliest actions, that they rely on obfuscation and other approaches to make it difficult for evaluators to interpret the disclosures, and that they offer thin, weak, or otherwise suboptimal explanations for failure to make progress that draw on tired tropes about meritocracy and pipeline limitations. It is important to emphasize that these findings are by no means inherent to the comply-or-explain regulatory design. On the contrary, they are a function of how Canada's rule has been implemented by individual firms to date. Comply-or-explain in the diversity space need not work this way and, by bringing these findings to light, it is our hope that other jurisdictions can learn from the Canadian experience in order to avoid potential pitfalls and to realize the full potential of the comply-or-explain disclosure mechanism.

1. Firms Avoid the More Costly Actions

When examining the items of the regulation, some are costlier to implement than others. It can be fairly easy for a company to say they consider the level of representation of women when nominating candidates for the board or executive leadership (Items 12 and 13) or even to write a diversity policy (Item 11). On the other hand, setting targets (Item 14) is much riskier because a target would create public accountability for meeting that goal. Similarly, actually increasing the number of women on the board (Item 15) may be harder than saying that they consider representation when adding new board members. The results support this observation, where in 2021, 60% of firms analyzed by the CSA adopted a policy related to representation but only 32% adopted targets for board members (and only 6% had adopted targets for women in executive officer positions).[164] Interestingly, the CSA annual reports which provide their overview of firm responses to the regulations omit any statistics on Items 12 and 13. In our own analysis of the 2018 data, we find that most firms (73.7%) do say they consider the level of representation of

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163. *See, e.g.*, Daphné Baldassari, Sarah Kaplan & Aaron Dhir, *Hiding in Plain Sight: Firm Strategic Responses to Diversity Disclosure Requirements* (Working Paper, 2023) (on file with authors).

164. CSA STAFF NOTICE YEAR 7 REPORT, *supra* note 150, at 1.

women when making board (Item 12) or executive officer (Item 13) appointments.

The substantial variation across industries and size of firm also supports the interpretation that firms are less likely to "comply" when costs are increased. For example, biotechnology, technology, and mining firms are less likely to have women on their boards, and this may be because those industries have historically excluded women and thus more effort would be required to search for candidates. Similarly, smaller firms are less likely to have policies in place, set targets, or have women on their boards. This may be because they also have smaller boards with fewer board committees, and thus less capacity to develop such policies, and fewer options for board turnover that would create openings for women.[165] Similarly, there might be industries for which it would be more costly *not* to comply, such as those in federally-regulated sectors, as they are subject to much closer oversight by the government. Indeed, for these companies, we observe that they are more likely than other firms to set targets (50% versus the 15% average) and more likely to have more women on their boards (25.9% versus the 13.5% average).

2. Firms Rely on Obfuscation

As reported by Professors Daphné Baldassari, Aaron Dhir, and Sarah Kaplan, the language in the diversity disclosures is highly obfuscating.[166] Using a standard measure of readability (the Gunning-Fog index), we find that the diversity disclosures measured on average 18.9. This index combines the length and complexity of words in sentences; the values indicate the number of years of education required to understand the text. A Gunning-Fog index of 12 is usually recommended for general readers. Yet, company disclosures on average have been found in other studies to have an index over 18, so a result of 18.9 may not be surprising.[167] What is of more interest is that the Gunning-Fox index for the rest of the disclosures (not including the diversity disclosure text) is on average 15.5. Thus, we find that firms tend to be more obfuscating in their diversity

165. *See id.* at 4.

166. *See generally* Baldassari, Kaplan & Dhir, *supra* note 163.

