

# CORPORATE BOARDROOM DIVERSITY: WHY ARE WE STILL TALKING ABOUT THIS?

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I. Overview .....	221
II. What is Diversity? .....	221
A. Benefits of a Diverse Board.....	222
B. Research Findings Inconclusive .....	225
C. SEC Diversity Statement Requirement.....	228
D. Diversity Justified on Moral or Social Grounds.....	229
E. Gender Dynamics.....	230
F. Personal Identity and the Leadership Role.....	233
III. Demographics of Diversity .....	235
A. Progress Lags .....	235
B. Progress for Women .....	238
C. Trophy Directors.....	239
D. Racial Minorities.....	240
E. Women of Color: A Particular Concern .....	241
IV. Attributes, Qualities & Skills Required of Every Director.....	242
A. What Boards are Looking For in Director Candidates .....	242
B. Requirements for the Nominating and Governance Committee .....	243

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C.	Desired Personal Attributes.....	244
D.	Experience Attributes.....	244
E.	The Must Have: Audit Committee “Qualified Financial Expert” .....	245
F.	Prior Business & Corporate Governance Experience.....	246
G.	Government and Regulatory Relations.....	248
H.	Cultural Diversity and International Sales .....	248
V.	The Pool of Qualified Candidates Issue .....	249
A.	So What is the Disconnect? .....	249
B.	Diversity Fatigue .....	250
VI.	Global Approach to Diversity .....	251
A.	European Trends.....	251
B.	United Kingdom .....	255
C.	Canada .....	257
D.	Pacific Region .....	258
VII.	Unconscious Racial Biases and Director Selection.....	258
VIII.	Achieving Increased Board Diversity: Special Considerations .....	260
A.	Business School Enrollment.....	261
B.	What About the Entrepreneurs? .....	265
C.	Women of Colore Entrepreneurs.....	266
D.	Auditing, Accounting, and Finance .....	268
E.	Professional Staff .....	269
F.	Audit Firm Partners.....	270
G.	Financial Services .....	272
H.	Legal Services.....	273
I.	Academia and the Nonprofit Sector.....	277
J.	The Technological Fields .....	279
IX.	Moving Forward: How to Address Inequalities in Corporate Diversity .....	282
A.	Candidate Nurturing, Recruitment, and Retention Strategies .....	282
B.	Glass Cliff Phenomenon .....	286
C.	Searching for the Diverse Director.....	289
D.	Diversity Mentorship Opportunities .....	290
E.	Whistleblowing.....	292
X.	Partners Advocating Greater Board Diversity .....	293
A.	Alliance for Board Diversity .....	293
B.	Boardroom Bound® .....	294
C.	Catalyst, Inc.....	294
D.	CalSTRS & CalPERS.....	295
E.	The Diverse Director Data Source .....	296
F.	DirectWomen .....	298

G. Influence of Fathers with Daughters .....	298
H. The InterOrganizational Network (ION) .....	299
I. National Association of Corporate Directors .....	299
J. On the Board (George Washington University Business School) .....	300
K. Stanford Women on Boards Initiative .....	301
L. TIAA-CREF.....	301
M. Women Corporate Directors .....	301
N. European Professional Women's Network .....	302
XI. Conclusion .....	302

## I. Overview

What exactly is board diversity and why does it matter? How does diversity fit into an attempt to build the best board for any organization? What attributes and skills are required by law and what mix of experiences and talents provide the best corporate governance? Even though most companies claim they are looking for diversity, why has there been such little progress? Are required director attributes, which are a must for all boards, consistent with future diversity gains and aligned with achieving high performance and optimal board composition?

The goal of this article is to review and synthesize existing literature, in order to provide answers to these questions. It also will discuss how a nominating committee and board can define their needs, explore their options, and provoke radical thinking about how corporate governance might be improved by reexamining the demographics and fundamental assumptions about diversity, the attributes of board standing committees, and international board diversity profiles. Hopefully, constructive thinking about diversity, board composition, and a productive dialogue among all in the corporate governance community result, providing a meaningful resource for corporate entities seeking to diversify their boards and others who are interested in increasing boardroom diversity.

## II. WHAT IS DIVERSITY?

*Diversity* means carries different meaning for different people. Among the types of diversity commonly described are: gender, national origin, race, sexual orientation, and viewpoint.<sup>1</sup> In her article, *Board Diversity Revisited: New Rationale, Same Old Story?*, Professor Lisa Fairfax provides a helpful description of corporate diversity: “the portion of women and people of color on a corporate board,” with “focuses on gender, ra-

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1. Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 856 n.2 (2011).

cial, and ethnic diversity . . . [using] the term ‘people of color’ to refer to African Americans, Hispanic Americans/Latinos, Asian Americans, and Native Americans as a group.”<sup>2</sup> J. Robert Brown, Jr. observes, “Diversity encompasses gender and race, two categories heavily represented among consumers but not among directors. It also includes persons with views and backgrounds at variance with management.”<sup>3</sup>

### A. *Benefits of a Diverse Board*

By having a diverse board of directors, an organization benefits greatly through the variety of “their expertise, skill sets, knowledge base, reputation and networks.”<sup>4</sup> Leszek Bohdanowicz reports that “the literature on corporate governance suggests that diversified boards better fulfill their conformance and performance roles, because diversity is seen as a way to combat the group-thinking problem.”<sup>5</sup> Through prior research I ob-

2. *Id.*

3. J. Robert Brown, Jr., *Essay: Neutralizing the Board of Directors and the Impact on Diversity 3* (Univ. Denver Legal Studies, Working Paper No. 11-18, 2011), available at <http://ssrn.com/abstract=1938427>.

4. Jill A. Brown et al., *Board Diversity as a Camouflage Signal* (2012 ACAD. MGMT. PROC. 1) (citing A.J. Hillman & T. Dalziel, *Board of Directors and Firm Performance: Integrating Agency and Resource Dependence Perspectives*, 28 ACAD. MGMT. REV. 383 (2003)); see also A.J. Hillman et al., *Organizational Predictors of Women on Corporate Boards*, 50 ACAD. MGMT. J. 941, 943 (2007) (discussing some of the specific benefits to having a diverse board, such as: “improved brainstorming, creativity, consideration of diverse perspectives, and questioning of the status quo”). But see James D. Westphal & Ithai Stern, *The Other Pathway to the Boardroom: Interpersonal Influence Behavior as a Substitute for Elite Credentials and Majority Status in Obtaining Board Appointments*, 51 ADMIN. SCI. Q. 169 (2006) (explaining directors continue to defer to the CEO despite an increase in corporate board diversity). See generally C.M. Beckman & P.R. Haunschild, *Network Learning: The Effects of Partners’ Heterogeneity of Experience on Corporate Acquisitions*, 47 ADMIN. SCI. Q. 92 (2002) (asserting firms with partners of a variety of experiences tend to be more successful in their decision-making); Rita D. Kosnik, *Effects of Board Demography and Director Incentives on Corporate Greenmail Decisions*, 33 ACAD. MGMT. J. 129 (1990) (“This study explored the extent to which a board of director’s demographic characteristics and the financial incentives of its outside members influence a company’s decision to privately repurchase stock from a dissident stockholder.”); James D. Westphal & Ithai Stern, *Flattery Will Get You Everywhere (Especially If You Are a Male Caucasian): How Ingratiation, Boardroom Behavior, and Demographic Minority Status Affect Additional Board Appointments at US Companies*, 50 ACAD. MGMT. J. 267 (2007) (describing a study that analyzes the correlation between the demographic characteristics of a person and the number of board appointments that person gets offered); Keitha L. Dunstan et al., *The Value Relevance of Board Gender Diversity for NZX Listed Firms and Its Association with Growth Options* (Dec. 2011) (unpublished working paper), available at <http://ssrn.com/abstract=2028720> (advancing, “in New Zealand the benefit gained from board gender diversity can be captured with the appointment of one female director”).

5. Leszek Bohdanowicz, *Ownership Structure and Female Directors on Two-tier Boards: Evidence from Polish Listed Companies 21* (July 26, 2012) (unpublished working

served the critical importance of including diverse viewpoints and experience as qualifying attributes for directors.<sup>6</sup> Boards ideally should reflect the diversity and composition of the broader population in order to best represent customers, employees, and stockholders.<sup>7</sup> After all, men make up roughly half the population of the United States—not seven-eighths!<sup>8</sup> For example,

If a company's major product line consists of selling feminine hygiene products in India, it just seems logical that there are better choices for board candidates than males who do not use the products, have no particular understanding of the cultural, marketing channels or religious backdrop of these markets, are not physicians, etc. These considerations are obvious. Yet, I remember vividly having friends in New York years ago who served on the board of a major company in the feminine hygiene industry with no women serving on the board at that time. How can this possibly be rational?<sup>9</sup>

Professors Orlando Richard, Murthi, and Ismail conclude, "Race Does Matter for Firm Performance! As the demographic landscape continues to change, it is those companies that proactively acknowledge, value, and exploit diversity that will profit most."<sup>10</sup> Experts have recognized that

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paper), available at <http://ssrn.com/abstract=2117870> (citing Francis J. Milliken & Luis L. Martins, *Searching for Common Threads: Understanding the Multiple Effects of Diversity in Organizational Groups*, 21 *ACAD. MGMT. REV.* 402, 402–03 (1996)); see also Laura Padilla Angulo, *The Impact of Director Heterogeneity on Corporate Restructuring Patterns: Beyond Insider/Outsider Duality* 1 (Mar. 5, 2012) (unpublished working paper), available at <http://ssrn.com/abstract=2015983> ("[F]indings suggest that boards' diversity matters for the understanding of corporate behavior."); Richard Borghesi et al., *Simultaneous Board and CEO Diversity: Does It Increase Firm Value?* (Mar. 11, 2014) (unpublished working paper), available at <http://ssrn.com/abstract=2412120> ("[D]iverse boards are associated with greater firm value. However, evidence suggests that this diversity effect is completely nullified if the CEO and the board are simultaneously diversified.").

6. Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment*, 11 *FLA. ST. U. BUS. REV.* 75, 111 (2012).

7. *Id.*

8. *Id.*

9. *Id.* at 111–12; see also Erica Beecher-Monas, *Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?*, 86 *OR. L. REV.* 373, 411 ("[N]ourishing a culture of dissent is the foundation for the kind of decision making that leads to effective monitoring, and that while gender and ethnic diversity are not guarantors of diverse viewpoints, they are a good place to start in creating the kind of board culture that will begin to take its monitoring duties seriously.").

10. Orlando C. Richard et al., *The Impact of Racial Diversity on Intermediate and Long Term Performance: The Moderating Role of Environmental Context* (2012) (unpublished manuscript) (on file with The Scholar: St. Mary's Law Review on Race and Social Justice). See generally Vathunyoo Sila et al., *Women on Board: Does Boardroom Gender*

including a broad range of perspectives resulting from racially diverse groups will more effectively stimulate creativity and inspire innovation than homogenous corporate groups.<sup>11</sup> Moreover, “firms with racially diverse management are likely to consider more options and generate more ideas for launching new competitive moves. They should also be better equipped to detect, interpret, and respond to various environmental cues and market trends and thus respond more rapidly to competitive challenges.”<sup>12</sup> Therefore,

Racially diverse firms perform better than homogeneous firms because they can launch new competitive actions more frequently . . . Compared to firms led by homogeneous management, firms with racially diverse management can create more temporal advantages and increase market share and profits . . . Racial diversity in management enhances the capacity to develop new competitive environments with high potential growth.<sup>13</sup>

Managers, administrators, and even shareholders face the significant modern challenge—the need to achieve an optimal balance of gender, race, and culture within the board of directors.<sup>14</sup> Indeed, diversity is frequently presented “as an ethical complement to statutory governance aimed at improving FRQ [(Financial Reporting Quality)] and ultimately at creating value.”<sup>15</sup> In the July 16, 2002 recommendations regarding in-

*Diversity Really Affect Firm Risk?* (Sept. 13, 2014) (unpublished working paper), available at <http://ssrn.com/abstract=2379025> (finding no evidence gender diversity influences corporate risk or vice versa, and firm policies that concern risk-taking are not affected by female board representation). There is evidence, however, the director appointment process is not gender-neutral, and that this process cannot be explained by the firm's risk. *Id.*

11. Goce Andrevski et al., *Racial Diversity and Firm Performance: The Mediating Role of Competitive Intensity*, 40 J. MGMT. 820, 821 (2014), available at <http://job.sagepub.com/content/40/3/820.full.pdfhtml>.

12. *Id.*

13. *Id.* at 840.

14. Réal Labelle et al., *Diversity Management and Financial Reporting Quality*, 335 J. BUS. ETHICS 335, 339 (2010) (citing David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, 38 THE FINANCIAL REVIEW 33 (2003)).

15. *Id.* at 335; see, e.g., Anthony F. Jurkus et al., *Women in Top Management and Agency Costs* (Feb. 28, 2008) (unpublished working paper), available at <http://ssrn.com/abstract=1085109> (investigating gender diversity among the top managers of Fortune 500 firms and its effect on agency costs); Nina Smith et al., *Do Women in Top Management Affect Firm Performance?: A Panel Study of 2500 Danish Firms*, (IZA Discussion Paper No. 1708, 2005), available at <http://ssrn.com/abstract=780910> (examining the effect of diversity on firm performance by specifically studying women in top management positions); Claude Francoeur et al., *Gender Diversity in Corporate Governance and Top Management*, 81 J. BUS. ETHICS, 83 (2008) (discussing gender diversity in top management and on corporate boards, and how the participation of women betters financial performance); David A. Carter et al., *The Diversity of Corporate Board Committees and Financial Performance* 34 (March 1, 2008) (unpublished working paper), available at <http://ssrn.com/abstract=11066>

ternal corporate governance, the preliminary report of the American Bar Association Task Force on Corporate Responsibility recommended that procedures be instituted “for periodic evaluations by the directors of . . . the diversity of experience of individual directors.”<sup>16</sup> Significantly, Professor J. Robert Brown writes that the board’s “advisory function must be accompanied by . . . increased emphasis on diversity as a criterion for board membership. Only with broad viewpoints that emanate from differences in background, experience, gender and race, will the board be able to provide the feedback necessary to make the advisory function meaningful.”<sup>17</sup> Brown concludes that tapping into the meaningful advisory function that boards are designed to fill, coupled with increasing board diversity, will ultimately produce more effective boards.<sup>18</sup>

### B. *Research Findings Inconclusive*

Two important questions emerge when discussing board diversity: (1) Does a linear relationship exist between board diversity and performance? And (2) How do female corporate directors uniquely enhance the governance of large corporations? With regard to the former question, Professors Ben-Amar, Francoeur, Hafsi, and Labelle suggest, “This is questioned by both logic and extant research.”<sup>19</sup> Unfortunately, “The complexity of board heterogeneity effects may explain that results of extant research on the relationship between board and top management gender diversity and financial performance are mixed and inconclu-

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98 (studying the performance of Fortune 500 Companies, focusing on gender diversity in boardrooms and its effect on “board functions and shareholder value”); Soku Byoun et al., *Does Corporate Board Diversity Affect Corporate Payout Policy?* (March 15, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1786510> (analyzing the effects of boardroom diversity on firm performance by focusing on how it impacts major corporate decision-making, and finding a positive relationship between diverse boards and the frequency of issuing dividends); Steven A. Ramirez, *Diversity and the Boardroom*, 6 *STAN. J.L. BUS. & FIN.* 85 (2000) (focusing on the diversity movement in corporate America and explaining how to embrace the movement, and why). *But see* Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 *J. FIN. ECON.* 291 (2009) (asserting that while women have better attendance than men, and tend to be more involved in monitoring the company, firm performance has a negative correlation to gender diversity).

16. Am. Bar. Ass’n Task Force on Corporate Responsibility, *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*, 58 *BUS. LAW.* 23 (2002).

17. Brown, *supra* note 3, at 22.

18. *Id.*

19. Walid Ben-Amar et al., *What Makes Better Boards? A Closer Look at Diversity and Ownership*, *BRITISH J. MGMT.* (2012); *see, e.g.*, Renee B. Adams, Ali C. Akyol & Patrick Verwijmeren, *Director Skill Sets*, (Nov. 11, 2013), available at <http://ssrn.com/abstract=2365748> (describing the examination of the skill sets of director with a focus on the effect of the certain skills on company performance).

sive.”<sup>20</sup> In the end, empirically, performance simply casts gender diver-

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20. Ben-Amar et al., *supra* note 19, at 89 (citing C.B. Shrader et al., *Women in Management and Firm Financial Performance: An Exploratory Study*, 9 J. MANAGERIAL ISSUES 355 (1997)); see, e.g., Carter et al., *supra* note 14 (investigating the interrelationship between the diversity of corporate boards and firm performance, in the Fortune 1000 companies, to find “significant positive relationships” between the two); Niclas L. Erhardt et al., *Board of Director Diversity and Firm Financial Performance*, 11 CORP. GOV: AN INT’L REV. 102 (2003) (examining the correlation between women in upper management positions and firm performance in U.S. companies from 1993 to 1998, and finding a positive correlation); Adams & Ferreira, *supra* note 15 (finding “the average effect of gender diversity on firm performance is negative”); Susan M. Adams et al., *Are Female Executives Over-represented in Precarious Leadership Positions?*, 20 BRITISH J. MGMT. 1 (2009) (asserting women are appointed to CEO positions during times the firm is in a good financial position, and men the opposite, thus, skewing the data to support whether there is a positive or negative correlation between gender diversity in the boardroom and financial performance); S. Alexander Haslam et al., *Investing With Prejudice: The Relationship Between Women’s Presence on Company Boards and Objective and Subjective Measures of Company Performance*, 21 BRITISH J. MGMT. 484 (2010) (concluding there is a positive relationship between board gender diversity and “accountancy-based measures of performance” and a negative relationship between the former and “stock-based measures of performance”); Charles A. O’Reilly III & Brian G. M. Main, *Women in the Boardroom: Symbols or Substance?*, 2 (Stanford Graduate Sch. of Bus. Research Paper No. 2098, 2012), available at <http://www.ssrn.com/abstract=2039524> (finding “no evidence that adding women outsiders to the board enhances corporate performance”); CREDIT SUISSE RESEARCH INST., *GENDER DIVERSITY AND CORPORATE PERFORMANCE* (2012), available at [https://www.credit-suisse.com/newsletter/doc/gender\\_diversity.pdf](https://www.credit-suisse.com/newsletter/doc/gender_diversity.pdf) (testing “2,360 companies globally over the past six years” and reporting on average it’s better to “have invested in corporates with women on their management boards than in those without”; “companies with one or more women on the board have delivered higher average returns on equity, lower gearing, better average growth and higher price/book value multiples”); Øyvind Bøhren & R. Øystein Strøm, *Governance and Politics: Regulating Independence and Diversity in the Board Room*, 37 J. BUS. FIN. & ACCT. 1281, 1281 (2010) (finding a firm creates more shareholder value when there is not gender diversity on the board); Meredith B. Larkin et al., *Board Gender Diversity, Corporate Reputation and Market Performance*, 9 INT’L J. BANKING & FIN. 1 (2012) (indicating no statistical significance); Rey Dang & Duc Khuong Nguyen, *Does Board Gender Diversity Make a Difference?: New Evidence from Quantile Regression Analysis* (May 9, 2014) (unpublished manuscript), available at <http://ssrn.com/abstract=2434030> (highlighting there is no concrete data as to whether gender diversity has a positive or negative impact on board performance, and there are a lot of variables to be considered such as country, culture, industry, etc.); Loanna Boulouta, *Hidden Connections: The Link Between Board Gender Diversity and Corporate Social Performance*, 113 J. BUS. ETHICS 185 (2013) (suggesting the impact of board gender diversity depends on “the social performance metric used” to evaluate the firm’s performance); Stephen Gray & John Nowland, *Professional Expertise and Board Diversity* (Jan. 2014) (unpublished manuscript), available at <http://ssrn.com/abstract=2289689> (stating no relationship between “professional expertise diversity and firm value”); see also Catherine M. Daily et al., *A Decade of Corporate Women: Some Progress in the Boardroom, None in the Executive Suite*, 20 STRATEGIC MGMT. J. 93 (1999) (speaking to the complexity of women progressing into upper management and corporate board positions).

sity as positive, or simply neutral.<sup>21</sup>

With regard to the latter question, Professor Diana Bilimoria reports that as of 2006, “a substantive case for women corporate directors has yet to materialize . . .<sup>22</sup> partly due to the difficulty researchers have had in isolating the impact of a single director, or a very small group of directors, on corporate performance, although recent studies have begun to make strides in this direction.”<sup>23</sup> An additional research challenge offered by Bilimoria concerns the difficulty inherent in uncovering the level of corporate performance specifically attributable to *women* occupying the highest positions in corporate governance.<sup>24</sup>

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21. Ben-Amar et al., *supra* note 19, at 90; *see, e.g.*, Francoeur et al., *supra* note 15 (documenting a positive relation between gender and financial performance in the case of firms operating in riskier environments and contending the presence of women on boards appears to help deal with more complex strategic issues); Maria Strydom & Hue Hwa Au Yong, *The Token Woman* (Aug. 7, 2012) (unpublished working paper), available at <http://ssrn.com/abstract=2136737> (asserting firms with merely one female director will not see the positive correlation with firm performance that a firm with three female directors will experience); Adams & Ferreira, *supra* note 15, at 291 (finding no difference in firms’ financial performance around the appointment of a woman or a man as a CEO in the U.S., but female directors have a significant impact on board inputs and governance). More specifically, gender diverse boards allocate more effort to monitoring management, but “[t]he true relation between gender diversity and firm performance is complex.” *Id.* at 308. For instance, these authors find that the relation between gender diversity and firm performance is contingent upon the quality of governance. *Id.* “We find that diversity has a positive impact on performance in firms that otherwise have weak governance, as measured by their abilities to resist takeovers. In firms with strong governance, however, enforcing gender quotas in the boardroom could ultimately decrease shareholder value.” *Id.* *But see* Haslam et al., *supra* note 20 (concluding there a negative correlation between gender diverse boards and “stock-based performance measures”); *see also* Nor Raihan Mohamad et al., *The Effects of Board Independence, Board Diversity and Corporate Social Responsibility on Earnings Management* (Fin. Corporate Governance Conference, 2011), available at <http://ssrn.com/abstract=172592> (suggesting that firms with “board diversity tend to have lower earnings management”).

22. Diana Bilimoria, *The Relationship Between Women Corporate Directors and Women Corporate Officers*, 18 J. MANAGERIAL ISSUES 47, 47 (2006) (citing Diana Bilimoria, *Building the Business Case for Women Corporate Directors*, in WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES 27 (R.J. Burke & M.C. Mattis eds., 2000); R.J. Burke, *Women on Canadian Corporate Boards of Directors: Still A Long Way to Go*, in WOMEN ON CORPORATE BOARDS OF DIRECTORS: INTERNATIONAL CHALLENGES AND OPPORTUNITIES 97 (R.J. Burke & M.C. Mattis eds., 2000); *see also* Thomas W. Joo, *A Trip Through the Maze of “Corporate Democracy”: Shareholder Voice and Management Composition*, 77 ST. JOHN’S L. REV. 735 (2003) (contending the current wave of corporate governance reform has produced only marginal increases in shareholders’ opportunity to influence the composition of corporate management).

23. Bilimoria, *supra* note 22, at 47 (citing Carter et al., *supra* note 14).

24. *Id.* (emphasis added). *But see* E-mail from Ya-wen Yang, Assistant Professor of Accounting, Wake Forest University, to Lawrence J. Trautman (July 10, 2014, 11:00CST)

### C. SEC Diversity Statement Requirement

In late 2009, the SEC adopted a rule designed to assess individual company commitment to establishing and maintaining diversity on their board. Essentially, public companies “are now required to disclose whether diversity is a factor in considering candidates for nomination to the board of directors, and how the company assesses how effective the policy has been.”<sup>25</sup> SEC Commissioner Luis A. Aguilar puts the case for boardroom diversity this way, “as American businesses compete in both a global environment, and in a domestic marketplace that is, itself, growing more diverse . . . the ability to draw on a wide range of viewpoints, backgrounds, skills, and experience is critical to a company’s success.”<sup>26</sup>

As stated by Thomas Lee Hazen and Lissa L. Broome, this amended proxy disclosure rule designed to illuminate board diversity is a step in the right direction; it may even foster such discussion in board nominating committees.<sup>27</sup> Moreover, “[i]t supplements ongoing efforts by various groups focused on increasing board diversity, but does so in a way that is far less intrusive than the quota approach adopted in several other countries.”<sup>28</sup> However, companies and the SEC are clearly interpreting the rules in different ways, with the majority of companies differentiating “consideration” of diversity and diversity “policy.”<sup>29</sup> Ultimately, this has led to a call for the SEC to issue interpretive guidance on the amended rule.<sup>30</sup>

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(on file with author), *citing* Maretno Agus Harjoto et al., *Board Diversity and Corporate Risk Taking* (Mar. 21, 2014) (unpublished working paper), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2412634](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2412634) (showing that preliminary results and subject to change measuring board diversity in multiple dimensions, including gender, race, age, experience, tenure, and expertise; and finding that firms with more diverse boards are more risk averse, spending less on capital expenditure, R&D, and acquisitions, and exhibiting lower volatilities of stock returns and accounting returns than those with less diverse boards).

25. Luis A. Aguilar, Comm’r, Sec. Exch. Comm’n, Keynote Speech at the Hispanic Association of Corporate Responsibility—Corporate Directors Summit, Washington D.C.: An Update on Diversity and Financial Literacy (Apr. 30, 2011), available at <http://sec.gov/news/speech/2011/spch043011aa.htm>; see also Proxy Disclosure Enhancements, 74 Fed. Reg. 68, 334 (Dec. 23, 2009) (to be codified at 17. C.F.R. pt. 229) (explaining the adoption of certain amendments to rules that enhance information about proxy solicitations and other reports filed with the Securities and Exchange Commission).

