ALL ON BOARD! STRATEGIES FOR CONSTRUCTING DIVERSE BOARDS OF DIRECTORS

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Georgia Institute of Technology. The author wishes to thank the participants of The First
Annual FL – GA Legal Studies Research Conference (October 2011) and the Academy of
Legal Studies in Business, 86th Annual Conference in New Orleans, Louisiana (August
2011) for their useful comments. The views and recommendations expressed in this
article are those of the author and do not reflect those of any affiliated institution or
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A global business convergence exists, making international business easier and more mainstream. Over the last decade, social activists, academics, government agencies, shareholder groups, and other investors have argued for greater diversity in U.S. businesses, including making public company boards of directors more heterogeneous. Such heterogeneity may be based on education, experience, background, class, gender, race, or ethnicity, each of which can be categorized as either a “Modifiable Attribute” or a “Non-Modifiable Attribute.” This Article argues that “board diversity” is necessary for U.S. public companies to remain competitive in the borderless global marketplace and that the U.S. should be the leader in and model for implementing “true” board diversity. Lastly, this Article presents practical solutions for creating diverse boards of directors.
I. INTRODUCTION

You must be the change you wish to see in the world.¹

The business community is becoming increasingly globalized as boundaries for doing business among countries and their people and organizations disappear. This in turn is making international business easier and more mainstream.² In The World is Flat, Thomas Friedman argues that global connectivity of the markets, businesses, and consumers forces organizations to accept a diversity of people, culture, and ideas.³ He emphasizes the changing nature of globalization:

[A]round the year 2000 we entered a whole new era: Globalization 3.0. Globalization 3.0 is shrinking the world from a size small to a size tiny and flattening the playing field at the same time. And while the dynamic force in Globalization 1.0 was countries globalizing and the dynamic force in Globalization 2.0 was companies globalizing, the dynamic force in Globalization 3.0 – the force that gives [globalization] its unique character – is the newfound power for individuals to collaborate and compete globally.⁴

The United States and its businesses must understand the progress being made by other advanced countries and adopt progressive ideals in order to stay ahead. Additionally, the United States and its businesses should continue to be in the forefront of business practices, setting the standard for inclusiveness. Nowhere is this more important than on public company boards of directors.

Over the last decade, social activists, academics, government agencies, shareholder groups, and other investors have argued for greater diversity at

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² Discussion and debate exist on whether globalization is a convergence or a decoupling. Traditional arguments indicate that globalization resulted in more cross-border economic interdependence and that such interchange of trade resulted in increased sensitivity of cross nation business fluctuations. See M. Ayhan Kose, Christopher Otrok & Eswar Prasad, Global Business Cycles: Convergence or Decoupling? 1 (Nov. 2010) (unpublished manuscript). (available at http://prasad.dyson.cornell.edu/doc/IERRRev23Nov2010.pdf) (examining business convergence during the period of 1985 – 2008 and determining that some convergence of business cycle fluctuations existed within the explored industrial economies and the emerging market economies; however, some decoupling appeared between such economies).
³ Thomas L. Friedman, THE WORLD IS FLAT 10 (1st rev. and expanded ed. 2006).
⁴ Id.
many levels of U.S. businesses, including making public company boards of directors more heterogeneous. Between 2002 and 2005, academics devoted substantial scholarship to the issue of public company board diversity. Following a period of diminished academic attention, board diversity is back in the spotlight.

Defining diversity is often difficult, and the meaning of group diversity may be based on an array of attributes including education, experience, background, class, gender, race, or ethnicity.5 Thus, in addressing diversity issues, it is critical to begin by defining what is meant by diversity. In its final rule on Regulation S-K—which requires new disclosures in the area of board leadership and structure and which addresses the board’s role in risk oversight—the Securities and Exchange Commission (SEC) made the definition of diversity flexible, recognizing that definitions of diversity will inevitably vary from one company to another.6

For purposes of this Article, heterogeneous attributes that contribute to diversity are categorized as either “Modifiable Attributes” or “Non-Modifiable Attributes.” “Modifiable Attributes” include education, experience, background, class, international exposure, and similarly distinguishing features into which a person is not born. “Non-Modifiable Attributes,” on the other hand, consist of gender, race, ethnicity, and other distinguishing birth characteristics that cannot be easily altered.

Although board inclusiveness is relevant to for-profit companies, non-profit organizations, governmental entities, and academic institutions, this Article focuses on board diversity as it relates to U.S. public companies. This Article addresses research on board heterogeneity; more specifically, it examines the emerging research on gender, race, and ethnicity as it pertains to public companies. The discussion of gender, race, and ethnic diversity is intended to illustrate current trends in board diversity and to highlight business and social arguments for and against board diversity. Of course, all

6 Proxy Disclosure Enhancements, 74 Fed. Reg. 245, 68344 (Dec. 23, 2009) (to be codified at 17 C.F.R. pt. 229). In full, the SEC made the following statement in its final rule: “We recognize that companies may define diversity in various ways, reflecting different perspectives. For instance, some companies may conceptualize diversity expansively to include differences in viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin. We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate. As a result we have not defined diversity in the amendments.” Id.
board members should possess sufficient competency requirements and add value to the board.

Following this introductory section, Section II provides cursory background information about the current state of boards of directors of U.S. public corporations, with particular focus on each of the following: the current lack of diversity on corporate boards; the obligations of boards; current guidance for selecting board members; and existing U.S. regulations regarding board diversity. Section III discusses justifications and benefits for board diversity. Section IV details practical solutions for constructing better boards of directors. Finally, Section V concludes with a call for action among the boards of U.S. public companies.

II. THE CURRENT STATE OF BOARDS OF DIRECTORS

A. The Current Lack of Diversity on Corporate Boards

The boards of directors of public companies in the United States are far from heterogeneous. In 2004, women only held 202 of the 1,195 directorships at the 2004 Fortune 100 companies.7 Racial and ethnic minorities held 178 of them.8 By 2010, women held 218 of the 1,211 directorships of the 2010 Fortune 100 companies, while racial and ethnic minorities held 153 directorships.9 This represents an increase from 16.9% to 18.1% in female directorships and a decrease from 14.9% to 12.7% in minority directorships.10 Finally, corporate boards also have a small number of directors that are non-U.S. citizens. As of 2007, only six percent of the directorships of the 200 largest S&P 500 companies were held by non-U.S. citizens, and more than half of all U.S. companies had no non-U.S. citizen board members.

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7 CATALYST, THE PROUT GROUP, THE EXECUTIVE LEADERSHIP COUNCIL, THE HISPANIC ASSOCIATION ON CORPORATE RESPONSIBILITY & LEADERSHIP EDUCATION FOR ASIAN PACIFICS, INC. ALLIANCE FOR BOARD DIVERSITY, MISSING PIECES: WOMEN AND MINORITIES ON FORTUNE 500 BOARDS – 2010 Alliance for Board Diversity Census, 3 (2011), available at http://theabd.org/ABD_Report.pdf. According to the study results’ publication, the Fortune 100 analyses are based on data from all 100 companies in the Fortune 100 for the applicable year, with result accuracy within one-tenth of a percent. (on file with the Virginia Law & Business Review Association) (noting its Fortune 100 analyses are based on data from all 100 companies in the Fortune 100 for the applicable year, with resulting accuracy within one-tenth of a percent). References to minority, men and women, for data reporting purposes represent African-American, Asian Pacific Islander, and Hispanic.

