

Corporate Diversity 2.0: Lessons from Silicon Valley’s Missteps

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ABSTRACT

Presently, there is lack of clarity regarding the objectives of board gender diversity laws across jurisdictions. This Article reviews the current laws and regulations for corporate gender diversity across countries and finds two separate problems that current laws address. The first problem is that board effectiveness is hampered by homogeneity and the second problem is the lack of gender equality in the corporate context. However, current gender diversity laws do not address either of these issues individually. Instead, there is a conflation of both these issues, because of which the laws are only able to provide superficial solutions.

To appropriately tailor the board gender diversity laws to the two problems, this Article argues a move toward a revised framework, or “corporate diversity 2.0.” Specifically, the Article focuses on the second problem of the lack of “gender equality” and argues that it should be framed more broadly as equality at the workplace rather than merely on the corporate board.

INTRODUCTION

As Victor Hugo famously said, “You can resist an invading army; you cannot resist an idea whose time has come.”¹ In recent years, the idea of diversity, particularly gender diversity, on company boards has gathered enough momentum to be regarded as “an idea whose time has come.” However, in our eagerness to give effect to this idea, we must be wary of regulations and proposals that are not optimal or are even counterproductive.

The gender diversity focus in the corporate context, in some European jurisdictions, has led to mandatory quotas for women sitting on company boards.² Other jurisdictions with softer regulations, such as “targets” and “disclosure rules,” are also hearing calls for quotas because these softer regulations have not resulted in an immediate increase in the percentage of women directors.

Further, a few recent studies and commentators have pointed out that an increase in women directors has not led to an increase in the number of women CEOs.³ This exclusive focus on women’s representation in boards is shallow and counterproductive. It is shallow because it does not seek to address the root of the problem and, instead, merely attempts to provide a cosmetic fix at the top. It is counterproductive because the board of directors is a crucial organ of the corporation and its composition should be designed to ensure that it functions optimally, as per the needs of each company.

What is required, therefore, is an evaluation of the problem that such regulations intend to address and the suitability of such regulations to address the problem. At present, we do not have a proper statement of the problem to tailor regulations. Instead, we have preconceived

¹ This, and other variants of this quote, are attributed to Victor Hugo. The original quote appeared in *Histoire d’un Crime* [The History of a Crime]. See VICTOR HUGO, *HISTOIRE D’UN CRIME* (T.H. Joyce & Arthur Locker trans., 1877), <http://www.gutenberg.org/files/10381/10381-h/10381-h.htm>.

² Norway, France, and Spain are examples. For a comprehensive review of countries with a mandatory quota for women directors, see Sandeep Gopalan & Katherine Watson, *An Agency Theoretical Approach to Corporate Board Diversity*, 52 *SAN DIEGO L. REV.* 1, 45–52 (2015).

³ See, e.g., James Fernyhough, *Almost Every Single CEO of an ASX 200 Company Is a Man*, *THE NEW DAILY* (Nov. 15, 2017), <http://thenewdaily.com.au/money/finance-news/2017/11/15/almost-every-ceo-asx-200-company-man/>; Kieran Guilbert, *More Women on UK T10 Boards but Top Jobs Out of Reach: Rep.*, *REUTERS* (Nov. 9, 2017), <https://www.reuters.com/article/us-britain-work-women/more-women-on-uk-boards-but-top-jobs-out-of-reach-report-idUSKBN1D92JH>.

solutions in the form of quotas or targets at the board level, accompanied by different rationales for such measures offered after the fact.

For instance, the equality rationale claims that gender diversity regulations address workplace equality issues.⁴ The economic rationales claim that these regulations are aimed at improving business outcomes and profitability, which would mean that they are addressing efficiency problems in businesses.⁵ Corporate governance arguments, usually subsumed within the umbrella of the economic rationales, claim that such regulations will improve board discussions and decisions, thus implying that they are addressing governance problems in companies.⁶

Additionally, two recent stories from Silicon Valley are recounted below, to further emphasize the imminent need for Corporate Diversity 2.0.

The first story involves Google and its former employee, James Damore, who (while he was employed at Google) circulated a document that criticized the company for vilifying those with differing views on the issue of gender diversity.⁷ According to Damore, the disparity in the proportion of men and women at software engineering companies and in leadership positions might not only be due to discrimination but also in part to the “differences in distributions of traits between men and women.”⁸ Such differences, according to Damore’s document, are not only attributable to social conditioning but also to biological differences.⁹ He also went on to discuss what he calls

⁴ See, e.g., Peta Spender, *Gender Diversity on Boards in Australia—Waiting for the Great Leap Forward?*, 27 AUSTRALIAN J. CORP. L. 22, 23 (2012). Spender argues that although it is often represented that women make a “choice” to opt out of their careers to care for children and elders, it is a structural impediment rather than a choice. See also Joan Acker, *From Glass Ceiling to Inequality Regimes*, 51 SOCIOLOGIE DU TRAVAIL [SOCIOLOGY OF WORK] 199, 206 (2009). Acker argues that one way to offset the structural barriers faced by women is the introduction of policies that are accommodative of such family demands and offer professionals ways to accommodate home responsibilities along with their careers.

⁵ See generally Deborah H. Rhode & Amanda K. Packel, *Diversity on Corporate Boards: How Much Difference Does Difference Make?*, 39 DEL. J. CORP. L. 377 (2014).

⁶ AARON A. DHIR, CHALLENGING BOARDROOM HOMOGENEITY 15 (Cambridge Univ. Press 2015); Rene B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291 (2009).

⁷ James Damore, *Google’s Ideological Echo Chamber* (July 2017), <https://assets.documentcloud.org/documents/3914586/Googles-Ideological-Echo-Chamber.pdf>.

⁸ *Id.*

⁹ *Id.*

“Google’s political orientation and moral biases.”¹⁰ Eventually, as a result of the document, Damore was fired by Google, with its CEO Sunder Pichai explaining that the document had crossed a line by “advancing harmful gender stereotypes in the workplace.”¹¹

A psychology professor was quoted by the *Guardian* as having said that some of Damore’s ideas were familiar to her as part of her research (even if there was no consensus around them). She also said that there was “something quite extraordinary about someone losing their job for putting forward a view that is part of the scientific debate.”¹² While there is no firm agreement among psychologists about these claimed gender differences,¹³ the incident illustrates that we lack an atmosphere that is conducive to an evaluation of various views and solutions around this issue.¹⁴

Further, coercing people into agreeing with a certain view might prove counterproductive. As Frank Dobbin and Alexandra Kalev have concluded based on interviews they conducted with managers and executives in the United States, voluntary diversity training often works better than mandatory diversity training at organizations.¹⁵ The Google incident was a missed opportunity to foster a discussion and analysis of views around diversity. In addition to this, the incident might also have served as an opportunity to investigate if unconscious bias was not the only reason for the lower number of women in top company positions. As this Article will discuss, hostile work environments and the lack of gender-neutral promotion metrics may contribute to the lower number of women in top management positions, including positions on boards, and these issues must be addressed. Consistent with this, Dobbin and Kalev found that mentoring, college

¹⁰ *Id.*

¹¹ Sunder Pichai, *Note to Employees from CEO Sunder Pichai*, GOOGLE BLOG (Aug. 8, 2017), <https://www.blog.google/topics/diversity/note-employees-ceo-sundar-pichai/>.

¹² Paul Lewis, “*I See Things Differently*”: James Damore on His Autism and the Google Memo, THE GUARDIAN (Nov. 17, 2017), <https://www.theguardian.com/technology/2017/nov/16/james-damore-google-memo-interview-autism-regrets>.

¹³ *Id.*

¹⁴ For a more detailed discussion of the diversity issues around the Google incident and its implications, see Akshaya Kamalnath, *A Memo to Google—Firing Employees with Conservative Views is Anti-Diversity*, THE CONVERSATION (Aug. 11, 2017), <https://theconversation.com/a-memo-to-google-firing-employees-with-conservative-views-is-anti-diversity-82318>.

¹⁵ Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, THE HARV. BUS. REV. (July-Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail>.

recruitment of women and minorities, and appointing a dedicated diversity officer are programs that have been effective, in addition to voluntary diversity training.¹⁶

The second story involves another Silicon Valley giant, Apple. A few months after the Google incident, Apple's diversity head, Denise Young Smith, made a reference to "diversity of viewpoints" and this, like Damore's memo, again resulted in public outcry. The statement that became controversial was as follows: "And I've often told people a story—there can be 12 white blue-eyed blonde men in a room and they are going to be diverse too because they're going to bring a different life experience and life perspective to the conversation."¹⁷ Ultimately, she apologized for the statement, via an internal memo, saying that her statements "were not representative of how I think about diversity or how Apple sees it" and that Apple's commitment to racial and gender diversity was "as strong as it has ever been."¹⁸ Just a month later, Apple announced that Smith would be leaving the company at the end of the year.¹⁹

Yet again, this was a missed opportunity to discuss the importance of viewpoint diversity in corporate boards and whether indicators, apart from gender and race, should be considered under the rubric of diversity. Further, the incident is another illustration of the repercussions of attempting to stray from the currently accepted idea of diversity. It is unsurprising then that out-of-the-box solutions for diversity have not emerged.

It is evident that the individuals involved, Damore and Smith, had to face repercussions for thinking outside the generally accepted narrative of diversity in the corporate context. These two episodes must serve as cautionary tales for us as a society because it is necessary to be able to evaluate and discuss all aspects of an issue before arriving at optimal solutions. Thus, this Article aims to take on the task of discussing and analyzing the difficult arguments around the issue of gender diversity

¹⁶ *Id.*

¹⁷ AppleInsider Staff, *Apple Diversity Chief Apologizes for Controversial Choice of Words at Summit*, TECHCRUNCH (Oct. 13, 2017), <https://techcrunch.com/2017/10/13/apple-diversity-head-denise-young-smith-apologizes-for-controversial-choice-of-words-at-summit/>.

¹⁸ Matthew Panzarino, *Apple Diversity Chief Apologizes to Staff for Statements Made at Summit*, APPLEINSIDER (Oct. 13, 2017, 8:52 PM), <https://appleinsider.com/articles/17/10/13/apple-diversity-chief-apologizes-to-staff-for-statements-made-at-summit>.

¹⁹ Jacob Kastrenakes, *Apple's First Diversity Chief Is Leaving After Less Than a Year*, THE VERGE (Nov. 16, 2017), <https://www.theverge.com/2017/11/16/16667510/apple-diversity-chief-leaving-after-less-than-a-year>.

on company boards to propose an improved diversity regime that overcomes the shortcomings in the current regulations.

Part 1 of this Article seeks to define the problem that is being addressed by board gender diversity laws and regulations. Because of the lack of clarity in this regard, Part 1 takes a backward approach by first reviewing board gender diversity regulations and rationales offered in support of them, and then attempting to distill the core problem being addressed by such regulations out of that analysis. Part 2 finds that there are two different problems addressed by diversity regulations, namely board effectiveness and gender equality in the workplace. Part 2 further finds that these regulations, as they are framed in most countries, seem to understand diversity almost exclusively in terms of gender. This implies that the problem being addressed is that of gender equality, although various governments have claimed that the issue of board effectiveness is also being addressed. Part 1 then argues that even if the aim is simply to address the problem of gender equality in the corporate context, the current regulations do not address the root of the problem.

To elucidate the problems at hand and optimal solutions, Part 3 next studies the case of Uber with respect to the recent allegations of sexism and a toxic work culture. The allegations eventually resulted in a full-fledged report by Eric Holder and his associates. This report makes important observations and suggestions regarding diversity and inclusion, which are worth discussing and building upon in the context of companies of different sizes.

This Article discusses the need to rethink the diversity discourse based on recent allegations of sexual harassment, race discrimination, and shareholder engagement. Part IV lays out the framework for Corporate Diversity 2.0 to help companies address diversity issues and to address these issues more effectively. This framework draws from the Holder Committee Report and from useful aspects of existing regulations and policy suggestions in various countries.

Finally, the conclusion reiterates the need for boards to take diversity and related issues seriously and for the diversity discourse to be remapped based on lessons from such incidents and their handling, i.e., missteps in Silicon Valley.

I**GENDER DIVERSITY REGULATIONS: A SOLUTION IN SEARCH OF A CLEARLY DEFINED PROBLEM**

Many countries have introduced legislation and softer regulations with the aim of increasing gender diversity on company boards. The policy rationales underlying such regulations are a mix of many arguments, including the need to make boards more representative of the population, make boards more effective, make companies more profitable, and ensure gender equality. It is unclear what specific problem(s) the legislation or regulation is trying to address. This section reviews the relevant law and the underlying rationale(s) in different countries, with the aim of understanding the specific problem(s) addressed by such laws.

Norway stands out as the first country to introduce regulations related to board gender diversity and as the country with the toughest sanctions for noncompliance with such regulations. However, it also represents the broad thrust of the discourse of board gender diversity in Europe and internationally. In contrast, the United States has fewer onerous regulations in this regard and focuses on board diversity more generally. However, even in the United States, concerns of gender diversity have started taking on greater importance than other forms of diversity. The United Kingdom and Australia have used targets and disclosure requirements and have focused primarily on gender diversity.

This Section will review the regulations introduced in Norway, the United States, the United Kingdom, and Australia and the rationales underlying the regulations in each of these jurisdictions. Based on this review, it will clarify the problem(s) sought to be addressed by these regulations.

A. Norway: The First Quota Law

Norway was the first country to introduce legislation aimed at increasing the number of women directors on company boards.²⁰ In 2003, Norway introduced a quota to the boards of state-owned companies, municipal companies, and companies incorporated by

²⁰ Julia Carpenter, *The Case for and Against Gender Quotas on Corporate Boards*, CNN MONEY (Sept 7, 2018), <https://money.cnn.com/2018/09/07/pf/gender-diversity-quotas/index.html>.

special legislation.²¹ Based on the public hearings, Norway decided to make these measures applicable to public limited liability companies as well.²² These measures took effect through the Public Limited Companies Act amendment to require a representation of at least forty percent for each gender on boards of public limited companies.²³

Section 6–11a²⁴ of Norway's Companies Act now reads as follows:

Requirement regarding the representation of both sexes on the board of directors

(1) On the board of directors of public companies, both sexes shall be represented in the following manner:

1. If the board of directors has two or three members, both sexes shall be represented.
2. If the board of directors has four or five members, each sex shall be represented by at least two.
3. If the board of directors has six to eight members, each sex shall be represented by at least three.
4. If the board of directors has nine members, each sex shall be represented by at least four, and if the board of directors has more members, each sex shall be represented by at least 40 percent.

