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All on Board? Board Diversity Trends Reflect Signs of Promise and Concern

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FOREWORD

Fall 2018 Symposium: All on Board? Board Diversity Trends Reflect Signs of Promise and Concern

*Lisa M. Fairfax**

ABSTRACT

This Article argues that while there is considerable reason to be optimistic about the possibility that board diversity efforts will create meaningful change in the number of women who occupy board positions, that optimism must be tempered by certain trends suggesting that the board diversity effort will continue to confront challenges. The recently enacted California law mandating board diversity has the potential to significantly increase board diversity not only at those companies that fall within the law's purview, but also with respect to other companies that may be motivated to increase their board diversity efforts as a result of the legislative and public sentiments symbolized by the law. Legal challenges, however, may mute the law's impact and reach. Then too, empirical trends as well as direct support and activism from a broad array of influential members of the investment community, including the three largest asset managers, BlackRock, State Street, and Vanguard, are strong indicators of the potential for meaningful change related to board diversity. Empirical trends, however, also reveal that board gender parity continues to be a difficult, if not elusive, goal. Additionally, recent surveys reveal that many cor-

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porate directors and members of the investment community continue to question the role and purpose of women on boards and thus still remain skeptical about the value of women board members and board diversity efforts. Hence, any optimism associated with board diversity efforts must be tempered.

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INTRODUCTION

On November 1, 2018, in conjunction with *The George Washington Law Review*, I hosted a conference on Women and Corporate Governance aimed at exploring the role and impact of women in the corporate governance landscape. The conference explored the role and impact of women on boards, in the C-suite, on the judiciary, and as regulators. This Article focuses on women on the board of directors and argues that while there is considerable reason to be optimistic about diversity efforts at the board level and the possibility that those efforts will create meaningful change in the number of women who occupy board positions, there remains some cause for caution and concern.

In recent years, there has been considerable support from many different sources generating significant momentum around gender diversity on corporate boards. Perhaps more importantly, members of the investment community have engaged in specific direct action aimed at pressuring corporations to diversify their boards. Those actions appear to have translated into increased board diversity and there are many signs suggesting that such an increase will continue in the future. Nevertheless, there are some trends suggesting that the

road ahead will continue to feature barriers that may impede the quest for advancement in this area.

Part I of this Article focuses on the recently enacted California law mandating board diversity and offers some thoughts about the potential impact of that law. Part II demonstrates the various reasons for optimism about board diversity by pinpointing the empirical trends as well as the support and direct action being embraced by an array of participants in the investment community. Those trends and actions strongly suggest that meaningful progress may be made in the area of gender diversity. Part III offers some notes of caution, pinpointing several reasons why the current focus on board diversity may not necessarily yield the kinds of results anticipated by its supporters.

At the outset, it should be noted that this Article, like the conference, only focuses on gender diversity or diversity as it relates to the presence of women on boards. This Article, however, acknowledges that while there are advocates of board diversity who are also concerned with increasing the presence of racial and ethnic minorities on boards, much of the current momentum related to board diversity—including the recent California law—focuses exclusively on gender diversity. While one hopes that the push for gender diversity will include a push to increase the number of women directors from racial and ethnic groups, the emphasis on gender otherwise clearly excludes racial and ethnic minorities who are men. For those interested in board diversity more broadly, this exclusion may be troubling because it is not clear that increasing the number of women on boards can or is intended to lead to an increase in other forms of board diversity. From this perspective, any optimism associated with board diversity is also tempered by this concern.

I. CALIFORNIA DREAMIN'?

Any conversation about board diversity would be incomplete without discussion of the recently enacted California law pursuant to which California became the first state to impose a diversity requirement on public corporations.¹ The new law, enacted on September 30, 2018, applies to any corporation with securities listed on a major public stock exchange and whose principal executive office is in California, even if the corporation is organized under the laws of a state other than California.² Any corporation subject to the law must have

1 See S.B. 826, 2018 Leg., 2017–2018 Sess. (Cal. 2018).

2 See *id.* § 2(a).

at least one female director by 2019.³ By the end of 2021, corporations with five board members must have at least two female directors, while those with six or more directors must have at least three female directors.⁴ The law enables the California Secretary of State to impose fines on noncompliant corporations of \$100,000 for the first violation and \$300,000 for subsequent violations.⁵

On its face, the law could have a considerable impact on gender diversity because of the sheer number of corporations that fall within its purview and because the law would require a significant number of corporations to increase the number of women on their boards to comply with its mandate. According to a California State Senate report, there are some 761 publicly traded companies headquartered in California.⁶ This represents about 20% of all publicly traded corporations.⁷ More importantly, a significant number of corporations appear to be currently out of compliance with the law's mandate.⁸ The legislation enacting the law stated that 26% of Russell 3000 companies based in California have no women directors on their boards, while only 12% of such companies have three or more women on their boards.⁹ Moreover, one study indicated that if the law's 2021 requirements were in effect today, some 79% of companies impacted by the law would be out of compliance with the law.¹⁰ Collectively, these findings indicate that if corporations comply with the California law, the law will significantly enhance the number of women serving on public corporation boards.

Some critics of the California law, however, have strenuously insisted that it is illegal as applied to most, if not all, of the corporations to which it purports to apply, rendering the law's impact "trivial" at best and meaningless at worst. Professor Joseph Grundfest, among

³ See *id.* The law defines female as any person who self-identifies as a woman, regardless of the person's designated sex at birth. See *id.* § 2(f)(1).

⁴ See *id.* § 2(b)(1)–(2).

⁵ See *id.* § 2(e)(1).

⁶ See Richard Vernon Smith, *California Mandates Female Representation on Public Company Boards*, FORBES (Oct. 1, 2018, 12:04 PM), <https://www.forbes.com/sites/allbusiness/2018/10/01/california-mandates-female-representation-public-company-boards/#6fb4e2f81775> [https://perma.cc/5CK8-REXW].

⁷ Current data indicates that there are approximately 3,671 public companies. See Jason M. Thomas, *Where Have All the Public Companies Gone?*, WALL STREET J. (Nov. 16, 2017, 7:10 PM), <https://www.wsj.com/articles/where-have-all-the-public-companies-gone-1510869125> [https://perma.cc/L7JZ-A86V]. This figure represents a decline from the 1990s in which there were some 7,322 public companies. See *id.*

⁸ See Smith, *supra* note 6.

⁹ See S.B. 826 § 1(e)(3); Smith, *supra* note 6.

¹⁰ See Smith, *supra* note 6.

others, has argued that the law represents an unconstitutional violation of the Commerce Clause to the extent it seeks to apply to corporations with principal executive offices in California, but that are incorporated in a state outside of California.¹¹ This reasoning stems from the internal affairs doctrine, which requires that the law of a corporation's state of incorporation regulates the internal affairs of a corporation, including matters between the corporation and its officers, directors, and shareholders.¹² Traditionally shareholder voting and board composition have been viewed as internal affairs.¹³ The Supreme Court not only has endorsed the internal affairs doctrine, but also has indicated that violations of the internal affairs doctrine constitute a constitutional violation of the Commerce Clause.¹⁴ In *CTS Corp. v. Dynamics Corp. of America*,¹⁵ the Supreme Court suggested that so long as a state only sought to regulate the internal affairs of the corporations it created, the state's regulations would not run afoul of the Constitution.¹⁶ The corollary to such suggestion is that state efforts to regulate corporations incorporated outside of the state *would* run afoul of the Constitution. Based on this logic, the California law can be viewed as unconstitutional to the extent that it seeks to regulate the internal affairs of corporations incorporated outside of California.¹⁷ In other words, as Grundfest asserts, the law is unenforceable, at least with respect to those corporations incorporated outside of California.¹⁸ If this assertion is accurate, it would dramatically decrease the number of corporations impacted by the law, amounting to what Grundfest calls "trivial gains" in the number of women appointed to boards as a result of the law.¹⁹

Other legal challenges have the potential of rendering the law wholly irrelevant. Indeed, it is also possible that the law could be challenged on Equal Protection grounds. In fact, California's own legisla-

¹¹ See Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826*, at 2 (Stanford Law Sch. & The Rock Ctr. for Corp. Governance, Working Paper No. 232, 2018).

¹² See *Edgar v. MITE Corp.*, 457 U.S. 624, 645 (1982).

¹³ See *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (indicating that shareholder voting rights reflected an internal affair or otherwise a matter regulated by a corporation's state of incorporation); Grundfest, *supra* note 11, at 3.

¹⁴ See, e.g., *CTS Corp.*, 481 U.S. at 78; *Edgar*, 457 U.S. at 645-46.

¹⁵ 481 U.S. 69 (1987).

¹⁶ See *id.* at 89.

¹⁷ See Grundfest, *supra* note 11, at 3.

¹⁸ See *id.* at 4.

