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## Gender Diversity in Corporate Boardrooms: Do Equal Seats Mean Equal Voices?

Nicolena Farias-Eisner

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# GENDER DIVERSITY IN CORPORATE BOARDROOMS: DO EQUAL SEATS MEAN EQUAL VOICES?

Nicolena Farias-Eisner\*

INTRODUCTION .....	1
I. HISTORY OF GENDER DIVERSITY ON BOARDS .....	3
A. <i>Understanding the Breakdown of a         Corporate Board</i> .....	3
B. <i>The Evolution of Corporate Boards' Composition</i> .	4
C. <i>The United States and Gender Diverse         Corporate Boardrooms</i> .....	5
1. <i>America's Approach to Gender Diversity             on Boards</i> .....	5
2. <i>Why Minimal Female             Representations on Boards</i> .....	9
3. <i>Trend Towards Increasing Gender             Diverse Boards</i> .....	9
4. <i>The United States Versus             Other Countries</i> .....	13
II. WHY THE RECENT MOVEMENT .....	17
A. <i>The Crucial Turning Points of 2016 and 2017</i> .....	17
B. <i>Impact of Growing Trend of Improving Gender         Diverse Boards</i> .....	18
C. <i>The Current State</i> .....	21
D. <i>Counterarguments and Opposition</i> .....	26
III. FUTURE SOCIAL IMPACT OF INCREASING GENDER DIVERSITY IN CORPORATE BOARDROOMS .....	29
IV. POLICY IMPLICATIONS.....	31
CONCLUSION.....	32

## INTRODUCTION

Clara Abbott and Lettie Pate Whitehead were two of the first female corporate directors in the United States—Clara Abbott as director of Abbott Laboratories in 1900 and Lettie Pate Whitehead as a board

member of Coca-Cola in 1934.<sup>1</sup> Despite these seemingly early stepping stones, both Abbott and Whitehead arguably only received the positions because their husbands were founders of their respective companies; the board only offered Whitehead the role upon her husband's death.<sup>2</sup> It was not until 1972 that Katharine Graham was the first female Fortune 500 CEO,<sup>3</sup> and it was not even until 2001 that Sarah Hogg became the first female to chair an FTSE 100 company.<sup>4</sup> These statistics highlight corporations' neglect towards appointing women board members and that nepotism permeates corporate boards and their decisions. How meaningful were Abbott's and Whitehead's positions, if there was such an immense time gap until another promotion of a woman to director or board member?

Gender diversity in corporate boardrooms has evolved into one of the most prevalent issues that corporate boardrooms face—to the extent that people termed it “the issue of 2017.”<sup>5</sup> This is because a corporate board constitutes the crux of a corporation, and consequently, scholars and individuals closely scrutinized the board's structure and composition, especially in recent years.<sup>6</sup> Though much progress remains to truly achieve gender parity in the boardroom, corporations over the last decade increasingly began to dedicate the effort and resources to improving gender diversity on their boards. Once strictly a world of homogeneity and nepotism, today women have begun to take their seats at the table and are continuing to do so while demanding respect and making an impact on the company's decisions.

This paper will first trace the history and evolution of gender diversity on boards. It then will assess why the growing trend toward

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<sup>1</sup> David F. Larker & Brian Tayan, *Pioneering Women on Boards: Pathways of the First Female Directors*, STANFORD CLOSER LOOK SERIES 1, 2 (Sept. 3, 2013), <https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/qg-diverseboards.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> Julia Carpenter, *Womine in the Fortune 500: 64 CEOs in half a century*, CNN MONEY (Aug. 7, 2017), <https://money.cnn.com/interactive/pf/femail-ceos-timeline/>.

<sup>4</sup> Roland Gribben, *Hogg makes history as FTSE 100 chair*, THE TELEGRAPH (May 19, 2001, 12:01 AM), <https://www.telegraph.co.uk/finance/2718677/Hogg-makes-history-as-FTSE-100-chair.html>.

<sup>5</sup> Yaron Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardrooms*, 94 IND. L. J. 145, 155 (2019).

<sup>6</sup> *Id.* at 153–55.

greater gender diversity became prevalent in recent years and the effects of this trend. Third, the paper addresses the social impacts that increasing gender diversity on boards will place on companies. Lastly, this paper concludes by discussing and suggesting policy implications that would enhance boardroom gender diversity and would ultimately achieve gender equality.

Because of the immense significance that boards represent in corporate America today, gender diversity in the boardroom is especially critical in modern society.<sup>7</sup> Although scholars are split over the extent to which gender-diverse boards concretely impact a corporation and its overall performance, studies consistently offer evidence that gender diversity can enhance decision making and improve the corporate image. Regardless of the impact's extent, it is immensely clear that gender diversity in corporate boardrooms would not harm, but could only benefit corporations; thus, there needs to be no business justification for increased female representation in a historically female-underrepresented world.

## I. HISTORY OF GENDER DIVERSITY ON BOARDS

### A. *Understanding the Breakdown of a Corporate Board*

To trace the history of corporate boards, it is important to understand the structure of a board and how it works. Today, shareholders elect the board of directors.<sup>8</sup> These board members consist of three different categories: chairman, inside directors, and outside directors.<sup>9</sup>

First, the chairman of the board, whom the board of directors elects, is the leader of the corporation, in the sense that his or her primary duty is to run the board “smoothly and effectively[;]” specifically, he or she is responsible for communicating with the CEO and other high-level executives of the corporation, developing the corporation's business strategy, serving as the representative of management and of the board to the general public and to shareholders, and preserving integrity of the company.<sup>10</sup>

Second, the inside directors, who are typically internal shareholders or high-level managers of the company, are tasked with approving high-level budgets that the upper management formulated,

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<sup>7</sup> *Id.* at 146.

<sup>8</sup> Investopedia Staff, *The Basics of Corporate Structure*, INVESTOPEDIA FIN. DICTIONARY (last updated Sept. 28, 2018), <https://www.investopedia.com/articles/basics/03/022803.asp>.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

enforcing and regulating business strategy, and approving important company initiatives and policies; inside directors are also known as executive directors if they comprise the management team of the corporation.<sup>11</sup>

Lastly, the outside directors, unlike the inside directors, bear no direct relationship to the management team; however, the outside directors do help to determine important strategies and policies of the company, as well as to offer objective and unbiased opinions regarding any issue that the board faces.<sup>12</sup> Overall, corporate board directors review the behavior of the corporate officers and executives, adopt general policies in accordance with the company's mission and vision, rather than partake in the company's daily decision-making processes.<sup>13</sup> Because the board of directors serves such an important oversight role of a corporation—essentially dictating the company's major decisions—one can understand why the board composition is especially crucial, and thus, why the board faces strict scrutiny; specifically in recent years, the increased advocacy for equality in the workplace even more so explains such strict scrutiny that corporate boards endured.

### *B. The Evolution of Corporate Boards' Composition*

Prior to the twentieth century, a majority of the companies were small and family-owned.<sup>14</sup> With the burst of technology in the twentieth century, corporations began expanding, emphasizing that the goal of the board is to support the CEO's plan and to convince the shareholders that experienced and intelligent individuals maintain the shareholders' interests; due to this priority, what corporations deemed the "best board" consisted of like-minded and known individuals.<sup>15</sup> This homogenous environment created several consequences—not only did the directors rely on the CEO for their positions, causing a lack of sufficient independence,

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Jean Murray, *What Does a Corporate Board of Directors Do?*, THE BALANCE SMALL BUSINESS (last updated Sept. 26, 2019), <https://www.thebalancesmb.com/what-does-a-corporate-board-of-directors-do-398865>.

<sup>14</sup> *The Basics of Corporate Structure*, *supra* note 8.

