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Gen Y More Black Corporate Directors

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GEN Y MORE BLACK CORPORATE DIRECTORS

Chaz D. Brooks[*]

Abstract

Corporate diversity has been in the spotlight for decades. Recent efforts have followed years of legal scholarship, arguments on the business rationale for greater diversity, and more recently, the racial unrest during the summer of 2020. Called by some, a "racial reckoning," the summer of 2020 catalyzed many corporate declarations on the importance of diversity, and more to the point of this article, the necessity of righting the economic disadvantages of Black Americans. This article looks specifically at one intervention by a corporate player following summer 2020, Nasdaq's volley to increase corporate diversity through required disclosure. This article reviews the state of Black representation on corporate boards: its history, proffered challenges and barriers, and calls to increase Black representation. Following a description of Nasdaq's efforts, this article argues that disclosure of board demographics will be a powerful tool for increasing the ranks of Black corporate directors because of an important constituency, Millennials. Millennials exert influence as retail investors, clients of some of the largest institutional investors, and as consumers. The diversity, capital, social views, and ideas on corporate purpose shared by Millennials and their younger peers mean diversity disclosures can have material impact. This is important because diversifying the nation's corporations can play a role in alleviating the centuries of economic exclusion meted out against Black Americans. This article is the first to connect the effectiveness of diversity disclosures on Black corporate representation with Millennials' expanding investment activity. This confluence of factors makes Nasdaq's disclosure rule an important model for others invested in diversity in the wake of recent U.S. Supreme Court jurisprudence.

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INTRODUCTION

On August 6, 2021, the United States Securities and Exchange Commission (the "<u>SEC</u>") approved a proposed rule change by The Nasdaq Stock Market LLC ("<u>Nasdaq</u>") of its listing requirements (the "<u>Diversity Rule</u>").[1] Nasdaq's proposal requires disclosure of racial, ethnic, sexual

[1] Securities and Exchange Commission, Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Order Approving Proposed Rule Changes, as Modified by Amendments No. 1, to Adopt Listing Rules Related to Board

orientation and gender demographics of a listed company's board of directors. As described in further detail below, the Diversity Rule generally requires companies listed on the Nasdaq stock exchange to either have two diverse directors, including at least one woman and one director from an underrepresented group, based on race, ethnicity, or sexual orientation. Absent such diversity, a company can choose to explain why it does not yet have such diversity on its board. This article focuses on the interaction between Black corporate board representation, the Diversity Rule, and Millennials. I argue that not only will the influence by Millennials fueled by better access to information through the Diversity Rule expand Black representation on corporate boards, but that even greater impact can be achieved if others private actors take similar action.

First this article describes the state of Black representation on corporate boards, and it then discusses the barriers and challenges to greater Black representation. Then, after describing the Diversity Rule, this article will argue that though the present and historical lack of Black representation on corporate boards is inexcusable, the Diversity Rule's disclosure requirements will be a powerful tool for remedying that lack of Black representation. I next argue that the Diversity Rule's power will derive from its information-forcing-substance capability,[2] largely through a key constituency—Millennials.[3] This article then argues that the Diversity Rule's potential impact due to Millennials is a model for other avenues to increase corporate diversity in light of the Court's recent assault on diversity efforts.

Board diversity has been of general interest for much of the 21st century. Yet, the interest has risen to a fever pitch following overdue reckonings with gender and race in the United States related to the "Me Too" and "Black Lives Matter" movements. Increased interest and pressure have led to many companies committing to increasing gender, racial and ethnic diversity on their boards—often at the bequest of large institutional investors. With respect to Black representation specifically, the increased attention to Black Lives Matter following the tragic killing of George Floyd—and media attention to the unfortunate volume of other unjustified killings of Black men and women in the United States—was met with major corporations publicly stating their support through press releases, social

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Diversity and to Offer Certain Listed Companies Access to a Complimentary Board Recruiting Service, Release No. 34-92590 (Aug. 6, 2021), File No. SR-NASDAQ-2020-081; SR-NASDAQ-2020-082.

[2] *See* Hillary A. Sale, *Disclosure's Purpose*, 107 GEO. L.J. 1045, 1048 (2019).

[3] Though this paper focuses on the impact of the generation born between 1981 and 1996 known as "Millennials," it should be noted that those born between 1997 and 2012, "Generation Z," are aligned in many ways with Millennials on social views and can be expected to have a similar impact as they gain more market power. *See* Kim Parker, Nikki Graf & Ruth Igielnik, *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, PEW RESEARCH CENTER'S SOCIAL & DEMOGRAPHIC TRENDS PROJECT (2019), https://www.pewresearch.org/social-trends/2019/01/17/generation-z-looks-a-lot-like-millennials-on-key-social-and-political-issues/ (last visited Jun 2, 2022).

media engagement and corporate giving.[4] If anything is clear, it is that many companies have publicly thrown their hats in the ring for racial equity. However, the inertia of history is never easy to overcome—no need for that to be taken as true on its face; the fact that Black representation on Fortune 100 boards only grew by 14% from 2004 through 2020 speaks volumes.[5] Further, the Diversity Rule has become effective at a time of potential backlash towards corporate diversity efforts.

Other scholars have noted that barriers to greater diversity are largely self-imposed.[6] When considering the dearth of diversity on public company boards, companies suggesting that it is a function of an inadequate pipeline of individuals with the "right" professional background are largely doing so without empirical support.[7] Additionally, for those corporate boards concerned that a focus on diversity might run afoul of their fiduciary duties, there is ample evidence suggesting that fiduciary duties are not only left undisturbed by such efforts,[8] they might even demand them.[9] This article supplements other recent contributions to this literature in two ways, first by arguing that the Diversity Rule will play an important role towards increasing Black representation on public company boards by its information-forcing-substance characteristics with respect to Millennial investors and their proxies.[10] Uniquely, this article then argues that given the interests of Millennials and other younger generations, the Diversity

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[4] *See* Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America's $50 billion promise*, WASH. POST, Aug. 24, 2021, https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/ (last visited Jun 29, 2022); *see also* These Are Notable Corporate Responses to George Floyd Protests, JUST Capital, https://justcapital.com/news/notable-corporate-responses-to-the-george-floyd-protests/ (last visited Jun 29, 2022).

[5] DELOITTE & THE ALLIANCE FOR BOARD DIVERSITY, MISSING PIECES THE BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 23 (6th ed. 2021), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/center-for-board-effectiveness/missing-pieces-fortune-500-board-diversity-study-sixth-edition.pdf.

[6] *See* Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story*, 89 N.C. L. REV. 855, 881-83 (2011) (describing how limited advances in greater board diversity are often attributed to a limited "pool" of "qualified" candidates, such qualifications not being imposed by law); *see also* Anat Alon-Beck, Michal Agmon-Gonnen & Darren Rosenblum, *No More Old Boys' Club: Institutional Investors' Fiduciary Duty to Advance Board Gender Diversity*, 55 U.C. DAVIS L.REV. 445, 461 (discussing gender segregation in corporate leadership).

[7] Fairfax, *supra* note 6, at 881 (noting the absence of studies demonstrating that high representation of executive-level expertise on a board is related to financial performance)

[8] Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1, 67 ("[F]iduciaries have wide discretion to take action they believe will ensure their corporations' respectful engagement with all stakeholders; improve corporate decisionmaking, productivity, and reputation; and enhance the firm's sustained profitability and long-term value.").

[9] *Id.* at 88 ("To comply with their Caremark duties, corporate boards must make a good faith effort to ensure the company has policies in place to monitor compliance with the laws requiring corporations to provide equal opportunities to job applicants, employees, contractors, and customers regardless of their race, gender, or sexual orientation."); Omari Scott Simmons, *Political Risk Management,* 64 WM. & MARY L. REV. 707, 741 (2023) ("As investors, reporters, potential employees, and regulators note how companies are evaluated by professionals making ESG recommendations and scores, any company's management is likely pushed to at least consider how actions, even those that would clearly increase shareholder value, might affect perceptions of the company with respect to ESG.").

[10] Atinuke O. Adediran, *Disclosing Corporate Diversity*, 109 Va. L. Rev. 307 (2023) (arguing that disclosures can be used to increase diversity in American corporations).

Rule should be emulated following concern about judicial skepticism of diversity efforts due to the holding in Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll. ("SFFA").[11]

PART I – BLACK CORPORATE BOARD REPRESENTATION

When Reverend Dr. Leon H. Sullivan joined General Motors' board of directors in 1971, he became the first Black individual to serve on GM's and in his words, "one of the first, if not the first, truly public directors to go on the board of a large corporation."[12] Fast-forward to 2010, and Blacks represented approximately only 7.6% of board members for Fortune 500 companies.[13] By 2020 Blacks' representation in Fortune 500 board seats had only moved to approximately 8.7%.[14] That paltry progress along with the civil unrest of the summer of 2020 were the backdrop for Nasdaq's efforts.

A. State of Black Board Member Representation and the Summer of 2020

Blacks only represented 8.7% of the board seats for Fortune 500 companies in 2020—however, for Fortune 100 companies, Blacks have seen their representation grow from 10.0% to 11.4% between 2004 and 2020.[15] While a review of the S&P 500 shows that Black individuals held 12% of directorships as of 2022.[16] Looking at a greater number of publicly traded companies through the Russell 3000 shows only 6% of board members being Black as of 2022.[17] At a glance, it is clear that larger companies are, and historically have been, either exerting more effort to diversify their boards than smaller publicly traded companies or finding it easier to source Black directors. However, it must be noted that of the Black directors on Fortune 500 boards, 43% are serving on multiple Fortune 500 boards.[18] This recycling of Black directors will be more fully evaluated later in this article, but it warrants raising the question whether repeatedly using the same individuals to increase board diversity truly meets the spirit of professed diversity efforts?

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[11] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023).
[12] Morton Mintz, *ACTIVIST MINISTER TOOK BOLD STEP AT GM ANNUAL MEETING IN 1971*, WASH. POST, June 3, 1987, https://www.washingtonpost.com/archive/business/1987/06/03/activist-minister-took-bold-step-at-gm-annual-meeting-in-1971/2d987195-c457-4a44-8bb6-1e4d17502428/ (last visited Jun 30, 2022).
[13] DELOITTE, *supra* note 5, at 35.
[14] *Id.*
[15] *Id.* at 34.
[16] Suborn Mishra, *Racial and Ethnic Diversity on U.S. Corporate Boards—Progress Since 2020*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE, July 21, 2022, https://corpgov.law.harvard.edu/2022/07/21/racial-and-ethnic-diversity-on-u-s-corporate-boards-progress-since-2020/ (last visited Jul 22, 2022)
[17] *Id.*; *see* J. Yo-Jud Cheng, Boris Groysberg & Paul M. Healy, *Why Do Boards Have So Few Black Directors?*, HARV. BUS. REV., August 13, 2020, https://hbr.org/2020/08/why-do-boards-have-so-few-black-directors (finding that Black individuals only holding 4.1% of Russell 3000 directorships as of 2019).
[18] DELOITTE, *supra* note 5 at 24.

A confluence of events during the summer of 2020 led to increased attention on the lack of Black representation on the U.S. largest companies' boards of directors. Several high-profile killings of unarmed Black men and women at the hands of police officers and citizens who seemingly felt deputized to act as law enforcement occurred at a time when many Americans were under lockdown orders due to COVID-19 pandemic. These events culminated in massive protests across the nation as many Americans walked in solidarity over the unjustified deaths. In response to these mass movements, many corporations made their own statements of support for the protestors and their calls for justice. As the protests and media attention continued, wider conversations on economic power and attendant disparities began. Such conversations spotlighted the lack of diversity on corporate boards. In response, some companies made public commitments to add Black directors to their boards. Launched in September 2020, The Board Challenge's leadership reached out to their networks and encouraged corporate leaders to commit to adding Black directors to their boards within 12 months of their pledge. As of July 27, 2022, 26 companies had pledged to add a Black director within the 12-month timeframe. Additionally, over 40 companies presently with a Black director on their board have committed to further their efforts to accelerate change.[19] Nasdaq contributed to the effort on December 1, 2020, when it filed with the SEC an initial proposal (the "Initial Proposal") to revise its listing standards.[20] These efforts are important, because the status quo remains untenable.

B. Why This Must Change

Much ink has been spilt on the rationale for seeking diversity in the corporate arena.[21] Some have focused energy on defining and measuring the business case for diversity.[22] These parties argue that in accordance with psychological and sociological literature, groups with diverse viewpoints tend to make better decisions than their homogeneous counterparts.[23] The

[19] THE BOARD CHALLENGE, https://theboardchallenge.org/ (last visited July 27, 2022).
[20] SECURITIES AND EXCHANGE COMMISSION, Self-Regulatory Organizations; The Nasdaq Stock Market LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Board Diversity, Release No. 34-90574 (Dec. 4, 2020), File No. SR-NASDAQ-2020-081.
[21] Robin J. Ely and David A. Thomas, *Getting Serious About Diversity: Enough Already with the Business Case*, Harvard Business Review (Nov. 2020) https://hbr.org/2020/11/getting-serious-about-diversity-enough-already-with-the-business-case; Jennifer Miller, *Why Some Companies Are Saying 'Diversity and Belonging' Instead of 'Diversity and Inclusion,'* The New York Times (May 16, 2023) https://www.nytimes.com/2023/05/13/business/diversity-equity-inclusion-belonging.html.
[22] Dieter Holger, *The Business Case for More Diversity,* The Wall Street Journal (Oct. 26, 2019) https://www.wsj.com/articles/the-business-case-for-more-diversity-11572091200; Morag Lucey, *What Do Purpose, Diversity, And Inclusion Have To Do With Business? Turns Out, Quite A Lot,* Forbes (Mar 28, 2019) https://www.forbes.com/sites/forbesbusinessdevelopmentcouncil/2019/03/28/what-do-purpose-diversity-and-inclusion-have-to-do-with-business-turns-out-quite-a-lot/?sh=5cd444884cc4.
[23] L. E. Gomez & Patrick Bernet, *Diversity Improves Performance and Outcomes,* 111, J. NAT. MED. ASS'N 383, 389 (2019); Adam D. Galinsky et al., *Maximizing the Gains and Minimizing the Pains of Diversity: A Policy Perspective,* 10 PERSP. PSYCH. SCI 742, 743 (2015); Alison Reynolds & David Lewis, *Teams Solve Problems*

thinking is that diverse corporate leadership can lead companies to perform better, management to make better decisions[24] and boards to more effectively monitor management—this Article itself draws from scholarship indicating that diversity across several dimensions is connected to better monitoring.[25] In terms of empirics, the evidence is largely mixed.[26] As discussed in Part III.D, the means of collecting evidence of diversity's impact on corporate performance is complicated and different methodologies can support different results.[27]

However, others have argued that diversity in corporate management and workforces has a justice rationale that is sufficient alone.[28] I find myself in this camp normatively due to the increasing ways in which corporate actions impact a diverse collection of stakeholders. If corporate actions can lead to externalities that find their impacts meted on a diverse population, then those impacted communities deserve a greater chance of having a community member at the table. Clearly not every single community will have their voice directly present on every board, but where greater diversity is present, it becomes more likely that some proximity to a possibly impacted community may be present. Given the history of Black subordination in the U.S. and how often negative externalities are placed in proximity to Blackness, the justice case is clear.[29] It is only *just* that as the

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Faster When They're More Cognitively Diverse, HARV. BUS. REV., March 30, 2017, https://hbr.org/2017/03/teams-solve-problems-faster-when-theyre-more-cognitively-diverse; David Rock & Heidi Grant, *Why Diverse Teams are Smarter,* HARV. BUS. REV., November 4, 2017, https://hbr.org/2016/11/why-diverse-teams-are-smarter.

[24] Afra Afsharipour provides a strong example of such potential by analyzing the corporate norms pervasive in investment banking and unicorn companies in connection with low female representation in each. By reviewing WeWork's decline, numerous sexual harassment claims, and a culture of competition and risk taking encouraged by investment bankers seeking a client, Afsharipour argues that greater gender parity could foster a more inclusive, less fiscally reckless, less masculinity-contest infused, and conflict-ridden environment both for investment bankers and the companies they service. Afra Afsharipour*, Investment Bankers and Inclusive Corporate Leadership,* 46 SEATTLE U. L. REV. 221, 247-49 (2023).

[25] Fairfax, *supra* note 6, at 860; Brummer & Strine, *supra* note 8, at 34.

[26] Fairfax, *supra* note 6, at 861; *The Business Case for Diversity in the Workplace is Now Overwhelming,* World Economic Forum (2019) https://www.weforum.org/agenda/2019/04/business-case-for-diversity-in-the-workplace/; Robin J. Ely & David A. Thomas, *Getting Serious About Diversity: Enough Already with the Business Case,* HARV. BUS. REV., November 2020, https://hbr.org/2020/11/getting-serious-about-diversity-enough-already-with-the-business-case.

[27] *See*, *e.g.,* Ely & Thomas, *supra* note 21; Derek K. Oler, Jeffrey S. Harrison & Mathew R. Allen, *The Danger of Misinterpreting Short-Window Event Study Findings in Strategic Management Research: An Empirical Illustration Using Horizontal Acquisitions*, 6 Strategic Organization 151 (2008), http://journals.sagepub.com/doi/10.1177/1476127008090008; *see* discussion *infra* Part III.D.

[28] Marilyn Y. Byrd & Torrence E. Sparkman, *Reconciling the Business Case and the Social Justice Case for Diversity: A Model of Human Relations,* 21 HUM. RESOUR. DEV. REV 75, 83-86 (2022); *see* Fairfax, *supra* note 6, at 859.

[29] *See* Priya Baskaran, *Thirsty Places*, 2021 ULR 501 (2021); Deborah N. Archer, *"White Men's Roads through Black Men's Homes": Advancing Racial Equity through Highway Reconstruction*, 73 VAND. L. REV. 1259 (2020); Deborah N. Archer, *The New Housing Segregation: The Jim Crow Effects of Crime-Free Housing Ordinances*, 118 MICH. L. REV. 173 (2019); Christie L. Parris et al., *Assessments of Environmental Injustice Among Black Americans,* 8 S. SOCIO. SOC'Y 45, 57 (2021); Raina Croff et al., *Whitest City in America: A Smaller Black Community's Experience of Gentrification, Displacement, and Aging in Place,* 61 GERONTOL. 1254, 1258 (2021); Danyelle Solomon et al., *Systemic Inequality: Displacement, Exclusion, and Segregation How America's*

most successful companies and brands have their marketing efforts inspired by Black art and culture,[30] target the demographic as a market opportunity,[31] and wrestle with their own corporate histories of disadvantaging Black Americans,[32] that they also seek Black representation in their highest offices.[33] The animus behind this Article is not just my belief in the justice case for corporate diversity, but also many companies having publicly stated that they value diversity in the workplace. Taking those companies at their word makes it all the more necessary that methods of gauging their sincerity are created and supported. The Diversity Rule is such an instrument.