¹⁹ See *id.* at 2, 6.

tive analysis conceded this possibility.²⁰ Moreover, Grundfest insists that the possibility of an Equal Protection challenge poses a serious threat to the evolution of the affirmative action doctrine.²¹ In Grundfest's view, such a threat, particularly when weighed against the potentially trivial benefits associated with the law, renders the law especially problematic.²² Even without this attendant threat, if an Equal Protection challenge is successful, the law would be struck down in its entirety, ensuring that no corporation would be required to increase diversity on their board as a result of the law.²³

To be sure, California has indicated that there is a path forward for the law despite these legal questions. On the one hand, it is entirely possible that corporations potentially subject to the law or organizations acting on their behalf are gearing up to challenge the law's legality. While acknowledging the possibility of legal challenge, the California law's sponsors nevertheless appeared to believe that the law would be able to survive such challenges.²⁴ The law's sponsors, thus, insisted that there are many internal matters governed by California law that nevertheless impact the internal affairs of corporations incorporated outside of California.²⁵ Moreover, while the law's sponsors acknowledged that the law could confront a "difficult challenge" in seeking to overcome constitutional concerns, the sponsors did not concede that defending its constitutionality would be impossible.²⁶ On the other hand, it also seems plausible that corporations would be reluctant to openly challenge the law because such a challenge could create the risk of backlash by supporters of diversity and gender equity. For example, the public outcry and negative publicity after Amazon, Inc., opposed a proposal from shareholders aimed at promoting the consideration of diversity in the board nomination process caused Amazon to quickly change gears and agree to adopt the proposal even without a shareholder vote.²⁷ Amazon's example highlights the poten-

²⁰ See *SB 826: Hearing Before the Assemb. Comm. on Judiciary*, 2018 Leg., 2017–2018 Sess. 8 (Cal. 2018) [hereinafter *Assembly Judiciary Committee Report*].

²¹ See Grundfest, *supra* note 11, at 7.

²² See *id.*

²³ See *id.* at 2.

²⁴ See *Assembly Judiciary Committee Report*, *supra* note 20, at 8.

²⁵ See *id.* at 6; Grundfest, *supra* note 11, at 3.

²⁶ See *Assembly Judiciary Committee Report*, *supra* note 20, at 7. Grundfest also insists that the impact of a challenge on equal protection grounds poses a tremendous collateral risk for the affirmative action doctrine, giving its opponents the opportunity to significantly undermine that doctrine and its efforts at ensuring diversity. See Grundfest, *supra* note 11, at 7. As a result, Grundfest insists that any gains made by the law would come at significant risks. See *id.*

²⁷ See Hallie Detrick, *Amazon Had Opposed a Requirement to Interview Diverse Board*

tial for backlash and serves as a cautionary tale for companies that would oppose board diversity efforts, and thus begs the question regarding whether companies would be willing to challenge the California law and risk such backlash at all.

Even if the law is challenged and ultimately invalidated, it remains possible that the law nevertheless will prompt corporations to enhance their gender diversity efforts. Notably, notwithstanding these legal questions, participants at the conference—several of whom are directly involved with organizations that promote board diversity efforts—maintained that some organizations focused on board diversity had already received inquiries from companies in California about how best to diversify their board.²⁸ These inquiries suggest that the law has motivated corporations to at least consider enhancing board diversity. These inquiries further suggest that the increased attention on board diversity generated by the law may encourage corporations to increase gender diversity on their boards.

It is also possible that the law will have an impact on gender diversity beyond those corporations directly covered by the law. This is because California's actions may prompt more companies to diversify their board in order to demonstrate their commitment to gender diversity efforts, to avoid any unwanted attention, or otherwise to forestall any efforts from their own legislature.²⁹

California's actions could also encourage other states to take action, thereby enhancing diversity efforts on a broader scale. Other states have pending legislation related to board diversity, including Illinois, Massachusetts, and Pennsylvania.³⁰ To be sure, the possibility or reality of a legal challenge could discourage these and other states from following California. These other states, however, do not have

Candidates. Now It's Embracing the 'Rooney Rule.' FORTUNE (May 15, 2018), <https://fortune.com/2018/05/15/amazon-board-diversity-rooney-rule/> [<https://perma.cc/JMW3-WL92>]. The proposal, modeled after the "Rooney Rule" requiring NFL teams to consider diverse candidates when making decisions related to hiring for top coaching positions, sought to require the Amazon board to interview at least one woman or minority candidate for any board opening. *Id.* At the time of the shareholder proposal, Amazon had an all-white board consisting of three women and seven men. *Id.*

²⁸ See Press Release, *The George Washington Law Review*, Women and Corporate Governance: A Conference Exploring the Role and Impact of Women in the Governance of Public Corporations (Nov. 2, 2018), <https://www.gwlr.org/symposium-2018-women-and-corporate-governance-a-conference-exploring-the-role-and-impact-of-women-in-the-governance-of-public-corporations/> [<https://perma.cc/5A4A-SGJ9>].

²⁹ See, e.g., Detrick, *supra* note 27.

³⁰ See SULLIVAN & CROMWELL LLP, 2018 PROXY SEASON REVIEW 24–25 (2018), <https://www.sullcrom.com/files/upload/SC-Publication-2018-Proxy-Season-Review.pdf> [<https://perma.cc/Y6Y9-BDQT>].

the same mandate as California and hence may not raise the same legal concerns.³¹ In addition, if the California law is successfully challenged, it could provide a road map for other states relating to how best to craft legislation aimed at board diversity.

The law also could prompt federal action, which would have broad repercussions for diversity efforts. Indeed, there are companion bills in the House and Senate related to board diversity.³² While the Securities and Exchange Commission (“SEC”) already has a provision requiring corporations to explain whether or not the company considers diversity as a factor in its nomination process, there have been several efforts aimed at pressuring the SEC to enhance its board diversity measures.³³ Apparently in response to recent trends in this area, the SEC issued new interpretations related to board diversity disclosures.³⁴ Even if these efforts prove unsuccessful, they could nevertheless spur more corporations to enhance their board diversity efforts.

Finally, it is entirely possible that California’s actions could spur increased shareholder activism in this area. Grundfest insists that shareholder activism offers a superior approach to the California law because it could have a broader reach without the legal issues and attendant risks associated with the California law.³⁵ This is because shareholder activism can be nationwide and thus not limited to California, but also because shareholder activism has proven successful with respect to other matters.³⁶ However, it is important to note that sometimes successful legal challenges can spur shareholder activism related to the challenged issue. For example, in 2011, the D.C. Circuit overturned a “proxy access” law aimed at enhancing shareholders’ voting rights by giving shareholders the right to nominate director

³¹ See *id.*

³² See Howard Dicker et al., *D.C. Speaks Up: A Push for Board Diversity from the SEC and Congress*, WEIL (Feb. 8, 2019), <https://governance.weil.com/featured/washington-d-c-speaks-up-a-push-for-board-diversity-from-congress-and-the-sec/> [<https://perma.cc/94TR-SA4P>]. The bills would require public companies to disclose data related to the racial, ethnic, and gender composition of its board as well as whether the board has a policy aimed at promoting board diversity. See *id.*

³³ See Ning Chiu, *Congressional Lawmakers Push SEC Chairman to Focus on Board Diversity Disclosure*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 6, 2017), <https://corpgov.law.harvard.edu/2017/07/06/congressional-lawmakers-push-sec-chairman-to-focus-on-board-diversity-disclosure/> [<https://perma.cc/H7SE-Y4NA>].

³⁴ See Dicker, *supra* note 32.

³⁵ See Grundfest, *supra* note 11, at 8.

³⁶ See *id.*

candidates of their choice on a corporation's proxy statement.³⁷ Soon after, proxy access became the most popular issue around which shareholders engaged in activism and their activism led to a steep rise in the number of public corporations that adopted proxy access.³⁸ Eventually shareholder activism related to proxy access became so intense that corporations began voluntarily adopting proxy access provisions prior to any proposal or shareholder vote.³⁹ Importantly, the dominant proxy access provision adopted by public corporations essentially mirrored the one struck down by the D.C. Circuit.⁴⁰ While proxy access and board diversity are two very different issues, the experiences with proxy access at least suggest that it may be possible that the spotlight and attention associated with the California legislation and any legal challenges not only could encourage greater shareholder activism around the issue, but also could encourage boards to enhance their diversity efforts as a result of such activism.

Ultimately, it is likely too soon to tell how the California law will impact board diversity efforts. At the very least, however, the law has stimulated further conversation about board diversity and how best to increase the number of women on boards.⁴¹ Moreover, the law serves as a tangible sign of the increased momentum associated with efforts aimed at increasing the number of women serving on corporate boards.

³⁷ See *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1146–47 (D.C. Cir. 2011).

³⁸ See SULLIVAN & CROMWELL LLP, 2016 PROXY SEASON REVIEW 5–6 (2016), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2016_Proxy_Season_Review.pdf [<https://perma.cc/9FL8-C8H6>] [hereinafter 2016 PROXY SEASON REVIEW]; SULLIVAN & CROMWELL LLP, 2015 PROXY SEASON REVIEW 4–5 (2015), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2015_Proxy_Season_Review.pdf [<https://perma.cc/78Y4-8FVJ>] [hereinafter 2015 PROXY SEASON REVIEW].

³⁹ See SULLIVAN & CROMWELL LLP, 2017 PROXY SEASON REVIEW 5–9 (2017), https://www.sullcrom.com/siteFiles/Publications/SC_Publication_2017_Proxy_Season_Review.pdf [<https://perma.cc/ER9Q-KYV3>].

