

BOARDROOM DIVERSITY: WHY IT MATTERS

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Abstract

What exactly is board diversity and why does it matter? How does diversity fit in an attempt to build the best board for an organization? What attributes and skills are required by law and what mix of experiences and talents provide the best corporate governance? Even though most companies say they are looking for diversity, why has there been such little progress? Are required director attributes, which are a must for all boards, consistent with future diversity gains and aligned with achieving high performance and optimal board composition? How might women and people of color best cultivate the skills necessary to make themselves attractive and productive board directors?

My goal in this paper is to provide answers to these questions, and to discuss how a nominating committee and board can define their needs, explore their options, and provoke radical thinking about how corporate governance may be improved by reexamining fundamental assumptions about diversity. Hopefully, constructive thinking about diversity and board composition, and a productive dialogue among all in the corporate governance community will result.

Keywords: Board Diversity, Corporate Boards, Corporate Directors, Corporate Governance, Corporate Law, Directors, Director Selection, Director Recruitment, Discrimination, Diversity, Gender, Gender Diversity, Glass Ceiling, Minorities, Minority Directors, People of Color, Race, Racial/Gender Diversity, Sex, Women

CONTENTS

I.	OVERVIEW	3
II.	WHAT IS DIVERSITY?	4
	Benefits of a Diverse Board	4
	SEC Diversity Statement Requirement.....	6
	Diversity Justified on Moral or Social Grounds	8
III.	DEMOGRAPHICS OF DIVERSITY.....	10
	Progress Lags	10
	Women.....	13
	Racial Minorities.....	14
	Women of Color: A Particular Concern	16
IV.	ATTRIBUTES, QUALITIES & SKILLS REQUIRED OF EVERY DIRECTOR.....	16
	What Boards Are Looking For in Director Candidates	17
	Each Board Has the Same “Core” Fundamental Needs for Talent.....	18
	<i>Desired Personal Attributes</i>	19
	<i>Experience Attributes:</i>	19
	<i>The Must Have: Audit Committee "Qualified Financial Expert”</i>	20
	<i>Prior Business/Corporate Governance Experience</i>	21
	<i>Government and Regulatory Relations</i>	22
	<i>International</i>	23
V.	THE POOL OF QUALIFIED CANDIDATES ISSUE	23
	So what’s the Disconnect?	25
VI.	GLOBAL APPROACH TO DIVERSITY.....	25
	Report from Canada.....	27
VII.	UNCONSCIOUS RACIAL BIASES AND DIRECTOR SELECTION	27
VIII.	ACHIEVING INCREASED BOARD DIVERSITY	29
	Business School Enrollment	29
	Auditing	33
	<i>Profession Staff</i>	34
	<i>Audit Firm Partners</i>	35

Legal Profession.....	35
Partners Advocating Greater Board Diversity	38
Alliance for Board Diversity.....	38
CalSTRS and CalPERS.....	39
<i>The Diverse Director Data Source</i>	41
Catalyst, Inc.	42
National Association of Corporate Directors.....	43
TIAA-CREF.....	44
Women Corporate Directors	45
Diversity Mentorship Opportunities	45
IX. CONCLUSION.....	46
X. APPENDIX: ABOUT THE AUTHOR	48

I. OVERVIEW

What exactly is board diversity and why does it matter? How does diversity fit in an attempt to build the best board for any organization? What attributes and skills are required by law and what mix of experiences and talents provide the best corporate governance? Even though most companies say they are looking for diversity, why has there been such little progress? Are required director attributes, which are a must for all boards, consistent with future diversity gains and aligned with achieving high performance and optimal board composition? How might women and people of color best cultivate these skills necessary to make themselves attractive and productive board directors?

My goal is to provide answers to these questions, and to discuss how a nominating committee and board can define their needs, explore their options, and provoke radical thinking about how corporate governance might be improved by reexamining the demographics and fundamental assumptions about diversity, the attributes of board standing committees, and

international board diversity profiles. Hopefully, constructive thinking about diversity, board composition, and a productive dialogue among all in the corporate governance community will result.

II. WHAT IS DIVERSITY?

Diversity means different things to different people. Among the types of diversity commonly described are: gender, national origin, race, sexual orientation and viewpoint. In her recent article, *Board Diversity Revisited: New Rationale, Same Old Story?*, Professor Lisa Fairfax defines board diversity as “the portion of women and people of color on a corporate board,”¹ and “focuses on gender, racial and ethnic diversity... [Using] the term ‘people of color’ to refer to African Americans, Hispanic Americans/ Latinos, Asian Americans, and Native Americans as a group.”² J. Robert Brown, Jr. observes “Diversity encompasses gender and race, two categories heavily represented among consumers but not among directors. It also includes persons with views and backgrounds at variance with management.”³

Benefits of a Diverse Board

Trautman observes, “Diversity of viewpoints and experience are key attributes for directors. It seems highly desirable to have a diverse board composed of individuals representative of its customers, employees, and stockholders. Approximately half of the population in the United States is men, not seven-eighths!”⁴ Moreover

If a company's major product line consists of selling feminine hygiene products in India, it just seems logical that there are better choices for board candidates than males who don't use the products, have no particular

¹ Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 854 (2011).

² Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 854 (2011).

³ J. Robert Brown, Jr., *Essay: Neutralizing the Board of Directors and the Impact on Diversity* 3 (October 4, 2011). U Denver Legal Studies Research Paper No. 11-18. Available at SSRN: <http://ssrn.com/abstract=1938427>.

⁴ Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment*, 11 FLA. ST. U. BUS. REV. (forthcoming, 2012), Available at <http://www.ssrn.com/abstract=1998489>.

understanding of the cultural, marketing channels or religious backdrop of these markets, are not physicians, etc.). These considerations seem obvious. Yet, I remember vividly having friends in New York years ago who served on the board of a major company in the feminine hygiene industry; yet, no women served on their board at that time. How can this possibly be rational?⁵

Alternative perspectives “that stimulate creativity and innovation” result from racially diverse groups.⁶ Moreover, “firms with racially diverse management are likely to consider more options and generate more ideas for launching new competitive moves. They should also be better equipped to detect, interpret, and respond to various environmental cues and market trends and thus respond more rapidly to competitive challenges.”⁷ Therefore

Racially diverse firms perform better than homogeneous firms because they can launch new competitive actions more frequently. Greater managerial racial diversity provides favorable conditions for individuals with diverse knowledge bases to exchange knowledge and information, which in turn increases the capacity to recognize and exploit opportunities for new competitive actions. This capacity reduces the development costs and hastens the introduction of competitive actions. Hence, compared to firms led by homogeneous management, firms with racially diverse management can create more temporal advantages and increase market share and profits... Racial diversity in management enhances the capacity to develop new competitive environments with high potential growth.⁸

Carter et al., (2002) note that “one of the most significant governance challenges that managers, administrators, and shareholders of the modern company face is establishing an optimal mix within the board of directors in terms of gender, race, and culture.”⁹ Indeed, much has been written where diversity is presented “as an ethical complement to statutory governance

⁵ Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment*, 11 FLA. ST. U. BUS. REV. (forthcoming, 2012), Available at <http://www.ssrn.com/abstract=1998489>.

⁶ Goce Andrevski, Orlando C. Richard, Jason D. Shaw & Walter J. Ferrier, *Racial Diversity and Firm Performance: The Mediating Role of Competitive Intensity 2* (Nov. 2011). *Journal of Management*, available at <http://jom.sagepub.com/content/early/2011/11/12/0149206311424318>.

⁷ *Id.*

⁸ *Id.* at 17 & 21.

⁹ Réal Labelle, Rim Makni Gargouri, & Claude Francoeur, *Diversity Management and Financial Reporting Quality* (September 10, 2009). *Journal of Business Ethics*, 335, 339 (2010), Available at: <http://ssrn.com/abstract=1471332>, citing David A. Carter, Betty J. Simkins & W. Gary Simpson, *Corporate Governance, Board Diversity, and Firm Performance 1* (March 2002). Oklahoma State University Working Paper. Available at: <http://ssrn.com/abstract=304499>.

aimed at improving FRQ [financial reporting quality] and ultimately at creating value.”¹⁰ In the July 16, 2002 recommendations regarding internal corporate governance, the preliminary report of the American Bar Association Task Force on Corporate Responsibility recommended that procedures be instituted “for periodic evaluations by the directors of... the diversity of experience of individual directors...”¹¹ Significantly, Professor Brown writes that the board’s “advisory function must be accompanied by... increased emphasis on diversity as a criterion for board membership. Only with broad viewpoints that emanate from differences in background, experience, gender and race, will the board be able to provide the feedback necessary to make the advisory function meaningful.”¹² Brown continues that “the institution of a meaningful advisory function, including greater board diversity, will likely result in a more effective board.”¹³

SEC Diversity Statement Requirement

During late 2009, the SEC adopted a rule “to assess a company’s commitment to developing and maintaining a diverse board. In summary, public companies are now required to

¹⁰ Réal Labelle, Rim Makni Gargouri, & Claude Francoeur, *Diversity Management and Financial Reporting Quality* (September 10, 2009). *Journal of Business Ethics*, 335, 339 (2010), Available at: <http://ssrn.com/abstract=1471332>. See also Anthony F., Jurkus, Jung Chul Park & Lorraine S. Woodard, *Women in Top Management and Agency Costs* (February 28, 2008). Available at: <http://ssrn.com/abstract=1085109>; Nina Smith, Valdemar Smith & Mette Verner, *Do Women in Top Management Affect Firm Performance? A Panel Study of 2500 Danish Firms* (August 2005). IZA Discussion Paper No. 1708. Available at: <http://ssrn.com/abstract=780910>; Claude Francoeur, , Réal Labelle, & Bernard Sinclair-Desgagne, *Gender Diversity in Corporate Governance and Top Management* (July 13, 2008). 81 *Journal of Business Ethics*, 83 (2008). Available at: <http://ssrn.com/abstract=1159472>; David A. Carter, Frank P. D'Souza, Betty J. Simkins, & W. Gary Simpson, *The Diversity of Corporate Board Committees and Financial Performance* (March 1, 2008). Available at: <http://ssrn.com/abstract=1106698>; Renee B. Adams, & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance* (October 22, 2008). Available at: <http://ssrn.com/abstract=1107721>; Soku Byoun, Kiyoun Chang, & Young Sang Kim, *Does Corporate Board Diversity Affect Corporate Payout Policy?* (March 15, 2011). Available at: <http://ssrn.com/abstract=1786510>; Nicola F. Sharpe, *The Cosmetic Independence of Corporate Boards* (June 1, 2011). *Seattle University Law Review*, Vol. 34, pp. 1435-1456, 2011; Illinois Program in Law, Behavior and Social Science Paper No. LBSS11-23; Illinois Public Law Research Paper No. 10-36. Available at: <http://ssrn.com/abstract=1856698> (cosmetic independence is not enough); and Steven A. Ramirez, *Diversity and the Boardroom*, 6 *Stan. J.L. Bus. & Fin.* 85 (2000).

¹¹ Lawrence A. Hamermesh,., *Preliminary Report of the American Bar Association Task Force on Corporate Responsibility*. 58 *The Business Lawyer*, 23 Available at: <http://ssrn.com/abstract=321701>.

¹² J. Robert Brown, Jr., *supra* note __ at 22.

¹³ J. Robert Brown, Jr., *supra* note __ at 22.

disclose whether diversity is a factor in considering candidates for nomination to the board of directors, and how the company assesses how effective the policy has been.”¹⁴ SEC

Commissioner Luis A. Aguilar puts the case for boardroom diversity this way,

Because of the importance of boards of directors, investors increasingly care about how directors are appointed, and what their background is. This is especially true as American businesses compete in both a global environment, and in a domestic marketplace that is, itself, growing more diverse. In this ever more challenging business environment, the ability to draw on a wide range of viewpoints, backgrounds, skills, and experience is critical to a company’s success.¹⁵

Thomas Lee Hazen and Lissa L. Broome write “The amended proxy disclosure rule regarding board diversity is a positive step that may increase discussion of diversity issues in board nominating committees.”¹⁶ Moreover, “It supplements ongoing efforts by various groups focused on increasing board diversity, but does so in a way that is far less intrusive than the quota approach adopted in several other countries.”¹⁷

It is obvious, however, that companies and the SEC are interpreting the new rule differently. The vast majority of companies do not seem to equate ‘consideration’ of diversity with having a diversity ‘policy,’ although the SEC’s comments on several proxies and Commissioner Aguilar’s public statements seem to conflate the two. Many companies have parsed the rule’s language and view consideration of diversity in nominating directors as different and distinct from having a formal diversity policy. Many even affirmatively state that they do *not* have a diversity policy so that they do not then trigger the rule’s requirements of discussing implementation of the policy and how the company assesses the effectiveness of the policy.

