

STALLED: GENDER DIVERSITY ON CORPORATE BOARDS

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Virtually every recent report or study describes women's progress in achieving greater representation on corporate boards of directors as "stalled" or some similar adjective.² The low number of women in the corporate boardrooms of U.S. public companies has "stayed more or less the same, with small variations from year to year."³ In light of the increased presence

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² See, e.g., Korn/Ferry Institute, *34th Annual Board of Directors Study*, 4 (Dec. 18, 2008), http://www.kornferryinstitute.com/files/pdf1/Board_Study07_LoRez_FINAL.pdf ("stalled"); *Charged for Boardroom Change*, INTERORGANIZATION NETWORK, <http://www.ionwomen.org/about-us/about-us> (last visited July 20, 2011) ("stagnant"); Press Release, Latest Catalyst Census Shows Women Still Not Scaling the Corporate Ladder in 2010; New Study Indicates Clue to Reversing Trend (Dec. 13, 2010), <http://www.catalyst.org/press-release/181/latest-catalyst-census-shows-women-still-not-scaling-the-corporate-ladder-in-2010-new-study-indicates-clue-to-reversing-trend> ("stagnation"); Press Release, 2020 Women on Boards Forms Grassroots Campaign to Increase Women on Corporate Boards (Nov. 26, 2010), <http://www.2020wob.com/news-and-resources/press-releases/> ("static") [hereinafter 2020 Women on Boards]. But see Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?* 2 (Rock Ctr. for Corp. Governance, Working Paper Series No. 89, 2010) (stating that women's share of new board appointments spiked in 2009 when 39% of 424 new director appointments were women).

³ *Guys Who Get It: Business Leaders Who Understand the Value of Diversity at the Top, The 6th Annual Status Report of Women Directors and Executive Officers of Public Companies in Fourteen Regions of the United States*, INTERORGANIZATION NETWORK, 3 (Mar. 2010),

of women in the workplace and the failure of initiatives to date, it is time to consider what additional efforts could be taken to improve the status quo.⁴

I. THE PRESENT

A. *The Numbers*

Women comprise slightly more than one-half of the U.S. population and control 76% of U.S. consumer purchasing power.⁵ Women account for 46.7% of the U.S. labor force and 51.5% of management, professional, and related occupations.⁶ Yet women held only 14.4% of executive officer positions and 15.7% of board seats on Fortune 500 companies in 2010.⁷ Moreover, the number of female CEOs was similarly small. Women accounted for only 2.8% of CEOs at Fortune 500 companies.⁸ There were fourteen female CEOs at Fortune 500 companies and nineteen female CEOs at Fortune 501–1000 companies.⁹ In 2010, women executive officers held 7.6% of top earner positions at Fortune 500 companies.¹⁰

Sixty Fortune 500 companies had zero women directors in 2010.¹¹ Only 57% of S&P 500 companies had at least two female directors, and only 19% had more than two.¹² Only seventy-two Fortune 500 companies had 25% or more women directors.¹³ Progress at smaller, less visible public companies has been even slower. Only 60% of companies comprising the Russell 3000, and only half of the Russell 2000 companies, had at least one female director.¹⁴

http://www.ionwomen.org/wp-content/uploads/2010/12/ION_Report_web_032210.pdf; see also *Missing Pieces: Women and Minorities on Fortune 500 Boards*, ALLIANCE FOR BOARD DIVERSITY, 4 (2010), http://theabd.org/Missing_Pieces_Women_and_Minorities_on_Fortune_500_Boards.pdf (stating that from 2004 to 2010 the increase in women's board seats was "not appreciable").

⁴ This essay addresses only gender diversity, in keeping with the Symposium's theme. It must be acknowledged, however, that the lack of racial and ethnic diversity on corporate boards is also a serious problem.

⁵ Virtcom Consulting, *Board Diversification Strategy: Realizing Competitive Advantage and Shareowner Value*, CALPERS, 8 (2008), <http://www.calpers.ca.gov/eip-docs/about/press/news/invest-corp/diversification-strategy.pdf>.

⁶ *U.S. Women in Business*, CATALYST (Aug. 2011), <http://www.catalyst.org/publication/132/us-women-in-business>.

⁷ *Id.*

⁸ *Id.*

⁹ *Women CEOs of the Fortune 1000*, CATALYST (Sept. 2011), <http://www.catalyst.org/publication/322/women-ceos-of-the-fortune-1000>.

¹⁰ Rachel Soares et al., *2010 Catalyst Census: Fortune 500 Women Executive Officers and Top Earners*, CATALYST, 1 (2010), http://www.catalyst.org/file/412/2010_us_census_women_executive_officers_and_top_earners_final.pdf.

¹¹ See Rachel Soares et al., *2010 Catalyst Census: Fortune 500 Women Board Directors*, CATALYST, 1 (2010), http://www.catalyst.org/file/413/2010_us_census_women_board_directors_final.pdf.