8 Id.
9 Id.
10 Id.
This lack of board diversity is especially notable when, for example, one considers that “women represent 53% of new hires.”

“[A]t the very first step in career advancement—when individual contributors are promoted to managers—th[at] number drops to 37%.”

“[O]nly 26% of vice presidents and senior executives are female and only 14% of the executive committee, on average, are women.” Joanna Barsh and Lareina Yee’s research suggests that male and female managers ignore female candidates for more senior positions based on assumptions that the women cannot handle the positions’ demands because of personal responsibilities or gender qualities.

Furthermore, Barsh and Yee note that “[s]everal diversity officers and experts told [them] that despite their best efforts, women are often evaluated for promotions primarily on performance, while men are often promoted on potential.”

SEC leadership also expresses concern about the lack of diversity in U.S. public companies. As recently as May 2011, Commissioner Aguilar voiced his disdain for the lack of diversity in the corporations that he regulates. Commissioner Aguilar issued a statement commenting that “[e]ven though our nation has grown more diverse, the corporate boardroom is proving resistant to change,” and “I find this status quo unacceptable and question why at a time when there are more qualified diverse board candidates, we have less diverse board members.”

Just a few days before issuing these


13 Id. at 5.

14 Id. at 5–6.

15 Id. at 4.

16 Id. at 6.

remarks, Aguilar gave a speech in which he stated, “It is past time to see the diversity of our nation reflected in corporate boardrooms, in the financial industry, and in the government.”

B. The Obligations of the Board of Directors

In general, the purpose of the board of directors is to monitor and evaluate senior management of the company. State law, which typically regulates the day-to-day management of a corporation, establishes that the obligations of the board of directors to its shareholders are the duties of care and loyalty; additionally, the duty of loyalty includes the obligation of good faith. A diverse group of directors may be a way to assist directors in fulfilling their duties of care and loyalty.

In the Delaware case *Smith v. Van Gorkom*, the court held that directors have an “unyielding fiduciary duty to the corporation and its shareholders” because the board of directors manages the business and affairs of the

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19 E.g., *Smith v. Van Gorkom*, 488 A.2d 858, 872-90 (Del. 1985). In connection with a proposed leveraged buyout of TransUnion Corporation, a Delaware corporation, by Marmon Group, Inc., a Delaware corporation, Jerome W. Van Gorkom, the CEO of TransUnion selected a proposed buyout price of $55 per share after consulting with TransUnion’s CEO on the “fair price range” per share for a leverage buyout. The CEO and CFO did not consult with outside financial experts or examine the total value of TransUnion. In the board’s discussions on the proposed leverage buyout, the CEO failed to present several key pieces of information, including the objections of management to the leverage buyout and the methodology and process used to determine the buyout share price. The board of directors approved the proposed leverage buyout without engaging a financial expert or inquiring about more details on the TransUnion value, a fair price for the stock and other important matters. In short, the case addresses a board of directors’ breach of its duty of care and that gross negligence is the standard to demonstrate a board failed to make an informed decision to be shielded by the business judgment rule. *Van Gorkom* was in the Delaware Supreme Court upon appeal from the Court of Chancery. The Delaware Supreme Court in part found the Trans Union Board grossly negligent “in that it failed to act with informed reasonable deliberation in agreeing to the Pritzker merger proposal on September 20” and that it had a fiduciary duty to Trans Union shareholders to disclose “all facts germane to the transaction at issue in an atmosphere of complete candor . . . [with] ‘germane’ in the tender offer context [meaning] . . . all ‘information such as a reasonable stockholder would consider important in deciding whether to sell or retain stock’ . . . [(i.e. disclose all material facts)].”
corporation. It is important to note that Delaware law typically has a high standard for establishing director and officer liability for corporate operations. Under the business judgment rule, courts do not delve into the content of evaluations the board makes in coming to business decisions. Rather, the courts defer to directors, expecting them to make business decisions after informed consideration. “The determination of whether a business judgment is ‘informed’ turns on whether the directors have informed themselves ‘prior to making a business decision, of all material information reasonably available to them.’” A party alleging that the board breached its duty of care must overcome the presumption that the board made an informed business decision.

Even in the post-Enron era of higher standards for fiduciary obligations, courts (including those in Delaware) still focus on whether managers and directors met minimum procedural requirements. To constitute a breach of the business judgment rule, directors’ actions must constitute gross negligence. Thus, a shareholder claim that a board of directors failed to meet its duty of care will rarely be successful. However, Van Gorkom functions as a reminder that directors must exercise “due care and prudence” before taking action on a board matter and must disclose all material facts relevant to a transaction subject to a shareholder vote. But, as evidenced in In re Citigroup, Inc. Shareholder Derivative Litigation, the business judgment rule will protect managers and directors, even when risky board decisions result in large losses, as long as the decisions in question were informed.

Some scholars have argued that a board’s failure to address diversity

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20 Van Gorkom, 488 A.2d at 872.
22 Van Gorkom, 488 A.2d at 872.
23 Id.
24 See Joo, supra note 21, at 18.
25 Van Gorkom, 488 A.2d at 873.
26 Henry Ridgely Horsey, The Duty of Care Component of the Delaware Business Judgment Rule, 19 DEL. J. CORP. L. 971, 977 (1994) (analyzing the duty of care case law in the United States before the mid-eighties regarding the relationship of the duty of care to the application by courts of the business judgment rule to directors).
27 Van Gorkom, 488 A.2d at 871-72.
28 In re Citigroup, Inc. Shareholder Derivative Litigation, 964 A.2d 106, 126 (Del. Ch. 2009) (refusing to hold Citigroup’s board accountable for its decision to enter into the subprime mortgage market even though such board’s decision caused a loss of billions for Citigroup and its shareholders and noting that it is times of substantial loss when it is most important to protect the laws governing director liability).
issues constitutes a breach of fiduciary duty.\textsuperscript{29} Professor Joo argues that the odds of winning a claim on these grounds are slim.

[I]t might be argued that directors were presented with a specific opportunity to address diversity to the material benefit of the corporation and its shareholders, yet dismissed it without information or consideration. These cases have the potential for success. And certainly directors violate their duties in those rare instances where they can be shown to have ignored corporate interests and acted out of personal racial animus. But if directors rejected diversity-based policies in a formally proper way, or if the issue is never squarely presented to the board, a court will not entertain a shareholder's retrospective complaint that the result was a costly one, much less that it failed to maximize returns.\textsuperscript{30}

Thus, the current threshold showing that existing board members “ignored corporate interests and acted out of personal racial animus” is high enough to practically foreclose the possibility of a shareholder challenge regarding board diversity.\textsuperscript{31}

The second prong of the board of directors’ fiduciary obligation is the duty of loyalty, which requires directors to act in good faith to advance the best interests of the corporation. Acting in good faith includes: (1) not engaging in self-dealing and unlawful activity; (2) avoiding passiveness that enables the diversion of corporate assets and profits or causes other frauds upon the corporation; and (3) affirmatively acting with good intentions to monitor the corporation’s affairs and the corporation’s compliance with law.\textsuperscript{32}

Without substantiating empirical evidence, given the benefits and justifications for management diversity, including greater questioning and discussion with diverse boards, it appears that a diverse board can assist

\textsuperscript{29} E.g., Steven Ramirez, \textit{Diversity in the Boardroom}, 6 STAN. J.L. BUS. & FIN. 85 (2000) (arguing for increased management and board responsibility for diversity using the fiduciary duties).

