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How the “Exception” Becomes the Standard

By MARGEAUX BERGMAN*

I. INTRODUCTION

The late Supreme Court Justice Ruth Bader Ginsburg once said, “Women belong in all places where decisions are being made . . . It shouldn’t be that women are the exception.”¹ The only way our society can benefit from the experience, insights, and intellect of all humanity is through the equal participation of women, which is “vital to stability, helps prevent conflict, and promotes sustainable, inclusive development.”² Our institutions maintain a layer of inequality based on the needs of one gender. Caroline Criado Perez calls this “‘default man’ thinking: The unquestioned assumption that men are standard, and women the exception.”³ Female representation on corporate boards is but one example of a case in which “men are the standard, and women the exception.”⁴ Equitable gender representation has recently developed into a sizeable issue of concern for corporate boards. Studies demonstrate various benefits experienced by corporations as a result of having more diverse boards of directors. This, combined with pressures from stakeholders, has led to slight increases in corporate board diversity, but boards have been generally slow to diversify. A number of policy solutions have been put forward to further advance gender equity on corporate boards, including the use of shareholder derivative actions for breach of fiduciary duty if the board fails to diversify as well as states’ adoption of gender quota laws; these solutions have had little traction, calling for the creation of new methods.

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1. Mary Kate Cary, *Ruth Bader Ginsburg’s Experience Shows the Supreme Court Needs More Women*, U.S. NEWS (May 20, 2009), <https://www.usnews.com/opinion/blogs/mary-kate-cary/2009/05/20/ruth-bader-ginsburgs-experience-shows-the-supreme-court-needs-more-women>.

2. Press Release, U.N. Secretary-General, *Twenty-first Century Must Be Century of Women’s Equality*, Secretary-General Says in Remarks at The New School (Feb. 27, 2020).

3. *Id.*

4. *Id.*

This article argues in favor of an alternative approach, promoting gender diversification of corporate boards through the proxy process and other corporate governance tools at shareholders' disposal, rather than through externally imposed requirements or litigation. The proxy process provides a forum in which shareholders may cause meaningful change to the company. Shareholders should take advantage of this medium to nominate director candidates to diversify boards, compel companies to have board members commit to more equitable gender representation, and submit proposals recommending the adoption and implementation of policies promoting gender equity. Notably, these recommendations transect with current discourse regarding the shareholder voice in the proxy process, illustrating the importance of robust shareholder access to the proxy.

This article proceeds as follows. Part II details the challenge of achieving gender parity on corporate boards by presenting historical data on the lack of female representation. Part III acknowledges the mixed findings of board gender diversity and firm performance, but then emphasizes why the positive correlations are determinative and of particular importance to companies. Part IV reviews the range of externally imposed policy solutions to improve female board representation, including disclosure requirements, shareholder derivative suits, regulation, and legislation, and highlights the limitations associated with these tactics. Part V puts forth an alternative approach to increase gender diversity on corporate boards and encourages the use of various tools available to shareholders, including active shareholder participation in the director nomination process, and the use of institutional investors to place external pressures on companies to increase female representation and achieve gender parity. This article asserts that increased shareholder participation in the director nomination process and the utilization of other mechanisms available to shareholders, including institutional investors placing pressures on companies to diversify or recommending the adoption of provisions such as the Rooney Rule, are long-term, effective strategies that will increase female representation on corporate boards.

II. HISTORICAL DATA AND STATISTICS DEMONSTRATE THE LACK OF BOARD GENDER DIVERSITY

Now more than ever, stakeholders are advocating for gender parity on corporate boards; while the industry has taken steps towards realizing gender parity, the data exemplifies the fact that boards have been slow to diversify. This intractable problem has been an issue for decades, emphasizing the need for alternative policy solutions to address the issues of equitable gender representation. In 1993, 69% of Fortune 500 companies maintained at least one woman on their board, and in 1998, that percentage increased to 86%.⁵ At first glance, this 17% increase appears to be a sign of significant change, but a more accurate depiction of the progress public companies have made in regard to increasing female representation quantify the percentage of board seats held by women. In 1993, women held 8.3% of all Fortune 500 board seats;⁶ in 1998, this statistic rose to 11.1%.⁷ By 2010, the percentage of Fortune 500 company board seats held by women had only risen to 15.7%.⁸ These numbers began to rise in 2018, due in large part to a combination of factors including the #MeToo movement and the passage of state legislation, such as Senate Bill 826. In 2018, 22.5% of Fortune 500 companies' board seats were held by women,⁹ and in 2019, that number rose to 25.5%.¹⁰ This 3% increase over the course of one year, compared to the 4.6% increase that took place between 1998 and 2010, demonstrates just how impactful the #MeToo movement and state legislation was in 2018. However, these advances still leave women grossly underrepresented in the boardroom, begging the question of how further progress can be made. What is even more demonstrative of society's appetite for change is the increase in percentage of new directors that are women. The total number of women holding new

5. *1995 Catalyst Census: Female Board Directors of the Fortune 500*, CATALYST 1, 3 (1995); *1998 Catalyst Census: Women Board Directors of the Fortune 500*, CATALYST 1, 5 (1998).

6. *Id.* at 7.

7. *Id.* at 2.

8. *2010 Catalyst Census: Fortune 500 Women Board Directors*, CATALYST 1, 2 (2010).

9. *Quick Take: Women on Corporate Boards*, CATALYST (Mar. 13, 2020), <https://www.catalyst.org/research/women-on-corporate-boards/>.

10. Courtney Connley, *The number of women running Fortune 500 companies is at a record high*, CNBC MAKE IT (May 16, 2019, 12:30 PM), <https://www.cnbc.com/2019/05/16/the-number-of-women-running-fortune-500-companies-is-at-a-record-high.html>.

board positions at Russell 3000 companies rose from 12% in 2008 to 45% in 2019.¹¹

The data clearly demonstrates that while public companies are moving in the right direction, it has been a slow, gradual process. Additionally, review of the statistics may lead one to assume that, in response to pressures from various stakeholders and in some instances to be in compliance with recently passed state legislation, public corporations have added a “token” woman to their boards of directors and have not adequately addressed the issue of gender-diversity on corporate boards. In light of evidence on the benefits of diversity experienced by companies, it is difficult to explain the hesitation in transitioning to more diversified boards. These statistics demonstrate that, while the diversification of corporate boards provides equal opportunity to historically marginalized individuals previously excluded from such positions of power, the corporate community’s motivations in pursuing diversity-related measures is prompted by much more than a moral obligation to redress past discriminatory acts and behaviors.¹² With shareholder value serving as the main objective in most, if not all, corporate decisions, the business case for diversity may hold more sway. The next section presents this evidence.

III. STUDIES SUGGEST CORPORATIONS BENEFIT FROM FEMALE REPRESENTATION ON CORPORATE BOARDS

Evidence that increased female representation on corporate boards positively affects company performance and shareholder value is mixed; some studies found negative correlations or no correlation between board diversity and firm performance, while others found positive correlations. Though the evidence that increased gender representation on corporate boards positively correlates to firm performance is unclear, what is clear is that board diversity leads to other outcomes, which are known to lead to good financial performance and increased shareholder value. First, this

11. Subdodh Mishra, *U.S. Board Diversity Trends in 2019*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (June 18, 2019), <https://corpgov.law.harvard.edu/2019/06/18/u-s-board-diversity-trends-in-2019/>.

12. Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, WISC. L. REV., 795, 804, (2005).

section will acknowledge a sample of studies that found a negative correlation or no correlation, between board diversity and firm performance. Second, this section will review studies that found a positive correlation between increased female representation on corporate boards and firm performance, as well as discuss why these studies are of particular importance to companies. Third, this section will discuss positive correlations to firm performance not only through included financial performance and shareholder value, but also board productivity, corporate social responsibility (CSR), environmental, social, and governance (ESG) initiatives, and increased female representation in executive leadership.

