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Breaking the Glass Ceiling:
Women in the Boardroom

Report Card on the United States

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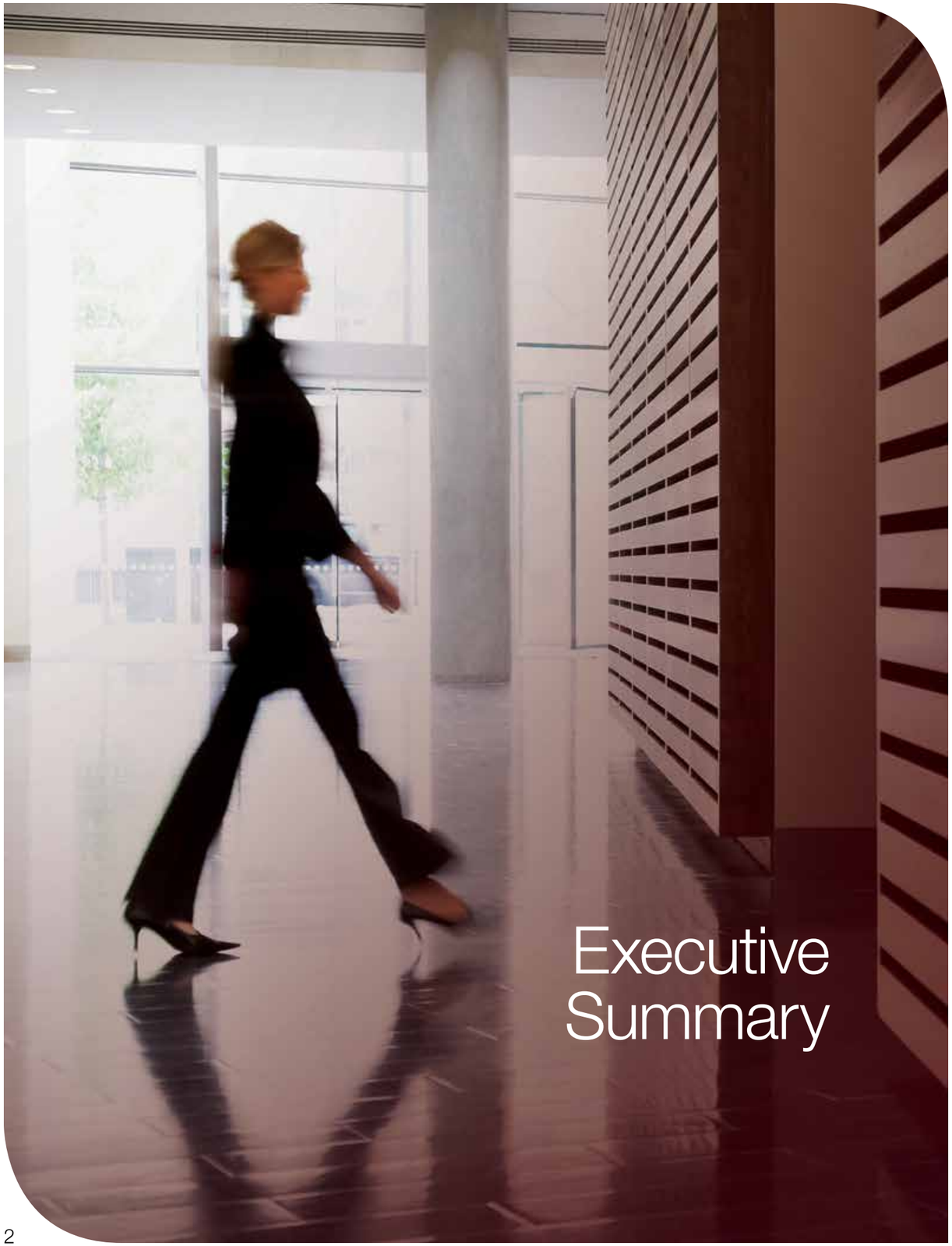

Executive Summary

Gender parity in the boardroom is a challenging, complex issue—one that inspires, and seems to require, a variety of approaches from those seeking progress. In our ongoing series, *Breaking the Glass Ceiling: Women in the Boardroom*, we take a close look at the initiatives and movement underway in countries around the world to help close the gender gap on corporate boards. Through examination of the strategies that are helping to drive change, we aim to foster further dialogue around this important issue.

In this *Report Card on the United States*, we review recent developments in the U.S. focused on initiatives to advance diversity writ large—not just gender diversity—on corporate boards led by four critical groups: lawmakers at the federal, state, and local levels; federal agencies, such as the Securities and Exchange Commission (SEC); institutional investors; and interest groups and industry organizations working on this issue. Our full report, available online at **www.paulhastings.com/genderparity**, includes developments from more than 40 jurisdictions around the world. We encourage you to share your thoughts and help continue the conversation.

Our Findings

While there is no longer much debate over the value of diversity on corporate boards, real change continues to be elusive—even as studies have provided empirical evidence that gender diversity can be a catalyst for a board's success. For instance, a recent McKinsey & Company report identified "a statistically significant relationship between a more diverse leadership and better financial performance."[1] Specifically, "[t]he companies in the top quartile of gender diversity were 15 percent more likely to have financial returns that were above their national industry median. Companies in the top quartile of racial/ethnic diversity were 30 percent more likely to have financial returns above their national industry median."[2]

However, while the issue continues to generate much discussion, there still seems to be a limited appetite to set clear directives or move beyond voluntary approaches. While some advances have been made, progress remains modest.

Federal Efforts Stall, But States and Cities See Progress

Two initiatives supporting gender parity on corporate boards have been introduced in the U.S. House of Representatives. The Gender Diversity in Corporate Leadership Act would strengthen diversity disclosure requirements and bolster the SEC's role in encouraging gender diversity. In addition, a resolution was introduced that would express the sense that "corporations should commit to utilizing the benefits of gender diversity in boards of directors and other senior management positions." Although these initiatives have sponsors from both sides of the aisle, they remain in committee, with no hearings or further action scheduled.

Legislative efforts at the state level have proven more successful, though they involve only voluntary guidelines. In 2013, California passed a resolution encouraging publicly traded corporations in the state to reach certain percentages of women on their boards by 2016. A similar resolution was also filed in the Illinois House of Representatives in 2015. In Massachusetts, a resolution encouraging greater gender diversity in the leadership of companies and state government was passed unanimously by the state legislature. Turning to local government, New York City and Philadelphia each have taken steps to increase diversity disclosures by city contractors.

SEC Seeks Stronger Disclosure Requirements

In recent years, the SEC has made efforts to improve the diversity of corporate boards—most notably in 2009, when the SEC amended its regulations to require disclosure of a company's consideration of diversity when identifying nominees for board member positions. It is now trying to strengthen this requirement. SEC Chair Mary Jo White recently announced that her staff is preparing a recommendation to propose amending the relevant rule to require more robust board diversity disclosures.

1 McKinsey "Diversity Matters" report, Nov. 24, 2014, page 1, *available at* https://web.duke.edu/equity/toolkit/documents/DiversityMatters.pdf.

2 *Id*.

Another federal agency, the Government Accountability Office (GAO), released an insightful report describing the lack of gender diversity within corporate boards. The report also outlines steps companies could take to address the issue—such as requiring that their slates of director candidates include at least one woman, or expanding their board searches beyond CEOs to include high-performing women in other senior executive level positions. These recommendations may help to spur further progress.

Institutional Investors Wield Influence

While mandatory policies on board diversity continue to attract only limited support, institutional investors have taken a more prominent role by using their financial influence to focus corporate efforts on increasing board diversity. Both public and private institutional actors have employed a number of tactics to urge publicly traded companies to take action. These include public statements of support for more diverse boards, support for shareholder resolutions encouraging companies to adopt formal diversity policies, threats to engage in or actual no-vote campaigns against directors on boards that have refused to respond to demands for increased diversity, and campaigns for proxy access to allow shareholders to directly nominate corporate directors.

Interest Groups Spur Additional Momentum

A number of other organizations are also involved in driving efforts to increase board diversity. These initiatives range from conducting research, to creating voluntary codes of conduct and best practices, to taking action by partnering with those involved in identifying board candidates or mentoring women senior executives. For instance, Catalyst focuses on increasing boardroom diversity by producing research and conducting programs in which current CEOs and board chairs mentor and sponsor CEO-endorsed women board candidates. The 30% Club likewise has established a mentoring program, and works with executive search firms to encourage them to put forward diverse slates of candidates.

Notably, the Thirty Percent Coalition issued a strong call to action in 2012, sending letters to 168 companies urging them to increase representation of women on their boards. By late 2015, 62 of the companies had appointed women.

Conclusion

With each edition of our report, we see a growing array of strategies and approaches being used to address the issue of gender parity on corporate boards. Clearly, there is interest from both the public and private sectors in establishing a strong pipeline of future women directors. While change continues to be modest in the U.S., the efforts of legislators, federal agencies, institutional investors, and others are laying the groundwork so that meaningful progress may be realized in the years ahead.

While it will take more time to determine the full impact of the efforts described in this report, we hope that our study will advance the conversation, inspire new ideas and approaches, and help us collectively close the distance between where we are today and where we hope to be in the future.

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Recent Research and Surveys

A strong, forward-thinking corporate board can enhance a company's financial success. In recent years, it also has become clear that diversity—of backgrounds, experiences, and perspectives—can be a catalyst for stronger financial performance. While gender parity on corporate boards is still a long way off, the business case for achieving diversity on corporate boards has become increasingly clear.