Essentially, the law describes how public companies are to meet the forty percent requirement for various board sizes. Norway introduced this requirement in three phases, with an initial window of two years that allowed for companies to voluntarily comply.²⁵ The first phase was from January 1, 2004, to December 31, 2005, when compliance with the law was voluntary. The legislation stipulated that the rule would be made mandatory only if companies did not, by July 1, 2005, have an

²¹ Act of 19 December 2003 No. 120, pt. XII, para 1, *Follow-up to the Package Meeting of 9 to 10 November 2005 Regarding Representation of Both Sexes on Company Boards* at 3, ROYAL MINISTRY OF CHILDREN AND FAMILY AFFAIRS, http://www.regjeringen.no/upload/BLD/Engelsk/Balanced%20gender%20representation%20on%20company%20boards/Svarbrev_til_ESA_19122005.pdf; DHIR, *supra* note 6, at 104.

²² DHIR, *supra* note 6, at 104.

²³ Amendment to the Public Limited Companies Act, Ot.prp. Nr. 97 (2002–2003) (Nor.).

²⁴ Allmennaksjeloven, lovav June 13, 1997 nr. 45 (Norwegian Public Limited Liability Companies Act of 13 June 1997 No. 45), available in an unofficial English translation at the website of the Oslo Stock Exchange (Oslo Bors), <http://www.oslobors.no/ob-eng/OsloBoers/Regulations/Acts-and-regulations>.

²⁵ CHRISTA TOBLER, GOING GLOBAL IN SEX EQUALITY LAW: THE CASE OF GENDER REPRESENTATION RULES FOR COMPANY BOARDS, 894 (Mario Monti et al. ed., 2007).

aggregate of forty percent women directors on their boards.²⁶ During this time, companies had the opportunity to voluntarily rectify gender imbalances on their boards without government intervention to mandate quotas. However, by July 1, 2005, less than sixteen percent of the directors on all public companies were women. This percentage was much lower than what the government had intended.²⁷ While this was still a large jump in a two-year period, it was not even close to the intended forty percent.²⁸ As a result, the government made quotas mandatory starting on January 1, 2006.

This mandatory quota system initiated the second phase, when all existing companies were given a two-year transitional period to meet the representation levels prescribed by the quota.²⁹ Companies that failed to comply with the requirement could be dissolved by a court after having been given sufficient notice.³⁰ To further facilitate the implementation of this law, the Norwegian government set up a database of female directorial candidates for corporations to consider.³¹ Eventually, despite protesting the new measure, almost all public companies in Norway complied. However, some public companies chose to convert to private companies rather than comply with the new measure.³²

Finally, in the third phase that began January 1, 2008, the regulation required all public companies to comply with the forty percent quota measure.³³ The highest noncompliance penalty in section 6-11a allows for a noncompliant company to be dissolved.³⁴ Although this penalty seems excessively harsh, a company is only actually dissolved after several warnings and opportunities for the company to comply with the quota.³⁵

²⁶ Beate Sjøfjell, *Gender Diversity in the Boardroom and its Impacts: Is the Example of Norway a Way Forward?* 20 DEAKIN L.R. 25, 28 (2015).

²⁷ *Id.*

²⁸ *Id.*

²⁹ DHIR, *supra* note 6, at 105.

³⁰ TOBLER, *supra* note 25; Julie Suk, *Gender Parity and State Legitimacy: From Public Office to Corporate Boards*, INT'L J. CONST. L. 449, 450 (2012).

³¹ Kenneth R. Ahern & Amy K. Dittmar, *The Changing of the Boards: The Impact on Firm Valuation of Mandated Female Board Representation*, 127 Q. J. ECON. 137, 145 (2011).

³² Sjøfjell, *supra* note 26.

³³ DHIR, *supra* note 6, at 105.

³⁴ Norwegian Pub. Limited Liability Companies Act, 45 § 16–15 (1997).

³⁵ Sjøfjell, *supra* note 26, at 32.

1. Rationale

While some have argued that the gender quota in Norway has been introduced to promote gender equality, others firmly believe that it is a measure to improve corporate governance. The rationale for the law is better understood in the context of Norway, where there is a tradition of gender quotas in the public sector. The deregulation and privatization of these enterprises in the 1980s and 1990s had raised concerns about the subsistence of the welfare state model.³⁶ In the context of gender equality, the concern was about the inapplicability of provisions of the Gender Equality Act (which regulated the gender composition of publicly appointed boards, councils, and committees) to boards of non-state-owned companies.³⁷ It would seem that these concerns were addressed by introducing the mandatory quotas on the boards of companies in Norway's company law legislation.

Officially, the Norwegian legislation mandating corporate gender quotas was justified with two reasons: 1) balanced participation is a question of democracy,³⁸ and 2) securing women's influence in decision making processes is important for the economy.³⁹ Explaining the democracy argument, a member of parliament said that because "market forces might be said to be more important than ever before, it is even more important that women are well-represented where power is situated within the companies and the boards."⁴⁰

However, in response to the business community's opposition to the law, Laila Dāvøy, the then minister of children and family affairs, emphasized, during the parliamentary debate, that it was more a matter of diversity than a quota law.⁴¹ Thus, she seems to have promoted the amendment as a corporate governance issue, because diverse boards

³⁶ MARI TEIGEN, GENDER QUOTAS ON CORPORATE BOARDS: ON THE DIFFUSION OF A DISTINCT NATIONAL POLICY REFORM, 115–27 (Frederik Englestad & Mari Teigen eds., *Firms, Boards and Gender Quotas: Comparative Perspectives* Comparative Social Research, Emerald Grp. Publ'g Ltd. 2012).

³⁷ *Id.*

³⁸ See generally Agnes Bolso, *Ignore the Doubters. Norway's Quota on Women in the Boardroom is Working*, THE GUARDIAN (July 18, 2011, 5:30 PM), <https://www.theguardian.com/commentisfree/2011/jul/18/diversity-boardroom-corporate-decisions>.

³⁹ *Id.*

⁴⁰ HILDE BJØRKHAUG & SIRI SØRENSEN, FEMINISM WITHOUT GENDER? ARGUMENTS FOR GENDER QUOTAS ON CORPORATE BOARDS IN NORWAY, 199 (Fredrik Englestad & Mari Teigen eds. *Firms, Boards and Gender Quotas: Comparative Perspectives* Comparative Social Research, Emerald Grp. Publ'g Ltd. 2012).

⁴¹ *Id.* at 200.

benefit from a variety of perspectives while making corporate decisions. On the other hand, calling the amendment a quota law would imply that the main aim was to achieve balanced gender representation on company boards. Her entire argument was as follows:

The Government wants to pave the way for increased value creation in business. The problem today is not that there are no qualified and suitable women. The problem is to ensure that the skills women possess, are used. This is what the rules on gender representation should do something about. Increased diversity in the boardroom can help improve the strategic choice, enhance innovation, speed up restructuring and thus improve profitability. Increasing the proportion of women in boards enhances diversity. . . . Finally, I would not call this a gender quota reform. It is diversity we talk about, diversity in boardrooms.⁴²

This statement has been argued to reflect a strategic shift in the government's rationale while contextualizing the measure for the private sector because the grounds for the business community's opposition of the measure was mostly based on shareholder property rights.⁴³

Yet, Dāvøy has emphasized that the measure is one of diversity rather than a gender quota. Although the gender quota measure was originally conceived of in the context of the gender equality legislation, there seems to have been a transformation in the rationales provided while introducing similar measures in the companies' legislation. Consistent with this, Hilde Bjørkhaug and Siri Sørensen, based on their review of the many rationales, find that the argument most strongly emphasized in the context of the gender quota law for companies in the private sector is profitability.⁴⁴

According to Bjørkhaug and Sørensen, since profit maximization seems to be the dominant goal of the private sector, the government had to downplay the equality arguments and instead focus on linking the law to profitability considerations.⁴⁵ On the contrary, Professor Sjøfjell argues that the very fact that noncompliance with the measure could result in dissolution of the company (at the extreme), indicates

⁴² *Id.*

⁴³ *Id.* at 251. The shareholder property rights argument in this regard is that, since the corporation is conceived of as the property of the shareholders, imposing a gender quota on the board would interfere with the property rights of shareholders.

⁴⁴ *Id.* at 189–99.

⁴⁵ *Id.* at 200.

that it is a core company law measure—unlike corporate social responsibility regulations—that are invariably voluntary.⁴⁶

However, in deciding the concerns or motivations behind a law, whether or not strict penalties are attached to such a law is not the determinative factor. Further, the emphasis on gender diversity, to the exclusion of other forms of diversity, makes it obvious that gender equality was the key concern driving the law reform. Other aspects, like the impact of such a law on profitability of the company, are secondary. In contrast, the focus of the diversity rule in the United States is much broader, as the next section shows.

B. United States: The Diversity Disclosure Rule

While the discourse in Norway used the general terminology of diversity, the specific focus was on gender diversity. In the United States, the discussion about board composition, especially diversity, has been broader from the outset. It is interesting to note that the board diversity discussion in the United States preceded the discussion in Norway, despite Norway being the first country to introduce legislation on the issue.

Leading commentators in the United States had linked the discussion of board independence to diversity as early as the 1990s. In fact, the board gender diversity discussion in the United States can be broken into two phases. The first phase involved the homegrown development of the board diversity discourse as a corporate governance measure. This phase resulted in companies being required to disclose their diversity policy and details regarding it, if they had one in place. The second phase was the diversity discourse, influenced by international developments, that focused more on gender diversity rather than on general diversity.

1. Phase I: The Early Discourse About Board Diversity in the United States

Excerpts from a panel discussion on corporate law reforms held at Fordham Law School in 1997 (where experts from academia and industry members were present) show that diversity had already found its way into the corporate governance conversation. Reverend Dr. Andy Smith, the director of an activist investor firm said, in the context of corporate misconduct, that “the question was not simply one of

⁴⁶ Sjøfjell, *supra* note 26, at 33.

independence but also one of diversity.” The term “diversity” for him encompassed not just gender diversity but also racial diversity.⁴⁷

Speaking on behalf of his firm, Dr. Smith explained that diversity added something to shareholder value because “it reflects what our society is about and it brings in a different perspective that often is very helpful in the management of the corporation.”⁴⁸ In the same panel, Richard Schlefer, who represented a pension fund, also mentioned that the fund considered diversity as a corporate governance issue. Schlefer also said that they had filed several shareholder resolutions⁴⁹ asking companies to seek ways to improve board diversity, but companies responded saying that the type of diverse candidates they sought were in short supply.⁵⁰ Other shareholder proposals regarding diversity had been made during this time. Although there was no resultant impact on diversity, these proposals established that diversity was a shareholder concern and set the foundation for the Security Exchange Commission’s (SEC) introduction of the diversity disclosure rule in 2010.⁵¹

Apart from institutional investors, in 1999 the Conference Board (an organization consisting of senior executives from all industries aiming to explore ideas of business policy and practice) had published a study to show that board diversity could increase shareholder value.⁵² Since the Conference Board consists of the top executives in the United States, such a publication signaled that business leaders believed that diversity was profitable.⁵³

Apart from the above study that focused on board diversity, the Conference Board had published other earlier reports about the value of diversity at all firm levels.⁵⁴ Thus, the issue of board gender diversity seems to have followed the broader issue of workforce diversity in the United States. Ultimately, the diversity discourse was firmly rooted in shareholder value and effective corporate governance.

⁴⁷ Jill Fisch, *Reform: Are There Too Many Cooks in the Corporate Kitchen?*, 2 *FORDHAM FIN. SEC. & TAX. L.F.* 67, 82 (1997).

⁴⁸ *Id.* at 82–83.

⁴⁹ A shareholder resolution is a proposal submitted by shareholders to be voted upon at the annual meeting. *Id.* at 57.

⁵⁰ *Id.*

⁵¹ Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37 *U. DAYTON L. REV.* 39, 44 (2011).

⁵² Steven A. Ramirez, *Diversity and the Boardroom*, 6 *STAN. J.L. BUS. & FIN.* 85, 97 n. 57, and 98 n. 63 (2000).

⁵³ *Id.* at 98.

⁵⁴ *Id.* at 98 n. 61.

2. *The Diversity Disclosure Rule*

Based on the above-mentioned developments, the concept of board diversity in general has now been incorporated in the U.S. disclosure regime. Public companies are required to comply with a range of reporting requirements. The Securities Exchange Act of 1934 requires that company shareholders, whose securities are listed on a national stock exchange, receive a proxy statement prior to a shareholder meeting (regardless whether an annual or special meeting).⁵⁵ The information contained in the statement must be filed with the SEC before soliciting a shareholder vote on the election of directors and the approval of other corporate actions.⁵⁶

After the financial crisis of 2008, the law was amended to include certain additional disclosures.⁵⁷ Following this, from February 2010, listed companies are required to disclose their diversity policy for nomination of directors, if they have one in place, and describe its implementation in their annual proxy and information statements.⁵⁸ The relevant portion of the law states that companies are to disclose a range of details regarding their director nomination process. The item corresponding to diversity states as follows:

[D]escribe the nominating committee's process for identifying and evaluating nominees for director . . . and whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.⁵⁹

The disclosure about diversity is with reference to whether it is a consideration for the company in the nomination process. Where such a diversity policy exists, the rule requires companies to disclose the implementation and effectiveness of the policy as assessed by the nomination committee of the board. While there is no need to explain why there is no diversity policy in place if the company does not have

⁵⁵ Securities Exchange Act of 1934 § 12, 15 U.S.C. § 78n (2012).

⁵⁶ *Id.*

⁵⁷ SECURITIES EXCHANGE COMMISSION, RELEASE NOS. 33-9089; 34-61175; IC-29092, PROXY DISCLOSURE ENHANCEMENTS (2009), <https://www.sec.gov/rules/final/2009/33-9089.pdf> [hereinafter PROXY DISCLOSURE ENHANCEMENTS].

⁵⁸ Regulation S-K, 17 C.F.R. § 229.407(c)(2)(vi) (2017).

⁵⁹ *Id.*

one, more detailed disclosures are required when the company has a diversity policy.

A significant point here is that the rule does not define the term “diversity,” and it is up to companies to define the term. In its proposal document, the SEC anticipated that companies might, and would likely, define diversity differently. While some companies might define diversity in terms of demographic aspects like race, gender, and nationality, other companies might define it in terms of diversity of viewpoint, educational qualifications, and professional experience.⁶⁰ The proposal document explains that “companies should be allowed to define diversity in ways that they consider appropriate.”⁶¹ These parameters show that the SEC specifically chose not to define the term to allow companies flexibility.⁶²

3. *Rationale*

Before the diversity disclosure rule was enforced, the SEC called for comments to determine whether disclosures related to board diversity should be required. A number of commenters responded that board diversity was important information for investors.⁶³ Their reasoning was that the disclosure would provide investors with information about the company’s corporate culture and governance practices with which they could make informed voting and investment decisions. While some scholars had noted that board diversity would improve corporate performance, the SEC’s focus has been that information about the company’s diversity policy and its implementation would be important to investors.⁶⁴

Further, the SEC states that the requirement for diversity-related disclosure is not meant to steer the behavior of corporations to appoint more diverse candidates on their boards.⁶⁵ Yet, scholars have been critical of the rule, saying that the SEC has, through this requirement, aimed to influence corporate behavior through “social shaming” that may result from the information being disclosed.⁶⁶ However, Professor Dhir has argued that the rule fits within the two key goals of securities

⁶⁰ PROXY DISCLOSURE ENHANCEMENTS, *supra* note 57, at 39.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 38.