A number of studies have found negative correlation or no correlation between board diversity and firm performance and, as a result, undermines companies' efforts to maximize shareholder value.¹³ For example, one study found that boards which did not maintain an egalitarian board culture would not realize the benefits of socially and professionally diverse boards, while those that did experienced the positive effects more strongly.¹⁴ Boards were more likely to maintain egalitarian culture if they maintained higher proportions of independent directors and institutional investors.¹⁵ The finding where boards that lacked egalitarian principles were less likely to experience the benefits of increased female representation on corporate boards does not diminish the value of gender diversity, but simply adds another consideration that must be handled in the pursuit towards gender parity on corporate boards. In order for companies to obtain the value from increased female representation, companies must foster a culture that promotes diversity of opinion and values various perspectives equally. Another study found that as female representation on corporate boards increased, the market value of those companies decreased; companies that had been recognized through higher rankings for their organizations' diversity practices were the companies most impacted by the decrease in

13. Stephanie J. Creary, Mary-Hunter ("Mae") McDonnell, Sakshi Ghai & Jared Scruggs, *When and Why Diversity Improves Your Board's Performance*, HARV. BUS. REV. (March 27, 2019), <https://hbr.org/2019/03/when-and-why-diversity-improves-your-boards-performance>.

14. *Id.*

15. Yannick Thams, Bari L. Bendell & Siri Terjesen, *Explaining women's presence on corporate boards: The institutionalization of progressive gender-related policies*, 86 J OF BUS. RESEARCH SEC. 5. 130, 135,138 (2018).

market value.¹⁶ As was the case with the other study, the results do not suggest that investors do not believe women serving as board members is an obstruction of shareholder value, “but that the firm, by choosing to appoint women directors, is prioritizing diversity” and therefore “deprioritizing shareholder value maximization.”¹⁷

Gender diversification of corporate boards positively impacts a company’s financial performance. One of the most cited studies was conducted by Credit Suisse Research Institute, which issued a report in August 2012 analyzing the relationship between gender diversity on corporate boards and financial performance of 2,360 companies around the world from 2005 to 2011.¹⁸ Companies with one or more female directors on their boards delivered higher average returns on equity and growth than those with no women on the board.¹⁹ Fortune 500 companies maintaining female representation on their boards were found to have even higher performance statistics than those with no female directors.²⁰ Notably, Fortune 500 companies with gender-diverse boards experienced an average of 84% improvement on return on sales, 60% improvement on return on capital, and 46% improvement on return on equity.²¹ The inclusion of at least one woman on a board has led to 40% fewer financial restatements.²² Recently, one study found that companies with increased female representation have delivered better returns with lower volatility, compared to their more-homogenous peers.²³

Though the evidence that increased gender representation on corporate boards leads to good financial outcomes is mixed, it is clear that board diversity leads to other outcomes, which are known to lead

16. Isabelle Solal & Kaisa Snellman, *Women Don’t Mean Business? Gender Penalty in Board Composition*, 2 (INSEAD Working Paper No. 2019/20/OBH, 2019).

17. Kim Elsesser, *Increasing Diversity And Profits? Investors Think Companies Can’t Do Both*, FORBES (July 20, 2020), <https://www.forbes.com/sites/kimelsesser/2020/07/20/increasing-diversity-and-profits-investors-think-companies-cant-do-both/?sh=45950c4022bc> (quoting Isabelle Solal).

18. Katherine W. Phillips, *How Diversity Makes Us Smarter*, SCIENTIFIC AMERICAN (Oct. 1, 2014), <https://www.scientificamerican.com/article/how-diversity-makes-us-smarter/>.

19. *Id.*

20. *Why Women on Boards?*, BOARDBOUND BY WOMEN’S LEADERSHIP FOUNDATION, <https://womensleadershipfoundation.org/add-women-boards-directors> (last visited Oct. 24, 2020).

21. *The Bottom Line: Corporate Performance and Women’s Representation on Boards (2004-2008)*, CATALYST 1,1 (2011).

22. Lawrence J. Abbott, Susan Parker & Theresa J. Presley, *Female Board Presence and the Likelihood of Financial Restatement*, 26 ACCOUNTING HORIZONS 607, 620 (2012).

23. *Why It Pays to Invest in Gender Diversity*, MORGAN STANLEY, (May 11, 2016), <https://www.morganstanley.com/ideas/gender-diversity-investment-framework>.

to good financial performance. A number of studies suggest that investing in environmental, social, and governance (ESG) initiatives has had a positive effect on a company's financial market performance.²⁴ Studies lend support to the notion that corporations will benefit from the addition of female directors and the maintenance of a diversified board. Research findings suggest female directors positively impact various aspects of the corporation, including financial performance and shareholder value, corporate social responsibility (CSR), corporate governance, and board productivity; these studies support the business case for increased female representation on corporate boards.

Companies, through the maintenance of gender-diverse boards, may reduce groupthink and, therefore, increase board productivity.²⁵ Groupthink, a psychological phenomenon where cohesive groups reach a consensus in which the "strivings for unanimity override their motivation to realistically appraise alternative courses of action," may be reduced by increasing female representation on corporate boards.²⁶ Homogenous boards, or those lacking gender parity, may fall victim to groupthink, putting the company at greater risk and reducing board productivity; to mitigate the risks associated with groupthink, studies recommend the addition and maintenance of female directors, who are less susceptible to groupthink and are generally better able to recognize the needs and interests of different stakeholder groups.²⁷

Corporations with women on boards experienced increases in corporate social responsibility and improved reputations.²⁸ Deutsche Bank conducted one of the most comprehensive reviews on this subject in 2012, and found that all of the academic studies in Deutsche Bank's examinations indicated that organizations with higher ESG and CSR standards had "a lower cost of capital in terms of debt (loans and bonds) and equity."²⁹ The report concluded these higher

24. Charles Mitchell et al., *The Business Case for Corporate Investment in Sustainable Practices*, THE CONFERENCE BOARD 1, 3 (2016).

25. Eunjung Hyun, Daegyung Yang, Hojin Jung & Kihoon Hong, *Women on Boards and Corporate Social Responsibility* 1, 9 (2016); Paul't Hart, *Irving L. Janis' Victims of Groupthink*, 12 POLITICAL PSYCHOLOGY 247, 256 (1991).

26. Hart, *supra* note 25, at 256.

27. Maretno Harjoto, Indrarini Laksmiana & Robert Lee, *Board Diversity and Corporate Social Responsibility*, 132(4) J BUS. ETHICS 641, 650 (2015).

28. Hyun et al., *supra* note 25, at 2.

29. Mitchell et al., *supra* note 24, at 3.

standards are tantamount to lower risk and are “rewarded by capital markets.”³⁰ These findings refute the prior assumption that maximizing shareholder value and CSR initiatives are not cohesive, and even suggest a positive correlation between the two. Increasing female representation on corporate boards may result in higher levels of CSG and subsequently increase shareholder value. Additionally, companies maintaining female representation on their boards experienced fewer “governance-related controversies, such as bribery, corruption, fraud, and shareholder battles.”³¹

The relationship between gender diversification of corporate boards and that of executive leadership also positively impact profitability and value creation. One study found that corporations ranked in the top 25% in regard to gender diversification among executive leadership teams are more likely to outperform other companies on profitability by 21% and value creation by 27%.³² Alternatively, companies “pay a price for lacking diversity” – in regard to gender and ethnic/cultural diversity, the bottom 25% of companies were 29% less likely to experience profitability above the industry average.³³ Another found a strong correlation between women in the C-suite and firm profitability.³⁴ “A profitable firm at which 30% of leaders are women could expect to add more than 1 percentage point to its net margin compared with an otherwise similar firm with no female leaders.”³⁵ When the study was conducted in 2016, the standard profitable firm’s net margin observed in the sample was 6.4% and, therefore, a 1 percentage point increase would result in a 15% increase in firm profitability.³⁶ These studies are consistent with other findings made by organizations such as Catalyst and McKinsey, demonstrating that consultants, another major player in the corporate governance space, agree that board

30. *Id.*

31. Linda-Eling Lee, Ric Marshall, Damion Rallis & Matt Moscardi, *Women on Boards: Global Trends in Gender Diversity on Corporate Boards*, MSCI INC. 1, 6 (2015).