Diversity Boosts Financial Performance

Empirical studies confirm that boards whose members have a variety of gender, racial, and sexual orientation backgrounds ultimately outperform boards where everyone is more or less the same. For instance, a report by McKinsey & Company concluded that there is "a statistically significant relationship between a more diverse leadership and better financial performance."[1] Specifically, "[t]he companies in the top quartile of gender diversity were 15 percent more likely to have financial returns that were above their national industry median. Companies in the top quartile of racial/ethnic diversity were 30 percent more likely to have financial returns above their national industry median."[2] On the other hand, "[c]ompanies in the bottom quartile for both gender and ethnicity/race were statistically less likely to achieve above-average financial returns than the average companies in the dataset."[3] In fact, "[c]ompanies with 10 percent higher gender and ethnic/racial diversity on management teams and boards in the US, for instance, had EBIT [earnings before interest and tax] that was 1.1 percent higher."[4] Notably, McKinsey concluded that "the unequal performance across companies in the same industry and same country implies that diversity is a competitive differentiator that shifts market share towards more diverse companies."[5]

Morgan Stanley affirmed McKinsey's findings in a research report published in May 2016, concluding that companies with more diverse gender populations (both inside and outside of the boardroom) tend to perform better. According to the report, "[h]igh gender diversity companies have delivered slightly better returns, with lower volatility, compared with their low diversity or sector peers, and they have moderately outperformed on average in the past five years."[6] Further, "[t]he top fifth of selected companies that consistently rank gender diversity among their priorities, with data to back it up, outperformed their peers based on volatility and risk factors."[7]

Companies in the top quartile of racial/ethnic diversity were 30 percent more likely to have financial returns above their national industry median.

—McKinsey, "Diversity Matters"

Additionally, the Peterson Institute's preliminary research suggests that the effect of diversity on the financial success of corporations may go beyond the boardroom. After analyzing nearly 22,000 firms globally, the institute found the following:

> [T]he presence of women in corporate leadership positions may improve firm performance and the magnitudes of the correlations are not small. The largest gains are for the proportion of female executives, followed by the proportion of female board members….[8]

1 McKinsey "Diversity Matters" report, Nov. 24, 2014, page 1, *available at* https://web.duke.edu/equity/toolkit/documents/DiversityMatters.pdf.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 "Why It Pays to Invest in Gender Diversity," May 11, 2016, *available at* http://www.morganstanley.com/ideas/gender-diversity-investment-framework.

7 *Id.*

8 Peterson Institute for International Economics, *Is Gender Diversity Profitable? Evidence from a Global Survey*, February 2016, page 3, *available at* https://piie.com/publications/wp/wp16-3.pdf.

Simply put, the research suggests that there is a correlation between the presence of women in C-suite positions and profitability:

> [A] profitable firm at which 30 percent of leaders are women could expect to add more than 1 percentage point to its net margin compared with an otherwise similar firm with no female leaders. By way of comparison, the typical profitable firm in our sample had a net profit margin of 6.4 percent, so a 1 percentage point increase represents a 15 percent boost to profitability.[9]

Given these results, it is significant that the presence of women on corporate boards increases the number of women in the C-suite of a company, according to the institute's findings.[10]

Despite this evidence, U.S. corporate boards are still struggling to add diverse directors. Women continue to make some strides, but racial, ethnic, sexual orientation, and gender identity minorities have not made as much progress.

In 2015, companies in the Fortune 500 appointed 399 new directors.[11] Thirty percent of those seats were filled by women, nine percent by African-Americans, four percent by Hispanics, and five percent by Asian/Asian-Americans.[12] Although these numbers are significant, the Heidrick and Struggles Board Monitor argues that they could have been higher.

> With the number of appointments at a seven-year high, it is reasonable to expect that a greater number of women, Hispanics, African-Americans, and Asian/Asian-Americans might have claimed seats in the boardroom. However, it did not turn out that way. Indeed, from the perspective of gender and ethnic diversity, the way in which board appointments unfolded in 2015 might be seen as a missed opportunity.[13]

Heidrick and Struggles attribute this problem to the recruiting pool for director positions. The firm opined that "the high proportion of former and current CEOs and CFOs tapped for board seats suggests that most boards are seeking new members from among 'the usual suspects.'"[14] It also concluded that "the stalled progress for women appointees and the generally flat numbers for directors of Hispanic, African, and Asian descent indicate that in some dimensions of diversity things are changing slowly—if at all."[15]

Within the Fortune 500, the number of openly LGBT directors is also fairly low. According to Out Leadership, less than 0.3 percent of directors of Fortune 500 companies are openly LGBT.[16]

The number of women on the boards of Fortune 1000 companies is better than it has been in the past, but there is still much room for improvement. According to the 2020 Women on Boards Gender Diversity Index, women account for 1,771, or 17.9 percent, of the 9,875 directors of Fortune 1000 companies.[17] Notably, the average number of female directors on the boards of Fortune 500 to 1000 companies is less than that of Fortune 100 and 500 companies. Fortune 100 companies average 2.7 female directors, while Fortune 500 companies average 2.2 women per board.[18]

9 *Id.* at 8-9.

10 *Id.* at 9.

11 Heidrick and Struggles Board Monitor, "2016 Board Monitor: Mapping Incoming Boardroom Talent," May 4, 2016, page 3, *available at* http://www.heidrick.com/~/media/Publications%20and%20Reports/Mapping%20incoming%20talent.pdf.

12 *Id.*

13 *Id.* at 10.

14 *Id.* at 2.

15 *Id.*

16 http://outleadership.com/quorum/.

17 2020 Women on Boards Gender Diversity Index, page 4, *available at* https://www.2020wob.com/sites/default/files/2020GDI-2015Report.pdf.

18 *Id.*

Fortune 500 to 1000 companies, however, only average 1.7 women per board.[19] It is important to note that, as stated by 2020 Women on Boards, there need to be at least three female directors for women to be "adequately represented" on the board.[20]

Within the S&P 500, women are doing well, but the results for racial minorities are mixed. Women are 20 percent of S&P 500 board members, up from 16 percent in 2010, but there are still 13 boards with no female members.[21] Meanwhile, "[t]he number of African-Americans on [S&P 500] boards has decreased since 2010, from 9.6% to 8.6%."[22] Among the S&P 500 companies, 75 percent had at least one African-American director, a decrease from 82 percent of companies in 2010.[23] The number of Hispanic/Latino directors has increased, but the movement is very slight: "4.8% of directors are Hispanic/Latino, compared to 4.2% in 2010."[24] Further, nearly half (47 percent) of S&P 500 boards have at least one Hispanic/Latino director, as compared to 44 percent in 2010.[25] As for Asians, only "1.8% of directors are of Asian descent, versus 1.3% [in 2010], and 18% of boards have one or more Asian directors, up from 15% in 2010."[26]

U.S. corporate boards are still struggling to add diverse directors. Women continue to make some strides, but racial, ethnic, sexual orientation, and gender identity minorities have not made as much progress.

Encouragingly, Spencer Stuart's survey of the S&P 500 indicates that boards are looking for women and minority candidates. According to the survey, "58% of survey respondents said that female candidates are a priority, while 51% of respondents said that minority candidates were a priority."[27] This is encouraging news, particularly because the majority of committee leaders are still white males: "Women now represent 20% of all directors, but the rate of women holding committee leadership roles is lower; 16% of nominating committees are chaired by a female director, 13% of audit committees and 10% of compensation committees."[28] It seems that white male directors understand that a diverse board is a high functioning and successful board.

Within the broader S&P 1500, women accounted for 16 percent of board members in 2014.[29] However, "[e]ven if every future board vacancy were filled by a woman, [the Government Accountability Office] estimated that it would take until 2024 for women to approach parity with men in the boardroom."[30]

19 *Id.*

20 *Id.*

21 Spencer Stuart, 2015 Spencer Stuart Board Index, page 6, *available at* https://www.spencerstuart.com/~/media/pdf%20files/research%20and%20insight%20pdfs/ssbi-2015_110215-web.pdf.

22 *Id.* at 18.

23 *Id.*

24 *Id.*

25 *Id.*

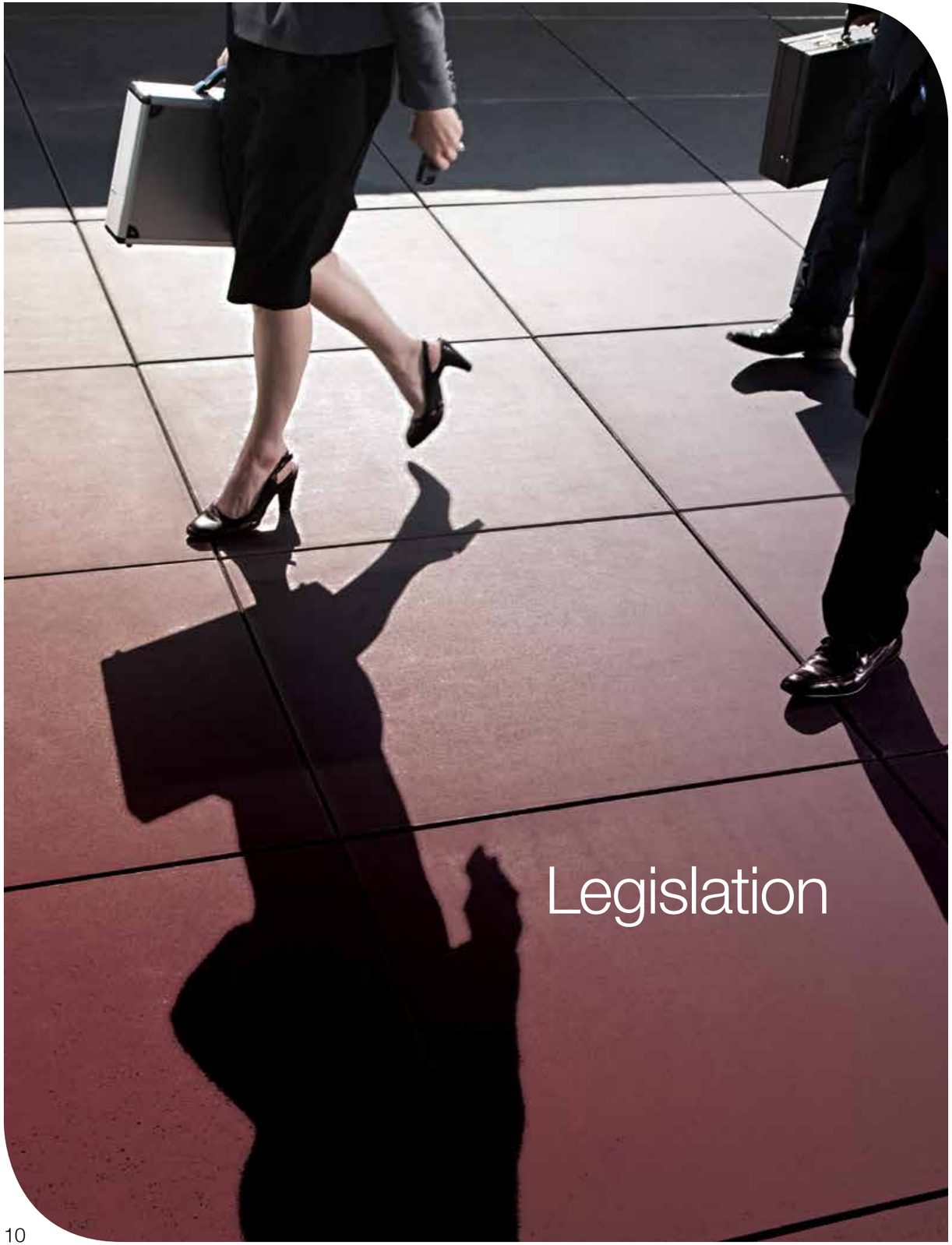
26 *Id.*

27 *Id.* at 10.