⁶⁴ *Id.*

⁶⁵ *Id.* at 80.

⁶⁶ STEPHEN M. BAINBRIDGE, CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS, 21, 34 (Oxford Scholarship Online, 2012).

regulation, namely encouraging informed investor decision-making and reducing agency costs.⁶⁷ In its argument that making boards more independent will reduce agency costs, the SEC alludes to the link between board diversity and independence when it states that, while looking for diverse candidates, boards might be forced to look outside their existing networks and, ultimately, create a resulting board more independent of management.⁶⁸ Further, it states that where the company was in need of more independence, a diverse board would lead to improved corporate governance.⁶⁹ The SEC explains that such improved governance might be the result of the availability of different viewpoints.⁷⁰

Between the SEC's reasoning and the lack of focus on gender or race as forms of diversity, it is clear that the board diversity rule was not exclusively motivated by concerns of gender or race equality. Rather, the rule gives companies the flexibility to define diversity as they deem most suitable to their specific context.

Consistent with this flexibility, Dhir's analysis of proxy statements from 2010 to 2013 showed that only fifty percent of the companies defined "diversity" to include gender.⁷¹ Thus, "gender" was not perceived as the overarching feature of the diversity disclosure rule.

4. Phase II: The More Recent Board Diversity Discourse in the United States

The former Chair of the SEC, Mary Joe White, referring to the fact that most companies had not provided details about gender, racial, and ethnic diversity, said that investors were unsurprisingly not satisfied with the lack of detail and specificity in the disclosures.⁷² She also said that the rule was intended to "meaningfully inform investors." Since the diversity rule was not serving the intended purpose, the rule needed to change. Possibly alluding to vague disclosures, she said that the "lens

⁶⁷ DHIR, *supra* note 6, at 93.

⁶⁸ PROXY DISCLOSURE ENHANCEMENTS, *supra* note 57, at 80.

⁶⁹ *Id.*

⁷⁰ *Id.* at 81.

⁷¹ DHIR, *supra* note 6, at 191.

⁷² Mary Jo White, Chair, U.S. Sec. and Exch. Comm'n, Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure to Set the Path Forward on Board Diversity, Non-GAAP, and Sustainability (Speech delivered at the International Corporate Governance Network Annual Conference, California, June 27, 2016), (<https://www.sec.gov/news/speech/chair-white-icgn-speech.html>).

of board diversity disclosure needs to be re-focused in order to better serve and inform investors.”⁷³ With a new SEC Chair, Jay Clayton, at the helm since 2017, it remains to be seen whether the “re-focusing,” with respect to gender diversity, will be in keeping with the international discourse.

Institutional investors have displayed their dissatisfaction not only with the lack of specificity in the disclosures but also with the lack of results in terms of actual diversity, particularly gender diversity, on company boards. One example is the California State Teachers’ Retirement System (CalSTRS), which aims to increase female representation on the boards of companies in which it invests. CalSTRS publicly criticized Facebook in 2012 for its all-male board, ahead of its initial public offering, to pressure Facebook into hiring women directors.⁷⁴ Investor pressure on companies, specifically with regard to diversity, has only intensified since these instances of activism. In fact, 2016 has been termed a breakout year for gender diversity in the United States, with shareholder proposals meeting with increased success.⁷⁵ Additionally, commentators have predicted that gender diversity is likely to one day become a standard aspect of board composition.⁷⁶ As a result, the international focus on gender diversity has slowly come to dominate the diversity conversation in the United States as well.

Unable to ignore the issue anymore, the business community has not just passively responded to investor pressure, but has also actively contributed to the diversity discourse. The recent Commonsense Principles of Corporate Governance drafted by some of the leading executives in the United States, argues that directors should be drawn from a diverse pool and that diversity is critical to a high-functioning board.⁷⁷ However, their focus is on diversity in general and not restricted to gender diversity. The relevant principle about diversity states: “Directors should have complementary and diverse skill sets,

⁷³ *Id.*

⁷⁴ Bianca Bosker, *Facebook’s All-Male Board Draws Investor Scrutiny—But Don’t Count on Change*, HUFFINGTON POST (Sept. 2, 2012), http://www.huffingtonpost.com.au/entry/facebook-all-male-board-_n_1263278.

⁷⁵ David A. Katz & Laura A. McIntosh, *Corporate Governance Update: Prioritizing Board Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Jan. 30, 2017), <https://corpgov.law.harvard.edu/2017/01/30/corporate-governance-update-prioritizing-board-diversity/>.

⁷⁶ *Id.*

⁷⁷ TIM ARMOUR ET AL., COMMONSENSE CORPORATE GOVERNANCE PRINCIPLES 1 (2016), http://www.governanceprinciples.org/wp-content/uploads/2016/07/GovernancePrinciples_Principles.pdf.

backgrounds and experiences. Diversity along multiple dimensions is critical to a high-functioning board. Director candidates should be drawn from a rigorously diverse pool.”⁷⁸ Clearly, the focus is on diversity in terms of skill sets, backgrounds, and experiences instead of a sole focus on gender. The principles further state that “no one size fits all” which shows that they support a flexible approach.⁷⁹

Next, the Business Roundtable, an organization consisting of CEOs of major U.S. corporations, released its principles of corporate governance in August 2016, where it specially advocated that nominating committees should develop a framework for considering minority and women candidates for each board seat.⁸⁰ Even here, the specific principle dealing with board composition only refers to diversity in general, while special mention is made to women and minorities in an explanatory note on diversity. The relevant principle is as follows: “The composition of a board should reflect a diversity of thought, backgrounds, skills, experiences and expertise and a range of tenures that are appropriate given the company’s current and anticipated circumstances and that, collectively, enable the board to perform its oversight function effectively.”⁸¹ This quotation elaborates on the meaning of diversity by proposing that boards should develop a framework for identifying “appropriately diverse candidates that allows the nominating/corporate governance committee to consider women, minorities and others with diverse backgrounds as candidates for each open board seat.”⁸² Therefore, the Business Roundtable has explicitly focused on women and minorities, while also leaving room for “others with diverse backgrounds,” which could encompass candidates who bring other types of diversity. For instance, educational qualifications, background, or age.

C. United Kingdom

The United Kingdom follows a voluntary and target-based approach to ensure gender diversity on company boards. The 2010 Corporate Governance Code (the Code) sets out the recognized corporate

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ BUSINESS ROUNDTABLE, PRINCIPLES OF CORPORATE GOVERNANCE 1, 11 (2016), <https://businessroundtable.org/sites/default/files/Principles-of-Corporate-Governance-2016.pdf>.

⁸¹ *Id.* at 11.

⁸² *Id.*

governance standards for companies listed in the United Kingdom.⁸³ Companies in the United Kingdom that have a premium listing⁸⁴ on the London Stock Exchange (LSE) must report on how they applied the Code. The Code's provisions were amended in 2014 to include the recommendations of the Davies Report (commissioned to promote gender equality on the boards of listed companies).⁸⁵ Principle B of the Code, which deals with board appointments, states that the appointment process for new directors must be formal and rigorous.⁸⁶ The supporting principle then states: "The search for board candidates should be conducted, and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender."⁸⁷ There is an emphasis on gender even if the principle is attempting to overcome the informal nature of board appointments.

Similarly, the supporting principle requiring disclosure of the process of board appointments in the annual report requires that the disclosure "should include a description of the board's policy on diversity, including gender, any measurable objectives that it has set for implementing the policy, and progress on achieving the objectives."⁸⁸ The other pertinent principle in the Code relates to board evaluation. It states that the board should undertake a "formal and rigorous evaluation" of its performance including that of its committees and individual directors.⁸⁹ The supporting principle to this, explains that "[e]valuation of the board should consider the balance of skills, experience, independence and knowledge of the company on the board, its diversity, including gender, how the board works together as a unit, and other factors relevant to its effectiveness."⁹⁰ In evaluating the

⁸³ FINANCIAL REPORTING COUNCIL, REVISIONS TO THE UK CORPORATE GOVERNANCE CODE (FORMERLY THE COMBINED CODE) (2010), <https://www.icaew.com/en/library/subject-gateways/corporate-governance/codes-and-reports/uk-corporate-governance-code> [hereinafter THE CODE 2010].

⁸⁴ As per 2010 changes to the Financial Services Authority (FSA), only voting equity shares can have premium listing. See Kobi Kastiel, *High Growth Segment: New Route to UK's Equity Capital Markets*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (Apr. 30, 2013), <https://corpgov.law.harvard.edu/2013/04/30/high-growth-segment-new-route-to-uks-equity-capital-markets/>.

⁸⁵ LORD DAVIES, WOMEN ON BOARDS 6 (2011) [hereinafter DAVIES REPORT].

⁸⁶ THE CODE 2010, *supra* note 83, at 11, 13.

⁸⁷ *Id.*

⁸⁸ *Id.*; see also THE CODE 2010, *supra* note 83, at 12.

⁸⁹ See THE CODE 2010, *supra* note 83, at 16.

⁹⁰ *Id.*

board's effectiveness, one of the considered factors is diversity. It is important to note that, in the above quotation, special mention is given to gender diversity.

In particular, international disclosure seems to have influenced the emphasis on gender diversity. This emphasis can also be seen in countries like the United States. The U.K. Corporate Governance Code is informed by a series of committee reports on corporate governance. The first report that mentions board diversity is the 1998 Hampel Report. This report referred to diversity in terms of experience.⁹¹ While the report did not favor "diversity for its own sake to give a politically correct appearance," it acknowledged that "there are people from other fields who can make a real contribution on the board."⁹²

Subsequently, the Higgs Review and the Tyson Report (both of which studied the role, effectiveness, and recruitment of nonexecutive directors), along with the Davies Report, influenced the development of the diversity discourse in the United Kingdom, and ultimately, resulted in the Corporate Governance Code of 2014. The rationale for the Code, and its 2014 reiteration, emerges from a brief look at these reports.

1. The Higgs Review

The Higgs Review, published in 2003,⁹³ postulated that the lack of diversity was a consequence of the informal basis in which board appointments were made.⁹⁴ Since personal contacts were used as the main source of finding candidates, those with similar backgrounds to the incumbent directors were favored.⁹⁵ Calling this a "natural bias," the Higgs Review noted that a rigorous appointment process would offset it.⁹⁶ There was also special focus on appointing women, and the review identified some roles and professions that could be sources of potential board candidates. These roles and professions included lawyers, accountants, human resource professionals, those in positions

⁹¹ HAMPSEL COMMITTEE ON CORPORATE GOVERNANCE, COMMITTEE FINAL REPORT 3.15 (1998).

⁹² *Id.*

⁹³ DEREK HIGGS, REVIEW OF THE ROLE AND EFFECTIVENESS OF NON-EXECUTIVE DIRECTORS, 10.24, (2003) [hereinafter HIGGS REVIEW].

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

just below the board level, directors of private companies, and individuals from public and charitable sectors.⁹⁷

Alongside the strong emphasis on merit, the review emphasized that board composition is a “signal” about the values of the companies. The review added that a “commitment to equal opportunities which can be of motivational as well as reputational importance is inevitably undermined if the board itself does not follow the same guiding principles.”⁹⁸ Here, there is a reference to the equality rationale that notes that the board’s composition signals a company’s commitment to equal opportunity. However, the problem is that board composition is not an effective signal of the entire company’s commitment to equal opportunity. Board diversity does not highlight whether diversity is achieved, or even aimed for, at other levels of the workforce.

With respect to women, the review states that the criteria used for selection may also implicitly discriminate against women by, for example, requiring senior executive or public company board experience.⁹⁹ The Higgs Review also proposed the creation of a group of business leaders, and others, to suggest how companies might draw on broader pools of talent to enhance board effectiveness. The review had further proposed that the group must pay particular attention to ways of bringing in candidates from the noncommercial sector who had the skills and experience relevant to board functioning. The group created for this purpose was chaired by Laura D’Andrea Tyson, which published the Tyson Report.¹⁰⁰ Again, although the mandate of the Tyson Report is a helpful first step, it can only be an interim measure if equal opportunity is the rationale for board gender diversity regulations. Measures should also be introduced to ensure that women progress naturally up the various levels in the company.

2. *The Tyson Report*

The Tyson Report made three main recommendations. First, it reiterated the Higgs Review by recommending that the selection process for nonexecutive directors should be made more rigorous and transparent.¹⁰¹ Second, it recommended that formal training and

⁹⁷ *Id.* at 10.25–10.32.

⁹⁸ *Id.* at 10.16.

⁹⁹ *Id.* at 10.24.

¹⁰⁰ LAURA TYSON, RECRUITMENT AND DEVELOPMENT OF NON-EXECUTIVE DIRECTORS (2003) [hereinafter TYSON REPORT].

¹⁰¹ *Id.* at 19.

evaluation of board members were necessary.¹⁰² Third, it recommended an initiative to measure board diversity in a reliable manner, which would encourage and monitor companies' progress.¹⁰³

The Tyson Report noted two reasons for ensuring board diversity. The first—and more fundamental reason—was a merit argument to find and employ the best talent.¹⁰⁴ With respect to board functioning, it is noted that diversity of skills and background among nonexecutive directors “is likely to provide the broad mix of relevant experiences and to foster the independence of mind, the probing, challenging attitude, and the sound judgement,” which is required for effective board performance.¹⁰⁵ Thus, like the SEC in the United States, the Tyson Report made the link between diversity and independence, and it did not limit the definition of diversity to gender or race. On the contrary, it emphasized “independence of mind” or viewpoint diversity.

The second reason cited is that board diversity enhances the company's reputation. Meaning, a diverse board will be more sensitive to a wider range of possible risks to its reputation. The Tyson Report illustrates this by example of nonexecutive directors with experience in customer relations, human resources, or environmental regulation being able to help a company contain risks in such areas.¹⁰⁶ Further, a diverse board will send a positive signal to various stakeholder groups; this will be especially beneficial in companies with diverse employee and customer groups.¹⁰⁷ Finally, companies with a diverse board will build a reputation as responsible corporate citizens who understand the community and are deserving of its trust.¹⁰⁸

The report does not stop at merely recommending board diversity through formal recruitment practices, but also identifies possible sources to draw candidates for board positions. Sources that are identified in the commercial sector are the “marzipan layer” (also known as the “second rung”) of company management and professional areas working in advisory roles.¹⁰⁹ While CEOs would be hard-pressed for time, the marzipan layer of company management

¹⁰² *Id.*

¹⁰³ *Id.* at 20.