26. Aguilar, *supra* note 25.

27. Thomas Lee Hazen & Lissa L., DAYTON L. REV. 39, 73 (2012).

28. *Id.*

29. *Id.* at 74.

30. See *id.* (urging the SEC to “issue interpretive guidance on the amended rule to explicate that any consideration of diversity in board nominations reflects a policy to consider diversity, therefore implementation and assessment of that policy must then be discussed”).

#### D. *Diversity Justified on Moral or Social Grounds*

It has been contended that promoting gender equality supports international financial institutions (IFIs), as well as private corporations.<sup>31</sup> Professor Darren Rosenblum explains,

These institutions derive moral legitimacy from the introduction of gender equality into their policy calculus. Corporations attempt to develop similar legitimacy through Corporate Social Responsibility (“CSR”) efforts. Women, men, and capital all benefit from this change, fortifying the corporations and IFIs that steer the world economy. A productive public/private symbiosis requires “public” values, such as economic empowerment for women and men, to institute rules and regulations like the CBQ in the “private” sector.<sup>32</sup>

Directors must be “people whom shareholders, employees, suppliers, customers and communities trust to ‘do the right thing.’”<sup>33</sup> Moreover, it has been noted by Lisa M. Fairfax, “today’s corporate form ‘enhances the probability that [board members] will respond in a principled fashion to the interests of all corporate constituencies simply through moral principles and social pressure.’”<sup>34</sup> Fairfax explains that in today’s world the broad understanding of corporate function allows corporate actors to now pursue actions that benefit both the company and the community, without needing to justify those actions through pure market returns.<sup>35</sup> Pointing out that courts have upheld charitable giving by boards based on the notion that such giving enhances a corporation’s community image, Fairfax contends that promoting board diversity for its own sake may therefore serve to enhance the public image of a corporation.<sup>36</sup>

Fairfax asserts that moral and social grounds may now justify diversity efforts since courts have begun allowing corporations the ability to forgo profits where doing so may benefit their employees, the community, and even society as a whole.<sup>37</sup> Thus, Fairfax argues, “rather than fitting their

31. Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 60 (2009).

32. *Id.*

33. Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 849–50 (quoting Ira M. Millstein, *A Perspective on Corporate Governance (Rules, Principles, or Both)*, in *THE ACCOUNTABLE CORPORATION* (2005)).

34. *Id.* (quoting Henry Hansmann & Reinier Kraakman, *What Is Corporate Law?*, in REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 1, 12 (2004)).

35. *Id.*

36. *Id.*

37. *Id.*

arguments into the shareholder primacy framework, diversity advocates should seek to push this broader concept of the corporation."<sup>38</sup>

The question becomes, then, must efforts to increase board diversity be justified by a business case argument?<sup>39</sup> Law Professor Barbara Black contends,

Given the poor performance of the boards of many leading financial institutions during the recent financial crisis, it is hard to believe that the presence of more women in the boardroom would have a deleterious effect on risk management oversight . . . . A business justification for increased female representation on corporate boards hardly seems necessary . . . . This is an issue of equal opportunity.<sup>40</sup>

### E. *Gender Dynamics*

George Washington University Professor, Gelaye Debebe describes the importance of gender by observing, “[g]ender reflects a socialization process that begins at birth.”<sup>41</sup> This process, deeply embedded throughout society,<sup>42</sup> establishes culturally created masculine and feminine identities and worldviews for men and women respectively.<sup>43</sup> While individuals seldom fully represent the ideals for their gender, men are expected to exhibit classically masculine behaviors whereas women are expected to exhibit similarly constructed feminine ones.<sup>44</sup> This typical means,

For most men, the career is a central life preoccupation that progresses in an upward trajectory. For women, careers are constructed in a fluid balance between private and professional roles, resulting in widely differing career trajectories. Women face pressure in balancing work and life demands since they still have primary responsibility for household responsibilities. This limits their participation in career-critical networking opportunities. Many women compensate by

38. *Id.*

39. Barbara Black, *Stalled: Gender Diversity of Corporate Boards*, 37 U. DAYTON L. REV. 7, 20 (2011).

40. *Id.*

41. Gelaye Debebe, *Creating a Safe Environment for Women’s Leadership Transformation*, 35 J. MGMT. EDU. 679, 681 (2011) (citing NANCY CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978); JEAN BAKER MILLER, *TOWARD A NEW PSYCHOLOGY OF WOMEN* (2d ed. 1986)).

42. *Id.*

43. *Id.* (citing CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT* (1982); JUDITH LORBER, *PARADOXES OF GENDER* (1994)).

44. *Id.* (citing BAKER MILLER, *supra* note 41; J.B. Miller, *The Development of Women’s Sense of Self*, in *WOMEN’S GROWTH IN CONNECTION: WRITINGS FROM THE STONE CENTER* 11 (J.V. Jordan et al. eds., 1991)).

developing parallel networks—with other women for support and with men for instrumental benefits. Unfortunately, women's efforts to manage the incongruity between organizational practice and their multiple roles is seen as evidence that they are not serious about their careers and not that organizations have failed to adapt to their needs.<sup>45</sup>

Professor Debebe describes the plight of women aspiring to top management roles by acknowledging, "As women advance into leadership roles, they face challenges exercising leadership. Consistent with societal gender-role expectations, they are expected to exhibit feminine behaviors, but when they do, they risk being regarded as ill-suited for leadership."<sup>46</sup> Such conflicting expectations for women result in organizational resistance when women lead.<sup>47</sup>

As pointed out by Professors Tatiana S. Manolova, Candida G. Brush, and Linda F. Edelman, the premise of social learning theory explains these workplace dynamics. Essentially, the particular socialization experienced by women often demeans confidence in their own ability to meet workplace expectations, ultimately preventing them from reaching their full potential.<sup>48</sup> They further highlight,

[A] variety of factors influence gender development (e.g. peers, media, educational practices, occupational systems) and explain differences in women's and men's socialization. In the entrepreneurial context, performance accomplishments and vicarious learning are two major sources of differences . . . Vicarious learning includes role models, sex role and occupational stereotypes that can increase efficacy expectations from observing others succeed.

A few empirical studies in entrepreneurship have tested these ideas. Early social learning experiences are related to career decisions, with males having higher preference for entrepreneurship. In a national study of entrepreneurial tendencies among youth, Kourilsky and Walstad found that females were less interested in starting a business and less confident in their abilities.<sup>49</sup>

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45. *Id.* at 682.

46. *Id.* (citing ALICE H. EAGLY, *SEX DIFFERENCES IN SOCIAL BEHAVIOR: A SOCIAL ROLE INTERPRETATION* (1987)).

47. *Id.* at 683 (citing S. MADDOCK, *CHALLENGING WOMEN: GENDER, CULTURE AND ORGANIZATION* (1999)).

48. Tatiana S. Manolova et al., *What Do Women (and Men) Want? Entrepreneurial Expectancies of Women and Men Nascent Entrepreneurs*, 27 *FRONTIERS OF ENTREPRENEURSHIP RES.*, no. 8, art. 2, at 2 (2007) (citing ALBERT BANDURA, *SOCIAL LEARNING THEORY* (1977); G. Hackett & Nancy E. Betz, *A Self-Efficacy Approach to the Career Development of Women*, 30 *J. APPLIED SOC. PSYCH.* 2137 (1981)).

49. Manolova et al., *supra* note 48, at 3.

Studies further suggest that the difference in the labor market between men and women stems from differences in perceptions, attitudes, or preferences.<sup>50</sup> Philipp Koellinger, Maria Minniti, and Christina Schade assert that “men and women see the world with ‘different eyes,’ and perceive the existence of opportunities and their ability to exploit them successfully in very different ways.”<sup>51</sup> As a result of their differences in perception and interpretation of information, men and women make vastly different choices.<sup>52</sup>

The difference between men and women extends further into small group decision-making.<sup>53</sup> Nancy McInerney-Lacombe and Diana Bilimoria’s research shows that “the level of trust at the board moderated the difficulty of the reception to the issue. Underpinning this trust was how well board members knew each other and what they had been through together.”<sup>54</sup> Significantly, trust for women was more of a “professional trust,” they trusted their colleagues to “do their homework” on an issue and vote for the right thing.<sup>55</sup> For men, trust was based in their relationship with the person: “[t]hey knew these guys . . . they knew which way they would vote . . . [it was a] more personal, almost familial way.”<sup>56</sup>

Inclusion verses exclusion has also proven to significantly differ for men and women. Women may not be seen as being part of the “in crowd,” and many of them simply did not care. Failing to be invited to drinks with the men following board meetings became a “non-event.”

50. Philipp Koellinger et al., *Seeing the World With Different Eyes: Gender Differences in Perceptions and the Propensity to Start a Business* 18 (Tinbergen Inst., Working Paper TI 2008-035/3, 2008) (citing Shane Frederick, *Cognitive Reflection and Decision Making*, 19 J. ECON. PERSP. 25 (2005); Uri Gneezy et al., *Performance in Competitive Environments: Gender Differences*, 118 Q. J. ECON. 1049 (2003); Uri Gneezy & Aldo Rustichini, *Gender and Competition at a Young Age*, 94 AM. ECON. REV. 377 (2004)), available at <http://www.ssrn.com/abstract=1115354>.

51. Koellinger et al., *supra* note 50.

52. *Id.*; see also Denise Loyd et al., *Social Category Diversity Promotes Pre-Meeting Elaboration: The Role of Relationship Focus*, in ORGANIZATION SCIENCE 2012 (Columbia Business School Research Paper No. 12/41, 2012), available at <http://ssrn.com/abstract=2120038> (discussing the effects of homogenous groups and their detrimental impact on group performance).

53. NANCY MCINERNEY-LACOMBE & DIANA BILIMORIA, DIRS. & BIDS. WINTER 2011, CHAMPIONING THE “TOUGH ISSUES,” at 42.

54. *Id.* at 43; see also Iris Bohnet & Steffen Huck, *Repetition and Reputation: Implications for Trust and Trustworthiness in the Short and in the Long Run* 1 (Kennedy Sch. of Gov’t, Working Paper No. RWP03-048, 2003), available at <http://ssrn.com/abstract=474544>.

55. MCINERNEY-LACOMBE & BILIMORIA, *supra* note 53, at 42–43.

56. *Id.*

The big concern women had regarding exclusion concerned having an actual voice in the meeting.<sup>57</sup>

Finally, influence also sharply differed between men and women. Nancy McInerney-Lacombe and Diana Bilimoria aptly described this difference:

Influence came with success. All directors came to the board with a track record, some more prestigious than others. This counted, particularly for the men. One male board member said, “We know who the good board members are and they get listened to.” For women, influence was more tactile. It was about the issue on the table. They worked hard and methodically to influence their board on important issues, and with each success their influence grew. It was, however, more about making a difference than making friends.<sup>58</sup>

Scholars have observed that, even without in-depth exploration into the ways that identify ultimately influences or ultimately shapes the development of leaders, it is clear that the related challenges differ for men and women.<sup>59</sup> Warren Bennis contends, “traditionally, it has been easier for men to make choices about their lives and define a self. Some have suggested that this may be more accurate in the case of white, upper class men, who have been encouraged and supported by society to advance in life.”<sup>60</sup> Moreover,

[E]ven these “privileged” men may be thwarted from defining themselves if their inner desires are not aligned with social expectations . . . . Men who are members of minority groups encounter even greater challenges because they have to overcome negative social expectations and cultural barriers to excel in domains that they have been traditionally denied.<sup>61</sup>

#### F. *Personal Identity and the Leadership Role*

“Social Identity” has been defined as, the “part of an individual’s self-concept which derives from his knowledge of his membership of a social

57. *Id.*

58. *Id.*

59. Gelaye Debebe & Kenneth A. Reinert, *Leading with Our Whole Selves: A Multiple Identity Approach to Leadership Development*, in *HANDBOOK ON RACE-ETHNICITY AND GENDER IN PSYCHOLOGY* 271 (M. Miville & A. Ferguson eds., 2012) (citing HENRI TAJFEL, *DIFFERENTIATION BETWEEN SOCIAL GROUPS AND SOCIAL CATEGORIES: STUDIES IN SOCIAL PSYCHOLOGY* (1978)).

60. *Id.*

61. *Id.*

group together with the value and emotional significance attached to that membership."<sup>62</sup> Debebe and Reinert observe,

Some of the most important social identities are based on race, gender, sexual orientation, class, nationality, ethnicity, religion, and physical ability . . . Identity is multifaceted and complex, comprised of many identities which are interrelated in ways that are unique to each individual. A personal identity emerges from this multiplicity, reflecting not how society has defined the individual on the basis of, sometimes conflicting, sociopolitical identities, but on the basis of the meaning an individual has made of these identities . . . Professional identity itself is gendered and favors men and masculinity, especially in some professions and in the leadership role.<sup>63</sup>

Interviews conducted with women who attended a women-only leadership conference, indicate that the participants are believed to have benefited from "recognition of shared experience along with a sense of belonging and acceptance . . . [And] participants felt they could open up and share without fear of rejection or negative self-presentation . . . [And] a sense of freedom to talk about gender-related concerns, concerns that are typically risky to address."<sup>64</sup> One moving story reveals such findings:

There was a board chair there. She was obviously a highly connected, powerful person, but she was really open about the sort of issues she faced as one of the only female board chairs at that time and working in a predominately male center. She never would have done that in a mixed-gender situation. She instantly felt comfortable. She wasn't speaking to us as "I'm the board chair and you're just whatever." She was speaking as a person. I think women tend to be less conscious of their levels of influence. At least in this context, she certainly was . . . And I think that in a mixed situation, you would never have that level of honesty.

[A] related aspect of uniqueness was the willingness to broach gender-related concerns, concerns that women find threatening to raise in mixed-gender settings for fear of being seen as weak or uncommitted. This was directly attributed to the all-female nature of

62. *Id.*

63. *Id.* (citing Joan Acker, *Hierarchies, Jobs, Bodies: A Theory of Gendered Organizations*, 4 *GENDER AND SOC'Y* 139 (1990)); LOTTE BAILYN, *BREAKING THE MOLD: WOMEN, MEN AND TIME IN THE NEW CORPORATE WORLD* (1993); Robin J. Ely & Debra E. Meyer-son, *Theories of Gender in Organizations: A New Approach to Organizational Analysis and Change*, 22 *RES. ORG. BEHAV.* 103, 113-14 (2000) (explaining that power imbalance among genders affects other social relations and strives to further preserve male superiority).

64. Debebe, *supra* note 41, at 695.

the setting. Being freed up to talk about these concerns enabled women to hear from others that they had valid concerns and that their experiences were shared.<sup>65</sup>

Urmi Ashar observes:

Fombrun and others have pointed out that reputation is a source of equity value. Good reputation can drive customers to buy more at higher prices, employees to bid up multiples, and regulators to cast a more benign eye. It is thus an epiphenomenon of the interplay between culture and operational matters, oversight and governance practices and its perception by stakeholders.

Put another way, corporate reputation isn't just about creating a nebulous branding statement that is associated with trustworthiness, reliability, honesty, product quality, or community responsibility. It's about a firm actually embodying all of those things, and setting up management and governance practices to ensure that the firm lives up to the values and investing truly "Diverse Board" is a key tactic.<sup>66</sup>

### III. DEMOGRAPHICS OF DIVERSITY

"Diversity is on the agenda, but the reality seems to suggest otherwise."<sup>67</sup>

#### A. *Progress Lags*

While American law, medical, and graduate business schools have been graduating women "since the mid-1970s at a 30% rate, escalating to well over 40% in the 1990s, women constitute only 3.5% of the corporate CEOs, 14% of the executive managers, and 12.5% of the corporate directors, holding approximately 16% of the board seats in the *Fortune 500*."<sup>68</sup> As pointed out by Professor Douglas M. Branson, no pipeline exists to

65. *Id.* at 694.

66. E-mail from Dr. Urmi Ashar, Adjunct Faculty, Carnegie Mellon University to Lawrence J. Trautman (Mar. 5, 2012) (on file with *The Scholar: St. Mary's Law Review on Race and Social Justice*) (citing Charles Fombrun & Cees Van Riel, *The Reputational Landscape*, 1 CORP. REPUTATION REV. 5 (1997)). See generally Toyah Miller & Maria Del Carmen Triana, *Demographic Diversity in the Boardroom: Mediators of the Board Diversity—Firm Performance Relationship*, 46 J. MGMT. STUD. 755 (2009).

67. SPENCER STUART, SPENCER STUART BOARD INDEX 2011 18 (2011), available at [https://content.spencerstuart.com/sswebsite/pdf/lib/SSBI\\_2011\\_final.pdf](https://content.spencerstuart.com/sswebsite/pdf/lib/SSBI_2011_final.pdf).

68. Douglas M. Branson, *Pathways for Women to Senior Management Positions and Board Seats: An A to Z List*, 2012 MICH. ST. L. REV. 1555, 1555 (citing *Media Announcements: No News Is Bad News: Women's Leadership Still Stalled in Corporate America*, CATALYST, <http://www.catalyst.org/media/no-news-bad-news-womens-leadership-still-stalled-corporate-america> (last visited Sept. 18, 2014)); cf. John Bussey, *Women, Welch Clash at Forum*, WALL ST. J. (May 4, 2012, 8:33 AM), available at <http://online.wsj.com/news/arti>

usher women smoothly from entry-level to higher executive corporate roles. Though women constitute approximately half of the overall U.S. workforce, as well as half of middle management, they remain disproportionately underrepresented at upper echelons of corporate governance.<sup>69</sup>

According to Professor Lisa Fairfax, “[a]s one might expect, there are many similarities between the circumstances of women directors and directors of color, which include African Americans, Latinos, and Asian Americans.”<sup>70</sup> She observes that immediately following the Civil Rights Movement, together, women and people of color began to comprise larger portions of corporate boards.<sup>71</sup> James Westphal and Laurie Milton found, that, in part, institutional pressure has resulted in higher demographic diversity across multiple characteristics.<sup>72</sup> In addition,

TIAA-CREF and several other major pension funds have filed blanket resolutions with companies that require them to create boards “composed of qualified individuals who reflect a diversity of experience, gender, and race.” For instance, a large chemicals firm was pressured to add directors with experience in other industries and a background in marketing or finance rather than engineering, while also appointing more women and ethnic minorities. It is routinely claimed or assumed that such demographic diversity should lead to less insular decision-making processes and greater openness to change. According to the president of TIAA-CREF, “people with diverse backgrounds contribute unique perspectives that greatly enrich discussions of critical issues . . . .” Many boards made up largely of industry insiders, or individuals with a particular functional back-

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cles/SB10001424052702303877604577382321364803912 (finding that in sixty of largest U.S. corporations, women hold 19% of C-suite positions).

69. Branson, *Pathways for Women to Senior Management Positions and Board Seats*, *supra* note 68, at 1555 (citing Black, *supra* note 39 (showing that women occupied 51.4% of middle management positions in 2011)). See also Floyd Norris, *In this Recession, Men Are Losing Jobs*, N.Y. TIMES, Mar. 19, 2009, <http://www.nytimes.com/2009/03/14/business/economy/14charts.html>. Cf. Bussey, *supra* note 68 (explaining that women hold 40% of manager positions in companies McKinsey analyzed); David F. Larcker & Brian Tayan, *Pioneering Women on Boards: Pathways of the First Female Directors* (Rock Center for Corp. Governance at Stanford University Closer Look Series: Topics, Issues and Controversies in Corporate Governance and Leadership, No. CGRP-35), available at <http://ssrn.com/abstract=2325026> (exploring the biographies of the first women to serve as directors in order to understand the different pathways women have taken to obtain board seats).

70. Lisa M. Fairfax, *Some Reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated With Women of Color*, 79 ST. JOHN'S L. REV. 1105, 1105 (2005).

71. *Id.*

72. James D. Westphal & Laurie P. Milton, *How Experience and Network Ties Affect the Influence of Demographic Minorities on Corporate Boards*, 45 ADM. SCI. Q. 366, 366 (2000).

ground, have appointed directors from outside the industry with experience in other functions, and the representation of women and racial minorities on boards has also gradually increased in recent years.<sup>73</sup>

Still, even with the progress made by women and people of color over the last several decades, these groups still constitute a relatively small percentage of board members.<sup>74</sup> Research by Korn/Ferry shows that, though women and ethnic minority members are not excluded from corporate boards, their participation rates have plateaued.<sup>75</sup> Furthermore,

The recent lack of progress has been similar across the three minority groups detailed in the proxy filings: African-Americans, Latinos and Asians. With the U.S. Census Bureau projecting that minorities will represent more than half of the U.S. population by 2050, it would seem that increasing ethnic diversity would, like gender diversity, offer a strategic benefit in reflecting the makeup of customers, shareholders and employees.<sup>76</sup>

Another concern is that even the most encouraging statistics do not reflect promising changes in board diversity.<sup>77</sup> Accordingly,

Much of the increase in women and minority directors over the last decade may reflect the same individuals sitting on more boards rather than the appointment of new individuals as directors. In addition, the Sarbanes-Oxley Act led many corporations to reduce overall board size, which means that the same number of women and minority directors may comprise a greater percentage of a *now smaller board*.<sup>78</sup>

Proxy data from the 2007 season as depicted in Table 1 is, unfortunately, dated since this survey was last published during 2009. However, it discloses a valuable look at historical trends.<sup>79</sup>

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73. *Id.* at 366–67 (citations omitted).

74. Fairfax, *supra* note 70, at 1110.

75. KORN/FERRY INST., 34TH ANNUAL BOARD OF DIRECTORS STUDY 6 (2009).

76. *Id.* at 7.

77. Deborah Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?* 3 (Rock Ctr. for Corporate Governance at Stanford University, Working Paper No. 89, 2010), available at <http://ssrn.com/abstract=1685615>.

78. *Id.* (emphasis added) (citing Joan MacLeod Heminway & Sarah White, *Wanted: Female Corporate Directors*, 29 PACE L. REV. 249 (2007)); DOUGLAS M. BRANSON, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* (2007), available at <http://ssrn.com/abstract=1685615>.

79. KORN/FERRY INST., *supra* note 75, at 18.

TABLE 1  
BOARDS HAVING ONE OR MORE OF THE  
FOLLOWING INDIVIDUALS

Proxy Data From	2007	2006	2005	2004	2003	2002	2001	1995
Retired executive (other companies)	96%	95%	95%	95%	94%	94%	93%	75%
Investor	93%	94%	94%	91%	91%	89%	91%	73%
CEO/COO (other companies)	78%	79%	80%	82%	83%	83%	82%	82%
Women	85%	85%	84%	82%	80%	79%	78%	69%
Former government official	52%	53%	55%	58%	59%	59%	56%	54%
Ethnic minority member	78%	76%	76%	76%	75%	71%	68%	47%
African-American	47%	46%	47%	47%	47%	44%	42%	34%
Latino	19%	19%	19%	18%	19%	17%	16%	9%
Asian	11%	10%	10%	11%	10%	10%	10%	4%
Academician	52%	55%	56%	58%	60%	59%	59%	53%
Commercial banker	26%	27%	27%	29%	30%	31%	30%	28%
Non-U.S. citizen	14%	14%	14%	15%	15%	16%	15%	17%

80

### B. Progress for Women

Research conducted by Catalyst, Inc.<sup>81</sup> reveals a clear correlation between past percentages of female board directors and future percentages of female corporate officers.<sup>82</sup> Additionally, “women board directors are a predictor of women corporate officers: the more women board directors a company has in the past, the more women corporate officers it will have in the future.”<sup>83</sup> Catalyst further contends that such findings matter because those companies with higher numbers of female board directors remain more likely to fill their leadership positions from “a broader, more inclusive talent pool that values skills and results regardless of gender.”<sup>84</sup> “[T]he analysis indicated that companies with two or more women board directors in 2001 would have 28% more women corporate

80. Source: KORN/FERRY INST., *supra* note 75.

81. *Who We Are*, CATALYST, <http://www.catalyst.org/who-we-are> (last visited Jan. 17, 2015) (describing Catalyst as “the leading nonprofit organization with a mission to expand opportunities for women and business”).

82. LOIS JOY, *ADVANCING WOMEN LEADERS: THE CONNECTION BETWEEN WOMEN BOARD DIRECTORS AND WOMEN CORPORATE OFFICERS 3* (2008), available at <http://catalyst.org/publication/273/advancing-women-leaders-the-connection-between-women-board-directors-and-women-corporate-officers>; see also Linda A. Bell, *Women-Led Firms and the Gender Gap in Top Executive Jobs* (IZA Discussion Paper No. 1689, 2005), available at <http://ssrn.com/abstract=773964> (acknowledging the likelihood of women being promoted into leadership positions increases when there are already women in that particular business or firm holding such positions).

83. *Id.*

84. *Id.*

officers in 2006 than companies with one woman board director in 2001.”<sup>85</sup>

A 2013 survey of S&P 500 companies reveals a large disconnect between the number of boards who said they were looking for women directors (54%) and the percentage of new directors who are women (24%).<sup>86</sup> Overall, seven percent of S&P 500 boards have no women, down slightly from 9% reported in the 2012 survey.<sup>87</sup> The number of S&P 500 companies having two or more women on their board reached two-thirds during 2013, up from just 41% of boards a decade ago and 61% during 2012.<sup>88</sup> The S&P 500 data shows that while nearly 93% of boards have at least one female director, women make up only 18% of all S&P 500 directors during 2013 compared with 17% a year earlier.<sup>89</sup> The average number of women serving on these larger-company boards during 2013 is 1.9, a slight increase from 1.8 during 2012.<sup>90</sup>

### C. Trophy Directors

Professor Douglas Branson criticizes the numbers of women directors reported by Catalyst (15.7% in 2010; 16.1% in 2011).<sup>91</sup> He believes that “Catalyst consistently fudges the number upward by reporting the number of directorships held by women as the number of women directors.”<sup>92</sup> He claims, “the latter number of (actual female bodies) is smaller.”<sup>93</sup> What accounts for the total number of directorships held by women being significantly larger than the number actual women who serve as directors? Branson explains this phenomenon results from “the prevalence

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85. *Id.*

86. STUART, *supra* note 67.

87. *Id.* at 17.