32. Vivian Hunt, Lareina Yee, Sara Prince & Sundiatu Dixon-Fyle, *Delivering Through Diversity*, MCKINSEY & CO. (2018).

33. *Id.* at 9.

34. Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey* (Peterson Institute for International Economics, Working Paper 16-3, 2016).

35. *Id.* at 8-9.

36. *Id.*

diversity is an issue of importance and worth advocating for.³⁷ Analysis of the S&P 1500, which accounts for almost 90% of the overall U.S. stock market capitalization, over a twelve-year period, found that increasing female representation on corporate boards led to increases in representation of women in companies' top management positions.³⁸ Additionally, the increase in female representation at the executive level will positively impact the pool of women qualified to hold board positions. One of the factors considered when reviewing potential director nominees is prior CEO and CFO experience; two thirds of newly appointed directors have prior or current CEO or CFO experience.³⁹ Increasing female representation in executive positions may subsequently increase the qualified pool of potential female board member nominees.

Though some of the evidence is mixed, major players, including shareholders, consultants, academics, and the SEC staff, support the general understanding that gender diversity benefits companies. Despite the mounting evidence of the business benefits companies gain from having female representation on their boards, companies have only made slow and incremental progress to diversify. Consequently, policymakers and advocates have stepped in to advance the cause of gender parity. The next Section outlines three policy solutions utilized by various stakeholders that increased female representation on corporate boards in light of the shortcomings of each.

IV. POLICY MECHANISMS, LITIGATION, AND EXTERNALLY-IMPOSED REQUIREMENTS ARE NOT EFFECTIVE STRATEGIES TO INCREASE BOARD GENDER DIVERSITY

Several policy solutions have been articulated and proposed to further advance the cause of gender parity on corporate boards, but

37. AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY 32 (2015) (citing Diana Bilimoria, "The Relationship between Women Corporate Directors and Women Corporate Officers" (2006) 18:1 J. OF MANAGERIAL ISSUES 47 at 57 ("The findings of this study empirically support the notion that women corporate board directors and top management gender diversity are positively related.")).

38. David A. Matsa & Amalia R. Miller, *Chipping Away at the Glass Ceiling: Gender Spillovers in Corporate Leadership*, AM. ECON. REV.: PAPERS & PROC., 1, 2,7 (2011).

39. Bonnie W. Gwin, *Chief Executive Officer & Board of Directors, Trends in Board Composition Over the Past Five Years*, HEIDRICK & STRUGGLES, Oct. 2015, at A2.

they all have significant limitations. First, this section will discuss the ineffectiveness of the Security and Exchange Commission's (SEC's) policy requiring disclosure of a board's diversity considerations as they relate to the nomination of directors. Additionally, this section will discuss the use of shareholder derivative suits and the shortcomings of this approach due to the safe harbor protections afforded to board members. The section will then highlight the legislative steps California and Washington have taken to promote equitable gender representation and review the issues relating to the constitutionality of the legislation as well as other potential consequences.

A. ITEM 407(C)(2)(VI)

The SEC maintains diversity disclosure requirements, in which companies that consider diversity in director nominations must disclose how and in what way diversity is considered.⁴⁰ If a company considers diversity characteristics, Item 407(c)(2)(vi) requires the company to describe the ways in which the board implements the diversity considerations in identifying director nominations.⁴¹ The motivations behind the disclosure were to promote diversity and transparency relating to the governance practices of a company, key issues identified by not only shareholders, but also consultants, academics, and corporate insiders.⁴² It was believed that such disclosure would enable investors to make "informed voting and investment decisions."⁴³

Though well-intentioned, the discretion provides the board with a number of ways to circumvent the disclosure requirements. First, the SEC does not define the term "diversity," enabling each individual company to draft and utilize its own interpretation of diversity. For example, some have defined the term diversity to include gender, race, ethnicity, and sexual orientation, while others have utilized a broader approach, defining diversity as differences in

40. 17 C.F.R. § 229.407 (2020).

41. SEC Compliance & Disclosure Interpretations, Question 116.11 (Sept. 21, 2020).

42. Public Statement, U.S. Securities and Exchange Commission, Shareholders Need Robust Disclosure to Exercise Their Voting Rights as Investors and Owners (Feb. 20, 2013) (on file with author).

43. Proxy Disclosure Enhancements, Securities Act Release No. 33-9089; 34-61175; IC-29092; File No. S7-13-09, 38 (Feb. 10, 2010).

perspective, professional experience, and education.⁴⁴ Additionally, the SEC knew investors were "particularly interested in board policies regarding gender and/or racial diversity," yet still permitted companies to define the term, excluding those characteristics. Finally, a corporation may have poor intentions, and, in order to avoid the disclosure requirement altogether, a nominating committee may simply elect to not consider diversity under any circumstance in the director nomination process. This thwarts the SEC's original intent in establishing this rule and results in a lack of information available to investors in order to make informed decisions. This result was an unforeseen consequence of the rule that further demonstrates the ineffectiveness of Item 407(c)(2)(vi) as a successful tool to increase female representation on corporate boards. The diversity disclosure requirements obligating companies to disclose whether, and if so how, diversity characteristics are considered in the director nomination process is not an effective means of promoting gender diversity on corporate boards and should not be relied upon as such a mechanism.

B. SHAREHOLDER DERIVATIVE SUITS

Directors of a corporate board are obligated to perform their duties with the "amount of care which ordinarily careful and prudent men would use in similar circumstances."⁴⁵ A shareholder or shareholder group may, on behalf of the corporation, file a shareholder derivative action against a corporate officer for breach of a fiduciary duty.⁴⁶ It has been argued that directors have a fiduciary duty to their shareholders to diversify the board, and therefore, are subject to liability if one or more members of the board violates this duty in some way.⁴⁷ Some have encouraged shareholders to file derivative suits against directors of companies maintaining a homogenous board for violating their fiduciary duty of care owed to the shareholders of the company.⁴⁸ Promoters of this approach argue

44. *Id.* at 38-39.

45. *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 749 (2005).

46. *Derivative Action*, Black's Law Dictionary (11th ed. 2019).

47. Mary Parmeter, Comment, *The Fiduciary Duty to Gender Diversify Within Corporate Boards: The Necessary Link Among Shareholder Primacy, The Director Nomination Process, and Higher Financial Return*, 32 WIS. J.L. GENDER & SOC'Y 85, 98 (2017).

48. *Id.* at 100

that directors who purposefully sidestep female director candidates or intentionally ignore the studies' findings by failing to include qualified female candidates throughout the director nomination process have violated their fiduciary duty of care.⁴⁹

There have been a number of derivative suits filed against the directors and officers of corporations including Oracle Corporation (Oracle), Facebook, Inc., and Qualcomm, Inc., claiming, among other things, breach of fiduciary duty for lack of board diversity. Specifically, the complaint against Oracle further claims that the company's failure to diversify has caused "severe financial and reputational damage to Oracle."⁵⁰

Here, the use of shareholder derivative suits faces significant obstacles and limitations. Delaware, where more than half of all publicly traded corporations are incorporated, provides two types of safe harbors for fiduciaries, the business judgment rule, a rebuttable presumption of good faith,⁵¹ and the exculpatory provision provided for in Delaware Code Annotated title 8, 102(b)(7).⁵²

Under the business judgment rule, it is presumed that a corporation's directors, in making business decisions, act in good faith, on an informed basis, and in the honest belief that such act is in the best interest of the corporation.⁵³ The fact that the judicial system is not in the best position to assess business decisions, as well as the role hindsight bias may play in the court's assessment of such decisions, supports the presumption established by the rule.⁵⁴

In the case of director nominations, it seems unlikely that a court would find a breach of fiduciary duty because of the court's emphasis on process, rather than outcomes, where hindsight bias can impact one's rationale and decision. Shareholders would be required to demonstrate a lack of good faith in nominating a male director candidate or a lack of good faith in not selecting a female director candidate. A corporation, in response to such a claim, would

49. *Id.* at 104

50. Complaint at 10, *Klein v. Ellison*, (N.D. Cal. 2020) (No. 3:20-cv-04439).

51. *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 124 (2009).