¹⁰⁴ *Id.* at 7.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 12–13.

could engage better with their duties as nonexecutive directors.¹¹⁰ The report also recommends searching for candidates from the noncommercial sectors like the charity sector, where successful individuals tend to have attributes essential for nonexecutive directors.¹¹¹

Interestingly, although the Tyson Report has called for diversity of backgrounds, age, gender, ethnicity, and nationality, the suggestions to widen the pool from which nonexecutive directors are hired focus primarily on women. The report found that women are more likely to take up professional consulting positions and can likely be found in the charity sector leadership positions.¹¹² However, the report also expressly mentions the need for foreign nationals, especially on boards of companies with international operations.¹¹³

3. *The Davies Report*

In 2011, the Davies Report was commissioned by the minister for business and the minister for women, as a first step to the incoming government's pledge to "look to promote gender equality on the boards of listed companies."¹¹⁴ The specific commission mandate was to "undertake a review of the current situation, to identify the barriers preventing more women reaching the boardroom and to make recommendations regarding what government and business could do to increase the proportion of women on corporate boards."¹¹⁵

Clearly, this is not merely seen as a corporate governance initiative like in the previous committee reports. Yet, the report states at the outset that "the issues debated here are as much about improving business performance as about promoting equal opportunities for women."¹¹⁶ So, even if the goal is focused on business performance, that goal must include striving for equal opportunities for women. It is unsurprising that this report, unlike the previous reports which only call for diversity among nonexecutive directors, addresses the need for more women executive directors.¹¹⁷ Also, although the previous reports had confined themselves to recommending diversity on the board, the

¹¹⁰ *Id.* at 12.

¹¹¹ *Id.* at 13–14.

¹¹² *Id.* at 12, 14.

¹¹³ *Id.* at 14.

¹¹⁴ DAVIES REPORT, *supra* note 85, at 6.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 7.

¹¹⁷ *Id.* at 19, 21 (recommendations 1 and 9).

Davies Report recommends that companies must disclose the percentage of women on their boards and the percentage of women in executive positions and in the entire organization.¹¹⁸

Ultimately, the Davies Report does not recommend quotas because “board appointments should be made on the basis of business needs, skill and ability.”¹¹⁹ Even though the Davies Report’s starting point is gender equality, it seems to subscribe to the view that “one size does not fit all” and, therefore, board appointments should be based on individual, specific company needs. This view provided the basis for the business case for board gender diversity as canvassed by the report. It summarizes the business case as having four key dimensions, namely: (1) improving performance, (2) accessing the widest talent pool, (3) being more responsive to the market, and (4) improving corporate governance.¹²⁰

The Davies Report’s claim that more women directors result in better firm profitability is based on a few studies. Moreover, the report notes that one way women directors “improve performance” is by making the board more independent.¹²¹ The report also claims that women directors help overcome “groupthink” by bringing different perspectives and debate to the board.¹²² Attention is also paid to studies that show that women directors reduce the likelihood of insolvency, thus situating the arguments in the post crisis concern about the likelihood of companies becoming insolvent.¹²³ Even within the business efficiency and corporate governance arguments, the exclusive focus is on gender diversity, disregarding the fact that other forms of diversity on the board offer similar benefits.¹²⁴

¹¹⁸ *Id.* at 19 (recommendation 2).

¹¹⁹ *Id.* at 18.

¹²⁰ *Id.* at 8.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 9.

¹²⁴ For a more detailed discussion on the phenomenon of “groupthink” on corporate boards and ways in which gender diversity and other forms of diversity might help in overcoming it, see Akshaya Kamalnath, *Gender Diversity as the Antidote to “Groupthink” on the Corporate Board*, 22 DEAKIN L. REV. 85 (2017). The article argues that attributes like the ability to think independently and offer differing viewpoints help to counter groupthink, gender diversity might not be the only type of diversity that offers such benefits. Diversity of nationality, for instance, might offer similar benefits since such directors do not belong to the same geographical networks as directors and executives.

The talent pool argument notes that an equal or greater number of women, compared to men, are graduating with professional degrees and that company boards must tap into this “talent pool” in order to stay competitive.¹²⁵ The market responsiveness argument essentially says that women directors would understand and respond to the needs of female customers better.¹²⁶ This is required since women constitute a majority of the population, of the workforce, and are estimated to be responsible for seventy percent of household purchasing decisions.¹²⁷ Of course, the report does not consider that such an argument would not be applicable to businesses with few female customers or businesses that hire external consultants to help them appeal to women customers.

The corporate governance argument in the report relies on one Canadian study that found that more gender-balanced boards “were more likely to identify criteria to measure strategy, monitor its implementation, follow conflict of interest guidelines and adhere to a code of conduct.”¹²⁸ This study also quotes a Harvard Business study claiming that women tend to be “more assertive” about corporate governance issues.¹²⁹

The Davies Report made ten recommendations to “generate momentum behind and increase focus on the business priority,” which basically encapsulates the voluntary approach of soft targets and disclosure that the United Kingdom has followed since 2011.¹³⁰ The key aspects of the recommendations are summarized below:

a. Targets and Disclosure (Recommendations 1 and 2)

All the Financial Times Stock Exchange (FTSE) 350 companies should set out a target percentage of women directors they hope to have by 2013 and 2015 respectively. Of these, FTSE 100 companies must aim to achieve a minimum of twenty-five percent women directors by 2015. The company is free to decide the breakdown of this percentage, but the report recommends that the aim must be to appoint both executive and nonexecutive directors who are women.¹³¹ Apart from

¹²⁵ DAVIES REPORT, *supra* note 85, at 9.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 10 (citing DAVID A.H. BROWN ET AL., WOMEN ON BOARDS: NOT JUST THE RIGHT THING . . . BUT THE ‘BRIGHT’ THING (The Conference Board of Canada 2002)).

¹²⁹ *Id.*

¹³⁰ *Id.* at 18.

¹³¹ *Id.* at 18–19.

setting these targets, the companies must also disclose the percentage of women on the board, women in senior executive positions, and women in the whole organization.¹³²

b. Disclosures About the Recruitment Process (Recommendations 3–10)

The report recommended amending the U.K. Corporate Governance Code to require listed companies to establish a policy on board diversity, create measurable objectives to implement such policy, and to annually disclose a summary of the policy and progress made in achieving the objectives.¹³³ These requirements are meant to provide more information to investors and customers to allow for more informed company decisions.¹³⁴

Further, the report required companies to describe the work of the nomination committee. This work includes the process used by the nomination committee to make board appointments in a separate section of the annual report. The Davies Report requires investors to pay close attention to all the information provided about diversity, nomination, and recruitment of directors in the annual report.¹³⁵ Overall, these recommendations are both asking companies to make diversity-related disclosures and exhorting investors to pay attention to this information.

The Davies Report provides further recruitment process guidance by encouraging companies to periodically advertise nonexecutive board positions in order to gather as diverse a range of applications as possible.¹³⁶ The report further recommended that executive search firms draw up a voluntary conduct code addressing best practices related to gender diversity that cover search criteria and appointment processes.¹³⁷

Finally, the Davies Report noted that two different populations of women must be recognized and developed: (1) executives from within the corporate sector, and (2) women from outside the corporate mainstream like academics, civil servants, entrepreneurs, and women

¹³² *Id.* at 19.

¹³³ *Id.* at 19–20.

¹³⁴ *Id.* at 20.

¹³⁵ *Id.*

¹³⁶ *Id.* at 21.

¹³⁷ *Id.*

in professional services. Further, the Davies Report recommends that boards pay attention to training and development of potential board members.¹³⁸ In closing, the report stated that the members of the committee lead by Lord Davies would meet every six months to consider progress regarding the Davies Report's recommendations and would report annually on the same.¹³⁹

As a result of the Davies Report's recommendations, the Financial Reporting Council amended the U.K. Corporate Governance Code in 2014 to include provisions to streamline board appointments and performance.¹⁴⁰

4. Financial Reporting Council (FRC) Consultations and the U.K. Corporate Governance Code of 2014

Since the Davies Report called on the FRC to amend the U.K. Corporate Governance Code, the FRC released a consultative document on gender diversity.¹⁴¹ This document clarified that the goal of the Corporate Governance Code was "improving the quality and functioning of corporate boards, rather than any wider social objectives."¹⁴² Thus, the FRC's rationale for board diversity is solely based on its potential benefits with respect to board effectiveness. The consultative document lists out three potential benefits: first, a diverse board can overcome "groupthink;" second, ensuring that women are considered for board positions would mean that a wider talent pool is being used; and third, boards with women directors could connect better with the workforce and with customers.¹⁴³

The U.K. Corporate Governance Code of 2014 limits the corporate diversity discourse to board effectiveness, although the reports informing it also seek to address issues of equal opportunity. The 2014 Code explicitly states that board diversity includes, but is not limited to, gender and race.¹⁴⁴ Yet, the Code contains rules pertaining to disclosure of gender diversity on the board and no specific rules on

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ FINANCIAL REPORTING COUNCIL, THE UK CORPORATE GOVERNANCE CODE (2014), <https://www.frc.org.uk/getattachment/59a5171d-4163-4fb2-9e9d-daefcd7153b5/UK-Corporate-Governance-Code-2014.pdf> [hereinafter THE CODE 2014].

¹⁴¹ FINANCIAL REPORTING COUNCIL, CONSULTATION DOCUMENT: GENDER DIVERSITY ON BOARDS 1–2 (2011), <https://www.frc.org.uk/getattachment/4684a139-525d-40c5-b911-54599c1ec32c/;> .aspx.

¹⁴² *Id.* at 3.

¹⁴³ *Id.*

¹⁴⁴ *See id.*; THE CODE 2014, *supra* note 140.

other forms of diversity, which is probably a consequence of the Davies Report. Ultimately, although various problems and corresponding solutions seem to have been articulated by the reports informing the 2014 Code, the diversity rules limit their focus to gender diversity.

D. Australia

Australia, like the United Kingdom, requires disclosures related to gender diversity, following an approach sometimes described as the “comply or explain” or the “if not, why not” approach. Along with this requirement, there is a range of other programs, like mentoring and scholarships to support training for directorships, which are meant to facilitate compliance.¹⁴⁵ The Australian Stock Exchange’s (ASX) corporate governance principles and recommendations (hereinafter referred to as ASX CGPR) introduced recommendations on board gender diversity in 2007 and 2010 and subsequently revised them in 2014.¹⁴⁶

The ASX Listing Rules require that every ASX-listed company must provide a statement in its annual report regarding the extent to which the company has complied with the recommendations.¹⁴⁷ The annual report must also explain where the recommendations have not been complied with, followed by an explanation for the noncompliance.¹⁴⁸

The ASX CGPR states that listed companies should “have a diversity policy which includes requirements for the board or a relevant committee of the board to set measurable objectives for achieving gender diversity and to assess annually both the objectives and the entity’s progress in achieving them.”¹⁴⁹ The ASX CGPR suggests that, for the board, the “measurable objectives” might be in the form of numerical targets setting the percentage of women directors sought to be appointed.¹⁵⁰ Further, the company must disclose the diversity

¹⁴⁵ Barnali Choudhury, *Gender Diversity on Boards: Beyond Quotas*, 26 EUR. BUS. L. REV. 229, 238–240 (2015).

¹⁴⁶ ASX CORP. GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS (Australian Securities Exchange, 2nd ed. 2010); ASX CORP. COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS (Australian Securities Exchange, 3rd ed. 2014), [hereinafter ASX CGPR 3rd. Ed.].

¹⁴⁷ AUSTRALIAN SECURITIES EXCHANGE, *Periodic Disclosure*, ASX LISTING RULES 409 r 4.10.3 (July 1, 2015), <https://www.asx.com.au/documents/rules/Chapter04.pdf>.

¹⁴⁸ *Id.*

¹⁴⁹ ASX CGPR 3rd. Ed., *supra* note 146 (Principle 1, Recommendation 1.5).

¹⁵⁰ *Id.*

policy annually along with the proportion of men and women on the board, in senior executive positions, and across the organization.¹⁵¹

In terms of the rationale for the gender diversity measure, it is relevant to note that there is an emphasis on ensuring that the process of appointment for directors is formal and transparent, to promote investor confidence.¹⁵² In formalizing the process, the ASX CGPR mentions diversity as an aspect to consider for the nomination committee. In reviewing the recruitment process for a new director, the nomination committee would evaluate “the balance of skills, knowledge, experience, independence and diversity” on the board and, in light of this, prepare a description of the role and capabilities required for a particular appointment.¹⁵³ Thus, diversity becomes an aspect built into the formal recruitment process.

Additionally, companies are encouraged, on a voluntary basis, to introduce mentoring programs and flexible work entitlements for women in management to ensure that there are more women available in the pool of candidates considered.

There have also been complementary efforts by the Australian Institute of Company Directors (AICD). Originally formed on the model of the United Kingdom’s Institute of Directors (IoD), the AICD consists of directors and senior leaders from business, government, and not-for-profit sectors.¹⁵⁴ Since 2015, the AICD has released quarterly tracking reports on board gender diversity to measure Australian board progress.¹⁵⁵ Apart from merely reporting diversity statistics, these reports contain interviews and opinion pieces to further facilitate the implementation of the diversity rules.¹⁵⁶

The AICD launched a mentoring program in 2010 that connects qualified, emerging female directors to mentors (chairs and experienced directors of ASX 200 companies) for a twelve-month

¹⁵¹ *Id.*

¹⁵² ASX CGPR 3rd. Ed., *supra* note 146 (Principle 2.1, 14).

¹⁵³ *Id.*

¹⁵⁴ For more information on the AICD, see *Find Out More About Who We Are and What We Do*, AUSTL. INST. CO. DIRS., <http://aicd.companydirectors.com.au/about> (last visited Sept. 8, 2018).

¹⁵⁵ *Tracking Gender Diversity*, AUSTL. INST. CO. DIRS., <http://aicd.companydirectors.com.au/advocacy/board-diversity/tracking-gender-diversity> (last visited Aug. 25, 2018).

¹⁵⁶ *Id.*

mentoring relationship.¹⁵⁷ The program's aim is for mentees to gain knowledge, skills, connections, and hopefully, board positions.¹⁵⁸

This is an important initiative considering that lack of mentors (along with gender bias and leadership style expectations) is one of the top challenges experienced by women executives.¹⁵⁹ One of the advantages of mentoring programs is that qualified women are brought to the notice of board chairs and other senior board members. This is especially relevant because companies have cited the lack of availability of qualified women in the pool of candidates. Thus, mentoring programs provide an opportunity for women to gain entry (or at least a "toehold") into what are currently mostly male networks.¹⁶⁰

While the mentoring program caters to qualified candidates, the AICD also has a scholarship program that provides training and support for women who wish to pursue careers as directors.¹⁶¹ It also introduced a program called "Board Ready," which aims, as the title suggests, to get women ready for board positions in terms of giving them access to training and skill-building programs.¹⁶²

1. Rationale

The ASX CGPR very briefly mentions the rationale for the introduction of gender diversity provisions. It cites studies that show a direct correlation between board gender diversity and financial performance. It also mentions that the promotion of gender diversity widens the pool of candidates considered for board positions. Finally, it states that promoting gender diversity could result in an enhanced

¹⁵⁷ *Chair's Mentoring Program 2015 Frequently Asked Questions*, AUSTL. INST. CO. DIRS., <http://www.companydirectors.com.au/~media/resources/director-resource-centre/governance-and-director-issues/board-diversity/board-diversity-pdf/2015-mentoring-program/faq-mentoring-program.ashx> (last visited Aug. 8, 2018).