28 *Id.* at 28.

29 U.S. Government Accountability Office, "Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements," December 2015, page 8, *available at* http://www.gao.gov/products/GAO-16-30.

30 *Id.* at 9.



Legislation

Federal Efforts Stall in House

Since 2009, the Securities and Exchange Commission (SEC) has required companies to disclose whether and how they consider diversity in identifying board members. However, the requirement is so flexible that these disclosures take many different forms; a number of companies simply disclose that they lack any formal policy. This makes it difficult for investors to find useful information about the diversity of boards and make an "apples-to-apples" comparison of different companies.

On March 7, 2016, U.S. Representatives Carolyn Maloney (D-NY), Donald Beyer (D-VA), and Debbie Dingell (D-MI) introduced the Gender Diversity in Corporate Leadership Act,[1] which strengthens diversity disclosure requirements and bolsters the SEC's role in encouraging gender diversity. The legislation requires that publicly-traded companies disclose in their annual SEC filings the gender of board directors and nominees—just as they currently disclose their names, ages, and qualifications. The bill also establishes an advisory group to study strategies to increase diversity among boards of directors and to release a report summarizing its findings and determinations. In addition, the bill requires the SEC to publish an annual report on gender diversity on corporate boards. "If we do nothing, we won't reach gender parity on corporate boards for at least another 40 years," said Maloney. "It's time for women, government, and corporate America to work together in addressing this problem."

The legislation has received important endorsements, including from the U.S. Chamber of Commerce. "The bill's goal of promoting gender diversity in the boardroom[s] of American businesses reflects the reality that women, who historically have been statistically underrepresented among corporate boards of directors, possess invaluable insights, experiences, and management skills that can and should be deployed to support the corporate goals of our nation's producers, innovators, and employers," wrote R. Bruce Josten, Executive Vice President for Government Affairs for the U.S. Chamber of Commerce in a letter to Rep. Maloney.[2]

Two initiatives supporting gender parity on corporate boards have been introduced in the U.S. House of Representatives. Although these initiatives have sponsors from both sides of the aisle, they remain in committee, with no hearings or further action scheduled.

The legislation was referred to the House Financial Services Committee, where it has remained since March. Although the legislation is bipartisan—as Rep. Lynn Jenkins (R-KS) signed on as a cosponsor in May—there are currently no hearings or markups scheduled for it.

In September 2015, Representatives Donald S. Beyer (D-VA), Tom Emmer (R-MN), Mark DeSaulnier (D-CA), Susan Davis (D-CA), and Kathleen Rice (D-NY) also introduced a resolution[3] expressing the sense that "corporations should commit to utilizing the benefits of gender diversity in boards of directors and other senior management positions." The resolution has 12 other cosponsors from Alabama, California, Illinois, Massachusetts, Minnesota, Nebraska, New York, North Carolina, Oregon, and Virginia. The resolution was referred to the House Committee on Education and the Workforce, where it has remained since September. Commenting on the resolution, Rep. Beyer stated: "It is long past time for corporate boardrooms to welcome women. Companies that include women in leadership roles outperform companies that do not. Simply put, when women succeed, our economy succeeds."

1 H.R. 4718, 114th Cong., 2d Session (2016).

2 Letter from R. Bruce Josten, Exec. V.P. Gov't Affairs, Chamber of Commerce, to Hon. Carolyn Maloney (Mar. 9, 2016), *available at* http://www.centerforcapitalmarkets.com/wp-content/uploads/2016/03/160309_GenderDiversityinCorporateLeadershipAct2016_Maloney.pdf.

3 H.Res. 445, 114th Cong., 1st Session (2015).

State and Local Efforts See Some Success

California

In addition to federal legislation, several states have made efforts to increase diversity among boards of directors. For example, in 2013 the California Senate passed Concurrent Resolution No. 62 ("SCR 62") which urged publicly-traded companies to reach certain goals by the end of 2016. This included having every publicly held corporation in California: with nine or more director seats, have a minimum of three women on its board; with five to eight director seats, have a minimum of two women on its board; and with fewer than five director seats, have a minimum of one woman on its board.

The resolution cites a University of California, Davis study, which found that there is only one woman for every nine men among directors and the highest paid executives in California; that no company in the state has a gender-balanced board or management team; and that 44.8 percent of California's companies have no women directors, and 34 percent have only one woman director. The resolution also cites a McKinsey study, "Women Matter," that showed that companies where women are strongly represented at high levels perform the best and that performance increases significantly once a certain "critical mass" of women is attained; specifically, "when there are at least three women on management committees with an average membership of 10 people." Additionally, the resolution cites a Credit Suisse study that concludes that "women on boards improve business performance by key metrics, including stock performance, as demonstrated by the fact that companies with a market capitalization of more than $10 billion, whose boards have women, outperformed shares of comparable businesses with all-male boards by 26 percent."[4]

A UC Davis study showed that between 2005 and 2014, there was a 133 percent increase in the number of companies among California's 400 largest meeting the resolution's benchmarks—from 7.5 percent in 2005 to 17.5 percent in 2014.[5] At the end of 2014, 13.3 percent of the California director positions were held by women.[6] However, while that number is low, the number of female minority directors is relatively even lower. According to the UC Davis study, among the Fortune 1000 companies they studied in 2014, 89.5 percent of the female directors were white.[7]

Massachusetts

A resolution related to gender diversity (S. 1007) unanimously passed the Massachusetts Senate on July 29, 2015 and the House on October 21, 2015.[8] The resolution cited striking statistics: while women make up 48 percent of the labor force in Massachusetts, they constitute only 14 percent of executive officers and 8.1 percent of top earners.

The resolution "encourage[d] equitable and diverse gender representation in the public and private leadership ranks of Massachusetts companies and state government."[9] It further encouraged companies doing business in the state to adopt policies designed to increase gender diversity in their boards of directors and senior management positions, and set goals to measure their progress.[10] The resolution recommended public disclosure of the number of women and total number of individuals on companies' boards of directors, and also set recommendations for the minimum number of female board directors.[11] Corporate boards with nine or more members should have a minimum of three female directors, and boards with fewer than nine members should have a minimum of two.[12]

4 Senate Concurrent Resolution 62 (Cal. 2013)

5 Amanda Kimball and Tonya D. Lindsey, *Women on Corporate Boards: Increasing in California but Still Underrepresented,* California Research Bureau, January 13, 2016, *available at* https://www.library.ca.gov/crb/16/WomenonCorporateBoards_Final.pdf.

6 *See id.*

7 *See id.*

8 Copy of text *available at* https://malegislature.gov/Bills/189/Senate/S1007.

9 S. 1007, 189th Gen. Ct. (Mass. 2015).

10 *Id.*

11 *Id.*

12 *Id.*

"This is not just a women's issue or a family issue. This is also a business issue," said Senate Committee on Ways and Means Chair Senator Karen E. Spilka (D-Ashland), who sponsored the bill in the Senate. "Research consistently shows that businesses with greater gender diversity in their leadership ranks have a competitive advantage. The future of the Massachusetts economy depends on bringing the best talent to the table. With this resolution, we are making a strong statement of public policy that Massachusetts values equality, justice and diversity."

Illinois

House Resolution No. 439, which aims to encourage gender representation on corporate boards of directors, passed the Illinois House on May 30, 2015.[13] Like the California resolution mentioned above, the Illinois resolution cited the McKinsey study "Women Matter," which showed that companies perform best when women are strongly represented at board or top-management levels. The resolution also cited an Oklahoma State University study that not only found an association between board diversity and improved financial value, but also identified a significant correlation between the percentage of a company's board comprised of women or minorities and the firm's value. Additionally, the resolution mentioned a Credit Suisse study of more than 2,000 companies that showed that women on boards "improve business performance by key metrics, including stock performance, as demonstrated by the fact that companies with a market capitalization of more than $10 billion, whose boards have women, outperformed shares of comparable businesses with all-male boards by 26 [percent]."[14]

Similar to resolutions passed in other states, the Illinois resolution encourages corporate boards of directors to have a minimum number of women. Specifically, publicly held corporations in Illinois should have a minimum of: three women on every board with nine or more seats; two women on every board with at least five but fewer than nine members; and one woman on every board with fewer than five members.

Philadelphia

On June 13, 2013, the City of Philadelphia enacted a bill that requires contractors who want to do business with the city to: disclose the current percentage of female executives in the company and the percentage of females on the company's boards; disclose the company's goals for including females in executive positions and on boards; and disclose the efforts the contractor is making to achieve the aspirational goals.[15]

"This bill will offer us the transparency needed to determine if a contractor values diversity in the workplace and in leadership positions," said Councilwoman Blondell Reynolds Brown, who sponsored the bill. "It is a fact that when three or more women are at the table in executive positions, the content and tone of a meeting changes. Women bring a different, yet equally significant set of priorities to the table."[16]

New York City

On April 21, 2016, the mayor of New York City signed into law a bill that would require the Department of Small Business Services to distribute a voluntary survey to all prospective city contractors to collect racial, ethnic, and gender information regarding those companies' executive boards.[17] The survey would also solicit information regarding selection and employment practices, policies, and procedures pertaining to the racial, ethnic, and gender composition of the entity's directors, officers, and other executives. The information is not to be used, however, in decisions

13 *Copy of text available at* http://www.ilga.gov/legislation/99/HR/PDF/09900HR0439lv.pdf.