\textsuperscript{30} Joo, \textit{supra} note 21, at 17.

\textsuperscript{31} \textit{Id}.

\textsuperscript{32} Leo E. Strine et al., \textit{Loyalty’s Core Demand: The Defining Role of Good Faith in Corporation Law}, 98 GEO. L.J. 629, 629-36 (2010) (analyzing an important component of a director’s duty of loyalty by examining the role of good faith in corporate law and its use as the standard by which a director must act for compliance with his or her duty of loyalty obligation and concludes that the good faith obligation in meeting a director’s duty of loyalty obligation (i) is broad as it prohibits self-dealing (for financial gain and otherwise) and acting for unlawful purposes and (ii) requires affirmative action by the director to make a good faith effort to monitor the corporation’s affairs and compliance with law).
directors in meeting their fiduciary obligations.

C. Current Guidance for Selecting Board Members

A key challenge for board composition is building a group that can work cohesively, offer constructive dissent, leverage each member’s experience to better understand tough issues, ask thought-provoking questions, demand pertinent information, and make the best informed decisions, while consistently adding value. Although there appear to be no specific U.S. laws requiring board diversity, several sources provide legal guidance for director qualifications, such as the Delaware General Corporation Law (DGCL), New York Stock Exchange (NYSE) Listed Company Manual, and National Association of Securities Dealers Automated Quotations (NASDAQ) Equity Rules.

Under the DGCL, a corporation’s board of directors and shareholders have authority to adopt bylaw provisions that specify the requisite qualifications for becoming a director. Section 303A of the NYSE Listed

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34 DGCL §§ 141(b), 242(b)(1), and 109(a). With respect to directors, Section 141(b) of the DGCL provides in part that “[t]he number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate. Directors need not be stockholders unless so required by the certificate of incorporation or the bylaws. The certificate of incorporation or bylaws may prescribe other qualifications for directors.” Pursuant to the DGCL, amendments to the certificate of incorporation require recommendation of such amendment by the board to the shareholders and approval by the shareholders, if the corporation is a stock corporation. Additionally, modifications of the bylaws of Delaware stock corporations require board of director recommendation and shareholder approval, as bylaw modifications are major corporate actions. Section 242(b)(1) of the DGCL, regarding approval for certificate of incorporation modifications, provides in part the next provision. “If the corporation has capital stock, its board of directors shall adopt a resolution setting forth the amendment proposed, declaring its advisability, and either calling a special meeting of the stockholders entitled to vote in respect thereof for the consideration of such amendment or directing that the amendment proposed be considered at the next annual meeting of the stockholders. . . . At the meeting a vote of the stockholders entitled to vote thereon shall be taken for and against the proposed amendment. If a majority of the outstanding stock entitled to vote thereon, and a majority of the outstanding stock of each class entitled to vote thereon as a class has been voted in favor of the amendment, a certificate setting forth the amendment and certifying that such amendment has been duly adopted in accordance with this section shall be executed . . . .” Section 109(a) of the DGCL provides in part the following provision with respect to amendments to the bylaws of stock corporations: “After a corporation . . . has received any payment for any of its stock, the power to adopt, amend or repeal bylaws
Company Manual\textsuperscript{35} provides that a listed company’s corporate governance guidelines should address the corporation’s director qualification standards.\textsuperscript{36} The NASDAQ Equity Rules require that each listed company have a board of directors that consists of a majority of Independent Directors (as defined in Rule 5605(a)(2) of the NASDAQ Equity Rules).\textsuperscript{37}

A large number of corporations have non-binding frameworks for director qualifications in their corporate governance policies, guidelines, or similar governance mechanisms. Many such policies are responses to the SEC’s rule regarding disclosure of directors’ or boards of directors’ information.\textsuperscript{38}

Beverly Behan\textsuperscript{39} has developed a three-prong model for evaluating the best directors in the boardroom: (1) skills and experience; (2) individual attributes; and (3) representative factors.\textsuperscript{40} To flesh out this model, Behan posits that first, companies should develop a list of the skills and experiences that are useful for understanding directors’ individual circumstances, such as industry specific knowledge, finance and economics background, executive level experience, international exposure, and marketing and consumer behavior experience.\textsuperscript{41} Second, companies should list the individual attributes

\begin{thebibliography}{99}
\bibitem{nyse} The New York Stock Exchange Listed Company Manual is a handbook of policies, practices, and procedures for NYSE-listed companies.
\end{thebibliography}
that each board member should ideally possess, such as independence, financial acumen, management background, confidence, and teamwork.\textsuperscript{42} Third, the company should attempt to benefit from a comprehensive approach to diversity.\textsuperscript{43} Some companies are expanding their candidate searches to rising talent that is not recognized by name in the board network. Such companies have begun tapping into the ranks below the C-suite for qualified talent. By recruiting corporate board candidates outside the C-suite, such as leaders of corporate divisions and middle management leaders, boards increase their diversity options. Furthermore, recruiting such talent outside the C-suite can improve the board’s understanding of the company’s internal operations, since such employees are closer to the organization’s day-to-day operations and, thus, are likely to bring a different perspective to the boardroom.

D. Existing U.S. Regulations Regarding Boardroom Diversity

Transparency is essential to enabling consumers\textsuperscript{44} to decide the manner in which to use their monies. The SEC has recently increased the visibility of diversity initiatives relating to U.S. public company boards of directors. In response to capital market requests for diversity disclosure,\textsuperscript{45} the SEC adopted a regulation, effective February 28, 2010, requiring public companies to disclose the following information: “[1] whether diversity is a factor in considering candidates for nomination to the board of directors, [2] how diversity is considered in that process, and [3] how the company assesses the effectiveness of its policy for considering diversity.”\textsuperscript{46} Former Chairman of the SEC, Christopher Cox, has even spoken on the need for user-friendly and value-adding disclosures, which take into account the needs of investors, directors, and others who rely on such disclosures.\textsuperscript{47}

This Article, however, argues that additional regulation requiring more specific disclosure information on the corporation’s board nominees is necessary. The existing regulation does not require actual facts about directors

\textsuperscript{42} \textit{Id.}\textsuperscript{43} \textit{Id.}\textsuperscript{44} For purposes of this Article, the term “consumer” includes both customers and investors of a company.\textsuperscript{45} 17 CFR § 229.407(c)(2)(vi) (2009). Note that 17 C.F.R. § 229 is Regulation S-K.\textsuperscript{46} \textit{Id.}\textsuperscript{47} Christopher Cox, Commissioner, SEC, Keynote Address at the Stanford Law School Directors’ College, Stanford University, Palo Alto, California: Making Disclosure More Useful for Public Company Directors (June 23, 2008), available at http://www.sec.gov/news/speech/2008/sprech062308cc.htm.
or director nominees; thus, there is a reliance on the company to disclose more than the required amount of information to meet the subjective spirit of the rule. Opponents of the requested regulation may argue that the SEC’s existing director disclosure rule is sufficient to capture information about board diversity and that companies should have discretion on the specifics of disclosed information. However, the current lack of more detailed guidance requires the SEC to make case-by-case requests for more specific diversity information. Additionally, the current limited disclosure requirements may not be truly useful to consumers in making informed market decisions.