167. *See generally* Gary C. Biddle, Gilles Hilary & Rodrigo S. Verdi, *How Does Financial Reporting Quality Relate to Investment Efficiency?*, 48 J. ACCT. & ECON. 112 (2009); Brian J. Bushee, Ian D. Gow & Daniel J. Taylor, *Linguistic Complexity in Firm Disclosures: Obfuscation or Information?*, 56 J. ACCT. RSCH. 85 (2018); Kira R. Fabrizio & Eun-Hee Kim, *Reluctant Disclosure and Transparency: Evidence from Environmental Disclosures*, 30 ORG. SCI. 1125 (2019); Feng Li, *Annual Report Readability, Current Earnings, and Earnings Persistence*, 45 J. ACCT. & ECON. 221 (2008); Tim Loughran & Bill McDonald, *Measuring Readability in Financial Disclosures*, 69 J. FIN. 1643 (2014); Tim Loughran & Bill McDonald, *Textual Analysis in Accounting and Finance: A Survey*, 54 J. ACCT. RSCH. 1187 (2016).

disclosures than in the rest of their information circulars. And, this is not just because the explanations might be longer or more detailed (where length and level of detail are not correlated with the Gunning-Fog Index). We take this to be a signal that firms are attempting to avoid transparency even as they are making disclosures. And, further, we find that firms that have few women on their boards (0 or 1) and/or do not set targets have on average higher rates of obfuscation than those that have more women on their boards and/or set targets (19.6 vs. 17.6 in the Gunning-Fog index).

3. Firms Offer Thin, Weak, or Otherwise Suboptimal Explanations

For the heart of our analysis, we look at the explanations associated with the most potentially costly item of the regulation—Item 14 on setting targets—and find that the reasoning that companies present is problematic in that it trades on tired tropes about meritocracy. Osler's analysis of the 2020 disclosures identifies the most popular explanations overall for non-compliance with setting internal targets as follows: (1) Would compromise a focus on merit and may not result in the best candidates being selected; (2) Targets are ineffective or arbitrary; (3) Gender and other diversity characteristics are considered but no targets set; and (4) The number of directors is small or there is low turnover, so there is no opportunity for increasing diversity.[168]

To take a closer look, we reviewed all of the explanations associated with whether or not companies had set targets. Firms that have set targets offer fairly short descriptions of what targets they have set and where they are in achieving them. For example, Manulife Financial stated the following in 2018:

> We promote gender diversity on our board and introduced a formal diversity policy in 2014. Our objective is to have women make up at least 30% of our independent directors and we've met this goal since 2013. 43% of the nominated independent directors are women and we also had a female Chair of the board from 2008 to 2013.[169]

And, similarly, Nova Scotia Power stated the following in 2015:

> To ensure that there are a significant number of women on the Company's Board of Directors, the Company recruits Board members under a long-standing corporate governance practice which requires that no fewer than 25 per cent of the members of the Board

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168. ANDREW MACDOUGALL, JOHN VALLEY & JENNIFER JEFFREY, DIVERSITY DISCLOSURE PRACTICES 26–27 (2022), https://www.osler.com/osler/media/Osler/reports/corporate-governance/Osler-Diversity-Disclosure-Practices-report-2022.pdf [https://perma.cc/PV7F-2SZB].

169. MANULIFE FINANCIAL CORPORATION, 2018 MANAGEMENT INFORMATION CIRCULAR 22 (2018), https://www.manulife.com/content/dam/corporate/investors/MFC_PC_2018_Q1_EN.pdf [https://perma.cc/Q37D-R435].

> of Directors are women. NSPI has achieved this requirement; its Board of Directors has 3 women, or 33 per cent of the total members of the Board. The list of Director nominees for the annual shareholders' meeting on May 21, 2015, includes three women out of eight Director nominees, or 37.5 per cent.[170]

Interestingly, with Air Canada in 2018, we see an example of the company actually setting and then increasing their target once the initial one was achieved:

> In August 2014, the Board established as its target that women represent at least 25% of the directors of Air Canada by 2017 and this target was achieved in 2016 . . . . Currently, three out of 11 directors (28%) are women, and following the meeting and assuming all director nominees are elected, three out of 11 directors (28%) will be women. In October 2017, the Board established as its new target that women represent at least 30% of the directors of Air Canada by 2020.[171]

When turning to the explanations that the regulation requires firms to provide if they have not set targets, our findings conform with Osler's analysis but extend it in important ways to examine the rhetorical strategies that firms have used. Some are truly remarkable, as with Barrick Gold's 2017 disclosure in which they note that they have two women on their board (13%) but have not set a target because, they argue:

> In November 2016, Barrick became a member of the 30% Club Canada, an organization that works with the business community to achieve better gender balance on the boards and senior leadership of Canadian companies. Like Barrick, the 30% Club Canada does not believe that setting mandatory quotas is the right approach to achieving greater gender balance. Rather, the organization, whose name comes from its aspirational goal for 30% of Canadian board seats to be held by women by 2019, is focused on building a strong foundation of business leaders who are committed to meaningful and sustainable gender balance in business leadership. Barrick supports this important objective.[172]

So, although they belong to the 30% Club whose name is a direct call to action to set targets, they have not set them. In doing so, they elide the

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170. NOVA SCOTIA POWER INCORPORATED, MANAGEMENT INFORMATION CIRCULAR 9 (2015), https://s25.q4cdn.com/978989322/files/doc_financials/2015/ar/3f3e2582-36f5-f108-a9dc-da226cec6479.pdf [https://perma.cc/W7HH-G9AY].

171. AIR CANADA, 2018 MANAGEMENT PROXY CIRCULAR 32 (2018), https://filecache.investorroom.com/mr5ircnw_aircanada/270/2018_proxy.pdf [https://perma.cc/YJ8E-PDTM].

172. BARRICK GOLD CORP., INFORMATION CIRCULAR 105 (2017).

30% Club's stance against the setting of quotas by the government (as has been done by Norway and other countries) with the setting of targets by individual firms as a way to avoid creating a measurable goal for themselves. Recall that this has also been a rhetorical strategy of opponents of the Nasdaq rule.

In our systematic coding of all of the Item 14 explanations, we found that arguments around meritocracy dominate.[173] Many firms argued that they make their choices of directors and senior executives "solely" based on merit and as such, targets would interfere. Relatedly, many did not mention "merit" but argued that they focused only on the "best" or "most" qualified candidates, "regardless of" or "without reference to" gender (or race and other diversity measures).

A substantial number of firms objected to targets by misrepresenting what target-setting is supposed to be. Sometimes they would elide targets with externally imposed quotas, which they portrayed as undesirable. Another tactic was to frame targets as requiring firms to select candidates "solely" based on gender, which of course they do not, in order to make the setting of targets appear to be unreasonable. Similarly, a common argument was that targets are "arbitrary" and not related to the specific needs of the business without recognizing that companies are free to set targets that reflect their specific contexts.

Other firms simply stated that setting targets was not in the "best interests" of the corporation without further explanation. Alternatively, other firms indicated that they were "equal opportunity employers," who used principles of fairness in recruiting directors and executives, and therefore targets were unnecessary. In a few cases, firms have indicated that they will monitor progress and might decide in the future to set targets. Table 2 presents the types of explanations offered by firms for not setting targets, sets out the percentage of firms using each type, and provides examples from the corporate disclosure documents.

173. *See infra* Table 2.

Table 2: Explanations for Not Setting Targets (Items 14a and 14b)

Type of reason	**% of firms using explanation**	**Examples (year/number of women on board/%women on board)**
Focus only on the "best" or "most" qualified, "regardless of" or "without reference to" gender	25%	• AGT Food and Incredients Inc. (2016/1/14%): "In considering individuals as potential Directors, the Nominations Committee is focused solely on finding the most qualified persons available, regardless of gender . . ." • Posera Ltd. (2018/0/0%): "The Board recognizes the importance of having the flexibility to appoint qualified candidates when they are available, which may mean adding male or female candidates, and as a result cannot commit to selecting a candidate whose gender is a decisive factor in their appointment."
Opposed to quotas	18%	• Clairvest Group (2017/0/0%): "Clairvest does not believe that quotas, strict rules or targets necessarily result in the identification or selection of the best candidates for directors or executive officers." • Klondex Mines Ltd. (2017/0/0%): "The Diversity Policy does not mandate quotas based on any specific area of diversity and specifically does not set targets for women on the Board or in executive officer positions . . . . The Board has determined that merit is the key requirement