14 *Id.*

15 Philadelphia, Pennsylvania, Municipal Code § 17-104 as amended by Bill No. 130457 (2013), *available at* https://phila.legistar.com/LegislationDetail.aspx?ID=1432999&GUID=0DB3C132-E00B-46D1-B7D5-6C96FEE35D3Fx.

16 Press Release, Blondell Reynolds Brown, City Council of Philadelphia, *City Council Unanimously Passes Women on Boards Legislation Sponsored by Councilwoman* (June 13, 2013), *available at* http://phlcouncil.com/city-council-unanimously-passes-women-on-boards-legislation-sponsored-by-councilwoman/.

17 Local Law No. 44 (2016) of City of New York, *available at* http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=2240496&GUID=43C2F69D-B671-4363-917F-3F8265961E93.

awarding or renewing any contract.[18] The law also provides that by July 1, 2018, the mayor will submit to the New York City Council a report analyzing: "1. Racial, ethnic and gender diversity among directors, officers and executive-level staff members of entities holding goods or service contracts with the city; and 2. Such entities' plans for improving racial, ethnic and gender diversity in such positions and such entities' efforts to achieve those plans."[19]

The mayor of New York City signed into law a bill that would require the Department of Small Business Services to distribute a voluntary survey to all prospective city contractors to collect racial, ethnic, and gender information regarding those companies' executive boards.

On October 22, 2015, the sponsor of the legislation, Council Member Elizabeth Crowley, testified before the Committee on Economic Development. She stated that "[d]ata shows [racial and gender] diversity improves financial performance and leverages talent. Diversity has been proven to produce significantly better financial performance, greater economic growth, and improve corporate sustainability."[20] Andrew Schwartz, Acting Commissioner for the Department of Small Business Services, said that the intention of the legislation is "laudable" but expressed concern that some businesses may be reluctant to gather and provide the information and that the requirement may deter some businesses from competing for contracts with the city.[21] Carra Wallace, testifying on behalf of Comptroller Scott Stringer, said that "[r]eporting initiatives of this kind bring much needed transparency to an area where it is sorely lacking, and communicate the city's values to those with whom we do business."[22] She cited statistics evidencing how diverse the City of New York is, such as that over 200 languages are spoken in the five boroughs and that 40 percent of the city's population hails from outside the United States. She also cited a study showing that "nearly two-thirds of the top 71 investment funds have no women as senior investment team members, and roughly 30% of those funds have a senior investment team that is composed entirely of white members."[23]

18 *See id.* at § 1.

19 *See id.* at § 2.

20 Transcript of Oct. 22, 2015 Hearing of the City Council of the City of New York's Committee on Economic Development at 5:23-6:2, *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=4126911&GUID=43B7AFC3-3E60-4868-A925-E41B51B8D2C5.

21 *Id.* at 9:25, 12:3-9.

22 *Id.* at 34:7-10.

23 *Id.* at 34:11-16, 35:2-7.

Federal Agency Activities

Although Congress has been slow to enact legislation that will significantly change board composition in a swift manner, agencies within the federal government have started to take a closer look at the problem of board diversity.

GAO Outlines Strategies for Diversity

In December 2015, the U.S. Government Accountability Office (GAO) released a report describing the lack of gender diversity within corporate boards. The report outlines the problem in very stark terms: "Even if every future board vacancy were filled by a woman, we estimated that it would take until 2024 for women to approach parity with men in the boardroom."[1] The comprehensive report also identified factors that hinder women's representation on boards. One specific reason the number of women on boards remains so low is that current members often rely on personal networks to choose prospective board members.[2] Board members may also be affected by unconscious bias, the tendency to look for candidates that reflect the seeking individual's characteristics.[3] Many companies also tend to focus less on diversity once they have a diverse individual or two on the board. For instance, the GAO noted that "[i]n 2014, 29 percent of companies in the S&P 500 that had no women on the board added a woman; 15 percent of companies that had one woman on the board added a woman; and 6 percent of companies that had two women on the board added a woman."[4] Small and medium size companies also demonstrated this pattern.[5] Unfortunately, these roadblocks are familiar to individuals who wish to see the number of women on boards increase.

A recent U.S. Government Accountability Office report outlines steps companies could take to address the lack of gender diversity within corporate boards. These include requiring that slates of director candidates include at least one woman and expanding board searches beyond CEOs to include high-performing women in other senior executive level positions.

The GAO's report is most helpful when it describes how to combat the aforementioned problems, and specifically, what steps companies are willing to take to increase board diversity. For instance, the GAO opined that companies could require their slates of director candidates to include at least one woman.[6] Of the 19 CEOs, board directors, and investors (collectively referred to as "stakeholders") interviewed by the GAO for the report, 11 "supported boards requiring a diverse slate of candidates," while four of the 11 stakeholders suggested that boards should aim for slates with more than one woman.[7] Two members of that group even advocated for slates divided evenly between men and

1 U.S. Gov't Accountability Office, GAO-16-30, Corporate Boards: Strategies to Address Representation of Women Include Federal Disclosure Requirements 9 (2015).

2 *Id.*

3 *Id.*

4 *Id.* at 13-14.

5 *Id.*

6 *Id.* at 17.

7 *Id.* at 17.

women.[8] The GAO also stated that boards could set voluntary diversity targets. This measure was supported by 10 of the stakeholders, but four stakeholders opposed such targets, with one "express[ing] concern over how voluntary diversity targets would work in the context of considering board candidates' skills."[9] That type of opinion is just one example of the hurdles that boards face when trying to implement diversity measures.

Expanding board searches was also proposed as a viable solution. Of the 19 stakeholders, 17 "supported expanding board searches beyond the traditional pool of CEO candidates to increase representation of women on boards."[10] Several "suggested, for example, that boards recruit high performing women in other senior executive level positions, or look for qualified female candidates in academia or the nonprofit and government sectors."[11] Expanding the recruitment pool beyond CEOs may be especially helpful. According to the GAO and 2013 EEO-1 data, women comprised 38 percent of senior-level managers in companies with more than 100,000 employees.[12] Many women in these senior-level positions have the talent and skill to succeed as board directors, and would make viable candidates.

Notably, the GAO also reported substantial support for federal disclosure requirements amongst the 19 stakeholders interviewed. "[S]everal large public pension fund investors and many stakeholders we interviewed (15 of 19) supported improving federal disclosure requirements on board diversity."[13] Somewhat surprisingly, "[s]takeholders were generally supportive of the government undertaking efforts to raise awareness about gender diversity on boards or to collect and disseminate information on board diversity."[14] About two-thirds of the stakeholders "also supported improving SEC rules to require more specific information from public companies on board diversity."[15] However, most stakeholders (16 of 19) did not support government quotas.[16]

In all, the GAO report outlines numerous strategies that companies could use to increase the diversity of their boards. However, many companies will still need a strong incentive to implement such strategies.

SEC Seeks More Robust Disclosures

In recent years, the SEC has made efforts to improve the diversity of corporate boards. Most notably, in 2009, the SEC amended its regulations to require disclosure of a company's consideration of diversity when identifying nominees for board member positions. Since that time, Item 407(c) of Regulation S-K has "require[d] disclosure of whether, and if so how, a nominating committee considers diversity in identifying nominees for director."[17] Additionally, if the nominating committee or the board has a policy on consideration of diversity in identifying director nominees, "disclosure would be required of how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy."[18] The SEC currently does not provide its own definition of diversity, instead permitting companies "to define diversity in ways they consider appropriate."[19]

SEC Chair Mary Jo White recently announced that her staff is preparing a recommendation to propose amending the relevant rule to require more robust board diversity disclosures.

The SEC is trying to strengthen this disclosure requirement. Its Strategic Plan for 2014-2018 lists more robust disclosure requirements as an objective.[20] Specifically, Strategic Objective 3.1 states that "[t]he SEC works to ensure that investors have access to high-quality disclosure materials that facilitate informed investment decision-making."[21] The SEC further explained that it "will continue its efforts to enhance disclosure requirements for the benefit of investors, including a reassessment of current core corporate disclosure requirements."[22]

Although Objective 3.1 does not specifically list diversity disclosures as a target area for improvement, recent remarks and actions taken by SEC Chair Mary Jo White indicate that more informative board diversity disclosures are a priority. Chair White is a vocal proponent of corporate board diversity, and has stated that board diversity is "enormously important" and that "greater diversity on boards adds value."[23] In her keynote speech before the Securities Regulation Institute, she also discussed the SEC's role in board diversity:

> When it comes to the SEC's regulatory space, we don't tell you who should be on your board and we don't generally talk about even board qualifications. You know, a couple of exceptions to that, we do have disclosure rules on directors and their experiences and backgrounds and diversity. Those rules have been the subject of some conversation as to whether they are strong enough, whether they really are giving [enough useful information to] investors who are interested, and many are, in the racial, ethnic, and gender diversity of boards. They don't require that disclosure. What they require is if a board considers diversity, say so and how, if it does. If you have a policy on diversity as you're locating and nominating directors how is that implemented and how do you judge its effectiveness?[24]

Chair White then went on to explain the criticism of that role:

> We have a number of petitions pending that raise the issue of—wouldn't this be more meaningful if you actually defined diversity in your rule, SEC, to at least include ethnicity, race, and gender, in addition to whatever other qualities, fall under that category and require disclosure of those facts. And I think those concerns, from my point of view, are well-founded and I've asked the staff to study basically what the disclosures are currently under our existing rule, what they've been over time with an eye towards—with these concerns that I share, whether we need additional guidance or rulemaking.[25]

She was likely referring to the Petition for Amendment of Item 407(c)(2)(v) of Regulation S-K submitted on March 31, 2015. The petition asked the SEC "to require new disclosures related to nominees for corporate board seats in order to provide investors with necessary information to evaluate the nominees' gender, racial, and ethnic diversity, as well as their mix of skills, experiences, and attributes needed to fulfill the corporation's mission."[26] The proposal would require companies "to indicate, in a chart or matrix, each nominee's gender, race, and ethnicity . . . ."[27] Representatives of financial institutions from multiple states, including the California Public Employees' Retirement System (CalPERS),

8 *Id.*

9 *Id.* at 17-18.