⁴⁰ Compare *id.* at 6 (noting that most companies that adopted a proxy access provision opted for a “3/3/20/20,” which has become the market standard and, in relevant part, calls for three percent ownership for three years), with *Bus. Roundtable*, 647 F.3d at 1147 (vacating an SEC rule that mandated the same).

⁴¹ See, e.g., Jeff Green et al., *Wanted: 3,732 Women to Govern Corporate America*, BLOOMBERG (Mar. 21, 2019), <https://www.bloomberg.com/graphics/2019-women-on-boards/> [<https://perma.cc/7S2Y-6UNB>]; Cydney Posner, *California Mandates Quotas for Board Gender Diversity—Will It Fuel a Movement?*, COOLEY PUBCO (Sept. 30, 2018), <https://cooleypubco.com/2018/09/30/california-mandates-quotas-for-board-gender-diversity/> [<https://perma.cc/PZ2L-P2AK>].

II. A CHANGE IS GONNA COME?

Even if the California legislation has no impact on board diversity efforts, there is considerable reason to be optimistic about the potential for other factors to meaningfully enhance the number of women directors on corporate boards. This optimism stems from the growing support for board diversity, particularly among influential shareholders and their advocates. It also stems from the fact that these supporters have adopted specific strategies aimed at increasing the number of women on corporate boards. As Grundfest insists, the adoption of these strategies is critical to the success of any activism in this area.⁴² Optimism also stems from the fact that corporations have been responding to these strategies by stepping up their diversity efforts. Finally, this optimism stems from the empirical trends which bolster the notion that shareholder activism and other organized efforts to promote diversity have translated into important changes in overall board composition. This Part highlights these trends and changes.

A. Coalitions of Support

One reason for optimism around the potential for meaningful change related to board diversity is the growing support for board diversity from corporate stakeholders with the ability to significantly influence corporate behavior. Most notably, the three largest asset managers have been very vocal in their support of board diversity.⁴³

In 2018, BlackRock, Inc., the world's largest money manager, stated publicly for the first time that the companies in which it invests should have at least two women on the board.⁴⁴ Larry Fink, BlackRock's CEO, also publicly announced his intention to emphasize the

⁴² See Grundfest, *supra* note 11, at 8.

⁴³ See Liam Kennedy, *Top 400 Asset Managers 2018: 10 Years of Asset Growth*, IPE (June 2018), <https://www.ipe.com/reports/special-reports/top-400-asset-managers/top-400-asset-managers-2018-10-years-of-asset-growth/10025004.article> [<https://perma.cc/PNY9-52RZ>] (identifying BlackRock, Vanguard, and State Street as the three largest asset managers).

⁴⁴ See BLACKROCK, PROXY VOTING GUIDELINES FOR U.S. SECURITIES (2019); see also Sarah Krouse, *BlackRock: Companies Should Have At Least Two Female Directors*, WALL STREET J. (Feb. 2, 2018, 2:06 PM), <https://www.wsj.com/articles/blackrock-companies-should-have-at-least-two-female-directors-1517598407> [<https://perma.cc/G8A3-RU64>]; Cydney Posner, *BlackRock Advocates that At Least Two Women Be on Each Company Board*, COOLEY PUBCO (Feb. 6, 2018), <https://cooleypubco.com/2018/02/06/blackrock-advocates-that-at-least-two-women-be-on-each-company-board/> [<https://perma.cc/4RY7-G5UH>]; Claire Zillman, *These Are the 12 Fortune 500 Companies with Zero Women on Their Boards*, FORTUNE (May 22, 2018), <https://fortune.com/2018/05/22/fortune-500-companies-women-boards/> [<https://perma.cc/4DAC-U9TR>].

importance of board diversity when engaging with public companies.⁴⁵ In 2017, The Vanguard Group (“Vanguard”), the world’s second largest asset manager, posted an open letter to directors of public companies indicating its expectation that boards focus on gender diversity and noting that whether a company had exhibited meaningful progress on board diversity over time would impact Vanguard’s engagement and voting.⁴⁶

State Street Global Advisors, Inc. (“State Street”), the third largest asset manager,⁴⁷ has been one of the first to visibly and vocally support board diversity.⁴⁸ In 2018, State Street published new voting guidelines stating its expectation that boards include at least one female director.⁴⁹ In 2017, State Street planted a *Fearless Girl* statue across from Wall Street’s *Charging Bull* statue both as a tangible symbol of its support for gender diversity and as a signal of its increased commitment to ensuring that companies diversify their boards.⁵⁰

This visible and vocal support both individually and collectively has the potential to significantly influence the behavior of a considerable number of corporate boards. As the world’s largest asset manager, BlackRock owns a stake in almost every publicly traded company and is the single biggest shareholder in many of those companies.⁵¹ In fact, BlackRock owns at least five percent of more than half of all publicly traded companies.⁵² Thus, BlackRock can and does wield significant influence in its role as both shareholder and asset manager. In recent years, observers have noted that BlackRock has almost outsized influ-

45 See BLACKROCK, BLACKROCK INVESTMENT STEWARDSHIP’S APPROACH TO ENGAGEMENT ON BOARD DIVERSITY 1 (2018).

46 See F. WILLIAM McNABB III, AN OPEN LETTER TO DIRECTORS OF PUBLIC COMPANIES WORLDWIDE (2017), <https://about.vanguard.com/investment-stewardship/governance-letter-to-companies.pdf> [<https://perma.cc/LKL4-HY66>]. Among other things, the letter highlighted board diversity as a key pillar of a good corporate governance practice. See *id.* at 1; SULLIVAN & CROMWELL LLP, *supra* note 30, at 23; Zillman, *supra* note 44.

47 See *State Street Global Advisors*, <https://www.ssga.com/home.html> [<https://perma.cc/265U-44GJ>].

48 See Zillman, *supra* note 44.

49 See STATE ST. GLOB. ADVISORS, *Proxy Voting and Engagement Guidelines* (2018); SULLIVAN & CROMWELL LLP, *supra* note 30, at 23.

50 See Zillman, *supra* note 44.

51 See Shawn McCoy, *How BlackRock Wields Vast Influence over Government & Economy*, GV WIRE (July 9, 2018), <https://gvwire.com/2018/07/09/how-blackrock-wields-vast-influence-over-government-and-the-economy/> [<https://perma.cc/989Z-ZW8G>]; *The Rise of BlackRock*, ECONOMIST (Dec. 7, 2013), <https://www.economist.com/news/leaders/21591174-25-years-blackrock-has-become-worlds-biggest-investor-its-dominance-problem> [<https://perma.cc/4LYW-MPG9>].

52 See McCoy, *supra* note 51.

ence over public companies.⁵³ Indeed, many outside of the investment community may have never even heard of BlackRock or otherwise may not fully appreciate the power it has as the world's largest asset manager.⁵⁴ Those within the investment community, however, fully appreciate that BlackRock's position not only enables it to command the attention of almost any public company board, but also to have considerable sway over the decisions made by those boards.⁵⁵ In this regard, BlackRock's ability to wield significant influence over the market and public corporations renders its vocal support of board diversity very significant. BlackRock's decision to emphasize the importance of boards having at least two women directors is especially significant because while many other large investors have expressed general support for board diversity, few have articulated a specific number, and none have articulated a number beyond one.⁵⁶ Like BlackRock, Vanguard and State Street have a sizeable stake in many public companies and thus their support, particularly coupled with BlackRock's, has the potential to meaningfully move the needle on corporate behavior as it relates to board diversity.⁵⁷ Collectively, the support from the three largest asset managers dramatically increases the potential for change given their collective ownership in the public market as a whole and hence their collective ability to both directly and indirectly influence the behavior of public corporations and their boards.

This support for enhanced gender diversity on boards appears to be shared by the investment community more generally, thereby increasing the potential that such support will translate into corporate change. A 2018 Ernst & Young LLP survey revealed that over 80% of asset managers, public pension funds, and other investors believed that boards should focus on ensuring that boards have the "right mix of members, including [having] women."⁵⁸ Consistent with these sentiments, some of the largest public pension funds have expressed their

⁵³ See *id.* (noting that "perhaps no company in the world now has greater reach and influence over financial markets and governments").

⁵⁴ See *The Rise of BlackRock*, *supra* note 51 (noting that BlackRock's name "rings few bells outside" the financial community).

⁵⁵ See *id.*

⁵⁶ See Krouse, *supra* note 44 (noting that investors that advocated for board diversity have "stopped short" of articulating a specific number).

⁵⁷ See Zillman, *supra* note 44.

⁵⁸ Posner, *supra* note 44 (quoting Andrea Vittorio, *Board Makeup Top Issue for Investors in Year Ahead, Survey Shows*, BLOOMBERG BNA (Jan. 31, 2018), <https://biglawbusiness.com/board-makeup-top-issue-for-investors-in-year-ahead-survey-shows> [<https://perma.cc/CGM4-QQLT>]).

support for ensuring that corporations increase the number of women on their boards.⁵⁹ In addition, the two largest proxy advisory firms also have publicly stated their support for board diversity and have published voting guidelines aimed at encouraging corporations to diversify their boards.⁶⁰ Proxy advisory firms' support of board diversity is important because such firms have the ability to influence corporate behavior as such firms advise public corporations regarding how best to vote their shares and, in some cases, also advise corporations about appropriate corporate governance practices.⁶¹ Even employees have demanded that boards increase their diversity efforts.⁶² The fact that a broad array of participants in the investment community have expressed their support for ensuring that boards diversify increases the possibility that public companies will feel compelled to respond to that support by enhancing their board diversity efforts. Thus, this broad array of support is a positive sign that such enhancements will occur.

