THE GLASS BOARDROOM: THE SEC'S ROLE IN CRACKING THE DOOR OPEN SO WOMEN MAY ENTER

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This Note explores the current status of gender diversity disclosures under the SEC's 2009 Proxy Disclosure Enhancements. It draws on original data compiled from the Fortune *50's 2012 proxies in its analysis of both corporate compliance under the SEC's revised rule and current female representation in America's most influential boardrooms.*

In a detailed empirical analysis of Fortune *50 proxy diversity statements, this Note reveals that, more than three years after implementation of the SEC's proxy disclosure amendments, over half of diversity disclosures fail to fully comply with the revised rule's requirements. This Note chronicles the stagnation in female board membership that coincides with this non-compliance, contrasting the United States' current status with significant growth abroad in countries that have experimented with gender quotas. While dismissing the implementation of similar quotas in this country, this Note proposes that the SEC issue enhanced guidance on the required comprehensiveness of diversity disclosures under its proxy disclosure rule via a detailed staff report distributed to all public companies. By singling out both inadequate and exemplary corporate disclosures, the SEC will not only increase the odds of regulatory compliance,*

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but will also provide investors with the information required to make informed decisions regarding board composition.

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I. INTRODUCTION

Peer into the boardrooms of our nation's largest and most powerful corporations. There are few women sitting at the table. Women represent over half of all new hires,[1] yet make up a far smaller proportion of corporate board members. In 2012, women held just 117 of the 568 directorships among the *Fortune* 50, amounting to less than twenty-one percent of total board seats.[2]

The ongoing debate over gender diversity in the boardroom, as well as acknowledgement of shareholder interest in board diversity, led the Securities and Exchange Commission ("SEC") to adopt various amendments to its proxy disclosure rule in 2009.[3] The present status of diversity disclosures under these amendments has not been

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1 Women represented fifty-three percent of new hires in 2011. *See* JOANNA BARSH & LAREINA YEE, MCKINSEY & CO. UNLOCKING THE FULL POTENTIAL OF WOMEN IN THE U.S. ECONOMY 5 (2011).

2 These data were compiled from an original empirical study. *See infra* Part III.C for an explanation of the study and the methodology behind it.

3 *See* Barbara Black, *Stalled: Gender Diversity on Corporate Boards*, 37 U. DAYTON L. REV. 7, 13–14 (2011).

comprehensively explored. In this Note, I provide the first empirical study of these disclosures, which reveals that, three years after the SEC implemented its revised rule in 2010, over half of diversity disclosures among the 2012 *Fortune* 50 fail to fully comply with the rule's requirements.[4] Ten percent of *Fortune* 50 proxies make no mention of diversity whatsoever.[5]

My extensive analysis of the *Fortune* 50's most recent diversity statements and current numbers of women in their boardrooms shows that the SEC's amendments have failed to bring any meaningful change to either disclosures or boardroom composition. The SEC has acknowledged that "the corporate track record for disclosure under this new requirement is quite spotty so far."[6] Incomplete disclosure has failed to provide investors the information they need to make informed decisions regarding board composition. This Note proposes several steps the SEC should take to provide investors with the comprehensive information they deserve—information fully in compliance with the SEC's proxy disclosure amendments.

This Note argues that the SEC should issue enhanced guidance on the required comprehensiveness of diversity disclosures under its proxy disclosure rule via a detailed staff report distributed to all public companies. Part II examines the current status of women on corporate boards by providing original statistical evidence gathered from my empirical study. Part III examines the main elements of the SEC's 2009 amendments to its proxy disclosure rule and explains why these amendments have failed to make a significant impact thus far. Part IV provides an original, detailed analysis of the statements that *Fortune* 50 companies provided in their 2012 proxies, concerning the inclusion (or exclusion) of diversity in their board nominating processes. This Part identifies those companies

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4 *See infra* Part IV for detailed findings from the empirical study.

5 *See id.*

6 Elisse B. Walter, Comm'r, SEC, Remarks at the DirectWomen Board Institute (Feb. 10, 2011).

that have and have not complied with the SEC's requirements and explores overall trends in current diversity disclosures. Part V offers a comparative perspective, exploring the drastic overhauls recently taken abroad to increase the number of female directors on corporate boards.[7] Part VI explains how the SEC must guide U.S. companies in drafting their proxy disclosures to both improve compliance with the SEC's disclosure rule and ensure that the rule's purpose of benefiting shareholders is realized.

For the purposes of this Note, I presume that increasing the number of females on corporate boards of directors is a worthwhile goal. Many policymakers in the United States and abroad, as well as scholars, businesspeople, and shareholders, believe it is desirable to have women in the boardroom. Some have argued for such inclusion using business rationale,[8] while others rely on ideas of fairness and

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[7] Norway, France, Italy, and Spain are just some of the countries that have recently instituted female director quotas. *See* Douglas M. Branson, *Initiatives to Place Women on Corporate Boards of Directors—A Global Snapshot*, 37 J. CORP. L. 793, 803–05 (2012); Seletha R. Butler, *All on Board! Strategies for Constructing Diverse Boards of Directors*, 7 VA. L. & BUS. REV. 61, 87 (2012); Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity and Proxy Disclosure*, 37 U. DAYTON L. REV. 39, 44 (2011).

[8] Business rationale relies on market-based and economic-based justifications in supporting board diversity. Various studies suggest that greater board diversity "increases the overall effectiveness of the board and hence the corporation, [and] also enhances the corporation's profitability." Seletha R. Butler, *"Financial Expert": A Subtle Blow to the Pool and Current Pipeline of Women on Corporate Boards*, 14 GEO. J. GENDER & L. 1, 21 (2013) (citing Lisa M. Fairfax, *The Bottom Line on Board Diversity: A Cost-Benefit Analysis of the Business Rationales for Diversity on Corporate Boards*, 2005 WIS. L. REV. 795, 795 (2005)). A 2007 study by Catalyst found that companies with higher percentages of female directors financially outperformed those with lower percentages by significant margins. LOIS JOY ET AL., CATALYST, THE BOTTOM LINE: CORPORATE PERFORMANCE AND WOMEN'S REPRESENTATION ON BOARDS (2007), *available at* http://www.catalyst.org/knowledge/bottom-line-corporate-performance-and-womens-representation-boards. Additionally, a 2012 Credit Suisse Research Institute worldwide study of approximately 2,400 companies found that companies with one or more female board members had "higher returns on equity, lower leverage, better growth, and higher price/book value multiples." David A. Katz & Laura McIntosh,

equality to support their arguments.[9] Because this Note focuses primarily on the policy choices made to achieve female inclusion and their effect, I do not devote significant attention to arguing why such inclusion is advisable. However, I believe it is a relevant subject worthy of further discussion.

II. WHERE DO WE STAND? THE DEBATE OVER GENDER DIVERSITY IN THE BOARDROOM

In an interesting historical coincidence, 1934—the year Congress created the SEC—is the same year in which Lettie Pate Whitehead became the first woman appointed to the board of a major corporation (Coca-Cola Co.).[10] While it has been almost eighty years since that milestone, the passage of time has not been as favorable to women as one might expect.

A. The Lack of Change over Time

Women represent over one half of the U.S. population.[11] They comprise 51.5% of management, professional, and related occupations, and make up 46.7% of the U.S. labor force.[12] However, if the number of women on boards continues to rise at the present rate, "most of us will not be around to see the day, 70 years from now, when women will finally achieve parity with men in terms of raw numbers in

Corporate Governance Update: Gender Diversity on Public Company Boards, N.Y. L.J. 2 (Sept. 27, 2012), www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.22072.12.pdf [hereinafter *Wachtell Report*].

9 This is often referred to as the "social rationale perspective." It rests on the notion that corporate boards should reflect the shareholders they serve as well as the customer and employee bases of their companies. *See* Butler, *supra* note 8, at 21.

10 *See* Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579, 579 (2006).

11 *See* Black, *supra* note 3, at 8.

12 *See id.* *See also* Fairfax, *supra* note 10, at 580 ("[W]omen have accounted for an increasingly larger portion of the workforce for decades.").

the boardrooms of America."[13] The empirical study of the 2012 proxies of the *Fortune* 50 described in this Note reveals that women currently comprise just 20.6% of total *Fortune* 50 board seats.[14] Put differently, women currently occupy 117 seats in America's most influential boardrooms, while men occupy 451 of these seats.[15] This amounts to an average of 2.44 female directors per board and an average board size of approximately 12 directors.[16]

When all *Fortune* 500 companies are considered, the overall percentage of 2012 board seats held by women declines to 16.6%; this is up less than two percentage points from 2009, the year immediately preceding the implementation of the SEC's revised diversity disclosure rule.[17] In fact, percentages may be even lower in reality. In calculating these figures, the number of directorships held by women is treated as equivalent to the number of female directors,[18] when the latter number (the number of actual female bodies) is smaller. This discrepancy can be explained by the "trophy director phenomenon"—the idea that one woman may be serving on a number of different boards of

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13 Amelia H. Boss, *Direct Women: Bringing Qualified Experience into the Boardroom*, DEL. LAW., Fall 2006, at 24, 25.

14 *See supra* text accompanying note 2.

15 *See id.*

16 *See id.*

17 *See* RACHEL SOARES ET AL., CATALYST, 2012 CATALYST CENSUS: FORTUNE 500 WOMEN BOARD DIRECTORS 1 (2012) [hereinafter CATALYST 2012 STUDY], *available at* http://www.catalyst.org/knowledge/2012-catalyst-census-fortune-500-women-board-directors. In 2011, women held 16.1% of *Fortune* 500 board seats. In 2010, women held 15.7% of board seats. *See* RACHEL SOARES ET AL., CATALYST, 2011 CATALYST CENSUS: FORTUNE 500 WOMEN BOARD DIRECTORS 1 (2011), *available at* http://www.catalyst.org/knowledge/2011-catalyst-census-fortune-500-women-board-directors; RACHEL SOARES ET AL., CATALYST, 2010 CATALYST CENSUS: FORTUNE 500 WOMEN BOARD DIRECTORS 1 (2010), *available at* http://www.catalyst.org/knowledge/2010-catalyst-census-fortune-500-women-board-directors.

18 *See* CATALYST, 2012 CATALYST CENSUS: FORTUNE 500 APPENDIX 1—METHODOLOGY 2 (2012), *available at* http://www.catalyst.org/knowledge/2012-catalyst-census-fortune-500-appendix-1—methodology.

directors, sometimes as many as eight.[19] Whether one perceives the percentages of female directors as high or low, statistics make clear that growth has been stagnant under the SEC's rule. The change that the SEC hoped to spur by promulgating its revised rule has yet to come.