<sup>15</sup> Russell Reynolds Associates, Inc., *Different is Better—Why Diversity Matters in the Boardroom*, RUSSELL REYNOLDS ASSOCIATES 1 (2009), [https://www.russellreynolds.com/en/Insights/thought-leadership/Documents/different-is-better\\_0.pdf](https://www.russellreynolds.com/en/Insights/thought-leadership/Documents/different-is-better_0.pdf).

but also the presence of predominantly pre-existing relationships created a very narrow-minded atmosphere.<sup>16</sup>

As globalization and the evolution of technology boomed throughout the century, the need for risk management and more dynamic work environments forced companies to broaden their boards.<sup>17</sup> The intent behind the types of board members who were elected shifted to “the deliberate creation of a dynamic and a chemistry that allow[ed] for the effective execution of corporate governance and strategic oversight[.]” this change emphasized “an environment in which challenging issues can be confronted, opposing opinions are sought [sic] and trust is implicit.”<sup>18</sup> Culminating the twentieth century with this shift and continuing this trend into the beginning of the twenty-first century, most companies today are “large international conglomerates that trade publicly on one or many global exchanges”<sup>19</sup>—completely contrary to companies before the twentieth century.<sup>20</sup>

### C. *The United States and Gender Diverse Corporate Boardrooms*

#### 1. *America’s Approach to Gender Diversity on Boards*

Title VII of the Civil Rights Act of 1964 established immense protections for gender equality in the workplace. However, even though Title VII prohibited discrimination on the basis of gender in the workplace, Title VII barred discrimination against employees only. Unfortunately, because Title VII failed to mention any reference to directors or board members, directors were and remain beyond the scope of Title VII’s protections.<sup>21</sup> Congress attempted to protect women specifically in corporate America through the Dodd-Frank Wall Street Reform and Consumer Protection Act. Although the Act mandated that the SEC implement an Office of Minority and Women Inclusion to assess “the diversity policies and practices of entities regulated by the agency[,] the statute expressly d[id] not give the SEC authority to require diversity measures.”<sup>22</sup> As a result of this minimal statutory regulation, the United States employed and continues to employ a “soft regulatory approach” to

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *The Basics of Corporate Structure*, *supra* note 8.

<sup>20</sup> *Id.*

<sup>21</sup> Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37

U. OF DAYTON L. REV. 7, 11 (2011).

<sup>22</sup> *Id.*

deal with gender diversity within corporate boardrooms.<sup>23</sup> This approach mandated companies to disclose only the presence or the absence of a diversity policy at the company, as well as to disclose to the company's investors, only a brief description of the diversity policy.<sup>24</sup>

Since 2004, the New York Stock Exchange (NYSE) and NASDAQ have been the corporate regulators primarily responsible for mandating the corporate governance standards for corporations enumerated for trading on their exchanges.<sup>25</sup> In 2002, due to Enron's and Worldcom's failures, the SEC urged the NYSE and NASDAQ to reassess their corporate governance standards.<sup>26</sup> As a result, the SEC approved the NYSE proposal, Section 303A of the NYSE Listed Company's Manual. Section 303A mandated that enumerated corporations have: 1) predominantly independent directors, 2) an independent nominating committee tasked with determining qualified board candidates following criteria approved by the board, and 3) an independent audit committee, consisting of financially literate members, one of whom has accounting or related financial-management skills.<sup>27</sup> The NYSE predicated these requirements on a desire to promote "the ability of honest and well-intentioned directors . . . to perform their functions effectively . . . [and] allow shareholders to . . . monitor the performance of companies and directors in order to reduce instances of lax and unethical behavior."<sup>28</sup> The NYSE created these standards not only to prevent fraud but also to facilitate broader searches to include well-qualified and independent directors in hopes of electing more female directors. However, the NYSE and the NASDAQ had neither diversity listing standards nor made any effort to adopt any such standards.<sup>29</sup>

In 2008, only fifty-five of ninety-four companies revealed that they focused on diversity, and only five corporations stated that they used gender as criteria in choosing candidates for directors.<sup>30</sup> For example, the corporation Emcor neither had mention of diversity in its disclosure, nor did it employ any female board members; pursuant to the SEC

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<sup>23</sup> Yaron Nili, *supra* note 5, at 183.

<sup>24</sup> *Id.*

<sup>25</sup> Black, *supra* note 21, at 15.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 15–16.

<sup>28</sup> *Id.* at 16 (quoting NASD and NYSE Rulemaking: Relating to Corporate Governance, SEC Rel. No. 34-48745, 81 SEC Docket 1586 (Nov. 4, 2003)).

<sup>29</sup> *Id.*

<sup>30</sup> Yaron Nili, *supra* note 5, at 184.

requirements, Emcor provided that it considered diversity when nominating a candidate, but “its focus is on obtaining a diversity of professional expertise rather than a diversity of personal characteristics.”<sup>31</sup> Even when Emcor increased its board size to ten directors, it still neglected to add any female directors.<sup>32</sup>

Before 2009, Congress and the SEC did not require boards in the U.S. to disclose information concerning their methods for nominating candidates, specifically concerning their diversity principles.<sup>33</sup> Additionally, in the SEC’s initial proposals of disclosure requirements for companies, legislation Item 407, the SEC failed to provide a requirement for mandatory disclosure about diversity; in fact, Item 407 failed even to address diversity at all.<sup>34</sup> However, the SEC did seek suggestions regarding whether it should amend the proposals to include such diversity disclosure requirements for the nominating committees. As a result, in 2009, the SEC amended Regulation S-K, noting that the SEC received many suggestions that indicated the need for corporate boards to provide their diversity practices; doing so would be a means to achieve perspective into the corporate governance procedures of these companies.<sup>35</sup> Additionally, the SEC was “interested in understanding whether investors and other market participants believe that diversity in the boardroom is a significant issue.”<sup>36</sup> Among the proponents who sent such comments included California Public Employees’ Retirement System (CalPERS) and the California State Teachers Retirement System (CalSTRS), two of the largest and most socially active pension funds.<sup>37</sup> These comments included remarks that disclosure of boardroom diversity practices was crucial information to provide to investors, and doing so would allow investors to make more informed voting decisions.<sup>38</sup> As a result of these suggestions, in December 2009, the SEC issued Item 407(c) that required companies to:

[d]escribe . . . whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the

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<sup>31</sup> *Id.* at 186.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 183.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> Black, *supra* note 21, at 14.

<sup>37</sup> David A. Katz & Laura A. McIntosh, *Gender Diversity on Boards: The Future is Almost Here; Corporate Governance*, N.Y. L. J. (2016).

<sup>38</sup> *Id.*



consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy[.]”<sup>39</sup>

In its Final Release, the SEC “agree[d] that it is useful for investors to understand how the board considers and addresses diversity, as well as the board’s assessment of the implementation of its diversity policy[;]” additionally, the SEC declared that even though “the amendments are not intended to steer behavior, diversity policy disclosure may also induce beneficial changes in board composition.”<sup>40</sup> Such changes might include nominating committees performing broader searches—this would not only increase director quality but also eliminate pre-existing relationships between directors and board members, ultimately encouraging increased independence among the board and management team from the directors.<sup>41</sup> Nonetheless, this regulation still failed to formally define “diversity” and gave discretion to companies to interpret diversity within their procedures and disclosures.<sup>42</sup> The SEC predicated this decision upon its belief that because corporations could define diversity differently based upon each of their own varied opinions, “companies should be allowed to define diversity in ways that they consider appropriate.”<sup>43</sup>

Even the executive branch struggled with improving gender diversity on corporate boards. Specifically, the U.S. Department of Treasury failed to capitalize on several chances offered by the Troubled Asset Relief Program (TARP) to enhance gender diversity in boardrooms.<sup>44</sup> Due to TARP bailing out five corporations in 2009, the U.S. Department of Treasury constituted a controlling shareholder, presenting itself with the opportunity to either choose or greatly influence the hiring of new directors at these various companies.<sup>45</sup> However, the Department of Treasury failed to improve gender diversity on these boards.<sup>46</sup> For example, in 2009, the Treasury owned 33.6% common-stock interest in

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<sup>39</sup> Black, *supra* note 21, at 13.

<sup>40</sup> *Id.* at 14.

<sup>41</sup> *Id.*

<sup>42</sup> Russell Reynolds Associates, *supra* note 15, at 40.

<sup>43</sup> Black, *supra* note 21, at 14 (quoting Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343 (Dec. 23, 2009)).

<sup>44</sup> *Id.* at 11.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 11–12.

Citigroup; in mid-2009, due to bankruptcy, the Treasury gained control of GM and Chrysler; and in 2010, the Treasury gained control of American International Group, Inc. (AIG).<sup>47</sup> All of this new control and ownership that the Treasury inherited meant that the Treasury elected each company's board of directors.<sup>48</sup> For Citigroup, the Treasury elected eight new independent directors to the board, seven of whom were men with a median age of sixty-three; for AIG, six of the seven newly elected directors were men with a median age of sixty-four; for GM and Chrysler, the Treasury had the power to elect fourteen new directors, eleven of whom were male with a median age of sixty.<sup>49</sup> Although the Department of Treasury never actually revealed what specific qualifications it considered crucial in appointing directors, its failure to increase diversity and to shy away from the stereotypical template of homogeneity indicated that diversity was not a significant attribute.<sup>50</sup> The Treasury's silence revealed the great progress still ahead of corporate America concerning gender diversity.