Importantly, board members themselves have begun to profess a desire for diversity. A Price Waterhouse Survey found that 94% of directors expressed the belief that board diversity added value to the boardroom.⁶³ A 2018 Spencer Stuart survey of S&P 500 boards found that 62% of board nominating committee members said that their highest priority in board recruitment was locating a woman board member, while 74% of such members said that board diversity was an issue that the nominating committee needed to address over the next three years.⁶⁴

These expressions of support from board members are pivotal because the board in general, and nominating committee members in particular, bear responsibility for identifying, recruiting, and nominating new board members.⁶⁵ Their expressions of support therefore in-

⁵⁹ See SULLIVAN & CROMWELL LLP, *supra* note 39, at 4.

⁶⁰ See SULLIVAN & CROMWELL LLP, *supra* note 30, at 23; e.g., INSTITUTIONAL S'HOLDER SERVS., 2019 AMERICAS PROXY VOTING GUIDELINE UPDATES 2 (2018), <https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf> [<https://perma.cc/F4MQ-F97X>].

⁶¹ See SULLIVAN & CROMWELL LLP, *supra* note 30, at 44.

⁶² See Detrick, *supra* note 27 (noting that pressure from Amazon employees had a significant impact on Amazon's decision to embrace a rule requiring it to consider at least one woman or minority for each board opening).

⁶³ See GOVERNANCE INSIGHTS CTR., PWC'S 2018 ANNUAL CORPORATE DIRECTORS SURVEY 2 (2018), <https://www.pwc.com/us/en/governance-insights-center/annual-corporate-directors-survey/assets/pwc-annual-corporate-directors-survey-2018.pdf> [<https://perma.cc/8CY7-BDXJ>].

⁶⁴ See SPENCER STUART, 2018 U.S. SPENCER STUART BOARD INDEX 35 (2018), https://www.spencerstuart.com/-/media/2019/july/ssbi_2018_new.pdf [<https://perma.cc/7VFC-KU7E>].

⁶⁵ See Nicholas J. Price, *What Is the Role of the Board Nominating Committee?*, DILIGENT

crease the likelihood that general sentiments related to the appropriateness of board diversity will translate into meaningful change in board composition.

B. *From Rhetoric to Reality*

The increased optimism around the potential to enhance board diversity also stems from the fact that these key stakeholders have moved beyond mere vocal support to tangible action. These actors have engaged in a variety of actions aimed at ensuring that corporations increase the diversity of their boards. The available evidence suggests that these actions are yielding results in a number of important ways.

1. *Engaging on Diversity*

In recent years, key stakeholders have stepped up their engagement efforts related to board diversity. The three largest asset managers have clearly revealed their desire for enhanced engagement related to board diversity.⁶⁶ After erecting the *Fearless Girl* statue, State Street launched a Fearless Girl campaign focused on pressuring public companies to diversify their boards.⁶⁷ Vanguard's open letter addressed to directors of public companies is also an example of its efforts to engage with public companies.⁶⁸ BlackRock sent letters to all of the companies in the Russell 1000 (around 300 companies in total) with fewer than two women on their boards "asking them to disclose their approaches to diversity and to establish a timeframe for improvement."⁶⁹

Other entities have similarly enhanced their engagement efforts. Thus, two of the largest public pension funds, California Public Employee's Retirement System ("CalPERS"), the largest public pension fund in the United States, and the California State Teacher's Retirement System ("CalSTRS"), sent letters to hundreds of companies asking them to address the issue of board diversity.⁷⁰ CalPERS alone sent letters to more than 500 companies who lacked gender diversity on

INSIGHTS (Feb. 14, 2019), <https://insights.diligent.com/nominating-governance-committee/what-is-the-role-of-the-board-nominating-committee/> [<https://perma.cc/7NYN-RXDE>].

⁶⁶ See Amy Whyte, *State Street to Turn Up the Heat on All-Male Boards*, INSTITUTIONAL INV. (Sept. 27, 2018), <https://www.institutionalinvestor.com/article/b1b4fh28ys3mr9/State-Street-to-Turn-Up-the-Heat-on-All-Male-Boards> [<https://perma.cc/2CKY-DWZ6>].

⁶⁷ See *id.*

⁶⁸ See McNABB, *supra* note 46.

⁶⁹ Posner, *supra* note 44.

⁷⁰ See *CalPERS Expands Engagement for Greater Diversity on Corporate Boards to More*

their boards asking them to address how they planned to remedy such a lack.⁷¹ In 2017, the third largest public pension fund, the New York City Comptroller (“Comptroller”), who makes investment decisions on behalf of the pension funds for New York City employees, began a focused campaign to increase board diversity, known as the Boardroom Accountability Project 2.0.⁷² Pursuant to this Project, on September 8, 2017, the Comptroller sent letters to 151 of its portfolio companies—80% of which are in the S&P 500—asking them to publish standardized annual disclosures on their board diversity.⁷³ The Comptroller’s decision to focus on board diversity is particularly notable because of the success the Comptroller has had with altering board behavior in other contexts. In 2014, the Comptroller launched its first accountability project, Boardroom Accountability Project, which focused on getting companies to adopt proxy access—the ability of shareholders to access the company’s proxy statement in order to nominate candidates of their choice.⁷⁴ The Project was extremely successful, resulting in a significant number of corporations adopting proxy access.⁷⁵ If the Comptroller experiences similar success in its board diversity efforts, the Comptroller’s diversity Project 2.0 could have a tremendous impact on increasing the number of women on public company boards.

More broadly, the decision of each of these corporate actors to engage with corporations on the issue of diversity is remarkable because shareholder engagement with corporate boards is a relatively new phenomenon. Indeed, two decades ago, the idea of shareholder engagement was almost non-existent because boards and shareholders simply did not engage.⁷⁶ Today, engagement is on the rise and has become the new normal.⁷⁷ Boards and shareholders, however, have a

than 500 U.S. Companies, CALPERS (Aug. 22, 2017), <https://www.calpers.ca.gov/page/newsroom/calpers-news/2017/engagement-corporate-board-diversity> [<https://perma.cc/RAG9-422D>].

⁷¹ See *id.*

⁷² See Arthur H. Kohn et al., *Update on Board Diversity Developments*, CLEARY GOTTLIEB (Aug. 1, 2018), <https://www.clearymawatch.com/2018/08/update-board-diversity-developments/> [<https://perma.cc/RAG9-422D>].

⁷³ See SULLIVAN & CROMWELL LLP, *supra* note 30, at 19; GOVERNANCE INSIGHTS CENTER, *supra* note 63, at 20; Kohn, *supra* note 72.

⁷⁴ See SULLIVAN & CROMWELL LLP, *supra* note 30, at 19.

⁷⁵ Indeed, from 2014 to 2018, we have gone from only a handful of companies with proxy access to more than 60% of S&P 500 companies with proxy access bylaws. See Kohn, *supra* note 72; 2016 PROXY SEASON REVIEW, *supra* note 38, at 4–5.

⁷⁶ See Lisa M. Fairfax, *Mandating Board-Shareholder Engagement?*, 2013 ILL. L. REV. 821, 827, 832.

⁷⁷ See EY CTR. FOR BD. MATTERS, ERNST & YOUNG LLP, 2018 PROXY SEASON REVIEW (2018).

relatively finite amount of time and thus a limited agenda pursuant to which shareholders must make a choice regarding the issues to prioritize and thus the issues around which they will engage.⁷⁸ Indeed, some corporations have complained that they have found it difficult to gain an audience with shareholders in order to engage.⁷⁹ Conversely, shareholders have indicated that they have had to make difficult choices about which corporations they will engage.⁸⁰ From this perspective, the fact that, among all of the corporate issues from which they could choose to engage, shareholders have chosen to prioritize engagement related to diversity is remarkable.

2. *Withholding the Vote for Diversity*

Investors also have waged “withhold the vote” campaigns designed to pressure corporations and their directors to increase gender diversity on their boards.⁸¹ A withhold the vote campaign is a targeted campaign pursuant to which shareholders either vote no or withhold their vote against particular directors in order to pressure such directors to step down, to signal dissatisfaction with some corporate action, or to otherwise pressure directors to take a particular action.⁸² In the context of board diversity, withhold the vote campaigns directly target corporations and directors deemed to have failed to appropriately address gender diversity on their boards.⁸³ In 2018, State Street implemented new guidelines stating it would vote against the entire slate of board members on the nominating committee of any company that failed to have a single woman on its board and failed to engage in successful dialogue related to board diversity.⁸⁴ BlackRock also announced that it would vote against directors on boards that have not made meaningful progress on board diversity.⁸⁵ Public pension funds have adopted similar policies. CalSTRS announced that it would be

⁷⁸ See Tom Johnson, *Shareholder Engagement: An Evolving Landscape*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Mar. 9, 2017), <https://corpgov.law.harvard.edu/2017/03/09/shareholder-engagement-an-evolving-landscape/> [<https://perma.cc/8FXU-FC66>].