88. *Id.*

89. *Id.*

90. *Id.*

91. See Douglas M. Branson, *An Australian Perspective on a Global Phenomenon: Initiatives to Place Women on Corporate Boards of Directors* (Legal Studies Res. Paper Series, Working Paper No. 2012-13, 2012), available at <http://ssrn.com/abstract=2064087> (criticizing the accuracy of statistics generally, and then highlighting the discrepancies of the Catalyst report results).

92. *Id.* at 11.

93. *Id.* (citing BRANSON, NO SEAT AT THE TABLE, *supra* note 78, at 97), available at <http://ssrn.com/abstract=2064087>. “Advocacy groups such as Catalyst, Inc., broadcast statistics about women’s increased presence in business that seem misleading . . . . Catalyst, as well as journalists and others, report that 11.2% (in 1999-2000) or 13.6% (in 2004) of directors are women. What the statistics really say is that women hold 11.2 or 13.6 percent of the board seats, not that 11.2 or 13.6 of the directors are women.” *Id.* at n.49.

among women of ‘trophy’ directors in the U.S., women serving on four, five, six, or seven boards of directors.”<sup>94</sup> In fact,

Trophy director status is an almost non-existent phenomenon among male directors, most of whom are CEOs, many of whose boards today limit their outside involvement to one other board or no other boards at all . . . The fastest growing segment of U.S. board members has been women trophy directors: the number rising from nineteen to approximately eighty just between 2001 and 2006. U.S. public companies appoint the same women over and over.<sup>95</sup>

David H. Zhu, Wei Shen, & Amy Hillman provide a possible answer explaining this phenomenon: “a candidate’s prior social ties to incumbent directors tend to help the candidate obtain board appointments.”<sup>96</sup> Under this theory, prior ties such as these “helped incumbent directors recategorize a minority candidate as an in-group member even when the candidate is more different from them. In contrast, a minority candidate without such ties has to be more similar to the incumbents along other salient demographic dimensions to obtain the board appointment.”<sup>97</sup>

#### D. *Racial Minorities*

During 2011, 36.2% of the U.S. population consisted of people of color “(13.1% Black, 5.0% Asian, 16.7% Hispanic or Latino Origin, 1.2% American Indian and Alaska Native Persons, and .2% Native Hawaiian and Other Pacific Islander Persons).”<sup>98</sup> Citing 2010 census data, Catalyst also recognizes that during the decade between 2000 and 2010: the Hispanic population accounted for the majority of total U.S. population growth; “[t]he Asian population grew faster than any other major race group;” and California, the District of Columbia, Hawaii, and New Mexico [were] ‘majority-minority’ populations, meaning over 50% of the population was a ‘minority.’”<sup>99</sup> Among S&P 500 boards surveyed by Spencer Stuart, 56% of the boards report seeking minorities, yet only 18% of “new independent directors” are minorities.<sup>100</sup> In all, S&P 500 boards

94. *Id.* (citing BRANSON, NO SEAT AT THE TABLE, *supra* note 78, at 97), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2064087](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2064087).

95. *Id.*

96. David H. Zhu, Wei Shen & Amy J. Hillman, *Recategorization: The Selection of Minority Directors and Their Subsequent Roles on Boards*; see also David H. Zhu et al., *Recategorization of the In-Group: The Appointment of Demographically Different New Directors and Their Subsequent Positions on Corporate Boards*, 59 ADMIN. SCI. Q. 240 (2014).

97. Zhu, Shen & Hillman, *supra* note 96; see also Zhu et al., *supra* note 96.

98. *Quick Take: People of Color in the U.S.*, CATALYST (Oct. 1, 2013), <http://catalyst.org/publication/356/people-of-color-in-the-us>.

99. *Id.*

100. STUART, *supra* note 67, at 4.

added sixty directors with these profiles in 2013.<sup>101</sup> Spencer Stuart further observes, “the representation of different minorities among directors in the top 200 companies remained relatively stable from 2012.”<sup>102</sup>

- 8.9% of directors are African-American, versus about 8.7% last year . . . .
- 4.6% of directors are Hispanic/Latino, the same as in 2012. However, 46% of boards today have at least one Hispanic/Latino director, up from 35% in 2008.
- 1.9% of directors are of Asian descent, and 19% of boards have one or more Asian directors, up from 12% in 2008.<sup>103</sup>

The Alliance for Board Diversity finds that between 2004 and 2010 the total number of board seats among the Fortune 100 remained relatively the same, with the addition of only sixteen seats<sup>104</sup> Women gained sixteen seats—a total increase of 1.1 percentage points over six years—while the number of seats occupied by men remained unchanged.<sup>105</sup> Furthermore, within the minority groups, Asian Pacific Islander men and women gained twelve and three seats, respectively, and African-American men and women lost five seats and one seat, respectively.<sup>106</sup> The three seats gained by Hispanic women offset the three seats lost by Hispanic men.<sup>107</sup>

#### E. *Women of Color: A Particular Concern*

When measured against their percentages of the labor force and within professional schools, women of color account for a disproportionately smaller percentage of available board seats. Fairfax notes, “in 2003, women of color accounted for only 3% of the total available board seats at *Fortune 500* companies.”<sup>108</sup> These statistics should raise particular concern for the meaningful corporate participation of women of color, specifically.

101. *Id.* at 19.

102. *Id.*

103. *Id.*; see also Ruth Mateos de Cabo et al., *Jobs for the Boys?: The Glass Ceiling and the Market for Corporate Control* 1 (June 25, 2014) (unpublished working paper), available at <http://ssrn.com/abstract=2458545> (observing that Hispanic directors are less likely to be appointed to the board of a merged firm).

104. ALLIANCE FOR BD. DIVERSITY, MISSING PIECES: WOMEN AND MINORITIES ON FORTUNE 500 BOARDS: 2010 ALLIANCE FOR BOARD DIVERSITY CENSUS 4 (2010), available at [http://theabd.org/ABD\\_report.pdf](http://theabd.org/ABD_report.pdf).

105. *Id.* (summarizing a chart that states increases and decreases in seats per gender and ethnicity/race and finding that overall, there had been no change in the number of seats occupied by men).

106. *Id.*

107. *Id.*

108. Fairfax, *supra* note 70, at 1115.

#### IV. ATTRIBUTES, QUALITIES & SKILLS REQUIRED OF EVERY DIRECTOR

Let us now turn to examining the backgrounds of those who are newly elected to serve on boards. Based upon responses from directors of S&P 500 companies, Table 2 provides the following snapshot of the backgrounds of new independent directors.

TABLE 2  
NEW INDEPENDENT DIRECTOR BACKGROUNDS

Background	Year			2013 by Gender	
	2003	2008	2013	Men	Women
CEO/chair/president/COO/vice chair	44%	47%	46%	53%	24%
<i>Active</i>	32%	31%	23%	26%	12%
<i>Retired</i>	12%	16%	23%	27%	12%
Other corporate executives	12%	19%	21%	18%	34%
<i>Division/subsidiary presidents</i>	4%	10%	11%	11%	13%
<i>Line and functional leaders</i>	8%	9%	10%	7%	21%
Financial backgrounds	23%	18%	18%	16%	21%
<i>Financial executives/CFO/treasurers</i>	10%	9%	6%	5%	9%
<i>Bankers/investment bankers</i>	4%	4%	2%	2%	4%
<i>Investment managers/investors</i>	4%	4%	8%	7%	4%
<i>Public accounting executives**</i>	5%	1%	2%	2%	4%
Academic/nonprofit	10%	6%	4%	2%	9%
Consultants	4%	3%	3%	2%	6%
Lawyers	2%	3%	2%	2%	1%
Others***	5%	4%	6%	7%	5%

109

##### A. What Boards are Looking For in Director Candidates

What personal characteristics and attributes are nominating committees looking for in the recruitment of new directors? According to Spencer Stuart's 2013 Board Index, *see* Table 3, at the top of boards wish-lists are active CEOs and COOs, with 54% of respondents seeking current top executives, while 34% look for retirees from CEO/COO roles. Because the demand for these groups is greater than the supply, they represent

109. Source: STUART, *supra* note 67, at 10. N= 257 men and 82 women in 2013.

\*Except where noted, all include both active and retired executives.

\*\*All former partners or executives of accounting firms, except for one director who is currently active as the founder of a public company firm.

\*\*\*Includes retired government/military and physicians/medical research executives.

just 23% of new directors added during 2013.<sup>110</sup> As to actual results for minority and women recruitment efforts, the actual number also falls short of expressed demand by boards. While 56% of S&P 500 boards surveyed say they seek to bring on minorities, only 18% of new independent directors added in 2013 come from diverse ethnic backgrounds.<sup>111</sup> The same disparity holds true for women: 54% versus twenty-four percent.<sup>112</sup>

TABLE 3  
WISH LIST FOR NEW DIRECTOR BACKGROUNDS

Minorities	56%
Women	54%
Active CEO/COO	54%
Financial expertise	47%
International expertise	44%
Industry expertise	38%
Retired CEO/COO	34%
Risk expertise	25%
Computer /information technology expertise	22%
Marketing expertise	22%
Regulatory/government expertise	20%
Digital or Social Media Expertise	12%

113

#### B. Requirements for the Nominating and Governance Committee

While the full board is responsible for approving nominees for election as directors, the Nominating and Governance (N&G) Committee retains ultimate responsibility for reviewing and then recommending nominees to the larger board. Independent directors alone should comprise the N&G, as reflected in the rules of the New York Stock Exchange (NYSE) as well as each board's corporate governance guidelines.<sup>114</sup>

110. *Id.* at 11.

111. *Id.* at 19.

112. *Id.* at 11.

113. Source: *Id.* N=107 survey respondents. Percentages add up to more than 100 as respondents could select more than one category.

114. Trautman, *The Matrix*, *supra* note 6, at 81 (citing Disclosure Required By Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release Nos. 33-8177; 34-47235 (Jan. 24, 2003), available at <http://www.sec.gov/rules/final/33-8177a.htm>). See also Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval to Proposed Rule Change and Amendment No. 1 Thereto Modifying the Exchange's Independent Director and Audit Committee Corporate Governance Standards; see also Self-Regulatory Organizations; The NASDAQ Stock Market LLC; No-

### C. *Desired Personal Attributes*

Best practice dictate that “[e]very board should agree on a clear statement of desired personal attributes of all board members to provide guidance to the nominating and governance committee as they search for director candidates.”<sup>115</sup> As a starting point, most boards have identified necessary personal attributes for director candidates: “high standards of ethical behavior, availability, outstanding achievement in the individual’s personal and professional life, possession of strong interpersonal and communication skills, independence, and soundness of judgment.”<sup>116</sup>

### D. *Experience Attributes*

Company-specific variables will determine the best mix of director skills and experience.<sup>117</sup> Some of the most important of these include, but are not limited to: (1) the company lifecycle stage, (2) the extent to which international markets are mission critical to [the company’s] future (including a detailed understanding of target culture, markets and business risk), (3) unique technology dependence, and (4) the need for access to financial and capital markets.<sup>118</sup>

“Every board should also set forth a statement of desired experience attributes for each director candidate. These might include such characteristics as:

- *General business experience*—Possess a general understanding of elements related to the success of a company like ours in the current business environment.
- *Specific industry knowledge*—Possess a reasonable knowledge about our businesses.
- *Financial acumen*—Have a good understanding of business finance and financial statements.
- *Educational and professional background*—Possess a complementary set of skills within a framework of total board knowledge base.

tice of Filing and Immediate Effectiveness of Proposed Rule Change to the NASDAQ Listing Rules to Reflect Changes to the Rules of the Commission, Release No. 34-60094.

115. Trautman, *supra* note 6, at 82.

116. *Id.*

117. *Id.* at 77.

118. *Id.*; see also Joseph A. McCahery & Erik P.M. Vermeulen, *Understanding the Board of Directors After the Financial Crisis: Some Lessons for Europe*, 41 J.L. & Soc’y 121, 140–41 (2014), available at <http://ssrn.com/abstract=2398141> (explaining the importance of firm-specific board requirements in company management and growth); Suzanne M. Le Mire & George Gilligan, *Developing a More Complete Understanding of the Independence of Corporate Directors* (U. Adel. L. Research, Paper No. 20135, 2012), available at <http://ssrn.com/abstract=2180671>.

- *Diversity of background and viewpoint*—Bring to the board an appropriate level of diversity.
- *Other attributes*—Provide those special attributes identified as needed.”<sup>119</sup>

What about formal education requirements for directors? It has been suggested that “women who aspire in business need not major in accounting or finance . . . Managers uppermost in the hierarchy too will have lawyers, accountants and financial people around them who can help answer the questions, or seek out responses and answers.”<sup>120</sup> However, “the top dogs need to evaluate what underlings are saying as well as have a certain feel for and confidence in their understanding of markets, share prices, accounting numbers, projections, and the like.”<sup>121</sup> Douglas Branson suggests:

Aspirants . . . should at least have a course in a managerial accounting (not debits and credits but what are financial statements, what do they demonstrate and, more importantly what do they *not* tell you); a course in finance (corporate, not personal . . .); economics 101 (to develop a feel for supply and demand, for markets, and for how they work); and perhaps a course in stocks, commodities and investments . . . After that, major in French (Laura Sen, CEO at BJ’s Wholesale Club did, as well as did Mary Sammons, CEO at Rite Aid), or geography (Christina Gold at Western Union), or psychology (Irene Rosenfeld at Kraft Foods). Literacy and feel, not necessarily deep expertise, are the goals.<sup>122</sup>

#### E. *The Must Have: Audit Committee “Qualified Financial Expert”*

First, we look at the skill and experience requirements every board needs—absolute “must haves” (1) independent directors to populate the audit, compensation and nominating, and governance committees, and (2) qualified individuals who meet the definition of “financial expert” to serve on the audit committee. By having three individuals who qualify as financial experts, this allows one to serve as chairman of the audit committee, one to serve as a back-up designated as vice chairman for succession planning purposes, and a third qualified “financial expert” to serve while gaining in-service experience over-time and gaining an increased familiarity with the company’s pressing audit issues. New York Stock Exchange and SEC Rules require audit committees consist of “independ-

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119. Trautman, *supra* note 6, at 87.

120. Branson, *supra* note 68, at 1567.

121. *Id.*

122. *Id.* at 1567–68.

dent” directors, at least one as chair deemed to be qualified “financial expert.”<sup>123</sup> Professor Seletha R. Butler contends that recent SEC audit committee requirements “dilute[ ] the focus on accounting, auditing, and internal controls experience on the audit committee . . . [And] at the same time turned the page backwards on the potential for a greater number of women serving on the audit committee and in such expert role (and ultimately public company boards in general).”<sup>124</sup>

Just as the fulfillment of each director’s “duty of care” requires that a succession plan be in place to assure that the enterprise will be able to adapt with minimal disruption when a CEO unexpectedly dies or is incapacitated; so too, it seems, all audit committees should have preferably more than one experienced, qualified financial expert replacement waiting in the wings should the audit committee chair fall open unexpectedly. Information technology plays an increasingly critical role for almost every enterprise. Accordingly, the board’s responsibility to govern information technology should also dictate that one or more audit committee members have relevant skill and experience.<sup>125</sup>

#### F. *Prior Business & Corporate Governance Experience*

Engaging in corporate governance is a legally intensive endeavor. Directors are required to understand and adhere to numerous rules and regulations which come from a variety of course, including state law, evolving case law, and an increasing trend toward federalization of corporate governance with such laws as the 33 Act,<sup>126</sup> 34 Act,<sup>127</sup> Foreign Cor-

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123. Disclosure Required By Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, 68 Fed. Reg. (Jan. 31, 2003) (to be codified at 17 C.F.R. pt. 228); *see also* Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval to Proposed Rule Change and Amendment No. 1 Thereto Modifying the Exchange’s Independent Director and Audit Committee Corporate Governance Standards; *see also* Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the NASDAQ Listing Rules to Reflect Changes to the Rules of the Commission, 74 Fed. Reg. 28750 (June 17, 2009). *See also* Lawrence J. Trautman, *Who Qualifies as an Audit Committee Financial Expert Under SEC Regulations and NYSE Rules?*, 11 DEPAUL BUS. & COM. L.J. 205 (2013).

124. Seletha R. Butler, “*Financial Expert*”: *A Subtle Blow to the Pool and Current Pipeline of Women on Corporate Boards*, 14 GEO. J. GENDER & L. 1, 30 (2013).

125. *See generally* Lawrence J. Trautman & Kara Altenbaumer-Price, *The Board’s Responsibility for Information Technology Governance*, 28 J. MARSHALL J. COMPUTER & INFO. L. 313, 314 (2011) (assessing the need for company boards to provide more effective governance and leadership over information technology).

126. 15 U.S.C. § 77(a) (“Securities Exchange Act of 1933”).

127. 15 U.S.C. § 78(a) (“Securities Exchange Act of 1934”).

rupt Practices Act (FCPA),<sup>128</sup> Sarbanes-Oxley,<sup>129</sup> and, more recently, Dodd-Frank.<sup>130</sup> Accordingly, those minority candidates with a legal education are likely best suited to corporate governance work. Connections also can be a very valuable resource for a potential director; consequently, directors often hail from backgrounds such as that of CEO or director of former firms, or possibly even of nonprofit organizations.<sup>131</sup> Accordingly, “[t]hese connections can be useful to the firm, for a director with them brings along knowledge of practices and strategies at other firms and can identify acquisition targets and financing options.”<sup>132</sup>

The number of years of previous public board service is probably a good indication of the likelihood of directorship skills having been acquired. This assumes that the company where a director served previously benefited from skilled legal counsel so that directors without legal training have had an opportunity to pick up an understanding of director duties and responsibilities as they go. A strong resume of attending National Association of Corporate Directors (NACD) sponsored education and training is also a good indication that a candidate understands the legal pressure points of directorship.<sup>133</sup>

128. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 (2012)); Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA. L. & BUS. REV. 145, 147-48 (2011), (“[E]very director needs to be aware of the risks posed by the provisions of the Foreign Corrupt Practices Act to both the companies they serve and to themselves.”); Lawrence J. Trautman, Jason Triche & James C. Wetherbe, *Corporate Information Governance Under Fire*, 8 J. STRATEGIC & INT’L STU. 105 (2013), available at <http://ssrn.com/abstract=2314119>; Lawrence J. Trautman & George Michaely, *The SEC & The Internet: Regulating the Web of Deceit*, CONSUMER FIN. L.Q. REP. (forthcoming), available at <http://www.ssrn.com/abstract=1951148>; Lawrence J. Trautman & Kara Altenbaumer-Price, *Foreign Corrupt Practices Act: An Update on Enforcement and SEC and DOJ Guidance*, 41 SEC. REG. L.J. 241 (2013), available at <http://ssrn.com/abstract=2293382>; Lawrence J. Trautman & Kara Altenbaumer-Price, *Lawyers, Guns and Money—The Bribery Problem and U.K. Bribery Act*, 47 INT’L LAW. (Winter 2014), available at <http://www.ssrn.com/abstract=2276738>.

129. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, see also Lisa M. Fairfax, *Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability Under the Sarbanes-Oxley Act*, 55 RUTGERS L. REV. 1 (2002).

130. Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010) (enacted).

131. James A. Fanto et al., *Justifying Board Diversity*, 89 N.C.L. REV. 901, 910 (2011).

132. *Id.*

133. See generally *Our Philosophy*, NAT’L ASS’N CORP. DIR’S, <http://www.nacdonline.org/Education/?navItemNumber=527> (last visited Sept. 18, 2014) (“[T]he only membership organization dedicated exclusively to director education, director training and board research.”).

### G. Government and Regulatory Relations

A particularly important networking characteristic today comes from a director's government 'connections,' which usually arise from government service, generally in the executive branch. These connections can be particularly significant for firms in highly regulated industries or for those doing considerable business with the government. For example, a director within a network of existing and former government officials can assist executives with regulatory issues and advise them and the board on relevant legislative and regulatory changes, and they may even act as an indirect lobbyist for a firm.<sup>134</sup> Such experiences provide an avenue through which women and minorities may qualify for board service even without traditional qualifications such as serving as CEO.<sup>135</sup>

### H. Cultural Diversity and International Sales

International sales play an ever-increasing role for U.S. based companies. Yet many American boards lack the benefit of directors who are experienced in the culture, market channels, and the substantial legal, economic, and governmental risk associated with doing business abroad. For these reasons, N&G committees increasingly seek to add directors who have knowledge and experience in the international markets where they are either now doing business or expect to look for future growth.<sup>136</sup>

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134. Fanto et al., *supra* note 131, at 910–11 (observing that recently, a U.S. firm, Amerilink Telecom Corporation, decided to market telecommunications equipment made by a Chinese manufacturer); see Spencer E. Ante & Shayndi Raice, *Dignitaries Come on Board to Ease Huawei into U.S.*, WALL ST. J. (Sept. 21, 2010, 12:01 AM), <http://online.wsj.com/articles/SB10001424052748704416904575501892440266992>. Amerilink brought on its board of directors former House majority leader Richard Gephardt and former World Bank head James Wolfensohn to help the firm overcome security concerns by U.S. government officials over the use of Chinese telecommunications equipment in the United States. *Id.* Amerilink's founder and CEO is a former vice chairman of the Joint Chiefs of Staff. *Id.*)

135. Fanto et al., *supra* note 131, at 902 ("Examples come to mind, such as Vernon Jordan, who began as a civil rights lawyer, served as senior advisor to former President Bill Clinton, and now is an ultimate corporate insider with numerous director positions."); see *Vernon E. Jordan, Jr.*, AKIN, GUMP, STRAUSS, HAUER & FELD LLP, <http://www.akingump.com/vjordan> (last visited Sept. 18, 2014). For a brief biography of Mr. Jordan, see the website of Akin Gump Strauss Hauer & Feld, *id.*, where he is a senior counsel.

136. See, e.g., Lawrence J. Trautman, *American Entrepreneur in China: Potholes and Roadblocks on the Silk Road to Prosperity*, 12 WAKE FOREST J. BUS & INTELL. PROP. L. 427, 427 (2012) (discussing how an increase in commerce between the United States and China necessitates directors who understand the fundamental differences of doing business in China).

## V. THE POOL OF QUALIFIED CANDIDATES ISSUE

We have seen previously that most boards are looking for (1) prior CEO experience, (2) industry experience, and (3) prior directorship experience.<sup>137</sup> This in itself may be the very reason that minorities and women are underrepresented. As Fairfax has observed, “While there may be a variety of explanations for this lack of adequate representation, one factor appears to be that corporate boards draw their members from the corporate executive ranks where women and people of color occupy relatively few positions.”<sup>138</sup>

This idea is further backed by 2013 data that indicates that of the S&P 500 boards, only 18% are women.<sup>139</sup> While 93% of U.S. companies have at least one woman director,<sup>140</sup> “[t]his compares to 100% in Sweden (which has a mandate) and 10% in Japan.”<sup>141</sup> Sweden has 56% of their companies with three or more women on the board, compared with only 10% of US companies, and none for Japan.<sup>142</sup> A study of gender diversity and women’s presence on the boards of European Union banks found cultural differences “explain part of the heterogeneity in the presence of women on the boards, since we find significant differences among European countries.”<sup>143</sup>

A. *So What is the Disconnect?*

Many currently sitting directors believe their role is to “serve as advisors to the CEO and other major executives on significant, often strategic, issues related to the firm.”<sup>144</sup> Accordingly,

This function could limit the range of those who appear eligible for board membership. Individuals who could offer advice on such is-

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137. See generally STUART, *supra* note 67, at 11 (describing the qualities corporate boards look for in a new member).

138. Fairfax, *Some Reflections on the Diversity of Corporate Boards*, *supra* note 70, at 1112.

139. STUART, *supra* note 67, at 6.

140. *Id.*

141. PRICEWATERHOUSECOOPERS, LLP, CENT. FOR BD. GOVERNANCE, FALL 2011, CONTINUING THE CONVERSATION: BOARD RENEWAL (2011), available at <http://www.pwc.com/us/en/corporate-governance/publications/assets/corporate-board-diversity-continuing-the-conversation.pdf>.

142. *Id.*

143. Ruth Mateos de Cabo et al., *Gender Diversity on European Banks’ Board of Directors: Traces of Discrimination* 24 (Mar. 18, 2009) (unpublished working paper), available at <http://ssrn.com/abstract=1362593>.

144. Fanto et al., *supra* note 131, at 909 (citing Adams & Ferreira, *supra* note 15, at 291); Jonathan L. Johnson et al., *Boards of Directors: A Review and Research Agenda*, 22 J. MGMT. 409, 424–25 (1996).

sues based upon their experience must generally be those who are current or former CEOs, or who have had other significant executive responsibilities (e.g. president of a nonprofit) . . . *Indeed, a possible reason for the smaller representation of women and racial and ethnic minorities on public company boards is that members of these groups have not had the necessary executive experience to qualify them for the advisory function.*<sup>145</sup>

## B. Diversity Fatigue

Professor Douglas M. Branson provides a plausible reason for why the number of U.S. women on boards has remained “virtually unchanged since 2004 (a maximum variation of .05 since that year).”<sup>146</sup> Branson contends, “Some observers attribute this stall to ‘diversity fatigue,’ as U.S. boards and managements have been under severe pressure to add women, African American, Hispanic, and other diversity group members to their numbers.”<sup>147</sup> Moreover, some companies are still preoccupied with recovering from the financial upheavals beginning in 2007.<sup>148</sup> He does recognize a renewed interest—at least among academics—in seeing more women serve as corporate directors.<sup>149</sup> He continues:

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145. *Id.* at 909–10 (emphasis added) (citing Nancy M. Carter & Christine Silva, *Women in Management: Delusions of Progress*, HARV. BUS. REV., Mar. 2010, at 19, 19–21 (discussing the difficulties of women in advancing in management ranks); Herminia Ibarra et al., *Why Men Still Get More Promotions than Women*, HARV. BUS. REV., Sept. 2010, at 80, 82–85 (discussing the lack of appropriate mentoring for women that will take them into top management)).