### 2. *Why Minimal Female Representations on Boards*

The predominant reasons for a stagnant level of female representation on corporate boards are that corporations wish to preserve "social comfort levels and board cohesion, narrow search criteria and procedures for selecting new directors," skepticism of appointing women to the boards, and sex discrimination.<sup>51</sup> Additionally, especially since the 2008 economic recession, businesses increasingly faced pressures to enhance their companies, so they have not viewed increasing gender diversity in their boardrooms as "a business imperative."<sup>52</sup> Furthermore, because of the regulatory soft approach that corporate America employed, the United States typically favored facially neutral policies as the fairest method of appointing directors.<sup>53</sup>

### 3. *Trend Towards Increasing Gender Diverse Boards*

Despite the long period of inaction, in 2011, institutional investors began focusing significantly more on environmental, social, and

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<sup>47</sup> *Id.* at 12–13.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 16 (quoting Jane W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703, 703–06 (2007)).

<sup>52</sup> *Id.* at 16–17.

<sup>53</sup> *Id.* at 17.

governance (ESG) practices because these investors found that ESG improves a “company’s performance and reputation, fosters revenue growth, and represents an avenue for shareholder engagement.”<sup>54</sup> One such significant effort was the founding of the Thirty Percent Coalition, an organization aimed at obtaining thirty percent female representation on U.S. public company boards.<sup>55</sup> It implemented a three-pronged plan: 1) its Institutional Investors Committee would work directly with companies to reform their corporate governance standards and to improve their methods for recruiting female directors, 2) its Public Sector Initiatives Committee would support legislative efforts at every government level and would require, through the SEC, enhanced disclosure requirements in order to urge gender diversity, and 3) its Corporate Leaders Committee would encourage executives to publicly and privately promote boardroom gender diversity.<sup>56</sup> Among its membership of corporate leaders were corporations, individuals, foundations, funds, and important institutional investors, including CalPERS and CalSTRS.<sup>57</sup> Even though the Coalition has yet to achieve its ultimate goal of thirty percent female representation across corporate boards, the Coalition has made slow progress.<sup>58</sup> As a result of its initiatives to contact direct shareholders of major corporations, sixty-two companies, all of which previously had solely male represented boards, elected at least one female director.<sup>59</sup>

These improvements continued in 2012 and 2016 after the SEC amended Regulation S-K; the number of companies that even considered diversity increased from fifty-five in 2008 to ninety-three and ninety-five, in 2012 and 2016, respectively.<sup>60</sup> Additionally, in 2012 and 2016, the number of corporations that employed gender as criteria in their director selections increased from five in 2008 to forty-two and fifty-three, respectively.<sup>61</sup> Despite the small increase, companies maintained a level of ambiguity regarding their diversity policies. Only six out of the S&P 100 companies imposed a formal definition of diversity in their diversity policies.<sup>62</sup> For example, the company Quanex indicated that although “the company has no formal policy on diversity for board members, the board

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<sup>54</sup> Katz & McIntosh, *supra* note 37.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Nili, *supra* note 5, at 40.

<sup>61</sup> *Id.* at 41.

<sup>62</sup> *Id.* at 42.

considers diversity of experience and background in an effort to ensure that the composition of our directors creates a strong and effective board.”<sup>63</sup> These facts show that although corporations might have had diversity procedures in place or may have sought gender diversity on the boards, the vast majority of these companies’ policies failed to be clear and precise; rather the companies “crafted [the policies] in a manner that dilute[d] any specific diversity criteria.”<sup>64</sup>

In 2014, the Government Accountability Office (GAO) published a report that indicated that women held sixteen percent of board seats in S&P 500 companies—only an eight percent increase from 1997.<sup>65</sup> In its report, the GAO also predicted that it would be decades before women’s board participation equaled that of men’s.<sup>66</sup> The report determined numerous methods to assist boards in improving their gender diversity, such as requiring diverse groups of candidates or including at least one woman candidate, setting voluntary targets, expanding board searches and board sizes, and enhancing seat turnover through implementing term or age limits, as well as executing board performance evaluations.<sup>67</sup> Among these strategies, the report revealed that stakeholders preferred voluntary efforts rather than government mandates, including quotas.<sup>68</sup> In March 2015, nine large pension funds proposed to the SEC that it should require the gender, race, and ethnicity of candidates to be disclosed in a chart or matrix form, in an effort to improve federal disclosure requirements, hoping to ultimately enhance diversity of director candidates.<sup>69</sup> The SEC implemented this change as part of its Disclosure Effectiveness Initiative, a broad-based review of disclosure requirements.

In addition to the federal and SEC efforts, there have been numerous state-wide actions to increase boardroom diversity.<sup>70</sup> In May 2015, the Illinois legislature passed a non-binding resolution encouraging public companies to include by 2018 at least three women directors on boards of nine or more members, at least two on boards of five to nine members, and at least one on boards with fewer than five members.<sup>71</sup> Illinois modeled its resolution after a similar California resolution adopted in 2013, and Massachusetts passed a similar resolution in 2015, as well.<sup>72</sup>

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<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 42.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

These states predicated their resolutions on studies revealing the business benefits to companies that employ women directors.<sup>73</sup>

Despite these small initiatives, in 2015, females represented only about fifteen percent of outside board member seats in the S&P 1500 and approximately eighteen percent of the S&P 500 seats, revealing a median of a mere one to two female board members in a group of nine to eleven board members.<sup>74</sup> At the Women's Forum of New York, the SEC chair Mary Jo White endorsed the organization's aim of fulfilling forty percent female representation on boards of all Fortune 1000 and S&P 500 companies by 2025.<sup>75</sup> Chairwoman White highlighted that a paucity of qualified candidates does not exist and that this forty percent goal is "not only attainable, but also a business and moral imperative."<sup>76</sup> At this time, the SEC staff assessed the disclosures with respect to board diversity to determine whether additional guidance or rulemaking would be warranted.<sup>77</sup> Despite Chairwoman White's actions, lawmakers criticized her for not moving quickly enough to amend disclosure requirements regarding board diversity.<sup>78</sup> Specifically, lawmakers released a letter communicating their "disappointment" that the SEC had not taken action yet.<sup>79</sup>

Gradually in 2015, more and more studies began indicating that companies with women in top management and board positions outperform their peers.<sup>80</sup> Specifically, International Monetary Fund issued new research concluding that an additional woman in senior management or on the board of directors, while maintaining the size of the board, correlates with a three to eight percent higher return on assets.<sup>81</sup> Moreover, a MSCI report revealed that companies in the MSCI World Index with "strong female leadership generated a return on equity of 10.1 percent per year" unlike companies without such leadership that generated a return on equity of only 7.4 percent per year.<sup>82</sup> Companies comprised of three or

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<sup>73</sup> *Id.*

<sup>74</sup> Diane Lerner & Christine Oberholzer Skizas, *Where Women Are On Board: Perspectives from Gender Diverse Boardrooms*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (2015).

<sup>75</sup> Katz & McIntosh, *supra* note 37.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

more female directors in at least four of five years outperformed those companies without any female directors in at least four out of five years; overall, the former companies possessed an eighty-four percent higher return on sales, a sixty percent higher return on invested capital, and a forty-six percent higher return on equity.<sup>83</sup>

#### 4. *The United States Versus Other Countries*

Even though the increased number of studies began improving the awareness of this prevalent issue, the United States remained slower than other countries to incorporate gender diversity in boardrooms; these countries included Norway, Iceland, Germany, France, Spain, Belgium, Italy, Netherlands, Australia, and most notably the United Kingdom.<sup>84</sup> This delay was due to the absence of mandatory quotas in the United States, the public's disapproval of perceived micromanaging of board configuration by outside forces, opposition to required target numbers, and ignorance regarding the abundance of qualified female directors.<sup>85</sup> The latter three reasons have been slowly dissipating in the culture of corporate America.<sup>86</sup> This was largely due to the fact that nominating committees possess the power and duty to not only consider diversity as criteria in structuring their boards, but also guarantee that they adequately describe their board diversity policies through the corporation's proxy disclosures.<sup>87</sup> Regarding the first reason, unlike the soft regulatory approach in the U.S. that lacks mandatory quota requirements, these European countries, plus many others, require companies to maintain a specific ratio of females to males on the companies' boards.<sup>88</sup> In particular, in 2003, Norway became the first country to enact a law that required all delineated company boards to consist of at least forty percent female directors and required full compliance by 2008, with Spain, Belgium, France, Italy, and the Netherlands adopting similar laws shortly thereafter.<sup>89</sup>

In early 2015, the Australian Council of Superannuation Investors (ACSI), a conglomerate of asset owners and funds, established its

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<sup>83</sup> Cathy A. Birkeland, Maj Vaseghi, and Drew G. Parkes, *Boardroom Perspectives: Gender Diversity in Boardrooms Gains Momentum*, LATHAM & WATKINS 1 (Aug. 31, 2018), <https://www.lw.com/thoughtLeadership/lw-gender-diversity-in-boardrooms-gains-momentum>.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> Nili, *supra* note 5, at 39.