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See WILLKIE FARR & GALLAGHER LLP, “JUST VOTE NO” CAMPAIGNS IN UNCONTESTED DIRECTOR ELECTIONS 1–2 (2009), https://www.willkie.com/~media/Files/Publications/2009/09/Just%20Vote%20No%20Campaigns%20In%20Uncontested%20Director%20E__/Files/Just%20Vote%20No%20Campaignspdf/FileAttachment/Just%20Vote%20No%20Campaigns.pdf [<https://perma.cc/87J5-RG55>].

⁸² See *id.*

⁸³ See Whyte, *supra* note 66.

⁸⁴ See *id.*

⁸⁵ See BLACKROCK, *supra* note 45, at 2.

holding the entire board, and not simply members of its nominating committee, accountable for a lack of board diversity.⁸⁶ CalPERS also stated that it would consider withholding votes against directors who failed to appropriately respond to the lack of diversity on their boards.⁸⁷ Proxy advisory firms have also stepped up their actions in this area. Both Institutional Shareholder Services (“ISS”), the largest proxy advisory firm in the country, and Glass, Lewis & Company (“Glass Lewis”), the second largest proxy advisory firm, which together advise on voting decisions related to about 97% of board meetings, indicated that they would recommend votes against the nominating chair of the board of any Russell 3000 or S&P 1500 company with no women on their boards.⁸⁸

These campaigns have led to an increase in withheld votes targeting directors based on their lack of actual diversity or lack of effort to increase diversity. For example, in 2018, State Street voted against directors at 581 companies that lacked a single female director because, in State Street’s view, those companies had inadequately addressed gender diversity on their boards.⁸⁹ CalPERS withheld votes from 271 directors at companies that they believed had not improved their diversity efforts.⁹⁰ BlackRock also voted against directors at five companies that failed to effectively address their board diversity concerns.⁹¹

These examples of the increased use of withheld votes related to board diversity are consistent with broader trends. Indeed, votes against directors on boards that lack women directors have more than doubled since 2015.⁹² Votes against chairs of nominating committees have increased the most, followed by votes against committee members and votes against the entire board.⁹³ Hence, the average withheld vote against a director is about three to four percent.⁹⁴ By comparison,

⁸⁶ See GOVERNANCE INSIGHTS CENTER, *supra* note 63, at 20.

⁸⁷ See *CalPERS Expands Engagement for Greater Diversity on Corporate Boards to More than 500 U.S. Companies*, *supra* note 70.

⁸⁸ See INSTITUTIONAL SHAREHOLDER SERVICES, *supra* note 60, at 3; SULLIVAN & CROMWELL LLP, *supra* note 30, at 23. ISS will begin such a policy for annual meetings held on or after February 1, 2020. INSTITUTIONAL SHAREHOLDER SERVICES, *supra* note 60.

⁸⁹ See GOVERNANCE INSIGHTS CENTER, *supra* note 63, at 20; Kohn, *supra* note 72. Similarly, in 2017, State Street voted against directors on nominating committees at some 400 companies that had no women directors on their boards. See Kohn, *supra* note 72; Krouse, *supra* note 44; Posner, *supra* note 44.

⁹⁰ See GOVERNANCE INSIGHTS CENTER, *supra* note 63, at 20.

⁹¹ See *id.*

⁹² See EY CENTER FOR BOARD MATTERS, ERNST & YOUNG LLP, *supra* note 77.

⁹³ See *id.*

⁹⁴ See *id.*

in 2018, directors targeted for the lack of diversity on their boards have received withheld votes on average of 15%, 11%, and 5.6% respectively.⁹⁵

Withhold the vote campaigns can be an important mechanism for encouraging corporations to increase the number of women on their boards. Both anecdotal and empirical evidence reveals that withhold the vote campaigns lead to changes in corporate behavior.⁹⁶ Evidence suggests that a high percentage of withheld votes, even if significantly less than a majority, can influence board behavior, prompting boards to take a variety of actions in response to withhold the vote campaigns.⁹⁷ Hence, relying on these campaigns to promote board diversity also has the potential to encourage more boards to change their policies with respect to diversity.

3. *Shareholders Proposing Diversity*

Shareholders also have been using the proposal process to advance gender diversity. Federal law allows shareholders to submit proposals on the corporation's proxy statement requesting that companies take certain actions.⁹⁸ Such proposals are then voted on by other shareholders.⁹⁹ There has been an upward trend in the number of shareholder proposals related to board diversity, and most of these proposals request increased disclosure related to board diversity.¹⁰⁰

Shareholder proposals are another important tool that could impact corporate behavior related to diversity. On the one hand, shareholder votes on shareholder proposals are nonbinding.¹⁰¹ Thus, even when shareholder proposals receive a majority of the shareholder vote, corporations are not required to implement them.¹⁰² Importantly, very few shareholder proposals related to board diversity re-

⁹⁵ See *id.*

⁹⁶ See Diane Del Guercio et al., *Do Boards Pay Attention when Institutional Investor Activists "Just Vote No"?*, 90 J. FIN. ECON. 84, 102 (2008); WILLKIE FARR & GALLAGHER LLP, *supra* note 81, at 1–2.

⁹⁷ See Del Guercio, *supra* note 96, at 102 (finding that withhold the vote campaigns influence board behavior); WILLKIE FARR & GALLAGHER LLP, *supra* note 81, at 1–2.

⁹⁸ See LISA M. FAIRFAX, *SHAREHOLDER DEMOCRACY* 63–65 (2011).

⁹⁹ See *id.* at 63.

¹⁰⁰ See Angelo Martinez, *Shedding Light on Diversity-Based Shareholder Proposals*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Oct. 16, 2018), <https://corpgov.law.harvard.edu/2018/10/16/shedding-light-on-diversity-based-shareholder-proposals/> [<https://perma.cc/3TXR-ZLLJ>]; SULLIVAN & CROMWELL LLP, *supra* note 30, at 22.

¹⁰¹ See FAIRFAX, *supra* note 98, at 63.

¹⁰² See *id.* at 63–64.

ceive a majority of the shareholder vote.¹⁰³ For example, only two shareholder proposals related to board diversity passed in 2017, whereas none passed in 2018.¹⁰⁴ The fact that shareholder proposals are nonbinding and rarely receive a majority vote may suggest that such proposals are not very significant. Shareholders, however, use the proposal process to gain the attention of corporate boards and other shareholders regarding issues they believe to be important, and to encourage corporations to take action with respect to those issues.¹⁰⁵ From this perspective, even when shareholder proposals receive less than a majority of the vote, they can be a crucial mechanism for highlighting the importance of an issue. In some cases, corporations do in fact respond to proposals even when they receive less than a majority of the vote.¹⁰⁶ Indeed, the vast majority of shareholder proposals related to board diversity are withdrawn before they come to a shareholder vote.¹⁰⁷ Typically, when a shareholder proposal has been withdrawn, it suggests either that there has been increased engagement related to the subject of the shareholder proposals or that the corporation has come to an agreement to take action related to the proposal.¹⁰⁸ Hence, the large rate of withdrawn proposals strongly indicates that corporations have responded to such proposals and that such proposals are playing a role in moving the needle related to board diversity.

4. *Proxy Contests, Proxy Access, and Board Diversity*

Proxy contests can also be used by shareholders to highlight and encourage board diversity. A proxy contest is a public company election contest pursuant to which shareholders nominate and run a slate of directors different from those nominated and supported by management.¹⁰⁹ Last year, for the first time in recent history, a majority

¹⁰³ See Martinez, *supra* note 100 (noting that in 2017, only 2 out of the 24 proposals received a majority vote and passed).

¹⁰⁴ See SULLIVAN & CROMWELL LLP, *supra* note 30, at 22.

¹⁰⁵ See FAIRFAX, *supra* note 98, at 63–64.

¹⁰⁶ See *Gender Diversity Shareholder Proposal Receives Record Support*, SHAREHOLDER ASS'N RES. & EDUC. (Apr. 27, 2018), <https://share.ca/gender-diversity-proposal-constellation/> [<https://perma.cc/7EGF-XM2N>] (noting a corporate decision to increase the number of women on its board on the heels of a shareholder proposal that received less than majority support).

¹⁰⁷ See JANET GELDZAHLER ET AL., SULLIVAN & CROMWELL LLP, *LESSONS FROM THE 2018 PROXY SEASON 25* (2018), https://www.sullcrom.com/files/upload/Lessons_on_2018_Proxy_Season_Webinar_Slides.pdf [<https://perma.cc/QG5U-NXCN>].

¹⁰⁸ See *id.* at 4.

