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FROM THE EXCEPTION TO THE RULE:  
A REALISTIC ANALYSIS AND APPROACH FOR ADVANCING  
BOARD DIVERSITY

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## ABSTRACT

With companies increasingly promoting diversity and inclusion measures, how are they ensuring diversity and inclusion within their own leadership teams? The landscape for gender diversity within corporate boards is bleak and the landscape for racial diversity is worse. Throw in the intersection of race and gender and the picture becomes even bleaker.

In order to combat this corporate governance issue, the U.S. and other countries have primarily focused on three regulatory approaches: (1) the quota system, (2) the disclosure method, and (3) the comply-or-explain approach. This paper addresses each approach (internationally and domestically) to implement greater board diversity for U.S. public corporations, while taking into account the unique corporate government of U.S. companies. Ultimately, this paper proffers a holistic, multi-factorial approach of both regulatory and non-regulatory solutions that will likely have the best chance to begin establishing long-lasting change.

## INTRODUCTION

An attorney appointed as the second female judge to the United States Supreme Court once said, “Women belong in all places where decisions are being made.”<sup>1</sup> Justice Ruth Bader Ginsburg continued, “[i]t shouldn’t be that women are the exception.”<sup>2</sup> When reviewing board demographics of public companies in the U.S. and worldwide, women are the exception.<sup>3</sup> In 2018, the percentage of women on corporate boards of Fortune 100 companies peaked at 25%; of that 25%, only 5.8% were women of color.<sup>4</sup>

The landscape for racial and ethnic board diversity is equally bleak. The same 2018 study shows that only 19.5% of the board seats on Fortune 100 companies were filled by directors not identifying as white.<sup>5</sup> Out of all of the

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

<sup>2</sup> *Id.*

<sup>3</sup> See AARON A. DHIR, *CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY* 4–5 (Cambridge Univ. Press 2015); see also DELOITTE & ALL. FOR BD. DIVERSITY, *MISSING PIECES REPORT: THE 2018 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS* 5 (2019), <https://corpgov.law.harvard.edu/2019/02/05/missing-pieces-report-the-2018-board-diversity-census-of-women-and-minorities-on-fortune-500-boards/>.

<sup>4</sup> DELOITTE & ALL. FOR BD. DIVERSITY, *supra* note 3, at 10.

<sup>5</sup> *Id.* at 11.

board seats on Fortune 100 companies, only 3.8% of members identified as Asian/Pacific Islander, 4.4% as Latinx, and 11.1% as Black.<sup>6</sup>

These board seat percentages are not reflective of the current racial and ethnic demographic in the U.S.<sup>7</sup> One year after the study, the U.S. Census found that over 6% of the population is Asian/Pacific Islander, 18.5% is Latinx, and 13.4% is Black.<sup>8</sup>

There are differing schools of thought as to why representation on boards matters.<sup>9</sup> When viewing the purpose of corporations through the lens of profit maximization for shareholders, scholars naturally focus on net profit increases.<sup>10</sup> When viewing the purpose of corporations as social vehicles for the betterment of society, scholars focus on the moral and ethical grounds for expanding diversity.<sup>11</sup> While the reasoning for diversity may diverge, the results lead to the same conclusion: board diversity is necessary and steps must be taken for its expansion.<sup>12</sup>

Having a more diverse board brings corporate opportunities for more effectively understanding client pools, expanding the net for talent, incorporating new ideas and innovations, and increasing returns on sales.<sup>13</sup> Socially, board diversity propels the “goals of democratizing power and equitable distributing access to opportunities.”<sup>14</sup>

It should not be overlooked that board diversity has expanded significantly over the previous decades and many companies have acknowledged the importance of increasing board diversity.<sup>15</sup> However, efforts in the U.S. have stagnated, and without seriously considering avenues of advancement the spark of momentum may extinguish.<sup>16</sup> And, in considering these avenues, it

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<sup>6</sup> *Id.*

<sup>7</sup> See *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (last visited Nov. 1, 2020).

<sup>8</sup> See *id.*

<sup>9</sup> Compare Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 859 (2011), with Erica Hersh, *Why Diversity Matters: Women on Boards of Directors*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (July 21, 2016), <https://www.hsph.harvard.edu/ecpe/why-diversity-matters-women-on-boards-of-directors/>.