<sup>89</sup> Larcker & Tayan, *supra* note 1, at 1.

dedication to obtain thirty percent female representation on ASX 200 boards by 2017.<sup>90</sup> Its initiative involved targeting companies with all men boards, specifically by conducting private meetings with company representatives, and if those failed to increase gender diversity in the boardroom, then the ACSI would suggest that the corporation's members vote against re-electing the same directors.<sup>91</sup> As a result of this initiative, in 2016, females constituted fifty percent of all board positions for ASX 200 companies, as well as women representation on corporate boards increased from nineteen percent to twenty-two percent in just one year.<sup>92</sup>

In 2016, Germany, the largest economy to enact such a mandate, established a thirty percent quota for women on boards.<sup>93</sup> Additionally, India adopted a quota that required public company boards to hire at least one woman.<sup>94</sup> Moreover, though the United Kingdom did not establish mandatory quotas, it still accomplished meaningful change.<sup>95</sup> In particular, companies noted that rather than require certain quotas, companies should establish their own goals and seek to achieve these goals, recommending that the FTSE 100 companies reach twenty-five percent women board participation by 2015.<sup>96</sup> Much to the country's surprise, these corporations surpassed this suggestion, achieving 26.1% of female directors and decreasing the number of solely male corporate boards to zero in the FTSE 100 companies.<sup>97</sup> This immense progress represented a "near revolution . . . in the boardroom and [a] profound culture change at the heart of British business."<sup>98</sup> Subsequently, the United Kingdom set non-binding targets, which adopted a thirty-three percent goal of female board directors at FTSE 100 and FTSE 350 companies by 2020, requiring companies to add approximately 350 females to its boards.<sup>99</sup>

Although mandatory quotas may have been successful for many countries, the corporate community of the United States generally agreed that quotas are not the best method to obtain increased gender diversity in corporate boardrooms; the preferred approach should be that each company set its own goal of female board representation, based upon each

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<sup>90</sup> Katz & McIntosh, *supra* note 37.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> Birkeland, Vaseghi, & Parker, *supra* note 83, at 1.

<sup>94</sup> *Id.*

<sup>95</sup> Katz & McIntosh, *supra* note 37.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Birkeland, Vaseghi, & Parker, *supra* note 83, at 1.

company's personal circumstances.<sup>100</sup> Though small developments occurred in boardroom gender diversity in the United States, a significant disparity between female and male board members still has been highly prevalent, placing the United States behind these various aforementioned countries.<sup>101</sup> An analysis of the S&P 500 companies from 2007 to 2015 revealed that women who were chairs were only one percent of the whole female director sample, whereas men were six times more likely to occupy a chair position—6.5 percent of the entire male director sample.<sup>102</sup> Additionally, women who were independent directors comprised only 3.6 percent of the entire female director sample, whereas men were more than twice as likely to work as lead directors—7.4 percent of the entire male sample.<sup>103</sup> The assessment also found that women were less likely to occupy a chair position of critical board committees.<sup>104</sup> Nonetheless, the study revealed that although small, the ratio of women on boards and serving as committee chairs was growing, as well as there was a positive trend of women gaining access to all of the important board committees.<sup>105</sup> The report further showed that the retail industry possessed the largest gender parity—19.2% of females serving as directors.<sup>106</sup> On the contrary, Industrial Services and Electronic Technology exhibited the smallest gender parity—women representing only 7.7% and 8.9%, respectively of the board positions.<sup>107</sup> Over the course of the entire study, there was a .04 percent increase each year of the percent of females serving on a board.<sup>108</sup> These statistics affirmed other studies' results that portrayed an increasing trend (though small) towards improving gender diversity on corporate boards, as well as illuminated differences in companies, depending upon industry, size, and age of the company.<sup>109</sup>

Despite this small progression, as of 2016, women constituted only 16.2% of corporate boards, numerous companies failed to even have female directors on their boards, and some companies lacked any female board directors over the past decade.<sup>110</sup> Lack of adequate turnover on companies' boards attributed to these low numbers, for minimal vacant

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<sup>100</sup> Katz & McIntosh, *supra* note 37.

<sup>101</sup> Nili, *supra* note 5, at 37.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 21.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 22.

<sup>110</sup> *Id.* at 3.



board seats inhibited the companies' ability to enhance diversity on the board.<sup>111</sup>

Then in 2016, State Street Global Advisors, one of the largest institutional investors in the United States, issued the SPDR SSGA Gender Diversity Index ETF, an exchange traded fund with the ticker symbol SHE.<sup>112</sup> The fund invested in U.S. companies that possessed the highest level of gender diversity in their sectors.<sup>113</sup> It identified that diversity on boards correlates to positive long-term performance; as a result, investors began questioning investors who failed to nominate women as directors.<sup>114</sup> Although similar funds existed in the past, they were significantly smaller in their assets than SHE; in particular, SHE aimed to obtain approximately \$1.5 to \$2 billion in assets just in its first year.<sup>115</sup> The vast size and prevalence of this fund demonstrated institutional investors' immense interest in and assurance of the performance-related advantages of gender diversity in corporate U.S.<sup>116</sup> For example, the Children's Place substantially reformed its policy regarding gender diversity on its board.<sup>117</sup> It specifically increased the percentage of women serving as board directors from only thirteen percent in 2008 to thirty-six percent in 2016, as well as disclosed a clear and precise graphic to investors and to the SEC, delineating the gender structure of its board of directors.<sup>118</sup> Having four female board members, the Children's Place noted that it sought a board with "an appropriate balance in terms of gender."<sup>119</sup> Because of its such positive effects, SHE, in which CalSTRS invested \$250 million,<sup>120</sup> remains dedicated to increasing gender diverse corporate boards and aims to double its investment in the near future.

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<sup>111</sup> *Id.*

<sup>112</sup> Katz & McIntosh, *supra* note 37.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Nili, *supra* note 5, at 42.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> Katz & McIntosh, *supra* note 37.

## II. WHY THE RECENT MOVEMENT

### A. *The Crucial Turning Points of 2016 and 2017*

In March 2016, State Street Advisors commissioned the “Fearless Girl” statue as a symbol of increased attention by investors and the public to a lack of gender diversity in U.S. corporate boardrooms.<sup>121</sup> The commissioning of this statue prompted the launching of the State Street’s boardroom diversity campaign, sparking a movement throughout the nation.<sup>122</sup>

With the prospect of the first female President, a majority of individuals believed that 2017 would be the “year of the woman.”<sup>123</sup> The first female President would finally shatter the glass ceiling “into a million pieces . . . sprinkl[ing] down like revolution, causing magical dust that would bring gender parity and allow women to soar to new heights of equality and success.”<sup>124</sup> Much to people’s dismay, this dream failed to occur. However, individuals did not allow the shattering of this prospect to ruin their hopes of this equality—an optimism that marked 2017 the critical year for gender equality.

The year following State Street’s commissioning of the “Fearless Girl” statue, advocacy for gender diversity in the boardroom increased among institutional investors.<sup>125</sup> Specifically, upon the publication of its Gender Diversity Index in March 2016, State Street published in March 2017 its Guidance on Enhancing Gender Diversity on Boards.<sup>126</sup> This publication issued that State Street would capitalize on its strong voting power to vote against all chairs of the nominating and governance committees if companies failed to satisfy State Street’s requirements for improving gender diversity.<sup>127</sup> Consequently, State Street voted against the re-election of directors at approximately 400 companies, an amount that was greater than ten percent of the total U.S. public companies.<sup>128</sup> Though not requiring a formal female director quota, companies had to now

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<sup>121</sup> Lerner & Oberholzer Skizas, *supra* note 74.