¹² Annalisa Barrett, *Uneven Progress: Female Directors in the Russell 3000*, THE CORPORATE LIBRARY, 1 (2010), http://info.thecorporatelibrary.com/Portals/30022/docs/unpri_p1_femaledirectors.pdf.

¹³ *2010 Catalyst Census: Fortune 500*, CATALYST, app. 2 at 3 (2010), http://catalyst.org/etc/Census_app/10US/2010_US_Census_Appendix_2_Final.pdf.

¹⁴ Barrett, *supra* note 12, at 1.

Moreover, women directors do not generally hold leadership positions on boards. There were only fourteen S&P 500 companies with female board chairs.¹⁵ “Only forty-five S&P 500 companies ha[d] women chairing their compensation committees, 58 ha[d] female audit committee chairs, and 75 ha[d] women leading their nominating committees.”¹⁶ Very few of the S&P 500 companies had women serving in two or more positions of responsibility.¹⁷

Contrast these statistics with the fact that in 2010 women constituted a majority of the Commissioners at the Securities and Exchange Commission (“SEC”), including the Chair.¹⁸ Can anyone argue seriously that there are not additional well-qualified women to participate in corporate America?

B. Private Initiatives

The slow progress toward making the boardroom more representative of the workforce is not for lack of attention to the issue from the private sector. A number of well-respected organizations expend considerable resources on efforts to improve diversity, including the Alliance for Board Diversity (“ABD”),¹⁹ Catalyst,²⁰ the InterOrganization Network (“ION”),²¹ and the DirectWomen Initiative.²² A new initiative, 2020 Women on Boards, announced that it aimed to raise the percentage of

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Chair Mary L. Schapiro (since 2009), Elisse B. Walter (since 2008), and Kathleen L. Casey (2006–2011). *SEC Historical Summary of Chairmen and Commissioners*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/about/sechistoricalsummary.htm> (last visited Sept. 5, 2011).

¹⁹ The Alliance for Board Diversity (“ABD”) is a collaboration of four leadership organizations that have a common goal to increase equitable representation of women and minorities on corporate boards. *About the Alliance Board for Diversity*, ALLIANCE FOR BOARD DIVERSITY, <http://theabd.org/index.html> (last visited Sept. 15, 2011). The four organizations are Catalyst, The Executive Leadership Council, the Hispanic Association on Corporate Responsibility, and Leadership Education for Asian Pacifics, Inc. *Id.*

²⁰ Catalyst is a leading nonprofit membership organization that studies women’s experiences in business, barriers to their career advancement, and individual and organizational strategies leading to success. *About Us*, CATALYST, <http://www.catalyst.org/page/59/about-us> (last visited Sept. 15, 2011).

²¹ Formed in 2004, ION consists of fifteen regional organizations in the United States. *Charged for Boardroom Change*, INTERORGANIZATION NETWORK, <http://www.ionwomen.org/about-us> (last visited Sept. 15, 2011). It represents more than 10,000 women in business across a wide range of industries that advocate for the advancement of women to positions of power in the business world, especially to boards of directive and executive suites. *Id.*

²² “The centerpiece of the DirectWomen initiative is the DirectWomen Board Institute, an annual two-day program providing a free orientation and update on key issues facing current and future directors. The goal is to position an elite group of exceptional senior women lawyers for service as directors of major U.S. corporations.” *DirectWomen Board Institute Overview*, DIRECTWOMEN, <http://directwomen.org/institute/> (last visited Sept. 15, 2011).

women on corporate boards in the U.S. to 20% or greater by 2020.²³ Executive search firms and consulting firms have issued reports on the issue.²⁴

Institutional investors advocate for greater gender diversity. For example, California Teachers' Retirement System ("CalSTRS") announced that increasing board diversity was one of its goals in the 2011 proxy season and that it planned to submit proposals asking companies with little or no board diversity to ensure that women and minority candidates were included in their pools of nominees.²⁵ The California Public Employees' Retirement System ("CalPERS") recognizes the importance of diversity on boards, particularly to address historically under-represented groups, including women and minorities.²⁶ Further, CalSTRS and CalPERS are working with a panel of leading corporate governance experts to create a digital database aimed at increasing board diversity.²⁷ The Diverse Director DataSource ("3D") aspires to provide a place for companies to recruit qualified, diverse individuals.²⁸ Finally, Institutional Shareholder Services ("ISS"), the influential proxy advisory firm, is generally supportive of proposals that request reports on the company's efforts to diversify the board.²⁹

In addition to attention by institutional investors, many respected legal scholars have studied the issue, including my fellow presenters on this program, Douglas M. Branson,³⁰ Joan MacLeod Heminway,³¹ and Darren Rosenbaum.³² Other law schools have previously held symposia that have

²³ 2020 Women on Boards, *supra* note 2.

²⁴ See, e.g., Korn/Ferry Institute, *supra* note 2, at 4, 6 (analyzing the stalled progress of women and minorities on corporate boards); Virtcom Consulting, *supra* note 5, at 1 ("In terms of gender representation, corporate boards are still quite clearly behind.")