<sup>10</sup> See Fairfax, *supra* note 9, at 874.

<sup>11</sup> *Id.* at 879.

<sup>12</sup> *Id.* at 884; see also Hersh, *supra* note 9.

<sup>13</sup> Hersh, *supra* note 9; Yaron G. Nili, *Beyond the Numbers: Substantive Gender Diversity in Boardroom*, 94 IND. L.J. 146, 147–48 (2019).

<sup>14</sup> DHIR, *supra* note 3, at 5.

<sup>15</sup> Nili, *supra* note 13.

<sup>16</sup> *Id.* at 149–50.

is significant to not only consider board diversity through the lens of gender but through the lens of race as well.<sup>17</sup>

This paper will explore differing approaches (internationally and domestically) to implement greater board diversity for U.S. public corporations. Part I provides an overview of three existing regulatory approaches: quota, disclosure, and comply-or-explain. Part II will examine the limitations of importing European regulation models for advancing board diversity. Specifically, it will touch on the differing corporate governance environments, third-party actor influences, and demographic variations. Finally, Part III will offer comprehensive solutions to enhance boardroom diversity through both regulatory and non-regulatory means of inclusion.

In examining the unique corporate environment of U.S. companies, this paper proffers that a holistic, multi-factorial approach of both regulatory and non-regulatory solutions will likely have the best chance to establish long-lasting change. To increase boardroom diversity through regulatory means, the U.S. (through Congress and the SEC) should lean toward the hybrid “comply-or-explain” approach and reform disclosure-based regulations. Non-regulatory measures through corporate initiatives and private third-party actors will buttress regulations and lay a foundation for enduring change.

## I. Overview of Existing Systems

In acknowledging the need for board diversity advancement, the U.S. and other countries have primarily focused on three regulatory approaches: the quota system, the disclosure method, and the comply-or-explain approach.<sup>18</sup> The following sections will address each approach in further detail and examine current implementations abroad and domestically.

### A. *Overview of the Quota System*

The quota system, as its name implies, is the institution of a law or laws requiring companies to meet a certain quota of diverse board members.<sup>19</sup> The most notable and successful implementation of a quota system is in Norway.<sup>20</sup> Corporate governance expert, Aaron A. Dhir, details in his comprehensive book, *Challenging Boardroom Homogeneity*:

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<sup>17</sup> See generally DELOITTE & ALL. FOR BD. DIVERSITY, *supra* note 3, at 13 (noting the number of seats gained or lost by African American women and Caucasian women from 2016 to 2018).

<sup>18</sup> See DHIR, *supra* note 3, at 17, 19; Francis Lin, *Comply or explain*, INQUIRER BUS. (Apr. 13, 2017), <https://business.inquirer.net/227752/comply-or-explain>.

<sup>19</sup> DHIR, *supra* note 3, at 72.

<sup>20</sup> *Id.* at 17.

With its combination of mandated gender balance and severe sanctions for non-compliance in the form of forced corporate dissolution, the Norwegian quota model represents the boldest assault on traditional market sovereignty. If we measure progress by the rapid increase in sheer numbers of women on boards, Norway unquestionably leads all other jurisdictions.<sup>21</sup>

Norway's quota laws have been in effect since 2006 and have significantly increased the number of women on boards of public companies.<sup>22</sup> Norway's quota approach was fairly aggressive and required women to "hold at least forty percent of board seats in publicly listed firms with at least nine directors."<sup>23</sup> If companies do not comply with the quota they must legally dissolve.<sup>24</sup> Unsurprisingly, each company in Norway has since complied with the regulation.<sup>25</sup> Though, it should be noted that some companies decided to go private in response to the law.<sup>26</sup>

The quota system may present an issue known as the "golden skirt."<sup>27</sup> In Norway, the "golden skirt" problem was feared to arise from the same pool of women being stretched too thin to fill multiple board seats.<sup>28</sup> However, in practice, this concern has not held much weight, with Norwegian men actually being more likely to sit on multiple boards and women being more academically qualified for the positions.<sup>29</sup>