146. Branson, *An Australian Perspective on a Global Phenomenon*, *supra* note 91, at 14 (comparing Press Release, Catalyst, Inc., Latest Catalyst Census Shows Women Still Not Scaling Corporate Ladder in 2010; New Study Indicates Clue to Reversing Trend (Dec. 13, 2010) (showing that 15.7% of Fortune 500 directors are women) with Press Release, Catalyst, Inc., Catalyst Census of the Fortune 500 Reveals Women Missing From Central Business Leadership, (Dec. 9, 2009)) (“[W]omen hold 15.2% of the board seats, a number that reflects little growth over the past 5 years.”).

147. *Id.* (discussing how “diversity fatigue” plagues efforts to put more women on boards and in executive positions).

148. *Id.* at 14–15; *see, e.g.*, Susan Vinnicombe et al., “The Female FSTE Report 2010 (12.5% figure in the UK represents ‘barely perceptible change’).”

149. Branson, *An Australian Perspective on a Global Phenomenon*, *supra* note 91, at 15; *see* Lissa L. Broome et al., *Does Critical Mass Matter?: Views from the Boardroom*, 34 SEATTLE U.L. REV. 1049 (2011); Fairfax, *Board Diversity Revisited*, *supra* note 1; Fanto et al., *supra* note 131, at 909; Julie C. Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, INT’L J. OF CONST. L. (2012); Kimberly D. Krawiec et al., *The Danger of Difference: Tensions in Directors’ Views of Corporate Board Diversity*, 2013 U. ILL. L. REV. 919 (2013) (“[M]ost directors proclaim that diverse boards are good; but very few can articulate their reasons for this belief.”).

[D]iversity in governance is a subject that receives short shrift, as opposed to women as judges, or as law firm partners, or as elected officials. Women in corporate governance often is limited to no more than ten to fifteen minutes, in a two day meeting, consigned to the smallest meeting room, in the most distant corner of the hotel, or not discussed at all. The subject begs for exposition because I strongly believe that women's increased participation in the upper echelons of Corporate America is the most promising pipeline to power existent.<sup>150</sup>

Professor Seletha R. Butler observes the need to draw women public company directors from pools other than that of current or retired CEOs of other public companies, given the low numbers of women historically filling those positions.<sup>151</sup> Therefore,

[I]t is imperative that nominating committees of public companies look to other qualified board candidates. Public company stakeholders must demand and keep consistent pressure on the nominating committee and other internal board composition decisionmakers to expand their pool of director candidates . . . . Nominating committees should look among other qualified professionals such as senior attorneys, academics, consultants, nonprofit executives, accountants and auditors.<sup>152</sup>

## VI. GLOBAL APPROACH TO DIVERSITY

Recent regulatory requirements in several European countries have fostered considerable debate and interest about board diversity. The appropriate framework for corporate governance has been the focus of recent reforms in many countries.<sup>153</sup>

### A. *European Trends*

Of particular interest in the recent European experience are the gender quotas for boards instituted in some jurisdictions. "Regulators have begun promoting broad diversity for societal and good-citizenship reasons (e.g., equal opportunity, equity, inclusiveness and recognition of systematic barriers to designated groups), and in the belief that diverse boards may produce more effective decision-making and mitigate group-think

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150. Branson, *supra* note 68, at 1557.

151. Butler, *supra* note 124, at 31.

152. *Id.*

153. See generally Marina Martynova & Luc Renneboog, *A Corporate Governance Index: Convergence and Diversity of National Corporate Governance Regulations 1* (Feb. 23, 2010) (unpublished working paper), available at <http://ssrn.com/abstract=1557627>.

within boardrooms.”<sup>154</sup> The European Professional Women’s Network in conjunction with Russell Reynolds Associates reports that during 2010:

Women comprise the 11.7% of boards at the top 300 European companies up from 9.7% in 2008 and 8.5% in 2006 . . . . Of a total 4,875 board seats, women occupy 571. As a result of quota legislation Norway remains at the top of the table with 37.9% women on boards. Portugal, Italy, Greece, Spain, Belgium, and France have more than doubled the number of women on boards; the introduction of Corporate Governance Codes together with equal access legislations currently under discussion in several countries is having a significant impact, as well as increased shareholder and media scrutiny of board membership.<sup>155</sup>

Professor Darren Rosenblum believes:

Norway’s Corporate Board Quota Law (“CBQ”) exposes the opportunities and complexities in rethinking the public/private relationship through gender.<sup>156</sup> The CBQ mandated that all publicly-listed corporations in Norway repopulate their boards to include at least 40% women by January 1, 2008. Norway’s dramatic intervention sought to feminize corporate leadership in one fell swoop, and it succeeded

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154. Richard Leblanc, *A Fact-Based Approach to Boardroom Diversity: The Research Record Shows Mixed Results from Quotas and Regulation*, 154 *INST. CORP. DIRECTORS* 6 (2011); see also Douglas M. Branson, *Women on Boards of Directors: A Global Snapshot* (U. Pitt. L. Studies Research Paper No. 2011–05, 2011), available at <http://www.ssrn.com/abstract=1762615>; Paul L. Davies & Klaus J. Hopt, *Boards in Europe: Accountability and Convergence*, 61 *AM. J. COMPARATIVE L.* 301 (2013); Siri A. Terjesen et al., *Legislating a Woman’s Seat on the Board: Institutional Factors Driving Gender Quotas for Boards of Directors*, *J. BUS. ETHICS* (Feb. 2014); David A. Matsa & Amalia R. Miller, *A Female Style in Corporate Leadership? Evidence from Quotas*, 5 *AM. ECON. J. APPLIED ECON.* 136 (2013) (finding that affected firms undertook fewer workforce reductions than comparison firms, increasing relative labor costs and employment levels and reducing short-term profits). The effects are strongest among firms without female board members beforehand and are present even for boards with older and more experienced members afterward. *Id.* Also found that the boards appear to be affecting corporate strategy in part by selecting likeminded executives. *Id.*

155. Press Release, Eur. Prof’l Women’s Network & Russell Reynolds Assocs., Fourth Bi-Annual EuropeanPWN BoardWomen Monitor 2010 1 (Oct. 4, 2010), available at [http://epwn.memberclicks.net/assets/docs/PressReleases/4th\\_bwm\\_2010\\_press\\_release\\_04-10-2010.pdf](http://epwn.memberclicks.net/assets/docs/PressReleases/4th_bwm_2010_press_release_04-10-2010.pdf) (last viewed Sept. 19, 2014).

156. Rosenblum, *supra* note 31, at 56; Aleksandra Gregoric et al., *Changing the Corporate Elite? Not so Easy: Female Directors’ Appointments onto Corporate Boards* (Research Inst. for Indus. Econ., Working Paper No. 978, 2013), available at <http://ssrn.com/abstract=2328151> (sampling 387 publicly-traded Nordic corporations during 2001–2008 and finding that new female appointments will not only depend on the current share of women on board but also on the current (minority) share of board positions held by male directors who are not prototypical of the established elite).

in doing so. Noncompliance would result in dissolution of the corporation.<sup>157</sup>

In France, a new law became effective on January 2011, requiring 20% female directors within the next three years in all companies listed on the Paris stock exchange, followed by 40% within six years. Spain similarly introduced quotas of 40% female directors in the board.<sup>158</sup> Table 4 presents the most recent data available for board seats held by women, by country.

TABLE 4  
BOARD SEATS HELD BY WOMEN, BY COUNTRY

Countries	% Women	Countries	% Women
Norway	40.5	Switzerland	10
Sweden	27	Thailand	9.7
Finland	26.8	Spain	9.5
France	18.3	Hong Kong	9.6
United Kingdom	20.7	Belgium	9.2
Denmark	17.2	Ireland	8.7
South Africa	17.1	Italy	8.2
Netherlands	17	China	8.1
United States	16.9	Malaysia	7.8
Israel	16.6	Brazil	7.7
Germany	14.1	New Zealand	7.5
Poland	13.6	Indonesia	6
Turkey	12.7	Mexico	5.8
Australia	12.3	Russia	4.8
Canada	12.1	India	4.7

159

157. *Id.* at 57.

158. Tineke Lambooy, *30% Women on Boards: New Law in the Netherlands*, (U. Oslo Faculty of L. Res., Paper No. 2012-4, 57-58, 2012), available at <http://www.ssrn.com/abstract=2083449>; see also Rey Dang, *Women's Progression on French Corporate Board: Theoretical and Empirical Analysis of the SBF 120 Index, 2000-2009* (Oct. 17, 2011) (unpublished working paper), available at <http://ssrn.com/abstract=1945189> (earlier study of women on corporate boards in France); Annick Masselot & Anthony Maymont, *Balanced Representation Between Men and Women in Business Law: The French 'Quota' System to the Test of EU Legislation 3* (Ctr. for Eur. Law and Legal Stud. Online Paper Series, University of Leeds 2014), available at <http://ssrn.com/abstract=2459916> (comparing and contrasting the French and EU methods used to achieve greater gender balance on company boards).

159. *Quick Take: Women on Boards*, CATALYST (Mar. 3, 2014), <http://www.catalyst.org/knowledge/women-boards>; see Carlo Drago et al., *The Role of Women in the Italian Network of Boards of Directors, 2003-2010* (Univ. of Verona Dep't of Econ., Working Paper No. 10, July 2011), available at [http://www.academia.edu/2747920/The\\_Role\\_of\\_Wo](http://www.academia.edu/2747920/The_Role_of_Wo)

Professor Charlotte Villiers compared approaches taken by various European countries to address the corporate governance gender inequality problem. For instance, Great Britain adopted a voluntary approach without quotas that proved unsuccessful.<sup>160</sup> Norway's system, on the other hand, stands ready to impose sanctions on companies that do not comply by forcing them to dissolve.<sup>161</sup> This Norwegian measure turned out to be effective and, in 2009, Norwegian public company boards were comprised, on average, of 44% females.<sup>162</sup>

Mijntje Lückerath-Rovers contends, "[i]t is surprising that so little attention is given to diversity in corporate governance codes when a homogeneous board poses a direct threat to an independent board, and independency is a key message in each corporate governance code."<sup>163</sup> As in the United States, "although the discussion about greater diversity in the Board has intensified internationally, this has not yet led to changes in international corporate governance codes (with the exception of Spain and the Netherlands)."<sup>164</sup> The five countries studied by Professor Lückerath-Rovers—France, Germany, Spain, The Netherlands, and

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men\_in\_the\_Italian\_Network\_of\_Boards\_of\_Directors (analyzing the network of women on boards in Italy); Silvia Del Prete & Maria Lucia Stefani, *Women on Italian Bank Boards: Are they "Gold Dust?"*, BANK OF ITALY OCCASIONAL PAPERS No. 175 (2013) (discussing the detriments of the gender gap in Italian banks); Magda Bianco et al., *Women on Corporate Boards in Italy* (Bank of Italy Occasional Paper, Working Paper No. 174, 2013), available at <http://ssrn.com/abstract=2297407> (examining the "presence of women in Italian corporate boards before the introduction of Law 120/2012"); Shital Jhunjunwala & R.K. Mishra, *Board Diversity and Corporate Performance: The Indian Evidence*, 11 IUP J. CORP. GOVERNANCE 71 (2012); Arunima Halda et al., *Board Room Diversity and Firm Value: Evidence from India* (Mar. 18, 2014) (unpublished working paper) (on file with Indian Institute of Technology) (finding significant positive relationship between board diversity and firm value among 500 large Indian firms); N. Balasubramanian, *Gender Equality, Inclusivity, and Corporate Governance in India*, 19 J. HUMAN VALUES 15 (2013) (finding Indian corporate boards still too thinly populated with women directors; active involvement of women in policy making legislative bodies such as the parliament during post-independence India is minimal).

160. Balasubramanian, *supra* note 159 (citing Charlotte Villiers, *Women on Boards: Report from the UK*, *European Company Law* no. 2/3, 94–99 (2011).

161. *Id.*

162. *Id.*

163. Mijntje Lückerath-Rovers, *A Comparison of Gender Diversity in the Corporate Governance Codes of France, Germany, Spain, the Netherlands and the United Kingdom* 29 (Apr. 6, 2010) (unpublished working paper), available at <http://ssrn.com/abstract=1585280>; see Mijntje Lückerath-Rovers, *Five Years After Lehman Brothers: Still Too Few Sisters—Gender Diversity in the Board in the Netherlands*, (Apr. 30, 2014) (unpublished working paper), available at <http://ssrn.com/abstract=2430871> (discussing how the economic collapse caused by Lehman Brothers would not have happened had there been more women on corporate boards).

164. Lückerath-Rovers, *supra* note 163, at 28.

the UK—deal differently with the issue of the presence of women on corporate boards. Accordingly,

In three countries (France, Germany, and UK) the demographic characteristics of directors is not a subject in the relevant corporate governance codes. In The Netherlands this has changed only since January 2009 and some guidance is given on the importance of obtaining a diverse board. Spain has installed both a law that obliges companies to adopt a more diverse composition of the board as the corporate governance code especially addresses the issue.

Most countries (except for the UK) do have a voluntary charter to increase diversity which has been signed by numerous companies in the relevant countries including the major listed companies. However, these charters have different background and often do not only focus on gender but address diversity from a very broad perspective (ethnicity, disabled persons) and with very broad societal intentions (including discrimination in general).<sup>165</sup>

In Poland, women have encountered difficulty advancing within the corporate setting. Professor Leszek Bohdanowicz observes, “[a]ccording to Hofstede’s cultural dimension theory (1993), Polish culture is a rather masculine one. In such cultures, women encounter more barriers in their professional carriers, but, at the same time, they reveal more masculine traits such as assertiveness and goal achievement, which help them, overcome the obstacles.”<sup>166</sup> In addition, Polish women have difficulty advancing “to management and director positions. As a result, the number and share of women on supervisory and management boards in Polish listed companies is low, and Polish companies are not able to utilize the advantages of board diversity.”<sup>167</sup>

## B. United Kingdom

The 2014 Cranfield Board Report shows that “women now account for 20.7% of board positions in the FTSE100—up from 12.5% in 2011 and 17.3% in April 2013.”<sup>168</sup> Maria Miller, Minister for Women and Equalities states, “Women don’t need special treatment they just need a modernized workplace that gives them a level playing field. Supporting

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165. *Id.* at 28–29.

166. Bohdanowicz, *supra* note 5, at 21 (citing Gert Hofstede, *Cultural Constraints in Management Theories*, 7 *ACAD. MGMT. EXEC.* 81 (1993), available at <http://ssrn.com/abstract=2117870>).

167. *Id.*

168. Press Release, Dep’t of Bus. Et al., Women on Boards 2014: 3 Years On, (Mar. 26, 2014), available at <https://www.gov.uk/government/news/women-on-boards-2014-3-years-on>.

women to fulfill their full potential should be a core business issue . . . for the long term sustainability of our economy.”<sup>169</sup> Furthermore,

- As of 3 March 2014, in the FTSE100:
- women now account for 20.7% of overall board directorships, up from 17.3% in April 2013
- of this, women account for 25.5% of non-executive directorships and 6.9% of executive directorships
- women account for 231 of the 1,117 FTSE100 board positions
- women account for 28% of all board appointments in 2013/14
- there remain 2 all-male boards – Glencore Xstrata and Antofagasta
- fewer than 50 new women appointments need to be made to reach the 25% target
- In the FTSE 250 the figures show:
- women now account for 15.6% of overall board directorships, up from 13.2% in 2013
- of this, women account for 19.6% of non-executive directorships and 5.3% of executive directorships
- women account for 33% of all board appointments in 2013/14
- there remain 48 all-male boards<sup>170</sup>

TABLE 5  
FTSE 100 AND FTSE 250 COMPARISONS

March 2014	FTSE 100	FTSE 250
Female held directorships	231 (20.7%)	310 (15.6%)
Female non-executive directorships	20 (6.9%)	29 (5.3%)
Female non-executive directorships	211 (25.5%)	281 (19.6%)
Companies with female directors	98	202
Companies with at least 25% women directors	36	51

171

As shown in Table 5, the percentage of women directors is smaller among the FTSE 250 companies.<sup>172</sup> Vinnicombe, Doldor & Turner re-

169. *Id.*

170. *Id.*; see also Ian Gregory-Smith et al., *Appointments, Pay, and Performance in UK Boardrooms by Gender*, 124 *ECON. J.* F019 (2014) (discussing appointments, pay, and performance in United Kingdom boardrooms by gender).

171. Source: SUSAN VINNICOMBE ET AL., CRANFIELD INT’L CENT. FOR WOMEN, THE FEMALE FTSE BOARD REPORT 2014: CROSSING THE FINISH LINE 4 (2014), available at <http://www.som.cranfield.ac.uk/som/dinamic-content/research/ftse/The%20Female%20FTSE%20Board%20Report%202014.pdf>.

172. *Id.*

port that, “we have seen three major breakthroughs on FTSE 100 boards: the percentage of women on them has broken the 20% level (20.7%), the number of women on them has exceeded the 200 mark (205) and the number of all male boards has dropped to two.”<sup>173</sup> In their foreword to the Cranfield University report, the Right Honourable Maria Miller MP and Right Honourable Vince Cable MP state,

The UK’s voluntary approach to Women on Boards is under intense scrutiny, with several countries in Europe—France, Italy and Germany—introducing legislative measures to tackle this problem. The world is watching to see whether British business can deliver real change by voluntary means that create a lasting cultural shift. Failure to achieve the goal would again bring EU pressure to enact their compulsory measures.<sup>174</sup>

### C. Canada

In Canada, as reported by Aaron Dhir, the boardroom diversity landscape is “grim” and reveals “a culture of widespread gender and racial homogeneity.”<sup>175</sup> Moreover,

The evidence does not appear to fully support businesses’ perception of a widespread pool problem. Instead, it seems that a more fruitful explanation can be rooted in the cognitive processes and structures that inform corporate decision-making. Attempts by Canadian civil society organizations and others to advance the market-based argument that board diversification will improve organizational performance can to some degree be grounded in the empirical literature to date. However, Canadian firms may be perpetuating environments that actively stifle factors which might otherwise enable them to successfully leverage diversity. Further, the market-based approach is not without its disadvantages. Despite its attractiveness as a political strategy, it should be treated with great caution. In assessing avenues for reform, consideration should be given to particular features of the legal culture and practice that shape the director nomination process, shareholder proposals and existing governance principles. As currently formulated, these features may facilitate board homogeneity and undermine future efforts at diversification. It is my hope that progress on these fronts will be the first step in building a more inclusive and equitable edifice of corporate governance.<sup>176</sup>

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173. *Id.*

174. *Id.* at 1.

175. Aaron A. Dhir, *Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity*, 35 QUEEN’S L.J. 569, 623 (2010).

176. *Id.*

#### D. Pacific Region

On the Pacific Rim, Australia leads among the countries from which statistics are available [for females serving on publicly held company boards], with 13.8%,<sup>177</sup> New Zealand follows with approximately 10%.<sup>178</sup> Others in the queue include Hong Kong (8.9%),<sup>179</sup> and Peoples Republic of China (7.2%).<sup>180</sup> The caboose is Japan (1.4%).<sup>181</sup>

### VII. UNCONSCIOUS RACIAL BIASES AND DIRECTOR SELECTION

Professor Aaron Dhir has provided invaluable review and analysis of the literature of psychological science, which can be applied in this context. He suggests that barriers to the advancement of women and people of color to the corporate boardroom include “implicit cognitive bi-

177. Branson, *supra* note 91, at 10 (citing Catherine Dunn, *Global Increase in Women on Corporate Boards; U.S. Lags*, Legal Intelligencer (Mar. 12, 2012), <http://www.thelegalintelligencer.com/id=1202545154264/Global-Increase-in-Women-on-Boards-US-Lags?slreturn=20140819143807>). Cf. Ruth Williams, *Crunching the Gender Numbers*, SIDNEY MORNING HERALD (Oct. 11, 2011), <http://www.smh.com.au/business/crunching-the-gender-numbers-20111014-11p8l.html> (showing an August 2011 statistic of 13%); Teresa Ooi, *Women Groomed in the Art of Smashing the Glass Ceiling*, THE AUSTRALIAN (Jan. 25, 2011, 12:00 AM), <http://www.theaustralian.com.au/business/women-groomed-in-art-of-smashing-glass-ceilings/story-e6frg8zx-1225993879008?nk=4a21ad2ec3b30a8d179b7068132321e6> (showing 10.6% early in 2011).

178. Branson, *supra* note 91, at 10 (citing Brian Gaynor, *Shallow Pool of Directors Needs Deepening*, NEW ZEALAND HERALD (May 7, 2011, 5:30 AM), [http://www.nzherald.co.nz/business/news/article.cfm?c\\_id=3&objectid=10723870](http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10723870)). Cf. N.Z. HUMAN RIGHTS COMM’N, NEW ZEALAND CENSUS OF WOMEN’S PARTICIPATION 2010 6 (2010), available at [http://www.hrc.co.nz/hrc\\_new/hrc/cms/files/documents/05-Nov-2010\\_09-29-40\\_HRC\\_Womens\\_Census\\_2010\\_WEB.pdf](http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/05-Nov-2010_09-29-40_HRC_Womens_Census_2010_WEB.pdf).

179. Branson, *supra* note 91, at 10 (citing Shalini Mahtani & Kate Vernon, *Women on Boards: Hang Seng Index 2009*, CMTY. BUS. LTD., 2009, at 16).

180. *Id.* (citing MICHELLE WEBSTER, *WOMEN ON CORPORATE BOARDS IN JAPAN, CHINA AND HONG KONG: THEIR ROLES AND PROSPECTS* 8 (2010) (unpublished seminar paper) (on file with *The Scholar: St. Mary’s Law Review on Race and Social Justice*); *Quick Take: Women in the Labor Force in China*, CATALYST (Apr. 4, 2012), <http://www.catalyst.org/knowledge/women-labor-force-china>.

181. *Id.*; see also Nirosha Hewa Wellalage & Stuart Locke, *Women on Board, Firm Financial Performance and Agency Costs*, 2 ASIAN J. BUS. ETHICS 113 (2013) (finding that “gender board diversity has an effect on Sri Lankan listed companies’ financial performance and agency costs . . . and that as board gender diversity increases, so does firm agency conflict “while decreasing firm financial performance.”).

ases.”<sup>182</sup> Dhir notes, “[i]mplicit social cognitions are a form of ‘unconscious cognitive involvement.’”<sup>183</sup> He continues to explain:

Judgments are instinctively and unintentionally generated, and may even contradict the individual’s explicit philosophies and beliefs.<sup>184</sup> Levels of implicit bias can be measured through a social psychology tool known as the “Implicit Association Test.” With respect to race, a study analyzing the results of 2.5 million completed tests reveals that almost 70% of participants exhibited white-positive, black-negative biases. Applying these concepts to the sphere of corporate governance, a recent U.S. study in the field of applied psychology examined the issue of race and corporate leadership through the lens of leadership categorization theory. Whether an individual is given a leadership position was found to be partly contingent on an evaluation of his or her leadership competencies, which will be most positive if the individual is thought to demonstrate characteristics that fit within an overall leadership organizing principle or prototype. Startlingly, *the authors found that “being white” was viewed as a characteristic of the leadership prototype.* Consequentially, decision-makers are more apt to prefer whites, who are judged as being “more effective leaders” and as possessing “more leadership potential.” Whites, therefore, “may be more likely to be promoted to leadership positions more frequently.”

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182. Dhir, *supra* note 175, at 569; *see also* Joan MacLeod Heminway, *Sex, Trust, and Corporate Boards*, 18 HASTINGS WOMEN L.J. 173, (2007) (finding that “men and women trust and are trustworthy on different bases” and that there is a bias against women in corporate leadership positions). Based on this research and current legal scholarship on corporate governance, the essay asserts that gender diversity on corporate boards may be desirable but difficult to attain. *Id.*; Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759 (2011) (observing that while “diversity” evokes universal acclaim in the abstract, our respondents’ narratives demonstrate that it is an elusive and even dangerous subject to talk about concretely).

183. Dhir, *supra* note 175, at 579 (citing Anthony G. Greenwald & Mahzarin R. Banaji, *Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes*, 102 PSYCH. REV. 4, 5 (1995)).

184. *Id.* (citing Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006)); *see also* Kathleen A. Farrell & Philip L. Hersch, *Additions to Corporate Boards: Does Gender Matter?* (Nov. 28, 2001) (Wichita St. U. Dep’t of Econ.) (unpublished working paper), available at <http://ssrn.com/abstract=292281> (“[T]he probability of adding a woman is substantially increased whenever a woman departs the board relative to the departure of a male outside director . . . . [T]he overall increase in female board representation during the past decade was due to a greater demand for diversity, rather than simply an increase in the pool of qualified female board candidates.”).

The findings of this study resonate with the robust body of work on inter-group relationships. This work has invariably revealed a human tendency toward in-group favoritism. The predilection for one's own kind is "overwhelmingly" demonstrated in groups that enjoy social privilege. Wade discusses a similar idea within the context of empathy. She cogently argues that white male corporate managers and directors customarily promote white males, with whom they can more easily empathize. The idea that monolithic institutions will reproduce themselves with monolithic inheritors has also been explained as a function of trust. Life in the corporate sphere is inherently unpredictable and therefore pressure-inducing. Appointing a trusted person to a leadership position creates a sense of predictability and order. However, because meaningful personal relationships are not always present in the firm hierarchy, trust is based less on interpersonal awareness and more on outward indicia of similarity, such as race . . . . In other words, like heuristics (psychological shortcuts or intuitive judgments that may result in patterns of mistake), subconsciously held biases can be abrogated and individuals left "debiased." *What is the implication of this for corporate governance? The cognitive biases of the predominantly white and male class of directors can be alleviated as they become better acquainted with candidates that fall outside of the existing leadership paradigm, and as they engage in cross-racial/gender learning.*<sup>185</sup>

#### VIII. ACHIEVING INCREASED BOARD DIVERSITY: SPECIAL CONSIDERATIONS

What is the most likely path for achieving increased board diversity? The answer to the promise of increased boardroom access seems to lie in penetrating the board skills most in demand by governance and nominating committees. An examination of the following pathways to the boardroom includes business schools; entrepreneurship; auditing, accounting and finance; the legal profession; academia and non-profits; and a brief comment about the "glass Cliff" phenomenon. Although specifically focusing on women, Professor Seletha R. Butler's comments appear to apply equally to all underrepresented minorities when she writes, "women need to gain the skills needed for successful opportunities in quantitative areas, such as accounting, finance, and mathematics earlier in life, especially because quantitative skills require years of development."<sup>186</sup>

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185. Dhir, *supra* note 175, at 579–581 (citations omitted) (emphasis added).