<sup>122</sup> *Id.*

<sup>123</sup> Amanda Greenberg, *How Workplace Gender Diversity Continued To Evolve In 2017, According To A New Report*, FORBES (Dec. 22, 2017, 9:00 AM), <https://www.forbes.com/sites/amandagreenberg/2017/12/22/how-workplace-gender-diversity-continued-to-evolve-in-2017-new-report/#692bb0d07ad5>.

<sup>124</sup> *Id.*

<sup>125</sup> Nili, *supra* note 5, at 18–19.

<sup>126</sup> Lerner & Oberholzer Skizas, *supra* note 74.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

demonstrate tangible efforts to reform their nominating methods as a means to prevent State Street from voting against them.<sup>129</sup> Accordingly, 2017 marked the first year that women and minorities filled a majority of vacant S&P 500 independent board seats, a forty-two percent increase from 2016.<sup>130</sup>

*B. Impact of Growing Trend of Improving Gender Diverse Boards*

Since the commissioning of the Fearless Girl statue, the launch of State Street's campaign, evidence that gender diversity in boardrooms enhances company performance, and mandatory quotas for female directors in several European countries,<sup>131</sup> forty-two companies began to address the lack of gender diversity in the boardroom.<sup>132</sup> For instance, BlackRock and Vanguard—two of the largest United States institutional investors—announced their dedication to prioritizing gender diversity on their boards.<sup>133</sup> In February 2017, BlackRock reformed its voting standards to require at least two female directors on every public company's board.<sup>134</sup> In March 2017, BlackRock established that its top engagement goals included focusing on what steps companies are taking to improve boardroom diversity, as well as assured it would hold nominating and governance committees responsible for failing to take such steps.<sup>135</sup> In August 2017, Vanguard published its Investment Stewardship 2017 Annual Report, in which it indicated that the firm would

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<sup>129</sup> Nili, *supra* note 5, at 1.

<sup>130</sup> Justin Baer, *State Street To Make Further Push for Gender Diversity on Boards*, WALL STREET JOURNAL (Nov. 13, 2017, 4:59 PM), <https://www.wsj.com/articles/state-street-to-make-further-push-for-gender-diversity-on-boards-1510610368>.

<sup>131</sup> Nili, *supra* note 5, at 1–2.

<sup>132</sup> See Baer, *supra* note 130.

<sup>133</sup> David Oelman, Gilian Hobson, Shaun Mathew, Sarah Fortt & Leonard Wood, *Diversity Poised to Take Center Stage in 2018 Proxy Season*, LAW 360 (Sept. 14, 2017), <https://advance.lexis.com/document/?pdmfid=1521360&crd=d71ffb28-38c4-4621-85e9-dabc6b79868b&pdworkfolderid=9fcd3083-1200-4e1b-a7f0-eeba449b680b&ecomp=cxJdk&earg=9fcd3083-1200-4e1b-a7f0-eeba449b680b&prid=7e490f30-564d-49d5-9ae6-1025049d17a5>.

<sup>134</sup> Nili, *supra* note 5, at 37.

<sup>135</sup> Oelman, Hobson, Mathew, Fortt & Wood, *supra* note 133.

base its future voting decisions on whether companies are employing meaningful improvements regarding board diversity.<sup>136</sup>

In addition to action by these institutional investors, Congress began taking steps toward advancing gender diversity in the boardroom. In particular, in May 2017, Representatives Carolyn B. Maloney and Donald S. Beyer submitted a letter to SEC Chair Jay Clayton that advocated “[t]he SEC has the opportunity and ability to enforce the transparency that is critical to securing gender balanced corporate leadership. Boardrooms with gender parity lead stronger, healthier companies, return more to their shareholders, and help our economy grow.”<sup>137</sup>

Additionally, in August 2017, CalPERS sent over 500 letters to companies, indicating that the company’s board lacked gender diversity.<sup>138</sup> The letters urged each company to develop and to disclose its policy concerning boardroom diversity, and to release a boardroom diversity implementation plan in its governance documents.<sup>139</sup> As a result, thirty-five of these boards adopted at least one woman.<sup>140</sup> Furthermore, on September 8, 2017, the New York City Comptroller, Scott M. Stringer, and the New York City Pension Funds launched the Boardroom Accountability Project 2.0, which increased the pressure on the S&P 500 companies to improve diversity on their boards.<sup>141</sup> Specifically, Stringer submitted letters to the boards of 151 companies requiring them to “publicly disclose the skills, race and gender of board members and to discuss their process for adding and replacing board members.”<sup>142</sup> Stringer’s goal for this project was to create a board matrix that would determine the skills, experience, sexual orientation, gender, age, and race of the director and board tenure, as well as to make such disclosure of information significantly more routine for S&P 500 companies.<sup>143</sup>

In 2017, the number of shareholder proposals concerning board diversity reached its record high.<sup>144</sup> Such shareholder proposals included “requesting that the board adopt a policy to improve boardroom or senior management diversity” and “requesting a report on the company’s plans for increasing boardroom or senior management diversity.”<sup>145</sup> These

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<sup>136</sup> *Id.*

<sup>137</sup> Nili, *supra* note 5, at 2.

<sup>138</sup> Oelman, Hobson, Mathew, Fortt & Wood, *supra* note 133.

<sup>139</sup> *Id.*

<sup>140</sup> Nili, *supra* note 5, at 10.

<sup>141</sup> Oelman ET AL., *supra* note 133.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> Nili, *supra* note 5, at 10.

<sup>145</sup> Oelman ET AL., *supra* note 133.

proposals, on which companies voted received about 28.3% of the votes cast, as opposed to merely 19.1% of the votes cast in 2016; twenty-five percent of these proposals passed, and several others settled before they even reached a vote.<sup>146</sup> Companies receiving such proposals included Apple, Bank of America, BlackRock, Chevron, Coca-Cola, Colgate-Palmolive, Continental Resources, Dominion Energy, EOG Resources, Exxon Mobil, Facebook, General Electric, Johnson & Johnson, Procter & Gamble, and Walmart.<sup>147</sup> Moreover, Institutional Shareholder Services, Inc., a leading shareholder advisory firm, urged shareholders to vote for all but two of the 2017 diversity proposals.<sup>148</sup> In addition to these initiatives by companies, ISS and Glass Lewis—the largest and most influential proxy advisor firms—declared their new dedication to prioritize gender diversity.<sup>149</sup>

As a result of the growing attention and dedication to improving gender diversity in corporate boardrooms by institutional investors,<sup>150</sup> in October 2018, California became the first state to codify requirements of gender diversity in corporate boardrooms.<sup>151</sup> California enacted a law, Senate Bill 826, that established several requirements for publicly traded companies incorporated in California or foreign corporations, i.e. Delaware corporations headquartered in California and enumerated on major U.S. stock exchanges.<sup>152</sup> These mandates included that corporations include at least one female director by the end of 2019 and include at least three female directors if the board of directors comprises of six or more members, at least two female directors if the board consists of five members, or at least one female director if the board consists of four or fewer members by the end of 2021.<sup>153</sup> The California Secretary of State

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<sup>146</sup> Nili, *supra* note 5, at 10.

<sup>147</sup> Oelman ET AL., *supra* note 133.

<sup>148</sup> Nili, *supra* note 5, at 10.

<sup>149</sup> *Id.* at 42.

<sup>150</sup> Benjamin F. Ridders, Jessica S. Lochmann & Collin M. Scheuermann, *California Codifies Gender Diversity Requirements for Public Company Boards*, FOLEY & LARDNER (Oct. 8, 2018), <https://www.foley.com/california-codifies-gender-diversity-requirements-for-public-company-boards-10-08-2018/>.

<sup>151</sup> Richard Vernon Smith, *California Mandates Female Representation on Public Company Boards*, FORBES (Oct. 1, 2018, 12:04 PM), <https://www.forbes.com/sites/allbusiness/2018/10/01/california-mandates-female-representation-public-company-boards/#363773d61775>.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

imposed penalties that any company in violation of this law would be subject to a \$100,000 fine for a first-time violation and a \$300,000 fine for a second violation, and each subsequent violation thereafter.<sup>154</sup> In addition to the financial penalties, the Secretary of State would publish annual reports indicating which corporations had and had not complied with the law in the prior year.<sup>155</sup> As of June 2017, approximately 377 corporations would need to appoint women directors to their boards to comply with the law by 2021.<sup>156</sup> More specifically, sixty-six companies would need to elect three females to their boards, 175 companies would need to elect two females to their boards, and 136 companies would need to elect one female to their boards.<sup>157</sup>

California enacted the law in an effort to narrow the “gender gap in business.”<sup>158</sup> However, California Governor Jerry Brown expressed that companies raised “serious legal concerns” regarding the statute, in terms of “how California could profess to control the internal corporate affairs of a foreign corporation . . . .”<sup>159</sup> Governor Brown dissipated these concerns by highlighting that Section 2115 of the California long arm statute “purports to apply to foreign corporations that satisfy certain tests related to presence in California (minimum contacts), referred to as ‘pseudo-foreign corporations.’”<sup>160</sup> Despite these concerns and initial backlash, by enacting this law, California took a significant step in forging the movement for not only gender diversity in boardrooms, but also, more significantly, gender parity.