¹⁵⁸ *Id.*

¹⁵⁹ Stefanie Balogh, *What Women Think*, THE AUSTRALIAN (Nov. 2016), <https://specialreports.theaustralian.com.au/643389/18/>.

¹⁶⁰ Choudhury, *supra* note 145, at 240.

¹⁶¹ Press Release, Department of the Prime Minister and Cabinet, AICD Scholarship Programme Expanded and More Targeted (June 8, 2014), <https://ministers.pmc.gov.au/cash/2014/aicd-scholarship-programme-expanded-and-more-targeted>.

¹⁶² *Transitioning to the Boardroom*, CO. DIRS. MAGAZINE (DEC. 2012), <http://www.companydirectors.com.au/director-resource-centre/publications/company-director-magazine/2012-back-editions/december/inside-your-institute-board-ready-program-transitioning-to-the-boardroom>.

reputation for the company, along with ensuring a closer connection with customers.¹⁶³

The amendments to the ASX CGPR in Australia were the result of a 2009 report by the Corporations and Markets Advisory Committee (CAMAC) that was commissioned by the minister for superannuation and corporate law in 2008.¹⁶⁴ The mandate of the report was to provide advice on options for creating an environment that would encourage companies to foster a governance culture that would embrace diversity on boards, especially gender diversity.¹⁶⁵

The CAMAC Report looked at the process of appointment of directors as a starting point of the study.¹⁶⁶ Prior to the publication of the CAMAC Report, the second edition of the ASX CGPR was in place.¹⁶⁷ It stated that the board should have a nomination committee to take care of the selection and appointment practices of the company, although the ultimate responsibility for this rested with the full board.¹⁶⁸ In line with this, the CAMAC Report recommended that the ASX CGPR include “diversity” as a factor to be considered by the nomination committee in the selection process.¹⁶⁹ This would “reinforc[e] the desirability of adopting an open approach to the identification of board candidates.”¹⁷⁰ The ASX CGPR further stated that a formal and transparent selection process would promote investor confidence in the process.¹⁷¹ In this regard, the CAMAC Report recommended that the ASX CGPR explain the benefits of undertaking a structured selection process, including the use of consulting firms or databases of available candidates maintained by industry bodies and interest groups. This way, the search would be widened to a larger pool of candidates.¹⁷²

¹⁶³ ASX CGPR 3rd Ed., *supra* note 146, at 11.

¹⁶⁴ CORPORATIONS & MARKETS ADVISORY COMMITTEE (CAMAC), DIVERSITY ON BOARDS OF DIRECTORS 51 (2009), [http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2009/\\$file/Board_Diversity_B5.pdf](http://www.camac.gov.au/camac/camac.nsf/byHeadline/PDFFinal+Reports+2009/$file/Board_Diversity_B5.pdf) [hereinafter CAMAC Report].

¹⁶⁵ *Id.* at 31.

¹⁶⁶ *Id.*

¹⁶⁷ ASX CORPORATE GOVERNANCE COUNCIL, CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS (Australian Securities Exchange, 2nd ed. 2007) [hereinafter ASX CGPR, 2nd ed.].

¹⁶⁸ *Id.* at 2.418.

¹⁶⁹ CAMAC Report, *supra* note 164, at 37.

¹⁷⁰ *Id.*

¹⁷¹ ASX CGPR, 2nd ed., *supra* note 167, at 18.

¹⁷² CAMAC Report, *supra* note 164, at 37.

Despite shareholder approval being a necessary step in the board nomination process, the CAMAC Report noted that, in practice, the process is largely controlled by the board. Thus, the report asked whether shareholders might be better assisted by companies disclosing information about the processes leading up to the vote.¹⁷³ According to the 2007 ASX CGPR, the shareholders, who had to ultimately elect the directors nominated by the nomination committee, were to be provided with information about each director regarding, among other things, their competencies, qualifications, independence, directorships held, relationships with the company or with directors of the company, and particulars of other positions held with significant time commitments.¹⁷⁴ The 2008 amendments had further suggested that information about the procedure for selection and appointment of new directors and the reelection of incumbent directors, the board's policy for nomination and appointment of directors, and details about the role and membership of the board's nomination committee must be made available to shareholders.¹⁷⁵

The CAMAC Report recommended that the ASX CGPR require companies to include further information for shareholders, including the skills that the board was looking for in new appointments, the steps taken to ensure that a range of candidates were considered, whether professionals were consulted to identify and assess candidates, factors that were taken into account in the selection process, and a statement about why a particular person was nominated by the board.¹⁷⁶

One reason often cited for the lack of women directors being appointed is that there are not many women available with the required skills. The CAMAC Report cites a study interviewing the board chairs and directors of ASX 200 companies that found most respondent directors considered it a challenge to find board members with the appropriate industry experience.¹⁷⁷ Since there is no clear stipulation of the requisite qualifications for a board member, the CAMAC Report takes note of a survey published in 2005 that indicated crucial factors for board appointments.¹⁷⁸ The survey classifies these factors as "human capital" (what you know), which includes business knowledge,

¹⁷³ *Id.* at 15–16.

¹⁷⁴ *Id.* at 34–35.

¹⁷⁵ *Id.* at 36.

¹⁷⁶ *Id.* at 38.

¹⁷⁷ *Id.* at 39.

¹⁷⁸ *Id.*

experience, performance, and skills; and “social capital” (whom you know), which includes business contacts often acquired through membership in formal or informal social networks.¹⁷⁹ Since the most common way to attain these skills is through management roles, and not many women are involved in management positions, this contributes to the problem of lack of women directors.¹⁸⁰ To overcome this problem, the CAMAC Report recommended establishing mentoring or other networking programs for women in management, along the lines of similar programs introduced in the United Kingdom, France, and Canada.¹⁸¹

Also addressing the fact that there are still barriers to the advancement of women in senior managerial roles, the CAMAC Report recommends that companies voluntarily introduce flexibility in working arrangements and also ensure that promotion policies do not unfairly disadvantage women.¹⁸² Further, based on studies that have identified that women are more significantly involved in positions of control in the not-for-profit sector and in the public sector than in public listed companies, the CAMAC Report suggests that this could be one way of widening the pool of candidates in the selection process for board appointments.¹⁸³ However, the report recognizes that people who do not have direct business experience might be discouraged from taking on board positions, especially in light of the strict obligations and liabilities that the law imposes on directors for breach of applicable laws.¹⁸⁴

Therefore, the CAMAC Report has tried addressing the lack of women directors problem at its root, i.e., by recommending the institution of a pipeline of women naturally progressing to management and board positions.

II GENDER INEQUALITY AND CORPORATE GOVERNANCE INEFFECTIVENESS: THE TWO PROBLEMS

It is apparent from the divergent historical origins of the laws in Norway and the United States (the countries at two ends of the

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 39–40.

¹⁸¹ *Id.* at 42–43.

¹⁸² *Id.* at 43.

¹⁸³ *Id.* at 45.

¹⁸⁴ *Id.* at 45–46.

spectrum for gender diversity laws) that a different problem was at the heart of the regulations in each country. Norway's concern for gender equality, especially after privatization, was the key to board gender quotas. In the United States, it was concern about corporate governance that motivated the diversity discussion. Norway's law was focused on gender equality whereas the U.S. law has left it open for companies to define diversity, aiming for a broader diversity discourse.

In Norway, the "business case" for board diversity seems to have been constructed later to make the law acceptable to businesses. When Laila Dâvøy in Norway articulates the business case for the gender quota, the language shifts from "representation" to "diversity" and she says: "I would not call this a gender quota reform. It is diversity we talk about, diversity in boardrooms."¹⁸⁵ According to her, diversity would ultimately be profitable to the company because it would improve strategic choice, enhance innovation, and speed up restructuring.¹⁸⁶

However, the problem with this rationale of profitability is twofold. The first issue is that the argument is mostly based on empirical studies that merely show correlation (between the increase in women directors and profitability of companies) rather than causation, i.e., the studies do not explain the factors that cause such an increase. The second issue, and the even bigger problem, is that many studies have contrary findings on this aspect.¹⁸⁷ This is unsurprising because the board's role in large companies is not directly linked to profit generation. Instead, any impact that the board has on company profits is through its role of corporate governance.¹⁸⁸

Norway's articulation of the business case (i.e., women directors are profitable for companies), rather than the corporate governance arguments from the United States, have gained traction in other

¹⁸⁵ BJØRKHAUG & SØRENSEN, *supra* note 40, at 200.

¹⁸⁶ *Id.*

¹⁸⁷ There are many examples of studies supporting the business case. See Nancy Carter, *The Bottom Line: Corporate Performance and Women's Representation on Boards (2004–2008)*, CATALYST (2011), <http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards-20042008>; J. N. Erhardt et. al., *Board of Director Diversity and Firm Financial Performance*, 102 CORP. GOVERNANCE: AN INT'L PERSPECTIVE 1111 (2013). There are examples of studies that do not support the business case. See Ovind Bohren & Oystein Strom, *Governance and Politics: Regulating Independence and Diversity in the Board Room*, 37 J. BUS. FIN. AND ACCT. 1281 (2010); Renee B. Adams & Daniel Ferreira, *Women in the Boardroom and their Impact on Governance and Performance*, 94 J. FIN. ECON. 291 (2009).

¹⁸⁸ Press Release, Cadbury Report, *The Financial Aspects of Corporate Governance*, 2.5 (1992); see also OECD, *Principles of Corporate Governance*, at art. VI (2004).

jurisdictions. This is evident from the emphasis on gender diversity over other forms of diversity, even in countries like Australia and the United Kingdom, despite the corporate governance arguments made. For instance, the United Kingdom's FRC talks only about board effectiveness.¹⁸⁹ Yet, if this were the only motivation to encouraging diversity, then the focus should have been on all forms of diversity.

In Australia, the ASX CGPR mentions that “the balance of skills, knowledge, experience, independence and diversity” on the board should be evaluated while deciding the profile of the candidate sought.¹⁹⁰ The fact that diversity is mentioned as a separate quality from skills, knowledge, experience, and independence suggests that the emphasis is solely on demographic diversity, i.e., race, gender, and, perhaps, age and nationality. Further, the ASX CGPR states that the diversity policy is required to set measurable objectives for gender diversity, and there is no such requirement for any other type of diversity.¹⁹¹ Similarly, although the United States' focus was diversity of all types, including that of viewpoint, recently diversity is understood in a very limited way based on the international discourse.¹⁹²

The above review of gender diversity law and regulations across the four jurisdictions studied therefore shows a conflation of two distinct problems. The first problem is the lack of women in the highest corporate positions, and the second problem is the need to strengthen board effectiveness. Because of this conflation, neither problem is individually understood or assessed accurately.

Regulations specifically designed to address the issue of board effectiveness would focus on diversity broadly because various forms of diversity might bring diverse perspectives to the board, and hence, strengthen decision-making. Further, board members coming from diverse backgrounds might be more willing to challenge the majority thinking on an issue.¹⁹³ Focusing on gender diversity alone will not be the most optimal solution if board effectiveness is the problem addressed by these regulations.¹⁹⁴

¹⁸⁹ THE CODE 2014, *supra* note 140, at 2.

¹⁹⁰ ASX CGPR 3rd. Ed., *supra* note 146 (Principle 2.1).

¹⁹¹ *Id.* at Principle 1, Recommendation 1.5.

¹⁹² *See* discussion under Section I(B); *see also* the discussion in this Article's Conclusion.

¹⁹³ *See generally* Kamalnath, *supra* note 124.

¹⁹⁴ *Id.*

The other issue is the glass ceiling for women in the workplace and, consequently, the underrepresentation of women on company boards. Regulations specifically designed to address this problem would find and address the reasons for women not progressing up the corporate ladder, rather than merely mandating (or encouraging) that a certain percentage of the board be composed of women.

If women are entering the workforce in equal numbers but not advancing to the top into board positions, then there is obviously an issue that needs to be investigated. The board diversity discourse has focused, regarding this glass ceiling problem, on the practice of boards not looking beyond their own networks, and therefore overlooking women and minorities who do not have access to such networks. For instance, the United Kingdom's Higgs Review found that women are discriminated against by recruitment committees that often do not look beyond CEOs and senior executives when making board appointments. As a solution, the Higgs Review recommends looking at other sectors like academia and NGOs.¹⁹⁵ However, the review does not attempt to investigate why there are not enough women CEOs and senior executives. In Australia, the CAMAC Report suggests that flexible work arrangements and promotion practices that do not discriminate against women must be voluntarily adopted by companies to ensure that women are retained in the pipeline.¹⁹⁶ However, this suggestion is not reflected in the disclosure regime.

It must be noted that the ASX CGPR requires companies to disclose the proportion of men and women not only in the board and executive rungs but also in the entire workforce.¹⁹⁷ Although this aspect has not received as much attention in the public narrative of corporate diversity, it is significant for the glass ceiling problem. Although it was not reflected in the U.K. Corporate Governance Code, a similar recommendation was made by the Davies Report in the United Kingdom.¹⁹⁸ Disclosures at various levels leading up to management positions would help investors and companies themselves track the points at which the gender balance starts to skew. The disclosure would allow us to ask further questions about the reasons for skewed gender balance at certain levels. Such metrics and reasons might differ across companies and sectors. For instance, certain sectors like IT might have

¹⁹⁵ HIGGS REVIEW, *supra* note 93, at 10.25–10.32.

¹⁹⁶ CAMAC Report, *supra* note 164, at 43.

¹⁹⁷ ASX CGPR 3rd. Ed., *supra* note 146, at Principle 1, Recommendation 1.5.

¹⁹⁸ DAVIES REPORT, *supra* note 85, at 19.

a skewed gender balance even in entry-level positions. Data regarding such metrics and differences across sectors will help us design more optimal solutions.

A deeper analysis of the glass ceiling problem is possible if the discussion is not restricted to company boards but is instead broadened to the entire workforce. This allows us to ask pertinent questions about the reasons for women dropping out of the workforce. As the next section will discuss, factors like family obligations, hostile work environments, discriminatory promotion metrics, or a combination of such factors might be relevant. The 2017 allegations of sexual harassment by a former employee of Uber, and the results of the subsequent investigation, might provide guidance in this regard. The next section will examine these factors and possible solutions based on the recommendations made to Uber by former Attorney General Eric Holder's law firm.

III

GENDER DIVERSITY IN THE WORKPLACE: THE UBER STORY

As Part 2 explained, the corporate gender diversity laws have, with the exception of Australia, focused on the board of directors. Committee reports in some countries have offered possible solutions, such as looking beyond the CEO pool to find suitable women candidates for board positions.¹⁹⁹ Another solution was to look at the level just below the CEO pool while filling board positions.²⁰⁰ This phenomenon of women dropping out of the workforce as they climb higher up the corporate ladder is referred to as the “leaking pipeline.”²⁰¹ The alleged events that transpired at Uber, and the subsequent report issued by the Holder Committee, helps shed light on relevant factors responsible for the leaking pipeline and on best practices that companies might adopt to address these issues.