III. BOARD DIVERSITY: JUSTIFICATIONS AND BENEFITS

A. Rationales for Board Diversity

1. Business Rationale

In the early to mid-2000s, many legal and business scholars used a business rationale, concentrating on market-based and economic-based justifications, to support arguments for and against increased corporate board diversity.48 Many advocated for increased corporate board diversity, focusing on Non-Modifiable Attributes, particularly gender, race, and ethnicity.49 They argued that increased board diversity (based on gender, race, and ethnicity, depending on the particular scholar’s approach to defining or segmenting diversity) “increases the overall effectiveness of the board and hence the corporation, [and] also enhances the corporation’s profitability.”50 Adams and Ferreira, in discussing the strong-arm tactics that some international legislators have taken to implement gender-diverse boards, conclude that “gender-diverse boards are tougher monitors” of corporate governance, as illustrated by the finding that the proportion of women on the board is an important factor affecting the prevalence of CEO turnover following poor stock performance.51 The strong monitoring argument often

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49 Id. at 795 n.1–2, 797, 853.
50 See id. at 795.
51 Renée B. Adams & Daniel Ferreira, Women in the Boardroom and Their Impact on Governance and Performance, 94 J. FIN. ECON. 291, 292, and 296 301 (2009) (presenting empirical analysis of the validity of governance arguments based on which European legislative initiatives are based, namely that women on boards, among other things, enhance board effectiveness with the larger talent pool and because they tend to cause more board independence and provide a larger talent pool from which to select directors).
results from the notion and findings that diversity increases board independence, reduces board member collusion, and fosters tough questioning, thus imposing a check on management.\(^{52}\) Additionally, Adams and Ferreira “conclude that strong evidence exists that the proportion of female directors is associated with more equity-based pay for directors, which is suggestive of a board that is more aligned with the interests of shareholders.”\(^{53}\) Adams and Ferreira found, however, that gender diversity quotas may harm corporations that are already well governed.\(^{54}\) They reason that the additional governance attributed to more gender diverse boards is counterproductive and that heterogeneity of directors can cause conflict on the board.\(^{55}\) They thus conclude that corporations should not institute a female-diverse board under a blanket expectation that doing so will improve performance.\(^{56}\)

However, Catalyst’s recent research results indicate that increased female board membership can improve return on invested capital. In its 2011 report, Catalyst reported a twenty-six percent positive difference in return on invested capital between companies with women comprising nineteen to forty-four percent on the board of directors versus companies with no female directors.\(^{57}\)

Directors, executives, regulators, and consultants cite six main reasons to implement broader diversity programs: (1) access to and utilization of untapped talent in order to include the best available human resources; (2) women and minorities have greater independence from management and therefore reduce the risk of management being self-serving; (3) diverse boards generate more information; (4) heterogeneous boards operate differently than homogenous boards; (5) diverse boards signal credibility of positive corporate behavior; and (6) board diversity is a public relations tactic to quiet diversity advocates.\(^{58}\) For the purposes of this Article, these justifications will be

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\(^{53}\) Adams, supra note 51, at 303.

\(^{54}\) Id. at 303.

\(^{55}\) Id. at 303 and 305–08.

\(^{56}\) Id. at 307.

\(^{57}\) Barsh, supra note 12, at 5.

\(^{58}\) Lissa Lamkin Broome, John M. Conley, & Kimberly D. Krawiec, Dangerous Categories: Narratives of Corporate Board Diversity, 89 N.C. L. Rev. 760, 764 (2011) (summarizing and analyzing the results of interviews with corporate directors, executives, regulators, and consultants regarding the importance of racial, ethnic, and gender composition of corporate boards of directors, with results uniformly expressing the importance of such diversity but with limited examples illustrating how or when diversity mattered; further
referred to as follows: (1) Efficient Talent Utilization; (2) Management Self-Serving Risk Reduction; (3) Greater Due Diligence; (4) Different People Different Activity; (5) Creditability Sign; and (6) Pacification Maneuver. The counterarguments to each of these business rationales are presented in the table below.

<table>
<thead>
<tr>
<th>Argument Title</th>
<th>Counterarguments</th>
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<tbody>
<tr>
<td>Efficient Talent Utilization:</td>
<td>The number of qualified minority and female candidates for corporate board positions is limited with very few having prior board service.</td>
</tr>
<tr>
<td>Management Self-Serving Risk Reduction; Greater Due Diligence:</td>
<td>As advocated in <em>Women in the Boardroom and Their Impact on Governance</em>, women arguably monitor more aggressively than men; however, excess monitoring in well-governed corporations leads to inefficiency and shareholder costs.</td>
</tr>
<tr>
<td>Different People Different Activity:</td>
<td>Although there are arguments that board diversity brings constructive questioning and disagreements to the boardroom, an alternative argument is that such dissent may result in hostility, unproductive behavior, and group dissatisfaction and turnover.</td>
</tr>
<tr>
<td>Credibility Sign:</td>
<td>It is difficult to estimate the costs and benefits and determine the reliability of the signaling rationale for board diversity.</td>
</tr>
<tr>
<td>Pacification Maneuver:</td>
<td>Board diversity only pacifies proponents of board diversity, but appeasing others creates no shareholder benefits.</td>
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2. Social Rationale

There are three main social rationales for board diversity. First is the “simple fairness” argument: “corporate boards should be more diverse because it is the morally correct outcome.” The reasons this argument is appealing is twofold. First, upper organizational echelons in corporate

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60 Broome, *supra* note 58, at 763. See also Ayuso, *supra* note 52, at 7.
America—including corporate boards of directors—should reflect the base. Second, women and minorities in such positions have the power to influence the youth of underrepresented groups in such top organizations and positively to influence employee and customer relations because such diverse persons (a) represent a signal of the company’s diversity focus and progress and (b) demonstrate empathy with employees and customers.61

“Group think” dilution is the second prominent social rationale for board diversity. It refers to “a mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members’ strivings for unanimity override their motivation to realistically appraise alternative course of action.”62 A diverse board may reduce the risk of groupthink by creating a more tolerant environment.63

The third social justification for board diversity is to eradicate CEOs’ “stacking the board.” A diverse board arguably can influence the board nomination process and curtail the CEO clone syndrome, or CEO parity concept—that is, lining the board with the CEOs of other companies who are happy to aid the CEO in his agendas through their voting preferences. The CEO “stacking the board” in his or her favor, has been the subject of complex debate in U.S. corporate law and in related reform.