52. Del. Code Ann. tit. 8, § 102 (2020).

53. *In re Citigroup*, 964 A.2d at 124.

54. *Id.* ("Hindsight bias is the tendency for people with knowledge of an outcome to exaggerate the extent to which they believe that outcome could have been predicted." Hal R. Arkes & Cindy A. Schipani, *Medical Malpractice v. The Business Judgment Rule: Differences in Hindsight Bias*, 73 OR. L. REV. 587, 587 (1994). *In re Citigroup Inc. S'holder Derivative Litig.*, 964 A.2d 106, 124 n.50 (Del. Ch. 2009).).

acknowledge that in selecting the male director candidate to join the board, the corporation's directors believed they were acting in the best interests of the company. It would be incredibly difficult for the shareholders to prove that a company's board of directors acted in bad faith when, in the end, the board selected a qualified candidate, even if that director candidate is male. For the foregoing reasons, the business judgment rule creates a steep uphill battle for shareholders to demonstrate directors have breached their fiduciary duty for failing to diversify their boards.

The exculpatory provision provided for in Section 102(b)(7) of the Delaware General Corporation Law, which may be adopted as part of a company's certificate of incorporation, provides a separate barrier for derivative suits. Section 102(b)(7) alleviates directors of liability for monetary damages resulting from breaches of the duty of care.⁵⁵ More than forty other states have adopted similar provisions; one sample found that by 1990, more than 90% of public companies had adopted such provisions.⁵⁶ Plaintiffs to duty of care shareholder derivative suits are limited by Section 102(b)(7) because it further narrows the scope of claims to those non-exculpated by the provision.⁵⁷

These protections afforded to fiduciaries, and the courts' deference to such protections, drastically constrict the impact and effectiveness such derivative suits could potentially have in promoting board diversity and, therefore, is not an efficient approach to improve female representation on corporate boards.

C. STATE LEGISLATION

The use of state legislation to increase female representation on corporate boards is another policy solution proposed and implemented in some jurisdictions, including California. This subsection will first address the advances made under the California statute. Second, this subsection will explain the broad consensus as to why the California statute and similar legislation is unconstitutional. Third, this subsection will acknowledge that, while there has yet to

55. 8 Del. C. § 102(b)(7) (2020).

56. WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 246 (2016); Roberta Romano, *Corporate Governance in the Aftermath of the Insurance Crisis*, 39 EMORY L.J. 1155, 1160-61 (1990).

57. Allen et al., *supra* note 56 at 124-25.

be a successful challenge to date, the law's position is precarious and thus should not be relied on as the sole mechanism for increasing gender diversity on corporate boards.

To promote equitable representation of corporate boards, the California legislature passed SB 826 requiring public companies to maintain a requisite number of women on their board of directors.⁵⁸ The state of Washington passed a similar law, Senate Bill 6037 (SB 6037), in March of 2020.⁵⁹ To be in compliance with SB 826 and SB 6037, public companies subject to the laws must maintain gender-diverse boards sufficient to satisfy the gender quota requirements set by the respective laws.⁶⁰ Failure to comply with the SB 826 results in a minimum fine of \$100,000.⁶¹ Alternatively, SB 6037 provides for a less fiscally burdensome solution; if a company does not maintain a gender-diverse board, the organization must provide shareholders with information relating to the company's diversity policies and procedures.⁶² SB 826 and SB 6037 embody legislation utilized overseas in western European countries such as France, Norway, and Spain.⁶³

Though SB 826 led to a dramatic increase in female representation on corporate boards, imperfections in the law and questions as to the law's constitutionality hinder its overall effectiveness and usefulness as a long-term tactic to achieve gender parity. SB 826 resulted in one of the largest surge's in female representation on corporate boards. One study analyzed the board composition of 488 California companies that filed proxy statements from January 2019 to July 2019.⁶⁴ These companies exhibited a 23% increase in female representation on corporate boards, with women obtaining 143 board seats.⁶⁵ The authors of this study also found that pre-SB 826, 188 of the 650 firms headquartered in California did not have any female members on their boards, but by December 31, 2019,

58. Cal. Stat. S.B. 826 (2018).

59. Wash. Stat. S.B. 6037 (2020).

60. Cal. Stat. S.B. 826 (2018); Wash. Stat. S.B. 6037 (2020).

61. Cal. Stat. S.B. 826 (2018).

62. Wash. Stat. S.B. 6037 (2020).

63. Douglas M. Branson, *Women on Boards of Directors: A Global Snapshot 1* (Univ. of Pittsburg Sch. of Law Legal Studies Research Paper Series, Research Paper No. 2011-05, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762615.

64. Daniel Greene, Vincent Intintoli & Kathleen M. Kahle, *Do Board Gender Quotas Affect Firm Value? Evidence from California Senate Bill No. 826*, 60 J. OF CORP. FIN. 1, 3 (2019).

65. *Id.*

that number decreased to 21.⁶⁶ Notably, seven of the companies with homogenous male boards moved their principal places of business outside the state of California.⁶⁷

While the passage of SB 826 led to a surge in female representation on corporate boards, the law was immediately challenged. Though a later decision to strike down a law will not necessarily reverse the gains obtained in the surge, it may disincentivize other states, especially those with company-friendly legislation where many companies are incorporated, to adopt similar legislation, and therefore negatively impacts use of the law as a long-term strategy to reach gender parity.⁶⁸ The creation of an express gender classification likely violates the Equal Protection Clause of both the California Constitution and the United States Constitution. Additionally, the fact the law is applicable to corporations headquartered in California but incorporated in another state calls into question the validity of the law on Commerce Clause grounds, which was at issue in *VantagePoint Venture Partners 1996 v. Examen (VantagePoint)*. In *VantagePoint*, the Delaware Supreme Court determined that the application of a California Corporate Code provision to a Delaware corporation violated the Commerce Clause of the United States Constitution reasoning that California "has no interest in regulating the internal affairs of foreign corporations."⁶⁹ This same reasoning can be utilized to hold SB 826 unconstitutional.

Since SB 826 was passed, a number of claims have been filed, but there has yet to be a successful challenge to the gender quota law. In *Meland v. Padilla*, a shareholder plaintiff brought suit alleging the law violated the Equal Protection Clause by impairing his shareholder rights to vote on the board of directors.⁷⁰ The Eastern District of California dismissed without prejudice the suit for plaintiff's lack of standing to pursue the claim.⁷¹ Since SB 826 obligated the

66. Keith Bishop & Allen Matkins, *Academics Find Firms With All Male Boards Have Left The State*, JDSUPRA (Jan. 8, 2020), <https://www.jdsupra.com/legalnews/academics-find-firms-with-all-male-69387/>.

67. *Id.*

68. Joseph A. Grundfest, *Mandating Gender Diversity in the Corporate Boardroom: The Inevitable Failure of California's SB 826*, 6-7 (Rock Center for Corporate Governance, Working Paper Series No. 232, 2018).

