Next Stop for Diversity Initiatives: Corporate Boardrooms

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I. Introduction

Over time, minorities have won some battles for equality within society, gaining leverage with voting rights, job opportunities, and education. However, some areas of equality have been left largely unaddressed. The corporate boardroom remains a setting in which diversity is still lacking.[1] While the Securities and Exchange Commission (SEC) has released some directives concerning board diversity,[2] and some state-level initiatives have recently been passed,[3] boardrooms in the United States have not diversified at the rate that they could. However, boards benefit from increased diversity. As diversity increases, the breadth of perspectives on a board increases[4]—contributing to better decision-making—which arguably increases corporate performance in other ways.[5]

This Note addresses the lack of board diversity initiatives currently in place in the United States and discusses the benefits that might be obtained from adopting a heightened diversity policy modeled after those found in other countries. While this Note primarily discusses gender diversity, this is merely due to more extensive literature on gender diversity. The benefits and recommendations concerning diversity initiatives can be applied to race, ethnicity, and age as well. Part II discusses existing initiatives to increase board diversity in the United States and some of the costs and benefits associated with board diversity policies generally. Part III analyzes how effective the United States' board diversity policies have been in increasing divesity and compares these methods to board diversity methods currently employed in other countries. Finally, Part IV recommends a heightened board diversity policy in the United States to help increase board diversity and, subsequently, corporate performance at a faster rate. While a number of other articles discuss diversity on corporate boards,[6] none have yet analyzed board diversity at a state, national, and international level, including recent legislation, and concluded with the

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1. *See* Richard L. Zweigenhaft, *Diversity Among CEOs and Corporate Directors: Has the Heyday Come and Gone?*, WHO RULES AM.? (Dec. 2013), http://www2.ucsc.edu/whorulesamerica/power/diversity_among_ceos.html (finding that board diversity "shows continuing under-representation for all groups . . . and very little if any change since [the] study of directors for 2005").

2. *See* Doreen E. Lilienfeld, *Measures To Increase Gender Diversity On Corporate Boards Gain Traction*, N.Y. L.J. (Jan. 7, 2014), http://www.newyorklawjournal.com/id=1202636453791/Measures-to-Increase-Gender-Diversity-on-Corporate-Boards?slreturn=20160829115359 (discussing the SEC rule requiring reporting of how diversity was taken into account in board nominations).

3. *See California Senate Concurrent Resolution 62 Urging More Women on Boards*, UC DAVIS CENSUS (2013), http://gsm.ucdavis.edu/sites/main/files/file-attachments/public-policy-impact.pdf (discussing California's resolution regarding board diversity); Michelle Mussman, *From the Community: Mussman Passes Resolution for Gender Diversity on Corporate Boards*, CHI. TRIB. (June 10, 2015), http://www.chicagotribune.com/suburbs/arlington-heights/community/chi-ugc-article-mussman-passes-resolution-for-gender-diversit-2015-06-10-story.html (discussing Illinois' resolution regarding board diversity); *Senate Passes Resolution to Encourage Corporate Gender Diversity*, KAREN SPILKA (July 29, 2015), http://karenspilka.com/2015/07/29/senate-passes-resolution-to-encourage-corporate-gender-diversity/ (discussing Massachusetts' resolution regarding board diversity).

4. DIFFERENT IS BETTER—WHY DIVERSITY MATTERS IN THE BOARDROOM, RUSSELL REYNOLDS ASSOCS. 4 (2009), http://www.russellreynolds.com/en/Insights/thought-leadership/Documents/different-is-better_0.pdf.

5. Lilienfeld, *supra* note 2.

6. *See, e.g.*, Seletha R. Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61, 79, 82 (2012) (arguing that board diversity benefits companies and recommending a "Tier-7 Diversity Strategy").

recommendation described in this Note.

II. BACKGROUND: PROS AND CONS OF INCREASING BOARD DIVERSITY

This Part will review the recent movement toward increasing board diversity. In particular, this Part will begin by discussing initiatives taken by federal, state, and governmental actors. This Part will then discuss the costs and benefits that have been associated with efforts to increase diversity.

A. Initiatives to Increase Board of Director Diversity in the United States

Corporations continue to struggle to maintain diversity on their boards. In 2011, 74% of corporate directors were white males.[7] Furthermore, historically, a large majority of these directors came from upper or upper-middle class backgrounds.[8] Fortune 250 companies did not even begin to elect female directors to increase diversity until the mid-1980s.[9]

While diversity on boards is still largely lacking, a recent movement has developed to further increase the amount of diversity on boards.[10] Stakeholders, organizations, and shareholder groups are becoming increasingly interested in board diversity.[11] Despite the growing focus, diversity has not rapidly increased.[12] The number of women serving on public company boards only increased from 16% to 18% from 2008–2012.[13] About 10% of U.S. companies have no women on their boards.[14] While some corporations have used term limits to increase the amount of younger members on boards, this growth has been slow.[15]

1. Federal-Level Initiatives to Increase Board Diversity

Instead of instituting federal regulations that mandate diversity, the United States has historically simply encouraged diversity on boards.[16] In 2009, the SEC adopted a rule

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7. Zweigenhaft, *supra* note 1. The remaining corporate directors studied consisted of 13.3% white females, 5.3% African American males, 1.5% African American females, 2.4% Latino males, 0.7% Latino females, 2.0% Asian American males, and only 0.4% Asian American females. *Id.*

8. *Id.*

9. Mary Jo White, Chairwoman, SEC, Completing the Journey: Women as Directors of Public Companies (Sept. 16, 2014), https://www.sec.gov/News/Speech/Detail/Speech/1370542961053.