### C. *The Current State*

Institutional investors implemented significant awareness and progress in the past few years regarding boardroom diversity. For the first time, women and minorities comprised half of the 397 newest independent directors at S&P 500 companies.<sup>161</sup> However, in 2017, women still constituted only seventeen percent of corporate boards, and over 600

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<sup>154</sup> *Id.*

<sup>155</sup> Ridders ET AL., *supra* note 150.

<sup>156</sup> John Jenkins, *California’s Board Gender Diversity Law: How Many Companies Impacted?*, THE CORPORATE COUNSEL (Oct. 2, 2018), <https://www.thecorporatecounsel.net/blog/2018/10/californias-board-gender-diversity-law-how-many-companies-impacted.html>.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

boards did not even have any female directors.<sup>162</sup> This current state of gender diversity indicates the immense evolution and improvement that these Fortune 500 companies still need. According to a FactSet's report published in September 2018, the percentage of companies in the Russell 3000 stock index with no female board members decreased from twenty-three percent to eighteen percent and the percentage of companies in which women hold fifteen percent of the board seats or fewer declined from fifty-eight percent to forty-seven percent.<sup>163</sup> Additionally, only twenty-two companies have boards with an equal number of men and women, and women comprise the board majority at only fourteen companies—shockingly an increase from previously comprising the board majority at only four companies.<sup>164</sup> The worst statistic that the FactSet's report revealed was that women led only five percent of companies in the Russell 3000 index—a percentage that remained the same from March 2017.<sup>165</sup> The most recent statistics revealed that the number of women on U.S. public company boards maintains a slow and steady growth.<sup>166</sup> Specifically, the 2020 Gender Diversity Index showed that women represented 17.9% of Fortune 1000 company directors, 19.7% of Fortune 500 company directors, and 22.3% of Fortune 100 company directors in 2015. If this current rate persists, corporate boards will not achieve gender parity until 2055.<sup>167</sup>

Despite slow progress, and the fact that the number of women on boards in the U.S. is increasing slower than those in other countries, a general consensus and collective action exist towards improving gender diversity at the top levels of corporate America.<sup>168</sup> In response to the slow rate of improvement of boardroom gender diversity and in an effort to increase the number of women board members at a faster growth rate, individuals founded various organizations.<sup>169</sup> One such group is the 2020

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<sup>162</sup> *Id.*

<sup>163</sup> Stephen Grocer, *Corporate America and Gender Diversity by the Numbers: DealBook's Closing Bell*, THE NEW YORK TIMES (Sept. 27, 2018), <https://www.nytimes.com/2018/09/27/business/dealbook/gender-diversity-closing-bell.html>.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Katz & McIntosh, *supra* note 37.

<sup>167</sup> Nili, *supra* note 5, at 11.

<sup>168</sup> See Katz & McIntosh, *supra* note 37.

<sup>169</sup> Nili, *supra* note 5, at 11.

Women on Boards, which aims to reform the review process for directors in order to add more females in the pool of director candidates.<sup>170</sup>

Especially in the past year, there has been a significant trend toward prioritizing gender diversity on corporate boards. This growing trend is due to activism going global in 2017, international developments, workplace trends, enhanced investor sentiment, and SEC disclosure requirements. First, regulators and legislators encouraged gender balance on public company boards—as seen through State Street’s campaign and the SEC disclosure requirements.<sup>171</sup> The Norwegian quota regime conducted a study that showed that women directors were more likely to introduce into the boardroom a “more vigilant and probing approach, and women may be particularly adept at critically questioning, guiding and advising management without disrupting the overall working relationship between the board and management.”<sup>172</sup> Additionally (according to a report of Israeli boards), boards comprised of at least three female and three male directors “are found to be at least 79% more active at board meetings than those without such representation and that [g]ender-balanced boards are also more likely to replace underperforming chief executive officers (CEOs) and are particularly active during periods when CEOs are being replaced.”<sup>173</sup> A recent Wellesley College study on boardroom gender diversity highlighted that having three or more women on a board leads to improved dynamics and advantages in board governance.<sup>174</sup>

Second, regarding workplace trends, since the 1960s there has been a substantial political movement for gender equality and anti-discrimination. Increasing gender diversity on boards echoes and further advances this movement, in that doing so allows equal opportunities to females, against whom employers historically discriminated or barred from positions of power.<sup>175</sup> Especially in 2017, there was a huge campaign targeted at replacing CEOs.<sup>176</sup> New CEOs meant restructuring the boards, which in turn allowed increased gender diversity on these boards.<sup>177</sup>

Third, regarding improved investor sentiment, companies have underscored that:

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<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 18 (internal quotations omitted).

<sup>173</sup> *Id.* (internal quotations omitted).

<sup>174</sup> See Russell Reynolds Associates, *supra* note 15, at 10.

<sup>175</sup> Nili, *supra* note 5, at 13.

<sup>176</sup> See Greenberg, *supra* note 123.

<sup>177</sup> *Id.*



a board composed of directors representing a range of perspectives leads to an environment of collaborative tension that is the essence of good governance. In a room where everyone has different points of view and there is greater opportunity for cross-pollination of ideas, there are fewer unspoken assumptions, less group think and a greater likelihood of innovation. This allows the board to ask the probing questions and tackle the challenging issues, such as risk management and succession planning, which are at the center of good corporate governance.<sup>178</sup>

Several pieces of evidence suggest that gender diverse boards provide a myriad of benefits to corporate governance and ultimately the overall company's performance. For example, a recent study revealed that companies comprised of the highest percentage of women on their boards possessed a rate of return of approximately fifty-three percent higher than companies comprised of the lowest percentage of women on their boards.<sup>179</sup> Several other studies showed that a diverse group of high-functioning individuals will likely perform significantly better than a non-diverse group of high-functioning individuals.<sup>180</sup> Another study demonstrated that "boards focused on gender diversity within the boardroom are also more likely to utilize talent pools more effectively, have a better understanding of the employee and customer bases, and that signaling that the company cares about diversity may be effective in bolstering economic arguments."<sup>181</sup> Additionally, studies exhibited that an increased number of females on corporate boards and serving in senior management positions correlates with increased earnings, higher total shareholder return, and increased surplus return.<sup>182</sup> Overall, companies with more female members on their boards demonstrated significantly greater valuations than boards with none.<sup>183</sup>

Further regarding investor sentiment, board diversity has been broadly identified as one of the leading measurements showing a compelling correlation with improved shareholder value and company

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<sup>178</sup> See Russell Reynolds Associates, *supra* note 15, at 9.

<sup>179</sup> Nili, *supra* note 5, at 3.

<sup>180</sup> *Id.* at 14.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> Nili, *supra* note 5, at 160–61.

performance.<sup>184</sup> Given these numerous studies that prove gender diversity could enhance performance and governance, an increasing number of corporate companies recognized such effects.<sup>185</sup> As a result, because investors wish to reap the benefits of such improved performance and governance, investors became more attracted to the idea of boardroom gender diversity.<sup>186</sup> Moreover, company directors highlighted that “having a wide range of perspectives represented in the boardroom is critical to effective corporate governance.”<sup>187</sup> In particular, because today’s boards face scrutiny from investors, the media, non-governmental organizations, and many others, no one person can solve the board’s problems. Rather, a board that consists of varied perspectives, experiences, and diverse backgrounds allows the decision-making process to consider various risks and consequences of the potential actions.<sup>188</sup> In general, advocates provide social and moral justifications, corporate finance reasons, and corporate governance evidence to support increasing gender diversity within corporate boardrooms.<sup>189</sup>

Lastly, the SEC disclosure requirements contributed to companies’ maintaining concrete policies regarding gender diversity in the companies’ boardrooms.<sup>190</sup> Studies revealed the link between the information that a company discloses to its investors and the company’s gender diversity ratio.<sup>191</sup> In particular, companies that referenced gender in their diversity disclosure tended to possess a higher ratio of women board members than companies that lacked a diversity procedure or companies that had a policy that only addressed differences in viewpoints, as opposed to gender diversity.<sup>192</sup>

Because of these various aforementioned studies, institutional investors began to view corporate governance not merely as a “means-to-an end administrative or procedural framework,” but as the foundation of a company that can be an “overarching value driver.”<sup>193</sup> These studies

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<sup>184</sup> *Working to Increase Gender Diversity in the Corporate Boardroom*, THIRTY PERCENT COALITION (2017), <https://www.30percentcoalition.org/>.