¹⁴ Luis A. Aguilar, SEC Commissioner, Keynote Speech before the 2011 Hispanic Association of Corporate responsibility, An Update on Diversity and Financial Literacy (April 30, 2011), Available at <http://sec.gov/news/speech/2011/spch043011laa.htm>. See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,355.

¹⁵ Luis A. Aguilar, SEC Commissioner, Address before the Stanford Law School, Diversity on Corporate Boards: When Diversity Makes a Difference (Sept. 10, 2009), Available at <http://sec.gov/news/speech/2009/spch091009laa.htm>.

¹⁶ Thomas Lee Hazen & Lissa L. Broome, *Board Diversity and Proxy Disclosure* 24 (August 31, 2011). University of Dayton Law Review, 2012; UNC Legal Studies Research Paper No. 1920442. Available at SSRN: <http://ssrn.com/abstract=1920442>.

¹⁷ Thomas Lee Hazen & Lissa L. Broome, *Board Diversity and Proxy Disclosure* 24 (August 31, 2011). University of Dayton Law Review, 2012; UNC Legal Studies Research Paper No. 1920442. Available at SSRN: <http://ssrn.com/abstract=1920442>.

We urge the SEC to issue interpretive guidance on the amended rule to explicate that any consideration of diversity in board nominations reflects a policy to consider diversity whose implementation and assessment must then be discussed. This would be preferable to the piecemeal proxy comment process which is now the only guidance companies are receiving about the SEC's interpretation of the rule.¹⁸

Diversity Justified on Moral or Social Grounds

Professor Fairfax observes that “in commenting on directors’ role, Ira Millstein, who drafted one of the first *OECD Principles of Corporate Governance*, recently stated that directors must be ‘people whom shareholders, employees, suppliers, customers and communities trust to ‘do the right thing.’”¹⁹ Moreover, “Professors Henry Hansmann and Reinier Kraakman... note that today’s corporate form ‘enhances the probability that [board members] will respond in a principled fashion to the interests of all corporate constituencies simply through moral principles and social pressure.’”²⁰ Fairfax contends, “This broader notion of the corporation means that corporate actors do not have to justify their actions in terms of market returns, but can pursue actions that have a valuable impact on the corporation and the community it serves.”²¹

Along these lines, courts have sanctioned corporate actions that appear to stem from this broader understanding of corporate responsibilities. Hence, even when they do not advance short-term profits, courts will not overturn director actions so long as they can be tied to the long-term health of the corporation.²²

¹⁸ Thomas Lee Hazen & Lissa L. Broome, *Board Diversity and Proxy Disclosure* 24 (August 31, 2011). University of Dayton Law Review, 2012; UNC Legal Studies Research Paper No. 1920442. Available at SSRN: <http://ssrn.com/abstract=1920442>.

¹⁹ Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, Wis. L. Rev.. 795 (2005); U of Maryland Legal Studies Research Paper No. 2005-58. Available at SSRN: <http://ssrn.com/abstract=835406>, citing Ira M. Millstein, *A Perspective on Corporate Governance (Rules, Principles, or Both)*, in *The Accountable Corporation* (forthcoming Sept. 2005) (manuscript at 7, on file with author).

²⁰ Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, Wis. L. Rev.. 795, 851 (2005); U of Maryland Legal Studies Research Paper No. 2005-58. Available at SSRN: <http://ssrn.com/abstract=835406>, citing Henry Hansmann & Reinier Kraakman, *What Is Corporate Law?*, in REINIER KRAAKMAN ET AL., *THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH* 1, 12 (2004).

²¹ Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, Wis. L. Rev.. 795, 851 (2005); U of Maryland Legal Studies Research Paper No. 2005-58. Available at SSRN: <http://ssrn.com/abstract=835406>.

²² *Id.* citing *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (allowing directors to forego profits to advance the long-term concerns of the corporation).

For example, courts have upheld charitable giving by boards based on the notion that such giving enhances the community image of the corporation, which benefits the corporation, if only intangibly.²³ Like charitable giving, promoting board diversity for its own sake may serve to enhance the public image of a corporation. Also, courts have allowed corporations to forgo profits in order to preserve the integrity of the community in which it serves.²⁴ Similarly, courts have enabled corporations to prevent shareholders from taking advantage of the lucrative returns available in connection with a takeover, so that corporations can protect their employees and society.²⁵ Courts sanction these actions based on a corporate governance paradigm that contends that corporations have an obligation beyond maximizing shareholder profits and returns.²⁶

Certainly, diversity efforts justified on moral or social grounds would fit into this paradigm. Thus, rather than fitting their arguments into the shareholder primacy framework, diversity advocates should seek to push this broader concept of the corporation. This effort not only appears more consistent with the modern understanding of corporations' role within society, but also encourages people to view the corporation in terms other than its market viability. Such a view makes it easier to justify efforts on social appeals, a justification for diversity that may be more honest and valid than business ones.²⁷

Urmi Ashar observes that

Fromburn and others have pointed out that reputation is a source of equity value. Good reputation can drive customers to buy more at higher prices, employees to work harder for less, vendor and creditors to offer superior terms, equity investors

²³ Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, Wis. L. Rev.. 795, 851 (2005); U of Maryland Legal Studies Research Paper No. 2005-58. Available at SSRN: <http://ssrn.com/abstract=835406>, citing *Theodora Holding Corp. v. Henderson*, 257 A.2d 398, 405 (Del. Ch. 1969) (noting that the overall benefits of charitable giving outweighed the loss of income to shareholders).

²⁴ Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, Wis. L. Rev.. 795, 851 (2005); U of Maryland Legal Studies Research Paper No. 2005-58. Available at SSRN: <http://ssrn.com/abstract=835406>, citing *Shlensky*, 237 N.E.2d at 780 (allowing corporations to forego profit to prevent the neighborhood's deterioration).

²⁵ Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, Wis. L. Rev.. 795, 851 (2005); U of Maryland Legal Studies Research Paper No. 2005-58. Available at SSRN: <http://ssrn.com/abstract=835406>, citing *Moran v. Household Int'l, Inc.*, 500 A.2d 1346, 1349, 1357 (Del. 1985) (allowing directors to adopt antitakeover strategies in order to protect employees); *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 955 (Del. 1985) (noting that when defending against a takeover, corporations could consider the interests of customers, employees, and even the community).

²⁶ Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, Wis. L. Rev.. 795, 851 (2005); U of Maryland Legal Studies Research Paper No. 2005-58. Available at SSRN: <http://ssrn.com/abstract=835406>, citing *Margaret M. Blair & Lynn A. Stout, Director Accountability and the Mediating Role of the Corporate Board*, 79 Wash. U. L.Q. 403, 406, 408 (2001) (noting that the case law allows directors to allocate resources to all relevant corporate constituents).

²⁷ Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, Wis. L. Rev.. 795, 851 (2005); U of Maryland Legal Studies Research Paper No. 2005-58. Available at SSRN: <http://ssrn.com/abstract=835406>.

to bid up multiples, and regulators to cast a more benign eye. It is thus an epiphenomenon of the interplay between culture and operational matters, oversight and governance practices and its perception by stakeholders.

Put another way, corporate reputation isn't just about creating a nebulous branding statement that is associated with trustworthiness, reliability, honesty, product quality, or community responsibility. It's about a firm actually embodying all of those things, and setting up management and governance practices to ensure that the firm lives up to the values and investing truly "Diverse Board" is a key tactic.²⁸

III. DEMOGRAPHICS OF DIVERSITY

Spencer Stuart reports that “diversity is on the agenda, but the reality seems to suggest otherwise,” noting that “90% of proxy statements discuss whether the board considers diversity among its current and potential members.”²⁹ Moreover

These boards have reported their commitment to achieving a diversified board in terms of age, race, gender, geographic origin, viewpoints and experience. Many boards also express a desire for the board to reflect the company's business footprint, customer base and shareholders.

Despite this stated commitment, the share of minority directors has scarcely budged in many years, while representation among women has inched up.³⁰

Progress Lags

According to Professor Lisa Fairfax, “As one might expect, there are many similarities between the circumstances of women directors and directors of color, which include African

²⁸ E-mail from Dr. Urmi Ashar, Adjunct Faculty, Carnegie Mellon University (Mar. 5, 2012) (on file with author), citing Charles Frombrun & Cees Van Riel, *The Reputational Landscape*, 1 CORPORATE REPUTATION REVIEW, 5 (20__) available at http://www.reputationinstitute.com/press/1_1_Reputation_Landscape.pdf; see also generally Toyah Miller & Maria Del Carmen Triana, *Demographic Diversity in the Boardroom: Mediators of the Board Diversity – Firm Performance Relationship*, 46 JOURNAL OF MANAGEMENT STUDIES 755 (July 2009).

²⁹ 2011 Spencer Stuart Board Index, 18, available at http://content.spencerstuart.com/sswebsite/pdf/lib/SSBI_2011_final.pdf.

³⁰ 2011 Spencer Stuart Board Index, 18, available at http://content.spencerstuart.com/sswebsite/pdf/lib/SSBI_2011_final.pdf.

Americans, Latinos, and Asian Americans.”³¹ She observes that “both groups began appearing on corporate boards in significant numbers during the same period – right after the civil rights period – pursuant to which the push for racial equality throughout society precipitated efforts to achieve greater representation of people of color, as well as women, on corporate boards.”³²

Westphal and Milton found (2000)³³ that “Partly in response to pressure from institutions, boards have increased demographic diversity across a range of characteristics.” In addition

TIAA-CREF and several other major pension funds have filed blanket resolutions with companies that require them to create boards ‘composed of qualified individuals who reflect a diversity of experience, gender, and race’ (Browder, 1995; Forbes, 1995). For instance, a large chemicals firm was pressured to add directors with experience in other industries and a background in marketing or finance rather than engineering, while also appointing more women and ethnic minorities (Rosenberg, 1994). It is routinely claimed or assumed that such demographic diversity should lead to less insular decision-making processes and greater openness to change (Gormley, 1996, Kotz, 1998). According to the president of TIAA-CREF, ‘people with diverse backgrounds contribute unique perspectives that greatly enrich discussions of critical issues’ (Biggs, 1995: 17)... Many boards made up largely of industry insiders, or individuals with a particular functional background, have appointed directors from outside the industry with experience in other functions, and the representation of women and racial minorities on boards has also gradually increased in recent years (Heidrick and Struggles, 1996; Kotz, 1998; Daily, Certo, and Dalton, 1999).³⁴

Moreover, “Despite the progress women and people of color have made over the last thirty years, the total number of board seats held by women and people of color are relatively small.”³⁵ Korn/Ferry finds, “While women and members of ethnic minorities are no longer

³¹ Lisa M. Fairfax, *Some reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated With Women of Color*, 79 St. John’s L. Rev., 1105 (2005), citing *Who Are the Women in the Board Rooms?*, 16 BUS. & SOC’Y REV. 5, 5 (1975).

³² Lisa M. Fairfax, *Some reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated With Women of Color*, 79 St. John’s L. Rev., 1105 (2005), citing *Who Are the Women in the Board Rooms?*, 16 BUS. & SOC’Y REV. 5, 5 (1975).

³³ James D. Westphal & Laurie P. Milton, *How Experience and Network Ties Affect the Influence of Demographic Minorities on Corporate Boards*, 3 (2000) Available at: <http://ssrn.com/abstract=236441>.

³⁴ James D. Westphal & Laurie P. Milton, *How Experience and Network Ties Affect the Influence of Demographic Minorities on Corporate Boards*, 3 (2000) Available at: <http://ssrn.com/abstract=236441>.

³⁵ Lisa M. Fairfax, *Some reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated With Women of Color*, 79 St. John’s L. Rev., 1105, 1110 (2005).

strangers to board service, analysis of the proxy data show that participation by these groups has reached a plateau, however temporary.”³⁶ Moreover

The recent lack of progress has been similar across the three minority groups detailed in the proxy filings: African-Americans, Latinos and Asians. With the U.S. Census Bureau projecting that minorities will represent more than half of the U.S. population by 2050, it would seem that increasing ethnic diversity would, like gender diversity, offer a strategic benefit in reflecting the makeup of customers, shareholders and employees.³⁷

Proxy data from the 2007 season as depicted in Table 1, discloses that “diversity numbers have increased for the first time in three years with major growth among African-Americans and Asians.”³⁸

Table 1
Boards Having One or More of the Following Individuals

Proxy Data From	2007	2006	2005	2004	2003	2002	2001	1995
Retired executive (other companies)	96%	95%	95%	95%	94%	94%	93%	75%
Investor	93%	94%	94%	91%	91%	89%	91%	73%
CEO/COO (other companies)	78%	79%	80%	82%	83%	83%	82%	82%
Women	85%	85%	84%	82%	80%	79%	78%	69%
Former government official	52%	53%	55%	58%	59%	59%	56%	54%
Ethnic minority member	78%	76%	76%	76%	75%	71%	68%	47%
African-American	47%	46%	47%	47%	47%	44%	42%	34%
Latino	19%	19%	19%	18%	19%	17%	16%	9%
Asian	11%	10%	10%	11%	10%	10%	10%	4%
Academician	52%	55%	56%	58%	60%	59%	59%	53%
Commercial banker	26%	27%	27%	29%	30%	31%	30%	28%
Non-U.S. citizen	14%	14%	14%	15%	15%	16%	15%	17%

Source: Korn/Ferry Institute, 34th Annual Board of Directors Study.