10. PWC'S 2014 ANNUAL CORPORATE DIRECTORS SURVEY: GOVERNANCE TRENDS SHAPING THE BOARD OF THE FUTURE: BOARD PERFORMANCE AND DIVERSITY, PWC 8 (2014), https://www.pwc.com/us/en/corporate-governance/annual-corporate-directors-survey/assets/acds-01-board-performance.pdf.

11. *See id.* ("Stakeholders are more interested in board diversity than ever. A number of organizations and shareholder groups in the US have undertaken efforts to increase diverse representation on public company boards. As a result, US boards are increasingly focused on recruiting directors with diversity of background and experience."). Furthermore, there is a higher percentage of new directors who are women, and those women tend to be younger and less tenured, so "it's reasonable to project that the boards of the future will include a higher proportion of women than today's boards." *Id.* at 10.

12. *Id.* at 8.

13. *Id.* at 9.

14. White, *supra* note 9.

15. Darla Stuckey, *Board Age Limits Continue Upward Trend*, WALL ST. J.: DELOITTE (Sept. 23, 2015, 12:01 AM), deloitte.wsj.com/cfo/2015/09/23/board-age-limits-continue-upward-trend/.

16. Lilienfeld, *supra* note 2.

regarding the reporting of how diversity was taken into account in board nominations.[17] The SEC Amendments to Item 407(c) of Regulation S-K require companies to disclose whether diversity is considered in identifying nominees and, if so, how diversity is considered.[18] Along with this, if a company has a policy for considering diversity, a description of how the policy is implemented must be included, as well as how the company evaluates the effectiveness of the policy.[19] When the rule was being proposed, many commentators suggested that these disclosures were important to investors because it would provide them with "information on corporate culture and governance practices that would enable investors to make more informed voting and investment decisions."[20] However, this rule does not define "diversity," so companies have been able to provide disclosures that fail to involve racial or gender diversity.[21]

2. State-Level Initiatives to Increase Board Diversity

Despite the nonexistence of expansive federal laws, movement among some state actors suggests board of director diversity may someday be mandated by state law. On July 11, 2013, the California State Senate introduced Resolution Number 62 regarding women on corporate boards.[22] The resolution was set forth to encourage "equitable and diverse gender representation on corporate boards, and urge that, within a 3-year period from January 2014 to December 2016, inclusive, every publicly held corporation in California" have a minimum amount of women on its board, with the minimum amount established by the statute depending on the size of the board.[23] The resolution discussed a number of studies finding that women directors are largely lacking and that improved diversity on boards is associated with an improvement in financial value and firm value.[24] California Resolution SCR-62 was passed on September 12, 2013, making California the first state in the United States to take a position on board diversity and the first state to define board diversity.[25] SCR-62 was sponsored by the National Association of Women Business Owners–California (NAWBO–CA).[26]

Although SCR-62 is a resolution having no binding legal costs for violations, the passage of the bill sets a valuable precedent that other states are beginning to follow.[27] On May 31, 2015, the Illinois House of Representatives passed HR 439,[28] and on July 29, 2015, the Massachusetts Senate passed S1007.[29] Each of these resolutions seeks to

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17. *Id.*
18. White, *supra* note 9.
19. *Id.*
20. PROXY DISCLOSURE ENHANCEMENTS, EXCHANGE ACT RELEASE NO. 9089, 2009 WL 4857389, at *18 (Dec. 16, 2009) (to be codified at 17 C.F.R. pts. 229, 239, 240, 249, & 274).
21. Lilienfeld, *supra* note 2.
22. S. Con. Res. 62, Leg. Sess. (Cal. 2013).
23. *Id.*
24. *Id.*
25. Betsy Berkhemer-Credaire, *CA Urges its Public Companies to Put More Women on Their Boards - SCR 62*, 2020 WOMEN ON BOARDS, http://www.2020wob.com/labels/scr-62 (last visited Oct. 13, 2016).
26. *Id.*
27. *California's (Non-Binding) Resolution on Board Gender Diversity*, VALUEEDGE ADVISORS (Aug. 27, 2015), http://valueedgeadvisors.com/2015/08/27/californias-non-binding-resolution-on-board-gender-diversity.
28. *Id.*; *see* Mussman, *supra* note 3 (discussing the significance of HR439 passing).
29. KAREN SPILKA, *supra* note 3.

accomplish the same set of goals that CA SCR-62 was established to achieve.[30] Again, although these resolutions are legally non-binding, they suggest that board of director diversity may someday be further mandated by law.