²⁵ Rosemary Lally ed., *Quarterly Governance Update*, COUNCIL OF INSTITUTIONAL INVESTORS (Dec. 16, 2010), <http://www.cii.org/UserFiles/file/resource%20center/council%20governance%20alert/2010%20Archive/2010%20Alert%2046.pdf>; see also Press Release, Cal. State Teachers' Retirement Sys., CalSTRS Continues to Advance Diversity on Corporate Boards (July 12, 2011), <http://www.calstrs.com/newsroom/2011/news071211.aspx>.

²⁶ Global Principles of Accountable Corporate Governance §§ 2.2, 2.4 (2010), available at <http://www.calpers-governance.org/docs-sof/principles/2010-5-2-global-principles-of-accountable-corp-gov.pdf>.

²⁷ Press Release, Cal. State Teachers' Retirement Sys., CalSTRS, CalPERS, Announce Diverse Director DataSource (3D) – A Resource to Identify Corporate Director Candidates (Apr. 5, 2011), <http://www.calstrs.com/newsroom/2011/news040511.aspx>.

²⁸ *Id.*

²⁹ 2011 U.S. Proxy Voting Guidelines Summary, INSTITUTIONAL S'HOLDER SERVS. INC., 62 (Jan. 27, 2011), available at <http://www.issgovernance.com/files/ISS2011USPolicySummaryGuidelines20110127.pdf>.

³⁰ Mr. Branson has authored NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE KEEPS WOMEN OUT OF AMERICA'S BOARDROOMS (2007) and THE LAST MALE BASTION: GENDER AND THE CEO SUITE IN AMERICA'S PUBLIC COMPANIES (2010).

³¹ Ms. MacLeod Heminway has authored *Sex, Trust, and Corporate Boards*, 18 HASTINGS WOMEN'S L.J. 173 (2007).

³² Mr. Rosenblum has authored *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55 (2009).

produced significant scholarship addressing the issue.³³

C. Government Initiatives (or Lack Thereof)

In contrast to these efforts by advocacy groups, investors, and academics, the federal government has largely failed to address the lack of diversity on corporate boards. The SEC's recent adoption of a disclosure rule addressing board diversity is the only exception to this governmental inaction.

1. Congress

Because Title VII of the Civil Rights Act of 1964 prohibits discrimination only against employees,³⁴ directors are outside its protections.³⁵ While the Dodd-Frank Wall Street Reform and Consumer Protection Act requires the SEC to create and staff an Office of Minority and Women Inclusion to, among other things, “assess[] the diversity policies and practices of entities regulated by the agency[,]”³⁶ the statute expressly does not give the SEC authority to require diversity measures.³⁷ In any event, the SEC has deferred creating and staffing this office due to budget uncertainty.³⁸

2. Treasury

The executive branch failed to use opportunities presented by the Troubled Asset Relief Program (“TARP”) to improve the diversity on boards. As a result of the TARP bailouts of five corporations, the U.S. Department of the Treasury became a controlling shareholder and had the opportunity to select or significantly influence the appointment of directors at these corporations.³⁹ By reason of its holdings of preferred shares in a

³³ See, e.g., Jennifer K. Brooke & Tom R. Tyler, *Board Diversity and Corporate Performance*, 89 N.C. L. REV. 715, 715–1082 (2011); Rhode & Packel, *supra* note 2, at 1; Jayne W. Barnard, *More Women on Corporate Boards? Not So Fast*, 13 WM. & MARY J. WOMEN & L. 703, 703–06 (2007); Lisa 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, 1105–07 (2005).

³⁴ Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006).

³⁵ 1 ARTHUR LARSON ET AL., EMPLOYMENT DISCRIMINATION § 4.05 (2d ed. 2008) (citing to legislative history).

³⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 342(b)(2)(C), 124 Stat. 1376, 1541 (2010).

³⁷ See *id.* § 342(b)(4) (stating that it should not be construed “to require any specific action based on the findings of the assessment”).

³⁸ See Memorandum from H. David Kotz, Inspector Gen., to the Honorable Barbara Lee, Subcomm. on Fin. Servs. and Gen. Gov't (June 15, 2011), available at http://www.sec-oig.gov/Reports/AuditsInspections/2011/Report_6_15_11.pdf.

³⁹ See Barbara Black, *The U.S. as “Reluctant Shareholder”*: *Government, Business and the Law*, 5 ENTREPRENEUR BUS. L.J. 561, 562 (2010) (discussing the government's actions as controlling shareholder).

number of other corporations, the Treasury has the power to appoint directors under certain circumstances, as when the corporation misses at least six consecutive dividend payments.⁴⁰ The Treasury has never discussed what attributes it deems important in filling directorships at these failed companies, but their actions do not suggest that diversity is an important consideration.