Type of reason	% of firms using explanation	Examples (year/number of women on board/%women on board)
		for Board appointment and employee advancement. The Company believes that decision-making is enhanced through diversity in the broadest sense . . . . Currently, the number of women directors and executive officers of the Company is nil (or zero percent of current directors and executive officers, respectively). In the context of an effective Board, diversity includes expression of thought, business experience, skill sets and capabilities." • Wi-LAN Inc. (2016/1/13%): "In addition, targets or quotas based on specific criteria, including gender, have the potential to limit the Board's ability to ensure that the overall composition of the Board and WiLAN's executive officers meets the Corporation's needs and those of its shareholders and, consequently, WiLAN has not set any such targets or quotas."
Decide on the basis of merit/meritocracy	10%	• Advantage Oil and Gas (2018/1/17%): "While the Corporation recognizes the benefits of diversity . . . the Board will not compromise the principles of meritocracy by imposing quotas or targets." • Granite Oil Corp. (2017/0/0%): "Committed to a merit and qualifications-based method of

Type of reason	**% of firms using explanation**	**Examples (year/number of women on board/%women on board)**
		selecting directors and believes that imposing quotas or targets would compromise its principle-based candidate selection system." • Precision Drilling Corporation (2017/1/11%): "We have not adopted targets for female directors because we believe that merit of the candidate and the needs of the organization must remain paramount."
Targets are not in the "best interest" of the corporation	7%	• Coro Mining Corp. (2018/1/17%) : "The Board has not adopted policies imposing an arbitrary term or retirement age limit in connection with individuals nominated for election as directors as it does not believe that such a limit is in the best interests of the Company." • Lundin Gold Inc. (2015/1/11%): "Governance and Nominating Committee determined it would not be in the best interest of the Corporation at this time to adopt firm targets with respect to gender representation on the Board or among senior officers. The Board believes that its current composition is highly effective and that the Board is well-composed."
Targets restrict decisions to be based "solely" on gender	3%	• Amerigo Resources Ltd. (2017/0/0%): "Management and the Board agree that appropriate skills and

Type of reason	% of firms using explanation	Examples (year/number of women on board/%women on board)
		experience must remain the overriding criteria for nomination to the Board in order to guard against any perception that directors may have been nominated solely or primarily on the basis of gender." • True North Apartment REIT (2015/0/0%): "The Corporation has not adopted a target for women on the board of directors because the Corporation does not believe that any director nominee should be chosen nor excluded solely because of their race, ethnicity, gender, age and cultural background."
Targets are arbitrary	3%	• BlackPearl Resources (2015/0/0%): "For now, the Corporate Governance and Nominating Committee has determined that it is better to promote gender diversity generally within the Company rather than imposing any arbitrary targets." • Cogeco Inc. (2015/2/22%): "An arbitrary target can be a weak substitute for a consistently applied recruitment policy of encouraging the hiring of qualified women for executive responsibilities." • MAG Silver Corp. (2015/1/13%): "The Corporation has not adopted a

Type of reason	% of firms using explanation	Examples (year/number of women on board/%women on board)
		target regarding women on the Board or regarding women in executive officer positions as the Board believes that such arbitrary targets are not appropriate for the Corporation.”
Use principles of fairness and equal access to opportunities	3%	• Cequence Energy Ltd. (2015/0/0%): “The Board . . . has not adopted a specific target regarding women in executive officer positions; however, Cequence is an equal opportunity employer committed to treating people fairly, with respect and dignity, and to offering equal employment opportunities based upon an individual’s qualifications and performance.” • TECSYS Inc. 2015: “The Board has not adopted a “target” relating to the identification and nomination of women directors . . . . The Corporation’s policies are committed to treating people fairly, with respect and dignity, and to offer employment opportunities based upon an individual’s qualifications, character and performance, not the particular gender or social group that an individual may belong to.”
Might set targets in the future	4%	• Acasta Enterprises Inc. (2018/0/0%): “Acasta does not presently have, nor does it

Type of reason	% of firms using explanation	Examples (year/number of women on board/%women on board)
		intend to establish, a target regarding the number of women on the Board. As of the date of this Information Circular, none of the Directors are female. Acasta believes a target would not be the most effective way of ensuring the Board is comprised of individuals with diverse attributes and backgrounds. Acasta will, however, evaluate the appropriateness of adopting targets in the future." • China Gold International Resources Corp. Ltd. (2017/0/0%): "While the Board is not setting any targets initially, it will monitor progress and could decide to do so in the future if progress is not being made in obtaining appropriate diversity."