3. Non-Profit and Industry Organization Initiatives to Increase Diversity

Industry and non-profit organizations have adopted further initiatives that may help forward board diversity goals. For example, the Thirty Percent Coalition is a group of leading women's organizations, institutional investors, executives, and elected and concerned individuals that seeks to achieve 30% women representation on public company boards by 2015.[31] The Thirty Percent Coalition has found success through letter-writing campaigns and shareholder resolutions aimed at companies without women serving on their boards.[32] Another organization that seeks to increase representation of women on boards is 2020 Women on Boards.[33] 2020 Women on Boards annually publishes a Gender Diversity Index of Fortune 1000 Companies to draw attention to companies' attempts to diversify.[34]

B. Potential Costs of Increasing Board Diversity Initiatives

Despite the aforementioned recent attempts to increase board diversity, many states have, so far, failed to adopt laws or resolutions addressing diversity on boards. There are some potential policy reasons for this. One reason is that some companies are concerned that diversity requirements may serve to replace qualified directors with less experienced, but more diverse, directors in order to meet the diversity quota.[35] Some research has shown that women receiving director promotions were less experienced than the directors whose positions they filled.[36]

Another worry among some companies is that if diversity is forced upon companies, the change will be rejected by current majority directors who would make attempts to undermine the minority directors.[37] Those that hold this belief think that, in order for women and other minorities to be welcomed and appreciated by companies and their boards, the selection process cannot be forced.[38] Some research has shown that, when a few minority members are included into a group, these members often experience feelings of "social isolation, heightened visibility, . . . pressure to adopt stereotyped roles[,] . . . [and] are likely to do less well in the group."[39] On the reverse side, non-minority members

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30. VALUEEDGE ADVISORS, *supra* note 27.

31. Deborah L. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377, 423 (2014).

32. *Id.*

33. *Id.*

34. *Id.*

35. *See, e.g.*, Nilofer Merchant, *Quotas for Women on Boards are Wrong*, HARV. BUS. REV. (Sept. 1, 2011), https://hbr.org/2011/09/quotas-for-women-on-boards-are/ (noting that one University of Michigan study found that firms forced to increase women on their boards experienced "one measure of corporate value fall by 18%").

36. *Id.*; *see* Rhode & Packel, *supra* note 31, at 402–04 (noting that CEO experience is often a background requirement to become a director, and minorities are underrepresented in top executive positions).

37. *See* Merchant, *supra* note 35 (discussing the belief that "[g]roups don't change dynamics until they decide to change their dynamics").

38. *Id.*

39. *See* Rhode & Packel, *supra* note 31, at 408 (quoting ROSABETH MOSS KANTER, THE PROBLEMS OF

might also feel that they are being excluded and that the minority group members are receiving preferential treatment over them.

Related to this notion is a fear that, although increasing diversity may add more perspectives to the board, it may also create tensions among board members by making "board work more complex, unsettl[ing] existing power structures, and weaken[ing] the bargaining power of the board vis-à-vis shareholders and other influential stakeholders."[40] Yet another possible explanation for the lack of support for diversity regulations on boards is a fear that mandating more diverse, and potentially younger, members to boards could lead to forcing older board members to resign.[41] A desire to nominate younger, more technologically-savvy individuals, for instance, may lead to pushing older board members into retirement.

C. Potential Benefits of Increasing Board Diversity Initiatives

While the fears behind implementing board diversity regulations may be dissuading potential supporters and slowing legislation, the benefits of increasing diversity may contribute to the growth of such legislation in the near future. One of the greatest potential benefits to companies that increase diversity lies in the increased breadth of perspective.[42] A wide range of perspectives is essential in the complex decision-making that companies may face.[43] Including more minority members on boards means the inclusion of more varied life experiences, leading to the ability to relate to, and understand, the actions of a range of actors that a company might encounter in negotiations and other relations.

The increased presence of minority directors may also increase a company's reputation with consumers by signaling the quality of the company to interested actors.[44] A good reputation may lead to an increase in interested job applicants[45] and investors.[46] Along with this, some believe that board diversity is associated with shareholder value.[47] Other empirical studies suggest a connection between diversity and good corporate

TOKENISM 39 (1974)).

40. Trond Randøy et al., *A Nordic perspective on corporate board diversity*, NORDIC INNOVATION CTR. (Norden Norway), NOV. 2006, at 7–8, http://www.nordicinnovation.org/Global/_Publications/Reports/2006/The%20performance%20effects%20of%20board%20diversity%20in%20Nordic%20Firms.pdf (noting further the importance of potential conflicts "between organizational performance and board group goals").

41. *See* Ann Yerger, *Board Retirement and Tenure Policies*, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Sept. 1, 2015), http://corpgov.law.harvard.edu/2015/09/01/board-retirement-and-tenure-policies/#more-71427 (discussing board retirement and tenure policies and mentioning "the push for enhanced board diversity and related performance benefits, and the need for fresh perspective, expertise and insights in the boardroom").