<sup>185</sup> *Id.*

<sup>186</sup> Katz & McIntosh, *supra* note 37, at 10.

<sup>187</sup> *Different is Better: Why Diversity Matters in the Boardroom*, RUSSELL REYNOLDS ASSOCIATES (2019), <https://www.russellreynolds.com/insights/thought-leadership/different-is-better-why-diversity-matters-in-the-boardroom>.

<sup>188</sup> *Id.*

<sup>189</sup> Nili, *supra* note 5, at 164.

<sup>190</sup> *Id.* at 186.

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 186–87.

<sup>193</sup> Katz & McIntosh, *supra* note 37, at 7.

further caused investors to see gender diversity not just as a social cause, but as a “matter of better corporate governance and thus can enjoy, and harness, the support of the investor community—in particular large institutional investors.”<sup>194</sup>

#### D. Counterarguments and Opposition

Despite the positive attraction board gender diversity received and the numerous studies suggesting the association between gender diverse boards and performance enhancement, some studies revealed the contrary; opponents largely predicate their critical views on these studies.<sup>195</sup> For example, some MSCI studies showed that female participation on boards does not, in fact, statistically correlate to increased performance metrics and that corporate performance actually decreased after several countries implemented female quota requirements.<sup>196</sup> Furthermore, unlike institutional investors, who growingly exhibited their dedication to increasing female representation on corporate boards, activist funds continue to dismiss nominating females onto their boards.<sup>197</sup> For instance, since 2011, five of the largest U.S. activist funds nominated only seven female directors out of the total 174 nominated, and females represented less than a mere five percent of actual director positions.<sup>198</sup> Additionally, out of the director nominees that Carl Icahn’s Icahn Associates Holding selected, none of the candidates were female—contrary to the S&P companies that elected twenty-six percent females to their vacant board positions during the same time frame.<sup>199</sup>

These statistics reflect the various opposition that gender diversity faced. Some scholars believe that studies, which consulting firms and financial institutions performed are not nearly as rigorous as those that peer-reviewed academic research conducted.<sup>200</sup> More specifically, two meta-analyses that summarize the results of several peer-reviewed studies revealed that the relationship between gender diversity in boardrooms and

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<sup>194</sup> Nili, *supra* note 5, at 149.

<sup>195</sup> *Id.* at 162.

<sup>196</sup> Nili, *supra* note 5, at 162.

<sup>197</sup> Katz & McIntosh, *supra* note 37, at 8–9.

<sup>198</sup> *Id.* at 8.

<sup>199</sup> *Id.* at 8–9.

<sup>200</sup> Katherine Klein, *Does Gender Diversity on Boards Really Boost Company Performance?*, KNOWLEDGE @ WHARTON (May 18, 2017), <http://knowledge.wharton.upenn.edu/article/will-gender-diversity-boards-really-boost-company-performance/>.

a corporation's overall performance is either effectively zero or is very weakly positive; they further suggested that no evidence exists that indicates increased female representation, or just the mere presence of women, on corporate boards "actually" benefits the company's performance.<sup>201</sup> These studies demonstrated that because there is no concrete "business case" for or against nominating female corporate board members, companies should hire females to their boards due to gender equality, rather than because "gender diversity on boards leads to improvements in company performance."<sup>202</sup> Statistically, the studies found a .047 correlation between gender diverse boards and firm accounting performance, and an even lower correlation between gender diverse boards and firm market performance, including stock performance and shareholder returns—numbers that were so small that they both were virtually statistically insignificant.<sup>203</sup>

Additionally, these studies refute the theory that companies with more gender diverse boards will outperform those with less gender diverse boards.<sup>204</sup> The academic research rejects this conclusion based upon its belief that females appointed to corporate boards do not actually possess values, experience, and knowledge distinct from that of pre-existing male board members.<sup>205</sup> Rather, the opposing research argues that females' accomplishments, experiences, and competencies are actually quite similar to those of their male counterparts; thus, adding females to solely male boards would not improve the board's "cognitive variety" as much as supporters believe.<sup>206</sup>

Another reason upon which this academic research predicates its opposition to gender diverse boards is that the women, as minorities on the board, will fail to "speak up in board conversations[,] due to fear of "expressing beliefs and opinions that run counter to the beliefs and opinions of the majority of the group."<sup>207</sup> Moreover, opponents alleged that as soon as boards appoint women members, these women will "lack the influence to change the board's decision[,] because "the majority group members may discount their views" as minorities or outliers on the board.<sup>208</sup> Lastly, opponents argued that even if increased female representation on corporate boards enhances a company's cognitive variety and decision making, this additional representation would only

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<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

benefit a corporation's accounting performance (such as its sales, profits, or return on assets); this additional representation would not benefit the company's market returns, and these critics argue the benefit to its accounting returns would only be minimal.<sup>209</sup> In general, based upon academic research, opponents alleged that considering "all the studies of board diversity and company performance that have been conducted to date, it seems very unlikely that new research will reveal a strong, clear relationship between board diversity and company performance."<sup>210</sup> Because some studies revealed negative or weak positive correlations between gender diversity on corporate boards and overall company performance, opponents adopted harsh and critical views regarding increasing gender diversity in corporate boardrooms.<sup>211</sup> Opponents rely on these weak connections to justify their dismissal of implementing policies or initiatives to improve gender diverse boards. As a result, these critics have contributed to the stagnant state of female representation on corporate boards.

Despite these various counterarguments and studies that failed to support gender diverse boards, scholars have indicated two unanimous conclusions prevalent among corporate directors regarding boardroom gender diversity. First, corporate directors recognize the immense importance of diversity on boards, emphasizing that boards should enhance their gender diversity.<sup>212</sup> Second, corporate directors struggled to highlight concrete examples of the impact that gender diverse boards made on the company.<sup>213</sup> Both these responses affirm the challenge of sufficiently linking the advantages of diversity within boardrooms,<sup>214</sup> a difficulty that contributes to the slow trend of enhancing gender diversity on corporate boards. Nonetheless, in light of the various opponents, several prominent and influential corporations remain dedicated to

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<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> See generally Kim Elessar, *The Truth About Women's Impact On Corporate Boards (It's Not Good News)*, FORBES, June 23, 2016, <https://www.forbes.com/sites/kimelsesser/2016/06/23/the-truth-about-womens-impact-on-corporate-boards-its-not-good-news/#9a7a5355ecbd>.

<sup>212</sup> Nili, *supra* note 5, at 17–18.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 18.

improving gender diversity on their boards.<sup>215</sup> Despite the backlash from the activist funds, it is significantly more noteworthy that major institutional investors, such as those included in the S&P 500, maintain advocacy for increasing gender diversity in their boardrooms.<sup>216</sup>

### III. FUTURE SOCIAL IMPACT OF INCREASING GENDER DIVERSITY IN CORPORATE BOARDROOMS

Although the dreams of the first female President have yet to come true, women have marked a changing landscape in today's corporate world. Institutional investors began prioritizing gender diversity in corporate boardrooms, and despite the slow and minimal improvements, progress remains.<sup>217</sup> However, even if companies increase their representation of women on corporate boards or achieve equal gender representation on their boards, the intended result of gender diversity still lacks, and the issue of substantive gender diversity still exists.<sup>218</sup> This issue of substantive gender diversity refers to equal treatment of genders within the boardroom, as well as actually achieving equal representation on the boards.<sup>219</sup> Boards are so focused on obtaining a "magic number" of gender representation that they fail to allow women the equal opportunity to actually make an impact on the boards.<sup>220</sup> Although on the board, women still face stereotyping discrimination, which inhibits their ability to earn credibility and respect.<sup>221</sup> Companies often only contact women for positions on boards due to their diverse demographic, as opposed to their unique qualifications or perspectives.<sup>222</sup> Without equal treatment within the boardroom, the progress to achieve equal representation on the board is virtually useless. Because most of the gender stereotypes are a product of the older generation, these attitudes are becoming more and more rare.<sup>223</sup> In particular, the development of instantaneous communications and technology began to remove these traditional national and cultural

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<sup>215</sup> See, e.g., Emma Hinchliffe, *GM's Board Will Have More Women Than Men. It's Not the Only One*, FORTUNE, May 20, 2019, <https://fortune.com/2019/05/20/women-boards-fortune-500-2019/>.