3. Progressive Theory

The Progressive Theory is a combination of the business and social rationales along with other rationales—namely, the governance perspective, a global rationale, and the human factor rationale. The governance perspective consists of three principles: (1) a pipeline of qualified diverse board candidates, (2) comprehensive due diligence for business judgment protection; and (3) respect for the requests of institutional investors. The global rationale focuses on the U.S. population and its diminishing workforce, and the human factor rationale emphasizes human traits that may enhance the board’s workings. The push for a Progressive Theory justification for board diversity starts with a simple qualitative argument for inclusiveness. Corporate boards should consist of an environment that enables and supports a collective group of qualified people with varied differences to engage in a positive and challenging discussion. The discussion’s goal is to add value to the corporation and its stakeholders by building a more complete consensus

61 Id. at 763, 795.
among a diversity of viewpoints.

a. The Governance Perspective

i. A Pipeline of Qualified Diverse Board Candidates

The traditional pool of potential board candidates is shrinking for a number of reasons, including: (1) increased liability (whether actual or perceived by the director or potential candidate) and increased commitment involved with being a public company director; (2) many existing directors are resigning or seeking no reelection; and (3) potential candidates are shying away from board service. Board effectiveness demands change consistent with the needs of the corporation. The shrinking pool of candidates makes succession planning critical for ensuring that the optimal mix of director talent is available when needed. Therefore, a company’s board and senior management must understand and take into account the company’s short-term and long-term strategic plan. They must evaluate the current composition of the board of directors, including the strengths and weaknesses. A board must also plan for its future human capital needs by filling gaps for missing skill sets that are necessary in the global marketplace. Finally, as companies look toward filling future boardrooms, a special focus should be placed on diversity—gender, race, ethnicity, class, background, international experience, education, and industry and functional skills.

ii. Comprehensive Due Diligence for Business Judgment Protection

Empirical research indicates that gender diverse boards improve board attendance, which in turn results in greater due diligence. Additionally, social and psychological research indicates that individuals make decisions based on their backgrounds and experiences. Thus, when groups are homogeneous, there is little opportunity to flesh out varied viewpoints and to utilize different analytical techniques, which otherwise would result in greater board due diligence. And simply put, “[t]he more perspectives you have, the better the

64 Fairfax, supra note 48, at 804–05. See also Kemba J. Dunham, Reforms Turn Search for Directors into a Long, Tedium Task, WALL ST. J., Aug. 29, 2002, at B1 (noting that with increase in perceived corporate liability exposure of directorship, candidates are turning down opportunities).
65 Adams, supra note 51, at 297-98.
66 Fairfax, supra note 48, at 831.
67 Id.
iii. Respect the Requests of Institutional Investors

Some of the largest institutional investors support and even take active steps to encourage more diverse boards.69 For example, one of TIAA-CREF’s positions on board diversity is that board nominating committees should utilize fitting diversity criteria for a director search to ensure that the search considers the largest applicable talent base.70 See Appendix B for more excerpts of the policy positions of large institutional investors on their expectations regarding diversity of portfolio companies.

b. The Global Rationale

The boardrooms of U.S. companies should reflect the changing racial and ethnic population of the U.S. and world marketplace. Although the non-Hispanic white population currently remains the majority race and ethnic class in the United States, it is growing more slowly than other racial and ethnic groups and actually has decreased from 69% to 64% of the total population over the last decade.71 The Hispanic and Asian populations in the United States have experienced the most rapid growth over that time period.72 The Hispanic or Latino origin population in the U.S. is projected to increase

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69 Ramirez, supra note 63, at 1600.
70 Infra note 113, at 27. “Boards of directors can also benefit from a diversity of perspective and demographics. Though we do not believe in quotas, we believe that nominating committees should develop appropriate diversity criteria for director searches to ensure that candidates are drawn from the broadest possible pool of talent. Companies should disclose how diversity policies support corporate efforts to strengthen the effectiveness of their boards.” Id.
from 12.6% in 2000 to 30.20% in 2050. Moreover, the populations of emerging or less developed countries, such as Bangladesh, Pakistan, and Nigeria, have surpassed that of more developed nations. Because this data demonstrates the racial, ethnic, and international composition of the future U.S. and world workforce and consumer base, immediate steps by U.S. companies to diversify its boardroom to reflect the world’s changing population will make the U.S. companies top management a reflection of the U.S. and world marketplace.

c. The Human Factor Rationale

People with diverse backgrounds and experiences often develop different methodologies towards approaching corporate decision making. This leads to varied comments and discussions on topics before the board of directors, which is essential to a meaningful understanding of corporate issues. This balance of thoughts and ideas engenders tolerance and empathy for corporate stakeholders, who are also from a diversity of backgrounds, because the diverse board likely consists of a party with direct or indirect experience similar to the corporate stakeholders being impacted by the strategic issues before the board.

B. Benefits of Board Diversity: Optimizing Director Behavior under Corporate Governance

Corporate governance is often viewed from two different perspectives—shareholder theory and stakeholder theory—however, boards of directors that approach decision making from a middle ground can arguably obtain socially and economically maximizing outcomes more often. And, importantly, a diverse board of directors is more likely than a nondiverse board to have the incentives to operate from that middle ground.

Under the limited shareholder theory, corporate governance is dominated by owners and managers, who guide the organization to further the owners’ best interests. The underlying rationale is as follows: shareholders “risk their investment capital and are the sole residual claimants, while other parties (e.g., employees) are compensated on the basis of their marginal products . . . [with]
wages[, . . . [and] [t]he governance process, therefore, . . . [requires] managers and other organizational participants to ensure that they act in the owners’ interests.”76

Under stakeholder theory, in developing its corporate strategies, an organization should consider the best interests of the groups and individuals who are affected by or who can influence the organization and its mission. Typically, the stakeholder theory is justified by corporate social responsibility. Moreover, although shareholders risk monetary or human capital, so do some non-shareholders.77

Some scholars expand stakeholder theory further to require stakeholder representation on the board of directors in order to legitimatize and protect stakeholder interests and to ensure that management will consider stakeholder concerns in designing corporate strategy and in making decisions.78 There should be representation specifically for those stakeholders that “add value, assume unique risks and possess strategic information for the corporation.”79 In sum, “the board must have directors who can knowledgeably express the multiple constituents’ interests both from ethical and economic reasons.”80

There is a third position – one that seeks middle ground between the two theories. Such position can be summed up by the words of the quintessential capitalist Milton Friedman: “[M]ake as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.”81

IV. PRACTICAL SOLUTIONS FOR CONSTRUCTING BETTER BOARDS

The entrenched beliefs of individuals often function to prohibit or slow diversity advancements.82 Although the legislative and judicial bodies strove to eradicate overt discrimination with laws such as Title VII of the Civil

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76 Id. at 3. Note, however, that “no courts actually require management to maximize shareholder wealth – that is, to show that they have chosen to use one of the corporate resources that will generate more net wealth than the other.” Joo, supra note 21, at 16–17. To do so would utterly undermine the business judgment rule.

77 Id. at 2.


79 Ayuso, supra note 52, at 4.

80 Id.


82 See Barsh, supra note 12, at 4.
Rights Act of 1964, many forms of bias with respect to race, gender, ethnicity, and class continue to exist in business, whether intentional or not. Professor Steven Ramirez points out that “the bastions of corporate governance remain the nearly exclusive province of white males, with no realistic end in sight. This racial homogeneity exists with little overt racial discrimination and few violations of antidiscrimination law.” Ramirez calls for legal reform to improve board diversity indicating that “real corporate governance reform should focus on neutralizing CEO influence over the board selection process and in the boardroom generally.” This section proposes some legislative reform and provides a strategy for improving board diversity.

A. Proposed Transparency Regulation

Despite existing regulations, determining the gender and race of board members remains difficult. The consumer’s ability to do so has improved over time because some organizations now include photographs of board members in their annual proxy statements; however, the difficulties inherent in accurately determining the gender and race of a board member remain.