¹⁰⁹ See FAIRFAX, *supra* note 98, at 97.

female slate of directors was elected in a director election contest.¹¹⁰ Importantly, the challenging shareholders ran their campaign with an explicit focus on gender diversity by emphasizing the fact that the company, Destination Maternity, only had three women directors in its 25 year history.¹¹¹ The challenging shareholders' slate included three women and one male.¹¹² Along similar lines, some have suggested that the Comptroller may seek to use the proxy access right to advance issues associated with board diversity.¹¹³

Proxy contests and proxy access could have an important impact on increasing board diversity. As an initial matter, as was the case with Destination Maternity, a successful proxy contest is one of the most effective ways of altering board composition because it serves to replace the existing board. In this regard, if shareholders are willing to use the proxy contest to advance gender diversity, it can have a direct and immediate impact. Indeed, it has long been understood that director elections and elections for corporate control represent one of the most important mechanisms for influencing board behavior because election contests threaten board seats.¹¹⁴ Such elections help ensure that directors act in the interests of shareholders by threatening those directors with losing their seats. Using proxy contests and director elections, therefore, could have meaningful implications for influencing board behavior related to board diversity.

5. *The Yield for Diversity*

Overall, the increase in support, engagement, and targeted campaigns related to board diversity appears to have resulted in increased diversity on boards. As a result of State Street's efforts, more than 300 companies added a female director to their board, while another 28 companies have pledged to do so.¹¹⁵ Moreover, in 2018, State Street noted gender diversity improvements at over 150 companies targeted

¹¹⁰ See Leslie Picker & Fahiemah Al-Ali, *Even Destination Maternity Is Having a Gender Diversity Debate About Its Board—and Dissident Women Win*, CNBC (May 23, 2018, 1:43 PM), <https://www.cnn.com/2018/05/22/even-destination-maternity-is-having-a-gender-diversity-debate-about-its-board.html> [<https://perma.cc/82MR-JUPK>]; Shirley Westcott, *Surprises from the 2018 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (June 27, 2018), <https://corpgov.law.harvard.edu/2018/06/27/surprises-from-the-2018-proxy-season/> [<https://perma.cc/N8TS-K9ET>].

¹¹¹ Picker & Al-Ali, *supra* note 110.

¹¹² See *id.*

¹¹³ See SULLIVAN & CROMWELL LLP, *supra* note 30, at 19–20.

¹¹⁴ See FAIRFAX, *supra* note 98, at 97.

¹¹⁵ See Whyte, *supra* note 66.

by State Street or with which it had otherwise engaged.¹¹⁶ Additionally, 49 of the companies targeted by the Comptroller's Office elected women or directors of color, while 24 companies publicly committed to including a woman and a person of color in their candidate pool for every future board search.¹¹⁷ This evidence reveals that these targeted campaigns have made a difference, bolstering the notion that the current environment of increased focus on board diversity will yield significant results. The next Section highlights empirical evidence supporting this notion.

C. *Diversity by the Numbers*

As an initial matter, the vast majority of large public corporations already have at least some gender diversity on their board. As of 2018, more than 99% of S&P 500 companies had at least one woman on their board.¹¹⁸ In 2017, 97.6% of Fortune 500 companies had at least one woman on their board.¹¹⁹ In the first quarter of 2018, 80% of Russell 3000 companies had at least one female director.¹²⁰ As one commentator has noted, these figures reveal that “[t]he all-male board is entering endangered species territory.”¹²¹

Many of these companies also have moved beyond a single female director on their boards. As of 2018, 87% of S&P 500 boards had two or more women on their boards, up from 80% in 2017.¹²² Moreover, 49% of S&P 500 boards have three or more women on their boards.¹²³ There are three or more women on 33% of Fortune 500 boards.¹²⁴ In addition, 29% of S&P 1500 companies have three or more women on the S&P 1500 board.¹²⁵ Importantly, these numbers reflect an upward trend. For example, the number of S&P 500 companies with two or more women grew by seven percent from 2017 to

¹¹⁶ See Kohn, *supra* note 72.

¹¹⁷ See *id.*

¹¹⁸ See SPENCER STUART, *supra* note 64, at 3, 8 (noting that only three S&P 500 companies have no women directors).

¹¹⁹ See Zillman, *supra* note 44 (noting that 488 out of 500 Fortune 500 companies have at least one woman on their board).

¹²⁰ See Kohn, *supra* note 72.

¹²¹ Zillman, *supra* note 44 (noting that “all-male bastions are outliers”).

¹²² See SPENCER STUART, *supra* note 64, at 3; see also SULLIVAN & CROMWELL LLP, *supra* note 30, at 26 (noting that approximately 90% of S&P 500 companies have two or more women on their boards, as compared to 58% of Russell 300 companies).

¹²³ See EY CENTER FOR BOARD MATTERS, ERNST & YOUNG LLP, *supra* note 77, at 3.

¹²⁴ See SPENCER STUART, *supra* note 64, at 19.

¹²⁵ See *id.*

2018, while the number of such companies with three or more women on the board grew by 14% from 2015 to 2017.¹²⁶

In recent years, there also has been a growing and record number of new female board members, a key indicator that the increased support for board diversity has resulted in tangible results. According to a study by Heidrick & Struggles, 2017 was “the biggest year for board appointments of women since the firm started tracking [such] data in 2009.”¹²⁷ In addition, 2017 was also “the biggest year-on-year increase . . . ever recorded,” as well as “the largest absolute number of female appointees.”¹²⁸ “[W]omen accounted for 38.3% of all newly named directors at Fortune 500 companies in 2017”¹²⁹ Hence, in 2017, of the 358 available board seats within the Fortune 500, 137 went to women.¹³⁰ This trend is mirrored at other companies. In 2018, women comprised 40% of the newly appointed directors at S&P 500 companies, a record.¹³¹ Women of color accounted for nine percent of new directors at S&P 500 companies, up from six percent in 2017.¹³² Both of these figures represented record increases. Women also accounted for 35% of new directors in the Russell 3000.¹³³ These increases are cause for considerable optimism and suggest that the mounting support for board diversity has led to mounting numbers of women occupying board seats.

The data also indicates that a growing and record number of first-time board members are women, revealing an important expansion of the pool of diverse board members. Women accounted for 40% of all first-time board members in Fortune 500 companies.¹³⁴ In 2018, wo-

¹²⁶ See *id.* at 3, 19.

¹²⁷ Heather Landy, *Fortune 500 Companies Appointed a Record Percentage of Women to Their Boards Last Year*, QUARTZ WORK (July 26, 2018), <https://qz.com/work/1340544/the-fortune-500-appointed-a-record-percentage-of-women-to-boards-in-2017/> [https://perma.cc/D2FQ-P3LB] (discussing Heidrick & Struggles report); see HEIDRICK & STRUGGLES, *THE HEIDRICK & STRUGGLES BOARD MONITOR: APPOINTMENTS OF WOMEN TO BOARDS HIT RECORD HIGH 2* (2018).

¹²⁸ HEIDRICK & STRUGGLES, *supra* note 127, at 2.

¹²⁹ Landy, *supra* note 127; accord HEIDRICK & STRUGGLES, *supra* note 127, at 2.

¹³⁰ HEIDRICK & STRUGGLES, *supra* note 127, at 2. The next highest absolute number was 119 in 2015, while the low was 54 in 2010. *Id.*

¹³¹ See SPENCER STUART, *supra* note 64, at 3, 11 (women accounted for 36% of newly appointed S&P directors in 2017). Indeed, women and people of color comprised half of the incoming class of S&P 500 directors for two consecutive years in 2017 and 2018. See *id.* at 1 (noting that while women made real strides on the diversity front, male minorities “saw their advancement in the boardroom slow”).

¹³² See SPENCER STUART, *supra* note 64, at 11.

¹³³ See SULLIVAN & CROMWELL LLP, *supra* note 30, at 26.

¹³⁴ See HEIDRICK & STRUGGLES, *supra* note 127, at 14. In 2017, nearly 36% of new board

men similarly accounted for 46% of all first-time board members at S&P 500 companies, while women of color accounted for 11% of first-time directors.¹³⁵

The growth in women as first-time board members is a pivotal component of the effort to diversify boards. Obviously, the increase in first-time female board members is important because it reveals an increase in the overall number of women serving as board members. However, it is also important for ensuring that the pool and pipeline for women directors is robust. Historically, it was often the case that the same women occupied multiple board seats.¹³⁶ Hence, even when the number of seats held by women increased, the overall number of women holding those seats did not increase.¹³⁷ The rise in the number of first-time women directors is critical because it indicates not only that the number of board seats held by women is expanding, but also that the overall pool of women from which boards are choosing to occupy those seats is expanding.

Similarly, the growing number of directors who are not current or prior CEOs is a reason for optimism related to increased board diversity. There are very few legal requirements associated with being a board director and none of those requirements mandate that a director have a particular employment background.¹³⁸ Historically, however, many companies had a strong preference for directors who were current or former CEOs, and thus many companies relied heavily on that criteria when seeking to fulfill board seats.¹³⁹ As a result, that criteria became a de facto requirement for many director positions. Such a requirement is a significant impediment for women because women represent only a very small fraction of people who hold such CEO positions.¹⁴⁰ For example, in 2018, women held five percent of

members in the Fortune 500 had no prior experience. *Id.* at 3, 14 (noting that this figure was up from 25% without board experience in 2016); Landy, *supra* note 127.

¹³⁵ See SPENCER STUART, *supra* note 64, at 12. Women accounted for 42% of first-time directors in 2017 and women of color accounted for 8% of first-time directors in 2017. Moreover, more than half (60%) of first-time directors in 2018 were women or people of color. *See id.*

¹³⁶ See 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, 1118 (2005) (noting that corporations often "call[ed] on the same African American women to hold multiple directorships").