<sup>216</sup> See Baer, *supra* note 130.

<sup>217</sup> Nili, *supra* note 5.

<sup>218</sup> *Id.* at 37.

<sup>219</sup> Katz & McIntosh, *supra* note 37.

<sup>220</sup> Nili, *supra* note 5, at 37.

<sup>221</sup> See Russell Reynolds Associate, *supra* note 15, at 7.

<sup>222</sup> *Id.* at 12.

<sup>223</sup> *Id.* at 7.

barriers.<sup>224</sup> However, given that some of these antiquated attitudes still remain, regulatory, legislative, and investor-driven strategies will be the most useful in order to expedite the progress that companies made towards achieving gender equality.<sup>225</sup>

Additionally, boards have become more appreciative of varied perspectives.<sup>226</sup> Some women directors reported that although their gender played a part in their initial nominations, it was not an ongoing factor—once they established their experience and reputation for effectiveness on the board, their constituents recognized their individual qualifications and skills and respected their opinions.<sup>227</sup> Furthermore, the pool of women considered is expanding and companies are increasingly recognizing the importance of diverse perspectives on their boards.<sup>228</sup> Given that advancing women’s equality can add \$12 trillion to global growth,<sup>229</sup> continuing to focus on improving boardroom gender diversity will prove useful to the overall economy.

Narrowing the focus, the recent California law consists of several potentially powerful implications for boardroom equality.<sup>230</sup> Specifically, because the California law explicitly employed gender classifications, likely causing heightened judicial scrutiny, scholars predicted that this law could lead to a constitutional challenge under the Equal Protection Clause, both federally and at the state-level.<sup>231</sup> Moreover, given that the law applies to corporations not incorporated in California, but headquartered and with principal places of business in California, the law could cause challenges pursuant to the “internal affairs” doctrine; this doctrine

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<sup>224</sup> Jem Bendell, *Barricades and Boardrooms: A Contemporary History of the Corporate Accountability Movement*, TECH., BUS. & SOC’Y PROGRAMME PAPER NO. 13, U.N. RESEARCH INST. FOR SOC. DEV. 1, 2–6 (2004).

<sup>225</sup> See Katz & McIntosh, *supra* note 37, at 5–6.

<sup>226</sup> Russell Reynolds Associates, *supra* note 15, at 6.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.* at 12.

<sup>229</sup> Jonathan Woetzel et al., *The Power of Parity: How Advancing Women’s Equality Can Add \$12 Trillion To Global Growth*, MCKINSEY GLOBAL INSTITUTE (Sept. 2015), <https://www.mckinsey.com/featured-insights/employment-and-growth/how-advancing-womens-equality-can-add-12-trillion-to-global-growth>.

<sup>230</sup> See generally *California Codifies Gender Diversity Requirements for Public Company Boards*, *supra* note 150.

<sup>231</sup> *Id.*

establishes that “only one state has the authority to regulate a corporation’s internal affairs.”<sup>232</sup>

Due to these potentially drastic consequences, scholars urged that “affected companies should start preparing for compliance to avoid the negative financial, reputational and potential business impacts of non-compliance,”—all of which could have severe effects for major institutional companies.<sup>233</sup>

#### IV. POLICY IMPLICATIONS

In order to adequately implement gender diversity in boardrooms, investors should urge companies to take more action, rather than merely adding additional females to the board.<sup>234</sup> Scholars determined several ways in which nominating committees can adequately implement diverse opinions and views into the process of choosing candidates.<sup>235</sup> First, the committee should identify the competencies, skills, and goals it desires in a candidate and create a method to assess for those abilities.<sup>236</sup> Second, the committee should perform a gap analysis of the board that includes the entire spectrum of competencies in order to increase awareness of all the various factors considered in composing the board.<sup>237</sup> Third, the committee should prioritize effective communicative and interpersonal skills.<sup>238</sup> Fourth, the committee should broaden the candidate pool, for much data has shown that there is a significant number of qualified women immediately below the C-suite level.<sup>239</sup> Lastly, the committee should implement a thorough director evaluation process in order to preserve common boardroom standards and goals.<sup>240</sup>

In addition to these initiatives, SEC Commissioner Luis Aguilar, who helped lead advocacy for increased gender diversity in corporate boardrooms, proposed three approaches to implement such advocacy.<sup>241</sup> First, the SEC can closely scrutinize the mandatory diversity disclosure requirements and provide feedback to companies in an effort to guarantee that investors gain effective knowledge about the diversity policies of

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<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> Nili, *supra* note 5, at 37.

<sup>235</sup> See Russell Reynolds Associates, *supra* note 15, at 11.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> Black, *supra* note 21, at 17.



corporations.<sup>242</sup> Second, the NYSE and NASDAQ could facilitate a blue-ribbon panel of industry leaders to “develop best practices for improving board diversity.”<sup>243</sup> Instead of requiring companies to adopt the standards, companies would either adopt these “best practices” or if not, justify why they failed to do so—referred to as “comply-or-explain.”<sup>244</sup> Implementing these diversity best practices while simultaneously adopting the SEC rule enhances the disclosure’s quality, for these best practices serve as the standard by which the exchanges would review companies’ dedication to diversity.<sup>245</sup> Lastly, corporations could adopt the NFL’s Rooney Rule, which mandates that all NFL teams interview at least one minority applicant for a head coaching job.<sup>246</sup> Similarly, a Rooney Rule for corporate boards would require nominating committees of corporations to interview at least one female for each vacant position of a director; the NYSE and NASDAQ would be responsible for implementing and enforcing such rule.<sup>247</sup>

The United States’ low emphasis on clear and precise policy disclosures to investors began to enhance the diversity of corporate boardrooms. However, adding more females as members of boards is only a stepping stone toward the greater goal of achieving a completely gender diverse board.<sup>248</sup> Even though the United States exemplifies a soft regulatory approach to gender diversity that placed it behind Germany, the United Kingdom, Norway, France, and other countries, the United States need not employ mandatory quotas to achieve gender diverse corporate boards. Because numerous studies highlighted that gender inequality exists across various industries and across market cap sizes, advocates of gender diverse boards must analyze companies on a company-by-company basis, rather than apply a *per se* assessment; doing so ensures the most comprehensive and thorough analysis of gender parity on corporate boards.<sup>249</sup>

“Diversity for the sake of diversity” harms performance quality, especially when it causes forced turnover and hiring less qualified directors.<sup>250</sup> As a result, in order to adequately address and enhance gender

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<sup>242</sup> *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 17–18.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 18.

<sup>247</sup> *Id.*

<sup>248</sup> Russell Reynolds Associates, *supra* note 15, at 11.

<sup>249</sup> *See* Nili, *supra* note 5, at 35.

<sup>250</sup> Larcker & Tayan, *supra* note 1, at 14.

diversity in corporate boardrooms, scholars and advocates of such cause need to dive deeper into the issue and focus on substantive diversity, with efforts aimed at hiring qualified directors, rather than hiring based on quotas.<sup>251</sup>

#### CONCLUSION

A board that is genuinely diverse affords women “more than a seat at the table—it grants them the ability to have a voice and an impact,”<sup>252</sup> an opportunity that is far greater, more tangible, and more powerful than a figurehead seat with no voice. Various initiatives and advocacy make abundantly clear that corporate America no longer desires a homogenous board. Despite the immense progress that corporations began to make, significant room still exists to achieve “genuine” gender diversity within the boardroom. Even greater progress remains to achieve complete gender parity. Advocacy and efforts aimed at holding corporations accountable for their policies can help evolve the movement. More significantly, increasing pressure on corporations to not only appoint, but also respect and listen to more female board members further progresses the cause. Though the extent of the impact of increasing gender diversity in boardrooms remains unclear, it is quite unambiguous that gender diversity can only benefit a corporation. At this point, there is no going back to the once homogenous corporate boardroom world.

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<sup>251</sup> *Id.*

<sup>252</sup> See Nili, *supra* note 5, at 164.