69. *VantagePoint Venture Partners 1996 v. Examen, Inc.*, 871 A.2d 1108, 1113 (Del. 2005), (quoting *Edgar v. MITE Corp.*, (1988) 457 U.S. 624, 645-46, 73 L. Ed. 2d 269, 102 S. Ct. 2629).

70. Motion to Dismiss at 1, *Meland v. Padilla*, (E.D. Cal. 2020) (No. 2:19-cv-02288-JAM-AC).

71. *Id.* at 13.

corporation, rather than its shareholders, the court determined that the shareholder's voting rights were in fact not impaired by the law.⁷² Plaintiff has appealed to the Ninth Circuit Court of Appeals.⁷³ If the district court's decision remains, corporations, rather than shareholders, may still challenge SB 826 on other grounds;⁷⁴ a company has yet to file such a claim and there is little guidance as to whether or not one will in the future.

Even if SB 826 and SB 6037 were held to be constitutional, the success of gender quota laws has been questioned and debated. Other countries have enacted similar gender quota laws applicable to public corporations. Though well-intentioned, an unanticipated result of such legislation was that public corporations circumvented the law through a change of incorporation, relocation, or dissolution; companies were also more likely to incorporate as private firms rather than public firms.⁷⁵ Norway, the first to enact such a law, has been classified by some as a failure, as well as a cautionary tale to states passing similar legislation.⁷⁶ There, public companies must comply with a quota law requiring that, at a minimum, 40% of the corporation's director positions be held by women.⁷⁷ When the Norwegian government initially enacted a quota law in 2003, it was applicable to a subset of companies, including those that were state-owned or chartered as a result of special legislation.⁷⁸ Norway anticipated broadening the scope of the law soon after it initially passed and began taking the necessary steps. In 2005, a transitional period was provided to existing public companies in order to achieve the quota requirements; immediate compliance was required, however, for newly incorporated public companies.⁷⁹ Though

72. *Id.* at 12.

73. Appeal of Petitioner, Meland v. Padilla, (E.D. Cal. 2020) (No. 2:19-cv-02288-JAM-AC).

74. William Savitt, Ryan A. McLeod & Anitha Reddy, Wachtell, Lipton, Rosen & Katz, *Federal District Court Dismissal of Challenge to Board Diversity Statute*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (April 24, 2020), <https://corpgov.law.harvard.edu/2020/04/24/federal-district-court-dismissal-of-challenge-to-board-diversity-statute/>.

75. Dhir, *supra* note 37, at 104.

76. Valerie Richardson, *California moves toward corporate gender quotas, ignoring Norway's failure*, WASHINGTON TIMES (Sept. 4, 2018), <https://www.washingtontimes.com/news/2018/sep/4/california-eyes-corporate-gender-quotas-despite-no/>; Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127(1) Q. J. OF ECON. (2012).

77. Dhir, *supra* note 37, at 73.

78. *Id.* at 104.

79. *Id.* at 105.

conformity by all applicable companies was achieved, data suggests companies circumvented the law through relocation, change of incorporation, or dissolution.⁸⁰ In 2003, the number of public companies in Norway began to decline while the number of private companies increased.⁸¹ By 2009, the number of public companies, which were subject to the quota law, decreased by more than 70%.⁸² Conversely, the number of private companies, which are not required to conform to the quota law, increased by 30%.⁸³ Notably, employment was increasing during this period, except in 2009, signifying an upward economic trend. Based on this information, researchers suggested that, following the announcement of the gender quota law, companies were more likely to incorporate as private firms as opposed to public firms.⁸⁴ The same study also suggested that companies with no female directors, those most affected by the law, circumvented its application by a change in incorporation.⁸⁵ These unanticipated consequences demonstrate the ways in which companies were able to circumvent the applicability of the gender quota laws and avoid penalties for failure to comply.

Gender quota laws are often implemented as a remedy to increase female representation and to right the wrongs associated with the prior discriminatory hiring methods, but some have argued that while these programs are well-intentioned, they can negatively impact those sought to be benefited by such practices. Data lends support to the assertion that preferential selection, the heightened weight given to "work-irrelevant" characteristics such as gender and race, can negatively impact a woman's self-assessment.⁸⁶ Alternatively, those selected for a position based solely on merit did not experience this reduction in self-esteem.⁸⁷ Based on these findings, SB 826 and SB 6037 may foster an environment in which female directors, elected after the passage of the respective state laws, would be devalued by colleagues and create a lack of self-esteem in

80. Ahern, *supra* note 76, at 1.

81. *Id.* at 30-31.

82. *Id.* at 30.

83. *Id.* at 30-31.

84. *Id.*

85. *Id.* at 31.

86. Madeline E. Heilman, Michael C. Simon & David P. Repper, *Intentionally Favored, Unintentionally Harmed? Impact of Self-Based Preferential Selection on Self-Perceptions and Self-Esteem*, 72(1) J. OF APPLIED PSYCHOL. 62, 62 (1987).

87. *Id.*

these women. Similarly, one of the drawbacks associated with gender quota laws is the fear of instilling a “token woman” mentality, causing further harm and reducing the benefits to be experienced by a corporation for maintaining a diverse board. Studies have demonstrated that our culture perceives leadership positions to be more masculine in character and that, as a result, the respective societal stereotypes of men and women influence our depiction of who will be most fit for such positions. Based on these stereotypes, women are often thought of as maintaining “far fewer of the qualities that comprise effective leadership skills than do men.”⁸⁸ Studies suggest that when gender-based preferential selection is a factor, the common perception is that other factors, such as competence, did not greatly influence the decision.⁸⁹ Consequently, this may generate a “vicious cycle of negative self-regard for women targeted for favored treatment.”⁹⁰ Even if a woman would have been selected for a position based on her skills and qualifications, this cycle may still take place.⁹¹ Studies suggest that women chosen based on their gender, rather than merit, perceived themselves as maintaining inadequate basic leadership skills, and were more likely to minimize the role they played in successful outcomes, as they, “rated their performance more negatively . . . and were less eager to persist in their leadership roles.”⁹²

The significant limitations maintained by the various policy solutions evaluated above exemplify the need for an alternative approach to increase board gender diversity.

V. SHAREHOLDER PARTICIPATION IS AN ALTERNATIVE APPROACH THAT SHOULD BE UTILIZED TO ADDRESS BOARD GENDER DIVERSITY

Shareholders should seek to influence management through the vehicles of director election and other types of shareholder resolutions to promote increased female representation on corporate

88. I. K. Broverman, S. R. Vogel, D. M. Broverman, F. E. Clarkson & P. S. Rosenkrantz, Sex-Role Stereotypes: A Current Appraisal 11, *Journal of Social Issues*, 28: 59-78. doi:10.1111/j.1540-4560.1972.tb00018.x (1972); Heilman et al., *supra* note 86 at 62.

89. Heilman et al., *supra* note 86 at 62.

90. *Id.*

91. *Id.*

92. *Id.*

boards. First, this section will discuss the various tools available to shareholders and how they should be employed. Second, this section will discuss the prerequisites, and potential barriers, shareholders exercising this power must satisfy and ways in which these requirements can be overcome. Third, this section will examine two prior examples of a shareholder's use of the proxy process to include a shareholder director candidate on the proxy and the lessons to be learned from each scenario. Fourth, this section will discuss other tools available to shareholders to increase female representation on corporate boards outside of shareholder participation in director elections through proxy access, including pressures from institutional investors and recommendations to implement other diversity provisions to the company's bylaws.

A. NOMINATION OF QUALIFIED FEMALE DIRECTORS BY SHAREHOLDERS

This section argues in favor of an alternative approach, promoting gender diversification of corporate boards through the proxy process and other corporate governance tools at shareholders' disposal, rather than through externally imposed requirements or litigation. The proxy process enables shareholders to affect meaningful change to the company. Once a corporation adopts a proxy access provision into its bylaws, shareholders meeting certain thresholds may submit director nominees to be included in the corporation's proxy. Shareholders should utilize proxy access to nominate director candidates to diversify boards, compel companies to have board members commit to more equitable gender representation, and submit proposals recommending the adoption and implementation of policies promoting gender equity. Notably, these recommendations transect with current discourse regarding the shareholder voice in the proxy process, illustrating the importance of robust shareholder access to the proxy.