B. The Root of the Discrepancy

Some scholars have argued that the dearth of female directors can be explained by two main reasons: the lack of female senior officers in *Fortune* 500 companies and the historically insular and "clubby" nature of the director nomination process.[20] Corporate directors are often selected from the senior officer ranks of other large companies. Because women hold only about a quarter of these senior level positions,[21] they are less likely than men to be asked to join corporate boards. Similarly, it is often companies that already have female directors that tend to promote female employees to senior officer positions in the first place, since these companies are more likely to have women on their governance and nominating committees making key

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19 In 2006, Susan Bayh, the wife of ex-senator Evan Bayh, sat on eight boards, while women such as Barbara Bowles, Shirley Jackson, Bonnie Hill, and Jackie Ward each sat on seven boards. The same women are often appointed to corporate boards again and again, as they serve as "safer" choices, given their previous experience and easily verifiable track record. The "trophy director phenomenon" is nearly non-existent among male directors. Branson, *supra* note 7, at 800.

20 *See* Elizabeth A. Nowicki, *Economic Concerns, Beleaguered Corporations, and Women in Corporate Boardrooms*, 30 HAMLINE J. PUB. L. & POL'Y 549, 553–55 (2009). Gender stereotyping underlies both of these reasons, as does a company's "desire to maintain social comfort levels." Anything that might upset corporate functioning or board cohesion is avoided. Black, *supra* note 3, at 16.

21 In 2010, twenty-six percent of senior officers and managers were women. This number has risen only slightly over time. *See Targeting Inequity: The Gender Gap in U.S. Corporate Leadership: Hearing on New Evidence on the Gender Pay Gap for Women and Mothers in Management* (2010) (testimony of Ilene H. Lang, President & CEO, Catalyst), *in* CAROLYN B. MALONEY, INVEST IN WOMEN, INVEST IN AMERICA: A COMPREHENSIVE REVIEW OF WOMEN IN THE U.S. ECONOMY 112 (2010).

decisions.[22] As the number of females in powerful, decision-making roles within a company increases, opportunities for other women expand.[23] However, top-down pressures facilitating female advancement into managerial jobs and subsequently into directorships create a precarious pattern[24]—the fewer female directors a company has, the fewer women it is likely to promote to officers; and the fewer female officers a company has, the fewer women who will ascend to a directorship in the first place. Thus, increasing the number of women in high-level roles, whether on corporate boards or in other leadership positions, is crucial to ensuring that women continue ascending to leadership roles.

Also working against women is the traditional nature of the board nominating process, which is usually led by a male-dominated nominating committee or a company's (usually male) chief executive officer.[25] The men spearheading the nominating process often seek out friends and business associates, who are predominantly (if not exclusively) male, to fill potential board spots. Therefore, when women fall outside these preferred social and business circles, they find themselves underrepresented in the director nominee pool.

C. Potential Effects of Adding More Women to Boards

Even when women do serve on boards, their power is often reduced by the "solo woman phenomenon," or "tokenism," whereby a single member of a minority group is treated as a token and becomes the brunt of excessive

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22 *See* Nowicki, *supra* note 20, at 554.

23 *See* Sheryl Skaggs et al., *Shaking Things Up or Business as Usual? The Influence of Female Corporate Executives and Board of Directors on Women's Managerial Representation*, 41 SOC. SCI. RESEARCH 936, 937 (2012); *see also* David A. Matsa & Amalia R. Miller, *Chipping Away at the Glass Ceiling: Gender Spillovers in Corporate Leadership* 7 (RAND Labor and Population, Working Paper WR-842, 2011) (discussing how increasing the share of women on corporate boards can lead to subsequent increases in the share of women in top management positions).

24 *See* Nowicki, *supra* note 20, at 555.

25 *See id.*

criticism and scrutiny.[26] A female victim of tokenism may therefore feel enhanced pressure to perform as a "gratuitous representative[]" of the female sex, as well as a sense of isolation from the rest of the group.[27] The effects of tokenism are an especially relevant concern, considering that in both 2011 and 2012, thirty percent of *Fortune* 500 companies had only one female director on their board.[28] When a woman is the only female on a particular board (or even when she is one of only two women), a "critical mass" of women is lacking, which may reduce her effectiveness as a leader.[29] Once this threshold is crossed, "women are no longer seen as outsiders and are able to influence the content and process of board discussions more substantially."[30] With three or more female board members, no single woman represents the "woman's point of view."[31] Critical masses are lacking on American corporate boards. In both 2011 and 2012, less

26 *See* Boss, *supra* note 13, at 25. *See also* DOUGLAS M. BRANSON, NO SEAT AT THE TABLE: HOW CORPORATE GOVERNANCE AND LAW KEEP WOMEN OUT OF THE BOARDROOM 109 (2008).

27 Edward S. Adams, *Using Evaluations to Break Down the Male Corporate Hierarchy: A Full Circle Approach*, 73 U. COLO. L. REV. 117, 169 (2002).

28 *See* CATALYST, 2012 CATALYST CENSUS: FORTUNE 500 APPENDIX 3—COMPANIES WITH ONE WOMAN DIRECTOR (2012), *available at* http://www.catalyst.org/knowledge/2012-catalyst-census-fortune-500-appendix-3—companies-one-woman-director.

29 *See* Boss, *supra* note 13, at 25. The "critical mass" threshold is met when a board features three or more women. *See* Lissa Lamkin Broome, John M. Conley, Kimberly D. Krawiec, *Does Critical Mass Matter? Views from the Boardroom*, 34 SEATTLE U. L. REV. 1049, 1055 (2011).

30 Broome et al., *supra* note 29, at 1055 (citing VICKI W. KRAMER, ALISON M. KONRAD & SUMRU ERKUT, WELLESLEY CTRS. FOR WOMEN, EXECUTIVE SUMMARY: CRITICAL MASS ON CORPORATE BOARDS: WHY THREE OR MORE WOMEN ENHANCE GOVERNANCE 3 (2006), *available at* http://www.wcwonline.org/pdf/CriticalMassExecSummary.pdf.

31 Lissa Lamkin Broome, *The Corporate Boardroom: Still a Male Club*, 33 J. CORP. L. 665, 679 (2008).

than a quarter of *Fortune* 500 companies had three or more female directors serving on their boards at one time.[32]

III. IN NEED OF REPAIR: THE FAILURE OF THE SEC'S 2009 PROXY DISCLOSURE ENHANCEMENTS

Before 2010, no laws or regulations directly addressed diversity on corporate boards.[33] With neither state nor federal law setting forth requirements for director diversity, the SEC took the initiative in addressing the dearth of women on boards.[34] The 2008 financial crisis and 2001 Enron scandal provided the SEC with an impetus to consider various corporate governance reforms, including requiring more detailed proxy disclosures surrounding director elections.[35]

A. Components of the SEC's 2009 Amendments

On December 23, 2009, the SEC approved a number of amendments governing diversity disclosure in the area of board leadership.[36] These "Proxy Disclosure Enhancements" went into effect on February 28, 2010[37] and require public companies to disclose the following information: (1) *whether* the nominating committee (or the board) considers diversity in identifying nominees for director; (2) *how* diversity is considered in the nomination process; and (3) if the nominating committee (or the board) has a policy with

32 In 2011, 21.7% of *Fortune* 500 companies had three or more female directors serving together. This figure rose slightly in 2012 to 23.1%. *See* CATALYST 2012 STUDY, *supra* note 17, at 2.

33 *See* Hazen & Broome, *supra* note 7, at 44.

34 *See id.* at 45.

35 *See id.* at 50.

36 *See* 17 C.F.R. § 229.407(c)(2)(vi) (2013).

37 The rule amended Item 407(c) of Regulation S-K—the "umbrella disclosure regulation"—that governs the information that public companies must disclose within the documents they are required to file with the SEC. *See* Branson, *supra* note 7, at 812; *see also* 17 C.F.R. § 229.407(c)(2)(vi); Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343 (Dec. 23, 2009) (to be codified at 17 C.F.R. pt. 229).

regard to the consideration of diversity in identifying director nominees, *how* this policy is implemented, as well as how the nominating committee (or the board) assesses the *effectiveness* of its policy.[38] Thus, under the revised rule, nominating committees or boards that consider diversity when nominating candidates to a board of directors must also disclose how they consider diversity in identifying nominees. Additionally, if the nominating committee or board has "a policy with regard to the consideration of diversity in identifying director nominees," formal or not, the committee must disclose "how this policy is implemented" and "how the nominating committee (or the board) assesses the effectiveness of its policy."[39] The rule does not require that companies have a formal diversity policy or even that they consider diversity in their nominating processes.[40] However, companies that lack diversity policies and/or do not consider diversity when choosing director candidates must still disclose this information in their proxies.

In its final rule governing proxy disclosure enhancements, the SEC specifically avoided defining "diversity." It chose, instead, to leave the definition flexible, allowing companies to define diversity "in ways that they consider appropriate."[41] The SEC noted that "some companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts

38 17 C.F.R. § 229.407(c)(2)(vi).

39 *Id.* *See also* Luis A. Aguilar, Comm'r, SEC, Keynote Speech by SEC Commissioner: An Update on Diversity and Financial Literacy (Apr. 30, 2011), *available at* http://sec.gov/news/speech/2011/spch043011laa.htm.

40 However, for the same reasons presented *infra* in Part V arguing against the imposition of gender quotas, an SEC rule mandating that companies have a diversity policy in nominating board candidates is disfavored. Still, the lack of clarity and enforcement of existing requirements undermines the SEC's power in encouraging companies' voluntary adoption of diversity policies.

41 Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,344.

such as race, gender and national origin."[42] The latter, more traditional understanding of diversity is one that explicitly includes women, while the former is a more abstract understanding that can be interpreted in countless ways.