Deborah Rhode and Amanda K. Packel report that “Some of the most encouraging numbers on board diversity may conceal less promising trends.”³⁹ Accordingly

³⁶ Korn/Ferry Institute, 34th Annual Board of Directors Study 6 (2009).

³⁷ Korn/Ferry Institute, 34th Annual Board of Directors Study 7 (2009).

³⁸ Korn/Ferry Institute, 34th Annual Board of Directors Study 18 (2009).

³⁹ Deborah Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, (Sept. 2010). Rock Center for Corporate Governance at Stanford University Working Paper No. 89. Available at: <http://ssrn.com/abstract=1685615>.

Much of the increase in women and minority directors over the last decade may reflect the same individuals sitting on more boards rather than the appointment of new individuals as directors. In addition, the Sarbanes-Oxley Act led many corporations to reduce overall board size, which means that the same number of women and minority directors may comprise a greater percentage of a now smaller board.⁴⁰

Women

Spencer Stuart reports “a large disconnect between the number of boards in [their] survey who say they are looking for women directors (44%) and the percentage of new S&P 500 directors who are women (21%). Overall, 9% of S&P 500 boards have no women,⁴¹ down slightly from 10% reported in the 2010 survey and 12% in 2005.”⁴² Korn/Ferry reported on 2008 data for the largest 100 American corporations (by market capitalization), “Irrespective of board size, the number of women directors serving has remained fairly consistent over the past several years. The number of companies with at least one woman on their board... remained unchanged from 2006 at 85 percent. This number has been rising only slowly in recent years.”⁴³ The Korn/Ferry data for the same group compiled from proxies related to fiscal year 2009 shows greater participation by women. “While nearly all – 97 percent – of boards have at least one female director, women make up only 16 percent of all directors. The average number of women on boards is two.”⁴⁴

⁴⁰ Deborah Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, (Sept. 2010). Rock Center for Corporate Governance at Stanford University Working Paper No. 89. Available at : <http://ssrn.com/abstract=1685615>, citing Lissa Lamkin Broome, *The Corporate Boardroom: Still a Male Club*, 33 J. CORP. L. 666, 667 (2008) (reviewing Douglas M. Branson, *NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM* (2007)), noting ‘Even corporations whose consumer base is largely female often have few women directors on their boards.’ See also Joan MacLeod Heminway & Sarah White, *Wanted: Female Corporate Directors*, 29 PACE L. REV. 249, 254 (2007).

⁴¹ 2010 Spencer Stuart Board Index, 19, available at http://content.spencerstuart.com/sswebsite/pdf/lib/SSBI_2011_final.pdf.

⁴² 2010 Spencer Stuart Board Index, 5, <http://www.spencerstuart.com/practices/boards/publications/1454/>.

⁴³ Korn/Ferry Institute, 34th Annual Board of Directors Study 6 (2009).

⁴⁴ Korn/Ferry, *KFMC 100: Board Leadership at America’s Most Valuable Public Companies*, 31 (2010).

Racial Minorities

Among S&P 500 boards, “47% of the boards... report seeking minorities, yet only 12% of new directors are minorities. And 11% of boards still have no minorities.”⁴⁵ Korn/Ferry provides us with an historical overview, observing

The representation of ethnic minorities on the boards of FORTUNE 1000 companies rose rapidly in the 1980s and 1990s, but it, too, seems to have hit a barrier. In the last four years, the number of companies that have at least one director from an ethnic minority has risen only slightly from 75 percent to 78 percent.⁴⁶

The Alliance for board diversity finds that between 2004 and 2010 the total number of board seats among the Fortune 100 remained relatively flat “with only 16 seats added.”⁴⁷ By gender, “Women gained 16 seats – a total increase of 1.1 percentage points over six years – while the number of seats occupied by men remained unchanged.”⁴⁸ Furthermore, “Within the minority groups, Asian Pacific Islander men and women gained 12 and three seats, respectively, and African-American men and women lost five seats and one seat, respectively. The three seats gained by Hispanic women offset the three seats lost by Hispanic men.”⁴⁹

Corporate governance is a legally intensive enterprise. For example, in a survey including many smaller Texas corporations, Trautman (2011) found that approximately 27 percent of directors sitting on Texas boards reportedly have a legal background.⁵⁰ Looking at the

⁴⁵ 2010 Spencer Stuart Board Index, 5, <http://www.spencerstuart.com/practices/boards/publications/1454/>.

⁴⁶ Korn/Ferry Institute, 34th Annual Board of Directors Study 7 (2009).

⁴⁷ Alliance for Board Diversity, Missing Pieces: Women and Minorities on Fortune 500 Boards, 2010 Alliance for Board Diversity Census 4 (Revised July 21, 2011), Available at http://theabd.org/ABD_report.pdf.

⁴⁸ Alliance for Board Diversity, Missing Pieces: Women and Minorities on Fortune 500 Boards, 2010 Alliance for Board Diversity Census 4 (Revised July 21, 2011), Available at http://theabd.org/ABD_report.pdf.

⁴⁹ Alliance for Board Diversity, Missing Pieces: Women and Minorities on Fortune 500 Boards, 2010 Alliance for Board Diversity Census 4 (Revised July 21, 2011), Available at http://theabd.org/ABD_report.pdf.

⁵⁰ Lawrence J. Trautman, TRAUTMAN’S GUIDE TO CORPORATE DIRECTORS: TEXAS (forthcoming 2012), Available at <http://www.TrautmansGuide.com>.

pattern of slow admittance to America's law schools and to the practice of law illustrates how one avenue of potential entrance to the corporate boardroom has not historically been available to women and people of color. For example, the practice of law in Maryland was restricted to white males until 1888.⁵¹ "Thus, both race and gender posed insurmountable barriers to black women, white women, and black men who wanted to practice law in Maryland."⁵² It wasn't until 1869, when "Bell Babb Mansfield, commonly believed to be the first woman lawyer of any race in the United States, was admitted to practice law in Iowa."⁵³ Three years later, a black woman named Charlotte E. Ray became the first known black woman lawyer when she was admitted to practice law in the District of Columbia."⁵⁴ Fast-forwarding to the 1940s, Texan Louise Raggio recalls the difficulty she experienced enrolling as the first female law student at Southern Methodist University in February, 1947. "If ever there was a persona non grata, in Southern Methodist University's night law classes, I was it!" she recalls.⁵⁵ Moreover,

... Was dean of the law school, and he was, indeed, of the old school. His bearing, behavior, and ideas were those of a male of the Civil War era. His standards for females were a throwback from the 1870s instead of the 1940s... [The admissions director] did not believe there was a place for *any* woman in law school, and he almost choked when I presented myself as a likely candidate. Everybody in a position of authority at SMU discouraged me. I was reminded that law was a male profession, that the rough-and-tumble charges and countercharges of the courtroom was no suitable contest for a lady, that if I *were* admitted (and my qualifications were better than any other candidate) I would only be taking up space that could be occupied by a man who would *do something* with his degree.⁵⁶

⁵¹ Taunya Lovell Banks, *Setting the Record Straight: Maryland's First Black Women Law Graduates*, 63 MD. L. REV. 752 (2004), citing David S. Bogen, *The Transformation of the Fourteenth Amendment: Reflections from the Admission of Maryland's First Black Lawyers*, 44. MD. L. REV. 939, 1020, 1032-33 (1985).

⁵² Taunya Lovell Banks, *Setting the Record Straight: Maryland's First Black Women Law Graduates*, 63 MD. L. REV. 752 (2004).

⁵³ Taunya Lovell Banks, *Setting the Record Straight: Maryland's First Black Women Law Graduates*, 63 MD. L. REV. 752 (2004), citing Karen Berger Morello, *The Invisible Bar: The Woman Lawyer in America 1638 to the Present* 11 (1986).

⁵⁴ *Id.* at 146.

⁵⁵ Louise Ballerstedt Raggio, with Vivian Anderson Castleberry, *Texas Tornado: The Autobiography of a Crusader for Women's Rights and Family Justice*, 111 (Citadel Press 2003).

⁵⁶ *Id.* at 113.

Women of Color: A Particular Concern

When measured against their percentages of the labor force and within professional schools, women of color account for a disproportionately smaller percentage of available board seats. Fairfax notes

As a subset of both women and people of color, women of color occupy a unique position within the corporate board structure. Like these other groups, the empirical evidence reveals that women hold a small portion of the total board seats, particularly as measured against their percentages within the labor force and student population. Then too, women of color hold a comparatively smaller percentage of board seats compared to both white women and men of color. Additionally... the empirical evidence highlights problems unique to African Americans that have important repercussions for the potential to increase the number of people of color holding corporate board seats.

Women of color occupy a small percentage of the total available board seats. Thus, in 2003, women of color accounted for only 3% of the total available board seats at *Fortune 500* companies.⁵⁷

IV. ATTRIBUTES, QUALITIES & SKILLS REQUIRED OF EVERY DIRECTOR

Let us now turn to examining the backgrounds of those who are newly elected to serve on boards. Based upon responses from directors of S&P 500 companies, Spencer Stuart's 2010 Board Index, as illustrated in Table 2, provides the following snapshot of the backgrounds of new independent directors.

⁵⁷ Lisa M. Fairfax, *Some reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated With Women of Color*, 79 St. John's L. Rev., 1105, 1115 (2005).

Table 2
New Independent Director Backgrounds

Background	2000	Year 2005	2010	2010 by gender	
				Men	Women
CEO/COO/chair/president/ vice chair	62%	45%	43%	50%	17%
<i>Active</i>	53%	32%	26%	29%	14%
<i>Retired</i>	9%	13%	17%	21%	3%
Other corporate executives	10%	16%	18%	15%	32%
<i>Divisions/subsidiary presidents/heads</i>	4%	5%	8%	7%	13%
<i>EVPs/SVPs/ functional unit heads</i>	6%	11%	10%	8%	19%
Financial backgrounds	17%	20%	21%	19%	28%
<i>Finance management/CFOs/ treasurers</i>	8%	8%	8%	5%	17%
<i>Bankers/ investment bankers</i>	3%	4%	2%	2%	3%
<i>Investment management/ investors</i>	2%	6%	9%	10%	5%
<i>Accountants</i>	4%	2%	2%	2%	3%
Academic/Nonprofit	2%	10%	8%	7%	14%
Consultants	4%	3%	5%	3%	9%
Lawyers	3%	4%	1%	2%	0%
Others	2%	2%	4%	4%	0%

Source: 2010 Spencer Stuart Board Index, p.12.

N= 92 survey respondents

What Boards Are Looking For in Director Candidates

What personal characteristics and attributes are nominating committees looking for in the recruitment of new directors? According to Spencer Stuart’s 2010 Board Index, based upon responses from directors of S&P 500 companies, (see Table 3) at the top of boards wish-lists are retired and active “CEOs and COOs... 48% of respondents said they sought current top executives, while 33% look for retirees from those roles. As usual, the demand for these groups outstrips supply: they represent just 26% and 17% of new directors added this past year.”⁵⁸ As to actual results for minority and women recruitment efforts, “The actual number... also falls short of expressed demand by boards. While 47% of [S&P 500] boards surveyed say they seek to

⁵⁸ *Id.*

bring on minorities, only 12% of new independent directors added in 2010 come from diverse ethnic backgrounds. The same disparity holds true for women: 44% versus 21%.⁵⁹

Table 3
Wish List for New Director Backgrounds

Active CEO/COO	48%
Retired CEO/COO	33%
Financial expertise	49%
Industry expertise	48%
International expertise	37%
Regulatory/government expertise	20%
Risk expertise	20%
Technology expertise	19%
Marketing expertise	17%
Human resource expertise	3%
Legal expertise	1%
Minorities	47%
Women	44%

Source: 2010 Spencer Stuart Board Index, p.12.

N= 92 survey respondents

Percentages add up to more than 100 as respondents could select more than one category.