B. PROXY ACCESS PREREQUISITES

Rule 14a-8 provides public company shareholders with a relatively cost-efficient forum to express themselves in regard to a wide variety of issues of significance to shareholders, including

corporate governance matters. Shareholder proposals have played an instrumental role in inciting change in corporations' self-governance mechanisms and general operations. Proxy access, a rule enabling shareholders to nominate candidates on the corporation's proxy, is a pivotal aspect of the shareholders' ability to meaningfully exercise their voting power. In order to gain proxy access, a provision must be adopted in the corporation's bylaws granting shareholders proxy access.

One way in which proxy access is obtained is via shareholder proposal to gain such access. "SEC Rule 14a-8 (Rule 14a-8) addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders."⁹³ Rule 14a-8 requires the inclusion of shareholder proposals amending, or requesting an amendment to, either of the company's governing documents, the Certificate of Incorporation and the bylaws, relating to director nomination procedures or disclosure provisions, provided such proposals do not otherwise conflict with SEC proxy rules or applicable law.⁹⁴ These changes enable shareholders to submit proposals establishing or recommending the establishment of proxy access and, therefore, allow shareholders to diversify the board.⁹⁵

Previously, companies wanting to exclude shareholder proxy access proposals from the company proxy utilized Rule 14a-8(i)(9), which enables companies to exclude shareholder proposals that conflict with a company's proposal.⁹⁶ The SEC addressed this issue in the following case, clarifying the scope of Rule 14a-8(i)(9), which benefits shareholders. Whole Foods Market, Inc. (Whole Foods) sought to exclude a shareholder proposal that, if passed, would have allowed an individual shareholder or shareholder group holding 3% of Whole Foods shares for at least three years to submit up to two director candidates on the corporate proxy in 2014.⁹⁷ Though Whole

93. 17 CFR § 240.14a-8 (2020).

94. U.S. Securities and Exchange Commission, Facilitating Shareholder Director Nominations, Release Nos. 33-9136; 34-62764 (2010).

95. Bloomberg Law, Corporate Practice Portfolio Series, Corporate Governance Portfolios, Portfolio 83-3rd: Shareholder Proposals, Detailed Analysis, Introduction and History, G. Role of the Rule in Spurring Corporate Governance Change, https://www.bloomberglaw.com/product/corporate/cp_home/document/2910179880.

96. 17 C.F.R. § 240.14a-8 (2020).

97. Whole Foods Market, Inc., SEC No-Action Letter, Response of the Office of Chief Counsel (Dec. 1, 2014).

Foods had not yet drafted a shareholder proxy access proposal of its own at the time of receipt, the company drafted such a proposal with more stringent standards, requiring a shareholder or shareholder group to maintain at least 9% of company stock for at least five years to be eligible to include director nominees on the company's proxy.⁹⁸ Whole Foods claimed the shareholder proposal and the proposal endorsed by Whole Foods "directly conflict," and if both were to be included on the proxy it "would present alternative and conflicting decisions for the stockholders" creating "the potential for inconsistent and ambiguous results."⁹⁹ The SEC issued a no-action letter stating they would not recommend enforcement action against Whole Foods for the omission of the shareholder proposal based on this reasoning proffered by Whole Foods.¹⁰⁰

The SEC later retracted the Whole Foods no-action letter and published a staff legal bulletin articulating a narrower interpretation of the exclusion's applicability.¹⁰¹ A shareholder proposal would no longer be perceived as "directly conflicting with the management proposal if a reasonable shareholder, although possibly preferring one proposal over the other, could logically vote for both."¹⁰² The staff legal bulletin then hypothecated an example similar to that of Whole Foods, stating that since both proposals seek to achieve "a similar objective, to give shareholders the ability to include their nominees for director alongside management's nominees in the proxy statement, and the proposals do not present shareholders with conflicting decisions such that a reasonable shareholder could not logically vote in favor of both proposals," and therefore does not fall within the scope of Rule 14a-8(i)(9).¹⁰³

The SEC's retraction of the Whole Foods no-action letter and publication of the staff legal bulletin clarifying the scope of Rule 14a-8(i)(9) has provided shareholders with the opportunity to ensure the requisite standards to be met by shareholders to submit proposals is not overly burdensome. This has the effect of promoting shareholder proposals to gain proxy access. Consequently, a greater number of shareholders, by gaining access to the proxy through such

98. *Id.*

99. *Id.*

100. *Id.*

101. SEC Staff Legal Bulletin No. 14H (CF), Shareholder Proposals (Oct. 22, 2015).

102. *Id.*

103. *Id.*

shareholder proposals, will have the opportunity to submit such proposals to promote female director candidates for election to a company's board.

Shareholders must satisfy certain requirements in order to submit a proposal. In September 2020, the SEC voted on and adopted amendments to modernize the shareholder proposal rule; the amendments eliminated the 1% threshold and amended the requirement with the addition of the following three thresholds:

continuous ownership of at least \$2,000 for at least 3 years,
continuous ownership of at least \$15,000 for at least 2 years, or
continuous ownership of at least \$25,000 for at least 1 year.¹⁰⁴

These amendments change the rule that governs the process for shareholder proposals to be included in a company's proxy statement.¹⁰⁵ Exchange Act Rule 14a-8 requires publicly traded companies under SEC regulation to include shareholder proposals in their proxy materials, with a few exceptions.¹⁰⁶ A shareholder or shareholder group is now required to hold a minimum of \$2,000 worth of shares for at least three years. The amendments require the shares to be held for at least three years in order to demonstrate long-term investment in the company.¹⁰⁷ The "one proposal" rule has also been updated to clarify that multiple proposals cannot be submitted by a single shareholder at the same shareholder's meeting on behalf of other shareholders.¹⁰⁸

The SEC's justifications for adopting these amendments were to ensure that shareholder proposals included in the company's proxy, "and thus draw on company resources . . . to command the time and attention of the company and other shareholders," consider the interests of all shareholders who bear the associated costs of "reviewing, considering, and voting on such proposals."¹⁰⁹ The SEC had determined that five individual shareholders accounted for 78% of all shareholder proposals and, therefore, adjustments needed to be

104. Press Release, SEC, SEC Proposes Amendments to Modernize Shareholder Proposal Rule (Nov. 5, 2019) (on file with author); Press Release SEC, SEC Adopts Amendments to Modernize Shareholder Proposal Rule (Sept. 23, 2020).

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. Press Release, SEC, SEC Adopts Amendments to Modernize Shareholder Proposal Rule (Sept 23, 2020).

made to address the benefits and burdens of such actions.¹¹⁰ It seems as though these amendments are meant to decrease the number of proposals from low-stakes shareholders looking to accomplish their niche agendas, while preserving “the ability of small, medium- and long-term shareholders to continue to enter and engage in the shareholder process,” so long as such claims were aimed at creating long-term value.¹¹¹ As demonstrated by the previously discussed findings, increased female representation on corporate boards is correlated to a number of outcomes that results in better firm performance, and arguably long-term value. Finally, the SEC Chair articulated that the amendments would foster proponent-issuer engagement sooner,¹¹² which may also result in fruitful conversations relating to increased female representation on corporate boards and achieving gender parity. While these recently adopted amendments did heighten the standards shareholders must satisfy in order to submit a proposal, they do not appear to substantially thwart a shareholder or shareholder group’s objective in proxy access and director nominations.