The purpose of the SEC's disclosure amendments is to "provide investors with information on corporate culture and governance practices that would enable investors to make more informed voting and investment decisions."[43] The SEC emphasizes that the amendments were "not intended to steer behavior."[44] However, the SEC believed that revisions to the disclosure rule would encourage "beneficial changes in board composition" by giving companies the opportunity to consider the benefits of a board diversity policy while preparing its disclosure documents.[45] The SEC noted that such diversity policies might encourage nominating committees to expand their searches to more independent directors, which might, in turn, enhance director and board quality.[46]

B. 2010 Diversity Data

The SEC's ambiguous explanation of "diversity" in relation to its disclosure amendments has limited assessments of the "success" of the revised rule. A study analyzing the 2010 proxies of twenty-four *Fortune* 500 companies divided disclosures provided under the SEC's (then-brand new) rule into four separate groups.[47] The first group included the largest number of companies—those who disclosed only that diversity was a factor in selecting board

42 Proxy Disclosure Enhancements, 74 Fed. Reg. at 68,344.

43 *Id.* at 68,343.

44 *Id.* at 68,355.

45 *Id.*

46 *See id.*

47 *See* Branson, *supra* note 7, at 812 (citing Bryce Holzer, Proxy Statement Diversity Disclosure Requirement (Fall 2010) (unpublished seminar paper, University of Washington School of Law) (on file with J. CORP. L.) [hereinafter Holzer Study]).

members, but nothing further.[48] These companies failed to explain how diversity was considered in that process and how the company assessed the effectiveness of its policy for considering diversity—both of which are required by the SEC regulation once a company states that it considers diversity.[49] The second group of companies also failed to meet the SEC requirements, though it came closer to compliance than the first. In addition to disclosing that diversity was considered during their nominating processes, the second group explained how their processes evidenced their commitment to diversity.[50] The small number of corporations that fully met the SEC requirements in their 2010 filings composed the third group. These companies thoroughly described both the racial and gender compositions of their boards, as well as the role that diversity played in their selection processes and the effectiveness of their diversity policies.[51] The fourth and final group, made up of only two companies, exceeded the SEC's requirements, setting itself drastically apart from the other groups.[52] These two corporations explained not only their diversity policies and board nomination processes, but also the effect diversity had on their businesses and goals.

C. An Original Study: 2012 Diversity Data and Methodology

The aforementioned Holzer study took place in 2010, the year the SEC disclosure amendments went into effect. At the time, it might have been argued that non-complying companies were unfamiliar with the new requirements. However, the three cycles of proxy statements that have

48 Branson, *supra* note 7, at 812 (citing Holzer Study at 11–12).

49 *See id. See also* 17 C.F.R. § 229.407(c)(2)(vi) (2013).

50 *See* Branson, *supra* note 7, at 812 (citing Holzer Study at 12–13).

51 *See id.* (citing Holzer Study at 14) (noting that the companies were Boeing, Microsoft, Weyerhaeuser, Home Depot, Altria, Century Aluminum, and Amazon).

52 *See id.* at 813 (citing Holzer Study at 15) (noting that Procter & Gamble and Citigroup were these stand-out companies).

taken place since the SEC promulgated its amendments have yielded sufficient data to meaningfully assess the impact of the revised rule on corporate diversity efforts. The empirical study in this Note looks at the *Fortune* 50's 2012 proxy statements to assess the longer-term effects of the SEC's 2009 Proxy Disclosure Enhancements on diversity disclosures and the number of women serving on corporate boards. The *Fortune* 50 companies are representative of the current state of corporate America, given their size, power, and influence. The data used are drawn from annual SEC proxy filings of the *Fortune* 50 submitted as of October 30, 2012.[53]

For the purposes of this study, board members are defined as individuals listed in proxy statements as serving on the board as of the 2012 annual meeting of shareholders. Women serving on more than one board were counted twice. AT&T (*Fortune* Rank 11) was considered to have two female directors, since one of three female directors retired on April 27, 2012. The percentage of female directors was calculated by taking the sum of all board seats held by women and dividing by the sum of all board seats in the sample group. The average number of female directors was calculated by dividing the sum of all board seats held by women by forty-eight (the number of *Fortune* 50 companies included in the sample). The average number of directors per corporate board was calculated by taking the sum of all board seats in the sample and dividing it by the number of companies in the sample (forty-eight).[54]

To assess the 2012 diversity disclosures of the *Fortune* 50, all forty-eight proxy statements were classified based on whether they mentioned the words "diversity," "sex," "female," "gender," "women," or none of these terms. After compiling the diversity statements that included at least one of these terms, they were grouped into one of four categories

[53] State Farm Insurance (*Fortune* Rank 43) was omitted, because it did not submit annual filings to the SEC. WellPoint (*Fortune* Rank 45) was similarly excluded from the analysis due to insufficient data.

[54] *See infra* Appendices 1 and 2 for examples of companies with particularly large and small numbers of female directors.

based on their comprehensiveness and how many of the three requirements set forth in the SEC's Proxy Disclosure Enhancements were met. As discussed above, the current rule requires public companies to disclose: (1) *whether* diversity is a factor in considering candidates for nomination to the board of directors; (2) *how* diversity is considered in that process; and (3) *how* the company assesses the *effectiveness* of its policy for considering diversity.[55]

The first three groups of companies failed to comply with the SEC's requirements. The first group omitted any mention of diversity from their proxies and, therefore, did not disclose whether diversity was a factor in selecting directors. While those in the second group mentioned whether diversity was a factor, they did not elaborate on how it was considered. The third group's statements included how diversity was considered; however, the companies in this group failed to discuss how they assessed the effectiveness of their diversity policies. The fourth group was the only group to meet all three of the SEC rule's requirements. This final group's statements were the most detailed, mentioning how diversity was considered and how the effectiveness of this consideration is assessed.

My empirical research reveals that little has changed since the enactment of the SEC's revised rule in 2009.[56] The lack of change is evident in the trivial references to diversity in over half of the *Fortune* 50's proxies—references that fail to meet the SEC's requirements[57] and, thus, fail to adequately inform investors. The following Part provides the first systematic evidence concerning the current status of these overwhelmingly superficial disclosures. This evidence suggests that, while companies have had over two years to develop a sense of what the SEC's rule requires, they have

55 *See* 17 C.F.R. § 229.407(c)(2)(vi) (2013).

56 *See supra* note 2; *see also infra* Tables 1–4.

57 Twelve and a half percent of *Fortune* 50 companies met only one of the SEC's requirements for all companies that consider diversity in the nomination of directors, while almost half (47.9%) met only two of the three SEC requirements. *See supra* note 2; *see also infra* Tables 2 and 3.

largely failed to improve their disclosures. As a result, board composition has failed to undergo significant alteration.

IV. NON-COMPLIANT: EMPIRICAL EVIDENCE ON 2012 DIVERSITY DISCLOSURES

The data provide striking evidence that, as of 2012, the disclosures of those *Fortune* 50 companies that reportedly consider diversity in their nominating processes remain largely superficial and uninformative. Additionally, over sixty percent of these companies failed to comply with the SEC's current regulation, meeting just one or two of the three distinct requirements set out for companies that consider diversity in selecting directors.[58] The tables below illustrate how much detail the *Fortune* 50 disclosed regarding diversity and their consideration of it in their 2012 proxy statements and, subsequently, their degree of compliance with the SEC's Proxy Disclosure Enhancements.

A. *Fortune* 50 Companies with No Mention of Diversity in Proxies

The following Table lists the roughly ten percent of *Fortune* 50 companies that completely omitted diversity from their 2012 proxies. These companies' proxies did not mention the words "diversity," "sex," "gender," "female," or "women."

TABLE 1: *FORTUNE* 50 COMPANIES WITH NO MENTION OF DIVERSITY IN PROXIES

2012 *Fortune* Rank	**Company**
29	AmerisourceBergen
17	Apple
10	Hewlett-Packard
36	Medco Health Solutions
34	MetLife
Percentage of *Fortune* 50 Companies in Sample = 10.4%	

58 *See infra* Tables 2 and 3.

B. *Fortune* 50 Companies Meeting Only One of the Three SEC Requirements

The Table below shows the 12.5% of companies whose proxies contained a single statement regarding *whether* they considered diversity in the board nomination process. Nearly all of the companies in Table 2 admitted to considering diversity. Berkshire Hathaway (*Fortune* Rank 7) was the only company in the *Fortune* 50 to explicitly reject the consideration of diversity in identifying nominees for director.[59] Because the companies in this group failed to elaborate further, they did not satisfy two of the three SEC requirements.

TABLE 2: *FORTUNE* 50 COMPANIES WITH SINGLE STATEMENTS STATING WHETHER DIVERSITY IS CONSIDERED (MET ONLY ONE OF THREE SEC REQUIREMENTS)

2012 *Fortune* Rank	**Company**
11	AT&T
7	Berkshire Hathaway
46	Caterpillar
4	Conoco Phillips
30	INTL FCStone
38	Target
Percentage of *Fortune* 50 Companies in Sample = 12.5%	

Single, brief statements noting that diversity is considered in the nominating process are unlikely to fully inform investors about the diversity of boards, and therefore do not comport with the purpose of the SEC's rule. INTL

59 *See* BERKSHIRE HATHAWAY INC., PROXY STATEMENT FOR ANNUAL MEETING OF SHAREHOLDERS 6 (2012) ("Berkshire does not have a policy regarding the consideration of diversity in identifying nominees for director. In identifying director nominees, the Governance Committee does not seek diversity, however defined. Instead, as previously discussed, the Governance Committee looks for individuals who have very high integrity, business savvy, an owner-oriented attitude and a deep genuine interest in the Company.").

FCStone's (*Fortune* Rank 30) short statement illustrates the nebulous nature of these types of disclosures. INTL FCStone notes that it "anticipate[s]" striving to increase diversity on its Board of Directors in the future—how far in the future and the degree of anticipation remain unclear.[60] Given how complex diversity is, single statements do not help shareholders assess the composition of a board. This is why the SEC also requires two follow-up disclosures once a company admits to considering diversity, as most companies do.

C. *Fortune* 50 Companies Meeting Only Two of the Three SEC Requirements

The following Table lists the companies whose disclosure statements met two of the three SEC requirements. These companies mentioned *whether* and *how* diversity was considered in the nomination process, but not how the *effectiveness* of this consideration was assessed. Nearly half of the *Fortune* 50 fell into this category.

TABLE 3: *FORTUNE* 50 COMPANIES WITH SINGLE STATEMENTS STATING WHETHER DIVERSITY IS CONSIDERED AND HOW IT IS CONSIDERED (MET ONLY TWO OF THREE SEC REQUIREMENTS)

2012 *Fortune* Rank	**Company**
33	AIG
28	Archer Daniels
13	Bank of America
3	Chevron

60 *See* INTL FCSTONE INC., NOTICE OF ANNUAL MEETING OF SHAREHOLDERS 13 (2012) ("In consideration of the growth of the Company and the expanded international scope of the Company, it is anticipated the Company will strive to increase the diversity on the Board of Directors in the future. To date, the Company has not engaged third parties to identify or evaluate potential nominees, although the Company reserves the right in the future to retain a third party search firm, if necessary.").