Often these explanations are combined, as with Zargon Oil and Gas Limited (with no women on their board), who stated in their 2017 disclosure:

> We are committed to a meritocracy and believe that considering the broadest group of individuals who have the skills, knowledge, experience and character required to provide the leadership needed to achieve our business objectives, without reference to their age, gender, race, ethnicity or religion, is in our best interests and all of our stakeholders.[174]

Similarly, Canadian Pacific Railway, who in 2017 had four women on the board (44% of total), but no women in executive leadership, indicated:

174. ZARGON OIL & GAS LTD, INFORMATION CIRCULAR-PROXY STATEMENT 34 (2017).

> CP has not implemented quotas or specific targets with respect to gender diversity at the Executive Officer level other than with respect to CP's Diversity and Employment Equity Program. CP believes that the Diversity and Employment Equity Program encourages the advancement and employment of women and that arbitrary targets are not in the best interests of CP in obtaining the highest caliber executives. CP does not currently have any female executive officers.[175]

Or, consider Petrus Resources Ltd., who had zero women on their board, and stated in their 2018 disclosure:

> Petrus is committed to a meritocracy and believes that considering the broadest group of individuals with the skills, knowledge, experience and character required to provide the leadership needed to achieve its business objectives is in the best interests of Petrus and its Shareholders, without reference to their age, gender, race, ethnicity or religion. While the Board recognizes the benefits of diversity at the Board level and in assessing candidates and selecting nominees for the Board, diversity will also be considered by the Compensation Committee, the Board will not compromise the principles of a meritocracy.[176]

In each of these cases, the explanations mobilize ideas about how targets would violate principles of meritocracy in ways that would not be in the interests of the corporation and indicate that they select board and management candidates "without reference to" or "regardless of" gender or other diversity indicators.

Interestingly, as with the Petrus quote above, when it comes to the meritocracy argument, many firms used the same language, where the precise phrase, "[we] will not compromise the principles of meritocracy," appears seventeen times in our data set across nine companies. Most other arguments about merit suggest that targets would contravene a merit-based decision. One exception to this is firms that explain that they use a merit-based process but that, as China Gold International Resources Corp. Ltd. indicated in 2017, "Diversity, including gender diversity, is one aspect of merit which includes an individual's skills, performance, values, leadership and other job-related criteria."[177]

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175. Can. Pac. Ry. Ltd., Notice of Annual Meeting of Shareholders and Proxy Statement 26 (Schedule 14A) (Apr. 20, 2016).

176. PETRUS RESOURCES, NOTICE OF ANNUAL AND SPECIAL MEETING AND INFORMATION CIRCULAR AND PROXY STATEMENT 39 (2018).

177. CHINA GOLD INTERNATIONAL RESOURCES CORP. LTD., NOTICE AND INFORMATION CIRCULAR A-13 (2017), https://www.chinagoldintl.com/_resources/agm/e-Circular2017.pdf?v=0.611 [https://perma.cc/2DRG-4Y2M].

Many of the statements appeared to be rhetorical attempts to connect target setting with less popular or more radical concepts such as government-imposed quotas or to frame targets as imposing constraints such as focusing "solely" on gender that the target policy does not require. These explanations either indicate a misunderstanding of the regulation or a deliberate rhetorical effort to misconstrue the regulation so as not to comply with it. The setting of targets would not be arbitrary but instead should be done based on the company's circumstances. Furthermore, targets do not obligate firms to select candidates "solely" based on gender but simply to look for qualified candidates who are also women. These efforts appear to be attempts to delegitimize targets as a reasonable tool that firms could use to set goals and measure progress. Of note, most of these companies had few or no women on their boards or in executive management.