186. Seletha R. Butler, 'Financial Expert': A Subtle Blow to the Pool and Current Pipeline of Women on Corporate Boards, 14 *Geo. J. Gender & L.* 1, 31–32 (2013).

Public companies and other organizations should start programs to expose and train the education community to better prepare women for corporate advancement. For example, programs on “financial literacy,” including financial accounting, financial reporting, auditing, internal controls methodology, corporate finance, and risk management could greatly improve opportunities for women.<sup>187</sup>

Also, organizations can even develop a program that fosters the interest and development of girls in accounting and finance in addition to existing focuses of girls in the science, technology, engineering, and mathematics (STEM) area.<sup>188</sup> Because many girls and women often are not exposed or encouraged to pursue or develop their interests and skills in the quantitative fields, primary and secondary educational institutions, community educational enhancement programs, and higher educational platforms must invest resources in getting girls and young women involved in programs and curricula which focuses on quantitative skill development.<sup>189</sup>

#### A. *Business School Enrollment*

What do we know about women who have actually become CEOs of major corporations? Professor Douglas Branson reports “of twenty female CEOs analyzed in 2010, twelve had MBAs, one an MSEE (Ursula Burns at Xerox), and one a JD (Angela Braley at Wellpoint).”<sup>190</sup> As we learn from Table 3, the “Wish List for New Director Backgrounds,” 54% of board searches during 2013 seek active CEO/COO experience.<sup>191</sup> Since boards have a decided preference for CEOs, the movement of more women into top leadership positions, may likely produce a growing group of women directors.<sup>192</sup> Professor Diana Bilimoria contends the greater presence of women “in positions of visible power and legitimacy may help break down the barriers that constrain top corporate women from effective representation and recognition. In these ways, the visible presence of women corporate directors may indirectly encourage and support women’s effective representation in high-level corporate executive teams.”<sup>193</sup>

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187. *Id.*

188. *Id.* (analyzing the need for women to gain skills in quantitative areas).

189. Seletha R. Butler, *supra* note 186, at 32 (2013).

190. Branson, *supra* note 68, at 1567; DOUGLAS M. BRANSON, *THE LAST MALE BASTION: GENDER AND THE CEO SUITE AT AMERICAS’ PUBLIC COMPANIES* 195 (2010).

191. STUART, *supra* note 67, at 11.

192. *Id.*

193. Bilimoria, *supra* note 22.

How then can women and people of color reasonably expect to find board positions if they lack CEO and high level executive experience? To what extent does the business school route suggest more diversity in the boardroom is on its way? What percentage of business school and MBA students are women and people of color? Table 6 presents data regarding business and management degrees awarded by level and gender.

TABLE 6  
DEGREES CONFERRED IN BUSINESS AND MANAGEMENT  
LEVEL & GENDER—U.S. (1995-2009)

Year	Bachelor's Degrees			Master's Degrees			Doctoral Degrees		
	Total	Males	Females	Total	Males	Females	Total	Males	Females
1995-96	226,623	116,545	110,078	93,554	58,400	35,154	1,366	972	394
1996-97	225,934	116,023	109,911	97,204	59,333	37,871	1,336	947	389
1997-98	232,079	119,379	112,700	101,652	62,357	39,295	1,290	885	405
1998-99	240,947	122,250	118,697	107,477	64,700	42,777	1,201	843	358
1999-2000	256,070	128,521	127,549	111,532	67,078	44,454	1,194	812	382
2000-01	263,515	132,275	131,240	115,602	68,471	47,131	1,180	783	397
2001-02	278,217	138,343	139,874	119,725	70,463	49,262	1,156	746	410
2002-03	293,391	145,075	148,316	127,685	75,239	52,446	1,252	820	432
2003-04	307,149	152,513	154,636	139,347	80,858	58,489	1,481	960	521
2004-05	311,574	155,940	155,634	142,617	82,151	60,466	1,498	901	597
2005-06	318,042	159,683	158,359	146,406	83,550	62,856	1,711	1,049	662
2006-07	327,531	166,350	161,181	150,211	84,115	66,096	2,029	1,188	841
2007-08	335,254	170,978	164,276	155,637	86,258	69,379	2,085	1,250	834
2008-09	347,985	177,862	170,123	168,375	91,981	76,394	2,123	1,302	821

194

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194. Source: Business School Data Trends and 2012 List of Accredited Schools, The Association to Advance Collegiate Schools of Business (citing U.S. Department of Education, National Center for Education Statistics, Higher Education General Information Survey (HEGIS), "Degrees and Other Formal Awards Conferred" surveys, and Integrated Postsecondary Education Data System (IPEDS) "Completions" surveys at 17).

**TABLE 7**  
**DEGREES CONFERRED IN BUSINESS AND MANAGEMENT**  
**BACHELOR'S DEGREES, PERCENT BY RACE/**  
**ETHNICITY—U.S. (1995–2009)**

<b>Year</b>	<b>White</b>	<b>Black</b>	<b>Hispanic</b>	<b>Asian/Pacific Islander</b>	<b>American Indian/ Alaska Native</b>	<b>Non-Resident Alien</b>
1995-96	77.8	7.9	5.0	5.5	0.6	3.2
1996-97	76.8	8.0	5.3	5.9	0.6	3.3
1997-98	76.1	8.3	5.6	6.1	0.7	3.3
1998-99	75.6	8.5	5.8	6.2	0.7	3.2
1999-2000	75.1	8.7	6.1	6.3	0.7	3.2
2000-01	74.5	8.9	6.2	6.3	0.7	3.2
2001-02	74.2	9.0	6.4	6.4	0.7	3.2
2002-03	73.7	9.2	6.6	6.5	0.7	3.2
2003-04	73.3	9.4	6.8	6.6	0.8	3.2
2004-05	72.9	9.5	7.0	6.8	0.7	3.2
2005-06	72.4	9.6	7.2	6.9	0.7	3.1
2006-07	72.2	9.6	7.5	6.9	0.8	3.0
2007-08	71.8	9.8	7.9	7.0	0.7	2.8
2008-09	71.5	9.8	8.1	7.0	0.8	2.9

195

Note from Table 7 that degrees conferred on students listed as Black, Hispanic, or Asian/Pacific Islander have made very slow but consistent gains since 1995. At the bachelor degree level in the United States, The Association to Advance Schools of Business (AACSB) observes that during the 2008 school year, 71.5% of degrees conferred were to students classified as White; 9.8% Black; 8.1% Hispanic; 7.0% Asian/Pacific Islander; 0.8% to American Indian/Alaskan Native; and 2.9% Non-resident Alien.<sup>196</sup>

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195. Source: Business School Data Trends and 2012 List of Accredited Schools, The Association to Advance Collegiate Schools of Business (citing U.S. Department of Education, National Center for Education Statistics at 17).

196. ASSOC. TO ADVANCE COLLEGIATE SCH. OF BUS., BUSINESS SCHOOL DATA TRENDS AND 2012 LIST OF ACCREDITED SCHOOLS 19 (2012).

TABLE 8  
DEGREES CONFERRED IN BUSINESS AND MANAGEMENT  
DEGREES CONFERRED BY LEVEL & GENDER—ALL  
SCHOOLS (2008–2009 TO 2012–2013)

	Year	United States		Global (Excluding U.S.)	
		Male	Female	Male	Female
<b>Undergraduate</b>	2008-09	56.4%	43.6%	49.9%	50.1%
	2009-10	56.5%	43.5%	49.3%	50.7%
	2010-11	56.7%	43.3%	49.3%	50.7%
	2011-12	57.1%	42.9%	49.2%	50.8%
	2012-13	57.3%	42.7%	49.6%	50.4%
<b>Master's Generalist</b>	2008-09	63.7%	36.3%	65.5%	34.5%
	2009-10	63.4%	36.6%	63.9%	36.1%
	2010-11	63.8%	36.2%	63.4%	36.6%
	2011-12	64.1%	35.9%	61.2%	38.8%
	2012-13	63.6%	36.4%	61.9%	38.1%
<b>Specialized Masters</b>	2008-09	52.7%	47.3%	53.4%	46.6%
	2009-10	52.8%	47.2%	52.7%	47.3%
	2010-11	52.4%	47.6%	50.8%	49.2%
	2011-12	53.5%	46.5%	51.1%	48.9%
	2012-13	53.3%	46.7%	49.5%	50.5%
<b>Doctorate</b>	2008-09	63.3%	36.7%	66.8%	33.2%
	2009-10	65.4%	34.6%	63.5%	36.5%
	2010-11	62.5%	37.5%	62.3%	37.7%
	2011-12	61.7%	38.3%	61.7%	38.3%
	2012-13	62.9%	37.1%	63.6%	36.4%

197

At the graduate level, Table 8 shows that in the United States, 63.6% of master's degrees (generalist) granted during 2012 school year were to males, while 36.4% were conveyed to females. Women did a little better in the Specialized Masters category, with 46.7% of master's degrees conferred, versus 53.3% for men.<sup>198</sup> What about the role models of U.S. business school faculty? The AACSB data shows 71.1% of full-time business faculty is reported as White, Non-Hispanic; 14.5% as Asian or Pacific Islander; 3.8% as Black, Non-Hispanic; 2.3% as Hispanic; 0.3% as

197. Source: The Association to Advance Collegiate Schools of Business (citing Higher Education General Information Survey (HEGIS), "Degrees and Other Formal Awards Conferred" surveys, and Integrated Postsecondary Education Data System (IPEDS) "Completions" surveys).

198. ASSOC. TO ADVANCE COLLEGIATE SCH. OF BUS., BUSINESS SCHOOL DATA TRENDS AND 2014 LIST OF ACCREDITED SCHOOLS 21 (2014).

American Indian or Alaskan Native; and 2.2 percent as Race/Ethnicity Unknown.<sup>199</sup>

At some university business schools, women directors have made an effort to facilitate increased board representation by women. For example, the Stanford *Women on Boards* initiative and the George Washington University *On The Board* program are both discussed more fully later in the article.

### B. *What About the Entrepreneurs?*

Research studies show “significant differences in motivations for starting a new business, with men being motivated by financial gains, self-realization and autonomy where for women status is a significant motivating factor.”<sup>200</sup> Data from the period 2008–2009 show, “nearly 10.4 million firms were 50% or more owned by women,<sup>201</sup> these firms employed over 13 million people,<sup>202</sup> and over \$1.9 trillion in sales were generated from these firms.”<sup>203</sup> Research suggests the reasons for “the systematic differences between women and men owned firms include human capital, social capital, access to debt or equity financing, strategy, industry sector, or personal motivations.”<sup>204</sup> Koellinger, Minniti, and Schade find that across all seventeen-countries sampled, “the number of women’s owned businesses is significantly lower than that of men.”<sup>205</sup> Moreover, consistent with prior studies is the following:

[M]en tend to be more optimistic, self-confident and less deterred by fear of failure than women. We also find some evidence that women who are more self-confident and undeterred by fear of failure have a greater probability to start a business than men with similar characteristics. Our results show that socio-economic and perceptual differences together explain the differences in prevalence rates of business start-ups across genders in 14 of the 17 country samples included in our data . . . . The existence of some interaction between

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199. *Id.* at 32.

200. Manolova et al., *supra* note 48, at 1; accord BANDURA, *supra* note 48 (agreeing with the assertion men and women have different motivations for starting a new business); Hackett & Betz, *supra* note 48 (agreeing with the assertion men and women have different motivations for starting a new business).

201. *Key Facts About Women-Owned Businesses*, CTR. FOR WOMEN’S BUS. RESEARCH, <http://web.archive.org/web/20080727020339/http://www.nfwbo.org/facts/index.php> (last visited Sept. 19, 2014).

202. *Id.*

203. *Id.*

204. Manolova et al., *supra* note 48; Nancy M. Carter et al., *The Career Reasons of Nascent Entrepreneurs*, 18 J. BUS. VENTURING 13, 16 (2003) (citations omitted).

205. Koellinger et al., *supra* note 50, at 18.

gender differences and countries suggest that cultural differences do have some influence on gender-specific perceptions.

However, the persistence of perceptual differences between genders across countries makes it hard to believe that such differences are entirely the result of culture, up-bringing and socialization. Rather, our results may suggest that at least a part of the perceptual distinctions between men and women may be inherited rather than learnt as suggested by recent works on cognition and neuroscience.<sup>206</sup> If women perceive, even if incorrectly, not having sufficient skills, knowledge and ability to start a business, the results will be analogous to those of a situation in which these beliefs are based on actual differences.<sup>207</sup> For example, confidence in one's ability and optimism has been shown to be significantly related to academic performance.<sup>208</sup>

Overall, we interpret our results to suggest that perceptions have important economic effects and explain a very significant portion of the observed gender difference in startup behavior.<sup>209</sup>

Catalyst (2012) reports women leaving companies to start their own businesses because of greater flexibility available to business owners (51%),<sup>210</sup> reaction to the glass ceiling (29%),<sup>211</sup> attempts to improve work environment (28%),<sup>212</sup> and a desire to be challenged by one's job (22%).<sup>213</sup> Also, during 2008's down economy, 5% of high potential women and four percent of high potential men left their companies to start their own businesses.<sup>214</sup>

### C. *Women of Colore Entrepreneurs*

Future research in the area of entrepreneurial governance may contribute much to our understanding of women and people of color on corpo-

206. *Id.*, at 18–19; Jennifer Connellan et al., *Sex Differences in Human Neonatal Social Perception*, 23 *INFANT BEHAV. & DEV.* 113 (2000).

207. Koellinger et al., *supra* note 50, at 19; Gneezy et al., *supra* note 50.

208. Koellinger et al., *supra* note 50, at 19; Martin Chemers et al., *Academic Self-Efficacy and First-Year College Student Performance and Adjustment*, 93 *J. EDUC. PSYCHOL.* 55, 56 (2001).

209. Koellinger et al., *supra* note 50, at 19; Chemers et al., *supra* note 208, at 56.

210. CATALYST KNOWLEDGE CENTER, *Women Entrepreneurs: Why Companies Lose Female Talent and What They Can Do About It*, CATALYST (Jan. 20, 1998), <http://www.catalyst.org/knowledge/women-entrepreneurs-why-companies-lose-female-talent-and-what-they-can-do-about-it>.

211. *Id.*

212. *Id.*

213. *Id.*

214. Carter & Silva, *supra* note 145, at 19.

rate boards of directors. Catalyst reports during the period 2008–2009 “women of color were the majority owners of 1.9 million firms;<sup>215</sup> these firms generated \$165 billion in revenue;<sup>216</sup> and 1.2 million people were employed by these women of color-owned firms.”<sup>217</sup> Regarding African-American women, Catalyst reports “as of 2008, there were an estimated 650,309 majority-owned, privately-held firms owned by African-American women in the U.S., and they generated almost \$26 billion in sales; and 34.2% of minority-women-owned firms were owned by African American women.”<sup>218</sup>

Regarding Latinas, Catalyst reports “as of 2008, there were an estimated 642,458 majority-owned, privately-held firms owned by Latinas in the U.S., and they generated \$45 billion in sales. 33.8% of minority-women-owned-firms were owned by Latinas.”<sup>219</sup> We learn from Catalyst that “as of 2008, there were an estimated 496,413 majority-owned, privately-held firms owned by Asian-American women in the U.S., and they generated over \$86 billion in sales, [while] 26.1% of minority-women-owned firms were owned by Asian-American women.”<sup>220</sup> Also as of 2008, Catalyst reports “there were an estimated 100,453 majority-owned, privately-held firms owned by Native American and Alaska Native women in the U.S., and they generated \$6.6 billion in sales, [and] 5.3% of minority-women-owned firms were owned by Native American and Alaska Native women.”<sup>221</sup>

It’s been noted that, “while data on these smaller firms is more difficult to obtain, these may reveal illuminating insights about the presence and utilization of WCBD [women on corporate boards of directors].”<sup>222</sup> Furthermore,

In addition, the types of firms studied should also be expanded to include entrepreneurial and private equity firms, as well as technology start-ups. Recent research has indicated that the percentage of women on the boards and top management teams of technology firms is lower than that of *Fortune 500* firms.<sup>223</sup> By focusing research attention on smaller, more entrepreneurial, and agile companies and

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215. CENTER FOR WOMEN’S BUSINESS RESEARCH, *supra* note 201.

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. Bilimoria, *supra* note 22.

223. *Id.*; *Bit by Bit: A Catalyst Guide to Advancing Women in High Tech Companies*, CATALYST 3–4 (Nov. 12, 2003), available at <http://www.catalyst.org/knowledge/bit-bit-catalyst-guide-advancing-women-high-tech-companies>).

industries, media and public interest in the board compositions of these firms may also be spurred.<sup>224</sup>

#### D. *Auditing, Accounting, and Finance*

During 2012, reports show that “[w]omen are 60.9% of all accountants and auditors in the United States;<sup>225</sup> [but only]. . . 49.4% of all auditors, accountants, and investment professionals in Canada.”<sup>226</sup> Every board is required to have a “financial expert” for audit committee chair and directors with appropriate skills and experience to populate the audit committee.<sup>227</sup> An examination by the American Institute of Certified Public Accountants (AICPA) of college enrollment and demographics of the accounting profession discloses the following:

- Enrollments by gender have almost reached an equality of 50% male, 50% female, at both the BA and MA levels. Ph.D. programs are still overrepresented by males.
- There were increases in the number of Hispanics at the BA level and the number of African-Americans at the MA level. However, despite substantial efforts by the AICPA, CPA firms, universities, state CPA societies and other professional organizations that have focused on diversity in the CPA profession, the survey data show a slight percentage decrease in minority representation at the BA and MA levels.

224. Bilimoria, *supra* note 22.

225. *Quick Take: Women in Accounting*, CATALYST (Dec. 10, 2013), <http://www.catalyst.org/publication/204/women-in-accounting>; see also Bureau of Labor Statistics, *Current Population Survey: Table 11, Employed Persons by Detailed Occupation, Sex, Race and Hispanic or Latino Ethnicity*, <http://www.bls.gov/cps/aa2011/cpsaat11.pdf> (last visited Sept. 23, 2014) (reporting 62.1% of all accountants and auditors were women).

226. *Quick Take: Women in Accounting*, CATALYST, *supra* note 225; STATISTICS CANADA, OCCUPATION—NATIONAL OCCUPATIONAL CLASSIFICATION FOR STATISTICS 2006 (720C), SEX (3) AND SELECTED DEMOGRAPHIC, CULTURAL, LABOUR FORCE, EDUCATIONAL AND INCOME CHARACTERISTICS (273) FOR THE POPULATION 15 YEARS AND OVER OF CANADA, PROVINCES, TERRITORIES, CENSUS METROPOLITAN AREAS AND CENSUS AGGLOMERATIONS, 2006 CENSUS: 20% SAMPLE DATA, available at <http://www12.statcan.gc.ca/census-recensement/2006/dp-pd/tbt/Rp-eng.cfm?LANG=E&APATH=3&DETAIL=0&DIM=0&FL=A&FREE=0&GC=0&GID=0&GK=0&GRP=1&PID=97611&PRID=0&P TYPE=88971,97154&S=0&SHOWALL=0&SUB=0&Temporal=2006&THEME=74&VID=0&VNAMEE=&VNAMEF>.

227. See Trautman, *supra* note 6, at 93 (emphasizing the importance of a financial expert on the committee to understand any accounting problems which may arise); see also Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the NASDAQ Listing Rules to Reflect Changes to the Rules of the Commission, 74 Fed. Reg. 28750 (June 17, 2009) (discussing the regulations concerning “audit committee financial experts”).

- For the first time in more than ten years, the percentage of male graduates was larger than female graduates with 52% of the total graduates being male.
- Hiring by ethnicity has seen an improvement in both the Hispanic population and total minority hiring overall. Hispanic hiring rose from 4% to 7% of total hires, while the total minority hiring increased from 22% to 25%. Hiring by gender has reached parity of 50% male and female, although it previously had been predominantly female.
- The overall ethnic diversity has increased from 17% minority to roughly 21% minority since 2009. This increase was evenly spread across the Hispanic, Asian and multi-ethnic populations.<sup>228</sup>

### E. Professional Staff

Catalyst reports “[i]n a 2011 study, women were half of newly hired accounting graduates at CPA firms, and 40% of all CPAs.”<sup>229</sup> As shown in Table 9, Professional Staff Demographics by Firm Size, the AICPA reports the following professional staff demographics by firm size for ethnicity.

TABLE 9  
ACCOUNTING PROFESSIONAL STAFF DEMOGRAPHICS  
BY FIRM SIZE

Ethnicity	All Firms	<10	10-49	50-200	>200
White	79%	87%	91%	96%	72%
Black/African-Americans	3%	2%	2%	1%	5%
Hispanic/Latino	4%	4%	3%	1%	5%
Asian/Pacific Islander	11%	5%	2%	2%	16%
American Indian/Alaska Native	1%	1%	1%	0%	0%
Multi-ethnic	0%	1%	0%	0%	1%
Other	1%	0%	1%	0%	1%
Unknown	1%	0%	0%	0%	0%

230

228. SCOTT MOORE ET AL., 2011 TRENDS IN THE SUPPLY OF ACCOUNTING GRADUATES AND THE DEMAND FOR PUBLIC ACCOUNTING RECRUITS 5–6, 7, 8 (2011), available at <http://www.aicpa.org/InterestAreas/AccountingEducation/NewsAndPublications/DownloadableDocuments/2011TrendsReport.pdf>.

229. *Quick Take: Women in Accounting*, CATALYST, *supra* note 225; MOORE ET AL., *supra* note 228.

230. Source: MOORE ET AL., *supra* note 228.

## F. Audit Firm Partners

Catalyst reports that women make up “21% of all partners at firms, although they are 45% of all accounting employees at accounting firms.”<sup>231</sup> Another “2010 study examined the number of women partners at the Big Four accounting” firms in 2009 disclosing “that women were 18.1% of all equity partners” at Big Four firms.<sup>232</sup> The best news is “hiring by ethnicity is on the rise—total hiring of people of color [in accounting] for 2011 reached 25% of total hires.”<sup>233</sup> However, the pipeline for board access via accounting does not appear very promising since “women of color earned [only] 15.8% of all bachelor’s degrees in accounting in [the] 2011–2012 school year;<sup>234</sup> [and] [w]omen of color are 15.8% of all those employed in industries of accounting, tax prep, bookkeeping, and payroll services.”<sup>235</sup>

Professor Seletha R. Butler provides a look at the Gender of the “Audit Committee Financial Expert” at Table 10, finding only twelve percent of S&P 500 company audit committee financial experts are women—while the numbers for women of smaller companies shrink even further.<sup>236</sup>

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231. *Quick Take: Women in Accounting*, CATALYST, *supra* note 225; MOORE ET AL., *supra* note 228.

232. *Quick Take: Women in Accounting*, CATALYST, *supra* note 225; *Women Continue to Advance Into Leadership at Largest Firms*, 34 PUBLIC ACCOUNTING REPORT, no. 11, 2010, at 3.

233. *Quick Take: Women in Accounting*, CATALYST, *supra* note 225; MOORE ET AL., *supra* note 228.

234. *Quick Take: Women in Accounting*, CATALYST, *supra* note 225. See generally U.S. Dep’t of Educ., *Integrated Postsecondary Education Data System*, NAT’L CENT. FOR EDUC. STATISTICS (2011), <http://nces.ed.gov/ipeds> (enumerating statistics for bachelor’s degrees in accounting).

235. *Quick Take: Women in Accounting*, CATALYST, *supra* note 225; U.S. Equal Emp’t Opportunity Comm’n, *2010 Job Patterns for Minorities and Women in Private Industry (EEO-1)*, <http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2010/> (last visited Sept. 18, 2014).

236. Butler, “*Financial Expert*,” *supra* note 124, at 29.

TABLE 10  
GENDER OF 'AUDIT COMMITTEE FINANCIAL EXPERTS'

	S&P 500 Firms		Small Firms		Total Firms
Number of Women "Adult Committee Financial Experts"	82	12%	6	5%	88
Number of Men "Audit Committee Financial Experts"	608	88%	125	95%	733
Total "Audit Committee Financial Experts?"	690		131		821

237

Table 11 provides a view of the Professional Experience of "Audit Committee Financial Experts."<sup>238</sup> Since many board of directors audit committee members and chairs are retired partners of large accounting firms, the likelihood of significantly bolstering boardroom participation with people of color during the near future appears bleak. They are simply not represented in the higher ranks of the auditing profession in any meaningful numbers.

TABLE 11  
PROFESSIONAL EXPERIENCE OF 'AUDIT COMMITTEE FINANCIAL EXPERTS'

Professional Experience Type	S&P 500 Firms	Small Firms	Total Firms
Chief Executive Officer	51.1%	30.5%	47.9%
Chairman	51.7%	16.0%	46.0%
President	25.7%	45.8%	28.9%
Executive or Senior Vice President	14.9%	17.6%	15.3%
Chief Financial Officer	10.9%	26.0%	13.3%
Certified Public Accountant	13.8%	30.5%	16.4%
Chief Operating Officer	6.1%	12.2%	7.1%
Other *academics, venture capitalists, lawyers, independent consultants, and private investors	10.9%	22.9%	12.8%

239

Table 12, "Audit Firm Partners: Demographics by Firm Size 2010," shows very minimal representation among the ranks of audit firm partners by people of color.