20	Citigroup
49	Comcast
1	ExxonMobil
9	Ford Motor
6	General Electric
5	General Motors
19	IBM
42	Johnson & Johnson
16	JPMorgan Chase
50	Kraft
23	Kroger
31	Marathon Petroleum
14	McKesson
37	Microsoft
41	PepsiCo[61]
40	Pfizer
12	Valero Energy
15	Verizon
32	Walgreen
Percentage of *Fortune* 50 Companies in Sample = 47.9%	

Several *Fortune* 50 companies attempted to meet the SEC's third requirement ("describe how this [diversity] policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its

[61] I chose to include PepsiCo among the companies that satisfied two of the three SEC requirements, because I treated the factors PepsiCo listed in its statement relating to discrimination as those factors it viewed as contributing to diversity. However, it might be argued that PepsiCo failed to meet the second SEC requirement, since it is debatable whether diversity was actually defined in its diversity statement. *See* PEPSICO., NOTICE OF 2012 ANNUAL MEETING OF SHAREHOLDERS 18 (2012) ("In addition, while not a formal policy, PepsiCo's director nomination processes call for the Nominating and Corporate Governance Committee, during the review and selection process, to seek diversity within the Board of Directors and adhere to the Company's philosophy of maintaining an environment free from discrimination based upon race, color, religion, national origin, sex, age, disability, sexual orientation, marital status or any unlawful factor.").

policy"[62]), but failed in their execution. Citigroup (*Fortune* Rank 20) exhibits one of the more detailed diversity statements of the *Fortune* 50. However, it does not fully meet the SEC's third requirement. Although it references evaluating the composition of its board in terms of diversity, it fails to explain how it performs this evaluation.[63] Kraft (*Fortune* Rank 50) is another company that produces a thorough diversity disclosure, yet does not meet all of the SEC's requirements, because it fails to mention how it determines whether its promotion of diversity is effective.[64] Likewise, though General Electric's ("GE") (*Fortune* Rank 6) proxy mentions that its nominating committee reviews the company's effectiveness in balancing diversity considerations, GE does not fully explain how this effectiveness is assessed.[65] Therefore, it is debatable whether GE meets the third requirement of the SEC's rule.

D. *Fortune* 50 Companies Meeting All Three of the SEC Requirements

The Table below showcases those companies whose disclosure statements fully comply with the SEC's requirements. These statements provide explanations of how diversity is considered in the nomination process, how diversity is understood, and how the effectiveness of a diversity policy is assessed.

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62 17 C.F.R. § 229.407(c)(2)(vi) (2013).

63 *See* CITIGROUP INC., NOTICE OF ANNUAL MEETING OF STOCKHOLDERS 8 (2012) ("The board believes that the current nominees reflect an appropriate diversity of gender, age, race, geographical background and experience but is committed to continuing to consider diversity issues in evaluating the composition of the board.").

64 *See infra* Appendix 3 for Kraft's diversity statement in its entirety.

65 *See* GEN. ELEC. CO., NOTICE OF 2012 ANNUAL MEETING AND PROXY STATEMENT 11 (2012) ("The committee's evaluation of director nominees takes into account their ability to contribute to the diversity of background and experience represented on the Board, and the committee reviews its effectiveness in balancing these considerations when assessing the composition of the Board.").

TABLE 4: *FORTUNE* 50 COMPANIES THAT MET ALL THREE SEC REQUIREMENTS

2012 *Fortune* Rank	Company
39	Boeing
21	Cardinal Health
24	Costco Wholesale
18	CVS Caremark
44	Dell
47	Dow Chemical
35	Home Depot
27	Procter & Gamble
22	UnitedHealth Group
48	United Technologies
2	Wal-Mart
26	Wells Fargo
Percentage of *Fortune* 50 Companies in Sample = 25%	

The thoroughness of the disclosures that meet all three SEC requirements varies significantly, ranging from statements that barely touch on the SEC requirements to those that extensively elaborate on diversity policies and evaluations of such policies, going above and beyond what the SEC requires. The majority of companies that meet all three SEC requirements fall into the former category. These include ExxonMobil, Cardinal Health, CVS, Home Depot, UnitedHealth Group, Boeing, and Wal-Mart. Cardinal Health's (*Fortune* Rank 21) and UnitedHealth Group's (*Fortune* Rank 22) concise diversity statements meet all three of the SEC requirements.[66] These statements show

[66] *See* CARDINAL HEALTH, INC., NOTICE OF ANNUAL MEETING OF SHAREHOLDERS TO BE HELD NOVEMBER 2, 2012 11 (2012) ("The Nominating and Governance Committee considers the foregoing criteria when assessing the operation and goals of the Board as a whole and seeks to achieve diversity of occupational and personal backgrounds on the Board, including race and gender diversity. The Nominating and Governance Committee assesses the effectiveness of this process by gathering data and discussing the diversity of the Board in the annual self-assessments of the Nominating and Governance Committee and the Board."). *See also*

that companies do not need elaborate disclosure statements to meet the SEC's demands. On the other hand, Dow Chemical, Procter & Gamble, and Wells Fargo each stand out for disclosure statements that exceed minimum requirements.[67]

Though companies may choose not to adopt such detailed statements, those looking to enhance their statement's utility to shareholders as well as its compliance with SEC requirements can adopt some ideas from two uniquely detailed diversity statements from Costco (*Fortune* Rank 24) and Dell (*Fortune* Rank 44). Costco provides one of the most detailed descriptions of how it assesses the effectiveness of its diversity policy. Every third year, according to Costco's Corporate Governance Guidelines, its "Nominating and Governance Committee oversees a self-assessment of the Board's performance . . . ."[68] Dell's proxy provides an elaborate "Director Qualifications Matrix." The matrix provides a concrete way of assessing each director candidate's potential leadership, financial, international, and diversity contributions. The matrix includes categories like gender, ethnicity, geographic diversity, CEO and CFO experience, technical industry expertise, academic expertise, and government expertise. Dell uses this matrix as part of

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UNITEDHEALTH GROUP INC., NOTICE OF ANNUAL MEETING OF SHAREHOLDERS 5 (2012) ("UnitedHealth Group embraces and encourages a culture of diversity and inclusion. We believe that valuing diversity makes good business sense and helps to ensure our future success. Diversity is included as one of the collective attributes in our directors' skills matrix. Our Board has not adopted a formal definition of diversity. Our Board assesses its overall effectiveness through an annual evaluation process. This evaluation includes, among other things, an assessment of the overall composition of the Board, including the diversity of its members.").

67 *See infra* Appendix 3 for examples of these detailed statements in their entirety.

68 COSTCO WHOLESALE CORP., NOTICE OF ANNUAL MEETING OF SHAREHOLDERS 7 (2011) ("The assessment seeks to identity [sic] specific areas, if any, in need of improvement or strengthening, including with respect to the diversity of our Board in terms of viewpoints, backgrounds and experiences.").

its process for "identifying and recommending new directors for the Board."[69]

E. *Fortune* 50 Companies Explicitly Denying the Existence of Any "Formal Diversity Policy"

The data gathered from the *Fortune* 50's 2012 proxies suggest that the withholding of detailed and useful information is systematic and seemingly uniform across many companies. The Table below lists the nearly one-third of *Fortune* 50 companies that deny having any "formal diversity policy."

TABLE 5: *FORTUNE* 50 COMPANIES THAT EXPLICITLY DENY EXISTENCE OF ANY "FORMAL DIVERSITY POLICY"

2012 *Fortune* Rank	**Company**
33	AIG
11	AT&T
13	Bank of America
46	Caterpillar
4	Conoco Phillips
18	CVS Caremark
44	Dell
5	General Motors
50	Kraft
14	McKesson
41	PepsiCo
27	Procter & Gamble
38	Target
22	UnitedHealth Group
26	WellsFargo
Percentage of *Fortune* 50 Companies in Sample = 31.3%	

"[A] simple one line disclosure stating that there is no fixed policy within the company regarding candidate

69 *See* DELL INC., NOTICE OF ANNUAL MEETING AND PROXY STATEMENT 2012 3–4 (2012).

diversity for the board of directors"[70] is one way companies attempt to bypass the diversity disclosure process altogether.[71] The words "formal" and "specific" reappear in proxies countless times to reject the existence of any kind of official diversity policy, as well as to attempt to justify the company's failure to elaborate further. However, the SEC's rule mandates that consideration of diversity, whether through a formal or informal diversity policy, must be expounded upon in a proxy statement. Two prime examples of the aforementioned phenomenon can be found in the 2012 proxies of AT&T (*Fortune* Rank 11) and Target (*Fortune* Rank 38). AT&T states that "[a]lthough the [Nominating] Committee does not have a formal diversity policy, it believes that diversity is an important factor in determining the composition of the Board."[72] Target's statement, though slightly longer, offers little more—"[t]he [Nominating Committee] does not have a specific policy regarding consideration of gender, ethnic or other diversity criteria in identifying candidates; however, the Board has had a longstanding commitment to, and practice of, maintaining diverse representation."[73] The widespread dismissal of formal diversity policies reveals companies' misunderstanding of the SEC's rule and highlights the need for further clarification on the rule's requirements.

F. *Fortune* 50 Companies Explicitly Mentioning "Gender" in Diversity Descriptions

When descriptions of diversity do appear in proxies, they are overwhelmingly broad and lackluster, usually ignoring any mention of gender in favor of more abstract conceptions such as diversity of "backgrounds," "perspectives," "skills,"

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70 Branson, *supra* note 7, at 813.

71 Nearly a third of *Fortune* 50 companies explicitly deny the existence of any "formal diversity policy." *See supra* Table 5.

72 AT&T INC., NOTICE OF ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT 7 (2012).

73 TARGET CORP., PROXY STATEMENT: ANNUAL MEETING OF SHAREHOLDERS 5 (2012).

and "experiences."[74] Only forty-four percent of *Fortune* 50 companies actually use the word "gender" in their proxies when describing how they consider diversity among board members. The following table lists those companies that explicitly mention "gender."