However, as illustrated in Table 2 above, in the case of Amerigo Resources, and a few other companies such as Dollarama, they suggested that the reason for avoiding targets was primarily to avoid the perception that candidates were selected based on their gender alone.[178] This argument plays into a persistent (though incorrect) view that targets (and also quotas) imply that women are only being selected because they are women. Indeed, many women have opposed targets precisely because they do not want their skills and accomplishments to be devalued (despite the evidence that quotas likely increase rather than decrease quality).[179] One could interpret these firms' avoidance of targets as benevolently intended to help any women that they would appoint avoid stigma. Indeed, Amerigo's board in 2017 was composed of eight members, two of whom (25%) were women, which is quite high given the average for most firms in Canada.

Another set of explanations focused on the idea that targets would be "arbitrary" and not in the "best interest" of the corporation. Here, the explanations do not offer any elucidation for why the targets are not in the best interest but simply refer back to the fiduciary duty of the board which is to act in the best interest of the corporation. Behind this idea is that the board can exercise "business judgement" in their decisions to decide what is and is not in the best interest of the company. Again, an exception is noted in Table 2, where Cogeco argues that targets are a "weak substitute"

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178. *See supra* Table 2.

179. *See generally* Timothy Besley, Olle Folke, Torsten Persson & Johanna Rickne, *Gender Quotas and the Crisis of the Mediocre Man: Theory and Evidence from Sweden*, 107 AM. ECON. REV. 2204 (2017); Daehyun Kim & Laura T. Starks, *Gender Diversity on Corporate Boards: Do Women Contribute Unique Skills?*, 106 AM. ECON. REV. 267 (2016).

for more substantial diversity policies and practices.[180] Given that this company has two women on its board which represents 22% of the total, we can surmise that they have taken diversity initiatives seriously in lieu of targets.

Other firms explained that they were equal opportunity employers, and that this principle applied when filling board positions and also leadership roles. They argued because they relied on "fair" practices, targets would not be necessary. And, finally, some firms indicated that they did not believe targets were appropriate but would re-evaluate this decision in the future. These explanations were repeated year after year, even as board representation of women did not increase, from which one could infer that the reference to the future was merely a means for avoiding setting targets altogether.

In summary, the explanations offered by many companies could be seen as a means to deflect pressures away from establishing targets. The disclosures did not do much to create transparency because of the obfuscating language and the inadequate explanations that called on tired tropes about meritocracy or inaccurately portrayed the regulations as forcing companies to include people "solely" based on gender. While many companies indicated that they had other (perhaps less costly) mechanisms in place, such as diversity policies or commitments to fair employment practices, it was not clear that these practices contributed to progress on representation in most cases. It was quite easy and not very costly for firms to say they "considered gender" but many fewer firms set targets or made much progress on increasing the representation of women in leadership.

V. DISCUSSION AND CONCLUSIONS

Our study of Canada's experience with comply-or-explain regulations provides valuable lessons for other jurisdictions as they begin their journey with similar forms of diversity disclosure. Our results, while preliminary, suggest that comply-or-explain's success depends on how it is implemented. The Canadian experience thus far has arguably been disappointing. We are not alone in our assessment. A 2021 Conference Board of Canada report titled: *All on Board: Does Disclosure Help Create More Inclusive Boardrooms?* concluded that there was "no compelling evidence" of acceleration in progress for women on boards in Canada after the introduction of the regulation.[181] As the report notes:

180. *See supra* Table 2.

181. SUSAN BLACK, MARIA GIAMMARCO & MARGARET YAP, CONFERENCE BOARD OF CANADA, ALL ON BOARD: DOES DISCLOSURE HELP CREATE MORE INCLUSIVE BOARDROOMS? 15

> Prior to the implementation of disclosure requirements in 2014, the representation of women across Canada's corporate boards rose, on average, by 1.9 percentage points annually. After the implementation of disclosure requirements, the pace of change increased by only 0.3 percentage points to an average annual increase of 2.2 percentage points.[182]