As a result of TARP financing, the Treasury controls American International Group, Inc. (“AIG”), and has the power to elect all of its directors.⁴¹ At AIG, aside from the CEO, seven directors elected by shareholders at the 2010 shareholders meeting joined the board after September 2008.⁴² Six of the seven are men; the median age is sixty-four. Six are retired CEOs or other senior management; one is currently senior management. The median service on other boards is two. Two additional directors appointed directly by the Treasury because of its preferred share holdings are both retired, male CEOs of approximately the same age.⁴³

In July 2009, as a result of TARP financing, the Treasury owned 33.6% common-stock interest in Citigroup;⁴⁴ in 2010, the Treasury began to sell off its common-stock holdings and, as of December 31, 2010, no longer owned common stock.⁴⁵ At Citigroup, since the bailout through the 2010 annual meeting, eight new independent directors were elected to the board. Seven of them are male and the median age is sixty-three; four are retired CEOs, two are current CEOs or senior management, one is an academic, and one is the former President of Mexico. The median number of other boards they serve on is two.⁴⁶

When GM and Chrysler emerged from bankruptcy in mid-2009, the Treasury had the power, because of its investments in each company, to designate a total of fourteen directors.⁴⁷ “Eleven of the fourteen directors

⁴⁰ The Treasury engaged a search firm to identify candidates and has interviewed possible directors. *Quarterly Report to Congress*, OFFICE OF THE SPECIAL INSPECTOR GEN. FOR THE TROUBLED ASSET RELIEF PROGRAM, 106 (Apr. 28, 2011), available at http://www.sig tarp.gov/reports/congress/2011/April2011_Quarterly_Report_to_Congress.pdf [hereinafter SIGTARP].

⁴¹ Am. Int’l Group, Inc., Proxy Statement 9–10 (Form DEF 14A) (Apr. 4, 2011), available at http://www.sec.gov/Archives/edgar/data/5272/000093041311002523/c64660_def14a.htm#c64660_relationships1 [hereinafter AIG Proxy Statement].

⁴² Black, *supra* note 39, at 580. At the 2011 shareholders meeting, two new directors were elected, both of whom are men. *American Int’l (AIG) Has Selected Two New Directors*, STREETINSIDER (Mar. 11, 2011), <http://www.streetinsider.com/Management+Changes/American+Intl+%28AIG%29+Has+Selected+Two+New+Directors/6362219.html>.

⁴³ Black, *supra* note 39, at 580. In 2011, the shareholders elected these two directors because the Treasury’s preferred shares were converted to common stock. AIG Proxy Statement, *supra* note 41, at 11.

⁴⁴ Black, *supra* note 39, at 573.

⁴⁵ SIGTARP, *supra* note 40, at 119.

⁴⁶ Black, *supra* note 39, at 586.

⁴⁷ *Id.* at 589. The Treasury’s equity holdings in each company have subsequently been reduced. SIGTARP, *supra* note 40, at 45–46. On July 21, 2011, the Treasury withdrew its investment in Chrysler. Press Release, Treasury Exits Investment in Chrysler Group LLC (July 21, 2011), <http://www.treasury.gov/press-center/press-releases/Pages/tg1253.aspx>.

[were] men; the median age [was] 60. Five [were] current CEOs or senior management, seven [were] retired CEOs or senior management, two [were] academics The median number of other boards [was] between one and two.”⁴⁸

At Ally, formerly known as GMAC, the government has appointed four directors.⁴⁹ Three are men and the median age is sixty-one; one is currently a CEO, one is an investment banker, and two are executives in private equity firms.⁵⁰

In short, the directors at the corporations in which the U.S. government was a controlling shareholder were a very homogeneous group who fit the template of the independent director in a publicly traded corporation: a predominately white, male cohort of retired CEOs who also serve on several other corporate boards.

3. SEC

In December 2009, the SEC adopted a number of amendments to the proxy disclosure rules, including amendments that require companies to set forth information for each director and nominee about that person’s specific qualifications for membership on the company’s board.⁵¹ In addition, Rule 407(c)(2)(vi) requires companies to:

Describe . . . whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy[.]⁵²

The SEC had not included a required disclosure about diversity in its initial proposal, but requested comments on whether the SEC should amend the rules to require disclosure of additional factors that the nominating committee should consider, such as board diversity.⁵³ The SEC

⁴⁸ Black, *supra* note 39, at 589.

⁴⁹ SIGTARP, *supra* note 40, at 163.

⁵⁰ Black, *supra* note 39, at 592 (reporting information as to the first three directors appointed by the Treasury); Press Release, Treasury Names Appointee to Ally Board of Directors (Feb. 28, 2011), <http://www.treasury.gov/press-center/press-releases/Pages/tg1080.aspx> (reporting information as to fourth director).

⁵¹ See SEC Proxy Rule 401(e), 17 C.F.R. § 229.401(e) (2011).

⁵² *Id.* § 229.407(c)(2)(vi).