PART II – OF GOLDEN SKIRTS AND CORPORATE KENTE CLOTHS

Efforts to diversity corporate boards frequently run into difficulties. Along with the Diversity Rule and the other efforts cited above, many companies will certainly seek to enhance the diversity on their respective boards. In doing so, however, companies should be aware that certain traditional sources of director candidates can lead to undershooting the potential impacts greater board diversity can foster and even lead to a suboptimal board.

A. Golden Skirts

Following the implementation of various laws and regulations in Europe seeking greater gender-diversity on corporate boards, female

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Housing System Undermines Wealth Building in Communities of Color, American Progress (Aug. 7, 2019) https://www.americanprogress.org/article/systemic-inequality-displacement-exclusion-segregation/.

[30] Maha Ikram Cherid, *Ain't Got Enough Money to Pay Me Respect": Blackfishing, Cultural Appropriation, and the Commodification of Blackness,* 21 CULT. STUD. CRITICAL METHODOL. 359, 360 (20221) (citing ELLIS CASHMORE, BLACK CULTURE INDUSTRY (1997)).

[31] Jenn McMillen, *Black Brands At Retail: How Target, Ulta, Amazon And Others Rate,* Forbes (Mar. 11, 2023) https://www.forbes.com/sites/jennmcmillen/2023/03/11/black-brands-at-retail-how-target-ulta-amazon-and-others-rate/?sh=38e9a0d168b2; Michael Chui et al., *A $300 billion opportunity: Serving the emerging Black American consume,* McKinsey & Company (August 6, 2021) https://www.mckinsey.com/featured-insights/diversity-and-inclusion/a-300-billion-dollar-opportunity-serving-the-emerging-black-american-consumer.

[32] Christopher L. Foote et al., *Arbitraging a Discriminatory Labor Market: Black Workers at the Ford Motor Company, 1918–1947,* 21 J. LAB. ECON. 493, 495 (2003); Cat Davis and Dorian Warren, *Walmart Exploits Black Lives While Paying Lip Service to Black Lives Matter,* NBC News (June 18, 2020) https://www.nbcnews.com/think/opinion/walmart-exploits-black-lives-while-paying-lip-service-black-lives-ncna1231493; Jessica Guynn and Brent Schrotenboer, *Why are there still so few Black executives in America?* USA Today (Aug. 20, 2020) https://www.usatoday.com/in-depth/money/business/2020/08/20/racism-black-america-corporate-america-facebook-apple-netflix-nike-diversity/5557003002/.

[33] Concerted effort to foster greater representation on corporate boards for Black Americans can foster changes in corporate culture and action. Additionally, a growing presence of Black corporate directors could increase the networks of other Black individuals, granting them access to greater opportunities. *See* Afra Afsharipour & Matthew Jennejohn, *Gender and the Social Structure of Exclusion In U.S. Corporate Law,* 90:7 *U. CHI. L. REV.* 1819, 1827-28 (2023) (providing empirical analysis of gender representation within a network of the judges and practicing attorneys involved in the Delaware Court of Chancery and positing that the white male dominance of the network means that women and other underrepresented groups are losing out on the opportunity to actively be involved in the development of corporate law in the most relevant court systems for such law in the United States).

directors became more prevalent. In some countries, along with that increase in female directors there has also been wide discussion on whether the openings are disproportionally going to a small collection of women.[34] Norway is one such country. Following the implementation of its gender board diversity quota, discussions on a select few women dominating board appointments, the "Golden Skirts," became prevalent.[35]

As more Norwegian public limited company boards appointed female directors, an increase in the number of female directors who sat on multiple boards occurred.[36] Though Norway generally saw an increase in directors who sat on multiple boards, the growth for women was materially larger.[37] In analysis by Cathrine Seierstad and Tore Opsahl, the maximum number of board seats held by one person in Norway doubled from May 2002 to August 2009 from four to eight.[38] The analysis also observed that of directors holding seats on more than one public limited company board, through the period from May 2002 to August 2009 female directors were the key drivers in a substantial increase of such multi-board directors. These observations strongly suggest that female directors were being sourced from a more selective group. In fact, when the analysis focused on directors serving on three boards in August 2009, more than 61% of them were women—yet women made up only 39.1% of all directors in the analysis for that same period.[39]

The pattern of women often maintaining more board seats individually has been observed in countries other than Norway.[40] This disparity occurs both in countries with and without gender-quota legislation.[41] While some countries have implemented quota requirements to increase gender diversity on corporate boards, other countries have seen

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[34] *See* Alessandra Rigolini & Morten Huse, *Women and Multiple Board Memberships: Social Capital and Institutional Pressure*, 169 J. BUS. ETHICS 443 (2021) (evaluating the different impacts on board seats held for individual women under different pressures, including legal quotas). *See* also Cathrine Seierstad & Tore Opsahl, *For the few not the many? The effects of affirmative action on presence, prominence, and social capital of women directors in Norway*, 27 SCANDINAVIAN JOURNAL OF MANAGEMENT 44–54 (2011) (discussing Norway's quota regime, the presence of the "Golden Skirts," and its overall effects on the presence of directors with extraordinarily high numbers of directorships).
[35] Seierstad & Opsahl, *supra* note 34.
[36] *Id.* at 50.
[37] *Id.* at 50.
[38] *Id*.
[39] *Id.* at 51.
[40] Antoine Rebérioux & Genaël Roudaut, *The Role of Rookie Female Directors in a Post-Quota Period,* 58 IND RELAT. 423, 434 (2019) (presenting findings that among both first-time and veteran directors, women are more likely to sit on multiple SBF120 boards). Yasaman Sarabi & Matthew Smith, *Busy Female Directors: An Exploratory Analysis of the Impact of Quotas and Interest Groups*, 36 GM 368, 369 (2020), https://www.emerald.com/insight/content/doi/10.1108/GM-07-2019-0129/full/html (last visited Jul 3, 2022) (reviewing the impact of social pressures for greater gender diversity on corporate boards in the United Kingdom).
[41] *See* Sarabi & Smith, *supra* note 40, at 369 (evaluating the gender board diversity in the United Kingdom, a country without a legal gender quota); *see also* Alessandra Rigolini & Morten Huse, *Women and Multiple Board Memberships: Social Capital and Institutional Pressure*, 169 J BUS ETHICS 443, 444 (2021), http://link.springer.com/10.1007/s10551-019-04313-6 (last visited Jul 3, 2022) (looking at Italian corporate boards composition under various regimes, including a quota).

increases related to interest group pressure and values reorientations.[42] In the United States, Fortune 500 companies saw the percentage of board seats held by women grow from 15.7% in 2010 to 26.5% in 2020, and 30% in 2022, without a national gender quota.[43] The United Kingdom similarly saw the percentage of board seats held by women on UK FTSE350 companies rise from approximately 13.3% in 2010 to approximately 27.7% in 2018 pursuant to self-regulation and interest group pressure.[44] Alongside these increases in representation on corporate boards in the United States and the United Kingdom, female directors were substantially more likely to serve on multiple boards than their male counterparts.[45] Given the extra-territorial analyses across legislative and social pressures, it becomes clear that a selective pool of female directors being stretched across several directorships has gone hand-in-hand with increased gender diversity in corporate boards. Unfortunately, that same pattern appears to reveal itself in the context of Black director representation.

B. Overuse of a Select Set of Black Directors

Following a stint serving as the U.S. Ambassador to Sweden, Jerome H. Holland simultaneously served on nine prestigious corporate boards during the 1970s.[46] In a 1983 New York Times article concerning who serves on corporate boards, Mr. Holland was quoted as saying, "There are times when I felt the recruitment of minority students has not been aggressive enough and I met with the personnel people … This work is something I've been interested in for years. But when I graduated from college, the corporate world was virtually closed."[47] That same article also quoted another Black corporate director, former Federal Reserve Governor, Andrew F. Brimmer.[48] The article notes that Mr. Brimmer and Mr. Holland, each extraordinarily accomplished men, served on six and ten boards respectively. As with white women, a distinct pattern of a small group of highly accomplished Black men and women have dominated appointments

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[42] Sarabi & Smith, *supra* note 40, at 369.
[43] DELOITTE, *supra* note 5, at 18. *See* Molly Bohannon, *Fortune 500 Board Seats For Women And People Of Color Surge—But There's Still Progress Needed, Report Say,* FORBES (June 15, 2023, 12:42 PM) (reporting that board seats held by women of all races rose to 30% in 2022) https://www.forbes.com/sites/mollybohannon/2023/06/15/fortune-500-board-seats-for-women-and-people-of-color-surge-but-theres-still-progress-needed-report-says/?sh=45712dc31ea6.
[44] Sarabi & Smith, *supra* note 40, at 375 (table 2).
[45] Sarabi & Smith, *supra* note 40, at 378 (Figure 3) (showing the proportion of directors serving on three or more boards is substantially larger for female directors on UK FTSE350 boards). *See* DELOITTE, *supra* note 5, at 24.
[46] Carlos Holmes, *Story of Dr. Jerome Holland*, DELAWARE STATE UNIVERSITY (2017), https://www.desu.edu/giving/ways-give/naming-opportunities/jerome-holland-statue/story-dr-jerome-holland (last visited Jul 3, 2022).
[47] Leslie Wayne, *WHO'S PLAYING THE BOARD GAME?*, N.Y. TIMES, Oct. 9, 1983, https://www.nytimes.com/1983/10/09/business/who-s-playing-the-board-game.html (last visited Jul 3, 2022).
[48] *Id.*

to corporate boards.[49] Patterns of individual Black professionals dominating board appointments are present today. These patterns have significant downsides to overall diversity efforts, the individual professionals, and potentially to the multiple companies in which they hold board seats.

C. The Perils of Overboarding

In the selection of board directors, the prior experience of a director is important. Traditionally companies appear to have weighed prior board experience heavily.[50] This focus on board experience often translates to the selection of candidates who already hold directorships with one or more other companies. Who could find fault with the general notion that if a professional receives recommendations from the company they already serve as a director for, that they would likely be good additions to another company's board? And yet, given the increasing time requirements inherent to board service, a director serving on various corporate boards can lead to unexpected harms.[51] And thus, these historic practices must be avoided for Black representation on boards to have a chance at reaching its full potential and impact.

Boards increasingly delegate operational management to members of a corporation's executive management team and instead focus on "monitoring and evaluating the corporation's business and affairs, including economic performance, management, compliance with legal obligations and corporate policies, and risk management."[52] Though presumably monitoring a company's business and affairs takes much less time than being involved in the operations of said company, for large public companies the process of monitoring them can be time-consuming and complex. Monitoring by boards is not just a commercial evolution in how companies operate. In fact, Delaware courts have recognized a duty to monitor for directors.[53] It follows that the larger a company is, the more time monitoring its likely complex operations will take. This remains as true for Black directors, as any others.

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[49] *See* DELOITTE, *supra* note 5, at 8, 23 (finding that the rates in which women and Black individual serve on multiple boards of the Fortune 500 are higher than those of white male directors); *see also* Sara Ashley O'Brien, *He's served on 14 boards. Now he wants companies to find other Black candidates,* CNN (July 24, 2020), https://www.cnn.com/2020/07/24/tech/barry-lawson-williams-black-board-representation/index.html (last visited Jul 3, 2022).

[50] *See* SPENCER STUART, *2. Boardroom Composition*, BOARDROOM BEST PRACTICE, https://www.spencerstuart.com/research-and-insight/boardroom-best-practice-chapter-2 (last visited Jul 3, 2022).

[51] George D. Cashman, Stuart L. Gillan & Chulhee Jun, *Going overboard? On busy directors and firm value*, 36 JOURNAL OF BANKING & FINANCE 3248 (2012).

[52] A.B.A., CORPORATE DIRECTOR'S GUIDEBOOK (7th ed. 2020), The Business Lawyer, Vol. 75 (Sept. 22, 2020), 2741, 2743.

[53] Eric J. Pan, *Rethinking the Board's Duty to Monitor: A Critical Assessment of the Delaware Doctrine*, 38 FLA. St. U. L. REV. 209, 212 (2011). In describing the standard for monitoring, the Supreme Court of Delaware provided a standard requiring boards to: 1) maintain "reporting or information systems or controls"; and 2) "monitor or oversee [the] operations" of such reporting or systems. Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).

Part of a director's monitoring role will include oversight on whether a company is making proper disclosures as required by law. Disclosure is seen in the U.S. securities regime as having the upmost importance.[54] Section 2 of the Securities Act of 1934 (the "34 Act") even goes so far as to state that requiring certain disclosures involved "a national public interest."[55] There exists some evidence that a company's level of disclosures is impacted by the degree in which its directors serve across multiple boards.[56] Busy directors may find it more difficult to either implement or review the "reporting or information systems or controls" seen as necessary for effective monitoring.[57] Beyond its potential effects on disclosures, director busyness also reveals itself in how individual directors participate on the boards they service.

In most states a corporation's board may delegate various powers to committees.[58] Much of the most important work of a board of directors is housed in committees. Nasdaq generally requires its listed companies to charter audit, executive compensation, and nomination committees.[59] Though not in absolute relation, a director's level of engagement on the board can relate to their participation on these committees focusing on the financial statements, compensation of the organization's most senior managers, and selection of new directors.

A director's busyness has been found to affect their membership on board committees.[60] Increased busyness of directors has been shown to have a negative relationship with committee membership, though at the highest levels of busyness, the relationship became positive—suggesting that the reputation or expertise of highly busy directors might lend to them serving on more committees than stressors of their time commitment might suggest.[61] Particularly notable on this last point is that the study also found

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[54] *See* Sale, *supra* note 2, at 1047.
[55] Securities Exchange Act of 1934 § 2, 15 U.S.C. § 78(b) (2021); *see also* Sale, *supra* note 2, at 1048.
[56] Kavitha D., Nandagopal R. & Uma Maheswari B., *Impact of the busyness and board independence on the discretionary disclosures of Indian firms*, 61 IJLMA 250 (2019). This study analyzed disclosures from 128 listed firms in India to study the impact of director busyness on disclosures. *Id.* at 251. The study analyzed the effect of various characteristics of relevant boards including the understood busyness of the board. *Id.* A statistically significant negative correlation between the defined busyness of a board and robusticity of the related firm's disclosures was indicated. *Id.* at 259.
[57] Stone ex rel. AmSouth Bancorporation v. Ritter, 911 A.2d 362, 370 (Del. 2006).
[58] A.B.A., *supra* note 52, at 2764.
[59] NASDAQ, Rule IM-5605-3, https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series; NASDAQ, Rule IM-5605-6, https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series; NASDAQ, Rule IM-5605-7, https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series (requiring independent director oversight of new director appointments, though a committee is not technically required).
[60] Pornsit Jiraporn, Manohar Singh & Chun I. Lee, *Ineffective corporate governance: Director busyness and board committee memberships*, 33 J. BANK. FINANCE 819 (2009). The effect of director busyness on committee membership was analyzed in a sample of 1,471 firm across the years 1999 to 2003. *Id.* at 822. The study measured the number of board seats held by a director and their participation on the audit, compensation, nominating and corporate governance committees. Measured across all committees, a u-shaped correlation between director busyness and committee membership was demonstrated. *Id.* at 827.
[61] *Id.*

that minority and female directors were more likely to serve on committees and have higher levels of busyness.[62] This can indicate a desire to have diverse candidates as engaged as possible, but the results might not meet that aim.

Drilling down on specific committees the study bore interesting results. For the audit and compensation committees, a significantly negative correlation between director busyness and committee membership was demonstrated.[63] Meanwhile the same analysis for nominating and governance committees demonstrated an inverted u-shaped and a traditional u-shaped correlation, respectively.[64] Keeping in mind that Black directors consistently make up a disproportionate share of busy directors, these findings have interesting implications for how Black directors may be participating in the boards they serve on.[65]

Among S&P 500 companies, directors from underrepresented ethnic or racial groups chaired the board and committees at rates lower than their white peers.[66] Conversely, minority directors appear more likely to serve on committees generally.[67] Clearly there is a disconnect. Bias could be at play, but especially with respect to audit committees, the overrepresentation of Black directors in the cohort of directors serving on multiple boards could serve as a drag on their ability to chair time-intensive boards. Coupled with potential deleterious effects for internal board leadership opportunities for Black directors stretched across several boards, evidence suggests negative market reactions may exist concerning overboarded directors.

Conceptually, concerns of director busyness are focused on the negative impacts over-commitment will have on a director's ability to monitor and manage the companies they serve. Will the director be able to implement information gathering and reporting systems to track the activities of the company? Can the director devote the necessary time needed to understand the binders full of information available on the operations of complex organizations? Or will the director be overly reliant on the representations made by the company's management and be derelict in their own duties? These questions are clearly ones that shareholders are mindful of, but it is not exactly easy to disentangle investor sentiments on a director's outside commitments versus other factors such as experience,

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[62] *Id.* at 819, 827.
[63] *Id.* 826.
[64] Meaning that busyness had a positive relationship with membership on the nominating committee up until a certain point where that relationship then turned negative for highly-busy directors, and the likelihood of participation on the governance committee decreased up to a certain point where the relationship then became positive for increasingly busy directors. *Id.*
[65] See DELOITTE, *supra* note 5, at 24 (noting higher recycle rate of Black directors than other groups).
[66] SPENCER STUART, 2021 S&P 500 BOARD DIVERSITY SNAPSHOT 7, 9 (2021), *available at* https://www.spencerstuart.com/research-and-insight/2021-sp-500-board-diversity-snapshot (last visited July 30, 2022).
[67] Jiraporn et. al, *supra* note 60 at 819-20, 827.

deal flow and expertise. To more directly follow market reactions to perceived director attention deficits, one study analyzed share prices of publicly traded companies impacted by a death of a director or chief executive officer of a separate company with which it has an interlocked director.[68] By testing a hypothesis that a negative stock market shock would be felt by companies having interlocked boards with another company that experienced a death among its directors, a study showed director busyness as detrimental to both shareholder value and the affected board's monitoring quality.[69] Perhaps even more suggestive of a diminished capacity to monitor, audit committees had more earnings restatements and increased earnings uncertainty, while compensation committees were connected to greater increases in CEO pay during attention shocks.[70] All this strongly suggests merit to the notion that external demands on a director's time can and will lead to a diminished capacity to monitor.