10 *Id.* at 18.

11 *Id.*

12 *Id.*

13 *Id.* at 21.

14 *Id.*

15 *Id.* at 24.

16 *Id.* at 21.

17 Proxy Disclosure Enhancements (2009), *available at* https://www.sec.gov/rules/final/2009/33-9089.pdf, page 38.

18 *Id.* at 38.

19 *Id.* at 39.

20 *See generally* SEC Strategic Plan, 2014-2018, *available at* https://www.sec.gov/reportspubs/strategic-plan/sec-strategic-plan-2014-2018.pdf.

21 *Id.* at 6.

22 *Id.* at 36.

23 A Conversation with Chair Mary Jo White, Keynote Session 43rd Annual Securities Regulation Institute, January 26, 2016, *available at* https://www.sec.gov/news/speech/securities-regulation-institute-keynote-white.html.

24 *Id.*

25 *Id.*

26 Petition for Amendment of Item 407(c)(2)(v) of Regulation S-K, page 1, *available at* https://www.sec.gov/rules/petitions/2015/petn4-682.pdf.

27 *Id.*

California State Teachers' Retirement System (CalSTRS), Connecticut Retirement Plans and Trust Fund, Illinois State Board of Investment, New York City Comptroller, New York State Common Retirement Fund, Ohio Public Employees Retirement Systems, North Carolina Department of State Treasurer, and Washington State Investment Board, signed the petition.

Recently, Chair White responded to urgings for more robust diversity disclosure requirements in a keynote address at the International Corporate Governance Network Annual Conference on June 27, 2016. She acknowledged that the current disclosure rule has led to vague reporting, and that few companies have disclosed a formal diversity policy.

> Companies' disclosures on board diversity in reporting under our current requirements have generally been vague and have changed little since the rule was adopted. Very few companies have disclosed a formal diversity policy and, as a result, there is very little disclosure on how companies are assessing the effectiveness of their policies. Companies' definitions of diversity differ greatly, bringing in life and work experience, living abroad, relevant expertise and sometimes race, gender, ethnicity, and sexual orientation. But these more specific disclosures are rare and, not surprisingly, there are investors who are not satisfied.[28]

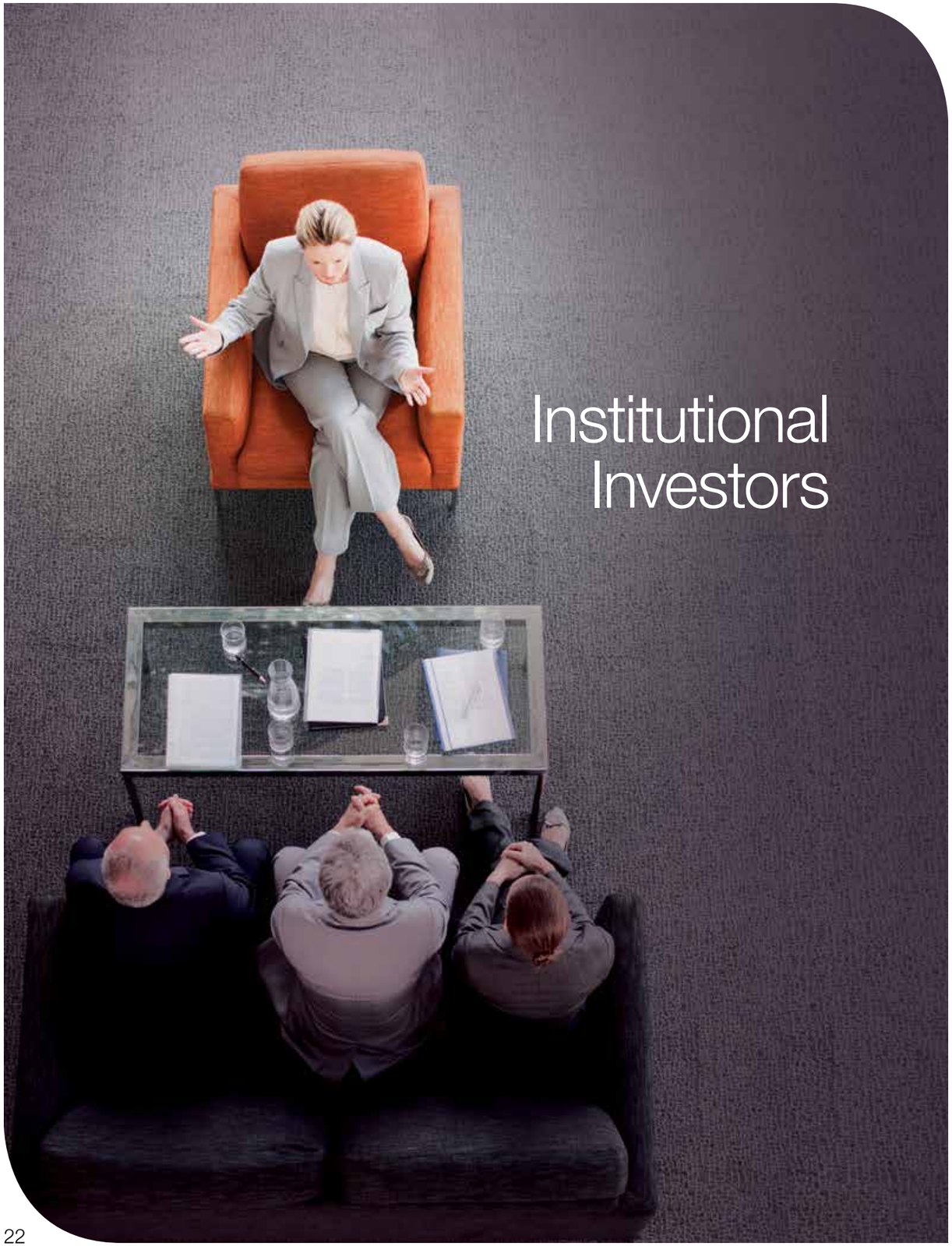
She went on to announce that the SEC is preparing to recommend an amendment to address that problem:

> To respond to these issues, I announced in January that I had directed the SEC staff to review our rule and the extent and quality of disclosures that have followed, with an eye toward revising the rule if there was a need. And, I can report today that the staff is preparing a recommendation to the Commission to propose amending the rule to require companies to include in their proxy statements more meaningful board diversity disclosures on their board members and nominees where that information is voluntarily self-reported by directors. […] My view is that the SEC has a responsibility to ensure that our disclosure rules are serving their intended purpose of meaningfully informing investors. This rule does not and it should be changed.[29]

This is a significant step forward in the effort to increase board diversity. Although no further efforts have been announced as of the time this report was prepared, Chair White's remarks promise that there will be movement on this issue.

28 SEC Chair Mary Jo White, Keynote Address for the International Corporate Governance Network Annual Conference, June 27, 2016, *available at* https://www.sec.gov/news/speech/chair-white-icgn-speech.html.

29 *Id.*



Institutional Investors

While mandatory policies related to board diversity continue to garner only limited support, institutional investors have taken a more prominent role by using their financial influence to focus corporate efforts on increasing board diversity. Indeed, in recent years institutional investors have become more involved in many areas of environment, social, and governance practices, which include increased representation of women and minorities on corporate boards. Investors increasingly associate progressive governance practices with enhancement of corporate performance and reputation, stronger growth, and positive, productive shareholder engagement.[1] To cite one example, the Thirty Percent Coalition, which works in coordination with corporate leaders, institutional investors, and government officials to achieve the goal of women holding 30 percent of all board seats in public companies, notes that its committee of institutional investors has been the most active arm of its organization.[2]

Both public and private institutional actors have thrown their support behind increased board diversity, utilizing a number of tactics to urge publicly traded companies to take action on this issue. These tactics include:

- Public statements of support for increased representation of women, minorities, and LGBT individuals on corporate boards;
- Support for shareholder resolutions encouraging companies to adopt formal diversity policies and to publicly disclose those policies;
- Threats to engage in or actual no-vote campaigns against directors on boards which have become too insular or have refused to respond to shareholder demands for increased board diversity; and
- Campaigns for proxy access to allow shareholders to directly nominate corporate directors.

While mandatory policies on board diversity continue to attract only limited support, institutional investors have taken a more prominent role by using their financial influence to focus corporate efforts on increasing board diversity.

While institutional investors often disagree on the best mechanism to achieve diversity goals,[3] the weight of their financial influence has put significant pressure on organizations to take the calls for increased diversity seriously and to adjust their policies accordingly.[4]

Public Statements of Support

On June 1, 2016, corporations were presented with one of the most forceful public statements demanding corporate boards either embrace board diversity or face consequential actions by their largest investors. Fourteen state and local officials who act as fiduciaries for more than $1 trillion in pension fund assets issued a Joint Statement urging

1 David A. Katz and Laura A. McIntosh, *Corporate Governance Update: Gender Diversity on Boards: The Future is Almost Here*, New York Law Journal, Mar. 24, 2016.

2 Thirty Percent Coalition, Who We Are, *available at* http://www.30percentcoalition.org/who-we-are.

3 For example, CalPERS (the California Public Employees Retirement System), which has issued strong public statements on board diversity and regularly supports shareholder proposals for proxy access, voted against a shareholder proposal requiring Apple to accelerate its recruitment of minority board members and argued that Apple's current diversity policy sufficiently addressed the concerns raised by the shareholder proposal. *See* CalPERS, Key Decisions, *available at* https://www.calpers.ca.gov/page/investments/governance/proxy-voting/key-decisions; Laura Colby, *Apple Holders Reject Proposal to Require Minorities in Top Ranks*, Bloomberg Technology, *available at* http://www.bloomberg.com/news/articles/2016-02-26/apple-holders-reject-proposal-to-require-minorities-in-top-ranks.