TABLE 6: *FORTUNE* 50 COMPANIES THAT EXPLICITLY MENTION "GENDER" IN DESCRIBING DIVERSITY

2012 *Fortune* Rank	**Company**
33	AIG
28	Archer Daniels
21	Cardinal Health
3	Chevron
20	Citigroup
49	Comcast
18	CVS Caremark
44	Dell
47	Dow Chemical
5	General Motors
35	Home Depot
42	Johnson & Johnson
16	J.P. Morgan Chase
23	Kroger
14	McKesson
37	Microsoft
40	Pfizer
27	Procter & Gamble
38	Target
12	Valero Energy
32	Walgreen
Percentage of *Fortune* 50 Companies in Sample = 43.8%	

IBM's (*Fortune* Rank 19) description of diversity in its proxy statement is typical, noting, "[i]n identifying potential director candidates, the Committee and the Board also focus

74 Black, *supra* note 3, at 15.

on ensuring that the Board reflects a diversity of experiences, backgrounds and individuals. . . . The Committee recommends candidates based on their business or professional experience, the diversity of their background, and their talents and perspectives."[75] Caterpillar's (*Fortune* Rank 46) diversity statement reads similarly to IBM's.[76] The same can be said for Ford's (*Fortune* Rank 9) statement, which mentions diversity of "experience in business, government, education and technology, and in areas that are relevant to the Company's global activities."[77] "[W]hile 'diversity' evokes universal acclaim in the abstract . . . it is an elusive and even dangerous subject to talk about concretely,"[78] which is part of the reason why companies have come to prefer including abstract statements in their proxies. By glossing over attributes like gender and race—the more contentious and concrete aspects of diversity—companies may feel they are shielding themselves from criticism and controversy.

G. Diversity Data Conclusions

Abstract diversity statements found in the majority of proxies are of little value to shareholders wishing to differentiate among directors when casting their votes. A mere mention of diversity without further definition leaves

75 INT'L BUS. MACHS. CORP., NOTICE OF 2012 ANNUAL MEETING AND PROXY STATEMENT 8, 13 (2012).

76 *See* CATERPILLAR INC., NOTICE OF ANNUAL MEETING OF STOCKHOLDERS OF CATERPILLAR INC. 9 (2012) ("Consistent with these criteria for potential director candidates and Caterpillar's Worldwide Code of Conduct, the Board values diversity of talents, skills, abilities and experiences and believes that the diversity that exists on the Board provides significant benefits to the Company. Although there is no specific diversity policy, the Governance Committee may also consider the diversity of its members and potential candidates in selecting new directors.").

77 FORD MOTOR CO., NOTICE OF 2012 ANNUAL MEETING OF SHAREHOLDERS AND PROXY STATEMENT 5 (2012).

78 Lissa L. Broome, John M. Conley & Kimberly D. Krawiec, *Dangerous Categories: Narratives of Corporate Board Diversity*, 89 N.C. L. REV. 759, 761 (2011).

shareholders no better off than if the company had not mentioned diversity at all, especially considering how abstract diversity can be. Likewise, a statement that a company has a "longstanding commitment"[79] to diversity or believes diversity is an "important factor"[80] is unhelpful without further explanation of how these beliefs are put into practice.

As the disclosure data discussed above show, the SEC's existing disclosure rule is not the problem. Rather, the issue is that companies are not abiding by the rule's requirements (and/or do not understand these requirements). Thus, creation of an entirely new rule is unnecessary. However, the SEC's lack of enforcement, which has permitted superficial adherence to its rule's requirements (and, in some cases, no adherence at all), must be addressed if it is to serve its purpose of informing shareholders and changing board composition.

The SEC recognizes the importance of compliance. In 2011, SEC Commissioner Luis Aguilar noted: "It is important that all companies—not just those with good stories to tell—comply with both prongs of the rule."[81] However, to accomplish this goal, the SEC must now halt the problematic trends that have emerged by meaningfully enforcing this rule. International efforts to pay greater attention to board diversity and diversity regulations can serve as a model for the SEC.

V. INTERNATIONAL APPROACHES TO BOARD DIVERSITY

Other nations have recently taken major steps to promote board diversity. In particular, gender quotas have become increasingly popular. These quotas reflect the drastic efforts

79 TARGET CORP., PROXY STATEMENT: ANNUAL MEETING OF SHAREHOLDERS 5 (2012).

80 AT&T and several other companies use this terminology in their proxies. *See* AT&T INC., NOTICE OF ANNUAL MEETING OF STOCKHOLDERS AND PROXY STATEMENT 7 (2012).

81 Aguilar, *supra* note 39.

some countries have adopted to address the lack of gender diversity on corporate boards and the growing impatience with male dominance of board seats.

A. The International Experiment with Gender Quotas

Beginning in 2003, Norway enacted the first corporate board gender-based quota law, requiring all publically-listed companies in Norway to meet a quota of having at least forty percent female directors by January 1, 2008.[82] Companies that did not comply with this requirement faced automatic corporate dissolution.[83] When the Norwegian government proposed its Corporate Board Quota Law ("CBQ"), it marketed the law as "an important step towards equality between the sexes, a fairer society and a more even distribution of power, and as an important factor in the creation of wealth in society."[84]

The European Union's ("EU") Justice Commissioner, Viviane Reding, has strongly urged that a quota measure apply to all EU member states.[85] The proposed law would require all of Europe's listed companies to meet a 40% quota by 2020, with sanctions for those who did not comply.[86] A number of EU member nations, including Spain, France, Italy, the Netherlands, and Belgium have already followed

82 *See* Branson, *supra* note 7, at 797; Darren Rosenblum, *Feminizing Capital: A Corporate Imperative*, 6 BERKELEY BUS. L.J. 55, 63 (2009) ("The exact percentage of gender representation required for each company varies proportionally to the size of the board, but boards with over ten members must maintain a forty percent ratio for each gender. The forty percent requirement does not apply to boards of nine or fewer members because it would practically result in a representational requirement of fifty percent.").

83 *See* Butler, *supra* note 7, at 87.

84 Rosenblum, *supra* note 82, at 66.

85 *See* James Kanter, *Europe to Study Quotas for Women on Boards*, N.Y. TIMES, Mar. 5, 2012, at B3.

86 Sanctions would include administrative fines and restrictions on receiving state aid and contracts. EU member states have resisted a quota law instituted at the European level, preferring to devise and implement diversity measures at the national level. *See Wachtell Report*, *supra* note 8, at 1.

Norway in imposing their own quota requirements.[87] Spain enacted statutes in 2007 requiring listed companies to comply with a 40% female director quota by 2016.[88] In early 2011, France also adopted a 40% quota, to be implemented in phases—requiring 20% female representation by 2014 and 40% by 2017.[89] Board nominations from 2017 onward that do not comply with the French law will be found invalid.[90] Italy passed its own law establishing a quota system in 2011, which requires that the boards of public companies be at least 30% female by 2015.[91] A multi-tier system of sanctions enforces the Italian quota. Violators are first warned by the Italian Securities and Exchange Commission ("CONSOB"). If the company fails to comply within four months of the warning, CONSOB is empowered to fine the company, as well as to strip the board of its power and legal mandate if the quota is not met within three additional months.[92] Belgium's similar legislation, adopted in June 2011, requires that one-third of a board be female and gives Belgian companies six years to meet this target.[93] Failure to comply results in the stripping of directors' advantages, financial and otherwise, that flow from board membership.[94] In Sweden, the threat of strict government-imposed gender

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87 *See* Branson, *supra* note 7, at 794. Other countries, like the United Kingdom, have not gone so far as setting specific gender quotas, but have instead opted for suggested "diversity targets," whereby companies can voluntarily work toward achieving a certain desirable percentage of female representation. A recent report by the British government suggested that British companies strive to achieve twenty-five percent female board representation by 2015. *See* Hazen & Broome, *supra* note 7, at 42.

88 Branson, *supra* note 7, at 803. The imposition of a 40% quota in Spain was especially drastic, considering Spain had only 5% female representation on corporate boards at the time the quota law was adopted. *See id.*

89 *See* Hazen & Broome, *supra* note 7, at 42.

90 Neil Hodge, *Women on Board,* 8 IN-HOUSE PERSP. 21, 23 (2012).

91 *See* Mildred Woryk, *Women in Corporate Governance: A Cinderella Story*, 37 U. DAYTON L. REV. 21, 26 (2011).

92 *See* Hodge, *supra* note 90, at 24.

93 *See id.*

94 *See id.*

diversity requirements looms if companies fail to voluntarily allocate 25% of board seats to females.[95] Several non-EU member states, including Iceland, Israel, Switzerland, and Malaysia, have also recently adopted quota laws.[96]

B. The Verdict on Gender Quotas

Drastic international approaches have led to greater diversity on boards. Norway's harsh penalty for noncompliance (automatic corporate dissolution) led to all public companies adhering to the 40% quota.[97] As of 2013, women make up 40.9% of board members in Norway.[98] This means that the number of female directors of publicly held Norwegian companies rose over thirty percentage points in just eight years.[99] Women represented 28.2% of board seats among Swedish companies in 2011, surpassing the approximate governmental target of 25%.[100] From 2004 to 2010, the percentage of women on boards rose from 7% to 12.5% in France, 3% to 12% in Belgium, and 3.5% to 12% in Spain.[101] As of 2012, French corporations already had 24% female directorship, moving these companies past the 20% objective for 2014, two years early.[102]

Forty percent appears to be the magic number abroad, painting the United States' mere 16.6% female board representation among *Fortune* 500 companies as even more

95 *See* Butler, *supra* note 7, at 87.

96 *See* Branson, *supra* note 7, at 794.

97 *See* Rosenblum, *supra* note 82, at 57.

98 *See Board Seats Held by Women, By Country*, CATALYST, http://www.catalyst.org/knowledge/board-seats-held-women-country (last visited Dec. 2, 2013).

99 *See Wachtell Report*, *supra* note 8, at 3. Women held 6.8% of board seats at the time of the Norwegian quota law's implementation. *See* Branson, *supra* note 7, at 798.

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

101 Branson, *supra* note 7, at 800.

102 *Id.* at 804.

striking.[103] Strict gender quotas and harsh penalties for non-compliance, however, are not the proper approach for the United States. First, they gloss over the root of the problem and thus oversimplify its solution, providing only a band-aid approach. Second, in addition to marking a drastic divergence from current U.S. approaches (therefore making them likely to draw significant criticism and uneven results), they may actually end up hurting women rather than helping them. In scrambling to adhere to a quick-fix quota approach, companies rush simply to name a woman to a directorship and may avoid thoroughly researching a woman's background and qualifications. This uninformed scramble results in an onslaught of "token" directors[104] and may misrepresent the females who acquire directorships as undeserving of their positions and under-qualified to hold them.