The experience of exemplary candidates like Paula T. Hammond is illustrative. Ms. Hammond, the department head of the Massachusetts Institute of Technology's chemical engineering department, went unrecruited for years, and then once appointed to a public company's board, found her phone ringing constantly with new board opportunities.[71] Ms. Hammond's experience is a representative example of more than half of newly-appointed Black directors being known to the other board members of their company in comparison with the same being true only for 35% of white appointees.[72] Now consider the additional burdens for Black directors, who might be seen as the arbiters of issues involving the Black community in addition to standard board service.[73] But the appointment of overboarded corporate stars is not the only way in which companies fail to best pursue Black board diversity.

D. It Ain't All Sweet in the C-Suite

Increasingly corporate boards of directors are expected to be independent of their company's executive management. Based on a study

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[68] Antonio Falato, Dalida Kadyrzhanova & Ugur Lel, *Distracted directors: Does board busyness hurt shareholder value?*, 113 J. FIN. ECON. 404 (2014).

[69] *Id.* at 404. The study analyzed the effects of a death from an interlocked board in S&P 1500 companies during the period between 1988 and 2007.[69] Markets reacted negatively where the inter-locked company contained a director who shared a committee assignment with another company's deceased director—suggesting that investors anticipated that the committee work of the inter-locked director would increase in response to the deceased directors absence. These findings were pronounced as inter-locking increased. *Id.* at411.

[70] *Id.* at 418.

[71] Peter Eavis, *Board Diversity Increased in 2021. Some Ask What Took So Long.*, N.Y. TIMES, January 3, 2022, https://www.nytimes.com/2022/01/03/business/corporate-board-diversity.html.

[72] J. Yo-Jud Cheng et. al, *supra* note 17.

[73] *See* Nitasha Tiku, T*ech Companies Are Asking Their Black Employee Groups to Fix Silicon Valley's Race Problem — Often for Free*, Washington Post, Jun. 30, 2020, https://www.washingtonpost.com/technology/2020/06/26/black-ergs-tech/ (discussing the prevalence of companies requesting that Black employees help solve racial issues in their organizations—acting outside their actual corporate responsibilities).

using results from the Investor Responsibility Research Center from 1950 through 2005, large public company boards went from being comprised of only 20% independent directors to 75%.[74] More recently, the boards of S&P 500 companies typically comprise 85% independent directors.[75] In shifting towards boards less connected with the management of the company, investors and regulators showed an interest in boards that could more effectively, and at times skeptically, monitor upper management. However, being a member of a company's executive management is not the only relevant marker of independence.[76] Social connections and career background affinity are each a factor that appears to inform the degree in which directors show limited independence and increased deference to chief executive officers.[77]

Organizations have often looked for executive experience in their directors.[78] This focus on executives bleeds into rationales for their being a limited pool of "qualified" Black candidates given the dearth of Black individuals in the highest management positions in large public companies.[79] If decisionmakers have determined to construct narrower pipelines, they should not be surprised by the small volume of "qualified" candidates coming forth.

E. Who Built the Pipeline?

In times past, or as recent as three years ago, an often-used reason for the paucity of Black individuals in positions of authority in corporations was "that there is a very limited pool of Black talent to recruit from."[80] These sorts of comments suggest a resignation to the assumed fact that Black candidates would be hired, or appointed in our context, if only they had the requisite background. Noticeably, the background is usually left unexplained and bereft of detail. Research has even shown that dominant groups will change their conceptions of merit to the benefit of their in-group

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[74] Jeffrey N. Gordon, *The Rise of Independent Directors in the United States, 1950-2005: Of Shareholder Value and Stock Market Prices.*, 59 STAN. L. REV., 1465, 1474-5 (2007).
[75] SPENCER STUART, 2023 U.S. SPENCER STUART BOARD INDEX 8 (2023).
[76] *See* Byoung-Hyoun Hwang & Seoyoung Kim, *It pays to have friends*, 93 J. FINANCIAL ECONOMICS 138 (2009). *See also* J. Robert Brown, *The Demythification of the Board of Directors*, 52 AM. BUS. LAW J. 131 (2015).
[77] Hwang & Kim, *supra* note 76, at 149.
[78] Fairfax, *supra* note 6, at. 871.
[79] Tracy Jan, *The striking race gap in corporate America*, THE SEATTLE TIMES (Dec. 18, 2021, 1:51 AM), https://www.seattletimes.com/business/the-striking-race-gap-in-corporate-america/ (discussing a survey of the 50 most valuable U.S. companies finding only eight percent of their C-suite executives were Black).
[80] Imani Moise, Jessica DiNapoli & Ross Kerber, *Exclusive: Wells Fargo CEO ruffles feathers with comments about diverse talent*, REUTERS, September 22, 2020, https://www.reuters.com/article/us-global-race-wells-fargo-exclusive-idUSKCN26D2IU (reporting on the CEO of Wells Fargo walking back comments made in an internal company memorandum regarding the difficulty of hiring Black professionals and meeting the bank's diversity targets. This internal conversation occurred after the murder of George Floyd).

when making hiring decisions.[81] As others have noted, there are no clear legal requirements for the professional background of prospective directors.[82] In its widely consulted guide to boards and directorships, the ABA discusses the requirements of directorships as follows:

> "Boards need to be prepared to explain why each director is suitably qualified and revisit, on an annual basis, the "fit" of each nominee, in light of the corporation's strategic direction and the board's needs. It is good practice for the board to prepare and periodically update a matrix or list of the personal qualities required of individual directors (such as integrity, candor, common sense, and capacity for objective judgment), and to identify the overall mix within the board of expertise, experience, independence, and diversity that will best serve the corporation presently and in the future. Individuals asked to join a board should clearly understand the business and culture of the corporation, their fiduciary duties to the corporation and its shareholders, and their ability to express objective viewpoints, debate issues, explore and resolve disagreements, and form an appropriate consensus among board members."[83]

Having no explicit legal requirements grants companies wide discretion on who serves on their boards, and even in the ABA's guidance there is no suggestion that board service requires executive-level experience. Yet, with respect to how this schema interacts with Black appointees to large public company boards—apparently the pipeline concerns require that Black appointees be more qualified than their white peers in certain aspects.[84]

In what seems incongruous with the assumption that there is not a robust pipeline of Black talent for director positions, Black directors have been found to hold more advanced degrees on average.[85] Additionally, a study found that Black directors are more likely to serve on several boards than their white counterparts, potentially indicating a soft requirement of a stronger reputation among peers and competitors for Black appointees.[86] Even if one assumes that these discrepancies are not related to an explicit preference for white male directors over others, it does indicate some form of selection bias. Such bias can lead to boards less independent from their respective company's executive management and more prone to group think amongst one another.

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[81] *See* Kimberly Houser & Jamillah Bowman Williams, *Board Gender Diversity: A Path to Achieving Substantive Equality in the U.S.*, 63 WM. & MARY L. REV. 497, at 511 (2021); Eric Luis Uhlmann & Geoffrey L. Cohen, *Constructed Criteria: Redefining Merit to Justify Discrimination*, 16 PSYCH. SCI. 474 (2005).
[82] Fairfax, *supra* note 6. Houser & Williams, *supra* note 81, at 516.
[83] A.B.A., *supra* note 52, at 2760.
[84] *See* Cheng et. al, *supra* note 17 *see* DELOITTE, *supra* note 5 at 23.
[85] Cheng et. al, *supra* note 17.
[86] *See* DELOITTE, *supra* note 5 at 23.

Evaluating the independence of directors in Fortune 100 companies to their respective company's CEO between 1996 to 2005, a study found that even connections beyond those traditionally considered for director independence—being an executive or employee of the company, being related to an executive or receiving compensation beyond director fees from the company a director serves, among others—had significant implications for the independence of directors.[87] Considering "mutual alma mater, military service, regional origin, discipline and industry as indicat[ors]" of social ties between a director and their company's CEO, it was found that when classifying a director independent only when they shared fewer than two of such indicators in common with a CEO, majority conventionally ***and*** socially independent boards were significantly more likely to tie CEO compensation to company performance and possibly even effectuate greater CEO turnover sensitivity.[88] A connection between social independence of a board's audit committee and the CEO's bonus also appeared likely.[89] If the pipeline is limited to Black individuals who have the same indicators of social connectedness as the study above detailed, to whose benefit is that? It does not appear to be to the shareholders' benefit, and certainly not to the existing talented Black professionals not being considered for board service—of course until they are, and then they find themselves considered perhaps too often.[90] However, companies can avoid both the pipeline excuse and follies attendant to a lack of social independence on their boards by expanding their searches in a couple of tangible ways.

i. Age Diversity

The median ages of directors serving on the boards of Russell 3000, S&P MidCap 400, and S&P 500 companies in 2022 were 63, 63, and 64 respectively.[91] Whereas the average age for directors in the S&P 500 was 63.4 in 2022,[92] increasing from 2004's average of 60.5.[93] Focusing on S&P 500 boards, the variance of ages appears to be tightly bound. Directors aged 50 or younger made up only 6% of directors on S&P 500 company boards

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[87] *See* Hwang & Kim, *supra* note 76, at 139.
[88] *Id.* at 150, 155.
[89] *Id.* at 152.
[90] *See* Eavis, *supra* note 71 (describing how after Dr. Paula T. Hammond was appointed to a public company's board, she was approached by several other companies to join their boards—recognizing that she might be stretched too thin, she demurred); *see also* Rigolini & Huse, *supra* note 34.
[91] *Board Composition > Age*, THE CONFERENCE BOARD, https://conferenceboard.esgauge.org/boardpractices/dashboard/boardcomp/1/1 (last visited July 31, 2022) (online database compiling data on corporate boards).
[92] *Id.*
[93] Tricia Duryee & Kim Peterson, *Inside the boardroom: Younger voices getting a platform*, THE SEATTLE TIMES, Oct. 3, 2004, https://archive.seattletimes.com/archive/?date=20041003&slug=youngboards03 (last visited Mar 1, 2022).

in 2017.[94] U.S. Companies in particular seem to have their boards skew older, having 21% of directors in U.S. publicly traded companies being 70 or older, compared to 10% in other countries.[95] Further, from 2008 to 2019, the share of new directors under the age of 45 appointed to Russell 3000 company boards dropped from 11.5% to 7.2%.[96] For Fortune 500 companies, even a 2022 uptick of newly appointed directors being younger than 50 saw a decrease in 2023, going from 18% down to 11%.[97] A greater willingness to foster age diversity on corporate boards could help Black board representation and present related benefits to companies and shareholders.

Greater age diversity on corporate boards has been found to positively affect corporate performance.[98] Arguments for the financial benefits of various forms of diversity on corporate boards have often pointed to increases in decision-making processes, a greater ability to solve complex problems, limits on excess risk taking, and fewer financial reporting mistakes.[99] Increasing the pipeline for Black directors by more frequently considering younger candidates could bring with it benefits from multiple angles of diversity of thought and experience. In consideration of the problems related to directors serving on multiple boards, it is noteworthy that a study found younger directors significantly less likely to serve on multiple boards than their older colleagues.[100] There is some evidence that jettisoning a rigid conception of the appropriate age for directors has been beneficial to the increase of female representation on public company boards.[101] So too could it be for increasing Black board representation.

Companies can benefit from the perspective of younger directors, as demographic changes affect markets for companies. As of July 1, 2019, Millennials overtook the Baby Boomer generation as the U.S.'s largest

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[94] PWC, BOARD COMPOSITION: CONSIDER THE VALUE OF YOUNGER DIRECTORS ON YOUR BOARD PWC'S CENSUS OF DIRECTORS 50 AND UNDER 2 (2018), *available at* https://www.pwc.dk/da/publikationer/2018/pwc-census-of-younger-directors-consider-the-value-for-your-board.pdf (last visited July 31, 2022).
[95] *Id.*
[96] KOSMAS PAPADOPOULOS, ISS ANALYTICS, U.S. Board Diversity Trends 2019 7 (2019), https://www.issgovernance.com/file/publications/ISS_US-Board-Diversity-Trends-2019.pdf.
[97] SPENCER STUART, 2023 U.S. SPENCER STUART BOARD INDEX 5 (2023).
[98] Idoya Ferrero-Ferrero, M. Ángeles Fernández-Izquierdo & M. Jesús Muñoz-Torres, *Age Diversity: An Empirical Study in the Board of Directors*, 46 CYBERNETICS AND SYSTEMS 249 (2015) (analyzing the effect on financial performance from age diversity on the boards of a sample of companies in France, Germany, and the United Kingdom).
[99] *See* Sunitha Malepati, *The Future (Public Company Boardroom) Is Female: From California SB 826 to a Gender Diversity Listing Standar*d, 28 AM. U. J. GENDER SOC. POL'Y & L. 493, 521-22 (2020) (surveying clinical research and scholarly commentary on the effects of diversity in thinking and solving complex problems); Karren Lee-Hwei Khaw, Jing Liao, David Tripe & Udomsak Wongchoti, *Gender diversity, state control, and corporate risk-taking: Evidence from China*, 39 PACIFIC-BASIN FINANCE JOURNAL 141, 157 (2016); DELOITTE, *supra* note 5, at 32 (referencing findings of decreased financial reporting mistakes from boards with greater gender diversity).
[100] *See* PWC, *supra* note 94, at 15.
[101] *See* PWC, *supra* note 94, at 7.

generation.[102] This means that for many public companies, a large proportion of their customers and clients will be much younger than the average age of their directors at 63. Younger directors might be better situated to have a closer sense of this key demographic, whether by being closer in age to the generation or being Millennials themselves.[103] Gucci, for example, saw an increase in sales, that its senior executive credited in part to the creation of an advisory board of Millennials that senior management consulted with.[104] One could imagine younger Black directors as more closely adjacent to Millennials and younger generations that are increasingly diverse and where individuals self-identifying as being Black or multi-racial are a larger share of such generations than in older cohorts.[105]

ii. Other Professionals

As of June 2023, only eight Black individuals were then CEOs of Fortune 500 companies.[106] Additionally, since Fortune began compiling the Fortune 500 list in 1955, Black CEOs have only made up approximately 1% of Fortune 500 CEOs.[107] This limited representation goes beyond CEO positions, however. A recent study of Fortune 100 companies found that Black men and women made up only 1% of chief financial officers and 3% of other executive positions with profit and loss responsibility. [108] Each of these positions are the likeliest to have opportunities for ascension to CEO or board of director positions.[109] Harkening back to this Part's discussion regarding the "pipeline problem," these statistics do not paint an optimistic picture for more Black professionals being groomed for corporate directorships.

[102] Richard Fry, *Millennials overtake Baby Boomers as America's largest generation*, PEW RESEARCH CENTER (April 28, 2020), https://www.pewresearch.org/fact-tank/2020/04/28/millennials-overtake-baby-boomers-as-americas-largest-generation/ (last visited July 31, 2022).
[103] Talal Rafi, *Council Post: Why Having Young People On Corporate Boards Is A Game-Changer,* FORBES (June 10, 2020, 7:30 AM), https://www.forbes.com/sites/forbesbusinesscouncil/2020/06/10/why-having-young-people-on-corporate-boards-is-a-game-changer/ (last visited July 31, 2022).
[104] *Id.*
[105] William H. Frey, *Diversity defines the millennial generation*, BROOKINGS (June 28, 2016), https://www.brookings.edu/blog/the-avenue/2016/06/28/diversity-defines-the-millennial-generation/ (last visited July 31, 2022).

[106] Paige McGlauflin, *Meet the record 8 Black CEOs leading Fortune 500 companies*, FORTUNE, https://fortune.com/2023/06/05/black-ceos-fortune-500-record-high-2023/ (last visited Aug 3, 2023).

[107] *Id.*
[108] David F. Larcker & Brian Tayan, *Diversity in the C-Suite: The Dismal State of Diversity Among Fortune 100 Senior Executives*, ROCK CENTER FOR CORPORATE GOVERNANCE AT STANFORD UNIVERSITY CLOSER LOOK SERIES: TOPICS, ISSUES AND CONTROVERSIES IN CORPORATE GOVERNANCE NO. CGRP-82, at 2 (Apr. 1, 2020), a*vailable at* https://ssrn.com/abstract=3587498.
[109] *Id*.

In spite of historical biases towards executive experience,[110] a study by Equilar found that from 2014 through 2017 the number of newly appointed directors with CEO experience decreased within a group of 500 large public companies.[111] This trend may be in connection with growing awareness of the academic literature involving impacts to executive compensation and monitoring by directors with CEO-experience.[112] Recalling the previously referenced study on social independence, directors having CEO-experience, whether active CEOs or retired, might be less socially independent and thus correlated with increased executive compensation, and both executive compensation and executive turnover being less related to corporate performance.[113] Without a doubt, directorships require a degree of financial acumen to interpret financial results and understand board materials; however, other areas of expertise inform the operations that lead to such results. In short, boards can find value in greater professional diversity among their ranks.

Within Fortune 100 executive positions, Black professionals saw their greatest levels of representation in sales, human resources, marketing, and legal roles.[114] Each of these professional backgrounds could provide valuable perspective to boards. Take for instance the potential for a director with a professional background as a lawyer; such experience could add to the board's ability to appropriately monitor regulatory disclosures, litigation risks, and complex contracts.[115] Importantly, companies appear ready to do so, as record numbers lawyers have received board appointments recently.[116] And as with openness to greater age diversity, professional experience diversity could provide opportunities for professionals more knowledgeable about the consumer marketplaces through the inclusion of sales and marketing professionals. By avoiding pipeline excuses in the recruitment of Black candidates, companies can also increase the monitoring capacity of their board.

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[110] *See* Chang Liu & Donna L. Paul, *A New Perspective on Director Busyness*, 38 THE JOURNAL OF FINANCIAL RESEARCH 193, 194 (2015), https://onlinelibrary.wiley.com/doi/10.1111/jfir.12058 (last visited July 5, 2022); *see also* Fairfax, *supra* note 6; Brown *supra* note 76, at 151.
[111] EQUILAR, BOARD COMPOSITION AND DIRECTOR RECRUITING TRENDS 48 (Dan Marcec et. al eds. 2017).
[112] *See* Fairfax, *supra* note 6, at 881.
[113] *See* Brown, *supra* note 76, at 150-52.
[114] Larker & Tayan, *supra* note 108, at 17.
[115] *See* Lubomir P. Litov, Simone M. Sepe & Charles K. Whitehead, *Lawyers and Fools: Lawyer-Directors in Public Corporations*, 102 GEO. L.J. 413 (2013) (discussing findings that firms with lawyers as directors have positive financial results).
[116] Brian Baxter, *It's the 'Golden Age' for Lawyers Seeking Corporate Board Seats*, BLOOMBERG LAW, https://news.bloomberglaw.com/business-and-practice/its-the-golden-age-for-lawyers-seeking-corporate-board-seats (last visited Aug 3, 2023).