C. PRIOR CASES OF SHAREHOLDER PARTICIPATION IN THE DIRECTOR NOMINATION PROCESS

The adoption of proxy access bylaws has skyrocketed in recent years. At the end of 2019, 76% of S&P 500 companies’ bylaws included a proxy access provision, compared to less than 1% in 2014.¹¹³ Companies generally limit a shareholder’s ability to utilize proxy access to nominate the candidates through the bylaws. The most common terms are known as the “3/3/20/20 provision.”¹¹⁴ The provision permits a shareholder owning, at a minimum, 3% of shares of the company for three years to put forward nominees equating up

110. Public Statement, U.S. Securities and Exchange Commission, Statement at Open Meeting on Proposals to Enhance the Accuracy, Transparency, and Effectiveness of Our Proxy Voting System (Nov. 5, 2019) (on file with author).

111. *Id.*

112. *Id.*

113. Holly J. Gregory, Rebecca Grapsas & Claire Holland, *Proxy Access: A Five-Year Review*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Feb. 4, 2020), <https://corpgov.law.harvard.edu/2020/02/04/proxy-access-a-five-year-review/>.

114. Stephen T. Giove, Arielle L. Katzman & Daniel Yao, *Proxy Access Proposals*, HARV. L. SCH. FORUM ON CORP. GOVERNANCE (Oct. 19, 2018), <https://corpgov.law.harvard.edu/2018/10/19/proxy-access-proposals-2/>.

to 20% of the number of seats on the board, or at least two directors.¹¹⁵ In the case of shareholder groups, the maximum number of shareholders able to aggregate their holdings to satisfy the requisite threshold is twenty.¹¹⁶ While shareholder access to the proxy has drastically increased, shareholders have made little use of these provisions. With only two cases exemplifying the use of proxy access to nominate directors, there is little guidance on what tactics work effectively to ensure a shareholder-nominated candidate will meet the requirements set in the bylaws of a company. In the first instance, an institutional investor's proposal was not in compliance with the company's bylaws and, as a result, was not included in the company's proxy materials.¹¹⁷ In the second instance, the shareholder proposal was included in the proxy materials and resulted in the election of the shareholder nominee.¹¹⁸

The first attempt to utilize the proxy access process was made by GAMCO Asset Management Inc. and Gabelli Funds, LLC (collectively, GAMCO) to nominate a director candidate to the National Fuel Gas Company (National Fuel) board of directors in 2017.¹¹⁹ GAMCO is made up of entities affiliated with activist investor Mario Gabelli.¹²⁰ The National Fuel board of directors reviewed the letters submitted by GAMCO to determine whether the nomination was in compliance with the company's bylaws relating to shareholder nominations of director candidates.¹²¹

The board found that GAMCO had not complied, and would not be able to comply, with the terms set forth in the bylaws.¹²² The key parameters of National Fuel's proxy access provision mirrored the

115. *Id.*

116. *See Id.*; *The Latest on Proxy Access*, Sidley Update app. B at B-86 (2019), <https://www.sidley.com/-/media/update-pdfs/2019/01/AppendixB.pdf?la=en>.

117. Letter to GAMCO Asset Management Inc. from National Fuel Gas Co., Exhibit 99, Schedule 14N (Nov. 23, 2016), <https://www.sec.gov/Archives/edgar/data/70145/000119312516776709/d296488dex99.htm>.

118. The Joint Corp., Schedule 14N (Dec. 27, 2018), https://www.sec.gov/Archives/edgar/data/1351443/000092189518003391/sc14n12021002_12272018.htm.

119. National Fuel Gas Co., Schedule 14N (Nov. 10, 2016), https://www.sec.gov/Archives/edgar/data/70145/000092189516006095/sc14n05867018_11102016.htm.

120. *The Latest on Proxy Access*, Sidley Update app. B at B-86 (2019), <https://www.sidley.com/-/media/update-pdfs/2019/01/AppendixB.pdf?la=en>.

121. *Supra* note 117.

122. *Id.*

"3/3/20/20 provision."¹²³ Satisfaction of the "3/3/20/20 provision" is not determinative in each case; here, GAMCO had owned greater than 3% of National Fuel's shares for more than three years, yet still was unable to meet the requirements set forth in the proxy access provision.

Other requirements may be articulated in a company's governing documents, further limiting a shareholder or shareholder group's ability to include a director candidate in the proxy materials. One of the representations to be made by a National Fuel shareholder seeking to use the proxy access provision is that the shareholder did not obtain the requisite number of shares with the "intent to change or influence the company," but "in the ordinary course of business."¹²⁴ The board denied GAMCO's nomination because they had failed on two counts.¹²⁵ First, after review of GAMCO's filings under Section 13(d), the board opined that GAMCO's previous and current conduct demonstrated an intent to "change or influence the company" in acquiring the requisite number of shares, and therefore was not able to utilize the proxy access provision to nominate a director candidate.¹²⁶

Second, GAMCO, through the use of a shareholder proposal, requested National Fuel to consider spinning-off a segment of its operations into a stand-alone entity.¹²⁷ While this proposal received 17.8% support, National Fuel did not pursue this recommendation.¹²⁸ Consequently, GAMCO repeatedly expressed dissatisfaction with National Fuel's decision and articulated its own desire to "split up the company," resulting in the board's determination that GAMCO maintained "a current intent to change or influence control of the Corporation."¹²⁹

GAMCO's attempted use of shareholder proxy access to nominate a director candidate demonstrates one of the ways in which a company may deny a proposal based on the issuer's governing documents, such as the certificate of incorporation or bylaws. While

123. *The Latest on Proxy Access*, Sidley Update app. B at B-86 (2019), <https://www.sidley.com/-/media/update-pdfs/2019/01/AppendixB.pdf?la=en>; Giove *supra* note 114, at B-46.

124. Giove *supra* note 114, at B-46.

125. *Id.*

126. *Id.*

127. Sidley Update, *supra* note 114, at B-86

128. *Id.*

129. *Supra* note 117.

GAMCO's proposal was unsuccessful, National Fuel's letter to GAMCO, as an institutional investor, demonstrated a commitment to maintaining shareholder proxy access and the board's belief that shareholder(s) should have access to the proxy in this way if in compliance with the bylaws.¹³⁰ The letter further stated the adoption of proxy access was motivated in part by the significance the board and company as a whole place on their relationships with shareholders.¹³¹ Novel approaches to resolve an issue are not successful from the get-go; it is a process of trial and error. Those wanting to put forth a director candidate must utilize the knowledge gained from prior successes, as well as the failures, in order to make progress. The lesson, and cautionary tale, established in GAMCO is that it is vital to ensure the shareholder putting forth a director candidate to include on the proxy is able to meet the requirements set forth in the company's governing documents, or else such submission will likely be excluded from the proxy for the shareholder(s) failure to comply. GAMCO's attempt is instructive and a useful source of information for future shareholders wishing to participate in the director nomination process and highlights the importance of understanding the threshold requirements that must be met by shareholders.

In contrast, the second use of proxy access resulted in a successful outcome. On December 27, 2018, the Austin Trust, in compliance with the proxy access bylaws of The Joint Corporation (The Joint Corp.), nominated Glenn Krevlin for election to the board of directors of the company.¹³² Similar to National Fuel's proxy access bylaw, a portion of The Joint Corp.'s proxy access requirements resembled a "3/3/20/20 provision."¹³³ According to the Form 8-K submitted by The Joint Corp., Krevlin was one of seven members elected to the board of directors, receiving over 99% of votes cast in favor of election.¹³⁴ Krevlin received 7,373,369 votes in favor of election with only 950 votes against, receiving more "yes votes" than two of the other elected directors.¹³⁵ Krevlin received 630,276 more

130. *Id.*

131. *Id.*

132. The Joint Corp. *supra* note 118 at 1-3.

133. Sidley Update, *supra* note 116, at B-86.

134. The Joint Corp., Form 8-K (May 31, 2019), https://www.sec.gov/Archives/edgar/data/1612630/000117184319003789/f8k_060319.htm.