The stigma accompanying quotas may also foster backlash against women and threaten to inhibit the impact of females on corporate boards—portraying women as incapable of reaching high-level positions on their own and subsequently, unfit to lead. In some instances, these assumptions may prove accurate, as the women appointed to meet the quotas may be blindly selected and lack the requisite experience for leading America's largest corporations. A study of the aftermath of the 2003 Norwegian quota law illustrates that the quota resulted in younger and less experienced boards, higher leverage, lower cash holdings, and deterioration in operating performance.[105]

When the companies that these women are selected to lead sustain harm, the companies become hampered with an onerous burden and loss of control. Displeased with the

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103 *See* CATALYST 2012 STUDY, *supra* note 17.

104 In an attempt to adhere to Norway's forty percent quota, Norwegian companies named one woman to eighteen corporate boards of directors. Branson, *supra* note 100, at 8–9; *see also supra* discussion of the "tokenism" phenomenon in Part III of this Note.

105 *See* 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, 141 (2012).

imposition of these draconian rules, companies are likely to adopt quotas begrudgingly or to find ways around them. This may include downsizing their boards of directors so that they can nominate fewer women and still fall within the quota.[106] Resentment stemming from the imposition of a quota can also lead to board dysfunction, which in turn can hinder corporate performance. However, despite the drawbacks of drastic international approaches, the United States can still draw lessons from other countries and interpret the imposition of quotas as evidence that achieving greater board diversity in a meaningful way is relevant. Seeing the progress of other nations in this area may serve as an added incentive for the SEC to increase enforcement of the diversity regulations it has in place. Given that these disclosure requirements are the only direct legal mechanism the United States has to address board diversity, it is especially important they serve their function.

VI. A HANDS-ON APPROACH: THE SEC'S ROLE IN INCREASING FEMALE REPRESENTATION ON CORPORATE BOARDS

The mere passage of time has neither significantly narrowed the disparity between the percentage of women in the workforce and their overall board membership nor eliminated the barriers that prevent women from rising to corporate boards. The SEC has recognized and publicly lamented the current lack of diversity on the boards of the corporations it regulates. In May 2011, SEC Commissioner Luis Aguilar noted, "[e]ven though our nation has grown more diverse, the corporate boardroom is proving resistant to change. I find this status quo unacceptable and question why at a time when there are more qualified diverse board candidates, we have less diverse board members."[107]

106 *See* Branson, *supra* note 7, at 805.

107 Luis A. Aguilar, Comm'r, SEC, Statement by SEC Commissioner: The Abysmal Lack of Diversity in Corporate Boardrooms Is Growing Worse (May 2, 2011), *available at* http://www.sec.gov/news/speech/2011/spch050211laa.htm.

A. From Words to Action: A Change for the SEC

This Note's review of current disclosures shows that although the SEC has voiced its concern and criticism of the deficiencies in submitted diversity disclosures, its speeches and statements have not improved the quality of company disclosures. To make diversity disclosures more effective and increase compliance, the SEC must: (1) signal what must be changed in order to fix the current problem and (2) ensure that those who possess the power to enact change (i.e., the companies themselves) heed this message and become aware of the future consequences of failing to act. Ignorance can no longer be used as an excuse to justify inadequate disclosures.

The current proxy disclosure rule is well-drafted and should be kept in place. Its main strength is that it does not unnecessarily interfere with a corporation's determination of who should assume positions on its board. However, this has also proven to be its major weakness, when left unchecked. Companies have abused the rule's flexibility, as evidenced by their failure to fully comply with its distinct requirements. Because implementation of the rule has proven ineffective thus far, the SEC must now alter corporate behavior by limiting companies' discretion in deciding what information to disclose surrounding the nomination of directors. Additional SEC guidance on the meaning of "diversity," as well as what constitutes adequate disclosure under the existing regulation, is needed. The SEC must also better police the implementation of its regulation to ensure companies are complying.

B. A Solution via a Five-Part Staff Report

The requisite feedback, incentives, guidance, and consequences for non-compliance should come in the form of a detailed SEC staff report distributed to all public companies—an approach less drastic than the creation of a new regulatory rule, but with the potential to bring about meaningful change.[108] In addition to avoiding the tediousness of drafting and enacting a new rule—a process likely to be time-consuming and, in light of recent court decisions, not guaranteed to be successful[109]—an SEC staff report also avoids the drawbacks of mandated quotas and forced timeframes. This approach considers companies' individual circumstances, allowing them to maintain a sense of control through the process of change. Those who believe that this advisory approach does not go far enough might advocate that the SEC provide individualized comments to companies regarding their specific disclosure deficiencies. However, this would be time-consuming and inefficient. It is also unnecessary: the present deficiencies are not unique,

108 A similar approach enjoyed much success in Australia. The current disclosure law in Australia, effective January 1, 2012, is very similar to the American law, in that it encourages public corporations to establish diversity policies, explain these policies, and include within them ways of assessing measurable objectives for achieving gender diversity. However, Australia diverges from the United States in requiring public corporations to comply with these requirements or explain why they did not. This divergence has made a significant difference. From 2004 to 2010, much like the situation in the United States, the percentage of women on Australian corporate boards remained virtually stuck at 8.5%, which motivated the Australian government to pay increased attention to the issue of female representation and implement the aforementioned law and its corresponding penalty for non-compliance. Additionally, in 2010, the Australian Institute of Company Directors ("AICD") instituted a hands-on mentoring and sponsorship program, which focused on placing women on public company boards and training women to contribute as board members. After a single year, the percentage of women on boards rose from 8.5% to 11.2%; by August 2011, this number reached 13%. This figure is now fast-approaching 14%—concrete evidence of the positive changes that can result from a combination of (1) increased attention on the dearth of females on corporate boards; (2) companies receiving meaningful guidance; and (3) the clear threat of penalties. *See* Branson, *supra* note 7, at 800–01, 807–09. Accordingly, the SEC must adopt a more hands-on approach.

109 *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–49 (D.C. Cir. 2011). In light of the 2011 *Business Roundtable* decision, any new SEC rule would have to survive a thorough cost-benefit analysis in order to withstand judicial review and avoid being deemed "arbitrary and capricious"—and, thus, invalid.

but in fact found in the majority of proxy statements submitted to the SEC. Thus, the feedback provided to one company would likely prove both valuable and relevant to others.

1. Singling Out Inadequate Disclosures

The SEC staff report must inform companies that the vast majority of current diversity disclosures fail to meet the Proxy Disclosure Enhancements' requirements. The SEC must emphasize the insufficiency of the disclosures it has received since the rule's enactment in 2010. In doing so, it should provide samples of superficial diversity statements taken from companies' most recent proxies. Companies that have fallen far short of meeting SEC requirements should be singled out in this report. Broadcasting their non-compliance to peer corporations—who might also be their competitors—might spur these companies to alter their behavior to avoid embarrassment and maintain a competitive edge.

The SEC must also remind companies that its rule requires disclosure as to whether a company has a formal *or informal* diversity policy.[110] The content of current disclosures shows that companies have either forgotten or have chosen to ignore that they are required to report further details for both formal and informal policies.[111] It is crucial that companies understand how the rule's mandatory components intersect with one another. Empirical evidence suggests that this understanding is currently lacking. While nearly half of *Fortune* 50 companies admit to considering diversity in the nominating process, only one-quarter of these companies explain how they assess the effectiveness of their diversity policy.[112] Considering that, under the rule, "any consideration of diversity in board nominations reflects a *policy* to consider diversity," and the implementation and assessment of any diversity policy must be discussed, a

110 *See* Aguilar, *supra* note 39.

111 *See supra* Table 5.

112 *See supra* Tables 3 and 4.

quarter of *Fortune* 50 companies are demonstrating that they do not understand this aspect of the rule.[113] This is only one of many facets of the rule that appears to be misunderstood.

If a company has a policy related to diversity, investors may still wish to know about it, even if it is informal. A shareholder is concerned with the substance and effectiveness of a policy, not its formality. To disregard informal policies is to ignore the reasons why the SEC created this rule—to address investors' interest in board diversity and assist them in making investment and voting decisions.[114]

2. Outlining a Comprehensive Disclosure Statement

The SEC staff report should also outline what a comprehensive disclosure in alignment with the rule must include. Because "[t]he existing regulation does not require actual facts about directors or director nominees . . . there is a reliance on the company to disclose more than the required amount of information to meet the subjective spirit of the rule."[115] It is unrealistic and ineffective to rely on companies to disclose more than they are required to without instructing these companies about what they should be disclosing. Without more detailed guidance, the SEC will have no choice but to make "case-by-case requests for more specific diversity information,"[116] or rely on the proxy comment process. This approach is both inefficient and unlikely to provide meaningful change on a broad scale, given its individualized nature. Companies must be provided with uniform examples of corporations that have successfully instituted diversity policies. Exemplary

113 Lissa Lamkin Broome and Thomas Hazen have urged the SEC to issue interpretive guidance on this specific aspect of the rule. *See* Hazen & Broome, *supra* note 7, at 74.

114 *See* Aguilar, *supra* note 39.

115 Butler, *supra* note 7, at 72–73.

116 *Id.* at 73.

diversity disclosures should be shared in their entirety, so that companies may use them as models in drafting their own disclosures. By making these policies public, there can be no excuse for failure to craft disclosures in compliance with the SEC's regulation.

The SEC should also remain mindful of the wants and needs of shareholders—which motivated the creation of the Proxy Disclosure Enhancements—when describing what disclosures must include.[117] Annual proxy statements should facilitate shareholders' assessment of board candidates by including biographies of each candidate that clearly delineate how a board member might add diversity to the board. Such information should include mentions of gender, as well as clear descriptions of corporate board nominees' backgrounds and experiences. Kraft (*Fortune* Rank 50), Citigroup (*Fortune* Rank 20), Wells Fargo (*Fortune* Rank 26), and Procter & Gamble (*Fortune* Rank 27) stand out for their inclusion of detailed written descriptions of nominees in their proxies—descriptions which include clear board figures on gender, race, age, and more.[118] For example, Citigroup's proxy notes that "[t]he candidates nominated for election at Citi's 2012 annual meeting exemplify that diversity: three nominees are women (25%) and three nominees (25%)—including the chief executive officer—are Asian, African-American or Hispanic."[119] Clear descriptions like this should be included in the SEC's staff report as models for other companies in fashioning their own disclosures.