⁵³ Proxy Disclosure and Solicitation Enhancements, 74 Fed. Reg. 35,076, 35,084 (July 17, 2009).

stated that it was “interested in understanding whether investors and other market participants believe that diversity in the boardroom is a significant issue.”⁵⁴ A number of commenters responded that disclosure about board diversity was important information to investors and that it would provide investors with information about corporate culture and governance practices that would allow investors to make more informed voting decisions.⁵⁵ In the Final Release, the SEC “agree[d] that it is useful for investors to understand how the board considers and addresses diversity, as well as the board’s assessment of the implementation of its diversity policy, if any.”⁵⁶ Moreover, “[a]lthough the amendments are not intended to steer behavior, diversity policy disclosure may also induce beneficial changes in board composition.”⁵⁷ Nominating committees might, for example, conduct broader searches that would improve director quality or result in directors with fewer ties to the board or management and greater independence.⁵⁸

The SEC, however, did not define diversity because it:

recognize[s] that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. [The SEC] believe[s] that . . . companies should be allowed to define diversity in ways that they consider appropriate.⁵⁹

What is the track record to date after two cycles of proxy statements? The results to date are disappointing for anyone who expected that boards would become more transparent in addressing their commitment to gender diversity.⁶⁰ An SEC staff review of disclosures found deficiencies in two primary areas. Some companies took the position that the rule required disclosure only if companies had a formal diversity policy and did

⁵⁴ *Id.*

⁵⁵ Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343 (Dec. 23, 2009).

⁵⁶ *Id.*

⁵⁷ *Id.* at 68,355.

⁵⁸ *Id.*

⁵⁹ *Id.* at 68,344.

⁶⁰ See Luis A. Aguilar, SEC Comm’r, Keynote Speech by SEC Commissioner: Still Fighting for Inclusion and Equal Opportunity (Apr. 21, 2011), *available at* <http://www.sec.gov/news/speech/2011/spch042111laa.htm> (stating that “many companies can do better”); Elisse B. Walter, SEC Comm’r, Remarks at the DirectWomen Board Institute (Feb. 10, 2011), *available at* <http://www.sec.gov/news/speech/2011/spch021011ebw-2.htm> (stating that “the corporate track record for disclosure under this new requirement is quite spotty so far”). An EDGAR search located eighty-five staff comment letters from the effective date of the rule through July 11, 2011, that referred to disclosure deficiencies. The two most common were failure to include any disclosure and failure to disclose diversity considerations.

not apply if its policy was informal.⁶¹ Other companies disclosed they had a policy; however, these companies failed to disclose how they evaluated its effectiveness.⁶² These findings are consistent with my own limited review of the proxy disclosures of a number of Fortune 500 companies, including those of the ten companies that have both women CEOs and 25% or more women directors,⁶³ since these companies may be expected to exhibit best practices. None of them stated that it had a formal policy on diversity. Diversity was most commonly described as diversity of backgrounds, skills, experiences, and perspectives. Furthermore, several did not explicitly identify gender as a factor of diversity. After personal attributes (integrity, independence, etc.), business expertise was most frequently identified as important. The discussions about the importance of diversity are even more abbreviated or formulaic at companies with zero women directors, the group of companies that we might hope would recognize the need to change.

D. The Exchanges' Corporate Governance Standards

At least since 2004, the New York Stock Exchange (“NYSE”) and NASDAQ are the regulators principally responsible for establishing corporate governance standards with respect to the companies listed for trading on their exchanges.⁶⁴ In 2002, the SEC’s Chairman asked them to review their corporate governance standards in light of the Enron/Worldcom failures. NYSE subsequently proposed, and the SEC approved, Section 303A of the NYSE Listed Company’s Manual, which requires that listed companies have a majority of independent directors.⁶⁵ Other requirements include an independent nominating committee,⁶⁶ which is responsible for

⁶¹ Luis A. Aguilar, SEC Comm’r, Keynote Speech at 2011 Hispanic Association of Corporate Responsibility—Corporate Directors Summit: An Update on Diversity and Financial Literacy (Apr. 30, 2011), available at <http://sec.gov/news/speech/2011/spch043011laa.htm>.

⁶² *Id.*

⁶³ Avon Products, Proxy Statement 8, 16 (Form DEF 14A) (March 25, 2010); Xerox, Proxy Statement 9, 13 (Form DEF 14A) (Apr. 8, 2010); WellPoint, Inc., Proxy Statement 11, 17 (Form DEF 14A) (Apr. 2, 2010); PepsiCo, Inc., Proxy Statement 12, 17 (Form DEF 14A) (Mar. 23, 2010); Archer-Daniels-Midland Co., Proxy Statement 4, 5 (Form DEF 14A) (Sept. 24, 2010); BJ’s Wholesale Club, Proxy Statement 4, 6 (Form DEF 14A) (Apr. 16, 2010); Sunoco, Inc., Proxy Statement 3, 5 (Form DEF 14A) (Mar. 17, 2010); E. I. du Pont de Nemours and Co., Proxy Statement 12, 21 (Form DEF 14A) (Mar. 19, 2010); Reynolds Am., Inc., Proxy Statement 9, 22 (Form DEF 14A) (Mar. 22, 2010); TJX Co. Inc., Proxy Statement 4–6 (Form DEF 14A) (Apr. 28, 2010).