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237. *Id.* at 29.

238. *Id.*

239. Butler, *supra* note 124, at 29.

TABLE 12  
AUDIT FIRM PARTNERS: DEMOGRAPHICS BY FIRM SIZE 2010

Ethnicity	All Firms	<10	10-49	50-200	>200
White	94%	94%	98%	100%	93%
Black/African-American	0%	0%	0%	0%	1%
Hispanic/Latino	2%	2%	1%	0%	2%
Asian/Pacific Islander	2%	2%	1%	0%	4%
American Indian/Alaska Native	0%	0%	0%	0%	0%
Multi-ethnic	1%	1%	0%	0%	0%
Other	0%	0%	0%	0%	0%
Unknown	0%	0%	0%	0%	0%

240

### G. *Financial Services*

A clear answer to the question of exactly “[h]ow many women work in financial services” is illusive, because no agreement exists as to what exactly constitutes financial services. Catalyst states “[i]nstead, we must look at different occupations that fall within the field of financial services.”<sup>241</sup> The “2013 Catalyst Census: Fortune 500 Women Executives Officers and Top Earners, which counts the number of women in upper management in Fortune 500 companies, [reports that] women are 17.6% of executive officers in the finance and insurance industries.”<sup>242</sup> Figures for 2012 show that in the Financial Post 500 companies, “women were 23.1% of all senior officers in the finance and insurance industries.”<sup>243</sup> While “women are 17.9% of board directors in the finance and insurance industries in Fortune 500 companies; similarly, in Financial Post 500 companies, women were 22.3% of all board directors in the finance and insurance industries in 2013.”<sup>244</sup> Catalyst observes that the “U.S. Equal Employment Opportunity Commission collects information from private employers with 100 or more employees or federal contractors with 50 or more employees.”<sup>245</sup> Accordingly, during 2010, according to the EEOC:

- Women made up 40.1% of all employees and 18.3% of executive/ senior level officials and managers at the 1,238 companies that fall

240. Source: MOORE ET AL., *supra* note 228.

241. *Quick Take: Women in Financial Services*, CATALYST (Mar. 3, 2014), <http://www.catalyst.org/publication/245/women-in-financial-services>.

242. *Id.*; RACHEL SOARES ET AL., 2011 CATALYST CENSUS: FORTUNE 500 WOMEN BOARD DIRECTORS (Catalyst 2011), app. 7, *available at* <http://www.catalyst.org/knowledge/2011-catalyst-census-fortune-500-women-board-directors>.

243. *Quick Take: Women in Financial Services*, CATALYST, *supra* note 241.

244. *Id.*

245. *Id.*

into the category ‘Securities, Commodity Contracts and Other Financial Investments and Related Activities.’<sup>246</sup>

- Women made up 35.2% of all employees and 15.6% of executive/senior-level officials and managers at the 229 companies that fall into the category ‘Investment Banking and Securities Dealing’ (which is a subcategory of ‘Securities, Commodity Contracts & Other Financial Investments’).<sup>247</sup>
- Women made up 59.5% of all employees and 29.6% of executive/senior-level officials and managers at the 4,236 companies that fall into the category ‘Commercial Banking.’<sup>248</sup>

#### H. *Legal Services*

Corporate governance is a legally-intensive enterprise. For example, in a survey including many smaller Texas corporations, approximately 27% of directors sitting on Texas boards reportedly have a legal background.<sup>249</sup> Looking at the pattern of slow admittance to America’s law schools, this avenue of potential entrance to the corporate boardroom has not historically been available to women and people of color. For example, the practice of law in Maryland was restricted to white males until 1888.<sup>250</sup> “Thus, both race and gender posed insurmountable barriers to black women, white women, and black men who wanted to practice law in Maryland.”<sup>251</sup>

The United States is littered with illustration like this from Bell Babb Mansfield, commonly believed to be the first woman lawyer of any race in the United States, was admitted to practice law in Iowa,<sup>252</sup> to a black woman named Charlotte E. Ray, who became the first known black woman lawyer when she was admitted to practice law in the District of Co-

246. *Id.*; U.S. Equal Emp’t Opportunity Comm’n, *supra* note 235.

247. *Quick Take: Women in Financial Services*, CATALYST, *supra* note 241; U.S. Equal Emp’t Opportunity Comm’n, *supra* note 235.

248. *Quick Take: Women in Financial Services*, CATALYST, *supra* note 241; U.S. Equal Emp’t Opportunity Comm’n, *supra* note 235.

249. Lawrence J. Trautman, Trautman’s Guide to Corporate Directors: Texas (unpublished manuscript) (on file with author).

250. Taunya Lovell Banks, *Setting the Record Straight: Maryland’s First Black Women Law Graduates*, 63 MD. L. REV. 752, 752 (2004); David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland’s First Black Lawyers*, 44 MD. L. REV. 939 (1985).

251. Lovell Banks, *supra* note 250, at 752.

252. *Id.* at 754; KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA, 1638 TO THE PRESENT* (1986).

lumbia.<sup>253</sup> Fast-forwarding to the 1940s, Texan Louise Raggio recalls the difficulty she experienced enrolling as the first female law student at Southern Methodist University in February, 1947. “If ever there was a *persona non grata*, in Southern Methodist University’s night law classes, I was it!” she recalls.<sup>254</sup> Moreover she remembers:

Charles Potts was dean of the law school, and he was, indeed, of the old school. His bearing, behavior, and ideas were those of a male of the Civil War era. His standards for females were a throwback from the 1870s instead of the 1940s . . . [The admissions director] did not believe there was a place for *any* woman in law school, and he almost choked when I presented myself as a likely candidate. Everybody in a position of authority at SMU discouraged me. I was reminded that law was a male profession, that the rough-and-tumble charges and countercharges of the courtroom was no suitable contest for a lady, that if I *were* admitted (and my qualifications were better than any other candidate) I would only be taking up space that could be occupied by a man who would *do something* with his degree.<sup>255</sup>

We have already observed approximately 27% of directors sitting on Texas boards report having a legal background.<sup>256</sup> We have also observed it has only been during relatively recent years in which women and people of color have been admitted to law schools in any meaningful numbers. For the 2011 academic year, 46.8% of first-year law students are women, 46.7% of total the juris doctorate enrollment are female, and 47.3% of juris doctorates awarded that year went to women.<sup>257</sup> The class of 2009 also resulted in 51% of judicial clerkships being obtained by women.<sup>258</sup> Women account for 30.2% of judges at the Circuit Court of Appeals,<sup>259</sup> but only 22.3% of Federal Court Judges are women.<sup>260</sup> Maria Pabon Lopez writes,

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253. Lovell Banks, *supra* note 250, at 754; Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006).

254. LOUISE BALLERSTEDT RAGGIO & VIVIAN ANDERSON CASTLEBERRY, *TEXAS TORNADO: THE AUTOBIOGRAPHY OF A CRUSADER FOR WOMEN’S RIGHTS AND FAMILY JUSTICE* 111 (2003).

255. *Id.*

256. Trautman, *supra* note 249.

257. AM. BAR. ASS’N COMM’N ON WOMEN IN THE PROFESSION, *A CURRENT GLANCE AT WOMEN IN THE LAW* 3 (2013).

258. *Id.* at 5.

259. *Id.*

260. *Id.*

[F]emale lawyers continue to be ensconced in the ‘50/15/15 conundrum’<sup>261</sup> where it has been 15 years since women comprised 50% of law students but only constituted 15% of law firm partners. Neither the passage of time nor the slowly trickling pipeline has resulted in women reaching higher levels of advancement in the legal profession.<sup>262</sup>

While women comprise 31.6% of all members of the American Bar Association, they account for 39.3% of Section/Division Chairs during the 2010–2011 Bar Year.<sup>263</sup> Catalyst reports that by 2011, “women made up 31.9% of all lawyers,<sup>264</sup> women were 45.4% of all associates,<sup>265</sup> 47.7% of summer associates,<sup>266</sup> [and] given the same rate of change, Catalyst estimates that it will take more than a woman lawyer’s lifetime to achieve equality.”<sup>267</sup> From a diversity standpoint, while strides have been made as shown by the fact that women now outweigh men in the population of many law schools, people of color are still not represented in meaningful proportions.

The Director Diversity Initiative is a joint project of the Center for Banking and Finance and the Center for Civil Rights at the University of North Carolina School of Law. A working group of academics and business professionals provides guidance and advice to the Initiative. The objective of the Initiative is to encourage boards of directors of public companies to increase their gender, racial, and ethnic diversity. In addition, The Diversity Initiative at the UNC School of Law “maintains a

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261. María Pabón López, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trends*, 19 HASTINGS WOMEN’S L.J. 53, 101 (2008); Nat’l Ass’n of Women Lawyers, *2006 Report: NAWL’s First National Survey on Retention and Promotion of Women in Law Firms*, 92 WOMEN LAWYERS J., no. 1, 2006, at 14, available at <http://www.nawl.org/p/cm/ld/fid=83>; see also Mary C. Noonan & Mary E. Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 ANNUALS AM. ACAD. POL. & SOC. SCI. 130, 146 (2004) (noting women partners earn 32% less than similarly situated male partners).

262. Pabón López, *supra* note 261, at 101.

263. AM. BAR. ASS’N, A CURRENT GLANCE AT WOMEN IN THE LAW, *supra* note 257, at 5; AM. BAR. ASS’N COMM’N ON WOMEN IN THE PROFESSION, GOAL III REPORT CARD: AN ANNUAL REPORT ON WOMEN’S ADVANCEMENT INTO LEADERSHIP POSITIONS IN THE AMERICAN BAR ASSOCIATION (2011), available at [http://www.americanbar.org/content/dam/aba/marketing/women/2011\\_goal\\_iii\\_women\\_access.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/marketing/women/2011_goal_iii_women_access.authcheckdam.pdf).

264. *Quick Take: Women in Law in the U.S.*, CATALYST (Mar. 11, 2013), <http://www.catalyst.org/publication/246/women-in-law-in-the-us>; Bureau of Labor Statistics, *supra* note 225.

265. *Quick Take: Women in Law in the U.S.*, CATALYST, *supra* note 264; Press Release, The Nat’l Ass’n for Law Placement, Law Firm Diversity Wobbles: Minority Numbers Bounce Back While Women Associates Extend Two-Year Decline (Nov. 3, 2011).

266. *Quick Take: Women in Law in the U.S.*, *supra* note 264.

267. *Id.*

computerized database on which diverse directors and potential diverse directors may register.”<sup>268</sup>

Headquartered at the University of California Hastings College of the Law, The Project for Attorney Retention found that a survey of the 2009 law firm partner classes showed “little progress for women lawyers. The good news is that at twenty-three of the one hundred firms surveyed . . . were at least 40% female. The bad news is that the gain is offset by the failure of fourteen firms to make any female partners.”<sup>269</sup> Joan C. Williams, distinguished professor of law at Hastings and Co-Director of the Project for Attorney Retention, says “These numbers show which firms need to work harder at promoting women lawyers . . . . They provide valuable information for women law students who are choosing their future employers and for clients who are interested in retaining law firms where women lawyers can succeed.”<sup>270</sup>

Any substantial discussion of differences in law firm compensation between men and women is beyond the scope of this paper. However, many of the structural issues that result in a “\$66,000 annual gap between male and female equity partners,”<sup>271</sup> is also indicative of roadblocks facing women attempting to advance in the legal profession. Joan C. Williams and Veta T. Richardson list barriers such as “[w]omen partners’ compensation [which] continues to be negatively impacted by their exclusion from rainmaking opportunities and receipt of a proportionate share of the financial benefits associated with a successful client pitch.”<sup>272</sup> In addition, the report highlights “subjectivity is inevitable in setting partner compensation but it introduces significant risks of gender bias.”<sup>273</sup>

The Minority Corporate Counsel Association and Association of Law Firm Diversity Professionals report from their recent survey of mostly larger law firms that “[m]ost law firms (79%) have a law firm diversity professional . . . as more and more law firms hire or retrain full-time pro-

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268. Univ. N.C. School of Law, *About the Director Diversity Database*, <https://ddi.law.unc.edu/database/login.aspx> (last visited Sept. 18, 2014).

269. Press Release, Project for Attorney Retention, *2009 New Partner Classes Stagnant for Women Lawyers*, 1 available at <http://www.attorneyretention.org/PressReleases/2009NewPartnerClassesReleaseFinal.pdf>.

270. *Id.*

271. Letter from Roberta D. Liebenberg & Catherine A. Lamboley to Colleagues (June 23, 2010), in JOAN C. WILLIAMS & VETA T. RICHARDSON, *NEW MILLENNIUM, SAME GLASS CEILING? THE IMPACT OF LAW FIRM COMPENSATION SYSTEMS ON WOMEN* 3, 3 (2010).

272. *Id.* at 7.

273. Liebenberg & Lamboley, *supra* note 271, at 7.

professionals entrusted with primary responsibility for advancing diversity efforts within the firm.”<sup>274</sup>

Data released during March 2011 for the *U.S. News* law school rankings and separately for African American enrollment available for 196 ABA-approved law schools provides a picture of African American law school enrollment. Accordingly, “[t]he highest percentage of African American students in the 196 schools was 79.7 (at Howard) and the lowest was 0.2 (at Gonzaga). The median is 5.65, the 75th percentile is 7.47 and 25th percentile is 3.02. The mean is 7.05 (SD=8.78).”<sup>275</sup> Historically black schools comprise the largest percentage of black enrollment—with the law schools having the largest black enrollment such as: Howard (79.7); Southern U (57.0); North Carolina Central (48.8); Texas Southern (44.5); Florida A&M (42.3); District of Columbia (30.7); Atlanta’s John Marshall (20.3); Rutgers Newark (15.7); Loyola New Orleans (14.5); and Cooley (13.3).<sup>276</sup> Some of the top rated schools have the following percentages of black student enrollment: Harvard (11.3); Stanford (10.2); Yale (6.5); Columbia (7.7); Chicago (5.8); NYU (7.7); UC Berkeley (4.8); Michigan (2.8); Penn (7.5); and Virginia (6.1).<sup>277</sup>

### I. *Academia and the Nonprofit Sector*

Considering academia and nonprofits, Professor Branson contends, at least the *Fortune 500* companies, the most likely route for a corporate directorship may be to “side step from a position as professor or dean at a university.”<sup>278</sup>

In order to reach the prestigious position of corporate director, a woman may have to leave business, make her way upward in academe, the not-for-profit sphere, government or consulting, or smaller corporations, areas in which women fare far better, and then re-emerge in the business world’s main arena as a director. Approximately 67.3% of women directors have reached the corporate board

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274. MINORITY CORP. COUNSEL ASSOC. & ASSOC. OF LAW FIRM DIVERSITY PROF’LS, 2010 LAW FIRM DIVERSITY PROFESSIONAL SURVEY 2, 3 (2010), available at [https://www.mcca.com/\\_data/global/images/Research/2010\\_LawFirmDiversityProfessional\\_Survey.pdf](https://www.mcca.com/_data/global/images/Research/2010_LawFirmDiversityProfessional_Survey.pdf).

275. Alfred L. Brophy, *African American Student Enrollment and Law School Ranking* 6 (UNC Legal Studies Research, Paper No. 1991909, 2012), available at <http://ssrn.com/abstract=1991909>; see also 2012 AM. BAR ASSOC., ABA-LSAC OFFICIAL GUIDE TO ABA APPROVED LAW SCHOOLS 22–30 (2011).

276. Brophy, *supra* note 275, at 11; see also AM. BAR ASSOC., *supra* note 275, at 22–30.

277. Brophy, *supra* note 275, at 15; see also AM. BAR ASSOC., *supra* note 275, at 22–30.

278. Branson, *Pathways for Women to Senior Management Positions and Board Seats*, *supra* note 68, at 1569; BRANSON, *supra* note 78, at 87.

of directors by “side stepping” in this fashion, sometimes with two or three sidesteps, rather than ascending vertically in business organizations. A woman’s best chance of becoming a corporate director may be to be a tenured professor in business, engineering, or the health sciences at a prestige university rather than having patiently worked her way up through corporate organizations. By contrast, in business, the male’s ascent seems to be a decidedly more linear one.<sup>279</sup>

Professor Seletha R. Butler recommends that “[i]n for-profit, not-for-profit, government, and academic environments, dedication to promoting diverse talent beyond middle management is essential to building the diverse director pipeline.”<sup>280</sup> In this regard, hopeful director candidates should remember that “[t]he goals of talent development and enhancement are (1) to identify the top talent; (2) to develop and to implement a tailored training program focusing on the person’s skills and interests and then-current industry needs; and (3) to push the individual out of his or her comfort zone to encourage growth.”<sup>281</sup>

Dr. Melvin Stith, Dean of the Whitman School of Business at Syracuse University, says “faculty fail to present teaching . . . as a viable career path for business school students.”<sup>282</sup> Dr. Carolyn Callahan, Director of the School of Accounting at the University of Memphis, remembers “[i]t became obvious to me that the way to effect change in programs was to be an administrator . . . . They are role models for our minority students and they enrich everyone’s experience.”<sup>283</sup> Dr. Melvin Stith, Dean of the Whitman School of Business at Syracuse University continues:

We always tell students about going to school and rising through the corporate ranks. We never talk to them about the academy itself being a viable career path. We never say to students, ‘You’ll be a great university professor.’ Business school salaries are pretty good. But it’s not just about the finances. It’s about the quality of life and how you want to spend your time.<sup>284</sup>

279. Branson, *supra* note 68, at 1556; *see also* BRANSON, *supra* note 78, at 105–06 (describing examples of powerful women who have side stepped out of one profession into a more powerful position at the top of a company).

280. Seletha R. Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA L. & BUS. REV. 62, 85 (2012).

281. *Id.*

282. Lekan Oguntoyinbo, *The Next Frontier: After Making an Indelible Impact on Business Faculty Ranks, The PhD Project Sets its Sights on Diversity Among Business School Deans*, DIVERSE, Sept. 2, 2010 at 3, <http://www.phdproject.org/ahead/Diverse-Sept2010.pdf>.

283. *Id.*

284. *Id.*

### J. *The Technological Fields*

The need in the boardroom for deep understanding of computer science and information technology has never been greater; unfortunately, the pipeline and outlook for women is far from encouraging. This realization is particularly disappointing, since “[h]igh tech career opportunities are expanding, and this sector is where we can expect the largest job growth for years to come.”<sup>285</sup> Professor LaVonda Reed-Huff observes “[a]s the United States transitions to the digital age, it is imperative that we position our country and each of its citizens to effectively compete in the global economy. Training and hiring a diverse work force are significant components in achieving such global competitiveness.”<sup>286</sup> Caroline Simard and Shannon K. Gilmartin note “[a] growing body of research has documented the underrepresentation of women in technical positions in U.S. companies.”<sup>287</sup> “Women hold 24% of technology jobs, yet represent half the total workforce.”<sup>288</sup> Surprisingly, “[t]his underrepresentation persists even though the demand for technical talent remains high: [with] computer occupations . . . expected to grow by 32% between 2008 and 2018.”<sup>289</sup> Moreover, factors offered to explain the lack of technical positions held by women include: “[a] shortage of women graduating with degrees in technical fields. Women earned 18.6% of computer science degrees in 2007, and 18.5% of engineering degrees. For computer science, this represents a sharp decline from the 37% of women graduating with a bachelor’s degree in 1985.”<sup>290</sup>

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285. LaVonda Reed-Huff, *Foreword* to DORRISSA GRIFFIN & KRISTAL LAUREN HIGH, *MINORITIES AND HIGH TECH EMPLOYMENT*, at i (2011), available at <http://mmtconline.org/lp-pdf/Jobs%20Report%20-%20Minorities%20&%20High%20Tech%20Employment.pdf>.

286. *Id.*

287. CAROLINE SIMARD & SHANNON K. GILMARTIN, *SENIOR TECHNICAL WOMEN: A PROFILE OF SUCCESS 2* (2010), available at <http://anitaborginstitute.org/files/Senior-Technical-Women-A-Profile-of-Success.pdf>; HEATHER FOUST-CUMMINGS ET AL., *WOMEN IN TECHNOLOGY: MAXIMIZING TALENT, MINIMIZING BARRIERS* (2008); CATHERINE ASHCRAFT & SARAH BLITHE, *WOMEN IN IT: THE FACTS* (2009), available at [http://www.ncwit.org/sites/default/files/resources/ncwit\\_thefacts\\_rev2010.pdf](http://www.ncwit.org/sites/default/files/resources/ncwit_thefacts_rev2010.pdf); ANDREA DAVIES HENDERSON ET AL., *CLIMBING THE TECHNICAL LADDER: OBSTACLES AND SOLUTIONS FOR MID-LEVEL WOMEN IN TECHNOLOGY* (2008); SYLVIA A. HEWLETT ET AL., *THE ATHENA FACTOR: REVERSING THE BRAIN DRAIN IN SCIENCE, ENGINEERING, AND TECHNOLOGY* (2008), available at <http://documents.library.nsf.gov/edocs/HD6060-.A84-2008-PDF-Athena-factor-Reversing-the-brain-drain-in-science,-engineering,-and-technology.pdf>.

288. SIMARD & GILMARTIN, *supra* note 287, at 2; *By the Numbers*, NAT’L CTR. FOR WOMEN IN INFO. TECH. (2014), available at <http://www.ncwit.org/resources/numbers>.

289. *Id.*

290. SIMARD & GILMARTIN, *supra* note 287, at 2. See generally NAT’L SCI. FOUND., *DIV. OF SCI. RESOURCES STATISTICS, SPECIAL TABULATIONS OF U.S. DEPARTMENT OF*

The Anita Borg Institute for Women and Technology concludes that five main components prevent the creation of inclusive technological environments:

1. *The Existing Technical Culture is Biased Against “Those Who Don’t Code.”* The majority of positions that involve coding are held by men, and these positions are more valued than other roles by the prevailing culture. . . . In many companies, technical women are more likely to be engaged in positions that involve large scale project or product management, acting as catalysts across multiple groups to drive organizational action . . . . Whether this is because organizations tend to put women in ‘non-coding’ roles, whether coding roles are not welcoming to women, or whether women are more attracted to project management positions is not well understood. However, executives emphasized that the globalized, collaborative, and matrixed organizational structures of today’s companies have a critical need for positions and skills involving program management. . . . The prevailing attitude, characterized by ‘if you aren’t doing coding, you’re not doing real work,’ is limiting organizations’ ability to hire and retain talent for a diversity of skills needed for organizational success.
2. *The Existing Technical Culture Rewards ‘Hero’ Behavior and an ‘In Your Face’ Communication Style.* [This appears to result from] the prevalence of a ‘Hero’ mindset in technical organizations, which impedes diversity of work styles and fails to recognize those who work to prevent problems. This impedes gender diversity in that it rewards a ‘last minute’ crunch where 24/7 work becomes necessary to ‘save’ a project, failing to acknowledge family responsibilities and flexibility needs. A pattern develops where an organization poorly defines requirements and project management. The engineer who comes in to try and ‘save’ such a project gets rewards and recognitions for solving problems at the ‘11th hour,’ while those who work to prevent problems from happening in the first place are not adequately recognized . . . .
3. *Risk-aversion is Embedded in Recruiting and Advancement Practices.* Most companies’ recruitment and advancement practices are structured to mitigate risk in hiring, which can significantly impede diversity. In recruitment, some companies favor people with similar backgrounds and levels of experiences, which reinforce workforce homogeneity . . . . In advancement practices, standards are set that reflect the backgrounds of those already at the top, again valorizing

similar career backgrounds, accomplishments, values, and work and communication styles . . . .

4. *The Individual Contributor Track Lacks a Development Culture.* The individual contributor technical track, especially at its highest level, lacks basic principles to broaden the pool of candidates . . . . The individual contributor work culture does not include mentoring the next generation of fellows/architects . . . [and] . . . .
5. *The Existing Reward Structures Built Around the High-tech Culture Do Not Encourage Rapid Change Around This Issue.* The state of research on the barriers and solutions for technical women has taught us a lot about the issues facing technical women and how to fix them. However, cultural change is difficult—talk does not equate action, and companies are looking to change reward structures to foster needed change in organizational practices.<sup>291</sup>

Dorriisa Griffin and Kristal Lauren High note that “minorities, particularly African Americans, Hispanics, and women, remain sorely under-represented across the high tech sector and in the ranks of some of the sector’s biggest companies.”<sup>292</sup> “Significant disparities in the employment of African Americans, Hispanics, and women in ten of the [fifteen] largest firms located in Silicon Valley, the leading high tech region in the country was discovered from a 2010 investigation conducted by the *San Jose Mercury News*.”<sup>293</sup> Moreover,

According to U.S. Census Bureau data, the proportion of African Americans employed in computer and mathematics occupations increased from 6.8% to 7.1% between 2000 and 2008. Similarly, the proportion of Hispanics in these occupations rose from 4.4% to 5.3% over the same time period. African Americans in computer manufacturing faced a 7.3% unemployment rate by August 2010, down from 23.6% in 2009 and 11.9% in 2008 . . . . By contrast, Asian Americans are generally over-represented in the U.S. high tech workforce. Comprising just 4.8% of the total U.S. population, this demographic group has secured 15.5% of computer and mathematics jobs, up from 11.8% in 2000. Similarly, Whites, who comprise 63.7% of the population, are also overrepresented in the high tech sector,

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291. ANITA BORG INST. FOR WOMEN AND TECH., 2009 TECHNICAL EXECUTIVE FORUM, THE RECRUITMENT, RETENTION, AND ADVANCEMENT OF TECHNICAL WOMEN: BREAKING BARRIERS TO CULTURAL CHANGE IN CORPORATIONS 4 (2009), available at <http://anitaborg.org/files/breaking-barriers-to-cultural-change-in-corps.pdf>.