Procter & Gamble and Wells Fargo have arguably the most detailed and useful diversity disclosures of the *Fortune* 50—disclosures that abide by all requirements of the SEC rule, and then some.[120] These thorough statements should be reproduced in their entirety in the SEC staff report as

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[117] *See* Black, *supra* note 3, at 13–14.

[118] See *infra* Appendix 3 for examples of language taken from these proxies.

[119] CITIGROUP INC., NOTICE OF ANNUAL MEETING OF STOCKHOLDERS 8 (2012).

[120] *See infra* Appendix 3 for Procter & Gamble's and Wells Fargo's diversity statements in their entirety.

models for other companies. Wells Fargo demonstrates a proper understanding of the SEC's rule. While it admits that it does not have a "separate policy specifically governing diversity," it explains not only how it considers and defines diversity among nominees for director, but also how it monitors the effectiveness of its practice of considering diversity.[121] Procter & Gamble similarly denies establishment of "specific goals with respect to diversity," but still explains its definition of diversity and how it assesses the effectiveness of its policy.[122] The language used in both Procter & Gamble's and Wells Fargo's proxy statements mirrors the exact wording of the SEC rule, indicating that the companies are aware of the rule's three distinct requirements. These companies also demonstrate their understanding that the rule applies whether or not a company has a formal diversity policy. It is no coincidence that Wells Fargo and Procter & Gamble boast more women on their boards (five each) than any other company in the *Fortune* 50.[123] This statistic illustrates a positive correlation between ensuring thorough diversity disclosures that comply with the SEC's rule and increased female representation on corporate boards. Therefore, the existing rule can be successful in achieving what it is intended to accomplish without further amendment: it merely needs to be enforced.

3. Elaborating on What is Meant by "Diversity"

In its staff report, the SEC must restrict companies' ability to define diversity "in ways that they consider appropriate,"[124] and instead elaborate further on what the SEC means by "diversity." In doing so, it should clarify the

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121 WELLS FARGO & CO., NOTICE OF ANNUAL MEETING OF STOCKHOLDERS 44 (2012).

122 PROCTER & GAMBLE CO., NOTICE OF ANNUAL MEETING OF SHAREHOLDERS 6 (2012).

123 *See infra* Appendix 1.

124 Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,344 (Dec. 23, 2009) (codified at 17 C.F.R. pt. 229) (noting that "companies may define diversity in various ways, reflecting different perspectives").

rationale behind its promulgation of a revised disclosure rule: to aid shareholders in their assessment of a nominee's fit for a particular company.[125] Though the SEC need not go so far as to explicitly define diversity (a task that would be unnecessarily complex and controversial), it must highlight the types of diversity that companies should emphasize—notably, gender. Disclosing the ways in which gender factors into the director nominating process would be useful to shareholders in assessing company leadership. One might argue that companies are clearly aware that gender falls under the SEC's understanding of diversity. However, whether companies are aware or not, they are not acting on this awareness, as the SEC intended them to do.[126]

Though catering to an abstract definition of diversity (e.g., diversity of experiences, viewpoints, etc.) may be a worthwhile goal, including such a broad definition in its guidance to companies undermines the usefulness of the SEC rule. Because the rule suggests that women are not integral to a diverse board as long as there is a diversity of experiences or viewpoints, it limits a company's need to increase the number of women on its board. Consequently, a company may be able to call its board "diverse" according to these abstract standards and feel little incentive to further diversify its board when, in reality, its board lacks more traditional diversity (i.e., female representation).[127]

By leaving the definition of diversity open to individual company interpretation and offering little guidance to streamline corporate behavior, the SEC's rule has failed to change the status quo of gender diversity on boards or provide meaningful information to shareholders. As the topic of diversity has become increasingly relevant over time, it is not surprising that its definition has also evolved. While diversity should never be oversimplified, a more clear-cut

125 *See* Proxy Disclosure Enhancements, 74 Fed. Reg. at 68, 342.

126 Less than half of 2012 *Fortune* 50 proxy statements mention gender when discussing the attention paid to diversity in choosing board nominees. *See supra* Table 6.

127 *See* Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 875 (2011).

understanding of diversity is an essential antecedent to addressing the current lack of diversity. Unless the SEC clearly states that increasing female board membership is a concrete and admirable means of achieving a diverse board and complying with its rule, companies are likely to remain "innocently" in the dark. With a more restricted "definition" of diversity in hand, companies can instruct search firms and nominating committees on exactly what they are seeking for their boards. Consequently, search firms and nominating committees will in turn be more likely to look outside the predominantly male CEO box to find board candidates.

4. Providing Incentives for Change

The SEC staff report should also include more concrete incentives for adopting and/or enhancing a company's diversity policy. As of now, the SEC has failed to concretely identify incentives for particular companies. This failure is detrimental to the rule's success, since incentives go hand-in-hand with behavior change.

Companies have found that the consequences of admitting that they do not have a board diversity policy are not severe enough to motivate them to adopt such a policy.[128] In the post-financial crisis world, many companies do not consider diversity to be a "business priority."[129] In addition, the adoption of a diversity policy creates more work for a corporation, and therefore may limit its desire "to formalize [its] diversity efforts."[130] Given these factors, it is especially important for the SEC to create incentives and educate companies on the benefits of changing their board composition. Clear incentives would make companies more likely to align their behavior to comply with the SEC rule.

In framing the presentation of incentives, the SEC should pay special attention to shareholders and the ways in which they are affected by and care about board diversity, given the

128 More than thirty percent of *Fortune* 50 companies explicitly deny the existence of any "formal diversity policy." *See supra* Table 5.

129 *See* Black, *supra* note 3, at 16.

130 Fairfax, *supra* note 127, at 876.

special duty that companies owe to their shareholders. When the SEC first proposed amendments to the proxy disclosure rule in July 2009, it "cited the increased desire among shareholders of publicly held companies to make informed voting and investment decisions as a motive behind these proposed amendments."[131] In its Final Release in December 2009, the SEC "agree[d] that it is useful for investors to understand how the board considers and addresses diversity, as well as the board's assessment of the implementation of its diversity policy, if any."[132] Incentives should thus specifically highlight the direct correlation between women on boards and corporate performance/shareholder satisfaction.[133]

Leaving the current disclosure requirements as they are—without incentivizing companies to change—will stifle the information that shareholders and other market participants receive about diversity in boardrooms. In order for shareholders to thoroughly evaluate management and return a ballot that reflects meaningful, rather than mindless, choices regarding the composition of the board, diversity disclosures must be thorough. Investors both deserve and desire detailed information about board diversity.[134] To this

131 Hazen & Broome, *supra* note 7, at 50. *See also* Proxy Disclosure and Solicitation Enhancements, 74 Fed. Reg. 35,076, 35,076 (July 17, 2009) (to be codified at 17 C.F.R. pt. 229). ("We have decided to re-examine our disclosure rules to provide investors with important and relevant information upon which to base their proxy voting and investment decisions.").

132 Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343 (Dec. 23, 2009) (codified at 17 C.F.R. pt. 229).

133 Lisa Fairfax has highlighted studies showing that gender diversity within upper-level management may facilitate better understanding of diverse employees, generating policies that enhance their performance and overall productivity. Fairfax also calls attention to the "market rationale," which argues that corporations "employ[ing] diverse individuals will reach a broader range of customers and clients, thereby increasing their sales performance and ultimate profitability." *See* Fairfax, *supra* note 8, at 820.

134 The SEC has found that ninety percent of respondents (investors and other market participants controlling over three trillion dollars in assets) expressed support for gender- and race-based board disclosure. *See* Butler, *supra* note 7, at 82.

end, the SEC staff report should include empirical findings illustrating shareholders' desire for more diverse boards governing the corporations in which they invest. These findings will provide additional incentive for companies to adopt stronger diversity policies, as those that do will increase their legitimacy among shareholders that have articulated their appreciation of diversity.[135]

5. Threatening Penalties for Non-Compliance

As outlined in Part V of this Note, penalties instituted abroad for companies that fail to comply with international quota laws have motivated companies to adhere to them. These penalties partly explain why other countries' board diversity figures have greatly surpassed those of U.S. companies in recent years. Harsh penalties, such as Norway's automatic dissolution of a company that fails to comply with its quota, are not recommended for application in this country. The international experience, however, illustrates the value of clear consequences and penalties when attempting to alter corporate behavior. Actually imposing penalties against companies that fail to meet the SEC's requirements would require further amendment to the existing SEC regulation or the adoption of a new rule—both options that are disfavored. Still, the SEC must begin by introducing the threat of penalties for non-compliance with its diversity disclosure requirements, while instituting such penalties only as a last resort.

VII. CONCLUSION

As the Norwegian government stated in assessing its gender quota, "[i]t is important to make use of all the human resources in our country, not just half of it."[136] Glass boardrooms around the country are impeding women from

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135 *See* Skaggs et al., *supra* note 23, at 937.

136 Rosenblum, *supra* note 82, at 66 (quoting the Norwegian Ministry of Children and Equality).

sitting at the table and contributing meaningfully to the United States' most powerful corporations. The statistics are eye-opening. Robust international efforts are making the United States' passive approach appear even more inadequate. However, with SEC regulations already in place, what is needed now is closer supervision and clearer instruction to ensure compliance. The SEC possesses an arsenal of tools at its disposal to address the failure of its proxy disclosure enhancements. Current empirical evidence revealing the superficiality of diversity disclosures and the scarcity of female directors should sufficiently alert the SEC to the importance of effectively implementing these tools. Ultimately, the approach proposed in this Note to increase compliance with the SEC's rule requires a partnership between the government and corporations. The former must set forth clear guidelines for mandatory disclosure and provide appropriate guidance and encouragement in following its rules, while the latter must cooperate in this disclosure and, ideally, do so with the understanding that such action will provide more robust and representative corporate governing bodies.