Uber's board unanimously adopted the Holder Committee Report. Subsequently, an employee meeting was held on June 13, 2017, to

¹⁹⁹ TYSON REPORT, *supra* note 100, at 12–13.

²⁰⁰ Janice Reals Ellig, *Women Board Candidates: Going Beyond the CEO Title*, HUFFINGTON POST (Nov. 27, 2017), https://www.huffingtonpost.com/entry/women-board-candidates-going-beyond-the-ceo-title_us_5a1c646ae4b073f567840a0b.

²⁰¹ PWC Gender Advisory Council, *The Leaking Pipeline: Where Are our Female Leaders? 79 Women Share Their Stories* (Mar. 2008), https://www.pwc.com/gx/en/women-at-pwc/assets/leaking_pipeline.pdf.

discuss the recommendations.²⁰² That same day, then CEO Travis Kalanick wrote an email to Uber staff announcing that he would take an indefinite leave of absence to work on “Travis 2.0” because Uber was going to transform into “Uber 2.0.”²⁰³ This was followed up by Kalanick announcing his resignation from Uber.²⁰⁴ Apart from helping Uber transform into Uber 2.0, the report offers important lessons about the causes of the leaking pipeline in companies generally, and potential solutions that might help us to move toward Corporate Diversity 2.0 or, in other words, a more effective diversity regime. This section will recount the events at Uber based on a former employee’s allegations, some counterinterviews to the allegations, and the relevant recommendations of the Holder Committee Report.

A. Allegations Regarding Sexual Harassment and Toxic Culture at Uber

The Holder Committee Report was adopted by Uber after a series of events that occurred after a former employee, Susan Fowler, published a blog post entitled “Reflecting on one, very, very, strange year at Uber.”²⁰⁵ In this blog post, she made allegations of sexual harassment faced by her and other women at Uber, sexism in general, and what she described as problematic work culture.

Ms. Fowler’s allegations, with respect to sexual harassment, are as follows: she alleged that her manager propositioned her on her first day on the team and that human resources (HR), and senior management said they would not do more than issue a warning because it was his first offense and he was a high performer with “stellar reviews.” She was then given the option of moving to another team or staying on the same team with the possibility of getting a negative review from the manager in question. Allegedly, an HR representative told Ms. Fowler

²⁰² Heather Somerville & Joseph Menn, *Uber Board Adopts All Recommendations from Eric Holder Investigation*, REUTERS (June 12, 2017), <https://www.reuters.com/article/uber-board-vote-idUSL1N1J91LB>.

²⁰³ Tracey Lien, *Uber CEO Pays a Price for Breaking the Rules*, L.A. TIMES (June 13, 2017), <http://www.latimes.com/business/technology/la-fi-tn-uber-eric-holder-report-2017-0613-story.html>.

²⁰⁴ Julia Carrie Wong, *Uber CEO Travis Kalanick Resigns Following Months of Chaos*, THE GUARDIAN (June 21, 2017, 6:49 PM), <https://www.theguardian.com/technology/2017/jun/20/uber-ceo-travis-kalanick-resigns>.

²⁰⁵ Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER BLOG (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>.

that if she did make the latter choice and received a negative performance review, it would not amount to retaliation because she was given the choice to move to another team.²⁰⁶

Fowler then details how she spoke to other women engineers and found that others had had similar experiences with the same manager. Fowler notes that these conversations revealed that what happened with her was not the first instance of such behavior by the manager. The manager in question eventually left the company, although Fowler alleges in her blog post that he might have been fired.²⁰⁷ If Fowler's statement regarding this issue is true, it speaks not only to harassment but also to the company's failure to redress the issue.

Next, Fowler speaks to the rampant sexism at Uber by giving an example of leather jackets ordered for all the employees. The number of women engineers at Uber had dwindled to six, and management sent an email to them that although the male engineers would be getting leather jackets, it had been decided that there would be no jackets for women because the low number did not enable the company to get a discount as they had got on the jackets for men. After some back and forth between the management, Fowler eventually received an email that said if "women really wanted equality, then we should realize we were getting equality by not getting the leather jackets."²⁰⁸ When the email thread was ultimately forwarded to HR, Fowler was asked to consider if she, herself, might be the problem because she had been the common factor in her many complaints to HR.²⁰⁹

Fowler says that the HR executive then asked her details of email addresses and chat rooms that she and other female engineers at Uber used to chat. Additionally, when Fowler noted the low percentage of Uber women engineers, she was told that, on average, women and minorities were better suited for certain types of jobs. Finally, Fowler says she was "berated" for keeping an email record of things. Further, Fowler's team manager summoned her to have a "difficult conversation" and threatened to fire her if she repeated such behavior. Fowler reported this threat to a higher-up in the organization, and also human resources (HR), both of whom agreed that the threat was illegal, but no action was taken against the manager who, according to Fowler, was a "high performer." A week after this, Fowler took a job with

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

another company.²¹⁰ Again, if these allegations are true, it reflects the company's failure to provide redress to Fowler against actions that contribute to creating a hostile work environment for women.

Regarding the problematic work culture, Fowler alleges that when she wanted to transfer out of the team her transfer was blocked because of "performance issues" even though she had very good performance scores. Allegedly, she was told that "performance problems aren't always something that has to do with work, but sometimes can be about things outside of work or your personal life."²¹¹ Fowler even talked about how her performance review was later changed after the fact to reflect a lower score, and she was only informed of this when she reapplied for a transfer.

This lower score suddenly made her ineligible for a graduate computer science program at Stanford, one in which she had already enrolled. Fowler explains later that this lowering of her score, which prevented her transfer out of the team, could be because having her on the team made her manager look good. She says she heard her manager boast that "even though the rest of the teams were losing their women engineers left and right, he still had some on his team."²¹² Finally, Fowler ends her blog by noting that she was thankful to have worked with some of the best engineers and that she was proud of the work she did at Uber.²¹³

Following Fowler's blog post, the New York Times reported that "at least two people" had reported instances of sexual harassment to the chief technology officer (CTO), Thuan Pham, and one of them had even emailed Kalanick.²¹⁴ The same article also mentions a company meeting in late 2015 where a manager groped several female employees.²¹⁵ It also reported that the manager was terminated within twelve hours.²¹⁶ A month later, another article by the same newspaper reported that an Uber manager had thrown a coffee mug at a subordinate in a fit of rage and that no action was taken against the

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Mike Isaac, *Inside Uber's Aggressive Unrestrained Workplace Culture*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/technology/uber-workplace-culture.html>.

²¹⁵ *Id.*

²¹⁶ *Id.*

manager because the particular city that the manager was in charge of was doing well.²¹⁷ All of these reports suggest that the company avoided taking action against high performers.

Fowler's blog post and the reactions it generated led to a public relations scandal, with Kalanick ultimately being asked to step down from his position as CEO. There were other problems, including lawsuits that Uber was already contending with, but the attention generated by Fowler's post catalyzed Kalanick's resignation. As one journalist wrote, "Travis Kalanick's fate was sealed the moment Susan Fowler hit 'publish.'"²¹⁸ However, the resignation of the CEO of a company is unlikely to cure systemic issues like the ones described in Fowler's blog post. The Holder Committee Report's recommendations are more helpful for companies looking to incorporate best practices that would prevent such issues from arising. Before looking at the Holder Committee Report's recommendations, however, it is worth looking at counter viewpoints about Uber's work culture rather than solely relying entirely on Fowler's account.

B. The Counter View on Uber's Work Culture

While many blamed Uber's work culture for fostering the environment that Fowler's blog post sketched out, there were also positive accounts of Uber's work culture. One example is Margaret-Ann Seger, a female employee at Uber who had previously worked at Facebook. Seger recounts that she felt much more comfortable in the competitive environment fostered inside Uber. She is quoted as having posted the following: "I left Facebook because I was told that I was too aggressive. Pushing too hard, wanting to move too fast. . . . Coming to Uber was like a homecoming. I could be who I truly am, without being labelled an 'aggressive' woman."²¹⁹ Her blog post raises the point that an aggressive and competitive work culture is not always antithetical to female employees. This experience is particularly important because

²¹⁷ Mike Isaac, *Uber's CEO Plays with Fire*, N.Y. TIMES (Apr. 23, 2017), https://www.nytimes.com/2017/04/23/technology/travis-kalanick-pushes-uber-and-himself-to-the-precipice.html?_r=0.

²¹⁸ Andrew J. Hawkins, *The Fall of Uber's CEO Reveals the Power of a Single Blog Post*, THE VERGE (June 21, 2017), <https://www.theverge.com/2017/6/21/15846014/uber-kalanick-resignation-fowler-blog-post>.

²¹⁹ Aric Jenkins, "Nobody Cares About Uber More": *Employees Past and Present Speak Out Against Travis Kalanick's Ousting*, FORTUNE (June 24, 2017), <http://fortune.com/2017/06/24/uber-ceo-travis-kalanick-employees/>.

much has been made of Uber's "hustle culture," despite the fact that most start-ups are known to have a demanding work environment.

Long before Fowler's blog post was published, another former Uber employee, Melanie Curtin, who had worked as community manager in 2013, had written a balanced account of her experience at Uber.²²⁰ She lists Uber's positive aspects as being able to work with smart and hard-working people, and that the company is performance driven and sustains a flat meritocracy environment where anyone's ideas could be heard. On the negative side, Curtin lists work stress, the fact that systems were not yet in place, and the lack of work-life balance.²²¹ Thus, these two women's views present counter narratives to that of Fowler's, showing that Fowler's experiences may have spoken only to a particular group of people or certain teams within Uber rather than the entire company.

However, Fowler's blog post did raise serious questions regarding HR's response(s) to sexual harassment complaints. A month after Fowler's post was published, Steve Tobek wrote that high-performance cultures are not necessarily bad and that a similar negative picture had been painted of Amazon.²²² Tobek was pointing out that meritocracy, which he defined as "a system in which the talented are chosen and moved ahead on the basis of their achievement," alone does not signify a bad work culture.²²³ Meritocracy, however, should not mean that the company ignores bad behavior when it comes from high-performing employees. Tobek notes that bias and favoritism, employees who push too hard, and HR executives who look the other way when high performers behave badly, are all unfortunately prevalent in almost every organization.²²⁴ He quotes Jeff Bezos, the founder and CEO of Amazon, that a company cannot survive unless such behavior is isolated.²²⁵ The solution, then, is to recognize these issues as systemic and to have standards in place to deal appropriately with those responsible for such conduct rather than blaming one company's work

²²⁰ See generally Melanie Curtin, *What It's Really Like Working for Uber*, HUFFINGTON POST (Sept. 4, 2014), http://www.huffingtonpost.com/melanie-curtin/what-its-really-like-working-for-uber_b_5748138.html.

²²¹ *Id.*

²²² Steve Tobek, *In Defense of Uber, Amazon, and Meritocracy*, ENTREPRENEUR (Mar. 8, 2017), <https://www.entrepreneur.com/article/289919>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

culture, or its CEO, or merely increasing the number of women on its board.

Further, Uber attempted to improve gender equality within the company in other ways. A 2016 Women in Technology event article speaks of Uber's legal counsel Salle Yoo's passion for equal pay across genders.²²⁶ The article states that Yoo is known for "asking HR to rerun offer letters if she doesn't think it represents equal pay," and that she hired female leaders for her teams.²²⁷ In 2014, she founded #LadyEng, an internal organization, to improve the recruitment process, career opportunities, and work environment for women engineers and women in other technical roles.²²⁸

Kalanick informed the company that women held 15.1% of Uber's engineering, product management, and scientist roles, and those numbers had not changed substantially over the previous year (when the incidents in Fowler's blog post are situated). He also noted that Twitter, Facebook, and Google reported having 10%, 17%, and 18% female workplace participation respectively, implying that Uber's gender diversity ratio was not drastically different from that of other tech companies.²²⁹ Due to Uber's similarity to many other companies, we would do well to draw lessons from the investigative report commissioned by Uber and incorporate those lessons into the corporate diversity discourse and practice.

C. The Holder Committee Report

A day after Fowler published her blog post, Kalanick told employees that he had hired former Attorney General Eric Holder and his associate, Tammy Albarrán, at the law firm Covington & Burling to "conduct an independent review into the specific issues relating to the workplace environment raised by Susan Fowler, as well as diversity and inclusion at Uber more broadly."²³⁰ Kalanick also informed them

²²⁶ Sarah Shull, *Corporate Culture Lessons from Uber*, SUMTOTAL SYSTEMS (Sept. 22, 2016), <http://blog.sumtotalsystems.com/corporate-culture-lessons-uber/>.

²²⁷ *Id.*

²²⁸ *Id.*; see also Tess Russell, *Introducing #LADYENG at Uber Engineering*, UBER (July 31, 2015), <https://eng.uber.com/lady-eng/>.

²²⁹ Eric Lieberman, *Uber Hires Former AG Eric Holder to Investigate Alleged Sexual Harassment, Lack of Diversity*, THE DAILY CALLER (Feb. 21, 2017), <http://dailycaller.com/2017/02/21/uber-hires-former-ag-eric-holder-to-investigate-alleged-sexual-harassment-lack-of-diversity-at-uber/>.

²³⁰ *Id.*

that Arianna Huffington, a board member, and Liane Hornsey, the chief human resources officer, would also be aiding the investigation.²³¹

Uber's special committee board specifically instructed Covington & Burling to deal with three issues:

(1) Uber's workplace environment as it related to the allegations of discrimination, harassment, and retaliation in Ms. Fowler's post;

(2) whether the company's policies and practices were sufficient to prevent and properly address discrimination, harassment, and retaliation in the workplace; and

(3) what steps Uber could take to ensure that its commitment to a diverse and inclusive workplace was reflected not only in the company's policies, but made real in the experiences of each of Uber's employees.²³²

The Holder Report's recommendations concern themselves not just with diversity but also with inclusion and then lays out guidelines to achieving such objectives. At the outset, the Holder Report states that "diversity is generally viewed as focusing on the presence of diverse employees based on religion, race, age, sexual orientation, gender, and culture."²³³ The report also highlights the importance of inclusion and retention policies to complement diversity efforts. The report's relevant best practices for all organizations are detailed next.

For the purposes of this discussion, the recommendations are broadly classified under four sections: (1) board oversight; (2) training; (3) diversity, inclusion and retention "enhancement" policies; and (4) harassment, discrimination, and employee relations.

1. Board Oversight

To give effect to diversity policies, the report makes the issue relevant at the board and senior management levels. The report recommends that the board create an Ethics and Culture Committee to

²³¹ *Id.*

²³² COVINGTON & BURLINGTON, RECOMMENDATIONS TO SPECIAL COMMITTEE OF THE UBER BOARD OF DIRECTORS (2017), <https://drive.google.com/file/d/0B1s08BdVqCgrUV M4UHBpTGROLXM/view> [hereinafter, The Holder Report]; see also Polina Marinova, *10 Things You Need to Know About Eric Holder's Uber Report*, FORTUNE (June 14, 2017), <http://fortune.com/2017/06/13/uber-internal-investigation-results-public/>; Oliver Staley, *The Official Recommendations for Reforming Uber Describe the Perfect Modern Company*, QUARTZ (June 14, 2017), <https://qz.com/1005316/eric-holders-recommendations-for-uber-describe-the-perfect-modern-company/>.