PART III – THE NASDAQ RULE

On August 6, 2021 the SEC approved an amendment to Nasdaq's listing requirements.[117] When Nasdaq introduced its initial proposal to amend its listing requirements for greater disclosure on board diversity, Nasdaq expressed its belief "that heightened focus on corporate board diversity by companies, investors, corporate governance organizations, and legislators demonstrates that investor confidence is enhanced when boardrooms are comprised of more than one demographic group," and noted the "recent calls from SEC commissioners and investors for companies to provide more transparency regarding board diversity."[118] In its December 1, 2020 press release regarding the Initial Proposal, Nasdaq expressed the Diversity Rule's goal as "provid[ing] stakeholders with a better understanding of the company's current board composition and enhance investor confidence that all listed companies are considering diversity in the context of selecting directors, either by including at least two diverse directors on their boards or by explaining their rationale for not meeting that objective."[119] The Diversity Rule has two key components: 1) requiring a matrix of board composition demographics ("Board Diversity Matrix"); and 2) requiring companies reach certain diversity objectives or explain why they have not. As a sign of its seriousness towards the Diversity Rule, as of July 31, 2022 Nasdaq has offered complimentary access to services including Equilar's BoardEdge Platform and Equilar Diversity Network, Athena Alliance's community of women leaders and theBoardlist's premium talent marketplace to companies listed with Nasdaq.[120] In addition to the above mentioned external resources, the Diversity Rule endeavors to provide ample time for companies of various size and geographical footprint to transition into compliance with the Diversity Rule's standards.

A. Description of the Listing Rule

The Diversity Rule primarily requires companies to: (1) either have or explain why it fails to have (A) at least one director who self-identifies as a female, and (B) at least one director who self-identifies as Black or African American, Hispanic or Latinx, Asian, Native American or Alaska

[117] *See* Securities Exchange Act Release No. 34-92590 (August 6, 2021) (order approving SR-NASDAQ-2020-081 and SR-NASDAQ-2020-082).
[118] SEC, *supra* note 20, at 3-4.
[119] *Nasdaq to Advance Diversity through New Proposed Listing Requirements*, NASDAQ, December 1, 2020, https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01.
[120] *Reference Library Search – Nasdaq Listing Center*, NASDAQ, https://listingcenter.nasdaq.com/Material_Search.aspx?mcd=LQ&cid=157&sub_cid=&years=2020&criteria=1&materials (last visited July 29, 2022).

Native, Native Hawaiian or Pacific Island, two or more races or ethnicities, or as LGBTQ+; and (2) provide statistical information on the self-identified gender, race, and self-identification as LGBTQ+ of directors on a company's board of directors in a standardized format.[121] Each of these requirements are subject to certain exemptions and grace periods. A description of each substantive revisions follows below.

i. Diverse Board Representation (Rule 5605(f))

Nasdaq outlines their diversity objectives for listed companies in a subsection (f) to Rule 5605. Rule 5605(f) sets forth definitions of diversity based on analogous definitions in the U.S. Labor Law context.[122] The new subsection defines a "Diverse" individual as "an individual who self-identifies in one or more of the following categories: Female, Underrepresented Minority or LGBTQ+."[123] For purposes of Rule 5605(f), "Female" is defined as "an individual who self-identifies her gender as a woman, without regard to the individual's designated sex at birth."[124] The rule identifies "LGBTQ+" as "an individual who self-identifies as any of the following: lesbian, gay, bisexual, transgender, or as a member of the queer community."[125] "Underrepresented Minority" is defined as "an individual who self-identifies as one or more of the following: Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander, or Two or More Races or Ethnicities," and "Two or More Races or Ethnicities" as "person who identifies with more than one of the following categories: White (not of Hispanic or Latinx origin), Black or African American, Hispanic or Latinx, Asian, Native American or Alaska Native, Native Hawaiian or Pacific Islander."[126] Under the Diversity Rule companies are required to at least have or explain their failure to have at least one director self-identifying as a member of an Underrepresented Minority or LGBTQ+ and one director self-identifying as Female.

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[121] NASDAQ, Rule 5605(f) (Diverse Board Representation), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series. NASDAQ, Rule 5606 (Board Diversity Disclosure), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series. Note that certain companies are exempted from each of these requirements pursuant to Rule 5605(f)(4) exempting special acquisition companies, limited partnership, and issuers of non-voting preferred securities, among others.

[122] *See* OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, U.S. DEP'T OF LABOR, *Scheduling Letter and Itemized Listing Frequently Asked Questions*, https://www.dol.gov/agencies/ofccp/faqs/scheduling-letters#Q17 (last visited on July 30, 2022).

[123] NASDAQ, Rule 5605(f), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series.

[124] NASDAQ, Rule 5605(f), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series.

[125] NASDAQ, Rule 5605(f)(1), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series.

[126] NASDAQ, Rule 5605(f), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series.

ii. Alternative Board Diversity Disclosure and Phase-In Periods

A company may satisfy the requirements of Rule 5605(f)(2) by explaining why they have failed to meet the diversity objectives applicable to them.[127] This disclosure must specify the diversity objectives applicable and then explain why those objectives were not met.[128] In describing this variation to the diversity objectives outlined in Rule 5605(f)(2), Nasdaq explained that the objectives coupled with the option to explain a deficiency indicates a disclosure based framework in lieu of a mandate.[129]

Complimenting the flexibility Rule 5605(f)(3) provides, Rule 5605(f)(7) provides various phase-in periods to ease companies into compliance with the objectives and disclosure requirements. Currently most companies listed by Nasdaq must either have or explain the absence of at least one Diverse director on its respective board of directors. The two Diverse director objective springs in 2025 or 2026 depending on which tier of the Nasdaq stock market a company is classified in. Additionally, large and mid-cap newly listed companies are required by approximately one year from their date of listing to have or explain the absence of at least one Diverse director and will have until roughly two years from their initial listing to have or explain the absence of at least two Diverse directors. Meanwhile, certain smaller-cap companies will have roughly two years from their listing to meet their obligations under Rule 5605(f)(2). These phase-in periods assume in each case that such companies were not already subject to substantially similar diversity objectives and disclosure requirements by another national securities exchange.[130]

The Diversity Rule further provides various accommodations that ease burdens on companies under many circumstances. Companies who fall out of compliance with the Diversity Rule due to a new vacancy on their board are granted approximately a one-year grace period from the vacancy to regain compliance.[131] Finally, Nasdaq's accommodations even go as far as to provide a 180-day cure period for companies who are not in compliance with the Diversity Rule for reasons unrelated to a board vacancy.[132] It is clear that Nasdaq endeavored to provide a plethora of means to aid companies in their compliance with the Diversity Rule, both in terms of transition time, avenues to correct non-compliance, and variations that are mindful of specific challenges certain companies may face. Many of these accommodations are in response to public comments received during the notice and comment period for the Initial Proposal. As demonstrated by

[127] NASDAQ, Rule 5605(f)(3), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series.
[128] *Id.*
[129] *See* SEC, *supra* note 20, at 24.
[130] NASDAQ, Rule 5605(f)(5)(A), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series.
[131] NASDAQ, Rule 5605(f)(2)(D), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series.
[132] NASDAQ, Rule 5605(f)(6)(A), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series. NASDAQ, Rule 5810(c)(3)(F), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5800-series.

the phase-in and cure periods described above, Nasdaq went to great lengths to accommodate concerns raised regarding various difficulties companies may face in meeting the objectives due to their size, jurisdiction, size of their board, or events leading to vacancies on their boards.[133] The predominately positive public reception to the Diversity Rule suggests that companies can expect a supportive environment for their efforts to meet the objectives of the Diversity Rule.[134] Part of that positive reception may emanate from Nasdaq eschewing more aggressive means of promoting board diversity used in other countries.

B. Other Responses by U.S. Securities Exchanges and Regulators

Nasdaq is not alone in responding to social pressures for increased diversity on corporate boards. The SEC began requiring public companies to disclose whether or not they considered diversity when reviewing candidates for their boards in 2010.[135] Then, the SEC took additional steps to encourage the disclosure of diversity details about board candidates.[136] And though no public steps to this effect have been taken yet, Comm. Allison Herren Lee has indicated that the SEC could consider new "amendments to Regulation S-K [that would] require disclosure of workforce diversity data at all levels of seniority" as far back as 2020.[137] More recently, SEC Chair Gary Gensler has indicated that the staff and commissioners at the SEC are actively considering changes to human capital disclosure requirements.[138]

In contrast, the New York Stock Exchange ("NYSE"), the world's largest securities exchange, has opted for a reliance on the market and providing assistance for discovering diverse talent.[139] As of May 2022, with

[133] As this article is focused on the implications of the Diversity Rule on Black board diversity, it does not tackle suggestions to expand the scope of the definition of "Diverse," however, several comments make compelling cases for the inclusion of disabilities. *See* Letter from Nicholas Lawson, *Proposed Rule Change SR-NASDAQ-2020-081*, (January 15, 2021), available at https://www.sec.gov/comments/sr-nasdaq-2020-081/srnasdaq2020081-8259889-227946.pdf (arguing for inclusion of disability as a category for diversity considerations). *See* Letter from Kelly Buckland, Exec. Dir., National Council on Independent Living, *SR#-NASDAQ-2020-081*, (March 9, 2021) (arguing that disability statistics should also be reported on in board demographic disclosures as a requirement of the Diversity Rule).

[134] *But see* Jesse M. Fried, *Will Nasdaq's Diversity Rules Harm Investors?*, SSRN Journal (2021), https://www.ssrn.com/abstract=3812642 (last visited Jul 22, 2022) (arguing that Nasdaq failed to engage with empirical research demonstrating that diversity may lead to decreases in share prices, but instead chose to cite sources from consultants and other less rigorous, non-academic sources).

[135] *See* SECURITIES AND EXCHANGE COMMISSION, *Proxy Disclosure Enhancements*, Rel. No. 33-9089 (Dec. 16, 2009), available at https://www.sec.gov/rules/final/2009/33-9089.pdf (last visited Jul 12, 2022).

[136] *See* Allison Herren Lee, Commissioner, Sec. and Exch. Comm'n, Diversity Matters, Disclosure Works, and the SEC Can Do More: Remarks at the Council of Institutional Investors Fall 2020 Conference (Sept. 22, 2020), https://www.sec.gov/news/speech/lee-cii-2020-conference-20200922 (last visited Jul 12, 2022).

[137] *Id.*

[138] SEC.gov | A Mission for Inclusion: In Conversation with Gary Gensler, https://www.sec.gov/sec-stories/mission-inclusion-conversation-gary-gensler#bubble-7 (last visited Jul 22, 2022).

[139] *See* Elizabeth King, NYSE Board Advisory Council, *The Importance of the NYSE's Market-Driven Approach to Board Diversity*, NYSE Board Advisory Council (June 16, 2022), https://www.nyse.com/boardadvisory/the-importance-of-the-nyse-s-market-driven-approach-to-board-diversity (last visited Jul 12, 2022) ("As an exchange

approximately $25.2 trillion in listed company market cap compared to approximately $19.1 for Nasdaq, NYSE is materially larger.[140] Given the disparity in size, one could reasonably be concerned that Nasdaq's Diversity Rule might have a diminished impact. However, the fact that over 3,700 public companies are listed with Nasdaq[141] compared to around 2,400 for NYSE,[142] means the Diversity Rule might well be more wide-reaching than NYSE's "market-based" approach. Nasdaq has increasingly been home to more newly-listed companies, beating out other exchanges for 33 quarters in a row as of April 12, 2022.[143] In addition to dominance with respect to numbers of existing listed companies and new listings, Nasdaq leads in sectors increasingly important to global markets—technology, consumer goods, and healthcare.[144] The Diversity Rule's application to industries most cognizably present in the lives of Americans, will only make it that much more effective in driving results. Also, the salience of these industries to everyday life, means that a company's success or failure meeting the Diversity Rule's objectives will be of great interests for investors, activists, and individuals plugged into culture and business news through social media.

C. ...And What About Quotas?

Countries besides the US have worked to foster corporate boards more closely reflecting their populations.[145] Unlike the Diversity Rule, many of these efforts are in the form of explicit quotas for greater representation of female directors.[146] Laws in several western European countries are particularly notable. Given the aspersions and exaggerated sense of prevalence the word "quota" engenders in the US, the means in which several Western European countries enforce quotas for gender

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operator with an abiding belief in the power of free markets, the NYSE is quite proud of our market-driven approach to board diversity.").

[140] Largest stock exchange operators by market cap 2022, STATISTA, https://www.statista.com/statistics/270126/largest-stock-exchange-operators-by-market-capitalization-of-listed-companies/ (last visited Jul 12, 2022).

[141] Kat Tretina, *An Introduction To The Nasdaq Stock Exchange*, FORBES ADVISOR (Aug. 12, 2021), https://www.forbes.com/advisor/investing/nasdaq-stock-exchange/ (last visited Jul 12, 2022).

[142] STATISTA, *supra* note 140.

[143] MARKETINSITE, *Nasdaq Leads Listing in First Quarter of 2022, Welcoming 70 Companies*, NASDAQ.COM (April 12, 2022), https://www.nasdaq.com/articles/nasdaq-leads-listings-in-first-quarter-of-2022-welcoming-70-companies (last visited Jul 12, 2022).

[144] *Id.*

[145] INST. SHAREHOLDER SERVS., INC., Gender Parity on Boards Around the World, HARV. L. SCH. F. CORP. GOVERNANCE & FIN. REG. (Jan. 5, 2017), https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/ (noting that Belgium, France, Germany, India, Italy, Netherlands, and Norway all have explicit legal requirements for gender diversity on certain corporate boards) (last visited Jul 1, 2022).

[146] *See* Norwegian Public Limited Liability Companies Act, § 6-1 la (Act No. 45/June 13, 1997) (Nor.). *See* Loi 2011- 103 du 27 janvier 2011 relative a representation equilibree des femees et des hommes au sein des conseils d'administration et de surveillance et a l' egalite professionnelle [Law 2011-103 of January 27, 2011 on Equal Representation of Women and Men on Corporate Boards and on Equality in the Workplace], JOURNAL OFFICIEL DE LA REPUBLIQUE FRANQAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], *Jan. 28, 2011, at 1680.*

representation may come as a surprise to some.[147] Methods employed by countries include exclusion from government contracts, limitations on public subsidies, fines, forcing companies to leave board seats vacant if they are unable to fill them with female candidates, and even dissolution.[148] One result of these policies has been a stark increase in female representation on corporate boards.[149] Additionally, the literature supports other positive benefits attendant to greater female representation.[150]

Female board representation has greatly increased across many countries since Norway fully implemented its gender quota reform in 2008 and other nations followed suit.[151] Norway saw representation of women on the boards of public limited liability companies rise from 5% in 2000 to 44% in 2020.[152] Even more starkly, as the 2008 compulsory dissolution for failure to reach the 40% gender quota loomed, Norway saw the median percent of female representation on public limited liability companies rise from 0% in 2003 to 40% in 2008.[153] As nations applied quota approaches, from 2005 through 2015, the largest publicly listed companies in the European Union saw female board representation increase from 10% to 22%.[154] France, for example, passed a law in 2011 requiring publicly listed and certain non-listed companies to have boards where women and men each separately represent at least 40% of directors or risk sanction by either having new non-compliant board appointments nullified or being unable to

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[147] THE EDITORIAL BOARD, Opinion, *The Woke Nasdaq*, W.S.J., December 1, 2020, https://www.wsj.com/articles/the-woke-nasdaq-11606865986 (last visited Jul 2, 2022).

[148] Melanie M. Hughes, Pamela Paxton & Mona Lena Krook, *Gender Quotas for Legislatures and Corporate Boards*, 43 ANNU. REV. SOCIOL. 331, 334 (2017).

[149] *See* SPENCER STUART, DIVERSITY: 2022 NORDIC SPENCER STUART BOARD INDEX, https://www.spencerstuart.com/research-and-insight/nordic-board-index/diversity (showing that the number of women on the boards of public LLC companies has risen to 45% in 2022).

[150] *See* Nadia Loukil, Ouidad Yousfi & Raissa Wend-kuuni Yerbanga, *Does gender diversity on boards reduce information asymmetry problems? Empirical evidence from the French market*, 10 JFBM 144, 158 (2019), https://www.emerald.com/insight/content/doi/10.1108/JFBM-02-2019-0007/full/html (last visited Jul 2, 2022) (finding that the presence of female independent directors was positively correlated to greater transparency for investors). *See* Md Aslam Mia*, Do women on boards affect employee benefits? Evidence from the global microfinance industry*, 210 ECONOMICS LETTERS 1, 4 (2022), https://linkinghub.elsevier.com/retrieve/pii/S0165176521004481 (last visited Jul 2, 2022) (finding that higher numbers of female directors was positively correlated to greater employee benefits across a survey of microfinance organizations).

[151] *See Ten years on from Norway's quota for women on corporate boards*, ECONOMIST (Feb. 17, 2018), https://www.economist.com/business/2018/02/17/ten-years-on-from-norways-quota-for-women-on-corporate-boards; *See also* Jennifer Rankin, *EU agrees 'landmark' 40% quota for women on corporate boards*, THE GUARDIAN (June 7, 2022), https://www.theguardian.com/business/2022/jun/07/eu-agrees-landmark-40-quota-for-women-on-corporate-boards (the European Union has even recently agreed to apply such a quota to companies across its members nations).

[152] Marianne Bertrand, Sandra E. Black, Sissel Jensen & Adriana Lleras-Muney, *Breaking the Glass Ceiling? The Effect of Board Quotas on Female Labour Market Outcomes in Norway*, 86 THE REV. OF ECON. STUD. 191, 192; INST. SHAREHOLDER SERVS., *supra* note 145.

[153] Bertrand et al., *supra* note 152.

[154] DAVID BARBIERI ET. AL., EUR. INST. FOR GENDER EQUALITY, GENDER EQUALITY INDEX 2017 – MEASURING GENDER EQUALITY IN THE EUROPEAN UNION 2005-2015 47 (Dr. Jane Pillinger ed., 2017).

compensate their directors while in noncompliance.[155] Notably, the European Institute for Gender Equality found that from 2010 to 2020, France saw the proportion of female directors on the largest publicly listed companies rise from 12% to 45%.[156] Clearly quotas can move the needle rapidly.