Each Board Has the Same “Core” Fundamental Needs for Talent

While the full board is responsible for approving nominees for election as directors, it is the Nominating and Governance ("N&G") Committee, which is usually responsible for reviewing and recommending nominees to the board. The N&G Committee should be comprised solely of independent directors as defined by the rules of the New York Stock Exchange (NYSE) and the board's corporate governance guidelines.⁶⁰

⁵⁹ *Id.*

⁶⁰ See Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment*, 11 FLA. ST. U. BUS. REV. (forthcoming, 2012), Available at <http://www.ssrn.com/abstract=1998489>. citing Disclosure Required By Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release Nos. 33-8177; 34-47235 (Jan. 24, 2003) Available at <http://www.sec.gov/rules/final/33-8177a.htm>. See also Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval to Proposed Rule Change and

Desired Personal Attributes

Best practice dictates that every board should agree on a clear statement of desired personal attributes of all board members to provide guidance to the nominating and governance committee as they search for director candidates. As a starting point, most boards have determined that each director candidate should possess the following necessary core personal attributes: high standards of ethical behavior; availability; outstanding achievement in the individual's personal and professional life; possession of strong interpersonal and communication skills; independence; and soundness of judgment.⁶¹

Experience Attributes:

Trautman previously observed that, the best mix of director skills and "experience will depend on many company-specific variables. Some of the most important of these variables include, but are not limited to: (1) company lifecycle stage, (2) extent to which international markets are 'mission critical' to your future (detailed understanding of target culture, markets and business risk); (3) unique technology dependence; and (4) need for access to financial and capital markets."⁶²

Trautman also recommends that "Every board should also set forth a statement of desired experience attributes for each director candidate. These might include such characteristics as:

- *General business experience*- Possess a general understanding of elements related to the success of a company like ours in the current business environment;

Amendment No. 1 Thereto Modifying the Exchange's Independent Director and Audit Committee Corporate Governance Standards; *See also* Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the NASDAQ Listing Rules to Reflect Changes to the Rules of the Commission, Release No. 34-60094.

⁶¹ *See generally* Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment*, 11 FLA. ST. U. BUS. REV. (forthcoming, 2012), Available at <http://www.ssrn.com/abstract=1998489>.

⁶² Lawrence J. Trautman, Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment*, 11 FLA. ST. U. BUS. REV. (forthcoming, 2012), Available at <http://www.ssrn.com/abstract=1998489>.

- *Specific industry knowledge*- Possess a reasonable knowledge about our businesses;
- *Financial acumen*- Should have a good understanding of business finance and financial statements;
- *Educational and professional background*- Should possess a complementary set of skills within a framework of total board knowledge base;
- *Diversity of background and viewpoint*- Bring to the board an appropriate level of diversity; and
- *Other attributes*- Provide those special attributes identified as needed.⁶³

The Must Have: Audit Committee "Qualified Financial Expert"

First, we look at the skill and experience requirements every board needs -- absolute "must haves" --- (1) independent directors to populate the audit, compensation and nominating and governance committees, and (2) qualified individuals who meet the definition of "financial expert" to serve on the audit committee. By having three individuals who qualify as financial experts, one to serve as chairman of the audit committee, a back-up designated as vice chairman for succession planning purposes, and preferably a third qualified "financial expert" to serve while gaining in-service experience over-time and gaining an increased familiarity with the company's pressing audit issues. New York Stock Exchange and SEC Rules require that audit committees consist of "independent" directors, at least one as chair deemed to be qualified "financial expert."⁶⁴

⁶³ Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment*, 11 FLA. ST. U. BUS. REV. (forthcoming, 2012), Available at <http://www.ssrn.com/abstract=1998489>.

⁶⁴ Disclosure Required By Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release Nos. 33-8177; 34-47235 (Jan. 24, 2003) Available at <http://www.sec.gov/rules/final/33-8177a.htm>, See also Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval to Proposed Rule Change and Amendment No. 1 Thereto Modifying the Exchange's Independent Director and Audit Committee Corporate Governance Standards; See also Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the NASDAQ Listing Rules to Reflect Changes to the Rules of the Commission, Release No. 34-60094. See also Lawrence J. Trautman, *Who Qualifies as an Audit Committee Financial Expert Under SEC Regulations and NYSE Rules?* (forthcoming), available at _____

Just as the fulfillment of each director's "duty of care" requires that a succession plan be in place to assure that the enterprise will be able to adapt with minimal disruption when a CEO unexpectedly dies or is incapacitated; so too, it seems that all audit committees should have preferably more than one experienced, qualified financial expert replacement waiting in the wings should the audit committee chair fall open unexpectedly. Information technology plays an increasingly critical role for almost every enterprise. Accordingly, the board's responsibility to govern information technology should also dictate that one or more audit committee members have relevant skill and experience.⁶⁵

Prior Business/Corporate Governance Experience

Corporate governance is a legally-intensive endeavor. Directors are required to understand and adhere to numerous rules and regulations which come from: state law, evolving case law and an increasing trend toward federalization of corporate governance (33 Act,⁶⁶ 34 Act,⁶⁷ Foreign Corrupt Practices Act (FCPA),⁶⁸ Sarbanes-Oxley,⁶⁹ and more recently Dodd-Frank.⁷⁰ Accordingly, those minority candidates with a legal education are likely best suited to corporate governance work. Fanto, Solan and Darley (2011) observe that “a board member with numerous connections can be a valuable resource to a firm. A typical director, it must be remembered, may be the CEO of another firm, a director of several other firms, and a director of

⁶⁵ See generally Lawrence J. Trautman & Kara Altenbaumer-Price, *The Board's Responsibility for Information Technology Governance*, 28 JOHN MARSHALL J. OF COMP. & INFOR. LAW, 313 (2011).

⁶⁶ 15 U.S.C. §77a.

⁶⁷ 15 U.S.C. §78a.

⁶⁸ See Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. §§ 78dd-1 et. seq. See also Lawrence J. Trautman & Kara Altenbaumer-Price, *The Foreign Corrupt Practices Act: Minefield for Directors*, 6 VA L. & BUS. REV. 145 (2011).

⁶⁹ See Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, See also Lisa M. Fairfax, *Form Over Substance?: Officer Certification and the Promise of Enhanced Personal Accountability Under the Sarbanes-Oxley Act*, 55 Rutgers L. Rev. 1 (2002).

⁷⁰ Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. (2010).

nonprofit organizations.”⁷¹ Accordingly, “these connections can be useful to the firm, for a director with them brings along knowledge of practices and strategies at other firms and can identify acquisition targets and financing options.”⁷²

The number of years of previous public board service is probably a good indication of the likelihood of directorship skills having been acquired. This assumes that the company where a director served previously benefited from skilled legal counsel so that directors without legal training have had an opportunity to pick up an understanding of director duties and responsibilities as they go. A strong resume of attending NACD sponsored education and training is also a good indication that a candidate understands the legal pressure points of directorship.⁷³

Government and Regulatory Relations

Fanto, Solan and Darley state that “a particularly important networking characteristic today comes from a director’s government ‘connections,’ which can arise from government service, generally in the executive branch. These connections can be particularly significant for firms in highly regulated industries or for those doing considerable business with the government. For example, a director within a network of existing and former government officials can assist executives with regulatory issues and advise them and the board on relevant

⁷¹ James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C.L. REV. 902 (2011); Brooklyn Law School, Legal Studies Paper No. 224. Available at <http://www.ssrn.com/abstract=1793172>, citing “one example, among many, William C. Weldon is Chairman/CEO of Johnson & Johnson, a director of JPMorgan Chase, and a trustee for Quinnipiac University (among other nonprofit positions).”

⁷² James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C.L. REV. 902 (2011); Brooklyn Law School, Legal Studies Paper No. 224. Available at <http://www.ssrn.com/abstract=1793172>, citing generally Christine Shropshire, *The Role of the Interlocking Director and Board Receptivity in the Diffusion of Practices*, 35 Acad. Mgmt. Rev. 246, 246-47 (2010) (discussing from a theoretical perspective, the characteristics of directors that promote diffusion of practices among firms as a result of interlocking directors).

⁷³ See generally NACD Education, National Association of Corporate Directors, available at <http://www.nacdonline.org/Education/?navItemNumber=527>.

legislative and regulatory changes, and she may even act as an indirect lobbyist for a firm.⁷⁴

This function can be an avenue to the board for women and ethnic and racial minorities who have not had the typical experience as a CEO to qualify them for board service.⁷⁵

International

International sales play an ever increasing role for U.S. based companies. Yet many American boards lack the benefit of directors who are experienced in the culture, market channels and the substantial legal, economic and governmental risk associated with doing business abroad. For these reasons, Governance and nominating committees are increasingly seeking to add directors having knowledge and experience in the international markets where they are either now doing business or expect to look for future growth.⁷⁶

V. THE POOL OF QUALIFIED CANDIDATES ISSUE

We have seen previously that most boards are looking for (1) prior CEO experience, (2) industry experience, and (3) prior directorship experience.⁷⁷ Fairfax observes

⁷⁴ James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C.L. REV. 902 (2011); Brooklyn Law School, Legal Studies Paper No. 224. Available at <http://www.ssrn.com/abstract=1793172>, observing “Recently, a U.S. firm, Amerilink Telecom Corporation, decided to market telecommunications equipment made by a Chinese manufacturer. See Spencer E. Ante & Shayndi Raice, *Dignitaries Come on Board to Ease Huawei into U.S.*, WALL ST. J. Sept. 21, 2010, at B1. Amerilink brought on its board of directors former House majority leader Richard Gephardt and former World Bank head James Wolfensohn to help the firm overcome security concerns by U.S. government officials over the use of Chinese telecommunications equipment in the United States. *Id.* Amerilink’s founder and CEO is a former vice chairman of the Joint Chiefs of Staff. *Id.*”

⁷⁵ James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C.L. REV. 902 (2011); Brooklyn Law School, Legal Studies Paper No. 224. Available at <http://www.ssrn.com/abstract=1793172>, observing “Examples come to mind, such as Vernon Jordan, who began as a civil rights lawyer, served as senior advisor to former President Bill Clinton, and is now the ultimate corporate insider with numerous director positions. See Vernon E. Jordan Jr., AKIN GUMP STRAUSS HAUER & FELD LLP, <http://www.akingump.com/vjordan>. For a brief biography of Mr. Jordan, see the website of Akin Gump Strauss Hauer & Feld, *id.*, where he is a senior counsel. *Id.* (last visited Feb. 2, 2012).

⁷⁶ Lawrence J. Trautman, *American Entrepreneur in China: Potholes and Roadblocks on the Silk Road to Prosperity*, 12 WAKE FOREST J. BUS & INTELL. PROP. L. (forthcoming 2012).

⁷⁷ See generally 2010 Spencer Stuart Board Index.

When viewed against their percentages in the labor force and among degree candidates, people of color appear to be under-represented at the corporate board level, though not to the same extent as women based on their portion of the labor force and school population.

While there may be a variety of explanations for this lack of adequate representation, one factor appears to be that corporate boards draw their members from the corporate executive ranks where women and people of color occupy relatively few positions. Studies suggest that the most common occupation of board members is executive or retired executive.⁷⁸ Women hold a relatively small percentage of such positions. Thus, in 2002, 15.7% of corporate officers in *Fortune 500* companies were women.⁷⁹ Then too, [as of 2002] ... only about 1.8% of women CEOs of *Fortune 500* companies.⁸⁰

By 2010, data indicates that of the S&P 500 boards, only 16 percent are women.⁸¹ In addition, “nearly 71% of US companies have at least one woman director, according to Governance Metrics International’s 2011 Women on Boards report. This compares to 100% in Sweden (which has a mandate) and 10% in Japan. Only 10% of US companies have three women or more on the board, however, Sweden has 56%, and Japan has none.”⁸² A study of gender diversity and women’s presence on the boards of European Union banks found that cultural differences “explain part of the heterogeneity in the presence of women on the boards, since we find significant differences among European countries.”⁸³

⁷⁸ Lisa M. Fairfax, *Some reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated With Women of Color*, 79 St. John’s L. Rev., 1105, 1110 (2005), citing KORN/FERRY INT’L, 31ST ANNUAL BOARD OF DIRECTORS STUDY 12 (2004).

⁷⁹ Lisa M. Fairfax, *Some reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated With Women of Color*, 79 St. John’s L. Rev., 1105, 1112 (2005), citing CATALYST, 2002 CATALYST CENSUS OF WOMEN CORPORATE OFFICERS AND TOP EARNERS IN THE FORTUNE 500, 1 (2002).

⁸⁰ Lisa M. Fairfax, *Some reflections on the Diversity of Corporate Boards: Women, People of Color, and the Unique Issues Associated With Women of Color*, 79 St. John’s L. Rev., 1105, 1112 (2005), observing The 2002 study lists six women CEOs.

⁸¹ PwC Center for Board Governance, *Continuing the Conversation: Board Renewal* (Fall, 2011), citing 2011 Spencer Stuart Board Index, *supra* note __.

⁸² PwC Center for Board Governance, *Continuing the Conversation: Board Renewal* (Fall, 2011).