42. *See* RUSSELL REYNOLDS ASSOCS., *supra* note 4, at 2 (stating that "[a] wide range of perspectives, not merely token representation, is critical to effective corporate governance").

43. *Id.* at 5.

44. Rhode & Packel, *supra* note 31, at 399.

45. *See* Peter Rampling, *Board Diversity & Corporate Performance* 2 (Dec. 7, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1969229 (stating that these corporate leaders believe one must look at the connection between board diversity and a successful company and that the issue will make a difference to applicants).

46. *See* Rhode & Packel, *supra* note 31, at 399 (noting that some research has suggested that board diversity increases reputation and sends messages to investors "about the robustness of the governance mechanisms in place and the quality of the firm").

47. *See* Rampling, *supra* note 45, at 1 (stating that one must look at the connection between board diversity and a successful company and that being more diverse may actually enhance shareholder value).

governance, including more meetings, higher attendance rates, and greater commitment to corporate social responsibility.[48] There are also a variety of studies linking diversity with improvement in financial performance,[49] innovation, motivation, and firm value; however, a number of studies also note no relationship, so commentators believe that a case for diversity should focus on the other benefits.[50]

The United States could potentially implement board of director diversity policies through a few different avenues, including legislative diversity efforts, regulatory diversity efforts, and encouraging voluntary efforts by companies.[51] Legislative efforts to increase diversity on boards have mostly occurred in countries outside the United States; however, the recent attention at the state level suggests that, perhaps, greater legislative efforts will appear in the United States in the future.[52] While legislative mandates may be the ultimate goal, regulatory and voluntary encouragement mechanisms also remain useful tools in helping to increase diversity.

III. Analysis: Are the Policies in Place Reaching the Desired Result?

This Part will introduce and evaluate the current ways that governmental entities try to increase diversity, particularly discussing efforts made by the U.S. federal government, state governments, and foreign governments. This Part includes some of the methods being used in countries outside the United States to serve as an analysis of alternative ways that state and federal entities might try to implement diversity in the future using the most cost effective means. The analysis of methods used by other countries might provide guidance for American entities. This Part will also discuss the benefits and shortcomings of efforts made by both the United States and foreign entities to increase diversity. This evaluation may lead to more efficient means of increasing diversity in the future.

As mentioned, while there has been a move toward increasing diversity, the move has happened slowly. Many of the policies being put in place at the state and federal levels

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48. Rhode & Packel, *supra* note 31, at 400.

49. *See, e.g.*, *Companies With More Women Board Directors Experience Higher Financial Performance, According to Latest Catalyst Bottom Line Report*, CATALYST, http://www.catalyst.org/media/companies-more-women-board-directors-experience-higher-financial-performance-according-latest (last visited Oct. 13, 2016) (discussing a study that found higher financial performance for companies with higher women representation in three measures: return on equity, return on sales, and return on invested capital); Dorothee Enskog, *Women's Positive Impact on Corporate Performance*, CREDIT SUISSE (Sept. 23, 2014), https://www.credit-suisse.com/us/en/news-and-expertise/investing/articles/news-and-expertise/2014/09/en/womens-impact-on-corporate-performance-letting-the-data-speak.html (discussing a study finding that gender diversity in company management "coincides with improved corporate financial performance and higher stock market valuations").

50. Rhode & Packel, *supra* note 31, at 384–93; *see also* Frank Dobbin & Jiwook Jung, *Corporate Board Gender Diversity and Stock Performance: The Competence Gap or Institutional Investor Bias?*, 89 N.C. L. REV. 809, 837 (2011) (stating that gender diversity may not be shaping the "efficacy or monitoring capabilities of boards themselves"; however, gender diversity may influence corporate performance by "activating bias on the part of [] institutional investors"); Isabel Gallego-Alvarez et al., *The Influence of Gender Diversity on Corporate Performance*, 13 REVISTA DE CONTABILLIDAD—SPANISH ACCT. REV. 53, 55 (Jan.–June 2010) (discussing a study finding that higher levels of gender diversity did not influence corporate performance in Spanish corporations).

51. Rachel Soares, *Increasing Gender Diversity On Boards: Current Index Of Formal Approaches*, CATALYST (Aug. 8, 2014), http://www.catalyst.org/knowledge/increasing-gender-diversity-boards-current-index-formal-approaches.

52. *Id.*

have been fairly recent,[53] so an analysis of the benefits achieved from these methods may not yet fully encompass the overall effect of the policies. Over time, the most effective methods may become more evident.