4 *See, e.g.*, Elenor Bloxam, *Institutional Investors Are Leading the Fight for More Diverse Corporate Boards*, Fortune, June 16, 2016.

their portfolio companies to diversify their board membership in terms of gender, race, and LGBT status.[5] They noted that despite significant evidence that board diversity "improves financial performance, leverages talent, enhances firm reputation, and increases innovation and group performance," progress in this area "remains unacceptably slow." The signatories made clear that as corporations have largely failed to proactively respond to the body of evidence showing that a lack of diverse perspectives on corporate boards harms shareholder value, institutional actors must respond by holding existing directors accountable when they ignore calls to make their boards less homogeneous and insular.

In the Joint Statement, the officials call on corporate boards to take a number of specific actions to address this situation, including:

- Broaden their search for new directors beyond the traditional circles;
- Consider diversity when evaluating potential new directors;
- Provide clear disclosures of the gender, race, and ethnicity of board members; and
- Support proxy access provisions which allow long-term shareholders to nominate directors for consideration.

While it's still too early to evaluate the impact the Joint Statement may have, $1 trillion worth of invested assets certainly makes a compelling case for corporate attention.

The Thirty Percent Coalition, which works in coordination with corporate leaders, institutional investors, and government officials to achieve the goal of women holding 30 percent of all board seats in public companies, notes that its committee of institutional investors has been the most active arm of its organization.

A number of individual investors have also updated their investment policy statements, which generally indicate the type of shareholder resolutions an investor may support or initiate as well as corporate governance considerations that figure into their investment criteria. BlackRock, the world's largest asset manager, and State Street Global Advisors have each indicated in their investment policies that they will more carefully scrutinize boards with long tenures as potentially too insular and may vote against sitting directors if they believe a corporation has failed to take action to ensure its board engages with new and diverse perspectives.[6] TIAA-CREF's Policy Statement indicates that it expects its portfolio companies to embrace board diversity, and encourages them to consider diversity criteria when nominating new directors and to publicly disclose their diversity policies and practices.[7]

5 *See* Joint Statement on Corporate Board Diversity, June 1, 2016, *available at* http://illinoistreasurer.gov/TWOCMS/media/doc/June2016BoardDiversityJoint%20statement.pdf. Signatories include public fund fiduciaries from California, Chicago, Connecticut, Illinois, Maryland, Massachusetts, New York City, New York State, Oregon, Philadelphia, Rhode Island, and San Diego.

6 *See* BlackRock, Proxy Voting Guidelines of U.S. Securities, Feb. 2015, *available at* http://www.blackrock.com/corporate/en-us/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf; Joann S. Lublin, *BlackRock Toughens Stance on Boards*, The Wall Street Journal, Mar. 3, 2015, *available at* http://www.wsj.com/articles/blackrock-to-take-tougher-stance-on-u-s-corporate-directors-1425414807; Ning Chiu, *State Street's Director Tenure Policy Contains Specific Lengths of Service Screens and May Result in Votes Against Directors*, Davis Polk, Briefing: Governance, May 27, 2014, *available at* http://www.briefinggovernance.com/2014/05/state-streets-director-tenure-policy-contains-specific-lengths-of-service-screens-and-may-result-in-votes-against-directors/.

7 TIAA-CREF [Teachers Insurance and Annuity Association – College Retirement Equities Fund] Policy Statement on Corporate Governance, Sixth Edition, *available at* http://www1.tiaa-cref.org/ucm/groups/content/@ap_ucm_p_tcp/documents/document/tiaa01007871.pdf.

Notably, many institutional investors have been broadening their concept of board diversity to include a wider set of minority groups. One such institutional investor is CalPERS,[8] which represents the largest public pension fund in the United States. In spring 2015 CalPERS issued updated Global Governance Principles that expanded its definition of "diversity" to include sexual orientation and gender identity. CalPERS' Global Governance Principles provide factors that its internal and external managers are expected to take into account when investing its more than $300 billion in assets.[9]

Support for Shareholder Resolutions

Institutional investors have the power to encourage corporations to both adopt and publicly disclose board diversity policies. Investors may either sponsor or publicly support a shareholder proposal that would require a corporation to consider diversity criteria when recruiting and evaluating board candidates. These proposals may also include a requirement that the corporation publicly disclose its diversity policies and the specific efforts it has made to increase gender, racial, and occasionally LGBT diversity, on their corporate boards. Corporations often prefer to negotiate with the sponsoring shareholders and reach an acceptable agreement rather than go forward with a public shareholder vote. If the corporation voluntarily adopts measures that address the issues raised in the shareholder proposal, the investors will withdraw the proposal and mark it in their shareholder records as "successfully withdrawn."

One particularly active public investor in this area is the New York State Common Retirement Fund (NYS Fund), which is the third largest pension fund in the United States, with approximately $178 billion in assets.[10] Since 2012 the organization has sponsored 17 shareholder proposals encouraging companies to disclose their efforts to increase gender and racial diversity on their corporate boards. Of those 17 proposals, 12 have been successfully withdrawn after NYS Fund was able to reach an acceptable agreement with the corporation. NYS Fund's successes demonstrate the tremendous power institutional investors often wield. Some of the more recent examples of corporations that have updated their diversity polices after engaging with NYS Fund include Priceline, where NYS Fund holds $200 million in shares; Monster Beverage Corporation; and Standard Pacific Corporation.[11]

Private entities have also enjoyed considerable success in convincing boards to adopt more progressive diversity policies and practices through the use of shareholder proposals. For example, Calvert Investments has sponsored or co-sponsored 22 shareholder proposals since 2012 and successfully withdrawn 77 percent of those proposals after negotiations with the corporation.[12] These proposals encouraged companies to agree to consider gender, race, ethnicity, national origin, and increasingly sexual orientation and gender identity as factors when evaluating candidates for board membership.

No-Vote Campaigns

No-vote campaigns against one or more directors are often used by shareholders to send a powerful message that current board actions are unacceptable and that directors are failing to promote shareholder interests. Increasingly, board diversity has become a focus for institutional investors, and as some boards have failed to respond, certain investors have turned to no-vote campaigns to communicate their dissatisfaction. These campaigns take a variety of forms and vary in focus. Public institutional investors are more likely to use these campaigns to make a public statement about the overall corporate need for greater board diversity and its general economic benefits. Private

8 The California Public Employees' Retirement System.

9 CalPERS Global Governance Principles, updated Mar. 16, 2015, *available at* http://www1.tiaa-cref.org/ucm/groups/content/@ap_ucm_p_tcp/documents/document/tiaa01007871.pdf.

10 Office of the New York State Comptroller, NYS Common Retirement Fund, *available at* http://www.osc.state.ny.us/pension/.

11 Robert Steyer, *Priceline Group Adopts N.Y. State Common Board Diversity Proposal Ahead of Meeting*, Pension and Investments, May 31, 2016, *available at* http://www.pionline.com/article/20160531/ONLINE/160539989/priceline-group-adopts-ny-state-common-board-diversity-proposal-ahead-of-meeting; Robert Steyer, *2 Companies Expand Board Diversity Policies Following N.Y. State Common Proposals*, Pension and Investments, Apr. 20, 2015, *available at* http://www.pionline.com/article/20150420/ONLINE/150429991/2-companies-expand-board-diversity-policies-following-ny-state-common-proposals.

12 Calvert Investments, Shareholder Resolutions: Most Recent, *available at* http://www.calvert.com/resources/shareholder-advocacy/shareholder-resolutions; Calvert Investments, Previous Years' Shareholder Resolutions Filed, *available at* http://www.calvert.com/resources/shareholder-advocacy/shareholder-resolutions/shareholder-resolutions-archive.

investors, on the other hand, are more likely to launch targeted campaigns which identify specific corporations, highlighting lack of board diversity as a symptom of an insular and entrenched board that may not be capable of leading the organization through dynamic corporate challenges. These targeted no-vote campaigns may focus their efforts on certain long-tenured directors who have failed to respond to new shareholder perspectives, or a nominating committee that has consistently failed to engage in a robust and far-reaching recruitment process.

Public Investors

The Rhode Island and Massachusetts pension funds have each pledged to vote against any slate of directors that is not sufficiently diverse. In April 2015, the Massachusetts pension fund, with its $61 billion in assets, pledged to vote against any board slate that would result in less than 25 percent of the board being made up of women or racial minorities.[13] This spring, the Rhode Island pension fund made a similar pledge, stating that it would vote no on any slate that would cause fewer than 30 percent of the directors to be women or minorities.[14] Massachusetts' policy replaces a previous policy which required a no vote for any board that was comprised entirely of white males.

The California State Teachers' Retirement Fund ("CalSTRS") has also updated its Corporate Governance Principles to include the threat of a no-vote against organizations that lack board diversity. Under the Corporate Governance Principles, CalSTRS may vote no against any slate of directors that takes no action to address a lack of diversity once CalSTRS has engaged with the board on the issue.[15] CalSTRS frequently engages with corporations on the issue of board diversity, and in 2014 offered its expertise to 131 California companies to help them find and place women on their all-male boards.[16]

Private Investors

Private investors seem less interested in using no-vote campaigns to make broad statements concerning board diversity. Rather, since the financial crisis, private investors have become more concerned that insular or homogeneous boards may create a poor environment for good governance. A number of academic and research articles have examined how a lack of diversity in corporate board rooms could be responsible for poor decision making, or an inability to react quickly to a change in economic circumstances. One such article, "Different is Better—Why Diversity Matters in the Boardroom," provides an apt summary of this new evaluation of corporate governance best practices:

> In a room where everyone has different points of view and there is a greater opportunity for cross-pollination of ideas, there are few unspoken assumptions, less "group think" and a greater likelihood of innovation. This allows the board to ask probing questions and tackle the challenging issues, such as risk management and succession planning, which are at the center of good corporate governance.[17]

Institutional investors have responded by more carefully examining board polices that promote new and diverse perspectives, specifically those related to board tenure.[18] Boards with long tenures tend to be both more insular and less diverse, as there are less frequently open board seats that could be filled by women or minority candidates. While specific age limits or term limits have remained unpopular among institutional investors, many have indicated that they will examine board diversity and insularity, and may vote against directors who are averse to new perspectives or nominating committees that have failed to promote the good governance practice of board refreshment.