Overall, Norway's quota system has been viewed as a success for efficient board diversity expansion.<sup>30</sup> Now, 40.5% of corporate board members in Norway are women, which is the highest rate of women board members in any country.<sup>31</sup> With such a high success rate, a handful of other countries

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<sup>21</sup> *Id.*

<sup>22</sup> See Amanda K. Packel, *Government Intervention into Board Composition: Gender Quotas in Norway and Diversity Disclosures in the U.S.*, 21 STAN. J. L. BUS. & FIN. 192, 194, 205 (2016) (reviewing AARON A. DHIR, *CHALLENGING BOARDROOM HOMOGENEITY: CORPORATE LAW, GOVERNANCE, AND DIVERSITY* (Cambridge Univ. Press 2015)).

<sup>23</sup> *Id.* at 194.

<sup>24</sup> *Id.* at 205.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Konstantina Govotsos, *Gender Diversity in Corporate Boards in France: An Analysis* (May 2017) (unpublished B.A. thesis, University of Pennsylvania) (on file with The Wharton School, University of Pennsylvania).

<sup>28</sup> *See id.*

<sup>29</sup> H.J., *The Spread of Gender Quotas for Company Boards*, THE ECONOMIST (Mar. 25, 2014), <https://www.economist.com/the-economist-explains/2014/03/25/the-spread-of-gender-quotas-for-company-boards>.

<sup>30</sup> *See id.*

<sup>31</sup> Taylor Fox-Smith, *Corporate Governance and Statecraft: The Gender Nexus of Policy*, CENTRE FOR FEMINIST FOREIGN POL'Y (Mar. 17, 2018), <https://centreforfeministforeignpolicy.org/journal/2018/3/12/corporate-governance-and-statecraft-the-gender-nexus-of-policy>; Albertine d'Hoop-Azar et al., *Gender Parity on Boards Around the World*, HARV. L. SCH. F. ON CORPORATE GOVERNANCE (Jan. 5, 2017), <https://corpgov.law.harvard.edu/2017/01/05/gender-parity-on-boards-around-the-world/>.

(primarily European) have followed Norway's lead.<sup>32</sup> One U.S. state has attempted to pioneer the quota system.<sup>33</sup>

While less bold, the California legislature passed Senate Bill 826 in 2018 which instituted a mandatory quota of one female director on boards of public corporations with executive offices in California.<sup>34</sup> After one year, boards must have at least two female directors on boards with five or fewer total directors or at least three female directors on boards with more than five total directors.<sup>35</sup> As a result of non-compliance, fines are instituted to the companies ranging from \$100,000 the first year to \$300,000 the second year for each seat violation.<sup>36</sup>

In the two years since this bill was passed, nearly half of new board appointments for Russell 3000 companies (with executive offices in California) have been women.<sup>37</sup> This is higher than the national average of 31%.<sup>38</sup> However, 43 companies officially have not met this quota and an additional 300 companies haven't disclosed whether or not they have met the quota.<sup>39</sup> It is too soon to tell how this bill will be enforced, but it has already been challenged in court twice.<sup>40</sup>

The first lawsuit against this bill was brought by a shareholder of a Californian corporation arguing that the regulation "infringed on men's rights."<sup>41</sup> The case, *Creighton Meland, Jr. v. Alex Padilla*, alleged constitutional violations under the 14th amendment equal protection clause.<sup>42</sup> The shareholder's challenge was dismissed for lack of standing due to no personal harm incurred.<sup>43</sup>

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<sup>32</sup> H.J., *supra* note 29.

<sup>33</sup> Howard Dicker et al., *Mandated Gender Diversity for California Boards*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 18, 2018), <https://corpgov.law.harvard.edu/2018/10/18/mandated-gender-diversity-for-california-boards/> (noting California's 2018 legislation requiring that certain corporations have a minimum number of women on their board of directors).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Jeff Green, *At Least 43 California Companies Failed to Add Women to Corporate Boards, Despite New Law*, TIME (Mar. 3, 2020), <https://time.com/5794271/california-women-corporate-boards/>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Sara Libby, *Sacramento Report: Governor, Legislature Grapple with Pandemic Roles*, VOICES OF SAN DIEGO (Apr. 24, 2020), <https://www.voiceofsandiego.org/topics/government/govern-legislature-pandemic-roles/>.