A. Analyzing Domestic Federal-Level Efforts to Increase Board Diversity

While SEC Item 407(c)(2)—the current SEC regulation regarding board diversity—attempts to increase diversity initiatives by requiring the disclosure of consideration of diversity in the board nomination process, some investors and commentators believe it falls short in many areas.[54] As mentioned, this rule does not define "diversity," so companies have been able to provide disclosures that fail to involve racial or gender diversity.[55] Under the current rule, shareholders still cannot easily discover the racial and ethnic makeup of boards.[56] Shareholders can also encounter difficulty in determining the gender of nominees in proxy materials.[57] While the rule calls for reporting how diversity was considered in nominees,[58] it does not account for individual director diversity attributes or board level diversity for all companies, which are important factors for investors to consider.[59] Investors concerned about increasing gender, racial, and ethnic diversity must spend their own time and money doing the research,[60] a burden that may lessen the concern about increasing diversity. Since the implementation of the amendments to Item 407 of Regulation S-K, there has been no meaningful evidence of an increase in board of director diversity accounted to the amendment, and the rule does not provide shareholders with sufficient details to determine board diversity and risk management.[61]

B. Analyzing Domestic State-Level Efforts to Increase Board Diversity

Although the state-level initiatives that have been taken are legally non-binding, the bills passed to increase corporate diversity have experienced some success in doing so. California's SCR-62 passed in September 2013, and by December 2013, the percent of companies meeting the goals outlined in the resolution reportedly increased to 16%.[62] 35% of the 63 firms that met the goals are in the technology hardware and software industries.[63] The companies with the most women in leadership positions increased from 74% to 96%,

53. *See* UC DAVIS CENSUS, *supra* note 3 (noting that California's resolution was adopted in September 2013); Mussman, *supra* note 3 (noting that Illinois' resolution passed May 31, 2015); KAREN SPILKA, *supra* note 3 (noting that Massachusetts' resolution passed July 2015).

54. *See generally* Anne Simpson, Director of Global Governance of California Public Employees Retirement System et al., Petition for Amendment of Proxy Rule Regarding Board Nominee Disclosure—Chart/Matrix Approach (Mar. 31, 2015), https://www.sec.gov/rules/petitions/2015/petn4-682.pdf (stating large institutional investors' concerns with the ability of SEC Item 407(c)(2) to convey board member diversity).

55. Lilienfeld, *supra* note 2.

56. Simpson et al., *supra* note 54, at 2.

57. *Id.*

58. White, *supra* note 9.

59. Simpson et al., *supra* note 54, at 2.

60. *Id.*

61. *Id.* at 5.

62. THE REPORT ON THE STATUS OF WOMEN AND GIRLS IN CALIFORNIA, MOUNT SAINT MARY'S U. L.A. 48 (2015), http://www.msmu.edu/uploadedFiles/Content/Status_of_Women_and_Girls/RSWG%202015%20final.pdf.

63. *Id.*

meeting the SCR-62 goals.[64] The outcome of California's SCR-62 is encouraging for Illinois' HR439 and Massachusetts' S1007, which both have not yet been in existence long enough to generate substantial evidence to truly gauge their effects.[65]

C. Analyzing Domestic Non-Profit and Industry Organization Efforts to Increase Board Diversity

The industry and non-profit organizations that promote board diversity have also experienced some success. The Thirty Percent Coalition implemented an Adopt a Company initiative that included letter-writing campaigns and collaborative discussions with public companies encouraging the companies to increase board diversity.[66] The Coalition also led Champions of Change, a list of corporate leaders that advocate for increasing the amount of women on public company boards.[67] At least 22 of the companies targeted by this initiative have now added women to their boards.[68] Organizations like Catalyst and Watermark, non-profit organizations dedicated to increasing opportunities for women, are also contributing to increasing board diversity.[69] Both groups assist "board-ready women" to obtain corporate director positions at a local and national level and provide research evaluating the status of women in board positions.[70]

D. Analyzing Efforts to Increase Board Diversity in Countries Outside the United States

While the current state and local diversity initiatives in America have seen some success, there may be options currently unexplored in the United States that could further increase diversity at a more rapid rate. The political and social climates of other countries might dramatically differ from the United States, but the methods employed in these countries can still serve as a comparative model to learn more about alternative options in which the United States might find success.

Some countries outside the United States have imposed quota laws regarding the amount of women on boards.[71] These laws punish companies that are non-compliant.[72] Beginning in 2003, Norway, Belgium, France, Italy, and the Netherlands—to name a few—have passed laws requiring public companies to allow women to represent 40% of boards within five years or risk fines or, potentially, dissolution for non-compliance.[73] Other countries threaten suspension of director benefits and compensation, public

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64. *Id.*
65. *See supra* note 53 (noting the dates that each of the mentioned resolutions was enacted).
66. Memorandum from the Thirty Percent Coalition, Institutional Investors Working with Thirty Percent Coalition Continue to Push for Increased Gender Diversity in the Boardroom, Thirty Percent Coalition (June 24, 2015), http://www.30percentcoalition.org/news/105-institutional-investors-working-with-thirty-percent-coalition-continue-to-push-for-increased-gender-diversity-in-the-boardroom.
67. Press Release, PR Newswire, Thirty Percent Coalition Commends 22 Public Companies Adding Women to their Boards of Directors, The Bus. Journals (June 17, 2015, 6:00 AM), http://www.bizjournals.com/prnewswire/press_releases/2015/06/17/MN34500.
68. *Id.*
69. Barbara B. Kamm, *Why Corporate Boardrooms Need More Women*, FAST CO. (Mar. 27, 2014, 5:02 AM), http://www.fastcompany.com/3028003/leadership-now/why-corporate-boardrooms-need-more-women.
70. *Id.*
71. Lilienfeld, *supra* note 2.
72. *Id.*
73. *Id.*

disclosure about why the target was not reached, or less public subsidies and state contracts awarded if diversity quotas are not met.[74]