¹³⁷ *See id.*

¹³⁸ *See id.* at 1113–14.

¹³⁹ *See id.* at 1114.

¹⁴⁰ *See* Landy, *supra* note 127 (noting that the pool of current and former CEOs is "overwhelmingly white and male").

CEO positions at S&P 500 companies,¹⁴¹ and just under five percent of such positions at Fortune 500 companies, which represented a 25% drop.¹⁴² In 2017, there were no black women CEOs of Fortune 500 companies.¹⁴³ And as of 2018, only two women of color occupied CEO positions at Fortune 500 companies.¹⁴⁴ Hence, focusing on CEOs as the primary pipeline for directors seriously impedes board diversity efforts. Currently, however, companies appear to have reduced their focus on such officers when engaging in their board recruitment efforts. The percentage of new directorships filled by current or former CEOs fell to 47% in 2017, down from 50% in 2016, and 55% in 2013.¹⁴⁵ Similarly, only 35.5% of newly appointed S&P 500 directors were current or former CEOs.¹⁴⁶ This trend further bolsters the notion that the current climate will yield meaningful results related to board diversity.

III. SOME NOTES OF CAUTION

To be sure, as the preceding Section suggests, there are many reasons to be optimistic about the possibility of enhanced board diversity.

141 *Women CEOs of the S&P 500*, CATALYST (Sept. 10, 2019), <https://www.catalyst.org/research/women-ceos-of-the-sp-500/> [<https://perma.cc/S7J3-EWQH>] (noting that women hold 27 CEO positions at S&P 500 companies).

142 Claire Cain Miller, *The Number of Female Chief Executives Is Falling*, N.Y. TIMES (May 23, 2018), <https://www.nytimes.com/2018/05/23/upshot/why-the-number-of-female-chief-executives-is-falling.html> [<https://perma.cc/JE2C-K72J>]. The number of women CEOs hit a record high of 6.4% in 2017, but then declined to under five percent in 2018, going from 32 to 24. *Id.* These percentages are not much better in other top positions. Thus, only 22% of senior vice presidents are women, while women are 18% less likely to be promoted to manager than their male peers. *Id.*; see Valentina Zarya, *The Share of Female CEOs in the Fortune 500 Dropped by 25% in 2018*, FORTUNE (May 21, 2018), <https://fortune.com/2018/05/21/women-fortune-500-2018/> [<https://perma.cc/WXV4-3RRP>]. The numbers for women of color are also low. Thus, there has only ever been one black female CEO of a Fortune 500 company, Ursula Burns, and she stepped down in 2016. Danielle Wiener-Bronner, *Soon, There Will Be Just 3 Black Fortune 500 CEOs*, CNN (Oct. 20, 2017, 10:24 AM), <https://money.cnn.com/2017/10/19/news/companies/black-ceos-fortune-500/index.html> [<https://perma.cc/NF5K-RHWU>]. Overall, the number of black CEOs is also at a record low. *See id.* Currently there are only three black CEOs of Fortune 500 companies, at Merck, TIAA, and JCPenny. *Id.* In 2007, there was a record high of seven. *See id.*

143 Wiener-Bronner, *supra* note 142.

144 Mary Mazzoni, *Only Two Fortune 500 CEOs Are Women of Color. What's up with That?*, TRIPLE PUNDIT (Aug. 15, 2018), <https://www.triplepundit.com/story/2018/only-two-fortune-500-ceos-are-women-color-whats/11146> [<https://perma.cc/GR2J-65TG>].

145 HEIDRICK & STRUGGLES, *supra* note 127, at 3, 11; Landy, *supra* note 127. Men accounted for 77% of the current or former CEOs while women accounted for 23%, indicating that men dominate this pool of appointees. HEIDRICK & STRUGGLES, *supra* note 127, at 11.

146 SPENCER STUART, *supra* note 64, at 2 (noting that such number is down from 47% a decade ago).

That optimism, however, must be tempered by some trends suggesting that the board diversity effort will continue to confront challenges.

As an initial matter, there are still many companies that have no gender representation on their boards. There are still 12 Fortune 500 companies and 585 companies in the Russell 3000 with no women on their boards.¹⁴⁷ These trends suggest that there are some companies at which board diversity efforts have had no impact.

Then too, empirical evidence indicates that board diversity efforts are more difficult at smaller companies. Again, that there are more companies with all-male boards in the Russell 3000 reveals that the complete absence of gender diversity is more prevalent outside of the top 500 companies.¹⁴⁸ Similarly, a 2018 study revealed that 50% of Russell 300 companies had one or no women on their boards.¹⁴⁹ The study noted, “Big Companies Get it. Small Companies Don’t” and discussed how smaller companies tend to be less diverse than larger ones.¹⁵⁰ For example, women hold 25% of the board seats at Russell 100 companies, compared to 21% at Russell 101 to 1000 companies, 17% at Russell 1001 to 2000 companies, and 13% at Russell 2001 to 3000 companies.¹⁵¹ In addition, not only is the percentage of women on boards outside the S&P 500 smaller than at S&P 500 companies, but also the disparity in gender diversity between such companies appears to be increasing over time.¹⁵² For example, the gap between board gender diversity at the S&P 500 and the remaining companies in the Russell 3000 went from 5.4% in 2009 to 8% in 2017.¹⁵³ As one commentator noted, “[w]hatever pressures are driving female representation at the upper end of the market-cap range, they are much weaker at the lower end of the range.”¹⁵⁴ The result is that these

¹⁴⁷ See Zillman, *supra* note 44. Five years ago, however, there were 42 Fortune 500 companies with no women directors and ten years ago there were 69. See Kohn, *supra* note 72; Zillman, *supra* note 44.

¹⁴⁸ See Kristin Broughton, *Small Companies Face Added Pressure to Put Women on Boards*, WALL STREET J. (Feb. 13, 2019, 10:39 AM), <https://www.wsj.com/articles/small-companies-face-added-pressure-to-put-women-on-boards-11550070322> [<https://perma.cc/J3VS-GNBR>].

¹⁴⁹ See 2020 WOMEN ON BOARDS: GENDER DIVERSITY INDEX 3 (2018), https://www.2020wob.com/sites/default/files/2020WOB_GDI_Report_2018_FINAL.pdf [<https://perma.cc/QSS4-EGZX>].

¹⁵⁰ See *id.* at 3.

¹⁵¹ See *id.* at 4.

¹⁵² See *id.* at 3; Madison Sargis, *Corporate Board Gender Diversity Is Increasing, but with Caveats*, MORNINGSTAR BLOG (Feb. 28, 2019), <https://www.morningstar.com/blog/2019/02/28/board-diversity.html> [<https://perma.cc/R79L-UE38>].

¹⁵³ See Sargis, *supra* note 152.

¹⁵⁴ *Id.*

smaller companies are just now reaching the level of board diversity already achieved by their larger counterparts.¹⁵⁵

Even corporations that do have female board members are a long way from gender parity. As one commentator has noted, women represent 51% of the population—and represent roughly 50% of the United States labor force, hold 50% of managerial and professional positions, and earn more than 50% of bachelor's and master's degrees¹⁵⁶—but occupy barely a fraction of seats in the vast majority of boardrooms.¹⁵⁷ Indeed, only 10 S&P 500 boards (that is, two percent) have 50% or more women on their boards.¹⁵⁸ Similarly, as of early 2018, only three Fortune 500 boards had reached gender parity or better.¹⁵⁹ This lack of parity on specific boards is reflected in an overall lack of parity. The portion of all Fortune 500 seats held by women in 2017 was just 22.2%, which is an increase of only 1.2% from 2016.¹⁶⁰ Women of color only account for five percent of total Fortune 500 board seats.¹⁶¹ Women only hold 24% of board seats on S&P 500 boards, a two percent increase from 2017, and a six percent increase from 2013.¹⁶² Women only represent 22% of directors at the largest 200 companies.¹⁶³ From any perspective, these figures reveal that public company boards are a long way from gender parity.

In addition, the rate of increase associated with gender representation on boards has been relatively slow.¹⁶⁴ “In 2003, women held 13.6% of available board seats at Fortune 500 companies.”¹⁶⁵ In 2018, 22.5% of such seats were held by women, which represents only a nine percent increase over 15 years.¹⁶⁶ If this rate of increase remains the

¹⁵⁵ See *id.*

¹⁵⁶ See Fairfax, *supra* note 136, at 1111 (citing statistics from 2002 and 2004).

¹⁵⁷ See Zillman, *supra* note 44.

¹⁵⁸ See SPENCER STUART, *supra* note 64 at 3. Industries with the largest percentage of board diversity are utilities (28%) and consumer (27–28%), while energy (13%) and information technology (17%) have some the lowest percentages of women board members. See EY CENTER FOR BOARD MATTERS, ERNST & YOUNG LLP, *supra* note 77 at 4.

¹⁵⁹ See Zillman, *supra* note 44 (citing study by Equilar).

¹⁶⁰ See HEIDRICK & STRUGGLES, *supra* note 127, at 2; Landy, *supra* note 127.