<sup>42</sup> William Ross, *Another Lawsuit Seeks to Halt SB 826 – California's Gender Quota Law for Boards of Directors*, CAL. LAWS. ASS'N, <https://calawyers.org/business-law/another-lawsuit-seeks-to-halt-sb-826-californias-gender-quota-law-for-boards-of-directors/> (last visited Nov. 6, 2020).

<sup>43</sup> Libby, *supra* note 41.

Currently, one more lawsuit exists challenging this bill.<sup>44</sup> The lawsuit, brought by the Judicial Watch on behalf of Californian taxpayers, names California's Secretary of State as the defendant for illegally spending taxpayer funds.<sup>45</sup> The plaintiff cites the equal protection clause for reason of illegal expenditure.<sup>46</sup> The court found that the plaintiff did, in fact, have standing but, as of the publishing of this note, the case has not yet been decided.<sup>47</sup>

California lawmakers have continued to lead the way through the passage of progressive bill AB 979 in late August of 2020.<sup>48</sup> The bill would require public companies with headquarters in California to appoint at least one person who self-identifies as "Black, African American, Hispanic, Latino, Asian, Pacific Islander, Native American, Native Hawaiian, or Alaska Native, or who self-identifies as gay, lesbian, bisexual, or transgender" by the year 2021.<sup>49</sup> One month later the governor signed the bill enacting it into California law.<sup>50</sup>

The bill will likely face similar equal protection challenges in court. The same plaintiff who filed suit against California's gender diversity law has already filed suit against this newly enacted law.<sup>51</sup> The court has not yet ruled if the plaintiff has standing.<sup>52</sup>

Other U.S. states, such as Hawaii, New Jersey, and Washington, are beginning to follow California's lead through the introduction of similar bills.<sup>53</sup> It is likely, though, that these states will stand by while California's law is challenged.<sup>54</sup>

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<sup>44</sup> See Keith Bishop & Allen Matkins, *Secretary of State Must Answer Legal Challenge to Female Director Quota Law*, JDSUPRA (June 11, 2020), <https://www.jdsupra.com/legalnews/secretary-of-state-must-answer-legal-29388/>.

<sup>45</sup> *Id.*

<sup>46</sup> Christopher J. Riley, *An Equal Protection Defense of SB 826*, CAL. L. REV. BLOG (July 2020), <http://www.californialawreview.org/equal-protection-defense-sb826/>.

<sup>47</sup> See Bishop & Matkins, *supra* note 44.

<sup>48</sup> See *California's Proposed AB 979 Requires Public Company Boards to Include Racial and Ethnic Diversity*, FENWICK (July 23, 2020), <https://www.fenwick.com/insights/publications/californias-proposed-ab-979-requires-public-company-boards-to-include-racial-and-ethnic-diversity>.

<sup>49</sup> *Id.*

<sup>50</sup> Michael Thomas & Amy Frenzen, *AB 979 Requires California-Based Publicly Held Corporations to Diversify Their Boards of Directors*, NAT'L L. REV. (Oct. 1, 2020) <https://www.natlawreview.com/article/ab-979-requires-california-based-publicly-held-corporations-to-diversify-their>.

<sup>51</sup> Karen Abesamis et al., *California Expands Diversity Requirements for Public Company Boards*, JDSUPRA (Oct. 8, 2020), <https://www.jdsupra.com/legalnews/california-expands-diversity-83521/>.

<sup>52</sup> *Id.*

<sup>53</sup> Green, *supra* note 37.