State Street Global Advisors, for example, has indicated it will engage in careful scrutiny of companies with average board tenure more than one standard deviation above the market average. Based on their analysis of a company's policies, they may vote no against the chairperson of the nominating committee who failed to address board refreshment, or against long-tenured directors who serve on key committees.[19] BlackRock has indicated that it will take a similar approach. It believes that insular and long-tenured boards are a detriment to organizations, and it will exercise its proxy votes accordingly.[20]

Other investors have focused more specifically on lack of board diversity, rather than board entrenchment generally. In the last proxy season Ctw Investment Group waged no-vote campaigns against Chipotle, Discover Communications, Nabors, and Netflix all due in part to diversity concerns.[21] In each of these campaigns Ctw sent communications to other shareholders urging them to vote no as well. Indeed, in one campaign, Ctw noted that the company's recent issues were contributed to by long board tenures and "most critically the flawed recruitment processes which resulted in an entrenched and insular board with a startling lack of racial and gender diversity."[22] These efforts highlight how investors are increasingly viewing lack of board diversity as a threat to the full potential of their investments, as well as their willingness to engage in concrete action to drive change.

Campaigns for Proxy Access

Proxy access provides certain shareholders the right to directly nominate directors who will appear on the company's director proxy statement. Generally access is only granted to those shareholders who have held a certain amount of the stock for a sufficient period of time. Proxy access enables shareholders to directly nominate a more diverse slate of candidates, and therefore allows a greater number of individuals to be considered for board seats. Over the past few years institutional investors have become increasingly interested in proxy access and have used their financial influence to compel many companies to give shareholders the ability to directly shape corporate boards.[23]

Shareholder proposals related to proxy access have become increasingly common. While proxy access proposals were fairly rare as recently as five years ago, by 2016 they have become the most common type of shareholder proposal. One of the first institutional investors to become involved in the campaign for proxy access was the New York City Pension Fund, which in 2014 submitted proxy access proposals to 75 companies. While progress was initially slow, by 2015 more than half of those corporations adopted bylaws granting proxy access.[24] Just in the last two years, more than a third of the S&P 500 have adopted proxy access provisions.[25]

Proxy access has enabled shareholders to engage more directly with corporations on the issues of board diversity and expertise. It also provides board diversity advocates an additional avenue for change, because once a corporation has granted investors proxy access, activist firms can expand their educational and advocacy efforts to include these investors, rather than being limited to convincing the nominating committee of corporate boards. With current trends suggesting that even more corporations will adopt proxy access provisions in the coming years, this is likely to become an increasingly important avenue for change.

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13 Shira Schoenberg, *New Massachusetts Pension Fund Voting Policy Takes Stance on Gender Diversity, Renewable Energy, and Tobacco*, Mass Live, Apr. 7, 2015, *available at* http://www.masslive.com/politics/index.ssf/2015/04/new_massachusetts_pension_fund.html; *Treasurer Goldberg Proposes Bold Prim Proxy Voting Guidelines to Bolster Corporate Board Diversity*, The Official Website of the Treasurer and Receiver General of Massachusetts, Mar. 26, 2015, *available at* http://www.mass.gov/treasury/about/media-pubs/treas-press-rel/2015/goldberg-proposes-prim-proxy-voting-guidelines.html.

14 *Treasurer Magaziner Announces Proxy Voting Initiative to Hold Corporate America Responsible for Increasing Board Diversity*, Rhode Island, Office of General Treasurer, Press Release, Mar. 20, 2016, *available at* http://www.ri.gov/press/view/27340; Matt O'Brien, *Rhode Island Pension Fund to Push for Corporate Diversity*, AP The Big Story, Apr. 20, 2016, *available at* http://bigstory.ap.org/article/e7f0ea8f1a944de681bd733a478c9885/rhode-island-pension-fund-push-corporate-diversity.

15 California State Teachers' Retirement System Corporate Governance Principles, Apr. 3, 2015, *available at* http://www.calstrs.com/sites/main/files/file-attachments/corporate_governance_principles_1.pdf.

16 Ricardo Duran, *CalSTRS Board Updates Corporate Governance Principles on Corporate Board Diversity*, CalSTRS News Release, Apr. 3, 2015, *available at* http://www.calstrs.com/news-release/calstrs-board-updates-corporate-governance-principles-corporate-board-diversity.

17 *Different is Better—Why Diversity Matters in the Boardroom*, Russell Reynolds Associates, 2009, *available at* http://www.russellreynolds.com/en/Insights/thought-leadership/Documents/different-is-better_0.pdf.

18 Cam C. Hoang, *Institutional Investors and Trends in Board Refreshment*, Harvard Law School Forum on Corporate Governance and Financial Regulation, Apr. 8, 2016, *available at* https://corpgov.law.harvard.edu/2016/04/08/institutional-investors-and-trends-in-board-refreshment/.

19 Rakhi Kumar, State Street Global Advisors, Head of Corporate Governance, *Addressing the Need for Board Refreshment and Director Succession in Investee Companies*, Feb. 2015, *available at* https://www.ssga.com/investment-topics/general-investing/2015/Addressing-the-Need-for-Board%20Refreshment-in-Investee-Companies.pdf.

20 http://www.blackrock.com/corporate/en-us/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf.

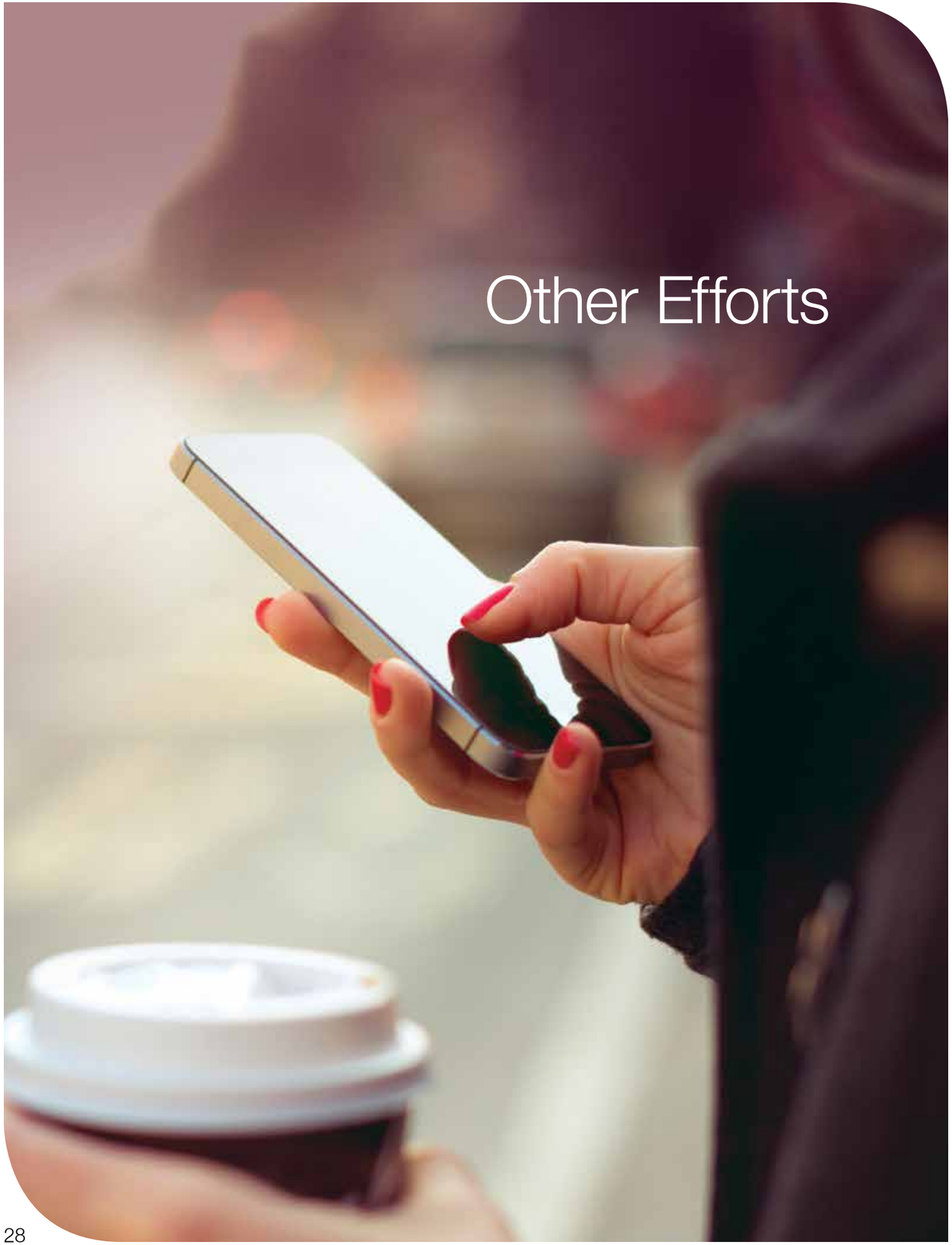
21 Elenor Bloxham, *Institutional Investors Are Leading the Fight for More Diverse Corporate Boards*, Fortune, June 16, 2016, *available at* http://fortune.com/2016/06/16/institutional-investors-are-leading-the-fight-for-more-diverse-corporate-boards/.

22 Ctw Investment Group, Letter to Shareholders of Chipotle Mexican Grill, Inc., Apr. 13, 2016, *available at* http://ctwinvestmentgroup.com/wp-content/uploads/2016/04/CMG_Final_April13.pdf.

23 Key Issues: Proxy Access, PwC, Governance Insights Center, *available at* http://www.pwc.com/us/en/governance-insights-center/proxy-access.html.

24 Boardroom Accountability Project, New York City Office of the Comptroller, *available at* http://comptroller.nyc.gov/boardroom-accountability/.

25 *Four Takeaways From Proxy Season 2016*, EY Center for Board Matters, June 2016, *available at* http://www.ey.com/Publication/vwLUAssets/EY-four-takeaways-from-proxy-season-2016/$FILE/EY-four-takeaways-from-proxy-season-2016.pdf.