Despite not having a broadly imposed gender quota in the United States, from 2008 to 2019 companies in the Russell 3000 saw the proportion of female directors rise from 9% to 28%;[157] and as of the third quarter of 2022, a calculated 28.2% of Russell 3000 board directors were female. [158] Far from the remarkable increases fostered in Norway, France, and others, but progress, nonetheless. Yet, it should be noted that both Norway and France have consistently maintained a proportion of female board representation higher than their respective laws require continuing a rapid move towards parity. Conversely in the U.S. it was recently calculated that at the current pace of growth in female director board representation on Russell 3000 companies, gender parity likely will not be reached until 2031.[159]

Domestically, California Senate Bill 826 was signed into law in 2018, requiring publicly traded companies that were either domestic Californian entities or maintained their principal headquarters in the state to have a set minimum number of female identifying directors on their boards by certain dates.[160] In 2020 and on the heels of S.B. 826's implementation, California enacted Assembly Bill 979.[161] Where S.B. 826 required minimum female representation on applicable corporate boards, A.B. 979 does the same for underrepresented communities.[162] Unsurprisingly, each of

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[155] Aline Poncelet & Talya Hutchison, PAUL HASTINGS LLP, *France*, in BREAKING THE GLASS CEILING: WOMEN IN THE BOARDROOM (5th ed. 2018), https://sites.paulhastings.com/Microsites/genderparity/countries/france.html#page=1 (last visited July 30, 2022).

[156] Eur. Inst. for Gender Equality, *France*, GENDER EQUALITY INDEX (2020), https://eige.europa.eu/gender-equality-index/2020/country/FR https://eige.europa.eu/sites/default/files/documents/mh0216049enn.pdf (last visited July 30, 2022).

[157] PAPADOPOULOS, *supra* note 96, at 4; 50/50 Women on Boards, *50/50 Women on Boards Reveals Fourth Quarter 2022 Gender Diversity Index™ Key Findings Show Percentage of Women Joining Boards Continued to Slip Below 2019 Numbers*, CISION PR NEWS WIRE (Feb. 16, 2023) https://www.prnewswire.com/news-releases/5050-women-on-boards-reveals-fourth-quarter-2022-gender-diversity-index-key-findings-show-percentage-of-women-joining-boards-continued-to-slip-below-2019-numbers-301748229.html (noting that as of Dec. 31, 2022 women hold 28.4% of Russell 3000 company seats).

[158] Amit Batish, *Q3 2022 Equilar Gender Diversity Index,* EQUILAR (Dec. 5, 2022) https://www.equilar.com/reports/97-q3-2022-equilar-gender-diversity-index (showing that as of the third quarter of 2022, a calculated 28.2% of Russell 3000 board directors were female).

[159] Amit Batish, *Q4 2022 Equilar Gender Diversity Index*, EQUILAR (Mar. 3, 2023) https://www.equilar.com/reports/98-q4-2022-equilar-gender-diversity-index (stating that at the current pace of growth in female director board representation on Russell 3000 companies, gender parity likely is expected to be achieved by 2031).

[160] S.B.826, Reg. Sess. (Cal. 2018); Cal Corp Code § 301.3; Cal Corp Code § 2115.5.

[161] A.B. 979, Reg. Sess. (Cal. 2020).

[162] Cal Corp Code § 301.3; Cal Corp Code § 301.4; Cal Corp Code § 2115.6. "Underrepresented community" is defined as "an individual who self-identifies as Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender." Cal Corp Code § 301.4(e)(1).

these quota-based laws were quickly challenged and as of June 1, 2022 have separately been ruled as unconstitutional and in violation of the Equal Protection Clause of California's Constitution.[163]

Nasdaq considered the merits of a mandate-based regime for increasing board diversity.[164] Per Nasdaq, however, in conversations with various stakeholder through the rule development process, a mandate would be received as more controversial than a disclosure-based regime.[165] Additionally, in the U.S. a quota-based regime would likely be more vulnerable to equal protection clause challenges.[166] It warrants pointing out that prior to the French law requiring gender-quotas for corporate boards[167] passing, France amended its constitution to limit constitutional challenges to such legislative initiatives.[168] Barring an unlikely constitutional amendment in the veto-point riddled constitution amendment process in the US and stated industry discomfort with quotas, Nasdaq opted to lean into the rich U.S. history of disclosure based regulatory regimes.[169] As covered in a later section, Nasdaq eschewing a quota-based framework should not mean that the Diversity Rule will fail to foster greater board diversity.

D. A Quota by Another Name, or "What if board diversity hurts shareholders?"

Some criticisms of legal interventions for board diversity that employ quotas have been levied against the Diversity Rule.[170] While taking pains to not explicitly state that board diversity may be detrimental to

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[163] *See* Crest v. Padilla, No. 20-STCV-37513 (LA Super. Ct., Apr. 1, 2022) (holding that A.B. 979 violated the Equal Protection Clause of the California Constitution). *See also* Crest v. Padilla, No. 19-STCV-27561 (LA Super. Ct., May 13, 2022) (holding that S.B. 826 violated the Equal Protection Clause of the California Constitution). The states of Washington and Illinois have similar legislation, but in each case have opted for a "comply or explain why" formulation like the Diversity Rule. *See* Wash. Rev. Code Ann. § 23B.08.120 (LexisNexis, Lexis Advance through 2022 Regular Session). *See also* 2019 Bill Text IL H.B. 3394.

[164] The Nasdaq Stock Market LLC, SR-Nasdaq-2020-081 (Form 19b-4) 166-7 (Dec. 1, 2020), https://listingcenter.nasdaq.com/assets/rulebook/nasdaq/filings/SR-NASDAQ-2020-081.pdf.

[165] *Id.* at 166.

[166] Grutter v. Bollinger, 539 U.S. 306, 335 (2003) (holding that a race conscious admissions program cannot survive strict scrutiny if it employs a quota); *see* USCS Const. Amend. 14 § 1.

[167] Loi 2011-103 du 27 janvier 2011 relative a la representation equilibree des femmes et des horn- mes au sein des conseils d'administration et de surveillance et a l'egalite professionnelle (1), Journal Officiel de la Republique Fram;aise [Official Gazette of France] LJ.O.). January 27. 2011, at 1680 (Fr.).

[168] Loi constitutionnelle 2008-724 du 23 juillet 2008 de modernisation des institutions de la Ve Rdpublique, art. 1. J.O.. July 24, 2008, at 11890 (Fr.).

[169] The Constitution of the Fifth Republic in France may be amended following a proposal by France's President on advice of the Prime Minster or members of the parliament, and then passed by both houses of parliament followed by ratification by referendum. *See Constitutional History of France*, CONSTITUTIONNET, https://constitutionnet.org/country/france (last visited Jul 3, 2022). Contrast this with the requirements of constitutional amendments in the U.S. A U.S. constitutional amendment requires that either two-thirds of both bodies of Congress propose an amendment or two thirds of the states call for a convention for the proposal of such amendments. Following a congressional proposal or constitutional convention, an amendment requires ratification by three-fourths of the states. *See* USCS Const. Art. V.

[170] *See e.g.,* Fried, *supra* note 134, at 1; C. Boyden Gray & Jonathan Berry, *Opinion | Nasdaq's Boardroom Diversity Push Isn't Evidence-Based*, WALL ST. J., Apr. 29, 2021, https://www.wsj.com/articles/nasdaqs-boardroom-diversity-push-isnt-evidence-based-11619735694.

corporate performance, these critiques and related studies largely view legal requirements for diversity as imposing undue costs to corporations and as a result, shareholders.[171] While aiming to critique the diversity initiatives under the business rationale put forward by California for S.B. 826 and by Nasdaq for the Diversity Rule, however, these critiques unknowingly elevate the broader societal rationale and stakeholderism.

In critiques of the Diversity Rule, critics have focused on select research suggesting that gender diverse boards may have a negative impact on firm performance.[172] While criticizing the Diversity Rule generally, they often accuse Nasdaq of not engaging with the literature providing evidence of negative impacts from diverse corporate boards.[173] However, these critiques often draw from a small universe of studies and make assumptions about investors and corporate managers that teeter between the naïve and negligent.

Much of the critical literature focused on the impacts of S.B. 826 uses immediate market reactions to the enactment of the bill.[174] These market reactions certainly give a sense of how the market thinks S.B. 826, and broadly other diversity seeking legal measures, will impact affected companies. But in considering such reactions, relevant studies assume rationality in those responses and discount possibilities of bias.[175] For example, Hwang et. al argue that evidence supports that negative market reactions are related to "board gender quotas resulting in mismatched director-firm skills."[176] Others suggest that if exclusion of women from corporate boards had a cost, the markets would have clearly already corrected for this.[177] These conclusions are problematic on several dimensions.

Firstly, in the American context biases across gender and racial lines have been enduring at all levels of society since the nation's founding.[178]

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[171] *See* Daniel Greene, Vincent J. Intintoli & Kathleen M. Kahle, *Do board gender quotas affect firm value? Evidence from California Senate Bill No. 826*, 60 JOURNAL OF CORPORATE FINANCE 101526, at 2 (2020), https://linkinghub.elsevier.com/retrieve/pii/S092911991930375X (last visited Jul 26, 2022). Sunwoo Hwang, Anil Shivdasani & Elena Simintzi, *Mandating Women on Boards: Evidence from the United States*, SSRN JOURNAL (2018), 18-19, https://www.ssrn.com/abstract=3265783 (last visited Jul 26, 2022). *But see* Felix von Meyerinck, Alexandra Niessen-Ruenzi, Markus Schmid & Steven Davidoff Solomon, *As California Goes, So Goes the Nation? Board Gender Quotas and the Legislation of Non-Economic Values,* (Working Paper, Oct. 1, 2020), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3303798 (last visited Jul 26, 2022) (indicating that negative shareholder reactions to S.B. 826 may have more to do with a sense that other government interventions empowering other stakeholders at the burden of shareholders are likely).

[172] Fried*, supra* note 134, at 1; Gray, *supra* note 170.

[173] *Id.*

[174] Greene et. al, *supra* note 171, at 2; Hwang et. al, *supra* note 171, at 6; Meyerinck, *supra* note 171, at 3.

[175] *See* Greene et. al, *supra* note 171, at 4; Hwang et. al, *supra* note 171, at 5.

[176] Hwang et. al, *supra* note 171, at 5.

[177] Greene et. al, *supra* note 171, at 4.

[178] Chattel slavery endured for nearly a century from the U.S.'s founding through emancipation. Following Plessy v. Ferguson blessing the legality of "separate but equal," it took nearly 60 years before the ruling was overturned through Brown v. Board of Education, and desegregation efforts continue into the present. Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Board of Education of Topeka, 347 U.S. 483 (1954); Camila Domonoske, *After*

Are we to assume that such bias survived for so long without corporate intervention because it was in fact rationale all along? I would imagine not. Secondly, one of the studies suggesting a negative impact to performance from S.B. 826 noted that such negative impacts increase within industries considered less friendly to women and in firms with lower existing female representation.[179] While each paper suggests that the market considers such factors as increasing the difficulty for a firm in finding a "qualified" female director,[180] it is important to consider that the market is in fact pricing in a firm's or industry's inability to source female directors because of its respective gender bias. Finally, noting the imposition of moderate costs on corporations is not persuasive in the face of societal harms such as gender or racial bias. Reflexively terminating such interventions because of costs considerations would be akin to questioning the government's ability to sanction factory dumping in waterways because factories would "incur costs that can outweigh the benefits of increased"[181] environmental protections to said factories.

Critiques of the sort described above assume that Milton Friedman was right about corporate purpose. Increasingly, it is clear that many investors disagree. As will be discussed in Part IV, Millennials and key institutional investors are aligned with the view that corporations are in fact incorporated to represent the interests of parties in addition to shareholders. This stakeholderism—as opposed to shareholderism—better explains the limited corporate pushback to statutory efforts to increase board diversity. In fear of assuming bias, such critiques and studies continually assume too much—they assume market rationality, shareholder primacy, and skills mismatches. Nasdaq appears to understand this and has proceeded accordingly with the Diversity Rule. Perhaps because as one prominent scholar notes, even if current research does not "support a business case for [board diversity, it] does not make a case against [it] either…. When discussing policies that promote [diversity] in business, it is better to focus on potential benefits to society that go far beyond narrow measures of firm profitability."[182]

PART IV – THE POWER OF MILLENNIAL INVESTORS

50-Year Legal Struggle, Mississippi School District Ordered To Desegregate, NPR (May 17, 2016), https://www.npr.org/sections/thetwo-way/2016/05/17/478389720/after-50-year-legal-struggle-mississippi-school-district-ordered-to-desegregate (last visited Jul 27, 2022). Finally, women could legally be barred from having a credit card without a male guarantor until 1974. The Equal Credit Opportunity Act, 15 U.S.C. 1691 *et seq*.

[179] Hwang et. al, *supra* note 171, at 8.

[180] *See* Hwang et. al, *supra* note 171, at 5; Greene et. al, *supra* note 171, at 11.

[181] *See* Hwang et. al, *supra* note 171, at 32.

[182] Daniel Ferreira, *Board Diversity: Should We Trust Research to Inform Policy?*, 23 CORPORATE GOVERNANCE: AN INTERNATIONAL REVIEW 108, 110 (2015), https://onlinelibrary.wiley.com/doi/10.1111/corg.

Millennials, those born between the years 1981 and 1996, represent approximately 22% of the US population.[183] Large institutional investors such as Vanguard have bluntly noted that Millennials are increasingly important to their businesses.[184] By some estimates, upwards of $68 trillion in wealth could be transferred from prior generations to Millennials.[185] In response, many investment advisors have begun to create investment products directly targeting Millennial investors.[186] These products are often not just focused on investment strategies cognizant of retirement timing and financial goals for Millennials, but are marketed as considering environmental, social and governance ("ESG") factors.[187] Entangled with this interest for ESG investment products by Millennials is a greater interest in racial justice and a revaluation of the purpose of corporations. As noted by the CEO of BlackRock, Larry Fink, "[t]he sentiments of these generations will drive not only their decisions as employees but also as investors, with the world undergoing the largest transfer of wealth in history: $24 trillion from baby boomers to Millennials."[188] The most powerful investors are taking note and aligning themselves with these Millennial notions.

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[183] U.S. CENSUS BUREAU, *Quick Facts*, CENSUS.GOV, https://www.census.gov/quickfacts/fact/table/US/PST045221 (last accessed on July 31, 2022). *See* Fry*, supra* note 102.

[184] *See* Michal Barzuza, Quinn Curtis & David H. Webber, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. CAL. L. REV. 1243, 1246-49 (2020) (arguing that competition between index funds for Millennial investors is occurring with respect to ESG considerations as index funds largely do not compete on returns given that they are reflections of the market broadly and have limited ability to further compete on already low fees); Larry Fink, *Larry Fink's 2019 Letter to CEOs: Profit & Purpose*, BLACKROCK (2019), https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter.

[185] Andrew Osterland, *What the coming $68 trillion Great Wealth Transfer means for financial advisors*, CNBC (Oct. 21, 2019, 9:01 AM) (citing Cerulli Associates estimate of coming wealth transfer between generations), https://www.cnbc.com/2019/10/21/what-the-68-trillion-great-wealth-transfer-means-for-advisors.html. Jack Kelly, *The Great Wealth Transfer From Baby Boomers To Millennials Will Impact The Job Market And Economy,* FORBES (Aug. 9, 2023) (estimating that millennial children will inherit more than $68 trillion, making them the richest generation in American history).

[186] *From Investing To Budgeting, How Millennials Are Disrupting Personal Finance*, CB Insights Research (Dec. 1, 2021), https://www.cbinsights.com/research/millennials-personal-finance/. *See* Cary Martin Shelby, *Profiting From Our Pain: Privileged Access to Social Impact Investing*, 109 CALIF. L. REV. 1261, 1270) ("Commentators have found that millennial investors have largely driven this growth [in social impact investing] as they tend to favor investments that are tied to a social benefit. According to Mark Haefele, global chief investment officer for the wealth management division at UBS, '[millennials] are extremely interested in sustainable investing, and 85 per cent of millennials are very interested in impact investing.'" (quoting from Owen Walker, Impact Investors Shoot for Clearer Goals, FIN. TIMES (Sept. 19, 2018), https://www.ft.com/content/fc7964f2-7474-11e8-bab2-43bd4ae655dd [https://perma.cc/CY28-FZ9S)).

[187] *See e.g.,* Alicia Adamczyk, *Millennials spurred growth in sustainable investing for years. Now, all generations are interested in ESG options*, CNBC (May 21, 2021, 9:00 AM), https://www.cnbc.com/2021/05/21/millennials-spurred-growth-in-esg-investing-now-all-ages-are-on-board.html (referencing a survey that found approximately 33% of Millennials often or exclusively used investments taking ESG factors into account); ETF TRENDS, *Millennials Are a Driving Factor in the Growth behind ESG Investments*, NASDAQ (May 25, 2021, 11:39 AM), https://www.nasdaq.com/articles/millennials-are-a-driving-factor-in-the-growth-behind-esg-investments-2021-05-25 (discussing growth in funds including ESG factors in their offerings).

[188] Fink, *supra* note 184.

A. Corporate Purpose and Fiduciary Duties

In far too many corners it is taken as gospel that a corporation's purpose is to "maximize shareholder value."[189] Coupled with the creed that "greed is good," the principal of maximizing shareholder value and self-interested shareholders and corporate insiders created gilded towers of dogma little concerned with any fallout created from aggregated self-interested actions. Proponents of this view often point to Dodge v. Ford Motor Co. assuming that Ford lost the case for running the business in a way that did not maximize investment returns for the company's shareholders.[190] However, Lynn Stout argues persuasively that this is a misunderstanding of the ruling in the case.[191] Instead of an authoritative ruling on the corporate purpose, Dodge v. Ford is better understood as a ruling concerning the duties majority shareholders hold to minority shareholders.[192] It must be noted that additionally the court in Dodge v. Ford states that a corporation may not conduct its business primarily for the benefit of others with only an *incidental* benefit to shareholders, this does not state to what degree benefits of others can be considered or to what extent the shareholders must be considered.[193] Others point to the outsized influence of economist Milton Friedman on conventional wisdom regarding corporate purpose.[194] In a 1970 piece for the New York Times, Friedman shared his view of corporate social responsibility bluntly, calling it "a "fundamentally subversive doctrine."[195] To Friedman "there [was] one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception [or] fraud."[196] Wherever the dogma originated, the view that corporations should merely be ran for the purely economic benefit of shareholders has been unquestionably dominant—but things have begun to change.

Several developments in business and corporate law have seemingly kicked open the door on the collective imagination for what corporate

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[189] *See* Scott Tong, *How shareholders jumped to first in line for profits*, MARKETPLACE (Apr. 25, 2022), https://www.marketplace.org/2022/04/25/how-shareholders-jumped-to-first-in-line-for-profits-rerun/ (article that accompanied related radio broadcasts, noting that "[i]n one study of S&P 500 companies, the share of profits going to stockholders has increased from 50% in the early '80s to 86% in 2013. That leaves a shrinking pool of money to invest in businesses themselves.").