The risk of comply-or-explain is that firms may offer weak explanations rather than meaningfully engaging with the underlying issue. Non-compliance with a particular standard of behavior, coupled with an explanation for this non-compliance, in and of itself is not inherently problematic. As discussed, a virtue of comply-or-explain is its flexibility and the ability of firms to offer explanations that are appropriate for their industry, size, stage of development etc. Nasdaq's position in the litigation challenging its rule is that companies are free to provide explanations "in as much or as little detail as they choose."[183] This is an accurate description of the Nasdaq rule. Comply-or-explain regulation's efficacy, however, is limited by the fact that it allows firms to provide thin, weak, or otherwise suboptimal explanations for their decisions not to comply, which in turn allows firms to avoid adopting measures that would require significant effort (such as establishing their own internal targets, as in Canada). That practice does not meet the spirit of the rule. Thus, while the level of detail provided certainly remains within the disclosing firms' discretion, the quality of the explanation would be more effective in supporting progress if it met the basic standard of providing meaningful information (barring firms that choose to disclose that they are not complying because they disagree with the very nature of the rule—which is permissible).[184]

In our study, the explanations were thin, weak, or otherwise suboptimal in two overall ways. First, by falling back on stereotypes and standard excuses, firms may be lowering their commitment level to making change. The excuses may reinforce the board's sense that they are justified in achieving only slow or no progress. If the goal of comply-or-explain is to increase transparency so that firms learn and make progress, it may not achieve its objective if the explanations are weak in quality and unhelpful in generating insight. Second, the explanations may risk perpetuating the kinds of retrogressive attitudes and norms that the law hopes to remedy. If laws and regulations can be understood to have not just material but also expressive purposes, where they serve as a

(2021), https://www.conferenceboard.ca/product/all-on-board-does-disclosure-help-create-more-inclusive-boardrooms/ [https://perma.cc/8T8X-6YYV].

182. *Id.* at 5.

183. Posner, *supra* note 17.

184. Nasdaq Amendment Letter, *supra* note 36, at 8.

mechanism to shift social norms, then disclosures that are filled with excuses about meritocracy and the pipeline problem will only serve to entrench existing norms rather than create new ones.[185]

More generally, the fact of compliance should not necessarily be equated with success either. Comply-or-explain gives firms a great deal of discretion to define what it means to comply, and compliance, as we have seen in our analysis, may simply be performative. Firms may, for example, disclose that they have a diversity policy. They would thus be "complying," and there would be no need to "explain." But we might not know much about the nature of the policy adopted—whether it is weak or strong, whether it was drafted via a formal intra firm deliberative process or written on the back of a dinner napkin.[186]

Thus, the devil is in the details. If regulators do not constructively engage with companies that do not fully disclose or who offer poor explanations, there may be few incentives for firms to make improvements. Ironically, one possible explanation for slow progress might be that other stakeholders may reduce their attention to these issues because they think that the regulators have them covered. Thus, if oversight bodies such as Nasdaq proceed with plans not to review corporate explanations, the efficacy of these regulatory initiatives may be compromised. To be clear, once again, in suggesting that entities such as Nasdaq take an active role in reviewing corporate explanations, or in partnering with civil society organizations, academic centers, or others to do the same, oversight bodies need not take a prescriptive approach, which is at issue in the litigation challenging the Nasdaq rule. Rather, for comply-or-explain to be successful, stock exchanges and regulators have an essential role to play in offering helpful and constructive dialogue and non-binding guidance to support companies in providing disclosures that are meaningful, that meet the spirit of the rule, and that provide useful information for investors. Disclosures that obfuscate or focus on antiquated conceptions of merit, for example, are lawful, and companies would not be sanctioned for offering them. But, in the grand scheme of things, they also do little productive work. And it is here that stock exchanges and regulators can assist disclosing parties in offering suggestions on how these parties can improve the substance of their

185. *See* BLACK, GIAMMARCO & YAP, *supra* note 181, at 3. This 2020 Report also highlighted the inadequacy of arguments related to meritocracy and suggested that these justifications were holding companies back from making progress. *Id.* at 7.

186. While it is true that the Canadian regulation requires firms with a diversity policy to provide, for example, summary information on that policy, and information pertaining to the policy's implementation and effectiveness, it is simply too easy for firms to provide only cursory information.

reporting and also in providing educative programming and materials aimed at enhancing their understanding of the substantive topic at issue.