The countries threatening harsher penalties have successively increased diversity.[75] GMI Ratings conducted an analysis of almost 6000 companies across 45 countries in 2013 that showed the highest amounts of female directors were in Nordic countries where the legislature had passed laws to increase diversity and threatened penalties for non-compliance.[76] However, the number of women on boards in Spain reportedly decreased despite a diversity law passed in 2007 requiring 40% of directors to be female.[77] Researchers attributed this decrease to the weak penalty for non-compliance because, in Spain, gender diversity is only "taken into account when state subsidies and public contracts are awarded."[78] On the other hand, those countries imposing stricter punishments for non-compliance, such as fines, dissolution, and withholding fees from directors, saw "sharp increases" in the amount of companies with the goal number of female board members.[79]

While the countries that have implemented penalties for non-compliant companies have generally obtained success in increasing gender diversity on boards, many view these laws as contentious—claiming the laws hurt corporate profits.[80] Some believe that setting quotas and penalizing non-compliance is not the best way to increase gender diversity.[81] One study on the Norwegian statute showed the law negatively impacted "stock prices, operating performance, and the experience level of directors, perhaps due to the short time frame in which companies were required to comply."[82] However, other surveys show that countries with quotas have higher support for quotas than countries without quotas, perhaps due to higher satisfaction levels associated with working on boards with greater gender balance.[83]

An approach more lenient than imposing fines or suspending director benefits is the "comply or explain" method.[84] This method has been adopted in countries including Australia and Canada.[85] The method "requires a company to either (a) comply and adopt and disclose the content of the necessary policies or make and describe the necessary considerations, or else (b) explain why it does not have such policies or make such

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74. *Id.*

75. Claer Barrett, *Gender quotas feel coercive but appear to work*, FIN. TIMES (May 14, 2014), http://www.ft.com/cms/s/0/aef9d9c4-d521-11e3-9187-00144feabdc0.html#axzz3pPp6v2bl.

76. *Id.*

77. *Id.*

78. *Id.*

79. "Sharp increases" here is considered an 8–18% increase in the "proportion of companies with at least three female board members." *Id.*

80. *See, e.g.*, Lilienfeld, *supra* note 2 (noting that imposing penalties for non-compliance remains controversial).

81. *Id.*

82. *Id.*

83. *See id.* ("Although it is still unclear why this is the case, the authors suggest that, once quotas are enacted, both men and women may experience the higher satisfaction levels that tend to be associated with working in groups with greater gender balance, thus eroding some of the initial opposition to quotas.").

84. Nancy E. Sheppard, *New "comply or explain" diversity disclosures required for Canadian firms*, WOMEN2BOARDS, http://women2boards.com/new-comply-or-explain-diversity-disclosures-required-in-for-canadian-firms (last visited Oct. 13, 2016) (discussing the "comply or explain" model adopted in Canada and Australia).

85. *Id.*

considerations."[86] After Australia amended its policy in 2010 to include gender diversity policies, the percentage of female board members on the Australian Stock Exchange (ASX) 200 Companies list almost doubled by 2014.[87] By 2013, almost a quarter of the ASX 200 companies achieved the goal of 25% women board directors.[88] The guidelines reason that this reporting system encourages transparency and accountability, ultimately improving the chances of achieving the goals of the diversity policy.[89]

As noted, important distinctions exist between the board diversity regulation system present in the United States and the systems present in other countries. The SEC Regulation currently in place requires companies to disclose how diversity was considered in the nominating process; however, it does not provide the kind of detailed information about diversity that interests investors concerned about board diversity.[90] The state-level and local organization initiatives have called for greater growth in terms of effectively increasing board diversity,[91] but still do not rise to the level that other countries—that create strict diversity quotas and impose penalties for failing to meet—do.[92]

While imposing penalties for non-compliance may face some opposition,[93] the penalties may help increase diversity at a faster rate.[94] Fines, threats of dissolution, or withholding of fees may lead to a sharp increase in diversity.[95] However, the lesser penalty, such as a "comply or explain" method, also exists as an option.[96] The SEC's reporting requirements are more similar, but still less stringent, than a "comply or explain" method that requires more detailed disclosures regarding diversity. The American policies in place have not quite reached the level of those policies present in other countries. However, further initiatives might be taken by the United States.

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86. *Id.*

87. *See Women on boards: global approaches to advancing diversity*, POINT OF VIEW (EY), July 2014, at 4. http://www.ey.com/Publication/vwLUAssets/ey-women-on-boards-pov-july2014/$FILE/ey-women-on-boards-pov-july2014.pdf (noting that the percentage of female board members went from 9% to 17.6% from 2010–2014).