135. *Id.*

votes than James Amos Jr. and 1,542,044 more votes than Ronald DaVella.¹³⁶ The director who received the most yes votes beat Krevlin by only 37,854 votes.¹³⁷

The Austin Trust success gives shareholders hope that a shareholder's use of proxy access can impact real change at the board level, but some relevant facts may have contributed to its success. Steven Colmar, trustee of The Austin Trust, had significant ties to The Joint Corp. Notably, Colmar co-founded The Joint Corp. and served on the company's board of directors with his brother, Craig, until his resignation in 2017.¹³⁸ Craig Colmar also is the Secretary of the company.¹³⁹ These connections may have impacted the willingness of the issuer to be amenable to The Austin Trust's nomination and are therefore relevant here. Regardless of the familial relationship, The Austin Trust's successful proposal is instructive, exemplifying shareholder compliance with a company's bylaws and resulting in the inclusion of such proposal in the company's proxy materials.

These two cases provide instructive guidance as to how eligible shareholders may wish to formulate proposals and take advantage of the opportunity to proactively increase gender-diversity of corporate boards. The nomination of directors by shareholders through proxy access is an economical method for eligible shareholders to nominate candidates to boards, creating a credible threat to current board members that may incentivize increased communications with their shareholders.¹⁴⁰ With the use of proxy access, a shareholder or shareholder group may nominate a qualified female candidate to the board, increasing board diversity. Submitting such proposals, regardless of if they come to a vote, will communicate to the board that gender parity is a key issue to the company's stakeholders.

D. EVEN WITHOUT THE USE OF SHAREHOLDER-NOMINATED DIRECTORS, SHAREHOLDERS SHOULD UTILIZE OTHER FORUMS TO INCREASE FEMALE REPRESENTATION ON CORPORATE BOARDS.

136. *Id.*

137. *Id.*

138. The Joint Corp., Form S-1 at 60-1 (Sept. 19, 2014), https://www.sec.gov/Archives/edgar/data/1612630/000114420414056976/v389460_s1.htm.

139. The Joint Corp., *supra* note 118 at 1-3.

140. Michael Barzuza, *Proxy Access for Board Diversity*, 99 *Bos. U. L.R.* 1279, 1289-90 (2019).

While the adoption of proxy access provisions has steadily increased, there are a number of companies in which shareholders are unable to submit director nominations due to lack of access to the proxy. Shareholders, including institutional investors, may compel companies to commit to more equitable gender representation and submit proposals recommending the adoption and implementation of provisions that support increased female representation on corporate boards, without putting forward a specific candidate.

Institutional investors, such as Blackrock, hold sway with corporations and may set expectations and guidelines for companies they have invested in.¹⁴¹ In regard to board composition, Blackrock emphasizes the importance of board diversity, articulating that if the firm believes an issuer has not sufficiently increased board diversity, it may result in the firm voting “against the nominating/governance committee for an apparent lack of commitment to board effectiveness.”¹⁴² This forum enables shareholders to express their dissatisfaction with the nominating and governance committees’ members and further pressures these directors to consider increasing gender diversity.

State Street Global Advisors (SSGA) has also provided guidance for boards to encourage the facilitation and maintenance of greater female representation in their companies and organizations.¹⁴³ SSGA first addresses current practices and biases thwarting the increase of female representation on corporate boards, citing issues such as requiring director nominees to have CEO experience and the overwhelming reliance on existing networks for director nominees.¹⁴⁴ SSGA highlights six steps directors should follow to promote gender diversity of corporate boards.¹⁴⁵ Boards of directors are encouraged to: (1) evaluate the company’s current status in regard to gender diversity on both the board and management levels, (2) set goals to

141. *Corporate Governance and Proxy Voting Guidelines for U.S. Securities*, BLACKROCK INVESTMENT STEWARDSHIP 1, 5-6 (2020), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf>.

142. *Id.*

143. SSGA Asset Stewardship, *State Street Global Advisors’ Guidance on Enhancing Gender Diversity on Boards*, SSGA Asset Stewardship Vol. 1, 1 (2020), <https://www.ssga.com/content/dam/ssmp/library-content/products/esg/guidance-on-enhancing-gender-diversity-on-boards.pdf>.

144. *Id.* at 2.

145. *Id.* at 4.

heighten female representation at these senior levels, (3) identify directors and members of senior management to actively promote and support these goals, (4) acknowledge the biases associated with the director nomination process and work to prevent such biases from interfering, (5) nominate and consider women for board and senior management positions, and (6) communicate transparently with shareholders and describe the steps taken by the board to address the issue of gender diversity.¹⁴⁶

Institutional investors have also submitted shareholder proposals urging companies to implement a Rooney Rule, a provision that was first implemented by the National Football League; this provision requires teams to interview "at least one minority candidate for any open head coaching or general manager position."¹⁴⁷

CtW Investment Group submitted a shareholder proposal recommending the adoption of a Rooney Rule at Amazon, which if implemented, would require the "initial list of candidates from which new management-supported director nominees are chosen should include (but need not be limited to) qualified women and minority candidates."¹⁴⁸ Initially, the shareholder proposal was not supported by Amazon's board of directors, emphasizing that Amazon's current methods for the recruitment and evaluation of board candidates reflected the company's commitment to diversity.¹⁴⁹ After the release of the proxy statements expressing Amazon's opposition to the shareholder proposal, the company experienced significant backlash, with employees and other stakeholders questioning Amazon's commitment.¹⁵⁰ At the time the proposal was submitted, the corporate governance guidelines stated "the Nominating and Corporate Governance Committee . . . seeks out candidates with a diversity of experience and perspectives,"¹⁵¹ yet the two most recent additions to the board are white men who were recommended by

146. *Id.*

147. Letter from CtW Investment Group to Amazon Shareholders (April 27, 2018) https://www.iccr.org/sites/default/files/page_attachments/amazon_shareholder_letter_4-27-18.pdf.

148. *Id.*

149. Amazon.com Inc., Schedule 14A (April 19, 2018), <https://www.sec.gov/Archives/edgar/data/1018724/000119312519102995/d667736ddef14a.htm>

150. Free and Fair Markets Initiative, *Amazon's Unfair Deal of the Day: Undercutting women. And their wages.*, 5 (2018).

151. *Id.* at 5.

current members of the board.¹⁵² Amazon's adoption of the Rooney Rule provision can be utilized as an example to shareholders, demonstrating the effective use of a shareholder proposal to direct the board members' attention to a key-issue important not only to shareholders, but other stakeholders as well. The examples above demonstrate the sway institutional investors hold with companies who tend to be more receptive to the investors' proposals and recommendations. Since institutional investors may be better situated to make such recommendations and hold greater influence over corporations, these alternative solutions are more efficient and effective mediums that can affect real change and increase female representation on corporate boards.

VI. CONCLUSION

Gender diversity of corporate boards has developed into a sizeable concern for corporate boards, with various stakeholders expressing a keen interest in increasing female representation. While a number of policy solutions have been suggested and utilized to advance this cause, such as the use of SEC disclosure requirements, shareholder derivative suits, and the passage of state legislation, they are accompanied by significant limitations, calling into question the effectiveness of such approaches. Shareholders have the unique opportunity to actively promote gender diversity and increase female representation on corporate boards through a number of forums, including the nomination of director candidates to be included on the company's proxy, institutional investors placing pressures on companies to diversify, and recommending the adoption of provisions such as the Rooney Rule. Shareholder participation in the director nomination process is a better and more effective strategy to accomplish the goal of increased female representation on corporate boards and should be utilized to a greater extent by shareholders meeting the requisite standards.

152. Letter from CtW Investment Group to Amazon Shareholders, *supra* note 147.