⁸³ Ruth Mateos de Cabo, Ricardo Gimeno & Maria J. Nieto, *Gender Diversity on European Banks’ Board of Directors: Traces of Discrimination*, 24 (March, 18 2009). Available at SSRN: <http://ssrn.com/abstract=1362593> or <http://dx.doi.org/10.2139/ssrn.1362593>.

So what's the Disconnect?

Many currently sitting directors believe their role is to “serve as advisors to the CEO and other major executives on significant, often strategic, issues related to the firm.”⁸⁴ Accordingly

This function could limit the range of those who appear eligible for board membership. Individuals who could offer advice on such issues based upon their experience must generally be those who are current or former CEOs, or who have had other significant executive responsibilities (e.g. president of a nonprofit). Too much should not be made of this experience, because it is conceivable that individuals without executive experience, such as a management scholar, might also be qualified to give good advice. What appears to matter for board selection on this point is that CEOs are believed to take seriously the advice only of those who have had this executive experience and whom they consider to be their peers...⁸⁵ *Indeed, a possible reason for the smaller representation of women and racial and ethnic minorities on public company boards is that members of these groups have not had the necessary executive experience to qualify them for the advisory function.*⁸⁶ [my emphasis added]

VI. GLOBAL APPROACH TO DIVERSITY

Recent regulatory requirements in several European countries have fostered considerable debate and interest about board diversity. The appropriate framework for corporate governance has been the focus of recent reforms in many countries.⁸⁷ “Regulators have begun promoting

⁸⁴ James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C.L. REV. 902 (2011); Brooklyn Law School, Legal Studies Paper No. 224 at 909 *citing* Adams et al., *supra* note 3, at 64; Jonathan L. Johnson et al., *Boards of Directors: A Review and Research Agenda*, 22 J. Mgmt. 409, 424-25 (1996).

⁸⁵ James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C.L. REV. 902 (2011); Brooklyn Law School, Legal Studies Paper No. 224 at 909 *citing* Colin B. Carter & Jay W. Lorsch, BACK TO THE DRAWING BOARD 67-68 (2004) (discussing three key functions of a board; monitoring performance, making key decisions, and giving advice); Daniel P. Forbes & Francis J. Milliken, *Cognition and Corporate Governance: Understanding Boards of Directors as Strategic Decision-Making Groups*, 24 Acad. Mgmt Rev. 489, 492 (1999) (discussing activities that a board may participate in that increase the effectiveness of both the board and the company).

⁸⁶ James A. Fanto, Lawrence M. Solan & John M. Darley, *Justifying Board Diversity*, 89 N.C.L. REV. 902 (2011); Brooklyn Law School, Legal Studies Paper No. 224 at 910 *citing* Nancy M. Carter & Christine Silva, *Women in Management: Delusions of Progress*, HARV. BUS. REV., Mar. 2010, at 19, 19-21 (discussing the difficulties of women in advancing in management ranks); Herminia Ibarra et al., *Why Men Still Get More Promotions than Women*, HARV. BUS. REV., Sept. 2010, at 80, 82-85 (discussing the lack of appropriate mentoring for women that will take them into top management).

⁸⁷ *See generally*, Marina Martynova & Luc Renneboog, *A Corporate Governance Index: Convergence and Diversity of National Corporate Governance Regulations* 1 (February 23, 2010). CentER Discussion Paper Series No. 2010-17; TILEC Discussion Paper No. 2010-012. Available at: <http://ssrn.com/abstract=1557627>.

broad diversity for societal and good-citizenship reasons (e.g. equal opportunity, equity, inclusiveness and recognition of systematic barriers to designated groups), and in the belief that diverse boards may produce more effective decision-making and mitigate group-think within boardrooms...,” observes Richard Leblanc.⁸⁸ Some European jurisdictions have instituted gender quotas for boards ranging “from 25% to 50% (in jurisdictions such as Quebec, Norway, France, Spain and Sweden) and apply to organizations ranging from public-sector boards (as in Quebec) to publicly traded corporate boards (e.g., France, Sweden and Norway). Similar laws are under debate in Belgium, Germany and the Netherlands.”⁸⁹

Mijntje Lückcrath-Rovers contends “It is surprising that so little attention is given to diversity in corporate governance codes when a homogeneous board poses a direct threat to an independent board, and independency is a key message in each corporate governance code.”⁹⁰ As in the United States, “although the discussion about greater diversity in the Board has intensified internationally, this has not yet led to changes in international corporate governance codes (with the exception of Spain and the Netherlands).”⁹¹ The five countries studied by Professor Lückcrath-Rovers, France, Germany, Spain, The Netherlands and the UK deal differently with the issue of the presence of women on corporate boards. Accordingly

In three countries (France, Germany and UK) the demographic characteristics of directors is not a subject in the relevant corporate governance codes. In The Netherlands this has changed only since January 2009 and some guidance is given on the importance of obtaining a diverse board. Spain has installed both a law that obliges companies to adopt a more diverse composition of the board as the corporate governance code especially addresses the issue.

⁸⁸ Richard Leblanc, *A Fact-Based Approach to Boardroom Diversity: The Research Record Shows Mixed Results From Quotas and Regulation*, Institute of Corporate Directors 6 (March 2011).

⁸⁹ *Id.*

⁹⁰ Mijntje Lückcrath-Rovers, *A Comparison of Gender Diversity in the Corporate Governance Codes of France, Germany, Spain, the Netherlands and the United Kingdom* 29 (April 6, 2010). Available at SSRN: <http://ssrn.com/abstract=1585280> or <http://dx.doi.org/10.2139/ssrn.1585280>.

⁹¹ Mijntje Lückcrath-Rovers, *A Comparison of Gender Diversity in the Corporate Governance Codes of France, Germany, Spain, the Netherlands and the United Kingdom* at 28 (April 6, 2010). Available at SSRN: <http://ssrn.com/abstract=1585280> or <http://dx.doi.org/10.2139/ssrn.1585280>.

Most countries (except for the UK) do have a voluntary charter to increase diversity which has been signed by numerous companies in the relevant countries including the major listed companies. However, these charters have different background and often do not only focus on gender but address diversity from a very broad perspective (ethnicity, disabled persons) and with very broad societal intentions (including discrimination in general).⁹²

Report from Canada

Aaron Dhir reports that “In terms of diversity, the corporate governance landscape in Canada is grim. The statistics on board composition reveal a culture of widespread gender and racial homogeneity.” Moreover

The evidence does not appear to fully support businesses’ perception of a widespread pool problem. Instead, it seems that a more fruitful explanation can be rooted in the cognitive processes and structures that inform corporate decision-making. Attempts by Canadian civil society organizations and others to advance the market-based argument that board diversification will improve organizational performance can to some degree be grounded in the empirical literature to date. However, Canadian firms may be perpetuating environments that actively stifle factors which might otherwise enable them to successfully leverage diversity. Further, the market-based approach is not without its disadvantages. Despite its attractiveness as a political strategy, it should be treated with great caution. In assessing avenues for reform, consideration should be given to particular features of the legal culture and practice that shape the director nomination process, shareholder proposals and existing governance principles. As currently formulated, these features may facilitate board homogeneity and undermine future efforts at diversification. It is my hope that progress on these fronts will be the first step in building a more inclusive and equitable edifice of corporate governance.⁹³

VII. UNCONSCIOUS RACIAL BIASES AND DIRECTOR SELECTION

We are indebted to Professor Aaron Dhir for his review and analysis of the literature of psychological science. He suggests that barriers to the advancement of women and people of

⁹² Mijntje Lückerath-Rovers, *A Comparison of Gender Diversity in the Corporate Governance Codes of France, Germany, Spain, the Netherlands and the United Kingdom* at 28-29 (April 6, 2010). Available at SSRN: <http://ssrn.com/abstract=1585280> or <http://dx.doi.org/10.2139/ssrn.1585280>.

⁹³ Aaron A. Dhir, *Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity*, 35 Queen’s L. J. 569, 623 (2010).

color to the corporate boardroom include “implicit cognitive biases.”⁹⁴ Dhir notes that “Implicit social cognitions are a form of ‘unconscious’ cognitive involvement.”⁹⁵ He continues to explain that “Judgments are instinctively and unintentionally generated,⁹⁶ and may even contradict the individual’s explicit philosophies and beliefs.”⁹⁷ Levels of implicit bias can be measured through a social psychology tool known as the ‘Implicit Association Test.’”

Accordingly

With respect to race, a study analyzing the results of 2.5 million completed tests reveals that almost 70 percent of participants exhibited white-positive, black-negative biases.⁹⁸ Applying these concepts to the sphere of corporate governance, a recent U.S. study in the field of applied psychology examined the issue of race and corporate leadership through the lens of leadership categorization theory.⁹⁹ Whether an individual is given a leadership position was found to be partly contingent on an evaluation of his or her leadership competencies, which will be most positive if the individual is thought to demonstrate characteristics that fit within an overall leadership organizing principle or prototype. Startlingly, *the authors found that ‘being white’ was viewed as a characteristic of the leadership prototype.* [Our emphasis added] Consequentially, decision makers are more apt to prefer whites, who are judged as being ‘more effective leaders’ and as possessing ‘more leadership potential.’¹⁰⁰ Whites, therefore, ‘may be more likely to be promoted to leadership positions more frequently...’¹⁰¹

The findings of this study resonate with the robust body of work on inter-group relationships. This work has inevitably revealed a human tendency toward in-group favoritism.¹⁰² The predilection for one’s own kind is ‘overwhelmingly’ demonstrated in groups that enjoy social privilege.¹⁰³ Wade discusses a similar idea within the context of empathy. She cogently argues that white male

⁹⁴ Aaron A. Dhir, *Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity*, 35 Queen’s L. J. 569, 579 (2010).

⁹⁵ *Id.*, citing Anthony G. Greenwald & Mahzarin R. Banaji, “Implicit Social Cognition: Attitudes, Self-Esteem, and Stereotypes” (1995) 102 PSYCH. REV. 4 at 5.

⁹⁶ *Ibid.*

⁹⁷ Dhir, *supra* note ___ at 579 citing Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations* (2006) 94 CAL. L. REV. 945 at 951.

⁹⁸ Brian A. Nosek, *et. Al.*, *Pervasiveness and Correlates of Implicit Attitudes and Stereotypes* (2007) 18 Eur. Rev. Soc. Psych. 36 at 52.

⁹⁹ Ashleigh Shelby Rosette, Geoffrey J. Leonardelli & Katherine W. Phillips, *The White Standard: Arcial Bias in Leader Categorization* (2008) 93 J. Appl. Psych. 758 [Rosette, “The White Standard”].

¹⁰⁰ *Ibid.*, at 758. See also David J. Maume, Jr., *Wage Discrimination over the Life Course: A Comparison of Explanations* (2004) 51 SOC. PROB. 505 at 506.

¹⁰¹ Rosette, *The White Standard*, *Ibid.* at 773.

¹⁰² Kristin A. Lane, Jerry Kang & Mahzarin R. Banaji, *Implicit Social Cognition and Law* (2007) 3 Ann. Rev. L. & Soc. Sci. 427 at 433.

¹⁰³ *Ibid.* at 435.

corporate managers and directors customarily promote white males, with whom they can more easily empathize.¹⁰⁴ The idea that monolithic institutions will reproduce themselves with monolithic inheritors¹⁰⁵ has also been explained as a function of trust. Life in the corporate sphere is inherently unpredictable and therefore pressure-inducing. Appointing a trusted person to a leadership position creates a sense of predictability and order. However, because meaningful personal relationships are not always present in the firm hierarchy, trust is based less on interpersonal awareness and more on outward indicia of similarity, such as race...¹⁰⁶ In other words, like heuristics (psychological shortcuts or intuitive judgments that may result in patterns of mistake), subconsciously held biases can be abrogated and individuals left 'debiased.'¹⁰⁷ *What is the implication of this for corporate governance? The cognitive biases of the predominantly white and male class of directors can be alleviated as they become better acquainted with candidates that fall outside of the existing leadership paradigm, and as they engage in cross-racial/gender learning.*¹⁰⁸ [My emphasis added]

VIII. ACHIEVING INCREASED BOARD DIVERSITY

What is the most likely path for achieving increased board diversity? The answer to the promise of increased boardroom access seems to lie in penetrating the board skills most in demand.

Business School Enrollment

How then can women and people of color reasonably expect to find board positions if they lack CEO and high level executive experience? To what extent does the business school

¹⁰⁴ Cheryl L. Wade, *Corporate Governance As Corporate Social Responsibility: Empathy and Race Discrimination* (2002) 76 TUL. L. REV. 1461 at 1473.

¹⁰⁵ Thomas W. Joo, *A Trip Through the Maze of 'Corporate Democracy': Shareholder Voice and Management Composition* (2003) 77 St. John's L. Rev. 735 at 742.

¹⁰⁶ *Ibid.* at 742-43.

¹⁰⁷ Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias* (2006) 94 CAL. L. REV. 969 at 973.