88. *Id.*

89. *See id.* (noting ASX's recent guidance stating that "[r]eporting annually on an entity's gender diversity profile and on its progress in achieving its gender diversity objectives is important. It encourages greater transparency and accountability and, because of that, is likely to improve the effectiveness of the entity's diversity policy in achieving the outcomes the board has set").

90. *See supra* notes 54–61 and accompanying text (discussing the shortcomings of the SEC regulation); *see also* Simpson et al., *supra* note 54, at 2 ("As a result [of the current disclosure rule], investors who care about gender, racial, and ethnic diversity must do their own investigation. Such collection of information about race and ethnicity of directors can be time consuming, expensive, and fraught with inaccuracies.").

91. *See supra* Part III.B (discussing the effects of the state level initiatives to increase board diversity).

92. *See supra* notes 71–74 and accompanying text (discussing the heightened initiatives to increase board diversity present in other countries, including the implementation of penalties for non-compliance with diversity quotas).

93. *See* Lilienfeld, *supra* note 2 (stating that "officials of nine countries signed a letter indicating their opposition to European-wide quotas . . . [and] some argue that quotas are not the ideal way to achieve gender diversity").

94. *See* Barrett, *supra* note 75 (noting that Italy, France, Germany, and the Netherlands—companies imposing penalties for non-compliance with diversity policies—experienced 8–18% increase in the proportion of companies with at least three female board members).

95. *Id.*

96. *See* Sheppard, *supra* note 84 (discussing the "comply or explain" model adopted in Canada and Australia).

IV. RECOMMENDATION

Based on the lack of diversity regulations at the federal level and the benefits found from corporations increasing diversity, the SEC should strengthen their current diversity reporting regulation and craft a more far-reaching diversity rule. While the more restrictive laws in other countries—those containing penalties for non-compliance—tend to find the most success, the SEC might be disinclined to adopt a similar statute out of fear American corporations and other interested parties will object due to the contentious nature of such regulations.[97] However, the SEC might successfully increase diversity in American companies at a faster rate by strengthening their reporting guidelines and requiring more detailed reports.[98] The SEC might also take its regulations to the next level and adopt a policy similar to the "comply or explain" method employed in several other countries.[99] These policies could also be implemented at the state level; however, the resolutions recently adopted in California, Illinois, and Massachusetts might effectively increase diversity, so there may be an interest in first gauging the effect of these attempts before adding another diversity policy.[100] While stricter diversity quota or reporting guidelines might impose some additional costs on corporations, these costs will be offset by the corporate performance benefits resulting from greater board diversity.[101]

A. Increase Details of Reporting Requirements Regarding Diversity Considerations

The SEC may see greater results in increasing diversity by calling for more detailed reporting from companies.[102] The SEC could begin by further defining "diversity" within the regulation so that companies must provide disclosures that divulge more detailed information, such as how racial, ethnic, and gender diversity was considered,[103] so that shareholders concerned about diversity can get a better idea of the specific makeup of boards.[104] The SEC notes that diversity was left undefined in the regulation due to the fact that companies define diversity in a variety of ways; some companies focus on "differences of viewpoint, professional experience, education, skill and other individual qualities and attributes . . . while others [focus on] race, gender and national origin."[105] While a desire

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97. *See* Lilienfeld, *supra* note 2 (noting that laws mandating penalties for companies non-compliant with diversity policies remain controversial).

98. *See supra* Part III.A (discussing some of the issues resulting from the lack of detail required under the current SEC reporting rule).

99. *See* Sheppard, *supra* note 84 (discussing the "comply or explain" methods used in Canada and Australia).

100. *See* UC DAVIS CENSUS, *supra* note 3 (discussing California's resolution regarding board diversity); Mussman, *supra* note 3 (discussing Illinois' resolution regarding board diversity); KAREN SPILKA, *supra* note 3 (discussing Massachusetts' resolution regarding board diversity).

101. *See supra* notes 42–48 (noting the corporate benefits potentially resulting from increased board diversity).

102. *See supra* Part III.A (discussing some of the issues resulting from the lack of detail required under the current SEC reporting rule).

103. *See* Lilienfeld, *supra* note 2 ("[T]he vagueness of the rule has allowed companies to provide disclosures that do not address racial or gender diversity.").

104. *See generally* Simpson et al., *supra* note 54 (discussing the challenges of the current SEC disclosure rule).

105. SEC, PROXY DISCLOSURE ENHANCEMENTS, EXCHANGE ACT RELEASE NO. 33-9089, 2009 WL 4857389, at *1, *39 (Dec. 16, 2009) (codified at 17 C.F.R. pts. 229, 239, 240, 249, & 274), https://www.sec.gov/rules/final/2009/33-9089.pdf.

to not restrain a company's decision-making is understandable, one of the big goals of the regulation remains to help investors make informed decisions on companies.[106] If a company claims to consider diversity in the nominating process and only explicitly mentions factors such as education and viewpoint, this may continue to leave investors wondering whether diversity factors such as race and gender are included.[107]

Along with reporting of how diversity was considered in nominees, the SEC reporting rule should account for individual director diversity attributes or board level diversity for all companies to lessen the research burden of investors interested in increasing diversity.[108] The current rule fails to provide shareholders with explicit details about companies' board diversity policies and, therefore, makes it difficult for investors, in analyzing risks, to fully evaluate whether their interests align with the company's.[109] A rule requiring more explicit disclosures of whether factors, such as race, gender, national origin, and age, were used in the nominating process, and the diversity already present on the board, will be more meaningful to investors.