Furthermore, without a requirement that director biographies contain specific information on how a board member adds diversity to the board, consumers cannot easily evaluate the Non-Modifiable and Modifiable Attributes that underpin a comprehensive definition of diversity.

To provide the consumer with more useful disclosure, the public filing disclosure rules should require that Modifiable Attributes—specifically post-secondary degrees, international background or exposure, key highlights of the last twenty years of employment history, and key current and past for-profit and not-for-profit board service—and Non-Modifiable Attributes—specifically race, gender, and ethnicity—must be disclosed in annual proxies. Such regulation would enable consumers to assess the level of diversity of

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83 Ramirez, supra note 63, at 1584-87 (arguing that board homogeneity in favor of white males of upper class distinction exists on corporate boards of directors because of their cultural proximity to corporate CEOs and calling for political and economic pressure on the applicable human power sources to institute legal reform to enhance board diversity).

84 Id.

85 See e.g., Fairfax, supra note 48, at 799 n.16 (discussing the difficulty of determining the number of directors of color on corporate boards of directors with reasonable accuracy and focuses on and critically examines the business rationales for increasing racial and ethnic diversity on corporate boards of directors with a discussion on the cost-benefit analysis of such board diversity, pointing out some individual and societal costs and concluding that such examined business rationales establish an environment subjecting directors of color to unrealistic expectations of solving corporate issues that are not simplistic and possibly not of their particular interest).
specific companies and to base their investment and purchase decisions on more complete information.

There are two main arguments against enhancing board disclosure rules for transparency purposes. The first stems from the general debate about the effectiveness of legislative and regulatory actions and their impact on corporate governance in practice. This Article, however, does not assume that legislative or regulatory action or market rules totally control board member behavior or singly determine overall board effectiveness. The second argument contends that it is wasteful to enhance board disclosure rules for transparency purposes because few consumers will look at the disclosures in making market decisions. However, that argument fails to take into account the importance of providing consumers with the means to make well-informed decisions.

In the Proxy Disclosure and Solicitation Enhancements, Securities Act Release No. 33-9052, the SEC sought input from investors and other market participants on their desire for greater disclosure regarding diversity in the boardroom. Ninety percent of respondents expressed support for race and gender board disclosure. In so doing, those respondents—controlling over three trillion dollars in assets—indicated their desire to have information about board diversity to assist them in evaluating current and potential investments.

B. Tier-7 Diversity Strategy

The Tier-7 Diversity Strategy is an approach for moving toward inclusiveness and continuous evolution of diversity—(1) Preparing Early; (2) Post-Secondary Governance Study and Training; (3) Promoting from Middle Management; (4) Establishing an Inclusive Nominating Committee; (5) Utilizing Available Diversity Information; (6) Being Intentional; and (7) Understanding International Actions on Board Diversity.

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86 Luis A. Aguilar, Commissioner, SEC, Speech at SAIS Center for Transatlantic Relations, Washington, D.C.: Diversity in the Boardroom is Important and, Unfortunately, Still Rare (Sept. 16, 2010), available at http://www.sec.gov/news/speech/2010/spch091610aa.htm#P15_1421 (acknowledges the importance of thinking of diversity in broad terms beyond traditional notions looking at “thought, geography, age, career experience, etc.”; Commissioner Aguilar’s speech focuses on traditional board diversity in terms of ethnicity and gender) infra note 49.


88 Aguilar, supra note 86.
1. Preparing Early

A lack of qualified diverse director options is often cited as an explanation for the lack of board diversity. For the purposes of this Article, this explanation will be called the Diverse Director Limitation Argument. The lack of qualified diverse director options could be addressed by focusing on training underrepresented groups in finance, economics, and law—the fields most prevalent in the backgrounds of existing directors. Over the years, the Diverse Director Limitation Argument has centered on women and persons of color, so the training should focus on this talent pool.

Concern exists about equal educational opportunities for all students living in the United States. There is “classism” in the U.S. society, which is often masked as being racial:

[E]ducational outcomes for minority children are much more a function of their unequal access to key educational resources, including skilled teachers and quality curriculum, than they are a function of race. In fact, the U.S. educational system is one of the most unequal in the industrialized world, and students routinely receive dramatically different learning opportunities based on their social status. In contrast to European and Asian nations that fund schools centrally and equally, the wealthiest 10 percent of U.S. school districts spend nearly 10 times more than the poorest 10 percent, and spending ratios of 3 to 1 are common within states. Despite stark differences in funding, teacher quality, curriculum, and class sizes, the prevailing view is that if students do not achieve, it is their own fault. If we are ever to get beyond the problem of the color line, we must confront and address these inequalities.89

Thus, early stage preparation requires the tough evaluation and implementation of equal educational opportunities across all educational systems.

Additionally, the NASDAQ and NYSE audit committees’ financial literacy requirements, along with SOX disclosure requirements regarding financial literacy of audit committee members, exemplify the need for taking

immediate, active steps to build the diversity pipeline of board candidates. For example, SOX provides that:

For purposes of this Item, an audit committee financial expert means a person who has the following attributes: (A) an understanding of generally accepted accounting principles and financial statements; (B) the ability to assess the general application of such principles in connection with the accounting for estimates, accruals and reserves; (C) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the registrant’s financial statements, or experience actively supervising one or more persons engaged in such activities; (D) an understanding of internal control over financial reporting; and (E) an understanding of audit committee functions.

The argument to prepare historically underrepresented diverse students with potential interests or acumen for public company board service does not hold that such parties must be financially astute. However, to increase the talent pool of diverse board candidates and to address the Diverse Director Limitation Argument, there should be a greater focus on preparing such underrepresented groups’ youth in these subject matter areas.

2. Post-Secondary Governance Study and Training

Providing underrepresented group director trainees with adequate corporate governance training on the roles and obligations of board members is another method for addressing the Diverse Director Limitation Argument. Additionally, such study and training can assist in combating the perception that diverse board members may have individual values that do not align with


shareholder values. Training programs should include guidance on selecting career paths within a designated industry, specifically in industries that lack diversity. This industry specialization approach would provide diverse director protégées with opportunities early in the director training process to gain insight and experience in a specific industry.

Because female directors are notably less prevalent in industries such as energy, infrastructure, electronics, and technology than in other industries, a greater focus should be placed on exposing females to these underrepresented industries and on providing them with training and advancement opportunities within these industries. Finally, after SOX, it appears that public company experience is important in having public company directorship opportunities. Thus, corporate senior management can help identify internal talent for board service and utilize platforms to prepare, mentor, and support diverse candidates in preparation for service on other corporate boards.

3. Promoting from Middle Management

In for-profit, not-for-profit, government, and academic environments, dedication to promoting diverse talent beyond middle management is essential to building the diverse director pipeline. The goals of talent development and enhancement are (1) to identify the top talent; (2) to develop and to implement a tailored training program focusing on the person’s skills and interests and then-current industry needs; and (3) to push the individual out of his or her comfort zone to encourage growth.

4. Establishing an Inclusive Nominating Committee

The nominating committee is extremely influential in shaping board diversity. It establishes a slate of director candidates, recommends such candidates to the full board of directors for approval, and sets director pay. The full board then provides its recommendation to shareholders for a vote. Because the nominating committee seeks out and provides initial nominees to

93 Id.
95 Adams, supra note 51, at 298.
the full board of directors, it is a powerful medium for achieving diversity. It is therefore important to have diverse nominating committee members, as well as members with an appreciation for the benefits of diversity.