²³³ The Holder Report, *supra* note 232, at 1.

oversee issues pertaining to diversity, inclusion, and ethical business practices.²³⁴ This committee would oversee senior management responsible for ethics, compliance, human resources, and risk.²³⁵ The committee could introduce metrics to establish and monitor compliance with Uber's values regarding diversity and inclusion.²³⁶ To ensure accountability, the committee recommends tying these metrics to the compensation of senior management.²³⁷ The Holder Report recommends that a member of the senior management team be responsible for giving effect to this committee's recommendations.²³⁸

Additionally, the report recommends that Uber's Audit Committee oversee the company's compliance efforts to ensure that significant compliance and harassment issues could be brought to the Audit Committee without going through the CEO.²³⁹ When necessary, the Audit Committee could oversee the response to such issues, including any potential investigations.²⁴⁰ This recommendation is significant because it brings harassment issues under the purview of the Audit Committee (which is responsible for overseeing financial reporting process, internal controls, and compliance with laws and regulations). The recent coverage of harassment claims against powerful people in the #metoo movement makes this a high-priority issue. Therefore, it is pertinent to make the Audit Committee ultimately responsible for such issues.

To further ensure that responses to harassment issues are adequate, both at the level of human resources and higher up the reporting line (all the way to the Audit Committee), the Holder Report recommends that software can be used to track such complaints to record repeat offenders and respond appropriately.²⁴¹ Again, the use of technology in this regard is an important suggestion that will ensure a company's ability to address problems before they escalate.

2. Training at All Levels

The Holder Report recommends training for leadership, management, human resources, and other employees with respect to

²³⁴ *Id.* at 2.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.* at 3.

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

conducting interviews and handling of complaints regarding harassment, discrimination, and retaliation.²⁴² The report recommends that Uber's senior leaders receive mandatory leadership coaching and that Uber's first-time managers receive significant training.²⁴³ This training is meant to ensure inclusive leadership, combat implicit bias, and encourage a culture of openness where employees feel comfortable proposing different ideas.²⁴⁴ Further, these aspects should be incorporated into the competency metrics for senior leadership to be used during annual performance reviews.²⁴⁵

Human Resources personnel, the first point of contact for reported harassment-related complaints, must be adequately trained. The Holder Report recommends that the training for HR personnel should include proper investigation of complaints regarding harassment, discrimination, and/or retaliation followed by appropriate documentation of such complaints and investigations.²⁴⁶

Most importantly, the report recommends that personnel should be trained to identify when incidents should be escalated to the company's legal team.²⁴⁷ The report envisages training programs for managers and HR personnel to recognize legal issues and escalate them where necessary. On the other hand, leadership training focuses on oversight of management and HR with respect to handling of such issues.

The complaints process could be strengthened by creating multiple avenues for such complaints to give employees alternative options in case they fear retaliation through any one avenue.²⁴⁸ Examples of such avenues could be reporting to the immediate manager and to HR. Again, the report recommends that protocols for escalating and tracking complaints are set for both HR personnel and managers.²⁴⁹

To address diversity and inclusion at the interview stage, the report recommends training all employees involved in conducting interviews to conduct inclusive interviews and to be aware of unconscious bias. The aim of such training is to standardize the interview process with respect to questions asked, evaluation of the candidate, and provision

²⁴² *Id.* at 4–5.

²⁴³ *Id.* at 4.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 6.

²⁴⁹ *Id.*

feedback.²⁵⁰ This kind of standardization helps interview panels rate candidates according to preset standards without succumbing to unconscious bias.

Finally, because Uber already had a head of diversity (Bernard Coleman) at the time of the Holder Report's writing, the report recommended that his role should be elevated. This elevation would make him more visible, allowing him to serve as a resource on issues of diversity and inclusion to both senior management and rank-and-file employees.²⁵¹

3. Diversity, Inclusion, and Retention Enhancements and Policies

The Holder Report recommends enhancements to diversity and inclusion that go well beyond what current gender diversity laws seek to achieve.

As many disclosure laws require, the report suggests that Uber publish its diversity statistics for the entire company.²⁵² Additionally, the Holder Report recommends that the company publish how it intends to increase diversity each year. It is also significant to note that the report does not restrict the requirement to gender but rather mentions diversity in terms of "under-represented populations."²⁵³ Further, the report suggests that the company set up an "employee diversity advisory board" to ensure consistency of diversity efforts across the company and also to funnel employee feedback in this regard to the head of diversity.²⁵⁴ Employee feedback on diversity policies and their implementation is to be solicited through annual anonymous surveys and focus groups conducted via reputable consultants, with the results made available to the company.²⁵⁵ For example, in a situation wherein employees want to communicate their views about diversity policies, there would be a channel to do so.

Finally, the report recommends that the head of diversity should publicize initiatives, accomplishments, and areas still needing improvement.²⁵⁶ It can be inferred that such publicity would make employees aware of initiatives and allow them to provide appropriate

²⁵⁰ *Id.*

²⁵¹ *Id.* at 1.

²⁵² *Id.* at 7.

²⁵³ *Id.*

²⁵⁴ *Id.* at 6.

²⁵⁵ *Id.* at 9.

²⁵⁶ *Id.*

feedback to help the company frame and implement improvements appropriately.

With these broad recommendations on diversity disclosures, and feedback as the framework, the final section of the report then goes on to present some interesting ways in which to achieve diversity. To overcome the “pool problem,” the report recommends that the company build deeper partnerships with “Historically Black Colleges and Universities and Hispanic-Serving Institutions.”²⁵⁷

Next, to overcome the problem of implicit bias, the report recommends adopting blind resume review, a process whereby the selection panel reviews resumes without knowledge of the candidate’s gender, ethnic background, name, or personal information.²⁵⁸ Where possible, the report recommends that the company use blind review in exercises during the selection process for technical and engineering roles.²⁵⁹ A complementary policy to the suggested blind review is to adopt a version of the “Rooney Rule” that requires at least a small percentage of women and other minority candidates to be included in the pool of candidates considered for each position.²⁶⁰

In addition to the Rooney Rule, the report recommends that one woman and/or minority person serves on the interview panel for each applicant to ensure diverse perspectives in the feedback and evaluation of candidates.²⁶¹ In addition to the above, the report recommends that the company review all its written communications, including job descriptions and evaluations, for bias.²⁶² Further, the report states that diversity efforts across company teams must be coordinated to ensure consistency and legal review of such efforts.²⁶³ The report also recommends incentivizing diversity efforts by recognizing successful diversity efforts of managers and using their skills and techniques as a platform for other company teams.²⁶⁴

²⁵⁷ *Id.* at 7.

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* at 8.

²⁶³ *Id.* at 9.

²⁶⁴ *Id.* at 8. Such incentives would be useful since research shows that managers who are women or belong to racial minority groups are perceived as less competent when they hire diverse candidates. See Stefanie K. Johnson & David R. Hekman, *Women and Minorities Are Penalized for Promoting Diversity*, HARV. BUS. REV. (Mar. 23, 2016), <https://hbr.org/2016/03/women-and-minorities-are-penalized-for-promoting-diversity>.

The report has also suggested the adoption of a “sponsorship” program, similar to the mentorship program promoted in Australia at the board and management levels, as a way to promote diversity enhancement and retention.²⁶⁵ The Holder Report recommends this program for the mid-management level and opines that sponsorship programs “positively impact pay, retention, ambition and career advancement.”²⁶⁶ This recommendation speaks to the problem of women and minority persons not having the required networks and role models in the workplace. The report explains that for such a program to be successful, both sponsors and protégés would need to be educated about the program.²⁶⁷ The report also explains that it would be more meaningful to let sponsors pick protégés from a pool of candidates identified for retention by the company rather than randomly assigning sponsors and protégés.²⁶⁸ To further ensure the sponsor’s active participation in the program, the report suggests that the company regularly review such programs and incorporate the results into the annual performance assessment metrics of the sponsor.²⁶⁹

In support of employee retention, the performance review process should be fair, transparent, and objective. Expected benchmarks should be made clear, and feedback should be continuous to ensure that employees are aware of the company’s expectations.²⁷⁰ Also, the report recommends introducing self-nomination and peer-manager nominations to an independent committee, along with a blind review process, to eliminate subjectivity in the performance review process.²⁷¹

Additionally, the report suggests that the company review employee benefits in order to ensure that a more diverse workforce is attracted and retained.²⁷² For example, a parental leave policy that does not discriminate between genders or between parents with biological children and those with adopted children.²⁷³ Another example is having policies regarding “off-ramping” and “on-ramping” an employee

²⁶⁵ The Holder Report, *supra* note 232, at 7.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 10.

²⁷¹ *Id.*

²⁷² *Id.* at 9.

²⁷³ *Id.*

before and after parental leave to ensure consistent and fair treatment.²⁷⁴

The report also recommends adopting flexible work schedules and remote work to ensure that employees with children, and those from a wider geographical pool, can be attracted and retained.²⁷⁵ Another suggested measure is that the regularly catered dinners at Uber be offered earlier in the day to signify an earlier end to the work day so that more employees can avail themselves of this benefit.²⁷⁶ This suggestion speaks to the unwritten requirement in most companies that employees have to work at the office until late, which often leads to many women with children choosing to exit the workforce. To further ensure that specific issues that lead to employees leaving the company are identified, the report recommends that companies conduct exit interviews with neutral third parties, like consultants or HR personnel, and internal surveys.²⁷⁷ Thus, the company can then address those issues that are identified.

4. Harassment, Discrimination, and Employee Relations

The Holder Report makes more specific recommendations that speak directly to Fowler's allegations. Some of the recommendations serve as a cautionary tale for other companies. With respect to harassment and discrimination, the report states that Uber should adopt a zero-tolerance policy for substantiated complaints of harassment and discrimination against employees even if they are high-performing employees.²⁷⁸ Further, the report recommends that the company apply all policies evenly without giving any special treatment based on level, tenure, or past performance of the employee.²⁷⁹

Regarding employee relations, the recommendations state that clear guidance regarding appropriate workplace relationships must be developed. This guidance would make it clear that any type of romantic or intimate relationship between individuals in a reporting relationship is prohibited.²⁸⁰ Also, the report recommends that barriers for employees to transfer to another team within the company must be

²⁷⁴ *Id.*

²⁷⁵ *Id.* at 11.

²⁷⁶ *Id.*

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 9.

²⁷⁹ *Id.* at 11.

²⁸⁰ *Id.* at 9.

removed and not be tied to performance.²⁸¹ The report goes on to specify that an HR staff person review transfer requests and decisions to evaluate if such requests are a result of hostile or divisive environments and if they are being blocked for improper reasons.²⁸² Similar to the suggestion regarding tracking harassment complaints, the report also suggests tracking transfer requests to identify patterns and underlying problems.²⁸³

With respect to work culture generally, the report recommended that the company adopt clear guidelines regarding alcohol consumption and the use of controlled substances.²⁸⁴ To facilitate inclusion, the report recommended that the company support work events where alcohol is not a strong component in order to enable employees who do not consume alcohol to network and engage in team-building activities.²⁸⁵

While some of the recommendations might not be feasible for all companies, especially smaller start-ups, the Holder Report broadly offers good guidance to companies seeking to bolster themselves against similar sexual harassment complaints and consequential public relations issues and possible shareholder actions. As the next section shows, shareholders have started to engage with companies more actively on such issues, and it is important that boards are able to implement an appropriate diversity framework.

IV

CORPORATE DIVERSITY 2.0: THE WAY FORWARD

Part 2 identified two distinct problems that diversity regulations attempt to address: (1) the lack of diversity at the board level impeding effective board functioning, i.e., the board effectiveness issue; and (2) the lack of equality in the workplace that prevents women and racial minorities from naturally progressing to top management levels, i.e., the glass ceiling issue. Since the regulations in most countries have conflated the two issues, the regulations focus on increasing the number of women directors while overlooking other types of diversity that might be useful on the board and at other levels in the workforce. Recently, issues of harassment and discrimination (like those detailed in Part 3) have brought poor diversity and inclusion practices into the

²⁸¹ *Id.* at 10.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

spotlight, and the existing regulations do not provide guidance on these issues. This further emphasizes the need for diversity regulations and company policies to address the second issue, i.e., workplace equality.

This section will first discuss the need for boards to prioritize issues of diversity as part of their fiduciary obligations. Next, it will lay out “Corporate Diversity 2.0” or an action plan for diversity regulations and best practices for companies across the globe.

A. The Need for Corporate Diversity 2.0: Shareholder Activism and Directors' Fiduciary Duties

Many other companies have been at the receiving end of similar allegations to those that led Uber to adopt the Holder Committee Report in 2017.²⁸⁶ Investor groups have begun to ask for more than superficial diversity policies at the board level, even claiming that directors and officers have a fiduciary duty to redress hostile work environment situations.

A recent letter by CtW Investment Group to Amazon's CEO, Jeff Bezos, expresses concern that Amazon has not acted for at least two years after a credible report of “harassing behavior” by Mr. Price, the former chief of Amazon Studios, became known to the company.²⁸⁷ The letter then links this concern to the “lack of diversity in its senior executive ranks” and “shortcomings of its human capital management policies,” making the Holder Committee recommendations relevant.²⁸⁸ The letter goes on to list a few recommendations to the board that echo some of the Holder Committee's recommendations. It urges Amazon's board to commit to gender parity on the board and to set targets for increasing diversity among its senior executives.²⁸⁹

Next, the letter asks the board to create a “Stakeholder Advisory Council” that would focus on sustainability issues, including promoting gender diversity and preventing sexual harassment. Further, the members of the Stakeholder Advisory Council should regularly

²⁸⁶ The Weinstein Company, Twenty-First Century Fox, and Amazon are some examples. See, e.g., Aja Romano, *The Harvey Weinstein Sexual Harassment Allegations: All the Key Players*, VOX (Oct. 6, 2017), <https://www.vox.com/culture/2017/10/6/16432526/harvey-weinstein-allegations-whos-involved>.

²⁸⁷ Letter from Dieter Waizenegger, Executive Director of CtW Inv. Grp., to Jeff Bezos, Chairman and CEO of Amazon.com, Inc. (Nov. 30, 2017) (letter available at <http://ctwinvestmentgroup.com/>) [hereinafter, Shareholder Letter to Amazon].