¹⁰⁸ Aaron A. Dhir, *Towards a Race and Gender-Conscious Conception of the Firm: Canadian Corporate Governance, Law and Diversity*, 35 Queen's L. J. 569, 579-81 (2010).

Table 4
Degrees Conferred in Business and Management
By Level & Gender – U.S. (1995-2008)

Year	BACHELOR'S DEGREES			MASTER'S DEGREES			DOCTORAL DEGREES		
	Total	Males	Females	Total	Males	Females	Total	Males	Females
1995-96	226,623	116,545	110,078	93,554	58,400	35,154	1,366	972	394
1996-97	225,934	116,023	109,911	97,204	59,333	37,871	1,336	947	389
1997-98	232,079	119,379	112,700	101,652	62,357	39,295	1,290	885	405
1998-99	240,947	122,250	118,697	107,477	64,700	42,777	1,201	843	358
1999-2000	256,070	128,521	127,549	111,532	67,078	44,454	1,194	812	382
2000-01	263,515	132,275	131,240	115,602	68,471	47,131	1,180	783	397
2001-02	278,217	138,343	139,874	119,725	70,463	49,262	1,156	746	410
2002-03	293,391	145,075	148,316	127,685	75,239	52,446	1,252	820	432
2003-04	307,149	152,513	154,636	139,347	80,858	58,489	1,481	960	521
2004-05	311,574	155,940	155,634	142,617	82,151	60,466	1,498	901	597
2005-06	318,042	159,683	158,359	146,406	83,550	62,856	1,711	1,049	662
2006-07	327,531	166,350	161,181	150,211	84,115	66,096	2,029	1,188	841
2007-08	335,254	170,978	164,276	155,637	86,258	69,379	2,084	1,250	834

Source: The Association to Advance Collegiate Schools of Business.

route suggests that more diversity in the boardroom is on its way? What percentage of business school and MBA students are women and people of color? Note from Table 5 that degrees conferred on students listed as Black, Hispanic, or Asian/Pacific Islander have made very slow but consistent gains since 1995.

At the Bachelor Degree level in the United States, The Association to Advance Schools of Business (AACSB) observes in Table 5 that during school year 2007-08, fully 71.8 percent of degrees conferred were to students classified as White; 9.8 percent Black; 7.9 percent Hispanic;

7.0 percent Asian/Pacific Islander; 0.7 percent to American Indian/Alaskan Native; and 2.8 percent Non-resident alien.¹⁰⁹

Table 5
Degrees Conferred in Business and Management
Bachelor's Degrees, Percent By Race/Ethnicity – U.S. (1995-2008)

YEAR	WHITE	BLACK	HISPANIC	ASIAN/ PACIFIC ISLANDER	AMERICAN INDIAN/ ALASKA NATIVE	NON- RESIDENT ALIEN
1995-96	77.8	7.9	5.0	5.5	0.6	3.2
1996-97	76.8	8.0	5.3	5.9	0.6	3.3
1997-98	76.1	8.3	5.6	6.1	0.7	3.3
1998-99	75.6	8.5	5.8	6.2	0.7	3.2
1999-2000	75.1	8.7	6.1	6.3	0.7	3.2
2000-01	74.5	8.9	6.2	6.3	0.7	3.2
2001-02	74.2	9.0	6.4	6.4	0.7	3.2
2002-03	73.7	9.2	6.6	6.5	0.7	3.2
2003-04	73.3	9.4	6.8	6.6	0.8	3.2
2004-05	72.9	9.5	7.0	6.8	0.7	3.2
2005-06	72.4	9.6	7.2	6.9	0.7	3.1
2006-07	72.2	9.6	7.5	6.9	0.8	3.0
2007-08	71.8	9.8	7.9	7.0	0.7	2.8

Source: The Association to Advance Collegiate Schools of Business.

At the graduate level, Table 6 shows that in the United States, 63.4 percent of Master's Degrees (Generalist) granted during school year 2009-2010 were to males, while 36.6 percent

¹⁰⁹ The Association to Advance Collegiate Schools of Business, BUSINESS SCHOOL DATA TRENDS AND 2011 LIST OF ACCREDITED SCHOOLS, 19 (2011), *citing* U.S. Department of Education, National Center for Educational Statistics, 2006-07 Integrated Postsecondary Education Data System (IPEDS), Fall 2007. (This table was prepared in July 2008).

were conveyed to females. Women did a little better in the (Specialized) category, with 47.2 percent of Master’s degrees conferred, versus 52.8 percent for men.¹¹⁰ What about the role

Table 6
Degrees Conferred in Business and Management
Degrees Conferred By Level & Gender – All School
(2007-08 to 2009-2010)

		UNITED STATES		NON-U.S.	
		Male	Female	Male	Female
Undergraduate	2007-08	55.8%	44.2%	49.4%	50.6%
	2008-09	56.4%	43.6%	49.9%	50.1%
	2009-10	56.5%	43.5%	49.3%	50.7%
Master’s Generalist	2007-08	64.5%	35.5%	63.3%	36.7%
	2008-09	63.7%	36.3%	65.5%	34.5%
	2009-10	63.4%	36.6%	63.9%	36.1%
Specialized Master’s	2007-08	52.5%	47.5%	51.8%	48.2%
	2008-09	52.7%	47.3%	53.4%	46.6%
	2009-10	52.8%	47.2%	52.7%	47.3%
Doctorate	2007-08	59.8%	40.2%	65.0%	35.0%
	2008-09	63.3%	36.7%	66.8%	33.2%
	2009-10	65.4%	34.6%	63.5%	36.5%

Source: The Association to Advance Collegiate Schools of Business.

¹¹⁰ The Association to Advance Collegiate Schools of Business, BUSINESS SCHOOL DATA TRENDS AND 2011 LIST OF ACCREDITED SCHOOLS, (2011), at 20.

models of U.S. business school faculty? The AACSB data show that 77.2 percent of full-time business faculty is reported as White, Non-Hispanic; 14.4 percent as Asian or Pacific Islander; 3.8 percent as Black, Non-Hispanic; 2.1 percent as Hispanic; 0.3 percent as American Indian or Alaskan Native; and 2.2 percent as Race/Ethnicity unknown.¹¹¹

At some university business schools, women directors have made an effort to facilitate increased board representation by women. For example, the Stanford Women on Boards initiative provides guidance to those wishing to enhance their board service qualifications and has established a community forum for prospective women board candidates. In addition, a clearinghouse has been established to identify Stanford alumnae board-qualified candidates.¹¹²

Auditing

Every board is required to have a “financial expert” for audit committee chair and directors with appropriate skills and experience to populate the audit committee.¹¹³ An examination by the American Institute of Certified Public Accountants (AICPA) of college enrollment and demographics of the accounting profession discloses the following:

- Enrollments by gender have almost reached an equality of 50% male, 50% female, at both the BA and MA levels. Ph.D. programs are still overrepresented by males
- There were increases in the number of Hispanics at the BA level and the number of African-Americans at the MA level. However, despite substantial efforts by the AICPA, CPA firms, universities, state CPA societies and other

¹¹¹ The Association to Advance Collegiate Schools of Business, BUSINESS SCHOOL DATA TRENDS AND 2011 LIST OF ACCREDITED SCHOOLS (2011), at 37.

¹¹² See Stanford Women on Boards Initiative, Available at <http://alumni.gsb.stanford.edu/women/issues/boards.html>.

¹¹³ See Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment*, 11 FLA. ST. U. BUS. REV. (forthcoming, 2012), Available at <http://www.ssrn.com/abstract=1998489>, citing Disclosure Required By Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Release Nos. 33-8177; 34-47235 (Jan. 24, 2003) Available at <http://www.sec.gov/rules/final/33-8177a.htm>, See also Self-Regulatory Organizations; American Stock Exchange LLC; Notice of Filing and Order Granting Accelerated Approval to Proposed Rule Change and Amendment No. 1 Thereto Modifying the Exchange's Independent Director and Audit Committee Corporate Governance Standards; See also Self-Regulatory Organizations; The NASDAQ Stock Market LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to the NASDAQ Listing Rules to Reflect Changes to the Rules of the Commission, Release No. 34-60094.

professional organizations that have focused on diversity in the CPA profession, the survey data show a slight percentage decrease in minority representation at the BA and MA levels...

- For the first time in more than 10 years, the percentage of male graduates was larger than female graduates with 52% of the total graduates being male...
- Hiring by ethnicity has seen an improvement in both the Hispanic population and total minority hiring overall. Hispanic hiring rose from 4% to 7% of total hires, while the total minority hiring increased from 22% to 25%. Hiring by gender has reached parity of 50% male and female, although it previously had been predominantly female
- The overall ethnic diversity has increased from 17% minority to roughly 21% minority since 2009. This increase was evenly spread across the Hispanic, Asian and multi-ethnic populations.¹¹⁴

Profession Staff

As shown in Table 7, Professional Staff Demographics by Firm Size, the AICPA reports the following professional staff demographics by firm size for ethnicity.

Table 7
Accounting Professional Staff Demographics by Firm Size

Ethnicity	All Firms	<10	10-49	50-200	>200
White	79%	87%	91%	96%	72%
Black/African-Americans	3%	2%	2%	1%	5%
Hispanic/Latino	4%	4%	3%	1%	5%
Asian/Pacific Islander	11%	5%	2%	2%	16%
American Indian/Alaska Native	1%	1%	1%	0%	0%
Multi-ethnic	0%	1%	0%	0%	1%
Other	1%	0%	1%	0%	1%
Unknown	1%	0%	0%	0%	0%

Source: AICPA.

¹¹⁴ AICPA, *2011 Trends in the Supply of Accounting Graduates and the Demand for Public Accounting Recruits*, 5, 6, 7, 8 (2011).

Audit Firm Partners

Since many boards of director audit committee members and chairs are retired partners of large accounting firms, the likelihood of significantly bolstering boardroom participation with people of color during the near future appears bleak. They are simply not represented in the higher ranks of the auditing profession in any meaningful numbers. Table 8, “Audit Firm Partners: Demographics by Firm Size 2010,” shows very minimal representation among the ranks of audit firm partners by people of color.

Table 8
Audit Firm Partners: Demographics by Firm Size 2010

Ethnicity	All Firms	<10	10-49	50-200	>200
White	94%	94%	98%	100%	93%
Black/African-American	0%	0%	0%	0%	1%
Hispanic/Latino	2%	2%	1%	0%	2%
Asian/Pacific Islander	2%	2%	1%	0%	4%
American Indian/Alaska Native	0%	0%	0%	0%	0%
Multi-ethnic	1%	1%	0%	0%	0%
Other	0%	0%	0%	0%	0%
Unknown	0%	0%	0%	0%	0%

Source: AICPA

Legal Profession

We have already observed that approximately 27% of directors sitting on Texas boards reportedly have a legal background.¹¹⁵ We’ve also observed that it has only been during relatively recent years that women and people of color have been admitted to law schools in any meaningful numbers. For the 2009-2010 academic year, 47.1 percent of first-year law students

¹¹⁵ Lawrence J. Trautman, *TRAUTMAN’S GUIDE TO CORPORATE DIRECTORS: TEXAS* (forthcoming 2012), Available at <http://www.TrautmansGuide.com>.

are women, 47.2 percent of total J.D. enrollment are female, and 45.9 percent of J.D.s awarded that year went to women.¹¹⁶ The class of 2009 also resulted in 51 percent of judicial clerkships being obtained by women.¹¹⁷ Women account for 30.2 percent of judges at the Circuit Court of Appeals,¹¹⁸ but only 22.3 percent of Federal Court Judges are women.¹¹⁹ Maria Pabon Lopez writes that

female lawyers continue to be ensconced in the ‘50/15/15 conundrum’¹²⁰ where it has been 15 years since women comprised 50% of law students but only constituted 15% of law firm partners. Neither the passage of time nor the slowly trickling pipeline has resulted in women reaching higher levels of advancement in the legal profession.¹²¹

¹¹⁶ American Bar Association: Commission on Women in the Profession, A Current Glance at Women in the Law 2011 3 (January 2011), http://www.americanbar.org/content/dam/aba/uncategorized/2011/cwp_current_glance_statistics_2011.authcheckdam.pdf, citing American Bar Association Section of Legal Education and Admissions to the Bar, *Enrollment and Degrees Awarded, 2009-2010*, www.abanet.org/legaled/statistics/charts/stats%20-%201.pdf, American Bar Association Section of Legal Education and Admissions to the Bar, *J.D. and LL.B. Degrees Awarded, 2008-2009*, www.abanet.org/legaled/statistics/charts/stats%20-%207.pdf.