Another barrier to the greater effectiveness of comply-or-explain for diversity on boards in Canada is that these disclosures are not made in a way that allows for easy access by external (or internal) stakeholders. Reflexive-style regulation, as revealed in disclosure provisions, aims in part to de-center the role of the state and, in doing so, to increase the participation of non-state actors such as civil society organizations, organized labor, and shareholders. But even setting aside the wisdom of non-state or non-regulatory parties assuming a monitoring (and thus regulatory) role, how realistic is this when the information flowing from disclosure regulations is not presented in a standardized or even accessible manner? The disclosures of Canadian firms are provided in their information circulars or other disclosure documents. There is no mechanism or web portal, for example, where any stakeholder would be able to search for a company's information and easily compare it with other companies in similar locations, of similar size or in similar industries. This major flaw in the regulation, which in Canada was attributed to a desire for paperwork reduction,[187] contributes to its inability to create the intended transparency.

Interestingly, the CSA has noted the challenge of variation in how companies make their disclosures in their information circulars. In their 2021 review, they included a section to provide "Guidance Related to Disclosure Practices," in which they stated:

> During our review, we noted that issuers generally provide disclosure addressing the disclosure requirements in different ways. As a result of this, the format and content of disclosure may vary from issuer to issuer. It may also be difficult to locate the relevant disclosure within an information circular and it may be difficult to interpret some of the disclosure.[188]

They then went on to suggest a "common format" for each item of the regulation including specific table formats for Items 10 (term limits), 14 (targets) and 15 (number and percent of women on board of directors and in executive positions).[189] We imagine that such a template might assist in creating greater transparency for external evaluators seeking to

187. CANADIAN SECURITIES ADMINISTRATORS, CSA MULTILATERAL STAFF NOTICE 58-314: REVIEW OF DISCLOSURE REGARDING WOMEN ON BOARDS AND IN EXECUTIVE OFFICER POSITIONS: YEAR 8 REPORT 10 (2022), https://www.securities-administrators.ca/wp-content/uploads/2022/10/sn_20221027_58-314_women-on-boards.pdf [https://perma.cc/S78V-DZFQ].

188. CSA STAFF NOTICE YEAR 7 REPORT, *supra* note 150, at 11.

189. *Id.* at 11–12.

understand a firm's diversity performance. However, this solution still does not offer stakeholders the ability to easily look up and compare company performance with other firms in an industry, province, or size category.

One of us (Sarah Kaplan) made this point as a 2017 witness to the Standing Senate Committee on Banking, Trade and Commerce when Bill C-25 for diversity on boards for federally regulated companies was being considered. She argued that the ability to easily access and compare data is essential for the mechanisms of comply-or explain to operate and that a webform with standardized items aligned with the regulation would make it both easier for firms to know how to comply and for stakeholders to access the data.[190]

Thus, our analysis suggests that comply-or-explain regulation, in the modes in which it has been implemented in Canada, may not achieve the intended objectives of greater transparency, improved dialogue and increased diversity on boards. The flexibility offered to firms may lead to poor explanations, a lack of accountability and an inability for stakeholders to access the information. But these Canadian imperfections are not inherent to comply-or-explain and there are clear opportunities to make such a regime more effective. Most notably, oversight bodies and regulators in other jurisdictions should either by themselves—or in partnership with others—take an active role by monitoring and reviewing disclosures, providing non-binding interpretative guidance and support to disclosing issuers on how their reporting can be improved, providing education programs to issuers on the relevance of diversity to corporate governance, verifying that disclosures conform with actual corporate practices, and designing disclosures systems in a manner that facilitates stakeholder access. Taking these steps should help to ensure that comply-or-explain has meaningful impact in diversifying corporate governance systems and that the potential of this regulatory mechanism does not go to waste.

190. *An Act to Amend the Canada Business Corporations Act and Other Acts: Hearing on Bill C-25 Before the Can. Standing Comm. on Banking, Com. & Econ.*, 42d Parl., Sess. 1 (2017) (Can.) (statement of Sarah Kaplan, Director, Inst. for Gender & Econ., U. Toronto).