⁶⁴ See ABA, *Special Study on Market Structure, Listing Standards and Corporate Governance*, 57 BUS. LAW. 1487, 1553 (2002) (explaining that corporate governance listing standards fill a gap between state corporate law and federal securities laws in matters of concern to the exchanges).

⁶⁵ NYSE Listed Company Manual § 303A (2009), available at <http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?searched=1&selectednode=chp%5F1%5F4%5F3%5F1&CiRestriction=303A&manual=%2Fflcm%2Fsections%2Fflcm%2Dsections%2F>; NYSE Listed Company Manual § 5605 (2006), available at http://www.nasdaq.com/about/nasdaq_listing_req_fees.pdf.

⁶⁶ NYSE Listed Company Manual § 303A.04. NASDAQ requires that independent directors select, or recommend to the full board for their selection, nominees for directors, either through a nominating committee or by executive session. NASDAQ Listing Rules § 5605(d)–(e).

identifying qualified board candidates consistent with criteria approved by the board,⁶⁷ and an independent audit committee whose members are financially literate and one of whom must have accounting or related financial-management expertise.⁶⁸ These provisions are, according to the NYSE, “designed to further the ability of honest and well-intentioned directors, officers, and employees . . . to perform their functions effectively . . . [and to] allow shareholders to . . . monitor the performance of companies and directors in order to reduce instances of lax and unethical behavior.”⁶⁹

Although the focus of the corporate governance standards was on fraud prevention, some held out the hope that the standards would encourage boards to engage in a wider search for well-qualified, independent directors that, in turn, would result in the nomination and election of more female directors.⁷⁰ To date, at least, the evidence shows small gains.⁷¹ Neither the NYSE nor NASDAQ has any listing standards with respect to diversity, nor does it appear that either exchange ever seriously considered adoption of any such standards.⁷²

E. Explanations

Why has progress toward greater female representation on boards stalled? Professor Jayne Barnard posits a number of reasons, including “the desire to maintain social comfort levels and board cohesion, narrow search criteria and procedures for selecting new directors, skepticism about the so-called ‘business case’ in favor of appointing women to corporate boards, and plain old-fashioned sex discrimination.”⁷³

In addition, many businesses do not believe that diversity is “a business imperative.”⁷⁴ In the post-financial crisis world, where businesses are under increasing pressure from a number of fronts to improve their bottom line, increasing diversity may simply not be a business priority.

⁶⁷ NYSE Listed Company Manual § 303A.04(b)(1). Apart from the requirement of a written charter the Rule does not impose requirements on the process used by the committee in identifying candidates. *See id.*

⁶⁸ NYSE Listed Company Manual § 303A.07. NASDAQ’s comparable standard is NASDAQ Listing Rules § 5605(c).

⁶⁹ NASD and NYSE Rulemaking: Relating to Corporate Governance, SEC Rel. No. 34-48745, 81 SEC Docket 1586 (Nov. 4, 2003).

⁷⁰ *See* Cynthia A. Glassman, SEC Comm’r, Remarks Before the 2005 Colloquium for Women Directors: Board Diversity: The 21st Century Challenge “The New Regulatory Climate and Impact on Board Composition” (Nov. 11, 2005), *available at* <http://www.sec.gov/news/speech/spch111105cag.htm>.

⁷¹ Between 2004 and 2010, women gained a total increase of 1.1 percentage points on Fortune 100 boards. Alliance for Board Diversity, *Missing Pieces: Women and Minorities on Fortune 500 Boards*, CATALYST, 4 (July 21, 2011), http://www.catalyst.org/file/469/abd_2010_census.pdf.

⁷² Although three commenters to the NYSE 2002 proposal recommended adding considerations such as ethnic and gender diversity to the discussion of independence, it is not discussed in the Final Release. NASD and NYSE Rulemaking: Relating to Corporate Governance, SEC Rel. No. 34-48745, 81 SEC Docket 1586 (Nov. 4, 2003).

⁷³ Barnard, *supra* note 33, at 704.

⁷⁴ Rhode & Packel, *supra* note 2, at 15 (quoting Kodak CEO).

Finally, corporate America may have embraced the trend toward facially neutral policies as the fair approach to find the best candidates.⁷⁵

II. WHAT NEXT?

SEC Commissioner Luis Aguilar, who has been in the forefront of advocating for increased board diversity, posits that what is missing is “the will to act.”⁷⁶ What additional initiatives could be pursued to motivate issuers? This section considers three approaches, ranging from mild to aggressive.

First, the SEC staff can rigorously review the required diversity disclosures and provide comments to issuers on their deficiencies, in order to ensure that investors receive more meaningful information about companies’ diversity practices. This jaw-boning by the SEC staff may not only improve disclosure of diversity practices, but also facilitate campaigns by institutional investors to improve board diversity.⁷⁷ In fact, SEC Commissioner Aguilar has asked the SEC staff to monitor the situation.⁷⁸ This mild approach has the advantage of giving the SEC disclosure rules an opportunity to work. Nevertheless, even if the disclosures become less formulaic, this does not necessarily result in issuers improving the diversity of their boards.