5. Utilizing Available Diversity Information

Sources exist that allow organizations to obtain a list of potential director candidates that meet specified diversity criteria. For example, CalPERS and California State Teachers’ Retirement System developed the concept for the Diverse Director DataSource, a diverse director database that may be useful for organizations seeking diverse talent for board service.96 Similarly, the Center for Civil Rights at the University of North Carolina School of Law, in conjunction with the Center for Banking and Finance, maintains the Director Diversity Initiative, a digital database of diverse director candidate options.97 The Director Diversity Initiative aims to increase gender, racial, and ethnic diversity on the boards of public companies and to develop and sponsor programs focused on director training.98 Sources such as the Diverse Director DataSource and the Director Diversity Initiative can be used to build comprehensively diverse boards of directors as well as to improve the pipeline for meeting existing and future diverse director needs.


To effectively build a pipeline of diverse board talent and to combat the Diverse Board Limitation Argument, diverse board talent must affirmatively participate in solutions for improvement. Historically, board candidate names are drawn from “elite” social networks. The lack of access that minority groups typically have to such networks may be one contributing factor to the perceived shortage of qualified minority candidates for corporate board service.99 Hence, members of diverse groups with board aspirations need to build their social networks to include members of “elite” social networks and to communicate board service desires. In short, aspiring minority candidates should act with the intention of building careers and networks that will help

96 More information about Diverse Director DataSource and indirect access to it is available at http://www.calpers-governance.org/marketinitiatives/initiatives/diverse-director-datasource/home.
97 Broome, supra note 94, at 665.
98 Id.
99 Ramirez, supra note 63, at 1589.
propel them to board service.

7. Understanding International Actions on Board Diversity

Many Western countries have been more progressive than the United States in taking action to increase heterogeneity on boards of directors. For example, after conducting studies on ways to achieve greater board diversity, the United Kingdom now requires companies “to ‘pay due regard to benefits of diversity on the board, including gender’ when searching for and appointing directors.” In Australia, corporations are required to disclose the company’s progress toward board-established gender objectives, including disclosure of the number of females on the board of directors. The Swedish government has threatened to institute gender diversity requirements on companies if companies fail to voluntarily allocate 25% of the board seats to female directors. The Norwegian government requires all listed companies to abide by a 40% female director quota, with non-compliance resulting in automatic corporate dissolution. Notably, as of April 2008, all Norwegian listed companies were in full compliance. Spain has also enacted statutes requiring listed companies to comply with a 40% female director quota by 2015.

Moreover, the rapid growth of emerging international markets suggests that the above-mentioned foreign economies will start contributing to global governance policies and direction. Although the U.S. has made some headway in the area of board diversity through the actions of the SEC, U.S. corporations will need to emulate the progress made in certain foreign countries in order to remain competitive. It is important to note that, although the United States needs to emulate the progress of certain foreign nations, the means by which this is accomplished must be tailored for U.S. companies. Accordingly, this Article does not advocate for and is not an endorsement of using quotas to achieve diversity on boards of directors and instead argues for the implementation of the mechanisms discussed in this Article.

100 See Adams, supra note 51, at 292.
101 See Aguilar, supra note 49, at 1.
102 Id.
103 Id.
104 Id. at 4.
105 Id.
106 Id.
107 Id. at 2.
V. CONCLUSION

In summary, this Article addresses the need and importance of constructing boards of directors that reflect the demographics and composition of the global marketplace that the companies serve. Additionally, this Article focuses on a middle ground of the corporate governance theories, while simultaneously providing practical solutions for curtail obstacles to board diversity. The goal of this Article is to help parties to understand the need for board diversity and to persuade parties to work collectively in seeking better processes and solutions for diversity. Ultimately, this will enable the U.S. corporate structure to become a model of inclusiveness for the global business environment.

Immediate action is necessary as the global marketplace continues to grow and becomes more complicated. Countries that have been historically considered secondary to the United States in terms of setting standards on corporate activity and legislative initiative are taking bold actions to rectify and enhance particular platforms of corporate diversity. These countries are taking the lead on many corporate diversity initiatives.

A push for regulatory action requiring additional corporate disclosure is envisioned. Such disclosure would create a more transparent environment in which consumers could make informed decisions regarding their market behavior. With more meaningful disclosures informing consumers of director identities, consumers will have the ability to make more informed market choices. Specifically, investors and consumers will be able to patronize companies that promote inclusiveness and diversity in their boardrooms. Additionally, the Tier-7 Diversity Strategy is the other practical solution for constructing better boards. The Tier-7 Diversity Strategy can assist in moving toward inclusiveness and a continuous evolution of diversity. The Tier-7 Diversity Strategy is: (1) Preparing Early; (2) Post-Secondary Governance Study and Training; (3) Promoting from Middle Management; (4) Establishing an Inclusive Nominating Committee; (5) Utilizing Available Diversity Information; (6) Being Intentional; and (7) Understanding International Actions on Board Diversity.

The calls for action in this Article represent a two-way request for shared responsibility. The responsibility for action falls among consumers, corporations, and the government. Consumers have to invest time in
investigating corporations and in deciding the best ways to utilize their scarce resources. Corporations must make meaningful diversity disclosures, and the government needs to enforce a mandatory disclosure regime. U.S. corporations should serve as innovators by building a qualified, diverse pipeline for boards of directors and by providing greater beneficial consumer disclosure regarding board membership. By so doing, U.S. corporations could demonstrate a highly progressive governance strategy—one that begins by addressing diversity at the highest level.
APPENDIX A

In providing a small sample of representative director qualification provisions from for-profit publicly traded corporations, this Article includes provisions from the corporate governance policies of Apple Inc. (“Apple”), representing a convergence company, Bank of America Corporation (“BofA”), representing a large financial institution, and Wal-Mart Stores, Inc. (“Walmart”), representing a multinational consumer corporation.

Apple’s Director Qualifications:110

Director Qualifications. The Nominating and Corporate Governance Committee is responsible for reviewing the qualifications of potential director candidates and recommending to the Board those candidates to be nominated for election to the Board. The Nominating and Corporate Governance Committee will consider the individual’s background, skills and abilities, and determine whether such characteristics qualify the individual to fulfill the needs of the Board at that time. The Board should monitor the mix of skills and experience of its directors in order to assure that the Board has the necessary tools to perform its oversight function effectively. Shareholders also may nominate directors for election at the Corporation's annual meeting of shareholders by following the provisions set forth in the Corporation’s bylaws. The Nominating and Corporate Governance Committee will consider their qualifications. Candidates should be selected for, among other things, their independence, character, ability to exercise sound judgment, diversity, age, demonstrated leadership, skills, including financial literacy, and experience in the context of the needs of the Board.

BofA’s Director Qualifications:111

Director Assessment and Nomination. The Corporate Governance Committee, in consultation with the Chairman, will identify and evaluate individual candidates for their qualifications to become directors. The Committee will recommend qualified candidates to the Board as the need arises to fill vacancies or to stand for election at the annual meeting of

stockholders, unless the Company has contractually granted the right to nominate directors to third parties.