[190] Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 164 (2008); Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 772-73 (2005).

[191] Stout, *supra* note 190, at 167.

[192] *Id.* at 168.

[193] See Dodge v. Ford Motor Co., 204 Mich. 459, 507 (1919).

[194] Brummer & Strine, *supra* note 8, at 4.

[195] Milton Friedman, *A Friedman doctrine-- The Social Responsibility Of Business Is to Increase Its Profits*, N.Y. TIMES, September 13, 1970, https://www.nytimes.com/1970/09/13/archives/a-friedman-doctrine-the-social-responsibility-of-business-is-to.html.

[196] *Id.*

purpose is or should be. ESG has become a host unto itself, inspiring investment strategies, marketing pushes, corporate policies, and even formal disclosure requirements.[197] Outside of the mentioned disclosure requirements, many aspects of the ESG ecosystem act to foster "soft law" requirements on corporate purposes. As investors, reporters, potential employees, and regulators note how companies are evaluated by professionals making ESG recommendations and scores, any company's management is likely pushed to at least consider how actions, even those that would clearly increase shareholder value, might affect perceptions of the company with respect to ESG.

Recalling this article's earlier discussion of the duty to monitor, Delaware corporate law recognizes other important duties.[198] The Delaware Supreme Court proclaimed that "fiduciary duty does not operate intermittently but is the constant compass by which all director actions for the corporation … must be guided."[199] Key among these duties are the duties of loyalty and care. The duty of loyalty requires that corporate directors and officers avoid self-dealing, meaning placing their economic interests above those of the corporations they serve.[200] In principle the duty of loyalty in corporate law seeks to balance enforcing corporate directors and officers to act in the best interest of the corporations they serve while not so aggressively enforcing the duty that fear of liability limits such managers' ability to take risks that appreciated by shareholders.[201]

Following the duty of loyalty, is the duty of care. This duty actually gives rise to the aforementioned duty to monitor that featured prominently in this article's discussion on Overboarding and board diversity.[202] Informed decision-making is the principal requisite to the duty of care in corporate law.[203] To satisfy the duty of care there should be a "good faith

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[197] *See* Sean Collins & Tania Lynn Taylor, *Ingraining sustainability in the next era of ESG investing*, DELOITTE INSIGHTS (Apr. 5, 2022), https://www2.deloitte.com/us/en/insights/industry/financial-services/esg-investing-and-sustainability.html. However, there has been a political backlash to ESG and DEI efforts. Some state governments are barring investment managers with ESG and DEI initiatives from managing large state pension funds. *See* Jessica Guynn, *Florida, DeSantis Yank Billions in Investments from "woke" BlackRock over ESG Investing*, USA TODAY, https://www.usatoday.com/story/money/2022/12/01/florida-desantis-blackrock-esg-woke/10812382002/. Additionally, some prominent capitalists like Elon Musk have publicly attacked ESG and DEI efforts. Though as Mark Cuban points out on Mr. Musk's platform, X (formerly known as twitter), even companies that Mr. Musk hold leadership and sizeable equity in, such as Tesla and Space X, report heavily (and positively) on their ESG and DEI efforts. Until Mr. Musk's online clash with Mr. Cuban that Tesla's 10-K filings spoke highly of its diversity. *See* Ramishah Maruf, *Tesla Erases References to DEI from Its New 10-K Following Elon Musk's Criticisms | CNN Business*, CNN (2024), https://www.cnn.com/2024/02/01/business/tesla-dei-elon-musk/index.html.

[198] *Infra* Part II.C.

[199] Julian Velasco, *Fiduciary Principles in Corporate Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 61 (Evan J. Criddle, Paul B. Miller, Robert H. Sitkoff eds. 2019) (quoting the court in Malone v. Brincat, 722 A.2d 5, 10 (Del. 1998)).

[200] *Id.* at 66-68; *see* Brummer & Strine, *supra* note 8, at 67.

[201] Velasco, *supra* note 199, at 68.

[202] *See* In re Caremark Int'l, 698 A.2d 959, 969 (Del. Ch. 1996).

[203] Velasco, *supra* note 199, at 69.

effort to be informed and exercise judgment."[204] Of course the "business judgment rule" gives broad discretion to corporate managers in that decision-making, because it "presumes directors act in compliance with their fiduciary duties when making business decisions, and courts will not second-guess those decisions or insert themselves into business operations unless shown otherwise. This necessarily places the initial burden of proof on the plaintiff, who, in order to survive a motion to dismiss, must rebut the presumption of the business judgment rule by showing the conduct or decision at issue was made in "bad faith."[205] Where systems of monitoring are completely absent, corporate managers are hard-pressed to demonstrate good faith efforts and risk being grossly negligent in their service.[206] Given Nasdaq's listing standard and the prevalence of ESG, how might these duties impact how directors should consider Black representation on corporate boards?

The Diversity Rule requires companies listed with Nasdaq to either meet diversity objectives or disclose why they have not.[207] Additionally, companies will be required to disclose demographic information for their respective board.[208] This article has discussed the various reasons why Black representation is not only important, but also outlined ways that such representation can increase board effectiveness. Also, given the resources Nasdaq makes available and the specious reasoning behind notions that there are not qualified Black candidates available being laid bare, there is a significant chance that failures to meet the Diversity Rule's objectives will be laden with excuses. I find such prospects offensive for two key reasons:1) good faith efforts to comply with relevant law are instrumental to satisfying a director's duties of loyalty and care; and 2) the grossly negligent standard of review and the business judgment rule allow directors great latitude to pursue corporate diversity goals.

"Delaware corporate law explicitly identifies legal compliance as a core feature of the duty of loyalty."[209] Such compliance regimes help to ensure that directors act in the interest of the corporations they serve. Directors serving on the boards of Nasdaq-listed companies would also need to make good faith efforts to comply with the Diversity Rule. The duty of care and its progeny, the duty to monitor, would take that compliance

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[204] *Caremark* at 968.
[205] Carliss Chatman & Tammi Etheridge, *Federalizing Caremark*, 70 UCLA L. Rev. 908, 946-47 (2023).
[206] *See* Velasco, *supra* note 199, at 70. *See also* Chatman & Etheridge, *supra* note 205 at 947-8 (noting that the standard for bad faith is "(1) [failure] to implement monitoring systems in contravention of their duty of care or regulatory requirements, or (2) [an] evidenced a "conscious disregard for one's responsibilities" by "non-compliance with applicable legal standards" because they failed to use the monitoring systems in place.").
[207] *Infra* Part III.A.
[208] NASDAQ, Rule 5606 (Board Diversity Disclosure), https://listingcenter.nasdaq.com/rulebook/nasdaq/rules/nasdaq-5600-series
[209] Brummer & Strine, *supra* note 8, at 81.

requirement further to include a need that when disclosures are made with respect to the Diversity Rule, systems are in place to monitor and affirm the veracity of the underlying facts attendant to such disclosure. In 2020 several plaintiffs even filed claims against companies for their disclosure regarding their commitment to diversity in light of lackluster results.[210] For directors, this should raise the salience of compliance with the Diversity Rule and any other diversity commitments made by a corporation. In fact, some scholars also argue that the duty of loyalty should be expanded in some situations to require consideration of equality factors from the standpoint of long-term stewardship.[211]

While recognizing that fiduciary duties call on corporate managers to seriously monitor their corporation's legal compliance requirements and internal diversity goals, the business judgment rule's judicial deference to corporate decision makers should give comfort to those corporate managers pursuing greater Black corporate board representation. The business judgment rule and the grossly negligent standard of review for claims involving potential breaches of the duty of care mean that directors who pursue such efforts need not be fearful of mixed empirical evidence of short-term share price appreciation.[212] Though such arguments might be compelling to some decision makers, it is worth reiterating that many corporations have explicitly disclosed their commitments to diversity both as a matter of justice and for economic reasons. A rational belief that the evidence suggesting short-term share price appreciation related to more diverse boards is persuasive would leap over the bar necessary to insulate directors from successful claims that they have breached their fiduciary duties.[213] Further, those same directors can then draw to the rational belief that reputational effects from achieving goals made with respect to Black board diversity as a matter of justice minded representation will benefit the corporation and shareholders in the long term.[214] Black directors could bring beneficial market insights born from their cultural identity, professional background or potential youth; additionally they have the potential to make a company more attractive to other hotly pursued Black talent, granting a competitive advantage in recruiting and increasing diversity throughout an organization. However, perhaps the clearest rationale for why directors can be confident in the legal unassailability of

[210] Brummer & Strine, *supra* note 8, at 84.
[211] Alon-Beck, Agmon-Gonnen & Rosenblum, *supra* note 6, at 500.
[212] "[The business judgment rule] is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984). *See* Brummer & Strine, *supra* note 8, at 81.
[213] *See* Brummer & Strine, *supra* note 8, at 78.
[214] *See* Kishanthi Parella*, Reputational Regulation*, Duke Law Journal 907, 931 (2018) (describing the impacts that reputational harms can have on a company and how such harms may elicit changes in behavior).

their efforts to increase Black corporate board diversity are these—Millennials are demanding it and the largest index fund managers are listening. And as it pertains to their interest in diversity, those demands appear primed to remain for years to come.

B. The Conventional Wisdom of Generations Ageing into Conservatism Is Neither Wise nor True

With so much staked on the Millennials' interest in diversity and views of corporate purpose that contemplate social impact, hopes for lasting impact rest on those views not waning. When it comes to the social passions of youth, many know the various forms of the axiom, "If you're not a liberal when you're young, you have no heart. If you're not a conservative when you're old, you have no brain."[215] In the views of many, the generational divide in voting patterns in U.S. politics and views on social issues are informed by the maturity or security of individuals.[216] If true, hopes that Millennials becoming more prominently engaged in finance and business would lead to their social views impacting these arenas, might be naïve. However, this conventional wisdom has little empirical support—making it no wisdom at all.

Many factors go into an individual's political affiliation and social stances.[217] Of these factors, the two most important for considering changing views for a generation are what have been called the "age effect" and the "cohort effect."[218] The age effect describes how the age of individuals within a generation might impact their views at discrete points in time—think how an early 20-year old's views might be impacted differently from that same individual when they are 55-years old, as their life circumstances change.[219] Cohort effects consider how the events and broad circumstances present during a generation's formative years may provide lasting impacts on the collective views of the group.[220] Across issues, the cohort effect appears to dominate, with the age effect producing minor changes in self-identification of ideology with time.[221]

In a review of the predominant theoretical models of age effects on ideology, it was noted that the political scientists have largely found that

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[215] Various versions of this quote are attributed to different people.

[216] *See* Johnathan C. Peterson, Kevin B. Smith & John R. Hibbing, *Do People Really Become More Conservative as They Age?*, 82 The Journal of Politics 600 (2020), https://www.journals.uchicago.edu/doi/10.1086/706889 (last visited Aug 3, 2023); Tanner Stening, *Are Millennials Getting More Conservative as They Age? Why It's Hard to Know*, Northeastern Global News (2023), https://news.northeastern.edu/2023/01/25/millenials-age-conservative/ (last visited Aug 3, 2023).

[217] *See* Paul Allen Beck & M. Kent Jennings, Family Traditions, *Political Periods, and the Development of Partisan Orientations*, 53 THE JOURNAL OF POLITICS 742 (1991).

[218] Abigail Geiger, *The Whys and Hows of Generations Research*, Pew Research Center - U.S. Politics & Policy (Sep. 3, 2015), https://www.pewresearch.org/politics/2015/09/03/the-whys-and-hows-of-generations-research/ (last visited Aug 3, 2023).

[219] *See Id*.

[220] *See Id*.

[221] Peterson *et al.*, *supra* note 216 at 609.

political attitudes remain stable throughout an individual's life.[222] However, though stability tends to be the road most taken, there is evidence that people are more likely to change their self-identification in a conservative direction than liberal one over time.[223] But it's important to recognize that in contrast to self-identification, when specific issue positions are tracked, they largely stay static and appear much more under the sway of cohort effects than age.[224] This is imminently important when engaging with skepticism concerning the commitments to diversity that Millennials have expressed.

According to Pew 62% of Millennials believe that Blacks are treated less fairly than whites.[225] When compared to Baby Boomers, Millennials are more likely to state that the primary impediment to Black progress is discrimination by a 16-point margin.[226] Part of this disparity could be explained by the greater racial diversity within the Millennial cohort when compared to prior generations. And yet, when looking solely at white individuals, half of white Millennials still affirm this belief in contrast with only 35% of Gen Xers.[227] If conventional wisdom were allowed to dictate how we view such results, we might not expect this to be all that meaningful for the Nasdaq rule and other diversity efforts. However, as explained above, not only are political identifications predominately static, issue positions are especially likely to remain more stable.[228] And it's important to remember what events are likely informing Millennials notions around justice for Black Americans: a rise in white supremacist rhetoric, the wide broadcasting of acts of violence against Black individuals, and political broadsides against the teaching of civil rights history. These are formative events, and to think that they will have little lasting impact is pessimistic at a minimum.

C. As Retail Investors or Through Their Institutional Investor Proxies, Millennials Have Dollars and A Voice

Millennial Investors have several avenues available to them for exerting pressure. As a basic principle in corporate law, ultimate authority for corporations resides with shareholders, who generally may vote on the board of directors, make shareholder proposals, and—in the ultimate

[222] Peterson *et al.*, *supra* note 216 at 602.
[223] Peterson *et al.*, *supra* note 216, at 607.
[224] Peterson *et al.*, *supra* note 216, at 608.
[225] Travis Mitchell, *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, Pew Research Center's Social & Demographic Trends Project (Jan. 17, 2019), https://www.pewresearch.org/social-trends/2019/01/17/generation-z-looks-a-lot-like-millennials-on-key-social-and-political-issues/ (last visited Aug 3, 2023).
[226] *The Generation Gap in American Politics*, Pew Research Center - U.S. Politics & Policy (Mar. 1, 2018), https://www.pewresearch.org/politics/2018/03/01/the-generation-gap-in-american-politics/ (last visited Aug 3, 2023).
[227] *Id.*
[228] Peterson *et al.*, *supra* note 216, at 608.

expression of disapproval—vote with their feet by divesting from the corporation's stock.[229] This section discusses the ways that Millennials are demonstrating influence as retail investors, through institutional investors competing for Millennial clients, and by a combination of both mechanisms through shareholder proposals (which are increasingly seeing support from major institutional investors).[230]

i. Retail Investors - Millennials and Technology, From Meme Stocks to Diversity Watches

As Jill E. Fisch in *GameStop and the Resurgence of the Retail Investor* and Sergio Alberto Grammito Ricci and Christina M. Sautter in an invited response argue, mobile applications like Robinhood have coincided with a reemergence of retail investors.[231] Ricci and Sautter further argue in *Corporate Governance Gaming: The Collective Power of Retail Investors* that new technologies, social media and gaming dynamics will result in retail investors reengaging with corporate governance.[232] Two key aspects of this cocktail of factors are 1) technology and social media increasing the accessibility of information and 2) the social views of younger generations of investors.[233] Those social views, technology, and social media can provide a platform for Millennials and Gen Z to react to the disclosures borne from the Diversity Rule. Together with the Diversity Rule, Millennial and Gen Z "[r]etail investors [can be] the Trojan Horse that brings diversity into corporate governance."[234]

A FINRA Foundation and NORC at the University of Chicago study found that 66% of newly opened non-retirement investment accounts in 2020 were opened by individuals who previously had no taxable investment accounts.[235] Of these new accountholders, 17% were African American and 62% were below the age of 45.[236] Notably, the demographics of these new investors mirror the greater diversity found in the Millennials and Gen Z, cutting against arguments that investors are less likely to consider diversity

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[229] OECD, G20/OECD Principles of Corporate Governance 18-19 (2015), https://www.oecd-ilibrary.org/governance/g20-oecd-principles-of-corporate-governance-2015_9789264236882-en (last visited Jan 27, 2024).

[230] VANGUARD, INVESTMENT STEWARDSHIP 2021 ANNUAL REPORT 32 (2021); *But See* Adediran, *supra* note 10, at 362 (discussing the regulatory restraints on shareholder proposals and the prevention of "micromanagement" by shareholders).

[231] Jill E. Fisch, *GameStop and the Resurgence of the Retail Investor*, 102 B.U.L. Rev. 1799 (2022). Sergio Alberto Gramitto Ricci & Christina M. Sautter, *The Corporate Forum*, 102 B.U.L. Rev. 1861 (2022).

[232] Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Collective Power of Retail Investors*, 22 Nev. L.J. 51, 87 (2021).

[233] *Id.*

[234] Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Harnessing the Collective Power of Retail Investors*, A RESEARCH AGENDA FOR CORPORATE LAW, 14 (Christopher Bruner & Marc Moore eds., 2023), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4359210_code538190.pdf?abstractid=4147388&mirid=1&type=2.

[235] Olivia Valdes, *et al*, *Investing 2020: New Accounts and the People Who Opened Them*, FINRA Investor Education Foundation and NORC 2 (2021), https://www.finrafoundation.org/sites/finrafoundation/files/investing-2020-new-accounts-and-the-people-who-opened-them_1_0.pdf.; Ricci & Sautter, *supra* note 234, at 2-3.

[236] FINRA, *supra* note 235, at 3; Grammito Ricci & Sautter, *supra* note 234 at 3.

in their activities because they are likely to be demonstrably whiter than their overall generational cohort.[237] Importantly, of these new accountholders, many are what Ricci and Sautter dub "wireless investors," defined as retail investors that invest primarily through apps while using social media to find investment information.[238]

Though these wireless investors seek their investment information from social media instead of (or in addition to) traditional sources such as SEC filings and investment analyst reports, they, like the large investors discussed elsewhere in this article, seek engagement with their portfolio companies.[239] Wireless investors are seeking company engagement on social media platforms and discussion forums like reddit.[240] On these platforms they are also building investor communities, and galvanizing around common causes.[241] This sort of coordinated action isn't typical for retail investors.[242] Perhaps these investor communities could even be engaged with one another on the diversity efforts of their portfolio companies?

Here, recall that the Diversity Rule provides investors and the broader public with two additional pieces of information about Nasdaq-listed companies—whether they met the Diversity Rule's objectives and the self-reported demographics of their boards. This article has spent more time focused on the objectives and related disclosure of the Diversity Rule, but the aforementioned Board Diversity Matrix presents an opportunity for technology and social media to take a standardized disclosure form and make it broadly accessible to the masses. Done correctly, this information can increase the salience of corporate performance on diversity and activate wireless investors to pressure their portfolio companies through the type of coordinated action mentioned above.