¹⁶¹ See DELOITTE & ALLIANCE FOR BOARD DIVERSITY, MISSING PIECES REPORT 17 (2019), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/us-cbe-missing-pieces-report-2018-board-diversity-census.pdf> [<https://perma.cc/U5YE-49EN>].

¹⁶² See SPENCER STUART, *supra* note 64, at 4, 8. Overall female representation on S&P 500 boards was 22% in 2017, 18% in 2013, and 16% in 2008. *Id.* at 4, 8.

¹⁶³ See Kohn, *supra* note 72.

¹⁶⁴ See SPENCER STUART, *supra* note 64, at 4.

¹⁶⁵ Fairfax, *supra* note 136, at 1110.

¹⁶⁶ See DELOITTE & ALLIANCE FOR BOARD DIVERSITY, *supra* note 161, at 17.

same, gender parity may not occur until 2063. To be sure, there has been an acceleration in the rate of increase in recent years. As a result of this acceleration, one firm has predicted that women will reach parity by 2025.¹⁶⁷ Even that firm, however, acknowledges that its prediction depends on whether or not the rate of increase will remain the same or contract over time.¹⁶⁸

Reaching gender parity may prove difficult for several reasons. First, the fact that the number of newly appointed women directors has risen dramatically, but the overall percentage of women directors increased only slightly may indicate that the vast majority of newly appointed female directors are replacing other women on boards.¹⁶⁹ Alternatively, it could be that companies are expanding the size of their boards in order to achieve some level of diversity. Achieving diversity in this manner may prove less controversial because women cannot be deemed to be displacing men. It ensures, however, that the overall percentage of women holding boards seats remains relatively low, while also making gender parity especially difficult to reach.¹⁷⁰

Second, turnover on boards continues to be low.¹⁷¹ This means that those seeking to diversify must either expand the number of overall board seats or wait until there is natural board turnover. As other commentators have noted, low turnover on boards makes “moving the needle on boardroom diversity . . . difficult.”¹⁷²

Third, “not all corporate ears are attuned to the cries for more female directors”;¹⁷³ that is, not everyone is on board with board diversity. For example, in its statement opposing a shareholder proposal related to board diversity, Amazon stated that adopting a rule requiring consideration of diverse candidates for board seats “would not be an effective and prudent use of the Company’s time and resources.”¹⁷⁴ While Amazon eventually capitulated, its original stance underscores the notion that boards continue to be reluctant to focus on board diversity.¹⁷⁵ Echoing this sentiment, a Price Waterhouse Survey found that while 94% of directors indicated a belief that board diversity added value to the boardroom, 48% of directors believed that share-

167 HEIDRICK & STRUGGLES, *supra* note 127, at 5.

168 *Id.*

169 *See id.* at 3; Landy, *supra* note 127.

170 *See* Landy, *supra* note 127.

171 *See* SPENCER STUART, *supra* note 64, at 1, 3.

172 *Id.* at 3.

173 Zillman, *supra* note 44.

174 Detrick, *supra* note 27.

175 *See id.*

holders are too preoccupied with diversity, and 52% of directors believed that diversity efforts resulted from political correctness.¹⁷⁶ Moreover, 56% of directors believe that board diversity results in nominating unneeded or unqualified directors.¹⁷⁷ The discrepancy between those professing to believe in the benefits of diversity and those indicating that such efforts result from political correctness strongly suggests that many directors may be professing a belief in diversity based on shareholder pressure or public perceptions rather than an honest belief in diversity. It also suggests that many directors would not focus on board diversity in the absence of such pressure or perceptions.

Fourth, some surveys indicate that board recruitment practices serve to undermine board diversity efforts. Thus, notwithstanding the empirical trends suggesting a movement away from an overreliance on executive experience, survey data indicates that such experience continues to play a dominant role in the board recruitment process. According to a 2017 Deloitte study, 90% of board members would see a candidate without executive experience as unqualified to serve as a director.¹⁷⁸ In addition, almost 90% of boards believe that current or retired CEOs are the most effective board members.¹⁷⁹ This data suggests that the promising statistics about the reduction in board members who serve as CEOs may not be permanent or sustainable, thereby undermining the board diversity effort. Finally, boards too often rely on recruitment and selection processes that reinforce a lack of diversity.¹⁸⁰ For example, the Deloitte study also revealed that boards source a majority of their candidates from other boards within their own industry.¹⁸¹ As the survey suggests, this process favors candidates with board experiences and reinforces the lack of diversity within the board ranks.¹⁸² The beliefs and practices highlighted in the study explain the gap between a board's professed support for board diversity and the actual board diversity results. They also underscore the fact that board diversity efforts may continue to face hurdles.

¹⁷⁶ See GOVERNANCE INSIGHTS CENTER, *supra* note 63, at 2.

¹⁷⁷ See *id.* at 18.

¹⁷⁸ See DELOITTE, 2017 BOARD DIVERSITY SURVEY 9 (2017), <https://www2.deloitte.com/content/dam/Deloitte/us/Documents/about-deloitte/us-about-board-diversity-survey-seeing-is-believing.pdf> [<https://perma.cc/D4JE-H2DS>]. 81% of board members would expect that their fellow board members would also see such a candidate as unqualified to serve as a director. See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.*

Finally, gender parity may be difficult to achieve because it may not necessarily be the goal of most board diversity advocates. Importantly, and with the exception of the California law which appears to have a parity component,¹⁸³ stakeholders who are pushing for gender diversity have not been pushing for gender parity.¹⁸⁴ Indeed, other than BlackRock's insistence that corporations have at least two directors, most other board diversity advocates have merely pushed for diversity without emphasizing a specific number.¹⁸⁵ To be sure, many groups have emphasized the importance of having more than one female director.¹⁸⁶ This emphasis often stems either from research related to critical mass and hence the importance of having more than one person from a diverse group in order for diversity efforts to be effective, or from empirical evidence suggesting a correlation between the presence of multiple women (generally at least two or three women) on the board and important financial results.¹⁸⁷ The fact that the research on which diversity advocates have cited and relied does not emphasize parity may mean that these diversity advocates are satisfied with something short of parity. While this does not undermine the optimism associated with the potential for board diversity effort to yield meaningful results, it does suggest that those results may not translate into gender parity.

Additionally, it is not altogether clear whether, and to what extent, diversity advocates have made the case for gender parity on boards. On the one hand, diversity advocates clearly have relied on empirical evidence to highlight the lack of gender parity, while simultaneously appearing to make gender parity a goal.¹⁸⁸ On the other hand, when those advocates advance arguments in favor of parity, those arguments often appear to focus on the importance of achieving critical mass or diversity more generally, or the presence of "more" women or "at least three women" on the board.¹⁸⁹ Such arguments do not necessarily require parity. To be sure, there are many reasons why

183 See Smith, *supra* note 6.

184 See Krouse, *supra* note 44.

185 See *id.*

186 See Posner, *supra* note 44.

187 See Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 861–64 (2011).

188 See e.g., DELOITTE ACCESS ECON., RESEARCH REPORT: TOWARDS GENDER PARITY: WOMEN ON BOARDS INITIATIVE 1 (2016), <https://www2.deloitte.com/content/dam/Deloitte/au/Documents/Economics/deloitte-au-toward-gender-parity-women-on-boards-initiative-041016.pdf> [<https://perma.cc/49UH-6S5Z>].

189 See, e.g., *id.* at 12–20; Shannon Mantaro, *Does Gender Parity Matter on Corporate Boards? California Thinks It Does*, HOUS. CHRON. (Sept. 22, 2018), <https://www.houstonchroni>

gender parity is important, including that the lack of parity may reflect unconscious bias or discrimination. It is still unclear if the case for parity itself—as opposed to some form of diversity with critical mass—has been made. The lack of such case may be at least one reason why achieving gender parity on boards continues to be difficult.

IV. CONCLUDING THOUGHTS

There has been considerable momentum associated with board diversity as it relates to gender. For those who have been pushing for board diversity for decades, this momentum is refreshing because it suggests that there may finally be meaningful increase in the number of women on corporate boards. And in fact, many factors suggest that an increase may be possible. There is a growing consensus on the benefits of board diversity and that consensus has caused a broad array of market participants, including some of the most influential members of the investment community, to support board diversity and to bring their considerable influence to bear in the push for board diversity. Investors have expanded their tactics, relying on both direct engagement as well as specific campaigns. These investors target corporations and their directors based on their lack of board diversity as well as their failure to engage around the issue of board diversity. And the empirical trends appear to be positive. Most notably, there is at least some evidence indicating that boards may have relaxed their reliance on practices that posed the most challenges for the recruitment of women directors.

Not all the news, however, is good. Indeed, while the empirical evidence suggests that some boards are moving away from recruitment practices that disadvantage women, many boards continue to use them, suggesting that such practices will continue to pose a long-term problem. Survey data also indicates that directors may not be as convinced of the benefits of board diversity as the rest of the community. Given their significant role in the board nomination process, such data represents a source of concern for board diversity efforts.

Finally, the pursuit of gender parity on boards may prove particularly challenging. In fact, it is not at all clear that any of the major advocates of board diversity believe that gender parity is the goal of board diversity, or otherwise have made the case for gender parity itself. Hence, even as progress is made with respect to board diversity, parity may continue to be an elusive goal.