Standards for Evaluating Candidates as Director-Nominees. To discharge their duties in identifying and evaluating individual nominees for directors, the Corporate Governance Committee and the Board shall consider the overall experience and expertise represented by the Board as well as the qualifications of each candidate. In the evaluation process, the Corporate Governance Committee and the Board shall take the following into account:

- At least a majority of the Board must be comprised of independent directors.
- Candidates should be capable of working in a collegial manner with persons of different educational, business and cultural backgrounds and should possess skills and expertise that complement the attributes of the existing directors.
- Candidates should represent a diversity of viewpoints, backgrounds, experiences and other demographics.
- Candidates should demonstrate notable or significant achievement and possess senior-level business, management or regulatory experience that would benefit the Company.
- Candidates shall be individuals of the highest character and integrity.
- Candidates shall be free from any conflict of interest that would interfere with their ability to properly discharge their duties as a director or would violate any applicable law or regulation.
- Candidates shall be capable of devoting the necessary time to discharge their duties, taking into account memberships on other Boards and other responsibilities.
- Candidates shall have the desire to represent the interests of all stockholders.

Walmart's Director Qualifications:112

Director Qualifications. The Board should have a majority of directors who meet the criteria for independence required by the NYSE. The Compensation, Nominating and Governance Committees are responsible for reviewing with the Board, on an annual basis, the requisite skills and

characteristics that the Board seeks in Board members as well as the composition of the Board as a whole, including an annual evaluation of whether members qualify as independent under applicable standards. During the course of a year, directors are expected to inform the Board of any material changes in their circumstances or relationships that may impact their designation by the Board as independent. Nominees for director will be selected on the basis of outstanding achievement in their personal careers; broad experience; wisdom; integrity; ability to make independent, analytical inquiries; understanding of the business environment; and willingness to devote adequate time to Board duties. The Board believes that each director should have a basic understanding of: (i) the principal operational and financial objectives and plans and strategies of the Company; (ii) the results of operations and financial condition of the Company and of any significant subsidiaries or business segments; and (iii) the relative standing of the Company and its business segments in relation to its competitors. The Board is committed to diversified membership. The Board will not discriminate on the basis of race, color, national origin, gender, sexual orientation, religion, or disability in selecting nominees.
APPENDIX B

**Teachers Insurance and Annuity Associate – College Retirement Equities Fund (“TIAA-CREF”)**

*Business Description:*

TIAA-CREF is a national financial services company that provides retirement services in the academic, research, medical, and cultural fields.

*Board Diversity Policy Position Excerpts:*

“*The board should reflect a diversity of background and experience.*”113

“*The board should be large enough to provide expertise and diversity and allow key committees to be staffed with independent directors, but small enough to encourage collegial deliberation with the active participation of all members.*”114

“*TIAA-CREF will generally support reasonable shareholder resolutions seeking disclosure or reports relating to a company’s workforce and board diversity policies and practices.*”115

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**Capital One Asset Management LLC**

*Business Description:*

Capital One Asset Management LLC provides investment advice to institutions, foundations, endowments, and high net worth individuals.

*Board Diversity Policy Position Excerpt:*

“*We believe that boards working to protect and enhance the best interests of shareholders are independent, have directors with diverse backgrounds, have a record of positive performance, and have members with a breadth and depth of relevant experience.*”116

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114 See id. at 18.

115 Id. at 35.

Morgan Stanley

Business Description:
Morgan Stanley, a financial holding company, through its subsidiaries and affiliates, provides financial products and services to an array of clients, including investment banking, securities, investment management, and wealth management services.

Board Diversity Policy Position Excerpt:
“We consider on a case-by-case basis shareholder proposals urging diversity of board membership with respect to social, religious or ethnic group[s].”117

Invesco Advisers, Inc.

Business Description:
Invesco Ltd., a global investment manager, through its subsidiaries, provides a range of investment strategies and products to assist its clients.

Board Diversity Policy Position Excerpt:
“Generally vote FOR requests for reports on the company’s efforts to diversify the board, unless: [t]he gender and racial minority representation of the company’s board is reasonably inclusive in relation to companies of similar size and business; and [t]he board already reports on its nominating procedures and gender and racial minority initiatives on the board and within the company.

Vote CASE-BY-CASE on proposals asking the company to increase the gender and racial minority representation on its board, taking into account: [t]he degree of existing gender and racial minority diversity on the company’s board and among its executive officers; [t]he level of gender and racial minority representation that exists at the company’s industry peers; [t]he company’s established process for addressing gender and racial minority board representation; [w]hether the proposal includes an overly prescriptive request to amend nominating committee charter language; [t]he independence of the company’s nominating committee; [t]he company uses an outside search firm to identify potential director nominees; and [w]hether the

company has had recent controversies, fines, or litigation regarding equal employment practices.”

California Public Employees’ Retirement System (‘‘CalPERS’’)

Business Description:
CalPERS is a public pension fund, providing retirement benefits to California state, public school, and local public agency employees and their families with certain health benefits to some members.

Board Diversity Policy Position Excerpts:
“No board can truly perform its function of overseeing a company’s strategic direction and monitoring management’s success without a system of evaluating itself. In CalPERS’ view, each director should fit within the skill sets identified by the board as necessary to focus board attention on optimizing company operating performance and returns to shareowners. . . . With this in mind, CalPERS recommends that: . . .

[1] The board establishes and discloses the mix of director attributes, experiences, diverse perspectives and skill sets that are most appropriate for the company. Core attributes of directors that make up a board should address accounting or finance, international markets, business or management experience, industry knowledge, customer-base experience or perspective, crisis response, leadership and strategic planning as well as address historically under-represented groups on the board, including women and minorities.

[2] With each director nomination recommendation, the board should consider the issue of continuing director tenure, as well as board diversity, and take steps as necessary to ensure that the board maintains openness to new ideas and a willingness to critically re-examine the status quo.”


“Boards need to generate effective debate and discussion around current operations, potential risks and proposed developments. Effective debate and discussion requires: . . . (b) that the chair works to create and maintain a culture of openness and constructive challenge which allows a diversity of views to be expressed; [and] (c) that there is a sufficient mix of relevant skills, competence, and diversity of perspectives within the board to generate appropriate challenge and discussion . . . .”

“The board should consist of directors with the requisite range of skills, competence, knowledge, experience and approach, as well as a diversity of perspectives, to set the context for appropriate board behaviors and to enable it to discharge its duties and responsibilities effectively.”

“[Regarding board succession planning,] [o]n a regular basis, the board should evaluate its current skills, competencies and diversity of backgrounds, experiences, ages, races and genders in order to identify existing gaps and those that future vacancies could create. Boards should establish clear procedures to encourage and process board nomination suggestions from long-term shareowners and should respond positively to requests seeking to open dialogues to air and share thoughts and concerns regarding incumbent and potential directors.”

“[Compensation committee members] should represent diverse backgrounds and professional experiences.”

Governance Principles establish the framework by which CalPERS executes its proxy voting obligations. Note that the CalPERS Governance Principles indicate that CalPERS votes in favor of a director or slate of directors that it believes will effectively oversee CalPERS’ ownership interest in line with the CalPERS Governance Principles.

120 Id. at 18.
121 See id. at 19.
122 Id. at 35.
123 Id. at 41.