²⁸⁸ *Id.*

²⁸⁹ *Id.*

meet with the board and senior management.²⁹⁰ These requirements echo the sentiment of the Holder Committee Report, which recommends that the Ethics and Culture Committee address such issues and bring those issues under the board's oversight. Further, the letter recommends that the board retain an independent expert in labor law to review all employment agreements of the company to ensure that employees are not inhibited from reporting, discussing, or litigating issues of harassment, unfair treatment, and/or inappropriate conduct.²⁹¹

Finally, the letter recommends that Amazon's "affinity groups"²⁹² be given more authority and independence so that employees can use these groups as an alternate channel to raise concerns over harassment, echoing the Holder Committee Report.²⁹³ The authority of such groups should extend to seeking external arbitration where management fails to address issues.²⁹⁴ The letter concludes by stating that a separate shareholder advisory resolution to the same effect will be submitted by the investment group and asks for the board's support for the proposal.²⁹⁵

Notably, the letter mentions that the "gender diversity gap" poses significant risks for long-term shareholders.²⁹⁶ Shareholders have begun recognizing that diversity and associated issues are linked to shareholder value in the long term. Also significant, the letter combines the issue of diversity at the board and senior management levels with the prevention of sexual harassment. However, the letter does not go as far as the Holder Committee Report, which explains that a commitment to diversity, inclusion, and retention at all levels will help address issues of sexual harassment and hostile work conditions for women and minorities.

Interestingly, CtW's letter to Amazon was preceded by a derivative action filed against Twenty First Century Fox Inc. (21CF) with similar claims, i.e., that the company had not taken steps to address sexual harassment and racial discrimination. The action alleged that directors, officers, and the controlling shareholder were in breach of their

²⁹⁰ *Id.*

²⁹¹ *Id.*

²⁹² Groups like Asians@Amazon and Women in Engineering are meant to help Amazon focus its diversity efforts. See *Diversity at Amazon*, AMAZON.COM, <https://www.amazon.com/b?ie=UTF8&node=10080092011#affinity-groups> (last visited Sept. 14, 2018).

²⁹³ Shareholder Letter to Amazon, *supra* note 287.

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 4.

²⁹⁶ *Id.*

fiduciary duties for, amongst other things, failing to redress the hostile work environment.²⁹⁷

21CF eventually entered into a \$90 million settlement, along with an agreement to undertake governance reforms.²⁹⁸ More specifically, the governance reform was in the form of establishing a Fox News Workplace Professionalism and Inclusion Council composed of “experts in workplace and inclusion matters.”²⁹⁹ The brief for the council is to “ensure a proper workplace environment for all employees and guests, strengthen reporting practices for wrongdoing, enhance HR training on workplace behavior, and further recruitment and advancement of women and minorities.”³⁰⁰ This setup of the committee and the committee’s tasks echo the recommendations by the Holder Committee to Uber. Further, the Council is to report directly to the board of 21CF, thus making the board ultimately responsible for these issues.³⁰¹ This is again reminiscent of the Holder Committee’s recommendation for Uber’s board to set up an Ethics and Culture Committee to ensure that the board oversees issues of diversity and inclusion.³⁰²

This derivative action shows that company boards are vulnerable to such actions where they do not identify and address issues of harassment, racial and gender discrimination, and a hostile work environment.³⁰³ One of the claims alleged that the directors and officers were in breach of their fiduciary duties. With respect to the board of directors, the complaint alleged that the directors owed “the highest obligation of good faith and loyalty” in the administration of the

²⁹⁷ Verified Derivative Complaint, City of Monroe Emps.’ Ret. Sys., *derivatively on behalf of ex rel.* Twenty-First Century Fox Inc. v. Rupert Murdoch and Ors., No. 2017-0833 (Del. Ch. filed Nov 20, 2017), [https://www.blbglaw.com/cases/00318/_res/id=Attachments/index=1/2017-11-20%20\(EFILED\)%20Stipulation%20of%20Settlement.pdf](https://www.blbglaw.com/cases/00318/_res/id=Attachments/index=1/2017-11-20%20(EFILED)%20Stipulation%20of%20Settlement.pdf) [hereinafter The Derivative Action].

²⁹⁸ Company Press Release, 21st Century Fox, 21st Century Fox Establishes the Fox News Workplace Professionalism and Inclusion Council (Nov. 20, 2017), <https://www.21cf.com/news/21st-century-fox/2017/21st-century-fox-establishes-fox-news-workplace-professionalism-and>.

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² The Holder Report, *supra* note 232, at 2.

³⁰³ Kevin LaCroix, *Massive Derivative Suit Settlement for Alleged Management Failure to Prevent Sexual Misconduct*, THE D & O DIARY (Nov. 21, 2017), <https://www.dandodiary.com/2017/11/articles/shareholders-derivative-litigation/massive-derivative-suit-settlement-alleged-management-failure-prevent-sexual-misconduct/>.

company, including the company's compliance with laws and its duty to "conduct a good faith investigation into known violations of laws, regulations, and internal policies concerning sexual harassment and discrimination."³⁰⁴

Two specific allegations were made within this claim against the board. The first allegation was that the directors breached their fiduciary duties "by permitting a hostile work environment, which included rampant sexual harassment and exploitation, racial discrimination, and retaliation to continue unabated for more than a decade."³⁰⁵ The second allegation was that the board breached its fiduciary duties by "allowing senior management to control the flow of information relating to the investigation into sexual harassment at Fox News and the negotiation of Ailes's separation agreement."³⁰⁶ These claims implicate the board's failure to adequately oversee the investigation of the sexual harassment allegations and monitor senior management. In terms of damages, the complaint alleged that the board's breach of fiduciary duties caused, and continued to cause, damage to the company's finances, image, and goodwill.³⁰⁷

The derivative action against 21CF, and resulting settlement, show that issues of workplace harassment, discrimination, and retaliation pose a significant risk to the company, and boards will now have to prioritize and address the issue more actively. So far, this has not been an issue discussed by company boards.³⁰⁸

A recent survey of more than 400 respondents who held positions in both private and public company boards in the United States found that the majority of company boards have not discussed sexual harassment and gender discrimination issues at all.³⁰⁹ Further, the survey found that

³⁰⁴ The Derivative Action, *supra* note 297, at ¶ 20666.

³⁰⁵ *Id.* at ¶ 20767.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at ¶ 208.

³⁰⁸ Although the 21st Century Fox Derivative Action was settled before the court could decide on it, commentators have already pointed to the duties of care and loyalty becoming a relevant issue in sexual harassment cases. See Elliot Grund, *Using the Duty of Loyalty as a Vehicle for Change in Sexual Misconduct Cases*, THE COLUMBIA BUS. L. REV. BLOG ONLINE (Nov. 27, 2017), <https://cblr.columbia.edu/using-the-duty-of-loyalty-as-a-vehicle-for-change-in-sexual-misconduct-cases/>; see also Meena Yoo, *Corporate Governance in a Post-Weinstein Era*, FORDHAM L.J. CORP. AND FIN. L. BLOG (Jan. 6, 2018), <https://news.law.fordham.edu/jcfl/2018/01/06/corporate-governance-in-a-post-weinstein-era/>.

³⁰⁹ *Corporate Boards Aren't Preparing for Sexual Harassment and Gender Discrimination Issues*, THE MEDIUM: THE BOARDLIST (Oct. 24, 2017), <https://medium.com/@theBoardlist/corporate-boards-arent-preparing-for-sexual-harassment-and-gender-discrimination-issues-24ba425d6497>.

the most common reason given by board members for not discussing the issue was that it did not feel like a board-level issue.³¹⁰ However, this perception is set to change in the near future as shareholder actions on the issue gain momentum.³¹¹ Thus, it is now imperative that boards are provided with a more comprehensively framed diversity policy and/or best practice guidance that addresses these issues with concrete guidelines and solutions.

B. Corporate Diversity 2.0: The Framework

Broadly, Corporate Diversity 2.0 (the diversity framework proposed in this Article) recognizes diversity in two tiers. In tier 1, it recognizes the importance of viewpoint diversity for its functional benefits at the board level. In tier 2, it recognizes demographic diversity complemented by inclusion and retention policies at all levels of the workforce to ensure workplace equality. These two tiers are interlinked, in that tier 2 diversity efforts will ensure that there are enough diverse candidates naturally retained in the corporate pipeline available for board positions. At the same time, valuing viewpoint diversity in tier 1 will not go against efforts to bring in and retain people of diverse demographics in the workforce. Further, it is expected that more women and minority members on the board and in executive positions will ensure that work environments are inclusive and responsive to issues of harassment and discrimination.³¹² This will also ensure that policy makers are able to individually identify and address the two separate issues of (1) homogenous boards leading to less optimal decision-making and (2) structural barriers impeding women and minority candidates from being retained within the corporate pipeline.

³¹⁰ *Id.*

³¹¹ It has been argued, based on the fall in share prices of a company whose CEO was accused of sexual misconduct, that even an unproven allegation of sexual misconduct on the part of the CEO is a financial risk. See John Foley, *Wynn Resorts' Slide Shows Sexual Misconduct is a Financial Risk*, N.Y. TIMES: DEALBOOK/BUSINESS & POLICY (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/business/dealbook/steve-wynn-sexual-misconduct.html?mtrref=t.co>.

³¹² Marcia Narine Weldon, *Will More Women on Boards Change Corporate Culture and Stem the Tide Of Harassment Complaints?*, L. PROFESSOR BLOGS NETWORK: BUS. L. PROF BLOG (Dec. 7, 2017), http://lawprofessors.typepad.com/business_law/2017/12/will-more-women-on-boards-change-corporate-culture-and-stem-the-tide-of-harassment-complaints.html.

For tier 1 diversity, which deals with diversity at the board level, it is important to focus on the value of diversity to the board because it enables the board to better perform its duties. Since the board is mainly tasked with monitoring management, viewpoint diversity would be essential to the board.³¹³ In other words, we need members on the board of directors who are psychologically independent of management to challenge decisions or present alternative courses of action.³¹⁴

Since viewpoint diversity is not easily established, proxies like gender, age, nationality, qualifications, and experience might be used.³¹⁵ Since not all companies are the same size, or operate in the same sector, or have the same circumstances, each company might have different needs at the board level. Thus, the United States' SEC rule's model of providing companies with the flexibility to define diversity according to their needs, is appropriate at the board level and should be retained. The misgivings expressed by the former chair of the SEC that companies had not focused on gender would not be relevant in tier 1 diversity, since aspects of gender equality will be the subject matter of tier 2 diversity under Corporate Diversity 2.0.³¹⁶

Further, in terms of the types of diversity that companies might consider at the board level, the Business Roundtable principles of corporate governance and Australia's Commonsense Principles of Corporate Governance are helpful. They emphasize that the board should have diversity in the form of skill sets, backgrounds, experiences, viewpoints, and range of tenures to effectively perform its functions.³¹⁷

For tier 2 diversity, a generalized version of the guidelines provided by the Holder Committee should be provided in the form of soft law guidance for company compliance. Australia's system of "comply or explain" might be an effective mechanism in the United States because investor groups are particularly aware and active on the issue of harassment, as the letter to Amazon's CEO and the derivative action against 21CF shows. Additionally, all recommendations of the Holder Report might not be suitable for all companies because they were formulated specifically for Uber's circumstances. Thus, a "comply or

³¹³ Kamalnath, *supra* note 124, at 103–06.

³¹⁴ See generally Erica Beecher-Monas, *Marrying Diversity and Independence in the Boardroom: Just How Far Have You Come, Baby?*, 86 OR. L. REV. 373 (2007).

³¹⁵ DAVID A.H. BROWN ET AL., WOMEN ON BOARDS: NOT JUST THE RIGHT THING . . . BUT THE 'BRIGHT' THING 5 (The Conference Board of Canada 2002).

³¹⁶ See 17 C.F.R. § 229.407(c)(2)(vi) (2018).

³¹⁷ See discussion under section I(B) of this Article.

explain” style regulation will enable companies to provide investors with information regarding why certain recommendations were not adopted, if that is the case.

Further, regulations in countries like Australia and the United Kingdom already provide for mentoring so as to help women candidates at executive levels break into board positions. Tier 2 diversity regulations, along the lines of those provided by the Holder Committee, would extend such practices to all levels of the company to facilitate inclusion and retention of not just women employees but also other underrepresented groups.

The relevance of the Holder Committee’s recommendations is apparent in the measures adopted by 21CF and those demanded by CtW. Most notably, although the public discourse on diversity has focused on gender diversity at the board level, it is significant that the 21CF allegations include allegations relating to responses to sexual harassment and racial discrimination complaints. The Holder Report references inclusion and retention for both women and minority employees. Therefore, it is pertinent, under tier 2, to widen the diversity discourse from gender to include other types of diversity. If workplace equality is the goal, it must include all forms of equality under its ambit, rather than just gender equality.

Thus, tier 2 diversity should aim to widen the diversity project in two aspects: To all levels of the corporate pipeline rather than just to the board of directors, and to all sections of employees who might face discrimination, unconscious bias, or other structural barriers in the workplace, rather than just to female employees.

Ultimately, the soft law measures are more suitable to regulate both tier 1 and tier 2 diversity. Although quotas and targets might be tempting to adopt because numerical results of such measures are more immediately apparent, such measures do not solve the two problems identified in Part 1. Gender quota measures, like the ones in Norway, address only one form of diversity, namely gender diversity. Further, as stated earlier, the needs of each company are different and it is best to allow companies the flexibility to decide the types of diversity required on their boards. Also, gender quotas are unhelpful even if the goal is to address gender equality because such measures are only a temporary fix and do not ensure that there is a pool of diverse board-ready women candidates available for board positions. This gives rise

to the “pool problem” as a counterargument against quotas.³¹⁸ A soft law approach consisting of guidelines for companies and requiring related disclosures will be the optimal solution.

CONCLUSION

While existing corporate diversity laws have almost exclusively focused on the board of directors and on gender, it was unclear what problems such laws were attempting to solve. The rationales provided by policy papers and governments in various jurisdictions have further conflated, rather than clarified, the problems at hand. This Article has surveyed the relevant law and regulations in four jurisdictions and found two main issues that such laws have sought to address—namely, board effectiveness and equality in the workplace. Based on this finding, the Article has argued that the lack of clarity regarding the issues addressed is responsible for the suboptimal solutions offered.

As the incidents at Google and Apple have shown, there is a need to reevaluate our thinking about corporate diversity. Further, the allegations of sexual harassment and hostile work conditions against Uber by a former employee, and similar claims by shareholders of Amazon and 21CF, have highlighted the need for revamping the diversity discourse in the corporate context. This Article has provided the blueprint for such a revamping via corporate diversity 2.0. After briefly pointing out that the board effectiveness issue would require a broader approach to diversity in terms of age, tenure, expertise, and viewpoint, this Article has focused on the second issue of workplace equality. Because the Holder Committee Report’s recommendations have the potential to serve as guidelines or best practices for companies seeking to address this issue, this Article has outlined the relevant recommendations and drawn from the report to formulate Corporate Diversity 2.0. Both companies and policy makers might draw from and expand upon this blueprint while formulating best practices or regulations in this regard.

³¹⁸ See, e.g., the “pool problem” articulated in Australia, CAMAC Report, *supra* note 164, at 39.