¹¹⁷ American Bar Association: Commission on Women in the Profession, A Current Glance at Women in the Law 2011 3 (January 2011), http://www.americanbar.org/content/dam/aba/uncategorized/2011/cwp_current_glance_statistics_2011.authcheckdam.pdf, citing *A Democratic Profile of Judicial Clerks – Patterns of Disproportionality*, NALP Bulletin, (Nov. 2010), www.nalp.org/nov2010_demog_clerkships.

¹¹⁸ American Bar Association: Commission on Women in the Profession, A Current Glance at Women in the Law 2011 4 (January 2011), http://www.americanbar.org/content/dam/aba/uncategorized/2011/cwp_current_glance_statistics_2011.authcheckdam.pdf, citing Circuit Court of Appeals: Race/Gender Data. (June 14, 2010), www.afj.org/judicial-selection/race_gender_data.html.

¹¹⁹ American Bar Association: Commission on Women in the Profession, A Current Glance at Women in the Law 2011 4 (January 2011), Available at http://www.americanbar.org/content/dam/aba/uncategorized/2011/cwp_current_glance_statistics_2011.authcheckdam.pdf, citing *Women in Federal and State-Level Judgeships. A Report of the Center for Women in Government & Civil Society*, Rockefeller College of Public Affairs & Policy, University at Albany, State University of New York. (Spring 2010), www.albany.edu/womeningov/judgeships_report_final_web.pdf.

¹²⁰ Maria Pabon Lopez, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trends* (July 23, 2008). 19 *Hastings Women's Law Journal*, 53, 101 (2008), Available at: <http://ssrn.com/abstract=1172247>, citing NATIONAL ASSOCIATION OF WOMEN LAWYERS, 2006 REPORT: NAWL'S FIRST NATIONAL SURVEY ON RETENTION AND PROMOTION OF WOMEN IN LAW FIRMS 8 (2006), available at <http://www.abanet.org/nawl/docs/NAWLFINALPUBLICATION10-25-06SURVEYREPORT.pdf>. See also Mary C. Noonan & Mary E. Corcoran, *The Mommy Track and Partnership: Temporary Delay or Dead End?*, 596 *ANNALS AM. ACAD. POL. & SOC. SCI.* 130, 146 (2004) (noting that women partners earn 32% less than similarly situated male partners).

¹²¹ Maria Pabon Lopez, *The Future of Women in the Legal Profession: Recognizing the Challenges Ahead by Reviewing Current Trends* (July 23, 2008). 19 *Hastings Women's Law Journal*, 53, 101 (2008), Available at: <http://ssrn.com/abstract=1172247>.

While women comprise 31.6 percent of all members of the American Bar Association, they account for 39.3 percent of Section/Division Chairs during the 2010-2011 Bar Year.¹²²

From a diversity standpoint, while strides have been made as shown by the fact that women now outweigh men in the population of many law schools, people of color are still not represented in meaningful proportions.

The Director Diversity Initiative is a joint project of the Center for Banking and Finance and the Center for Civil Rights at the UNC School of Law. A working group of academics and business professionals provides guidance and advice to the Initiative. The objective of the Initiative is to encourage boards of directors of public companies to increase their gender, racial, and ethnic diversity. In addition, The Diversity Initiative at the UNC School of Law “maintains a computerized database on which diverse directors and potential diverse directors may register.”¹²³

Headquartered at the University of California Hastings College of the Law, The Project for Attorney Retention found that a survey of the 2009 law firm partner classes showed “little progress for women lawyers. The good news is that at 23 of the 100 firms surveyed... were at least 40 percent female. The bad news is that the gain is offset by the failure of 14 firms to make any female partners.”¹²⁴ Joan C. Williams, distinguished professor of law at Hastings and Co-Director of the Project for Attorney Retention, says “These numbers show which firms need to work harder at promoting women lawyers... They provide valuable information for women law

¹²² American Bar Association: Commission on Women in the Profession, *A Current Glance at Women in the Law* 2011 5 (January 2011), http://www.americanbar.org/content/dam/aba/uncategorized/2011/cwp_current_glance_statistics_2011.authcheckdam.pdf, citing *Goal III Report Card: An Annual Report on Women's Advancement into Leadership Positions in the American Bar Association* (Feb. 2011).

¹²³ See UNC School of Law, About the Director Diversity Database, Available at <https://ddi.law.unc.edu/database/login.aspx>.

¹²⁴ Press Release, Project for Attorney Retention, *2009 New Partner Classes Stagnant for Women Lawyers*, 1 Available at <http://www.attorneyretention.org/PressReleases/2009NewPartnerClassesReleaseFinal.pdf>.

students who are choosing their future employers and for clients who are interested in retaining law firms where women lawyers can succeed.”¹²⁵ The Minority Corporate Counsel Association and Association of Law Firm Diversity Professionals report from their recent survey of mostly larger law firms that “Most law firms (79%) have a law firm diversity professional... as more and more law firms hire or retrain full-time professionals entrusted with primary responsibility for advancing diversity efforts within the firm.”¹²⁶

Partners Advocating Greater Board Diversity

A number of organizations are helpful in advocating greater diversity among corporate boards. Many public pension funds have become activist investors during recent years to protect and enhance the value of their investments. Including all such organizations is beyond the scope of this paper; however several of the more prominent are described here. Organizations that have been particularly active in promoting diversity in corporate governance include: the Alliance for Board Diversity, CalSTRS and CalPERS, Catalyst, Inc., the Diverse Director Data Source, the National Association of Corporate Directors, and TIAA-CREF.

Alliance for Board Diversity

Founded in 2004, The Alliance for Board Diversity is a joint effort of four leadership organizations: Catalyst, The Executive Council, Hispanic Association on Corporate Responsibility, and Leadership for Asian Pacifics, Inc. committed to the proposition that

¹²⁵ Press Release, Project for Attorney Retention, *2009 New Partner Classes Stagnant for Women Lawyers*, 1 Available at <http://www.attorneyretention.org/PressReleases/2009NewPartnerClassesReleaseFinal.pdf>.

¹²⁶ The Minority Corporate Counsel Association and Association of Law Firm Diversity Professionals, *2010 Law Firm Diversity Professional Survey* 2, 3 (2010).

shareholder value may be “enhanced by promoting inclusion of women and minorities on corporate boards.”¹²⁷

The members of the Alliance for Board Diversity are committed to the following as they pertain to women and minorities within the boardrooms of corporate America:

- Offer referrals of qualified candidates through its member and partner organizations that can help facilitate boardroom diversification.
- Conduct research to measure changes in the demographic makeup within Fortune 500 boards and raise awareness of these findings.
- Ally with and/or support like-minded organizations that are committed to the issue of diverse boardroom composition as a vital shareholder concern, as well as with organizations that affect boardroom diversity.¹²⁸

CalSTRS and CalPERS

The California State Teachers' Retirement System (CalSTRS), has an investment portfolio recently valued at \$154.6 billion, and is the largest teacher pension fund in the United States. CalSTRS administers a hybrid retirement system, consisting of a traditional defined benefit, cash balance and defined contribution plans, as well as disability and survivor benefits. CalSTRS serves California's 852,000 public school educators and their families from the state's 1,600 school districts, county offices of education and community college districts.”¹²⁹ During “recent years, the issues of board of director leadership and oversight roles have taken on increased significance to long-term investors, such as CalSTRS. Today's economic challenges highlight the importance that board diversity plays in enhancing value and providing companies

¹²⁷ See Alliance for Board Diversity, <http://theabd.org/index.html>.

¹²⁸ *Id.*

¹²⁹ Press Release, CalSTRS, CalSTRS Continues to Advance Diversity on Corporate Boards (July 12, 2011), <http://www.calstrs.com/newsroom/2011/news071211.aspx>.

with a full range of fresh talent and experience.”¹³⁰ Anne Sheehan, Director of CalSTRS

Corporate Governance says

We've advanced the ball in the name of board diversity and are committed in our conviction that corporate boards and their nominating committees consider diversity in the larger context of improving shareholder value... One lesson from the financial crisis was the role corporate board group-think played in fostering management of short-term priorities that proved detrimental to sustainable value creation. We think improved board diversity will address that problem... The California State Teachers' Retirement System withdrew all eight of its board diversity shareholder proposals filed during the 2011 proxy season after successfully engaging companies to consider diversity in director searches.¹³¹

Following the SEC filing for the Facebook IPO, Ms. Sheehan wrote the following letter to Mark Zuckerberg, Facebook Chairman and Chief Executive Officer, stating (in relevant part)

CalSTRS is currently invested in Facebook through its Private Equity allocation in two partnerships and we will most likely be a common stock investor once the IPO is completed. We are pleased with the appreciation that the fund has enjoyed from its investment in Facebook, but as a long-term investor, we engage portfolio companies on a variety of issues.

I write to you today because of the reported composition of the Facebook board of directors. We are disappointed that the Facebook board will not have any women members. This is particularly glaring in view of the fact that Facebook is going public at a time when there is clear evidence that companies with diverse boards perform far better than the companies with more homogeneous boards. We also note that the Facebook COO, Sheryl Sandberg has been very supportive of increasing the diversity on corporate boards, particularly gender diversity, and in the senior management of corporations.

The Facebook board is relatively small for a company with its estimated market capitalization. We believe that investors and the company would benefit from a larger, more diverse board and urge you to expand its size. We realize that Facebook will be a controlled company in which the public stockholders will have little influence, but when the company's mission and subscriber base are considered, a diverse board makes good business sense.

¹³⁰ *Id.*

¹³¹ *Id.*

On behalf of CalSTRS and our beneficiaries, the teachers of the state of California we strongly encourage you to increase the diversity of your board prior to the IPO.¹³²

The Diverse Director Data Source

Anne Sheehan previously announced that CalSTRS has recently partnered with The California Public Employee Retirement System (CALPERS) to provide a database of “board-ready candidates... a resource to these companies that we are large shareholders in. And this is the way we feel like we can provide some value add – and contribute to getting more diversity on the boards.”¹³³ Diversity is important at CALSTRS, as reflected in the following statement from their recent semi-annual report on the topic of Diversity in the Management of Investments

While maintaining a financially sound retirement system, CalSTRS seeks to honor the philosophy of inclusion, long reflected in California educators. Diversity in the management of investments is interwoven in the investment business goals and is consistent with the objective of investing to enhance the returns at a prudent level of risk, in accordance with CalSTRS Investment Policies, the California Constitution, and the Education Code.¹³⁴

In October 2001, the CalSTRS “Investment Committee adopted a Policy on California Investments to engage in diversity efforts within the investment portfolio.”¹³⁵ The Director DataSource, known as “3D,” will offer shareowners, companies and other organizations a facility

¹³² Letter from Anne Sheehan, Director of Corporate Governance, California State Teachers’ Retirement System to Mark Zuckerberg, Chairman and Chief Executive Officer, Facebook Inc. (Feb. 7, 2012), *Available at* http://www.calstrs.com/CorporateGovernance/letter_facebook.pdf.

¹³³ Pablo Schneider, *The Diverse Director DataSource: Conversations with Anne Sheehan of CALSTRS, Nell Minow of the Corporate Library, and Anne Simpson of CALPERS*, 12 *Latino Leaders*, July-Aug. 2011 at 20.

¹³⁴ Semi-Annual Report of California Teachers’ Retirement Board on Diversity in the Management of Investments, June 3, 2010, *Available at* <http://www.calstrs.com/publicdocs/Page/CommonPage.aspx?PageName=DocumentDownload&Id=62e06ae4-3fd7-4e23-a132-ac3d0eef7618>.

¹³⁵ Report of California Teachers’ Retirement Board on Five-Year Diversity in Investment Management Business Plan, Nov. 4, 2010, *Available at* <http://www.calstrs.com/publicdocs/Page/CommonPage.aspx?PageName=DocumentDownload&Id=a9bd16c7-2368-4107-9149-a55e1d1d701d>.

from which to recruit individuals whose experience, skills and knowledge qualify them to be a candidate for a director's seat.¹³⁶

The California Public Employees' Retirement System (CalPERS) “manages retirement benefits for more than 1.6 million California public employees, retirees, and their families.”¹³⁷ CalPERS provides pension benefits to 1,116,044 active and inactive members and 513,623 survivors, beneficiaries, and retirees as of June 30, 2010.¹³⁸ CalPERS are reportedly the largest public pension fund in the United States, having approximately \$220 billion in assets.¹³⁹

Moreover

As a global investor, public employer, and provider of retirement and health benefits services within the nation's most ethnically and culturally diverse state, CalPERS recognizes diversity as a competitive advantage that calls for the broadest possible pool of talent, experience, and perspective. The CalPERS Board of Administration acknowledged this by including diversity as an element in [their] Strategic Plan.¹⁴⁰

Catalyst, Inc.

Felice Schwartz founded Catalyst in 1962, dedicated to promoting social equality for women in the workplace. Based in New York City, the organization has expanded globally and is the source of considerable data, research and community.¹⁴¹

¹³⁶ See CALSTRS, <http://www.calstrs.com/CorporateGovernance/DiverseDirectorDatasource/index.aspx>.