Other Efforts

The entities described above are not the only ones driving efforts to increase diversity. A number of other organizations are also involved in increasing the diversity of corporate boards in the United States. These organizations conduct research, draft and support legislation, and provide resources to companies and potential board members.

Notably, certain organizations have focused their efforts on countering claims that there are not enough women or minority candidates to fill open board seats. Such efforts range from making pledges to discuss diversity with boards to creating repositories of diverse candidates for companies to peruse when looking for board members.

Voluntary Measures and Research

Many organizations have taken preliminary, if limited, steps to create voluntary codes of conduct or best practices to encourage the support of diversity.

Catalyst focuses on increasing boardroom diversity by producing research and conducting programs in which current CEOs and board chairs mentor and sponsor CEO-endorsed women board candidates. The 30% Club likewise has established a mentoring program, and works with executive search firms to encourage them to put forward diverse slates of candidates.

Public Statements and Resolutions

The United Kingdom, for example, promoted a voluntary code of conduct for executive search firms to adopt in their practice. In 2011, Lord Davies' Review of Women on Boards encouraged the leading British executive search firms to sign on to a voluntary code of conduct aimed at addressing the lack of diversity on British company boards. The code included a specific item that firms should raise the issue of diversity when discussing the board's goals with the chairman, and aim to include at least 30 percent women on the list of candidates.[1] Lord Davies' 2015 Annual Report[2] showed that this (as well as other efforts) had found success. Since 2011, female representation on FTSE 100 boards has doubled, with women now comprising 26.1 percent. For FTSE 250 companies, the percentage of women board members is 19.6 percent.

Similarly, in the United States, the 30% Club works with executive search firms to encourage them to present a diverse array of candidates to board chairs. The Club also has an investor relations group, which encourages all investors to engage on issues of board diversity. The Thirty Percent Coalition also maintains an institutional investor committee, which similarly lobbies public companies to make diversity-oriented changes.[3]

1 Press Release, MWM Consulting, *Executive Search Firms Launch Voluntary Code of Conduct in Response to the Davies Review of Women on Board* (July 22, 2011), *available at* http://www.prnewswire.co.uk/news-releases/executive-search-firms-launch-voluntary-code-of-conduct-in-response-to-the-davies-review-of-women-on-boards-145049045.html.

2 Women on Boards Five Year Summary, *Improving the Gender Balance on British Boards*, Davies Review (Oct. 2015), at 2, *available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/482059/BIS-15-585-women-on-boards-davies-review-5-year-summary-october-2015.pdf.

3 The Thirty Percent Coalition also has a corporate leaders committee, which works to mobilize CEOs, board chairs, and other executives to advocate for board diversity in their organizations, and a public sector initiative committee to mobilize government officials to support board diversity efforts. *See* http://www.30percentcoalition.org/who-we-are.

In February 2016, the American Bar Association adopted a resolution urging public companies to diversify boards in a manner that reflects the diversity of the United States.[4] Resolution 116 encourages public companies to adopt plans and policies to foster diversity and to include board composition in their disclosures.[5] Further, it urges governments, investors, and other market actors to call on public companies to adopt, and publicly disclose, diversity plans and policies.

Business Roundtable, an association of CEOs from major U.S. companies who engage with business-related public policy issues, recently announced major revisions to its Principles of Corporate Governance, which it publishes as an assertion of best practices in "effective, ethical corporate governance," to place more emphasis on board diversity. Business Roundtable believes that boards should develop a diversity framework so women and minority candidates are considered for each open board seat.[6]

The Thirty Percent Coalition issued a strong call to action in 2012, sending letters to 168 companies urging them to increase representation of women on their boards. By late 2015, 62 of the companies had appointed women.

Support through Research

Other organizations have attacked the diversity challenge through research. Catalyst[7] focused on increasing boardroom diversity worldwide by producing research into board diversity and engaging in a variety of board-related initiatives. These include the Women on Board Initiative[8] launched in Canada in 2007 and expanded to the U.S. in 2015.

The 30% Club has also developed a dedicated research branch, which provides analysis on the lack of diversity and makes specific recommendations to address issues.

2020 Women on Boards, a national campaign focused on "increasing the percentage of women on corporate boards to 20% by 2020,"[9] created the 2020 Gender Diversity Directory.[10] The Directory maintains data on over 1,800 organizations, including the total size of the board, the number and percentage of women, and the industry sector.[11] Organizations are ranked as "winning" if they have reached the 20 percent goal, "very close" if they have 11–19 percent, "token" if they have only one woman, and "zero" if there are no women on the board. As of July 2016, 36 percent of the 1800 organizations achieved "winning" status, 11 percent received a rating of "very close," 34 percent received "token" status, and 18 percent had zero women.

Bridging the gap between public statement and calls for action, the Thirty Percent Coalition[12] started a campaign in 2012 in which it sent letters to 168 companies urging them to increase representation of women on their boards. These letters were signed by the Coalition's members and other institutional investors with a total of $3 trillion in assets. By October 2015, 62 of the 168 companies that received letters had appointed women to their boards.[13]

Moving from Encouragement to Action

Realizing that voluntary measures and statistics alone cannot effect change, many organizations have taken concrete steps to foster the diversity they want to see in the boardroom.

Mentoring

Through its Women on Board initiative, Catalyst has created two-year programs in which current CEOs and board chairs mentor and sponsor CEO-endorsed women board candidates. More than 50 percent of program alumnae have been appointed to corporate boards.

The goal of the 30% Club is for women to constitute 30 percent of directors on all S&P 100 boards by 2020. To help achieve this goal, the 30% Club offers a mentoring program for women in the "danger zone" of their careers—the period in which men's and women's careers may start to diverge due to children and other family demands. These women are partnered with executives at other firms to help them navigate this challenging period.

Diverse Talent Databases

Many organizations have become involved in ensuring more qualified women candidates come to the attention of boards searching to fill director seats by creating platforms and databases where women can be endorsed by CEOs, other executives, or board chairmen. For example, Catalyst developed the Catalyst Corporate Board Resource, which allows current CEOs to endorse and sponsor women ready for corporate board positions as well as review other women candidates who have been endorsed by CEOs.[14]

In another example, Quorum[15] developed initiatives to promote the hiring of diverse candidates by "building the world's most comprehensive database of top LGBT talent around the world, with a particular focus on candidates who are women and/or people of color."[16] Quorum's main focus is "to identify and place senior LGBT executives on corporate boards."[17] To help achieve this goal, Quorum provides potential LGBT board members with McKinsey leadership development and opportunities for networking. The organization also seeks to identify companies looking to increase the diversity of their boards.[18] In addition, Quorum is developing a network of senior business leaders to act as ambassadors for its goals.

4 Resolution 116, American Bar Ass'n House of Delegates (Feb. 8, 2016), *available at* http://www.americanbar.org/news/reporter_resources/mid-year-meeting-2016/house-of-delegates-resolutions/116.html.

5 *Id.*

6 *Business Leaders Add Boardroom Diversity to Best Practices List*, Business Roundtable (Apr. 20, 2016), *available at* http://businessroundtable.org/media/news-releases/business-leaders-add-boardroom-diversity-best-practices-list; *see also* John Hayes, *Driving Diversity in the Boardroom*, Business Roundtable (Apr. 20, 2016), *available at* https://medium.com/business-roundtable/driving-diversity-in-the-boardroom-19b371e42d0a#.5xepxc3cc.

7 *Board Diversity: Increase Gender Diversity on Corporate Boards*, Catalyst, *available at* http://www.catalyst.org/issues/board-diversity.

8 *Diverse Corporate Boards: Good for Women, Men, and Companies*, Catalyst, *available at* http://www.catalyst.org/what-we-do/services/corporate-board-services.

9 2020 Women on Boards, *available at* https://www.2020wob.com/.

10 *Gender Diversity Directory*, 2020 Women on Boards, *available at* https://www.2020wob.com/company-directory.

11 *Id.*

12 *See* Thirty Percent Coalition, http://www.30percentcoalition.org. Members consist of corporation and professional service firms, institutional investors, government officials, and nonprofit/women's organizations. *Board of Directors of the Thirty Percent Coalition,* Thirty Percent Coalition, http://www.30percentcoalition.org/members-list.

13 Laura Colby, *The $578 Billion Push for Boards with More Than Just White Men,* Bloomberg (Updated Jan. 12, 2016, 5:35pm), *available at* http://www.bloomberg.com/news/articles/2016-01-12/white-men-corporate-boards-and-the-578-billion-diversity-push.

14 *Connecting CEO-Sponsored Women to Board Opportunities,* Catalyst, *available at* http://www.catalyst.org/catalyst-corporate-board-resource.

15 Out Leadership Return on Equality, *available at* http://outleadership.com/quorum/.

16 *Id.*

17 *Id.*

18 *Id.*

CalSTRS and CalPERS established a database of prospective directors called the Diverse Director DataSource.[19] In 2014 they offered 131 California companies their expertise to help identify potential women candidates and place them on currently all-male boards. Thirty percent of those companies responded and 17.5 percent added at least one woman to their boards.[20]

As a result of the lag in diversity in the technology industry, 40 tech companies created a campaign to counteract the lack of female representation on tech company boards.[21] From this campaign, theBoardlist created a "tech marketplace" where CEOs, executives and investors can nominate board-ready women as candidates, creating a database of women qualified for tech board positions for companies to consider.[22]

19 *Diverse Director DataSource*, CalSTRS, *available at* http://www.calstrs.com/diverse-director-datasource.

20 Ricardo Duran, *CalSTRS Board Updates Corporate Governance Principles on Corporate Board Diversity*, CalSTRS (Apr. 3, 2015), *available at* http://www.calstrs.com/news-release/calstrs-board-updates-corporate-governance-principles-corporate-board-diversity.

21 *Tech Companies Lag in Gender Diversity on Boards of Directors*, EQUILAR (Nov. 18, 2015), *available at* http://www.equilar.com/press-releases/40-tech-companies-lag-in-gender-diversity.html.

22 *Frequently Asked Questions*, theBoardlist, *available at* https://theboardlist.com/member-criteria.

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