Two other approaches would require action on the part of the NYSE and NASDAQ, consistent with their role as principal regulators of the corporate governance standards of their listed companies.⁷⁹ The first is the customary approach of the exchanges’ convening a blue-ribbon panel of industry leaders to develop best practices for improving board diversity.⁸⁰ Although adoption of the standards would not be mandatory, issuers would have to implement these best practices or explain why they have elected not to do so (“comply-or-explain”).⁸¹ Adoption of diversity best practices

⁷⁵ Cf. James Fanto et al., *Justifying Board Diversity*, 89 N.C. L. REV. 901, 927 (2011).

⁷⁶ Luis A. Aguilar, SEC Comm’r, Board Diversity: Why It Matters and How to Improve It (Nov. 4, 2010), available at <http://www.sec.gov/news/speech/2010/spch110410laa.htm>.

⁷⁷ Institutional investors, however, have lost a potentially valuable look with the D.C. Circuit’s vacating the SEC rule affording shareholders proxy access in certain limited circumstances. See *Bus. Roundtable v. SEC*, No. 10-1305, 2011 WL 2936808 (D.C. Cir. July 22, 2011).

⁷⁸ Aguilar, *supra* note 61.

⁷⁹ Absent Congressional authorization, the SEC’s power to impose corporate governance standards is limited. See *Bus. Roundtable v. SEC*, 905 F.2d 407, 408 (D.C. Cir. 1990) (holding the Exchange Act § 19(c) did not confer authority on SEC to impose corporate governance listing standards on exchanges).

⁸⁰ See, e.g., NYSE & NASD, REPORT AND RECOMMENDATIONS OF THE BLUE RIBBON COMMITTEE ON IMPROVING THE EFFECTIVENESS OF CORPORATE AUDIT COMMITTEES (1999), available at http://www.nasdaq.com/about/Blue_Ribbon_Panel.pdf (identifying experts in the field of corporate audit committees).

⁸¹ See ABA, *supra* note 64, at 1490 (proposing a similar approach with respect to certain corporate governance standards).

would work in tandem with the SEC rule and should improve the quality of disclosure because those best practices would be the benchmark for assessing issuers' commitment to diversity. Issuers could no longer refer vaguely to informal policies that take into account diversity of backgrounds, skills, experiences, and perspectives, or otherwise resort to vague or boilerplate language. As a result, investors should have better information to assess the adequacy of the issuers' efforts. The expectations are that adoption of best practices will cause boards to examine critically their current practices and that issuers would be reluctant to deviate from best practices unless they had good reason to believe their practices were better fashioned to find the best nominees for their board. Unfortunately, however, these expectations may not be met, especially if issuers do not recognize the value of the best practices or a diversified board.

A final approach is suggested by recent speeches of SEC Commissioner Luis Aguilar, in which he frequently cites as a laudable example the adoption by the National Football League ("NFL") of the Rooney Rule, which requires all NFL teams to interview at least one minority candidate when filling a head coaching position.⁸² Since the Rooney Rule was adopted in 2003, 22% of head coaching positions have been filled with minorities.⁸³ An important, if not the key, factor to the success of the Rooney Rule is that it is more than an aspirational statement of best practices. An affinity group consisting of African-American coaches, scouts, and front-office officials monitors the efforts and notifies the NFL if it suspects violations.⁸⁴ Failure to comply can result in hefty fines.⁸⁵

Similarly, if a Rooney Rule for corporate boards is to have real force, it must be a corporate governance rule with real consequences for failure to comply. It is time for the NYSE and NASDAQ, as the institutions principally responsible for the corporate governance standards of the largest publicly traded domestic issuers, seriously to consider adopting and enforcing a rule that would require nominating committees to interview at least one woman for each vacancy among the independent directors. The previously identified leadership organizations and institutional investors would continue their efforts to assist corporate boards in achieving more diverse boards, as by identifying qualified candidates, but the exchanges would provide the will to act in the form of an enforcement stick.⁸⁶

⁸² See Aguilar, *supra* note 76. See N. JEREMI DURU, *ADVANCING THE BALL: RACE, REFORMATION, AND THE QUEST FOR EQUAL OPPORTUNITY IN THE NFL* (2011), for background information and the implementation of the Rooney Rule.

⁸³ Aguilar, *supra* note 76.

⁸⁴ DURU, *supra* note 82, at 143.

⁸⁵ *Id.* at 129.