Owners of greater than 5% of the outstanding stock of a publicly traded company are required to make filings with the SEC regarding their ownership.[243] These filings, either 13D filings or 13G are intended to provide the market information on potential control changes.[244] In a past life, I was actually responsible for making such filings at a prior employer. What I noticed was that I would often receive inquiries about my firm's

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[237] *See* FINRA, *supra* note 235.
[238] Grammito Ricci & Sautter, *supra* note 234, at 3.
[239] *See* Grammito Ricci & Sautter, *supra* note 234 at 3.
[240] *See* Grammito Ricci & Sautter, *supra* note 232.
[241] *See* Grammito Ricci & Sautter, *supra* note 232.
[242] *See* Kobi Kastiel & Yaron Nili, *In search of the absent shareholders: A new solution to retail investors' apathy*, 41 DELWARE JOURNAL OF CORPORATE LAW 55, 60-2 (2016).
[243] 17 CFR § 240.13d-1 - Filing of Schedules 13D and 13G. It should be noted that the SEC recently hastened the filing deadline for Schedules 13D and 13G. Securities and Exchange Commission, Modernization of Beneficial Ownership Reporting, Release Nos. 33-11253; 34-98704 (Oct. 10, 2023), File No. S7-06-22, 10-11.
[244] *See* Gary Gensler, *Statement on Final Rules Regarding Beneficial Ownership*, Securities and Exchange Commission (Oct. 10, 2023), https://www.sec.gov/news/statement/gensler-statement-final-rules-regarding-beneficial-ownership-231010.

investment intentions from financial reporters very soon after filing. I came to realize that these inquiries were largely automated, and that real-time, automated updates on the filings were available to interested parties.[245] The Diversity Rule's standardized Board Diversity Matrix seems like ripe fodder for similar automated reporting. Imagine automated reports triggered from filings with Board Diversity Matrices for companies with the greatest salience to the public.[246] These reports could be posted through social media platforms, where they could drive discussion and engagement, perhaps even finding their way to wireless investor fora found on platforms like reddit. Done correctly, the reach of the Diversity Rule could spotlight the real power of wireless investors and younger generation's emerging views of corporate purpose and value placed on corporate diversity.[247]

ii. The Big Three and Millennials Dollars

An OECD report on the ownership of the 10,000 largest publicly listed companies globally found that in the United States, institutional investors made up 72% of equity ownership in such companies.[248] Another report focusing on US-listed companies solely, showed that from 1999 to 2019, the percent of the S&P 500 owned by institutional investors grew from roughly 55% to more than 80%.[249] From the period between 2000 and 2017, three of the largest institutional investors, BlackRock, Vanguard and State Street (increasingly known as the "Big Three"), saw their share of the S&P 500 rise from roughly a combined 6% to 21% .[250] This growth in holdings for institutional investors is important to understand as they have each publicly noted the need for greater diversity.[251] Harkening back to our

[245] For example, law firms offer these services to clients interested in being immediately informed of new, large investors in their company. *See* Squire, Sanders & Dempsey L.L.P., Corporate Alert (Nov. 2010), https://www.squirepattonboggs.com/en/insights/publications/2010/11/corporate-alert (an example from Squire Patton Boggs' predecessor firm offering such services in 2010).

[246] These companies are typically consumer companies. These consumer companies have a particular draw for wireless investors. *See* Ricci & Sautter, *supra* note 234, at 8.

[247] As a continuing part of this article's project, I am working with a software engineer to create an API that will follow marquee companies listed with Nasdaq and automate reporting of their board diversity efforts.

[248] A. DE LA CRUZ, A. MEDINA & Y. TANG, OWNERS OF THE WORLD'S LISTED COMPANIES, OECD CAPITAL MARKET SERIES, PARIS 11 (2019).

[249] MATTHEW BACKUS, CHRISTOPHER CONLON & MICHAEL SINKINSON, THE COMMON OWNERSHIP HYPOTHESIS: THEORY AND EVIDENCE 11 (January 2019), *available at* https://www.brookings.edu/research/the-common-ownership-hypothesis-theory-and-explanation/.

[250] *Id.* at 15; *see* Benjamin Braun, *Asset Manager Capitalism as a Corporate Governance Regime*, *in* AMERICAN POLITICAL ECONOMY: POLITICS, MARKETS, AND POWER 270, 271 (Jacob S. Hacker et. al eds. 2021).

[251] *See Diversity, equity and inclusion*, BLACKROCK, https://www.blackrock.com/corporate/about-us/diversity-equity-and-inclusion (last visited July 12, 2022) ("We all just want to be respected – to be treated with dignity; listened to; and heard. Once you understand that, you realize how simple it is to reach out and make connections. So as we face a daunting set of global challenges, we have to face them not as adversaries, but as fellow human beings." Larry Fink, CEO of BlackRock). *See Inclusion and Diversity* | Values | STATE STREET CORPORATION, http://www.statestreet.com/content/ssbsr/en_US/values/inclusion-diversity.html (last visited July 12, 2022) ("Guided by our values and culture traits, we are fostering an environment that inspires, empowers, and supports employees at every level reinforcing our commitment to creating a vibrant workplace with different perspectives and innovative ideas."). *See Diversity, equity, and inclusion*, VANGUARD, https://corporate.vanguard.com/content/corporatesite/us/en/corp/who-we-are/we-care-about/diversity-equity-inclusion.html (last visited July 12, 2022) ("Not only are we focused on improving DEI in our workplace, but we

earlier discussion, BlackRock's CEO, Larry Fink, recently explained and extolled the virtue of "stakeholder capitalism" to the CEOs of BlackRock's portfolio companies.[252] Urging the importance of broader recognition of stakeholders and not just a singular focus on shareholders, Fink argued:

> "Stakeholder capitalism is not about politics. It is not a social or ideological agenda. It is not "woke." It is capitalism, driven by mutually beneficial relationships between you and the employees, customers, suppliers, and communities your company relies on to prosper. This is the power of capitalism."[253]

Fink's plea seems as close as one could expect from an executive whose success is based on economic returns to support of ESG considerations and a full embrace of a stewardship relationship for institutional investors.[254] However, there is ample evidence that the managers of traditionally passive index funds have taken steps to encourage their portfolio companies to respond to ESG and specifically to the lack of diversity on corporate boards.

In 2017 State Street announced that it objected to all-male boards for its index fund portfolio companies, voting against 400 of the 476 firms that failed to have any female directors.[255] Merely two years later, the final company in the S&P 500 with an all-male board added a woman.[256] Following State Street's actions, BlackRock upped the ante and announced that it expected all portfolio companies to have boards with a minimum of two female directors.[257] Perhaps in the absence of legislative quotas in the United States, these actions by large investors did substantial work to increase gender diversity on corporate boards for publicly-listed companies? Before Nasdaq drafted the Diversity Rule with its "comply or explain why you failed" structure, BlackRock was reaching out to over 300 companies in the Russell 1000 having fewer than two women on their boards and demanding a justification.[258] This sort of action goes to show that the Big Three have been serious in their initiatives to respond to Millennial conventions regarding the purpose of corporations. With greater visibility for board diversity statistics broadly from the Diversity Rule and

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are also committed to integrating it into the ways we engage the world around us. We promote equity in childcare and early education, activate it in our supply chain, and support social justice through our corporate giving programs. We also advocate for greater diversity in boardrooms and the broader business community worldwide.").

[252] Larry Fink, *Larry Fink's Annual 2022 Letter to CEOs*, BLACKROCK (2022), https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter.

[253] *Id.*

[254] *See* Braun at 16-17 (explaining a growing interest from investors of the Big Three for stewarding of their investments that considers longer-term effects on value instead of solely short-term returns).

[255] *See* Barzuza, Curtis & Webber, *supra* note 184, at 1248.

[256] *Id.*

[257] *Id.* at 1250.

[258] *Id.* at 1267; *see* Emily Chasan, *BlackRock Asks Companies to Explain Dearth of Women on Boards*, BLOOMBERG (Feb. 2, 2018, 2:27 PM), https://www.bloomberg.com/news/articles,2018-02-02/blackrock-asks-companies-to-explain-dearth-of-women-on-boards.

the public conversation on Black economic justice, there is reason to believe that the Big Three will get more involved on issues of racial diversity.

More than 60% of Millennials view increasing racial and ethnic diversity as a societal good according to a survey conducted by Pew Research in 2018.[259] In contrast, less than 50% of baby boomers saw increasing racial and ethnic diversity as a social good in the same survey.[260] When Millennials are job seekers, they prefer organizations with demonstrated commitments to diversity, equity and inclusion.[261] Millennials are also clearly invested in speaking with their dollars. Among Millennials and Generation Z, over half reported boycotting at least one company in a 2020 survey.[262] Particularly of import here, greater than 20% of those indicating they were boycotting a company noted that the company had been accused of racism.[263] It follows that those same Millennials would want to see their values reflected in the companies they invest in. And like with the actions taken by the Big Three regarding gender diversity on the boards of their portfolio companies, they are responding with commitments concerning racial and ethnic diversity.

Much like many other companies in the summer of 2020, BlackRock publicly committed to promote diversity within itself and within its portfolio companies, stating that it would seek racial and ethnic diversity reporting by its portfolio companies and continue to "emphasize the importance of diversity in the board room, considering personal characteristics like gender, as well as race and ethnicity…."[264] Coupling the expressed interest in workforce ethnic and racial demographics along with the actions of the Big Three on gender diversity on boards, Nasdaq's actions and the Diversity Rule will likely further raise the salience of Black representation for the Big Three on top of their expressed commitments. And as noted by Veronica Root Martinez and Gina-Gail S. Fletcher,

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[259] Kim Parker, Nikki Graf & Ruth Igielnik, *Generation Z Looks a Lot Like Millennials on Key Social and Political Issues*, PEW RESEARCH CENTER'S SOCIAL & DEMOGRAPHIC TRENDS PROJECT (2019), https://www.pewresearch.org/social-trends/2019/01/17/generation-z-looks-a-lot-like-millennials-on-key-social-and-political-issues/. Diversity, equity, and inclusion hereafter referred to as "DEI."

[260] *Id*.

[261] Jennifer Miller, *For younger job seekers, diversity and inclusion in the workplace aren't a preference. They're a requirement.*, WASH. POST, Feb. 18, 2021, https://www.washingtonpost.com/business/2021/02/18/millennial-genz-workplace-diversity-equity-inclusion/ (citing a survey from Glassdoor showing 76% of employees and job seekers considered a diverse workforce as important in their job search).

[262] Tamara Holmes, *38% of Americans Are Currently Boycotting a Company, and Many Cite Political and Coronavirus Pandemic-Related Reasons*, LENDINGTREE (Julie Sherrier ed., July 20, 2020), https://www.lendingtree.com/credit-cards/study/boycotting-companies-political-pandemic-reasons/.

[263] *Id. See* Parella*, supra* note 214, at 931 ("In consumer markets, reputational consequences harm an organization's bottom line when consumers boycott products. In order to regain consumers, organizations will change their behavior.").

[264] *Racial equity and inclusion*, BLACKROCK, https://www.blackrock.com/corporate/about-us/social-impact/advancing-racial-equity (last visited June 2, 2022).

"Institutional investors' large equity holdings across multiple corporations provide power to pressure management decision-making."[265]

The combination of the Diversity Rule and pressure from large institutional investors such as BlackRock, State Street and Vanguard gives force to the potential for the Diversity Rule's information-forcing-substance effects. Ever being mindful of their fiduciary duties, not only must corporate directors consider the validity of their corporation's disclosures with respect to diversity generally, and Black economic justice and Black board representation specifically, they must also consider the interests of what were historically passive investors that have now become aggressive activists on corporate diversity matters as they compete over Millennial investments. That combination can bring about rapid change. Recent developments in the shareholder proposal space give a relevant glimpse at how rapidly change can occur for Black corporate representation.

iii. Signs of Momentum from Shareholder Proposals on Race

Shareholder proposals are a means by which shareholders can recommend and even require board action.[266] These proposals are generally made at a company's annual shareholders meeting but may also be made at special meetings of a company's shareholders.[267] These proposals may be required on a company's publicly disclosed proxy statement prior to the relevant shareholders meeting.[268] As increased attention has been paid to the importance of diversity, shareholders proposals regarding a company's DEI efforts and demographic information have been made towards many of the largest corporations.[269]

During the 2021 proxy season that followed the summer of 2020's "racial reckoning," on study reported that proposals related to social issues saw their support increase from 21.5% to 30.6% from 2020 to 2021.[270] The report noted that this increase in support was largely driven by more proposals relating to diversity receiving higher levels of support, as anti-discrimination and diversity proposals increased from 7% of proposals submitted in 2020 to 16% in 2021.[271] On a combined basis from 2019

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[265] *See* Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, 130 Yale Law Journal Forum 869, 895 (2021) (the authors further argue that salience places institutional investors as well-suited to pushing their portfolio companies to address both internal and external causes of racial inequity, as "[i]nstitutional investors can utilize their shareholder rights, threaten to decrease ownership interest in the entity, or harm the corporation's public image.").

[266] *See* Adediran, *supra* note 10, at 363 (discussing the impact of incentivizing shareholder proposals that pressure companies to disclose diversity instead of merely explaining a lack of diversity).

[267] 17 C.F.R. § 240.14a-8 (2022).

[268] *Id*.

[269] *See* Client Alert, GIBSON DUNN, Shareholder Proposal Developments During the 2021 Proxy Season (Aug. 19, 2021), https://www.gibsondunn.com/wp-content/uploads/2021/08/shareholder-proposal-developments-during-the-2021-proxy-season.pdf.

[270] *Id.* at 2.

[271] *Id*. at 2, 5. *See* Lisa Fairfax, *Social Activism Through Shareholder Activism*, 76 WASH. & LEE L. REV. 1129, 1161-62 (2019) (noting the increase in diversity proposals and noting that shareholder proposals may strongly signal future trends).

through 2021, proposals related to board diversity, reporting on DEI efforts, reporting on management diversity, and mandatory annual EEO-1 disclosures were successful eight, three, three, and two times respectively.[272] Success with respect to EEO-1 disclosure proposals is particularly encouraging because as noted by Jamillah Williams, many companies have gone to great lengths to prevent public disclosure of such information.[273] These EEO-1 successes might be related to efforts by the New York City Comptroller and pension funds to enact agreements with publicly listed companies to disclose their EEO-1 disclosure information.[274] However there are some signs of backlash.

In the 2023 proxy season, proposals related to social and environmental topics continued their rise.[275] Yet nondiscrimination and diversity proposals saw a decrease from 2022 to 2023, ticking down from 11% of all proposals to 9%.[276] Importantly for this project, the success of social issue related proposals saw their support ultimately drop from 23.2% in 2022 to 17.2% in 2023, far lower than the 30.6% support found in 2021.[277] Following several years of proposals focused on social issues, it has been suggested that this decrease in support might be related to the higher level of prescriptive requests.[278] These results are concerning, but speak to the importance of continuing attention and salience for these efforts. It is not just a benign coincidence that these proposals saw more success following national attention on race relationship than they did in subsequent years. Importantly, proposals antagonistic to ESG appeared to increase in numbers, but received dismal support, far lower than the DEI inform proposals they targeted, 1.5% and 22.4% average support respectively.[279] Clearly a backlash is taking place, but it also remains clear that support from large institutional directors can weigh heavily in favor of continued efforts on diversity.

Vanguard reports that their support for workforce diversity proposals increased from 19% in 2020 to 46% in 2021.[280] During the same

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[272] *Id*. at 9. The EEO-1 Component 1 Report, EEO-1 for short, is an annual disclosure form required of employers having 100 or more employees. The EEO-1 disclosure requires demographic data on employees by race, ethnicity, sex, and job category. *About the EEO-1 Component 1 Report*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeocdata.org/EEO1/support/faq (last visited June 2, 2022).

[273] Jamillah Williams, *Diversity as a Trade Secret*, 107 GEO. L.J. 1685, 1694-98 (2019).

[274] Press Release, NYC Comptroller and Pension Fund Trustees Announce Agreements With 11 Companies to Disclose Annual Workforce Diversity Data (Mar. 31, 2022), https://comptroller.nyc.gov/newsroom/nyc-comptroller-and-pension-fund-trustees-announce-agreements-with-11-companies-to-disclose-annual-workforce-diversity-data/**.**

[275] *See* Client Alert, GIBSON DUNN, Shareholder Proposal Developments During the 2021 Proxy Season 3 (Jul. 25, 2023), https://www.gibsondunn.com/wp-content/uploads/2023/07/shareholder-proposal-developments-during-the-2023-proxy-season.pdf.

[276] *Id.* at 5.

[277] *Id.* at 6. *See* GIBSON DUNN, *supra* note 269, at 2.

[278] GIBSON DUNN, *supra* note 275, at 6.

[279] *Id.* at 15.

[280] VANGUARD, *supra* note 230.

period, Vanguard's engagement with companies on diversity increased from 198 companies to 581.[281] Like the other members of the Big Three, Vanguard has stated that they view diversity as a key component to an effective board.[282] To emphasize that point, Vanguard noted that its funds have voted against 200 directors at companies where they were concerned with a company's efforts related to DEI or increasing board diversity.[283] This potentially demonstrates that even where shareholder proposals do not achieve majority support, they might find large institutional directors engaging on the merits of the proposals directly with the applicable company's management. These developments show that further disclosure pursuant to the Diversity Rule will be of great interest to investors, and failures to increase Black representation on boards will be notable.

PART V – PROVIDING A ROADMAP FOR RACE-CONSCIOUS INTERVENTIONS IN CHIEF JUSTICE ROBERTS' POST-RACIAL AMERICA

A. Impact of SFFA v. Harvard on Corporate Diversity Efforts

The Court recently ruled against Harvard's consideration of race as one factor of many in its admissions decisions.[284] As it relates to the Nasdaq Rule and similar efforts, concerns of invalidation stem from whether they represent violations of the equal protection clause of the 14th amendment and possibly provisions of the Civil Rights Act of 1964 (the "Civil Rights Act"). The Court's holding in SFFA ties a violation of the Equal Protection Clause with a violation of Title VI of the Civil Rights Act ("Title VI") for applicable organizations receiving federal funds.[285] Though Nasdaq, and other similarly situated private organizations, would only find Title VI directly applicable to them if they accepted government funding, Title VII of the Civil Rights Acts ("Title VII") possibly applies. Title VII made it unlawful for an employer: "1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his

[281] *Id*.
[282] *Id*. at 6.
[283] *Id*. at 28.
[284] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023).
[285] Civil Rights Act of 1964 § 601; 42 U.S.C.A. § 2000d; *see* 143 S. Ct. at 2157, n. 2 (referencing *Gratz v. Bollinger*, 539 U.S. 244, 276, n. 23 (2003) ("We have explained that discrimination that violates the Equal Protection Clause of the Fourteenth Amendment committed by an institution that accepts federal funds also constitutes a violation of Title VI.")).

status as an employee, because of such individual's race, color, religion, sex, or national origin."[286]

Following SFFA, concerns have arisen over whether the Court's analysis will apply in the employment context.[287] In his concurrence to SFFA, Justice Neil Gorsuch went to great lengths to tie the analysis of what constitutes unlawful discrimination under Title VI to the same under Title VII.[288] Citing Justice Gorsuch's concurrence soon afterwards, the attorney generals of 13 states issued a letter to the CEOs of the Fortune 100 warning them of the implications of SFFA to their DEI initiatives and arguing that racial discrimination was rampant in the Fortune 100.[289] Considering such implications, the key questions for the Diversity Rule are first, is Nasdaq acting as an employer, and secondly, through the Diversity Rule's objectives, are Nasdaq-listed companies being forced to act in a way requiring them to "limit, segregate, or classify" potential employees in a way leading to depriving any individual of employment on account of their race, color, religion, sex or national origin.[290] The answer to these two questions with respect to the Diversity Rule is a resounding no.