APPENDIX 1: *FORTUNE* 50 COMPANIES WITH THE LARGEST NUMBER OF FEMALE DIRECTORS

2012 *Fortune* Rank	Company	Total Board Seats Held by Women	Total Board Seats	Percentage of Female Directors
5	General Motors	4	14	28.6%
6	General Electric	4	16	25.0%
10	Hewlett-Packard	3	11	27.3%
14	McKesson	3	9	33.3%
15	Verizon	3	11	27.3%
18	CVS Caremark	3	10	30.0%
21	Cardinal Health	3	12	25.0%
26	Wells Fargo	5	15	33.3%
27	Procter & Gamble	5	11	45.5%
34	MetLife	4	13	30.8%
38	Target	4	11	36.4%
40	Pfizer	4	14	28.6%
41	PepsiCo	4	12	33.3%
47	Dow Chemical	2	10	20.0%
50	Kraft Foods	3	11	27.3%

APPENDIX 2: *FORTUNE* 50 COMPANIES WITH THE SMALLEST NUMBER OF FEMALE DIRECTORS

2012 *Fortune* Rank	**Company**	**Total Board Seats Held by Women**	**Total Board Seats**	**Percentage of Female Directors**
1	Exxon Mobil	1	11	9.1%
3	Chevron	1	11	9.1%
12	Valero Energy	1	12	8.3%
17	Apple	1	8	12.5%
30	INTL FCStone	0	11	0.0%
31	Marathon Petroleum	1	10	10.0%
46	Caterpillar	1	16	6.3%
49	Comcast	1	11	9.1%

APPENDIX 3: SAMPLES OF EXEMPLARY DIVERSITY STATEMENTS

Dow Chemical Diversity Statement[137]
There are certain minimum qualifications for Board membership that Director candidates should possess, including strong values and discipline, high ethical standards, a commitment to full participation on the Board and its Committees, relevant career experience, and a commitment to ethnic, racial and gender diversity. The Governance Committee has adopted guidelines to be used in evaluating candidates for Board membership in order to ensure a diverse and highly qualified Board of Directors. In addition to the characteristics mentioned above, the guidelines provide that candidates should possess individual skills, experience and demonstrated abilities that help meet the current needs of the Board and provide for diversity of membership, such as experience or expertise in some of the following areas: the chemical industry, global business, science and technology, finance and/or economics, corporate governance, public affairs, government affairs, and experience as chief executive officer, chief operating officer or chief financial officer of a major company. Other factors that are considered include independence of thought, willingness to comply with Director stock ownership guidelines, meeting applicable Director independence standards (where independence is desired) and absence of conflicts of interest. The Governance Committee may modify the minimum qualifications and evaluation guidelines from time to time as it deems appropriate. These guidelines for Director qualifications are included in Dow's Corporate Governance Guidelines, available at *www.DowGovernance.com*.

137 DOW CHEM. CO., NOTICE OF THE ANNUAL MEETING OF STOCKHOLDERS TO BE HELD ON THURSDAY, MAY 10, 2012 at 10:00 A.M. EDT 15 (2012).

The guidelines for Director qualifications provide that a commitment to diversity is a consideration in the identification and nomination of Director candidates. The Governance Committee and the full Board implement and assess the effectiveness of these guidelines and the commitment to diversity by referring to these guidelines in the review and discussion of Board candidates when assessing the composition of the Board and by including questions regarding the diversity of the Board membership in the Board's annual self-evaluations.

The Governance Committee and the Board believe that the qualifications, skills and attributes set forth generally above for all Directors and more specifically below for each of the Directors, support the conclusion that these individuals are qualified to serve as Directors of the Company and collectively possess a variety of skills, professional experience, and diversity of backgrounds allowing them to effectively oversee the Company's business. As noted below, the Directors have a diverse combination of the following background and qualifications: leadership experience (including current and former chief executive officer, chief financial officer and other senior executive management positions) at major domestic and foreign companies with global operations in a variety of relevant fields and industries; experience on other public company boards (including chair positions); board or other significant experience with academic, research and philanthropic institutions and trade and industry organizations; and prior government or public policy experience. The Governance Committee and Board have determined that all of the Directors nominated for election meet the personal and professional qualifications identified in this section and the list below highlights several of these key attributes as they apply to the individual Directors that support the conclusion that these individuals are highly qualified to serve on the Company's Board of Directors.

Kraft Diversity Statement[138]
The Guidelines provide that the Committee will consider factors that promote diversity of views and experience when evaluating the suitability of individuals for nomination. While we have no formal written policy regarding what specific factors would create a diversity of views and experience, the Committee recognizes diversity's significant benefit to the Board and Kraft Foods, as varying viewpoints contribute to a more informed and effective decision-making process. The Committee seeks broad experience in relevant industries, professions and areas of expertise important to our operations, including global business, manufacturing, marketing, science, finance and accounting, academia, law and government. The Committee also recognizes the importance of having directors with significant international experiences and backgrounds given our global, multicultural business. As shown below, our director nominees have varied experiences, backgrounds and personal characteristics, which ensure that the Board will have a diversity of viewpoints and enable it to effectively represent our business, shareholders, employees, business partners and consumers: • 7 director nominees are current or former presidents or chief executive officers of large, complex enterprises; • 7 director nominees currently hold or held key positions at major consumer products or retail companies, including food and beverage companies; • 3 director nominees have significant financial and accounting backgrounds; • 2 director nominees are current or former professors at leading institutions;

138 KRAFT FOODS INC., NOTICE OF 2012 ANNUAL MEETING OF SHAREHOLDERS 3–4 (2012).

- 3 director nominees are women, including the Chairman;
- 3 director nominees are living and working or have lived and worked outside the United States;
- 1 director nominee is African-American; and
- the age range for the director nominees is 42 – 71.

Citigroup Diversity Statement[139]
Diversity is among the critical factors that the nomination, governance and public affairs committee considers when evaluating the composition of the board. For a company like Citi, which operates in over 100 countries around the globe, diversity includes race, ethnicity and gender as well as the diversity of the communities and geographies in which Citi operates. Included in the qualifications for directors listed in the company's Corporate Governance Guidelines is "whether the candidate has special skills, expertise and background that would complement the attributes of the existing directors, taking into consideration the diverse communities and geographies in which the company operates." Citi's board is committed to ensuring that it comprises individuals whose backgrounds reflect the diversity represented by our employees, customers and stakeholders. The candidates nominated for election at Citi's 2012 annual meeting exemplify that diversity: three nominees are women (25%) and three nominees (25%)—including the chief executive officer—are Asian, African-American or Hispanic. In addition, each director candidate contributes to the board's overall diversity by providing a variety of perspectives, personal and professional experiences and backgrounds, as well as other characteristics, such as global and international business

[139] CITIGROUP INC., NOTICE OF ANNUAL MEETING OF STOCKHOLDERS 8 (2012).

experience. The board believes that the current nominees reflect an appropriate diversity of gender, age, race, geographical background and experience but is committed to continuing to consider diversity issues in evaluating the composition of the board.

Wells Fargo Diversity Statement[140]
Although the GNC does not have a separate policy specifically governing diversity, as described in the Corporate Governance Guidelines the GNC will consider, in identifying first-time candidates or nominees for director, or in evaluating individuals recommended by stockholders, the current composition of the Board in light of the diverse communities and geographies we serve and the interplay of the candidate's or nominee's experience, education, skills, background, gender, race, ethnicity and other qualities and attributes with those of the other Board members. The GNC incorporates this broad view of diversity into its director nomination process by taking into account all of the above factors when evaluating and recommending director nominees to serve on the Board to ensure that the Board's composition as a whole appropriately reflects the current and anticipated needs of the Board and the Company. In implementing its practice of considering diversity, the GNC may place more emphasis on attracting or retaining director nominees with certain specific skills or experience, such as industry, regulatory, public policy or financial expertise, depending on the circumstances and the composition of the Board at the time. Gender, race and ethnic diversity also have been, and will continue to be, a priority for the GNC and the Board in its director nomination process because the GNC and the Board believe that it is essential that the composition of the

140 WELLS FARGO & CO., NOTICE OF ANNUAL MEETING OF STOCKHOLDERS 44–45 (2012).

Board appropriately reflects the diversity of the Company's team members and the customers and communities they serve. The GNC believes that it has been successful in its past efforts to increase gender, race, and ethnic diversity on the Board, and of the 15 director nominees for election at the 2012 annual meeting, nine nominees (60 percent) are women, Asian, African-American and/or Hispanic.

The GNC and the Board believe that the 15 nominees bring to the Board a variety of different backgrounds, skills, professional and industry experience, and other personal qualities, attributes, and viewpoints that contribute to the overall diversity of the Board. The GNC and the Board will continue to monitor the effectiveness of its practice of considering diversity through assessing the results of any new director search efforts, such as those recently involving Ms. Chao and Mr. Peña, and the GNC's and Board's self-evaluation process in which directors discuss and evaluate the composition and functioning of the Board and its committees.

Procter & Gamble Diversity Statement[141]

[T]he evaluation of Director nominees by the Governance & Public Responsibility Committee takes into account diversity, including with respect to international background, age, gender, and race. . . .

The Board considers diversity to be an important criterion in the selection and nomination of candidates for Director. As a global company, the Board seeks Directors with international background and global experience, among other factors. This is reflected in the Board's Corporate Governance Guidelines, which set forth the minimum qualifications for Board members and note that

141 PROCTER & GAMBLE CO., NOTICE OF ANNUAL MEETING OF SHAREHOLDERS 5–6 (2012).

the Board "seeks to achieve a mix of Board members that represents a diversity of background and experience, including with respect to age, gender, international background, race, and specialized experience."

Although the Board does not establish specific goals with respect to diversity, the Board's overall diversity is a significant consideration in the Director nomination process. For this year's election, the Board has nominated 11 individuals; all are incumbent nominees who currently bring tremendous diversity to the Board. Each nominee is a strategic thinker and has varying, specialized experience in areas that are relevant to the Company and its businesses. Moreover, their collective experience covers a wide range of countries, geographies, and industries, including consumer products, technology, financial services, media, agriculture, aerospace, and health care, as well as roles in consulting and government. These 11 Director nominees range in age from 51 to 66, and five of these 11 Directors, or 45% of our current Board, are women; two are African-American; and one is Mexican. The Board views this diversity as a clear strength.

The Board assesses the effectiveness of its diversity policy every year as part of the nomination process for the annual election of Directors by the Company's shareholders. The Board's Governance & Public Responsibility Committee, responsible for making recommendations for Director nominations to the full Board, reviews the Director nominees (including shareholder nominees) and ascertains whether, as a whole, the group meets the Board's policy in this regard. Having reviewed the collective background and experience of the 11 nominees, the Board has concluded that they provide significant diversity and clearly meet the Board's policy.