292. GRIFFIN & HIGH, *supra* note 285, at 3.

293. *Id.* See generally Mike Smith, *Blacks, Latinos and Women Lose Ground at Silicon Valley Tech Companies*, SAN JOSE MERCURY NEWS (Feb. 13, 2010), [http://www.mercurynews.com/ci\\_14383730](http://www.mercurynews.com/ci_14383730).

representing 70.3% of jobs. But this group's share of high tech employment decreased from 75.1% in 2000.<sup>294</sup>

TABLE 13  
WORKERS IN COMPUTER AND MATHEMATICAL  
OCCUPATIONS BY DEMOGRAPHIC

	Nationwide: Share of U.S. Population (2008)	Nationwide: Computer & Mathematics Workers (2006-08)	Silicon Valley: Share of Working Age (18-64) Population (2006-08)	Silicon Valley: Computer & Mathematics Workers (2006-08)
<b>White</b>	65.6%	70.3%	39.9%	37.6%
<b>Asia</b>	4.5%	15.5%	30.4%	53.9%
<b>Black</b>	12.8%	7.1%	2.9%	1.5%
<b>Hispanic</b>	15.4%	5.3%	24.3%	4.7%
<b>Female</b>	50.7%	27.4%	n/a	23.8%

295

## IX. MOVING FORWARD: HOW TO ADDRESS INEQUALITIES IN CORPORATE DIVERSITY

### A. Candidate Nurturing, Recruitment, and Retention Strategies

In order to nurture candidates, recruit effectively and establish retention strategies, Caroline Simard and Denise L. Gammal state that, "Research shows that targeted diversity recruitment efforts are a significant predictor of diversity in companies."<sup>296</sup> Moreover, "[c]ompanies that aim to increase the pool of women candidates for technical positions should start by seeking out new recruitment venues and opportunities, engaging young women as students, or employing networks to reach a broader range of women."<sup>297</sup>

Simard and Gammal offer the following strategies to expand recruitment avenues and reach more and diverse women candidates:

1. Build strong ties to conferences, colleges and universities, and professional organizations where there are high proportions of women from diverse backgrounds.
2. Build a gender-balanced internship program for technical positions.

294. GRIFFIN & HIGH, *supra* note 285, at 5-6.

295. Source: Mike Swift, *Blacks, Latinos and Women Lose Ground at Silicon Valley Tech Companies*, Feb. 13, 2010, The San Jose Mercury News.

296. CAROLINE SIMARD & DENISE L. GAMMAL, ANITA BORG INST. FOR WOMEN AND TECH., *SOLUTIONS TO RECRUIT TECHNICAL WOMEN 5* (2012), available at <http://anitaborg.org/files/Anita-Borg-Inst-Solutions-To-Recruit-Technical-Women.pdf>.

297. *Id.*

3. Use social networks strategically to increase the number of female candidates for technical positions and minimize homogeneity in referrals.
4. Apply broad individual and institutional criteria to the recruitment effort.
5. Re-think the meaning of ‘cultural fit’ to broaden the talent pool under consideration and limit the effect of hidden bias.
6. Revise job descriptions to reduce gender stereotypes.
7. Institute a blind resume screening process to reduce the potential for unconscious bias.
8. Build gender-diverse hiring teams and showcase technical women during the interview process.
9. Set targets to hire technical women.
10. Require that every open technical position has a viable female candidate.
11. Support and reward hiring managers’ open hire practices.
12. Adapt the interview process to be welcoming to diverse candidates.
13. Train hiring teams and managers to reduce implicit biases.
14. Implement dual-career support mechanisms when relocating is involved.
15. Hold executives and managers accountable for reaching diversity goals and targets.
16. Develop, maintain and project a welcoming culture.
17. Refine the pipeline—create alternative pathways and establish mechanisms to bring women back to technical roles.
18. Measure and evaluate your efforts to increase the representation of women.
19. Fund or create K-12 initiatives around the world and advocate for computer science education to encourage a bigger pipeline of technical women for the future.<sup>298</sup>

When asked, “Why does it matter that we have more girls interested in the sciences?,” Maria Klawe, president of Harvey Mudd College and former dean of engineering and professor of computer science at Princeton University says, “These are amazing careers. Particularly right now in computer science, the job opportunities are incredible. And it doesn’t matter—I mean it’s not just about going to work for a place like Google or Microsoft or Facebook.”<sup>299</sup> She continues:

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298. *Id.* at 4.

299. Transcript of *PBS Newshour: Bridging the Gender Gap—Why More Women Aren’t Computer Scientists* (PBS television broadcast Apr. 26, 2012), available at [http://www.pbs.org/newshour/bb/science/jan-june12/womenscience\\_04-26.html](http://www.pbs.org/newshour/bb/science/jan-june12/womenscience_04-26.html).

It's about doing computer science in medicine, or doing computer science in arts, or doing computer science in languages, or doing educational software. . . . [T]he careers are out there that pay really well. They're very flexible, great opportunities to combine a career with family. So I hate that young women don't get that opportunity . . . . [Also] what gets created in technology today depends on who's doing the creation. I'll talk about computer games for a moment. So, for a very long time, virtually all the computer games were built by young men and somewhat older men, and played by young men and somewhat older men. And so we had shoot-'em-ups,' we had lots of violence, we had sports. Now, all of a sudden, what has happened is, the game publishers and the game developers and the Nintendo and Sony and so on have realized that the market for video games has plateaued. And so now they're going after young women and older women. And, all of a sudden, we're seeing games that are really different. So the first example is "The Sims," which came out of Electronic Arts and became the most popular computer game ever played. A lot of the people associated with "The Sims" were female.<sup>300</sup>

While speaking to a group of corporate directors interested in the topic of increasing diversity among board members, Maria Klawe observes that "[a]ttracting more young women to the STEM (science, technology, engineering, and math) subjects is something that I am very passionate about . . . . When you think about where the economic opportunities are . . . it completely demands that we have to have a work force that is skilled in science, engineering and mathematics."<sup>301</sup> A good description of the dynamics young female students face comes from a direct observant of higher education:

We get lots of young women going into chemistry and biology. Many of those think they're going to go to med school afterwards. But we get very few young women going into computer science and physics and areas of engineering. And we even know the reason why it's the case. It's because, number one, they think it's not interesting, and, number two, they think they wouldn't be good at it. And, number three, they have an image of the people in those fields that they don't think is attractive. And what we encourage our young people do in this country is follow your passion. Well, if you don't think it's interesting and you don't think you'd do well at it, would you go there? Probably not . . . . [I]f you do a program at the middle school

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300. *Id.*

301. Maria Klawe, President, Harvey Mudd College, Remarks at the NACD Meeting on: Diversity in the Boardroom: A Competitive Advantage (Sept. 11, 2012).

level, and you get girls interested, they've got another four years of high school for peer pressure to get them disinterested again. And it mostly happens.

So my recommendation is you actually do it right when they enter college. You get them into an intro computer science course that is absolutely fascinating and fun and creative. And you have them have so much fun, that they just can't believe that this is really computer science . . . . And that's actually what we have done at Harvey Mudd College, because we have all kinds of students who arrive saying, I hate computers. But they have to take a computer science course in the first semester. And halfway through the semester, I'll be asking them, what do you think? What's your favorite course? And probably 90% say C.S.-5. I hate computers, I hate computing, but, oh, my God, that's the greatest course ever . . . . [A]nd if there are some male students in the class who seem to know way more than you do, ignore it, because they tend to show it off more. Look for an instructor who is encouraging, because that makes a huge difference. And I have had so many female students in my life who I talked into taking their first computer science course. And they're so grateful . . . . They're [believing that] . . . I have these great career opportunities. I can do anything. I can travel around the world. But they had to take the first course.

We do not have a future unless we achieve that. And, unfortunately, we graduate many fewer scientists and engineers and mathematicians than our competitors do. So, I truly believe that, if we are to have the kind of future that we have had in the past, we have to address getting more young people to major in those areas. We have to improve our math and science teaching in our schools.<sup>302</sup>

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302. Transcript of *PBS Newshour*, *supra* note 299; see also J. Cohen et al., *Sharing Toys on the Electronic Playground: Documenting Collaborative Classroom Interactions*, 2002 *COMPUTERS AND ADVANCED TECHNOLOGY IN EDUCATION* 38 (identifying gender issues within the technology field, and proposing ways to encourage girls to get involved with computer sciences at an early age); J. DAI ET AL., *PROMOTING PEER-TO-PEER DISCOURSE FOR COLLABORATIVE MATHEMATICS IN CANADIAN GRADE 7 CLASSROOMS* (2002); Frank Dobbin & Alexandra Kalev, *The Architecture of Inclusion: Evidence from Corporate Diversity Programs*, 30 *HARV. J.L. & GENDER* 279 (2007) (describing the National Science Foundation's providing substantial funding to colleges and universities that propose institutional changes to promote women in science and engineering); J. Gautheir et al., *Peer Presence and Real-Time Assessment: A Symbiotic Relationship*, 2003 *ED. MEDIA WORLD CONF. ON EDUC. MULTIMEDIA, HYPERMEDIA, & TELECOMM. PROC.* 2703; Kori Inkpen et al., "We Have Never-Forgetful Flowers in Our Garden": *Girls' Responses to Electronic Games*, 13 *J. COMPUTERS MATHEMATICS & SCI. TEACHING* 383 (1994); Maria M. Klawe, *Increasing Female Participation in Computing: The Harvey Mudd College Story*, 46 *COMPUTER* 56 (2013); Maria M. Klawe et al., *Women in Computing: Take 2*, *COMM. OF THE*

Dr. Klawe reports that “as recently as 1985, 37% of graduates [in computer science] were women; by 2005 it was down to 22% and sinking. And the situation at [Harvey] Mudd was even grimmer.”<sup>303</sup> When she became Harvey Mudd president in 2006, “of the college’s 750 students, about a third were women (the figure is now closer to half), but for years the percentage of computer science graduates has been hovering around the single digits.”<sup>304</sup> Elsewhere, “[a]t Carnegie Mellon, the percentage of incoming women enrolled in the computer science program has risen since 2008, and is at 32%. M.I.T.’s figure is 30%.”<sup>305</sup>

### B. *Glass Cliff Phenomenon*

Professor Diana Bilimora states “recently conducted glass cliff research has provided a contemporary twist to the glass ceiling phenomenon, where instead of being systematically blocked on the way to the top of

ACM, Feb. 2009; Maria M. Klawe, *Refreshing the Nerds*, 44 COMM. ACM 67 (2001); J. Lawry et al., *Exploring Common Conceptions About Boys and Electronic Games*, 14 J. COMPUTERS IN MATH & SCI. TEACHING 439 (1995); V. Chan et al., *Gender Differences in Vancouver Secondary Students’ Interests Related to Information Technology Careers*, (Proc. WWC, Vancouver, 2000); R. Davies et al., *Virtual Family: Including Girls in the World of Programming*, (Proc. ED-MEDIA, Montreal, 2000); Maria M. Klawe et al., *Playing Together Beats Playing Apart, Especially for Girls*, 1995 CSCL ‘95 THE FIRST INTERNATIONAL CONFERENCE ON COMPUTER SUPPORT FOR COLLABORATIVE LEARNING 177; Maria M. Klawe et al., *Give and Take: Children Collaboration on One Computer*, CHI ‘95 (Conference Companion, Denver, Co) May 7–11, 1995; Maria M. Klawe, *Lumines Forever*, 15 MATH HORIZONS 14 (2007); Maria M. Klawe, *Girls Boys, and Computers*, INROADS (SIGCSE Bull.) June 2, 2002; Maria M. Klawe et al., *E-Gems: A Project on Computer Games, Mathematics, and Gender*, in GHOSTS IN THE MACHINE (A. Rubin & N. Yelland eds., 2002); Maria M. Klawe et al., *ARC: A Computer Science Post-Baccalaureate Diploma Program that Appeals to Women* (Proc. WWC, Vancouver, 2000); Maria M. Klawe et al., *Toys to Teach: Mathematics as a Collaborative Climbing Exercise*, 2002 INT’L CONF. ON COMP. GRAPHICS AND INTERACTIVE TECHNIQUES 117; Maria M. Klawe, *When Does the Use of Computer Games and Other Interactive Multimedia Software Help Students Learn Mathematics?*, (Technology and NCTM Standards 2000 Conference, Arlington, 1998); Maria M. Klawe & Nancy Leveson, *Women in Computing: Where Are We Now?*, 38 COMM. ACM 29 (1995); Maria M. Klawe, *Bringing Mathematical Research to Life in the Schools*, (Proc. 7th Int. Cont. Math. Edu., Quebec, 1992); Kamran Sedighian & Maria M. Klawe, *An Interface Strategy for Promoting Reflective Cognition in Children*, CHI ‘96 (Conference Companion on Human Factors in Computing, Vancouver) Apr. 13–18, 1996; Kamran Sedighian & Maria M. Klawe, *Super Tangrams: A Child-Centered Approach to Designing a Computer Supported Mathematics Learning Environment*, 1996 PROCEEDINGS OF THE 1996 INT’L CONF. ON LEARNING 490; M. Wu et al., *Colorful Hints for Collaborative Climbing*, (CSCL Workshop on Documenting Collaborative Learning, Boulder, 2002).

303. Katie Hafner, *Giving Women the Access Code*, N.Y. TIMES, Apr. . 2, 2012, [http://www.nytimes.com/2012/04/03/science/giving-women-the-access-code.html?pagewanted=all&\\_moc.semityn.www](http://www.nytimes.com/2012/04/03/science/giving-women-the-access-code.html?pagewanted=all&_moc.semityn.www).

304. *Id.*

305. *Id.*

corporations, women are appointed to the top (corporate boards or TMTs [top management teams]) when the company is in dire straits.”<sup>306</sup>

This phenomenon has been described as follows: “corporations are more likely to turn to a female for an officer or CEO position [presumably a director also] when events magnify the risk of failure.”<sup>307</sup> New research describes this phenomenon:

Psychologists Michelle Ryan and Alexander Haslam found that businesses appoint women to corporate leadership positions “in problematic . . . circumstances.” Their appointments “hence [were] more precarious [than men’s appointments].” If she succeeds, of a woman CEO, directors and senior executives say: “We expected nothing less.” If she falls from grace, many will say: “I told you so,” leaving unstated that failure must have been due to gender.<sup>308</sup>

Using U.S. *Fortune 500* female CEOs as the sample, the glass cliff theory seems to bear up under examination. Patricia Woertz became CEO after Archer Daniels Midland had reached a nadir, with the former CEO’s son beginning a term in prison for price fixing on ADM’s behalf.<sup>309</sup> Susan Ivey became CEO at Reynolds American when the \$368.5 billion settlement with forty-six states and other adverse judicial outcomes had laid the tobacco industry low.<sup>310</sup> Brenda Barnes got the reins at Sara Lee after over-diversification and lackluster returns had driven the company down.<sup>311</sup> Ann Mulcahy got the top job at Xerox only after a sea of red ink flowed and the company’s future was uncertain.<sup>312</sup> Mary Sammons became the CEO of Rite Aid in the midst of deeply troubled times, with former CEO Martin Grass beginning a prison term and the share price reduced to a few dollars and cents.<sup>313</sup> Patricia Russo became CEO of Lucent after it had laid off over 64,000 employees and the shares price flirted

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306. Bilimoria, *Directions for Future Research*, *supra* note 22; Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Evidence That Women Are Over-Represented in Precarious Leadership Positions*, 16 BRITISH J. MGMT. 81 (2005); Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Exploring the Dynamics Surrounding Women’s Appointment to Precarious Leadership Positions*, 32 ACAD. MGMT. REV. 549 (2007)

307. Branson, *supra* note 68, at 1568.

308. *Id.*; Michelle K. Ryan & S. Alexander Haslam, *The Glass Cliff: Evidence That Women Are Over-Represented in Precarious Leadership Positions*, 16 BRITISH J. MGMT. 81 (2005); Jayne W. Barnard, *At the Top of the Pyramid: Lessons from the Alpha Women and the Elite Eight*, 65 MD. L. REV. 315 (2006).

309. Branson, *supra* note 68, at 1568; BRANSON, *supra* note 190, at 73.

310. Branson, *supra* note 68, at 1568; BRANSON, *supra* note 190, at 66.

311. Branson, *supra* note 68, at 1568.

312. *Id.* (“Xerox’s market share had gone from 90% to 13%.”).

313. *Id.*

with the \$1.00 barrier.<sup>314</sup> Carol Bartz came to the CEO suite at Yahoo! After a badly botched response to a takeover proposal from Microsoft and . . . continuing losses had caused previous management to resign.<sup>315</sup> In fact, a near majority, ten of twenty-two, of the female CEOs my book portrays came to power only when the corporation faced telling and uncertain circumstances, or worse.<sup>316</sup>

However, Alison Cook and Christy Glass in their study of the twenty-eight women *Fortune 500* CEOs during the period 1990 to 2011 find “little evidence that women are more likely to be promoted to CEO in firms that are struggling.”<sup>317</sup> In addition:

We do find evidence that institutional diversity significantly impacts women’s mobility and tenure. First, women’s integration on boards of directors significantly increases the likelihood that a woman will be appointed CEO. Second, there is a significant positive relationship with the proportion of women on the board of directors and women CEOs’ length of tenure. Taken together these findings suggest that diversity among decision makers plays a strong role in women’s ability to overcome the barriers posed by the glass ceiling. While previous research has shown that gender integration among managerial ranks increase women’s odds of being hired and promoted, this study shows that this impact holds for promotions at the highest level. Furthermore, diverse boards increase the duration of women leaders’ tenure, allowing them a greater opportunity to demonstrate their leadership capacity. Conversely, our findings also suggest that all-male boards or predominantly male boards are much more likely than diverse boards to appoint male CEOs.<sup>318</sup>

314. *Id.*

315. *Id.* at 1568–69.

316. *Id.* at n.68 (“Those women CEOs who came to power in precarious corporate settings (10) include: Jill Barad at Mattel; Andrea Jung at Avon; Ann Mulcahy at Xerox; Patricia Russo at Lucent; Susan Ivey at Reynolds American; Patricia Woertz at AMD; Brenda Barnes at Sara Lee; Mary Sammons at Rite Aid; Christina Gold at Western Union; and Carol Bartz at Yahoo. Those female CEOs of whom the same thing cannot be said (12) include Carleton Fiorina at Hewlett-Packard; Marion Sandler at Golden West Financial; Paula Rosport Reynolds at Safeco; Angela Braly at Wellpoint; Indra Nooyi at Pepsico; Carol Meyrowitz at TJX; Meg Whitman at Ebay; Lynn Elsenahns at Sunoco; Ellen Kullman at DuPont; Irene Rosenfeld at Kraft; Ursula Burns at Xerox; and Laura Sen at BJ’s Wholesale Club.”); BRANSON, *supra* note 190.

317. Alison Cook & Christy Glass, *Women and Top Leadership Positions: Toward an Institutional Analysis*, 21 *GENDER, WORK & ORG.* 91, 100 (2014).

318. *Id.*

### C. Searching for the Diverse Director

The quest to achieve greater board diversity may require a diligent search in non-traditional places. It has been observed that “some companies are expanding their candidate searches to rising talent that is not recognized by name in the board network. Such companies have begun tapping into the ranks below the C-suite for qualified talent.”<sup>319</sup> Professor Seletha R. Butler suggests:

By recruiting corporate board candidates outside the C-suite, such as leaders of corporate divisions and middle management leaders, boards increase their diversity options. Furthermore, recruiting such talent outside the C-suite can improve the board’s understanding of the company’s internal operations, since such employees are closer to the organization’s day-to-day operations, and thus, are likely to bring a different perspective to the boardroom.<sup>320</sup>

Certain industries (energy, infrastructure, electronics, and technology) have notably less female directors than in other industries.<sup>321</sup> Professor Butler believes “a greater focus should be placed on exposing females to these underrepresented industries and on providing them with training and advancement opportunities within these industries.”<sup>322</sup> A former CEO of U.S. Bank of Washington, Phyllis J. Campbell is the chairman, Pacific Northwest for JPMorgan Chase.<sup>323</sup> She also currently serves as the lead independent director for the Alaska Air Group; serves on the boards of Nordstrom, and others.<sup>324</sup> With regard to refreshing the board, Ms. Campbell recommends that all boards should “make diversity a focus of the Nominating and Governance committee.”<sup>325</sup>

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319. See Butler, *supra* note 280, at 72 (offering a 7-tier strategy to promote “inclusiveness and a continuous evolution of diversity, [consisting of:] (1) preparing early; (2) post-secondary governance study and training; (3) promoting from middle management; (4) establishing an inclusive nominating committee; (5) utilizing available diversity information; (6) being intentional; and (7) understanding international actions on board diversity.”). *Id.* at 82.

320. Butler, *supra* note 280, at 72.

321. *Id.* at 85; Daniel Ferreira, *Board Diversity*, in *CORPORATE GOVERNANCE: A SYNTHESIS OF THEORY, RESEARCH AND PRACTICE* (H. Kent Baker & Ronald Anderson eds., 2010).

322. Butler, *supra* note 280, at 85.

323. *Executive Profile: Phyllis J. Campbell*, BLOOMBERG.COM, <http://www.bloomberg.com/research/stocks/people/person.asp?personId=170145&ticker=JPM> (last visited Jan. 26, 2015).

324. *Id.*

325. Phyllis J. Campbell, Keynote address before the NACD Meeting on “Diversity in the Boardroom: A Competitive Advantage”, Seattle Marriott Waterfront (Sept. 11, 2012).

#### D. Diversity Mentorship Opportunities

Professors Orlando Richard and Goce Andrevski find “formal mentoring programs should strengthen the relationship between management crosscutting diversity and firm performance by facilitating positive interactions across race and gender.<sup>326</sup> Moreover, they “expect that companies with formal mentoring for minorities will be more able to benefit from crosscutting diversity in management, which in turn will lead to superior firm performance.”<sup>327</sup> Richard and Andrevski also state, “[o]ur results show that only when organizations provide a context where both diverse managers and board of directors can experience high quality task and social interactions within and between their respective groups can organizations move towards accruing a ‘sustainable diversity-based advantage.’”<sup>328</sup> Moreover, “[t]he board of directors plays an integral part in facilitating strategic changes within the firm. In fact, recent research uses upper echelons theory coupled with demographic faultline logic to argue that background board of diversity influences discussion of entrepreneurial issues.”<sup>329</sup> Recognizing the crucial importance the role of mentoring plays in assisting women and minorities to reach organizational leadership, Schipani, Dworkin, Kwolek-Folland and Maurer provide a valuable review of the literature on networking and mentoring from the various academic fields of economics, law, social psychology and sociology.<sup>330</sup> Catalyst reports that for high potential executives “the people with whom they discuss important work matters, from bouncing ideas around to getting advice on key decisions, strategizing projects, evaluat-

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326. Richard et al., *supra* note 10; see also Cindy A. Schipani et al., *Women and the New Corporate Governance: Pathways for Obtaining Positions of Corporate Leadership*, 65 MD. L. REV. 504 (2006) (highlighting the role of mentoring as a pathway of success for women in the corporate hierarchy).

327. Richard et al., *supra* note 10.

328. *Id.*

329. *Id.* See generally Jerry Goodstein et al., *The Effects of Board Size and Diversity on Strategic Change*, 15 STRAT. MGMT. J. 241 (1994); Christopher S. Tuggle et al., *Attention Patterns in the Boardroom: How Board Composition and Processes Affect Discussion of Entrepreneurial Issues*, 53 ACAD. MGMT. J. 550 (2010).

330. Cindy A. Schipani et al., *Pathways for Women to Obtain Positions of Organizational Leadership: The Significance of Mentoring and Networking*, 16 DUKE J. GENDER L. & POL'Y 89 (2009); see also Bernali Choudhury, *Gender Diversity on Boards: Beyond Quotas*, 21 EUR. BUS. L. REV. (forthcoming 2015), available at <http://ssrn.com/abstract=2442040> (discussing quotas and mentoring programs); David H. Zhu & James D. Westphal, *How Directors' Prior Experience With Other Demographically Similar CEOs Affects Their Appointments onto Corporate Boards and the Consequences for CEO Compensation*, 57 ACAD. MGMT. J. 791 (2014) (suggesting CEOs are influenced in appointing new directors by whether candidates have experience working with demographically similar CEOs).

ing options, or discussing career goals.”<sup>331</sup> Various types of important career development identified by Catalyst include:

- Job or Career Advice: The person provides advice on specific tasks, offers coaching, or provides general information about navigating the organization.
- Sponsorship: The person opens doors for you, has power and/or an influential position within the organization and uses it in your favor to advocate for you and help you get projects and assignments that can enhance your position and visibility.
- Support: The person provides friendship, empathy, or caring beyond the job.
- Role-Modeling: The person sets an example you aspire to emulate.<sup>332</sup>

Catalyst found “when asked about the trusted people with whom they discussed important career matters, high potentials who received development support from others are more likely to now be developing the next generation of leaders.”<sup>333</sup> Those who have benefited from the help of others (mentors) are “providing others with the same help that they themselves received along the way.”<sup>334</sup> Key findings include:

- Being developed matters: a higher percentage of high potentials who had received developmental support in the past two years were more likely to be offered similar support to a protégé. Fifty-nine percent of those who received developmental support were now, in turn, developing others compared to 47% of those who hadn’t received this type of support.
- Numbers matter: the more people high potentials received developmental advice from, the more likely they were to pay it forward to others.
- The type of development received matters: if high potentials had received sponsorship, they were more likely to be paying it forward. Sixty-six percent of high potentials who were sponsored were developing others vs. 42% who hadn’t been sponsored.
- High potentials are more likely to develop future talent if others have similarly invested in their advancement.
- Developing others pays off in greater career advancement and compensation growth.

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331. Sarah Dinolfo & Christine Silva, *High Potentials in the Pipeline: Leaders Pay it Forward 2* (2012), available at <http://www.catalyst.org/publication/534/high-potentials-in-the-pipeline-leaders-pay-it-forward>.

332. *Id.*

333. *Id.* at 3.