B. Implement a "Comply or Explain" Policy

Another possible regulation that the SEC could adopt would be to take the reporting guidelines a step further and implement a "comply or explain" policy. Under this policy, instead of merely requiring reporting of diversity on the board, the SEC would recommend a percentage increase in diversity within a few-year time frame. Companies could either comply with the regulation by taking steps to meet the diversity minimum or report back with an explanation of why diversity efforts were not made.[110]

This policy would create a variety of benefits. As mentioned, this reporting system encourages transparency and accountability by giving companies the option to increase board diversity or explain the lack thereof.[111] It also supports innovation and proportionality by encouraging more diversity—and, therefore, new backgrounds and ideas—but allowing companies the option to not comply by explaining their motives.[112] By giving the companies more choice, it reduces some of the potential opposition that would otherwise likely result from a stricter policy. Companies that do not meet diversity

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106. *See id.* at *65 ("The regulations, forms and schedules set forth the disclosure requirements for periodic reports, registration statements, and proxy and information statements filed by companies to help investors make informed investment and voting decisions.").

107. Again, this is problematic because it incurs additional time and costs spent by investors to try and determine whether their interests align with the company. *See* Simpson et al., *supra* note 54, at 2 ("[I]nvestors who care about gender, racial, and ethnic diversity must do their own investigation. Such collection of information about race and ethnicity of directors can be consuming, expensive, and fraught with inaccuracies."). This might harm companies because investors may not want to take the time to do additional research on such information, so they might elect to invest somewhere else where the company's interests are easier to determine.

108. *Id.*

109. *See id.* at 3 (asking the SEC to adopt a rule requiring better disclosure to aid investors in better analyzing the board's ability to manage risk).

110. *See* Sheppard, *supra* note 84 (discussing the "comply or explain" methods used in Canada and Australia).

111. POINT OF VIEW, *supra* note 87, at 4.

112. *See When is Comply or Explain the Right Approach*, ICAEW, http://www.icaew.com/en/technical/corporate-governance/non-executive-directors/corporate-governance/when-is-comply-or-explain-the-right-approach (last visited Oct. 13, 2016) (discussing innovation and proportionality as benefits resulting from the "comply or explain" approach).

recommendations might fail to do so because of concerns such as having to select less qualified candidates[113] or having to force older members into resigning.[114] Instead of limiting the freedom of companies to manage boards, the "comply or explain" approach allows companies to provide legitimate reasons for failing to meet diversity quotas. The process will also help the SEC learn more about the costs and benefits associated with diversity regulations, as well as the struggles associated with company implementation of such policies.

Finding a balance between overarching, restrictive diversity quota policies and policies that fail to increase diversity is important to efforts to increase corporate performance. The American federal-level policies are currently lacking in effectively increasing diversity; however, the SEC may be interested in allowing companies the freedom to make board decisions as they please. Increasing the detail requirements for reporting diversity considerations or implementing a "comply or explain" diversity standard are both ways the SEC could avoid overly restrictive policies and increase board diversity at a greater rate.

V. CONCLUSION

The benefits associated with greater diversity on corporate boards are invaluable to a company and how it performs.[115] Because of this, more initiatives should be taken to encourage the growth of diverse boards in the future, particularly at the federal level where such initiatives are especially lacking.[116]

It is desirable and important that companies are able to maintain a degree of autonomy in their decision-making; however, there are policies that the SEC could call for that would likely increase board diversity without forcing companies to give up much, if any, of their independence in choosing directors. These could be achieved in a number of ways, but two were highlighted in this Note, in particular: 1) increasing the detail necessary in the current reporting guidelines,[117] or 2) implementing a "comply or explain" method that requires companies to reach a certain amount of diversity or explain why efforts were not made to do so.[118] Each of these methods would be relatively easy for companies to abide by and would likely help increase the number of diverse boards in the future, providing further performance benefits to these companies in the long run.

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113. *See* Merchant, *supra* note 35 (noting the concern that quotas might "de-emphasize qualifications").

114. *See* Yerger, *supra* note 41 (noting that increasing diversity may include asking long-standing directors to leave the board).

115. *See supra* Part II.C (discussing some of the benefits associated with board diversity, including increased breadth of perspective and reputation).

116. *See supra* notes 54–61 (discussing the limits of the current SEC regulation regarding board diversity).

117. *See supra* Part IV.A (recommending that the SEC increase the detail required under the current reporting guidelines).

118. *See supra* Part IV.B (recommending that the SEC implement a "comply or explain" method, requiring companies to reach a diversity quota or explain reasons for not doing so).