B. How the Diversity Rule avoids this concern

On October 18, 2023, the U.S. Court of Appeals for the Fifth Circuit rejected constitutional challenges to the Diversity Rule.[291] The challenges to the Diversity Rule largely argued that the SEC violated the First and Fourteenth Amendments by approving the Diversity Rule's required disclosures on diversity.[292] In holding in favor of the SEC, the Fifth Circuit held that Nasdaq was neither a state actor nor were its actions state actions due to the SEC's mere approval of the Diversity Rule.[293] Speaking directly to the argument that the SEC's approval of the Diversity Rule was state action, the Fifth Circuit noted that "yes-or-no approval process does not

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[286] 42 U.S.C.A. § 2000e-2(a).

[287] The Impact of the SFFA Decision: Lessons for Employers, JD Supra, https://www.jdsupra.com/legalnews/the-impact-of-the-sffa-decision-lessons-3169326/ (last visited Aug 7, 2023); Andrew Turnbull, Carrie Cohen, Michael Schulman, Sadé Tidwelll, MORRISON FOERSTER, *Impact of College Admissions Affirmative Action Cases on Employer DEI Initiatives*, BLOOMBERG LAW, May 2023.

[288] 143 S. Ct. at 2209 ("This Court has long recognized, too, that when Congress uses the same terms in the same statute, we should presume they "have the same meaning." IBP, Inc. v. Alvarez, 546 U. S. 21, 34 (2005). And that presumption surely makes sense here, for as Justice Stevens recognized years ago, "[b]oth Title VI and Title VII" codify a categorical rule of "individual equality, without regard to race." Regents of Univ. of Cal. v. Bakke, 438 U. S. 265, 416, n. 19 (1978)").

[289] Attorney General Skrmetti Co-Leads Multistate Coalition Educating Fortune 100 Companies Concerning Racially Discriminatory Employment and Contracting Practices, https://www.tn.gov/attorneygeneral/news/2023/7/13/pr23-27.html (last visited Aug 8, 2023); July 13, 2023 letter from AGs of Alabama, Arkansas, Indiana, Iowa, Kansas, Kentucky, Mississippi, Missouri, Montana, Nebraska, South Carolina, Tennessee, and West Virginia to F100. https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2023/pr23-27-letter.pdf]

[290] 42 U.S. Code § 2000e16(a).

[291] All. for Fair Bd. Recruitment v. Sec. & Exch. Comm'n, 85 F.4th 226 (5th Cir. 2023).

[292] *Id.*

[293] *Id.* at 239, 240 ("… our fellow circuits have found that SROs registered with the SEC are private entities, not state actors.").

reflect the degree of entwinement required to turn the [Diversity Rule] into state action."[294] Fortunately for the Diversity Rule, neither of these prongs seems to be a close question. Even as state attorneys general file an amicus brief supporting a petition for an *en banc* review by the Fifth Circuit, there does not appear to be any strong contrary rulings for either Nasdaq being a state actor or the SEC's role amounting to state action.[295] It's noteworthy that the amicus brief relies more on an aversion to quotas than case law on what constitutes state action—hanging it hat on sophistry rather than established doctrine.[296] Thus, I find it unlikely that even if an appeal were to make it to the Court, a different determination is eminent.[297]

With constitutional challenges involving state action unlikely to succeed, that means challengers must look to other sources for their chum. Title VII applies to employers and other organizations making determinations for membership.[298] Though Nasdaq certainly determines which companies may list with it, Nasdaq neither makes an employment decision in determining which companies to list, nor is acting in any other applicable capacity in connection with the Diversity Rule. Where more care must be taken is considering whether Nasdaq-listed companies are being forced to violate Title VII in complying with the Diversity Rule.

As discussed in Part III, by centering disclosure as its primary mechanism, the Diversity Rule avoids its objectives being construed as a quota.[299] This is key, because if companies were required to meet quotas for their boards, challengers to their practices could more readily argue that their actions were analogous to the actions of the University of California Medical School at Davis in Bakke, or the city of Richmond's requiring contractors awarded city construction contracts to subcontract at least 30% of the project to minority businesses—each seeking "racial balancing" in the Court's view.[300] Setting aside positions for individuals based on their

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[294] *Id.* at 246 (further quoting the Supreme Court's view that "[a]ction taken by private entities with the mere approval or acquiescence of the State is not state action," and that state "permission of a private choice cannot support a finding of state action"); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 165, 98 S.Ct. 1729, 56 L.Ed.2d 185 (1978)).

[295] For example, the brief is heavily reliant on two circuit court cases where state action analysis is either referenced in dicta or is not separately considered in the holding. The drafting suggests a high hope that regurgitating quotes from recent Court decisions reversing established precedent on racial issues will carry more weight than arguing the fundament question of state action. *See* Alliance for Fair Board Recruitment & National Center for Public Policy Research, Amicus Brief in Support of National Center for Public Policy Research Petition for Rehearing En Banc, All. for Fair Bd. Recruitment v. Sec. & Exch. Comm'n, United States Court of Appeals for the Fifth Circuit, No. 34-92590, (November 28, 2023).

[296] *Id.*

[297] *Id.*

[298] 42 U.S. Code § 2000e – Definitions.

[299] *Infra* Part III.

[300] Regents of Univ. of Cal. v. Bakke, 438 U. S. 265, 416, n. 19 (1978); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2175 (2023); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989 (finding that the city's 30% subcontracting requirement failed strict-scrutiny for not being narrowly tailored to address past discrimination and instead appeared to be a form of racial

race or ethnicity, in the Court's view, clearly requires discrimination against individuals who lack the targeted characteristics.[301] In contrast, the Diversity Rule requires no such thing. Rather, the rule sets out objectives and then requires listed companies to disclose their results. If a listed company "fails" the objectives, it is not penalized by Nasdaq, or the SEC for that matter, but rather, as long as they file the appropriate disclosure, it may go on choosing to person its board however it best sees fit.[302]

Here is where skeptics would point out that this is a bit duplicitous—"sure, a company may disclose its failure, even its disinterest, in meeting the objectives, but we all know that the goal is for companies to be shamed into seeking diversity!" such skeptics might say. The full implications of this critique truly must be considered. Could we construe any required disclosure about diversity that might lead to shame as being per se discriminatory? Is such a critique presuming that a diverse board cannot exist but for discrimination against some candidates? Though the Court recently argued that looking at proportional representation of races as a way to evaluate the existence of racial disparities was of greater concern than the disparities themselves,[303] such conclusions embody the absurd. These formulations, if given credence, would make any newly-appointed diverse board member "suspect" in a way generations of deeply socially-entangled appointments have never been. Here, the ambiguity of what deems someone a good board candidate can actually work in service of diversity. There are no clear testing criterium, no grade point averages, and no presumed level of extracurricular activity that makes an individual a lock to be on the board of say, Alphabet, rather industry knowledge, market savvy, deal-flow, and social cachet form a subjective basis for the "right" director. If courts are to presume that diverse candidates are objectively lacking in the abovesaid criteria, then we have truly landed at an unworkable standard—I do not think the courts are willing to go so far.

C. Other potential actors and a framework to tackle corporate diversity

At a time where it appears the Court is ready to apply greater skepticism to organizations taking active steps to foster greater racial diversity, approaches like the Diversity Rule that can push diversity efforts forward while avoiding scrutiny are key. Nasdaq obviously holds sway with

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balancing).requirement failed strict-scrutiny for not being narrowly tailored to address past discrimination and instead appeared to be a form of racial balancing).

[301] *Id.*

[302] NASDAQ, *supra* note 1, at 100 ("In contrast, a disclosure-based framework that provides companies with flexibility would empower companies to maintain decisionmaking authority over their board's composition while providing stakeholders with a better understanding of the company's current board composition and its philosophy regarding diversity.").

[303] SFFA 33 (rejecting Harvard's argument that a potential way to judge when considering race in admissions programs could be terminated was when race-blind admissions policies result in diverse classes).

companies presently listed with it and continues to dominate with new company listings when compared to its biggest competitor, the NYSE.[304] That means the Diversity Rule may be a powerful tool within the universe of Nasdaq-listed companies and companies soon to be listed, but there remain many existing companies outside of this ecosystem and NYSE has already stated its intentions to not act. However, there remain may other organizations that could take the disclosure forcing substance nature of the Diversity Rule forward within their own communities.

The U.S. Internal Revenue Service reports that there are over 66,000 trade associations in the U.S.[305] B Labs has certified over 6,000 companies globally,[306] and Bloomberg Professional Services has proprietary ESG scores for thousands of public companies.[307] These figures are meaningful because they show the scale of industry groups already present, as well as the proliferation of organizations scoring or certifying ESG performance. These factors reveal an opportunity for either committed industry groups or third parties to have a role in encouraging diversity among U.S. companies.

A potential framework could take a similar approach as the Diversity Rule. As an example, a volunteer group such as a trade association or a third-party certifier could issue objectives with respect to corporate diversity. In conjunction with these objectives, the issuer of the objectives could then require disclosure from its members (or customers) of their results in meeting such objectives. These disclosures could be made explicitly public facing for the purposes of receiving a certification or kept internal within the issuer's membership for internal tracking and competition.[308] Given the momentum I argue that Millennials and Gen Z are likely to apply to diversity efforts, public disclosures and certifications would be the most impactful.[309] As companies wrestle with the implications of judicial reactions to corporate diversity efforts in hiring, such disclosure focused approaches should seriously be considered.

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[304] STATISTA, *supra* note 140.

[305] Association FAQ, ASAE, https://www.asaecenter.org:443/en/about-us/newsroom/association-faq (last visited Jan 29, 2024).

[306] B LAB, How many Certified B Corps are there around the world?, https://www.bcorporation.net/en-us/faqs/how-many-certified-b-corps-are-there-around-world (last visited Jan 29, 2024).

[307] ESG Data, BLOOMBERG PROFESSIONAL SERVICES, https://www.bloomberg.com/professional/product/esg-data/ (last visited Jan 29, 2024).

[308] In creating such disclosure initiatives, the ability to spotlight positive information while masking detrimental facts should be of a concern. *See* Carliss N. Chatman, *Corporate Family Matters*, 12 U.C. Irvine L. Rev. 1, 45-6 (2021) ("… the danger of excessive disclosure and the use of disclosures as a cleansing device for behavior that may violate the duties of loyalty and care. When these disclosures are combined with state standards, they can provide a mechanism for disclosing only what is positive, and concealing what is negative, to generate artificially positive periodic reports.").

[309] *See* Matinez & Fletcher, *supra* note 265 at 904; Adediran, *supra* note 10, at 366.

PART VI – THEIR ABSENCE IS INEXCUSABLE, BUT THEIR PRESENCE ALONE IS INSUFFICIENT

It should be stated outright that nothing in this article is intended to suggest that greater Black representation on public company boards is a panacea to the racial injustice in the U.S. More graduates from top business schools landing prestigious board appointments are not direct solutions to state violence against Black civilians,[310] over-policing stunting social and emotional development of Black youth,[311] or the broader socio-economic disparities endemic to the U.S. Those problems are all branches of a tree with slavery as its roots, tangled and knotted into the very foundation of the U.S.'s founding. However, greater Black representation on public company boards is an important baseline expectation for companies that signaled commitments to diversity and the value of Black lives. Further, greater Black representation on such boards can have knock-on effects that can play a small, but important, role in addressing American racial inequality.

Greater female board representation has been shown to have a positive effect on female presence among a company's executive leadership.[312] Ethnic and gender diverse boards can make a company more attractive to prospective employees.[313] It follows then that greater Black representation on corporate boards could lead to increases in Black representation in the c-suite. And if findings in the gender context are informative, larger numbers of Black c-suite professionals can foster greater representation in mid-level management and beyond.[314] This greater Black presence throughout corporate America can certainly provide for better

[310] *See* Christina Pazzanese, *How unjust police killings damage the mental health of Black Americans*, HARVARD GAZETTE (May 13, 2021), https://news.harvard.edu/gazette/story/2021/05/how-unjust-police-killings-damage-the-mental-health-of-black-americans/ (discussing emergent research on the links between state violence against unarmed Black individuals and mental health impacts on Black communities in response with Dr. David R. Williams of the Harvard T.H. Chan School of Public Health).
[311] KRISTIN HENNING, THE RAGE OF INNOCENCE: HOW AMERICA CRIMINALIZES BLACK YOUTH 212 (2021) (citing a 2016 study of Black youth in several cities indicating policing as a major detriment to their mental well-being).
[312] *See e.g.,* David A Matsa & Amalia R Miller, *Chipping away at the Glass Ceiling: Gender Spillovers in Corporate Leadership*, 101 AMERICAN ECONOMIC REVIEW 635, 636 (2011); Jill A. Gould, Carol T. Kulik & Shruti R. Sardeshmukh, *Trickle-down effect: The impact of female board members on executive gender diversity*, 57 HUM RESOUR MANAGE 931, 941 (2018), *available at* https://onlinelibrary.wiley.com/doi/10.1002/hrm.21907 (last visited July 27, 2022). *See also* Fidan Ana Kurtulus & Donald Tomaskovic-Devey, *Do Female Top Managers Help Women to Advance? A Panel Study Using EEO-1 Records*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 173, 174 (2012) (reviewing EEO-1 data and finding a positive correlation between the presence of female upper management and female representation in lower levels of management across multiple sectors, industries, and company sizes).
[313] Philipp Schäpers, Leon Windscheid, Jens Mazei, Meinald T. Thielsch & Guido Hertel., *"Like will to like" or "opposites attract"? Management board diversity affects employer attractiveness*, 36 GENDER IN MANAGEMENT: AN INTERNATIONAL JOURNAL 569, 579 (2021), https://www.emerald.com/insight/content/doi/10.1108/GM-10-2019-0182/full/html.
[314] *See* Kurtulus & Tomaskovic-Devey, *supra* note 312, at 174.

economic outcomes for Black Americans, but it can also lead to corporations that are more responsive to the concerns of the Black community. We must remember that in the same year Reverend Dr. Leon H. Sullivan became the first Black individual on the board of General Motors, he was the sole vote against the usually consensus-maintaining board's refusal to close a manufacturing plant in South African during apartheid.[315] This greater economic power can assist in the fight to eradicate racial injustice, but even the absolute eradication of state violence against Black individuals, discriminatory hiring practices, and disinvestment in the communities made vulnerable by America's past and present choices still leaves Black America with a lot of catching up to do. Better corporate representation is part of balancing present opportunity but does not begin to address past harms and disadvantage—that is a project for a different sphere, and for my purposes, a different article.

[315] Jerry M. Flint, *A Black Director Of G.M. Will Vote Against the Board.*, N.Y. TIMES, Apr. 9, 1971, https://www.nytimes.com/1971/04/09/archives/a-black-director-of-gm-will-vote-against-the-board-black-general.html; *see* Paul Lewis, *Leon Sullivan, 78, Dies; Fought Apartheid*, N.Y. TIMES, Apr. 26, 2001 (recounting the many ways Rev. Dr. Sullivan fought against apartheid through his position on GM's board).

CONCLUSION

Nasdaq's new diversity disclosure listing standards are as fine a tapestry as any to imagine the convergence of corporate proclamations on Black economic justice, the power of disclosure, and emerging Millennial norms on corporate purpose. Requesting that companies meet diversity objectives and requiring them to disclose the demographic make-up of their boards is a small but important step in pursuing greater Black representation in corporate America. And as Gary Gensler, Chair of the SEC, notes "whether it's climate risk, human capital risk or cyber risk, the markets benefit from consistency and comparability that investors can then use to make decisions."[316] Other actors should consider modeling their efforts after the Diversity Rule as it gives useful information to Millennial customers, employees, and investors for a corporation's level of commitment to equitable social progress. With more information on Black representation on corporate boards, those public statements on racial economic justice and representation can be better judged for their earnestness. Institutional investors might even meet their portfolio companies over a "really nasty cup of … coffee" to discuss their failures in making good on their stated commitments to Black representation and diversity.[317] And recently, there has been significant advances made with Black board representation since the summer of 2020.[318] In 2021 alone, approximately one third of newly appointed independent directors on S&P 500 boards were Black.[319] But this progress is not destined to continue without ongoing efforts, especially given recent attacks on corporate diversity efforts. In times such as these, schemes like the Diversity Rule should be adopted by other private actors to continue efforts to make our companies look more like the pluralities they serve, regardless of feared judicial skepticism to corporate diversity programs. Social progress, economic justice, and the wealth of available Black talent require continued progress here, and Millennials and their financial fiduciaries demand it.

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[316] *A Mission for Inclusion: In Conversation with Gary Gensler*, SEC.GOV, https://www.sec.gov/sec-stories/mission-inclusion-conversation-gary-gensler#bubble-7.

[317] Sarah Krouse, *At BlackRock, Vanguard and State Street, 'Engagement' has Different Meanings; Less Aggressive than Activists, Biggest Passive Money Managers use their Heft to Influence Portfolio Companies,* WALL ST. J. (ONLINE) (Jan. 20, 2018), http://proxygt-law.wrlc.org/login?url=https://www.proquest.com/newspapers/at-blackrock-vanguard-state-street-engagement-has/docview/1989198500/se-2?accountid=36339 (quoting BlackRock governance head Michelle Edkins on BlackRock's engagement with portfolio companies regarding their board diversity).

[318] *See* Mishra, *supra* note 16 (from 2020 to 2022, S&P 500 companies have seen Black directors go from 11% to 12% of directors, while Russell 3000 boards have seen Black directors double from 3% to 6% of all directorships).

[319] SPENCER STUART, 2021 U.S. SPENCER STUART BOARD INDEX 4 (2021).