334. *Id.*

- Women were more likely than men to be developing women.<sup>335</sup>

During March, 2010, the Australian Institute of Company Directors (AICD) launched a program to mentor/sponsor women directors.<sup>336</sup> Professor Douglas M. Branson reports:

Mentee applicants must attend either the AICD's "Directors' Course in Mastering the Boardroom" or its "International Company Director's Course." Once they have become "ASX 200 board ready," through attendance at the course, and their experience as lawyers, accountants, corporate managers, or non-profit entities, women candidates join with a mentor. Initially sixty-three women qualified. The mentors are company chairmen, or experienced directors of ASX listed companies." At the program's inception, fifty-six of the chairmen of the ASX 200 had signed on. They pledge not only to mentor the candidate for a year but at the end of the year place that woman on a public company board of directors.

Between April 2010, and November, 2010, the percentage of women directors on Australian corporate boards increased 2%, from 8.5% to 10.4%, and has continued to increase thereafter. The percentage reached 13.8% by March 2012. A news article recounted that in 2010 alone, ASX 200 corporations added fifty-nine women to their boards, compared with ten in 2009. At first blush the number may seem small but one must remember that corporate boards are smaller in Australia (5–7 directors) than in many other nations (in the U.S. approximately 10.6) and that the Australian sample is smaller (ASX 200 versus, say *Fortune 500* in the U.S.).<sup>337</sup>

### E. Whistleblowing

Contending that "organizations tend to pay attention to whistleblowers who have more bases of social power," the assertion that women managers tend to be more effective whistle blowers seems to be supported by evidence based on a "more inclusive 'coalition-building'" management style.<sup>338</sup>

335. *Id.* at 6.

336. Branson, *supra* note 91, at 27. *See generally* Williams, *supra* note 177 ("The Australian Institute of Corporate Directors . . . has a well-publicized new mentoring and scholarship program in place, which it says has contributed to a recent surge in the ranks of women on boards, from 8.3% in early 2010 to 13% at August [2011].").

337. Branson, *supra* note 91, at 29 (citations omitted).

338. Schipani et al., *supra* note 326, at 533. *See generally* DEBORAH TANNEN, THAT'S NOT WHAT I MEANT!: HOW CONVERSATIONAL STYLE MAKES OR BREAKS RELATIONSHIPS (Harper Collins 2011) (1986); DEBORAH TANNEN, YOU JUST DON'T UNDERSTAND: WOMEN AND MEN IN CONVERSATION (Harper Collins 2001) (1990); Sue Newell, *Communica-*

When whistleblowing concerns incidents such as discrimination and/or harassment, women are disproportionately likely to be victims or perceived to be personally involved and therefore not be as readily believed. Mentoring (discussed above) can also affect credibility. If the whistleblower has a powerful mentor, that indirectly gives the whistleblower power. As stated, power is positively correlated with credibility. If the mentor backs up the mentee (and that may be a big if) then the whistleblower is likely to be more effective.<sup>339</sup>

## X. PARTNERS ADVOCATING GREATER BOARD DIVERSITY

A number of organizations are helpful in advocating greater diversity among corporate boards. Many public pension funds have become activist investors during recent years to protect and enhance the value of their investments. Including all such organizations is beyond the scope of this paper; however several of the more prominent are described here. Organizations or identifiable groups of individuals who have been particularly active in promoting diversity in corporate governance include: the Alliance for Board Diversity, Boardroom Bound, Catalyst, Inc., CalSTRS and CalPERS, the Diverse Director Data Source, Direct Women, influence of fathers with daughters, the National Association of Corporate Directors, and TIAA-CREF and Women Corporate Directors (WCD).

### A. *Alliance for Board Diversity*

Founded in 2004, The Alliance for Board Diversity is a joint effort of four leadership organizations: Catalyst, The Executive Council, Hispanic Association on Corporate Responsibility, and Leadership for Asian Pacifics, Inc. committed to the proposition that shareholder value may be “enhanced by promoting inclusion of women and minorities on corporate boards.”<sup>340</sup>

The members of the Alliance for Board Diversity are committed to the following as they pertain to women and minorities within the boardrooms of corporate America:

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tion, in ORGANIZATIONAL BEHAVIOUR REASSESSED: THE IMPACT OF GENDER 60 (Elisabeth Wilson ed., 2001); Judy B. Rosener, *Ways Women Lead*, HARV. BUS. REV., Nov. 1990, available at <http://hbr.org/1990/11/ways-women-lead/ar/>; MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATIONAL & LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES (1992); John R.P. French, Jr. & Bertram Raven, *The Bases of Social Power*, in STUDIES IN SOCIAL POWER (Dorwin Cartwright ed., 1959).

339. Schipani et al., *supra* note 326, at 534.

340. *About the Alliance for Board Diversity*, ALLIANCE FOR BD. DIVERSITY, [http://theabd.org/ABD\\_report.pdf](http://theabd.org/ABD_report.pdf) (last visited Sept. 19, 2014).

- Offer referrals of qualified candidates through its member and partner organizations that can help facilitate boardroom diversification.
- Conduct research to measure changes in the demographic makeup within Fortune 500 boards and raise awareness of these findings.
- Ally with and/or support like-minded organizations that are committed to the issue of diverse boardroom composition as a vital shareholder concern, as well as with organizations that affect boardroom diversity.<sup>341</sup>

### B. *Boardroom Bound*®

Founded by Linda K. Bolinger, Boardroom Bound's stated mission is to "Foster quality governance through inclusive leadership in America's boardrooms."<sup>342</sup> The organization states that their three cornerstones in fostering quality corporate governance involve:

1. Advancing new standards for board candidacy in preparing and sourcing prequalified candidates.
2. Building a premier diverse and inclusive board service pipeline that promotes public service as a core value and responsibility.
3. Championing corporate governance preparedness through progressive board service experience and opportunities . . . .

[And that this] system has three central elements that are sequentially related to moving individuals through [their] pipeline. They are: training and education; repository of pre-qualified candidates; and [candidate] referral/promotional service.<sup>343</sup>

### C. *Catalyst, Inc.*

Felice Schwartz founded Catalyst in 1962, dedicated to promoting social equality for women in the workplace.<sup>344</sup> Now, with offices in Canada, Europe and India and based in New York City, the organization has expanded globally and is the source of considerable data, research and community.<sup>345</sup>

341. *Id.*

342. BOARDROOM BOUND, <http://www.boardroom-bound.com> (last visited Sept. 18, 2014).

343. *Id.*

344. See generally CATALYST: CHANGING WORKPLACES, CHANGING LIVES, <http://www.catalyst.org/who-we-are/our-history> (last visited Sept. 7, 2014) (discussing the history of the Catalyst Organization).

345. *Id.* (inviting women, men, and organizations to join in building the inclusion that will make business society, and lives change for the better).

#### D. *CalSTRS & CalPERS*

The California State Teachers' Retirement System (CalSTRS), has an investment portfolio recently valued at \$154.6 billion, and is the largest teacher pension fund in the United States. CalSTRS administers a hybrid retirement system, consisting of a traditional defined benefit, cash balance and defined contribution plans, as well as disability and survivor benefits. "CalSTRS serves California's 852,000 public school educators and their families from the state's 1,600 school districts, county offices of education and community college districts."<sup>346</sup> During "recent years, the issues of board of director leadership and oversight roles have taken on increased significance to long-term investors, such as CalSTRS. Today's economic challenges highlight the importance that board diversity plays in enhancing value and providing companies with a full range of fresh talent and experience."<sup>347</sup> Anne Sheehan, Director of CalSTRS Corporate Governance says:

We've advanced the ball in the name of board diversity and are committed in our conviction that corporate boards and their nominating committees consider diversity in the larger context of improving shareholder . . . . One lesson from the financial crisis was the role corporate board group-think played in fostering management [of] short-term priorities that proved detrimental to sustainable value creation. We think improved board diversity will address that problem.<sup>348</sup>

"The California State Teachers' Retirement System withdrew all eight of its board diversity shareholder proposals filed during the 2011 proxy season after successfully engaging companies to consider diversity in director searches."<sup>349</sup>

Following the SEC filing for the Facebook IPO, Ms. Sheehan wrote the following letter to Mark Zuckerberg, Facebook Chairman and Chief Executive Officer, stating (in relevant part):

CalSTRS is currently invested in Facebook through its Private Equity allocation in two partnerships and we will most likely be a common stock investor once the IPO is completed. We are pleased with the appreciation that the fund has enjoyed from its investment in

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346. Press Release, Cal. State Teachers' Ret. Sys., CalSTRS Continues to Advance Diversity on Corporate Boards (July 12, 2011), *available at* <http://www.calstrs.com/news-release/calstrs-continues-advance-diversity-corporate-boards>.

347. *Id.*

348. *Id.*

349. *Id.*

Facebook, but as a long-term investor, we engage portfolio companies on a variety of issues.

I write to you today because of the reported composition of the Facebook board of directors. We are disappointed that the Facebook board will not have any women members. This is particularly glaring in view of the fact that Facebook is going public at a time when there is clear evidence that companies with diverse boards perform far better than the companies with more homogeneous boards. We also note that the Facebook COO, Sheryl Sandberg has been very supportive of increasing the diversity on corporate boards, particularly gender diversity, and in the senior management of corporations.

The Facebook board is relatively small for a company with its estimated market capitalization. We believe that investors and the company would benefit from a larger, more diverse board and urge you to expand its size. We realize that Facebook will be a controlled company in which the public stockholders will have little influence, but when the company's mission and subscriber base are considered, a diverse board makes good business sense.

On behalf of CalSTRS and our beneficiaries, the teachers of the state of California we strongly encourage you to increase the diversity of your board prior to the IPO.<sup>350</sup>

#### E. *The Diverse Director Data Source*

Anne Sheehan previously announced that CalSTRS has partnered with The California Public Employee Retirement System (CALPERS) to provide a database of “board-ready candidates . . . a resource to these companies that we are large shareholders in. And this is the way we feel like we can provide some value add—and contribute to getting more diversity on the boards.”<sup>351</sup> Diversity is important at CALSTRS, as reflected in the following statement from their recent semi-annual report on the topic of Diversity in the Management of Investments:

While maintaining a financially sound retirement system, CalSTRS seeks to honor the philosophy of inclusion, long reflected in California educators. Diversity in the management of investments is interwoven in the investment business goals and is consistent with the

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350. Letter from Anne Sheehan, Dir. Corp. Governance, State Teachers' Retirement System, to Mark Zuckerberg, Chairman and Chief Exec. Officer, Facebook Inc. (Feb. 7, 2012), available at [http://www.calstrs.com/sites/main/files/file-attachments/letter\\_facebook.pdf](http://www.calstrs.com/sites/main/files/file-attachments/letter_facebook.pdf).

351. Pablo Schneider, *The Diverse Director DataSource: Conversations with Anne Sheehan of CALSTRS, Nell Minow of the Corporate Library, and Anne Simpson of CALPERS*, 12 *LATINO LEADERS*, July-Aug. 2011, at 20.

objective of investing to enhance the returns at a prudent level of risk, in accordance with CalSTRS Investment Policies, the California Constitution, and the Education Code.<sup>352</sup>

In October 2001, the CalSTRS Investment Committee adopted a Policy on California Investments to engage in diversity efforts within the investment portfolio.<sup>353</sup> The Director DataSource, known as “3D,” will offer shareowners, companies and other organizations a facility from which to recruit individuals whose experience, skills, and knowledge qualify them to be a candidate for a director’s seat.<sup>354</sup>

The California Public Employees’ Retirement System (CalPERS) “manages retirement benefits for more than 1.6 million California public employees, retirees, and their families.”<sup>355</sup> CalPERS provide pension benefits to 1,116,044 active and inactive members and 513,623 survivors, beneficiaries, and retirees as of June 30, 2010.<sup>356</sup> CalPERS are reportedly the largest public pension fund in the United States, having approximately \$220 billion in assets.<sup>357</sup> Moreover:

As a global investor, public employer, and provider of retirement and health benefits services within the nation’s most ethnically and culturally diverse state, CalPERS recognizes diversity as a competitive advantage that calls for the broadest possible pool of talent, experience, and perspective. The CalPERS Board of Administration acknowledged this by including diversity as an element in [their] Strategic Plan.<sup>358</sup>

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352. CAL. TEACHERS’ RET. BD. ON DIVERSITY IN THE MGMT. OF INV’S, SEMI-ANNUAL REPORT 1 (2010), available at <http://www.calstrs.com/publicdocs/Page/CommonPage.aspx?PageName=DocumentDownload&Id=62e06ae4-3fd7-4e23-a132-ac3d0eef7618>.

353. CAL. STATE TEACHERS’ RET. SYS., DIVERSITY IN THE MANAGEMENT OF INVESTMENTS: 5 YEAR BUSINESS PLAN 6 (2010), available at <http://www.calstrs.com/report/reports-investment-management>.

354. See CALSTRS, available at <http://www.calstrs.com/CorporateGovernance/DiverseDirectorDataSource/index.aspx>.

355. California Public Employees Retirement System, Facts at a Glance: General (Sept. 2011), <http://www.calpers.ca.gov/eip-docs/about/facts/general.pdf>.

356. *Id.*

357. Press Release, Cal. Pub. Employee’s Ret. Sys., Workshop to Explore Integrating Environmental, Social, Governance Issues into Investment Process (Aug. 9, 2011), available at <http://www.calpers.ca.gov/index.jsp?bc=/about/newsroom/news/2011/integrating-is-sues.xml>.

358. CALIFORNIA PUBLIC EMPLOYEES’ RETIREMENT SYSTEM, DIVERSITY UPDATE 1 (2011), available at <http://www.calpers.ca.gov/eip-docs/about/board-cal-agenda/agendas/full/201106/item16.pdf>.

#### F. *DirectWomen*

DirectWomen is a program specifically designed to identify, develop, and support a select group of accomplished women attorneys to provide qualified directors needed by the boards of U.S. companies, while promoting the independence and diversity required for good corporate governance.<sup>359</sup> The organization states its goals and objectives as:

- Providing strategic career development and networking opportunities to women exiting the active practice of business law who wish to continue contributing to the corporate world;
- Reinforcing the merits of gender diversity in the minds of corporate directors, and enhancing their appreciation for the tremendous reservoir of seasoned talent that senior women business law practitioners represent;
- Facilitating access of executive search firms to well-qualified women attorney candidates for independent director positions;
- Recognizing and honoring women attorneys who serve on the boards of public companies, lead corporate America and epitomize the value of diversity in the boardroom with the Sandra Day O'Connor Board Excellence Award.<sup>360</sup>

#### G. *Influence of Fathers with Daughters*

A thorough review of the literature produced a surprise worthy of mention. It appears that one of the most receptive groups to the promotion of women to the boardroom may be comprised of fathers who have daughters. Professor Douglas Branson states:

[T]he father of two daughters, both of whom are university educated, each with a master's degree [recalls that] [i]n my research and travels on the subject, I find that a principal exception to the 'good ole boy's club' attitude comes from corporate directors and officers who are, like me, the fathers of daughters. When a study group upon of which I am a member interviewed company chairpersons (all male) in Australia, the group asked each chair why he took time out of his undoubtedly busy day to meet with our group researching pathways women directors actually have taken in their careers. With no prompting whatsoever, every company chair replied that he was the father of daughters. They regarded it as essential that women have the same opportunities as men in the arts, in sport, or in business. Many (most) fathers are not overly protective of daughters as they

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359. *Who We Are*, DIRECT WOMEN, <http://www.directwomen.org/who-we-are> (last visited Sept. 7, 2014).

360. *Id.*

may once have been. Instead, they regard their daughters as equal to and in many respects the same as sons [would be].<sup>361</sup>

#### H. *The InterOrganizational Network (ION)*

The InterOrganizationNetwork (ION), founded in 2004, consists of sixteen regional organizations in the United States representing more than 10,000 women in business across a wide range of industries. Through ION, these women combine their energies in advocating the advancement of women to positions of power in the business world, especially to boards of directors and executive suites. In the U.S., the number of women advancing to the senior ranks—the executive suite and boardroom—remains stagnant. The ION message and mission are significant, by developing corporate leadership that includes the talents of all and better reflects the composition of today’s workforce—consumers, society, and business will benefit.<sup>362</sup>

#### I. *National Association of Corporate Directors*

Founded in 1977, the NACD now has more than 14,000 members and is focused on creating more effective and efficient boards through director-led education and peer forums to share ideas and leading practices based on over thirty years of primary research. Highlighting NACD’s ongoing commitment to advancing diversity in the boardroom, Ken Daly, president and CEO of NACD recently observed that “[d]iverse insights are essential components to exemplary board performance, . . . [a]t a time when companies are facing more challenges than ever before, having a wide range of opinions is crucial to developing innovative corporate strategies.”<sup>363</sup> The inaugural Board Composition: Opportunities for Women in the Boardroom Summit (the Summit) was attended by over 100 women directors and C-Suite executives during September 2011.

Co-sponsored by the NACD and PwC’s Center for Board Governance, the Summit “successfully fostered a dialogue about the challenges women face getting on boards and the business challenges facing directors in today’s environment. The women at the Summit shared advice and anecdotes about their experiences and challenges getting and sitting on

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361. Branson, *supra* note 68, at 1558.

362. INTERORGANIZATION NETWORK, <http://www.ionwomen.org> (last visited Sept. 18, 2014).

363. Press Release, Nat’l Ass’n of Corp. Dirs., NACD and PwC Convene Group to Move the Needle: Diversity and Women in the Boardroom as a Strategic Business Imperative (Sept. 22, 2011), *available at* <http://www.nacdonline.org/AboutUs/PressRelease.Cfm?ItemNumber=3937>.

boards.”<sup>364</sup> Spencer Stuart’s Julie Hembrook Daum contended that rigorous board evaluations result in more diverse boards, observing that “[i]f we allow boards to think about who is in the room, we’ll get much better board. . . . If you’re on a nominating and governance committee, you should be pushing for serious board evaluations.”<sup>365</sup>

The NACD announced its Blue Ribbon Commission on diversity in corporate boardrooms, consisting of experienced public company directors and leading corporate governance experts.<sup>366</sup> The work and commission recommendations, discussing the benefits of boardroom diversity, the barriers that exist, and action steps to advance greater diversity are available in the *Report of the NACD Blue Ribbon Commission on the Power of the Diverse Board*.<sup>367</sup>

#### J. *On the Board* (George Washington University Business School)

*On The Board*, an initiative of the George Washington University School of Business and the International Women’s Forum, is designed to prepare women leaders to become successful candidates for, and directors on, corporate boards. Established by a generous gift from GW Trus-

364. PRICEWATERHOUSECOOPERS, LLP, *supra* note 141.

365. Judy Warner, *Acting on What We Know: Lack of Board Turnover is Seen as One Impediment to Women’s Advancement in the U.S.*, NACD DIRECTORSHIP (Sept. 9, 2011), <http://www.directorship.com/acting-on-what-we-know/>.

366. Press Release, Nat’l Ass’n of Corp. Dirs., NACD Forms Commission to Examine “The Power of the Diverse Board” (May 17, 2012), *available at* <http://www.nacdonline.org/AboutUs/PressRelease.cfm?ItemNumber=4881>.

367. *Id.* (The NACD Blue Ribbon Commission is led by four co-chairs from across the corporate governance spectrum, including Curtis Crawford, Ph.D. (president and CEO of XCEO Inc., director of DuPont, ON Semiconductor, and ITT Corporation); Cari Dominguez (director of Manpower, Inc.); William McCracken (CEO of CA Inc.); and Kathi Seifert (director of Eli Lilly and Company, Lexmark International Inc., Revlon Inc. and Supervalu Inc.). Other 2012 Commissioners: Aida Alvarez (Wal-Mart); Orlando Ashford (Chief HR Officer & Communications Officer at Marsh & McLennan Companies); Roger Barker (head of corporate governance at the Institute of Directors (UK)); Sandra Beach Lin (director for Wesco International); Reatha Clark King (former director at ExxonMobil); Kenneth Daly (president and CEO of NACD); Roy Dunbar (Humana); Denise Fletcher (Unisys Corp.); Charles M. Elson (HealthSouth); Barbara Hackman Franklin (former U.S. Secretary of Commerce, director for Aetna and chairman of the board for NACD); Raymond Gilmartin (General Mills); Peter R. Gleason (managing director and CFO of NACD); Holly J. Gregory (Weil, Gotshal & Manges); Bonnie Gwinn (Heidrick & Struggles); Michele Hooper (United Health Group); Jill Kanin-Lovers (Heidrick & Struggles); Richard Koppes (NutraCea); Alex Mandl (Dell, Inc.); Mary Pat McCarthy (former Executive Director of KPMG’s Audit Committee Institute); Irene Natividad (chairman of Corporate Women Directors International); John Olson (Gibson, Dunn & Crutcher); Richard Rivera (Winn-Dixie Stores, Inc.); Michael Rochelle (MDR Strategies, LLC); Anne Sheehan (director of corporate governance at CalSTRS); and Solomon Trujillo (Target).

tee Linda Rabbitt, the year-long fellowship program provides advanced training in board-level leadership knowledge and practice, including corporate strategy, crisis management, ethical and responsible decision-making, corporate finance and value creation, compliance, and many other issues germane to effective corporate governance.<sup>368</sup> The *On the Board* program provides valuable corporate governance mentors who provide guidance and help create personal networks. Maria M. Klawe, President of Harvey Mudd College and a director of both Microsoft and Broadcom, serves as an *On the Board* mentor.<sup>369</sup>

#### K. *Stanford Women on Boards Initiative*

The Stanford Women on Boards initiative provides guidance to those wishing to enhance their board service qualifications and has established a community forum for prospective women board candidates. In addition, a clearinghouse has been established to identify Stanford alumnae board-qualified candidates.<sup>370</sup>

#### L. *TIAA-CREF*

We have previously noted that the Teachers Insurance and Annuity Association (TIAA) and College Retirement Equities Fund (CREF), New York, commonly known as “TIAA-CREF” and several other major pension funds have filed blanket resolutions with companies that require them to create boards “composed of qualified individuals who reflect a diversity of experience, gender, and race.”<sup>371</sup>

#### M. *Women Corporate Directors*

Women Corporate Directors (WCD) is a global membership organization and community of women corporate directors. The WCD seeks to expand the WCD community through leadership, diversity, education and by fostering corporate governance best practices. WCD membership (over 1,400 members serving on over 1,550 boards) is a resource for networking, education and community. The WCD website is a resource

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368. See *On the Board: Advancing Women's Corporate Board Leadership*, GEORGE WASHINGTON UNIVERSITY, <http://business.gwu.edu/ontheboard> (last visited Sept. 19, 2014) (describing an excellent elite fellowship program under the direction of Professor Susan L. Kulp).

369. Elizabeth Olson, *Focused Effort to Narrow the Gender Gap on Corporate Boards*, N.Y. TIMES (Oct. 24, 2013, 5:18 PM), <http://dealbook.nytimes.com/2013/10/24/focused-effort-to-narrow-the-gender-gap-on-corporate-boards/>.

370. See *Stanford Women on Boards Initiative*, STAN. SCH. OF BUS., <http://alumni.gsb.stanford.edu/women/corpboards> (last visited Sept. 18, 2014).

371. Westphal & Milton, *supra* note 72, at 366.

for relevant news, speaking opportunities, open board positions and a member directory.<sup>372</sup>

#### N. *European Professional Women's Network*

The European Professional Women's Network (EuropeanPWN) is a network for professional international women, organizing over 600 events a year in seventeen major cities in Europe. With 3,000 members from more than ninety nationalities and from all business sectors across Europe, their pan-European networking activities are a testimony to the fact that diversity is a source of strength and creativity.<sup>373</sup>

The organization's stated mission is to "promote the professional progress of women through all their career phases, from potential through the pipeline to power by networking, mentoring and training . . . [and to] [e]ncourage companies to recognize the necessity of diverse and innovative management approaches . . . by promoting women's success stories. . . ."<sup>374</sup>

EuropeanPWN initiatives regarding corporate governance includes (1) a European-wide Women on Board programme (with events in several cities); (2) listing of Women on Board Club members (not public); and (3) a best practice Think Tank gathering.<sup>375</sup> In addition, the EuropeanPWN conducts and makes available valuable research about participation rates for women and other important corporate governance topics.<sup>376</sup>

### XI. CONCLUSION

Analysis of proxy data finds that while women and members of ethnic minorities are no longer strangers to board service, the total number of board seats held by women and people of color remain relatively small. Among S&P 500 boards, only 18% of new directors added during 2013 are minorities, although 56% of these boards report desiring minorities for board service. The SEC now requires public companies to disclose whether diversity is a factor in considering candidates for nomination to the board of directors, and how the company assesses how effective the policy has been.

What are boards looking for in director candidates? Active CEOs and COOs reportedly remain at the top of boards' recruitment wish-lists.

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372. See WOMENCORPORATEDIRECTORS, <http://www.womencorporatedirectors.com> (last visited Sept. 19, 2014).

373. See generally Press Release, Eur. Prof'l Women's Network & Russell Reynolds Assocs., *supra* note 155 (describing the European Professional Women's Network).

374. *Id.*

375. *Id.*

376. *Id.*

Next, most boards are looking for: financial and international expertise; industry experience; retired CEO/COOs; risk expertise; computer and information technology skills; marketing; regulatory/government; and digital or social media expertise. The answer to the promise of increased boardroom access seems to lie in penetrating those board skills most in demand. Accordingly, the most likely pathways to the boardroom for women and people of color are from the executive suite, from auditing careers, government, or from the law.

An absolute “must have” set of skills for every board includes independent directors to populate the audit, compensation, and nominating & governance committees. In addition, every board needs one or more financial experts to serve on its audit committee. Because corporate governance is a legally-intensive endeavor, those minority candidates with a legal education may have an advantage in gaining access to the boardroom. Another needed set of directorship skills where women and ethnic minorities may compete on a merit basis includes government and regulatory relations. A director with a network of existing and former government officials can assist executives with regulatory issues and advise them and the board on relevant legislative and regulatory changes. Finally, the benefit of diverse approaches to problem solving and broadly different career experiences seems highly desirable when seeking to engineer the optimal people mix for productive small group decision making.