¹³⁷ California Public Employees Retirement System, Facts At A Glance: General (Sept. 2011), <http://www.calpers.ca.gov/eip-docs/about/facts/general.pdf>.

¹³⁸ *Id.*

¹³⁹ Press Release, California Public Employees Retirement System, Workshop To Explore Integrating Environmental, Social, Governance Issues Into Investment Process, (Aug. 9, 2011), <http://www.calpers.ca.gov/index.jsp?bc=/about/press/pr-2011/aug/envrntl-wkshp.xml>.

¹⁴⁰ CalPERS, Diversity Update (June 15, 2011), <http://www.calpers.ca.gov/eip-docs/about/board-cal-agenda/agendas/full/201106/item16.pdf>.

¹⁴¹ See generally Catalyst: Changing workplaces. Changing lives., <http://www.catalyst.org/home>.

National Association of Corporate Directors

Founded in 1977, the NACD now has more than 11,000 members and is focused on creating more effective and efficient boards through director-led education and peer forums to share ideas and leading practices based on over thirty years of primary research. Highlighting NACD's ongoing commitment to advancing diversity in the boardroom, Ken Daly, president and CEO of NACD recently observed that "Diverse insights are essential components to exemplary board performance... At a time when companies are facing more challenges than ever before, having a wide range of opinions is crucial to developing innovative corporate strategies."¹⁴² The inaugural Board Composition: Opportunities for Women in the Boardroom Summit (the Summit) was attended by over one-hundred women directors and C-Suite executives during September 2011. Co-sponsored by the NACD and PwC's Center for Board Governance, the Summit "successfully fostered a dialogue about the challenges women face getting on boards and the business challenges facing directors in today's environment. The women at the Summit shared advice and anecdotes about their experiences and challenges getting and sitting on boards."¹⁴³ Spencer Stuart's Julie Hembrook Daum contended that rigorous board evaluations result in more diverse boards, observing that "If we allow boards to think about who is in the room, we'll get much better boards... If you're on a nominating and governance committee, you should be pushing for serious board evaluations."¹⁴⁴

¹⁴² Press Release, National Association of Corporate Directors, NACD Convenes Group to Move the Needle: Diversity and Women in the Boardroom as a Strategic Business Imperative: More than 120 Corporate Directors and Executives Attend NACD Forum in New York City to Reinforce the Importance of Strong, Diverse Corporate Boards of Directors (Sept. 22, 2011).

¹⁴³ PwC Center for Board Governance, *Continuing the Conversation: Board Renewal* (Fall, 2011).

¹⁴⁴ Judy Warner, *Acting on What We Know: Lack of board turnover is seen as one impediment to women's advancement in the U.S.*, NACD Directorship 76 (Sept. 2011) (Participant's included: Patricia (Tosh) Barron, Catherine Bromilow, Janet Clarke, Julie Hembrook Daum, Denise K. Fletcher, Patricia Flynn, Virginia Gambale, Holly Gregory, Leslie Heisz, Cynthia Jamison, Steve Kalan, Reatha Clark King, Catherine Kinney, Olivia Kirtley, Lynn Krominga, Ellen Odoner, Kalpana Raina, Henry Stoeber, Bettina Whyte, Rosalie Wolf and Phoebe Wood).

The NACD recently announced its Blue Ribbon Commission on diversity in corporate boardrooms, consisting of experienced public company directors and leading corporate governance experts.¹⁴⁵ The work and commission recommendations, “discussing the benefits of boardroom diversity, the barriers that exist, and action steps to advance greater diversity” will result in the *REPORT OF THE NACD BLUE RIBBON COMMISSION ON THE POWER OF THE DIVERSE BOARD*.¹⁴⁶

TIAA-CREF

We have previously noted that the Teachers Insurance and Annuity Association (TIAA) and College Retirement Equities Fund (CREF), New York, (commonly known as TIAA-CREF and several other major pension funds have filed blanket resolutions with companies that require them to create boards “composed of qualified individuals who reflect a diversity of experience, gender, and race.”¹⁴⁷

¹⁴⁵ Press Release, National Association of Corporate Directors, NACD Forms Commission to Examine “The Power of the Diverse Board” (May 17, 2012), *available at*

<http://www.nacdonline.org/AboutUs/PressRelease.cfm?ItemNumber=4881>.

¹⁴⁶ *Id.* (The NACD Blue Ribbon Commission is led by four co-chairs from across the corporate governance spectrum, including Curtis Crawford, Ph.D. (president and CEO of XCEO Inc., director of DuPont, ON Semiconductor, and ITT Corporation); Cari Dominguez (director of Manpower, Inc); William McCracken (CEO of CA Inc.); and Kathi Seifert (director of Eli Lilly and Company, Lexmark International Inc., Revlon Inc. and Supervalu Inc.). Other 2012 Commissioners : Aida Alvarez (Wal-Mart); Orlando Ashford (Chief HR Officer & Communications Officer at Marsh & McLennan Companies); Roger Barker (head of corporate governance at the Institute of Directors (UK); Sandra Beach Lin (director for Wesco International) ; Reatha Clark King (former director at ExxonMobil); Kenneth Daly (president and CEO of NACD); Roy Dunbar (Humana); Denise Fletcher (Unisys Corp.); Charles M. Elson (HealthSouth); Barbara Hackman Franklin (former U.S. Secretary of Commerce, director for Aetna and chairman of the board for NACD); Raymond Gilmartin (General Mills); Peter R. Gleason (managing director and CFO of NACD); Holly J. Gregory (Weil, Gotshal & Manges); Bonnie Gwinn (Heidrick & Struggles); Michele Hooper (United Health Group); Jill Kanin-Lovers (Heidrick & Struggles); Richard Koppes (NutraCea); Alex Mandl (Dell, Inc.); Mary Pat McCarthy (former Executive Director of KPMG’s Audit Committee Institute); Irene Natividad (chairman of Corporate Women Directors International); John Olson (Gibson, Dunn & Crutcher); Richard Rivera (Winn-Dixie Stores, Inc.); Michael Rochelle (MDR Strategies, LLC); Anne Sheehan (director of corporate governance at CalSTRS); and Solomon Trujillo (Target).

¹⁴⁷ Westphal & Milton, *supra* note ____.

Women Corporate Directors

WomenCorporateDirectors (WCD) is a global membership organization and community of women corporate directors. The WCD seeks to expand the WCD community through leadership, diversity, education and by fostering corporate governance best practices. WCD membership (over 1,400 members serving on over 1,550 boards) is a resource for networking, education and community. The WCD website is a resource for relevant news, speaking opportunities, open board positions and a member directory.¹⁴⁸

Diversity Mentorship Opportunities

Professors Richard, Murthi, and Ismail conclude that “Race Does Matter for Firm Performance! As the demographic landscape continues to change, it is those companies that proactively acknowledge, value, and exploit diversity that will profit most.”¹⁴⁹ In another study, Professors Orlando Richard and Goce Andrevski find that “formal mentoring programs should strengthen the relationship between management crosscutting diversity and firm performance by facilitating positive interactions across race and gender.”¹⁵⁰ Moreover, “we expect that companies with formal mentoring for minorities will be more able to benefit from crosscutting diversity in management, which in turn will lead to superior firm performance.”¹⁵¹ Richard and Andrevski state, “Our results show that only when organizations provide a context where both diverse managers and board of directors can experience high quality task and social interactions within and between their respective groups can organizations move towards accruing a ‘sustainable diversity-based advantage.’”¹⁵² Moreover,

¹⁴⁸ See WomenCorporateDirectors website, Available at

<http://www.womencorporatedirectors.com/displaycommon.cfm?an=1&subarticlenbr=28>.

¹⁴⁹ Orlando C. Richard, B.P.S. Murthi & Kiran Ismail, *The Impact of Racial Diversity on Intermediate and Long Term Performance: The Moderating Role of Environmental Context* (2012) (unpublished paper, on file with author).

¹⁵⁰ Orlando C. Richard & Goce Andrevski, *Interactive Effects of Managerial Diversity, Board Diversity, and Managing Diversity Mentorship Practices on Firm Performance: A Crosscutting Approach to Conceptualizing Diversity* (2012) (unpublished paper, on file with author).

¹⁵¹ *Id.*

¹⁵² *Id.*

The board of directors plays an integral part in facilitating strategic changes within the firm (Goodstein, Gautam, & Boeker, 1994). In fact, recent research uses upper echelons theory coupled with demographic faultline logic to argue that background board of diversity influences discussion of entrepreneurial issues Tuggle, Schnatterly, & Johnson, 2010).¹⁵³

IX. CONCLUSION

Analysis of proxy data finds that while women and members of ethnic minorities are no longer strangers to board service, the total number of board seats held by women and people of color remain relatively small. And, while FORTUNE 1000 company board participation by ethnic minorities rose rapidly during the 1980s and 1990s; it now, seems to have hit a barrier. Among S&P 500 boards, only 12% of new directors are minorities, although 47% of these boards report desiring minorities for board service. While 47% of [S&P 500] boards surveyed say they seek to recruit minority directors, only 12% of new independent directors added in 2010 come from diverse ethnic backgrounds. The SEC now requires public companies to disclose whether diversity is a factor in considering candidates for nomination to the board of directors, and how the company assesses how effective the policy has been.

What are boards looking for in director candidates? Most boards are looking for (1) prior CEO experience, (2) industry experience, and (3) prior directorship experience, with retired and active CEOs and COOs reportedly remaining at the top of boards' wish-lists. The answer to the promise of increased boardroom access seems to lie in penetrating those board skills most in demand. Accordingly, the most likely pathways to the boardroom for women and people of color are from the executive suite, from auditing careers, government, or from the law. An absolute "must have" set of skills for every board includes independent directors to populate the

¹⁵³ *Id. citing* _____ .

audit, compensation and nominating & governance committees. In addition, every board needs one or more financial experts to serve on its audit committee. Because corporate governance is a legally-intensive endeavor, those minority candidates with a legal education may have an advantage in gaining access to the boardroom. Another needed set of directorship skills where women and ethnic minorities may compete on a merit basis includes government and regulatory relations. A director with a network of existing and former government officials can assist executives with regulatory issues and advise them and the board on relevant legislative and regulatory changes. Finally, the benefit of highly diverse approaches to problem solving and broadly different career experiences seems highly desirable when seeking to engineer the optimal people mix for productive small group decision making. Diversity should help in the inevitable need to address the difficult monitoring of corporate systems and a likely constant flow of future corporate problems.

X. APPENDIX: ABOUT THE AUTHOR

LAWRENCE J. TRAUTMAN

LARRY TRAUTMAN is founding-Chairman & CEO of social media enterprise Cogent Information Analytics, Inc., and has over thirty years experience as a professional corporate director. He has held numerous corporate directorships in publicly-traded and privately-owned corporations engaged in such diverse industries as dairy processing, financial services, franchising and fast food (Custom Creamery, Orange Julius and Crescott, Inc.-- all NASDAQ), mortgage banking, publishing, software and information technology, oil & gas (founding director of Comstock Resources, Inc., NYSE:CRK), and others. He served as chairman of the committee of independent directors in the sale of Orange Julius, Inc. to International Dairy Queen. As Senior Vice President of the New York-based investment banking firm Donaldson, Lufkin & Jenrette, he had a diverse corporate finance practice, having sole client responsibility for the origination, negotiation and processing of \$Hundreds of Millions of merger and acquisition transactions and public equity offerings for both traded and going-public situations. His other transaction experience includes: venture capital, real estate, public finance, and private debt and equity placement.

Mr. Trautman provided testimony (economic analysis and policy strategy as an investment banker) before hearings of the United States Congress. He taught accounting and finance at several colleges and universities. He is author of many articles on corporate governance, investment banking and corporate finance-related topics for numerous industry trade publications, and newspapers such as The American Banker, The Baltimore Sun and The Washington Post. He is author of *Trautman's Guide to Mortgage Banking and Loan Servicing Portfolio Acquisitions*, and has frequently been quoted in the financial press. Mr. Trautman previously served as Chairman and President of the Dallas Internet Society. For the Mortgage Bankers Association of America, he served as Chairman of the Industry Corporate Planning Subcommittee, as a member of the President's Economic Task Force; and has been a frequent speaker at many conferences.

At the National Association of Corporate Directors ("NACD"), he served as: President of the New York Chapter (several years) and subsequently as Chairman of the Executive Committee; Past-president of the Metropolitan Washington/Baltimore chapter; has contributed numerous articles and monographs published by the NACD; and has appeared as a frequent speaker.

Mr. Trautman earned a BA from The American University (international relations); MBA (finance & investments) from The George Washington University; and J.D. from the Oklahoma City University School of Law. He may be contacted at www.ljtrautman.com.