⁸⁶ Aguilar, *supra* note 76. The ultimate sanction for non-compliance with the listing standards is trading suspension and delisting. Since these are harmful to investors, Rule 303A.13 of the NYSE Listed

Do the exchanges currently have the statutory authority to require adoption of a Rooney Rule? The legal limit of the exchanges' authority to adopt rules on corporate governance matters is unclear.⁸⁷ The Exchange Act gives the exchanges broad authority to adopt rules, among other purposes, "to promote just and equitable principles of trade . . . and, in general, to protect investors and the public interest,"⁸⁸ but those phrases are so vague that they do not provide much guidance. Conversely, the rules cannot be designed to regulate "matters not related to the purposes of this chapter" and cannot be designed to permit "unfair discrimination" between issuers.⁸⁹ Finally, the SEC shall approve an exchange's proposed rule if the agency finds it "consistent with the requirements of this chapter and the rules and regulations thereunder applicable to such organizations."⁹⁰ Conversely, it shall disapprove the proposed rule if it does not make such a finding.⁹¹ In its 2003 approval of the NYSE/NASDAQ corporate governance listing standards, the SEC emphasized the role of good governance practices in "maintain[ing] effective oversight of the reliability of corporate financial information[.]" consequently "enhanc[ing] investor confidence in the securities markets."⁹² Some may argue that there is no statutory authority for a mandatory exchange rule on diversity without a stronger showing of a connection between diversity and good corporate governance. Yet, the SEC recognized in its adoption of a disclosure rule on diversity that many investors care about diversity, and that efforts to increase diversity could promote better board performance by improving both the qualifications and the independence of directors.⁹³

III. REASONS FOR CARING

Finally, why should we care about the abysmal lack of diversity in corporate boardrooms?⁹⁴ Some advocates think it is necessary to advance the business case that increased board diversity improves the corporate

Company Manual provides for a public reprimand letter as a lesser sanction to deter violations. NYSE Listed Company Manual § 303A.13.

⁸⁷ ABA, *supra* note 64, at 1516.

⁸⁸ 15 U.S.C. § 78o-3 (2006).

⁸⁹ *Id.*

⁹⁰ *Id.* § 78s.

⁹¹ *Id.*

⁹² Order Approving NYSE and NASDAQ Proposed Rule Changes Relating to Corporate Governance, 68 Fed. Reg. 64,154, 64, 175–76 (Nov. 12, 2003).

⁹³ Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343 (Dec. 23, 2009).

⁹⁴ Luis A. Aguilar, SEC Comm'r, Statement by SEC Commissioner: The Abysmal Lack of Diversity in Corporate Boardrooms is Growing Worse (May 2, 2011), *available at* <http://www.sec.gov/news/speech/2011/spch050211laa.htm>.

bottom line.⁹⁵ These assertions may be overstated, because, to date, the empirical support for the proposition that increased board diversity improves corporate performance is mixed. While there are studies that find that diversity improves board oversight,⁹⁶ Professor Rhode and Ms. Packel recently reviewed empirical studies on the impact of diversity on corporate financial performance, and concluded that the relationship between diversity and financial performance has not been convincingly established.⁹⁷ However, the studies do provide some support for the assertion that diversity can improve decision-making and enhance the corporate image.⁹⁸

Is it really necessary to make a business case to justify increased efforts toward board diversity?⁹⁹ The number of women, including professional women, in corporate America, should put the onus on the business community to explain their failures to nominate more female candidates for board positions. It cannot be for lack of qualified women; advocacy groups and institutional investors have redoubled their efforts to develop talent banks for corporate America.¹⁰⁰ Perhaps the need for a business justification would be more persuasive if we had greater confidence that current nomination practices achieved the objective of a well-functioning board of directors. 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, to cite one egregious failing. In short, a business justification for increased female representation on corporate boards hardly seems necessary.

To date, it is clear that relying on corporations, on their own, to improve their track record on diversity has not significantly improved board diversity. Without more aggressive intervention, this will continue to be a slog to equality. The lack of progress is profoundly discouraging for those who believe in meritocracy. This is an issue of equal opportunity.

⁹⁵ See, e.g., Virtcom Consulting, *supra* note 5, at 14 (“Core business concepts such as competitive advantage, organizational performance, creativity, innovation and shareowner value are the new talking points linked to a diverse slate of board directors.”).

⁹⁶ See, e.g., Press Release, Cal. State Public Employees Retirement System, *Diverse Corporate Boards Achieve Higher Performance*, CalPERS Report Says (Feb. 18, 2009), <http://www.calpers.ca.gov/index.jsp?bc=/about/press/pr-archive/pr-2009/feb/diverse-boards-higher-performance.xml> (discussing a study that found that “[c]ompanies that have diverse boards perform better than those with similar director profiles in terms of ethnicity, gender and skill sets”).

⁹⁷ Rhode & Packel, *supra* note 2; see also Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 856, 861–62 (2011) (reviewing the empirical evidence); Fanto, *supra* note 75, at 918 (reviewing existing studies).

⁹⁸ Rhode & Packel, *supra* note 2.

⁹⁹ See Fanto, *supra* note 75, at 906 (arguing that diversity advocates should offer normative frameworks other than finance-based shareholder value to justify board diversity).

¹⁰⁰ See, e.g., Cal. State Teachers’ Retirement Sys., *supra* note 27 (working to develop digital resources aimed at increasing board diversity).