<sup>54</sup> *Id.*



### B. Overview of Disclosure

Board diversity disclosure regulations have been viewed as less invasive but also potentially less effective at expanding board diversity.<sup>55</sup> Disclosure proffers benefits such as “internal self-reflections on the part of the moving party that can prompt behavioral change.”<sup>56</sup> Moreover, disclosure regulations may bring important social issues to the forefront of corporate discussions.<sup>57</sup> Experts also claim that disclosure rules work through “public shaming.”<sup>58</sup> In actuality, regulating entities often broaden disclosure definitions or underenforce board diversity rules which decrease the rule’s potency.<sup>59</sup>

In 2010, the SEC promulgated its first board diversity disclosure rule.<sup>60</sup> The rule requires companies to state “whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director.”<sup>61</sup> Notably, the standards for considering diversity were not defined.<sup>62</sup> As a result, “[c]ompanies’ disclosures on board diversity in reporting under our current requirements have generally been vague and have changed little since the rule was adopted.”<sup>63</sup> There has not been a significant change in company disclosure and companies may define diversity so broadly as to include having lived abroad.<sup>64</sup>

Recently, the SEC issued new guidance for the 2010 disclosure rule interpretation.<sup>65</sup> The new guidance promotes disclosure of self-reported diversity characteristics in both proxy statements and SEC filings.<sup>66</sup> The guidance was likely updated due to criticism of its previous lack of specificity.<sup>67</sup>

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<sup>55</sup> See DHIR, *supra* note 3, at 17–18.

<sup>56</sup> *Id.* at 20.

<sup>57</sup> See *id.*

<sup>58</sup> Teresa Johnson, *Disclosure will not solve the lack of diversity on boards*, FIN. TIMES (June 8, 2019), <https://www.ft.com/content/a7b76cd4-8850-11e9-b861-54ee436f9768>.

<sup>59</sup> See *id.*

<sup>60</sup> Packel, *supra* note 22, at 221.

<sup>61</sup> 17 C.F.R. § 229.407(c)(vi) (2019).

<sup>62</sup> See *id.*

<sup>63</sup> Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, Keynote Address, International Corporate Governance Network Annual Conference: Focusing the Lens of Disclosure on Board Diversity, Non-GAAP and Sustainability (June 27, 2016).

<sup>64</sup> *Id.*

<sup>65</sup> Ben Maiden, *SEC encourages board diversity disclosure*, CORP. SECRETARY (Feb. 19, 2019), <https://www.corporatesecretary.com/articles/compliance/31513/sec-encourages-board-diversity-disclosure>.

<sup>66</sup> *Developments on Public Company Disclosures on Board and Executive Diversity*, GIBSON DUNN (Feb. 8, 2019), <https://www.gibsondunn.com/developments-on-public-company-disclosures-on-board-and-executive-diversity/>.

<sup>67</sup> *Id.*

In other developments, the House of Representatives passed a bill that would require the disclosure of board diversity for public companies and require the SEC to report on diversity trends and produce a best practice report.<sup>68</sup> A disclosure bill passed by the House may face fewer viable lawsuits than a quota bill because of existing securities regulations.<sup>69</sup> The House has the authority to regulate through securities laws “which are focused on disclosure and investor protection.”<sup>70</sup>

This bill “would require public companies to publish diversity data on the racial, ethnic, and gender composition of their board of directors, nominees for the board of directors and executive officers each year.”<sup>71</sup> The bill ultimately died in the Senate, but has since been reintroduced in February of 2021.<sup>72</sup>

Illinois has led U.S. state efforts for disclosure laws.<sup>73</sup> In 2019, Illinois enacted a disclosure requirement for companies headquartered in the state to include diversity information (self-reported gender and race) in yearly reports.<sup>74</sup> With the information gathered, the University of Illinois will write a report and rate representation of the companies.<sup>75</sup> The self-identification definitions are much more specific in comparison to the SEC’s disclosure standards which do not include any definition as to what constitutes diversity.<sup>76</sup>

### C. Overview of Comply-Or-Explain

The United Kingdom has employed a hybrid approach called “comply-or-explain” that may be the most reasonable model for the U.S. to follow.<sup>77</sup> Comply-or-explain regimes require companies to comply with the rule (e.g., board diversity standards) or explain the reasoning for not complying.<sup>78</sup>

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<sup>68</sup> Lori Tripoli, *House passes bill requiring disclosure of diversity on corporate boards*, COMPLIANCE WEEK (Nov. 20, 2019), <https://www.complianceweek.com/regulatory-policy/house-passes-bill-requiring-disclosure-of-diversity-on-corporate-boards/28084.article>.

<sup>69</sup> Packel, *supra* note 22, at 219–20.

<sup>70</sup> *Id.*

<sup>71</sup> David Brand, *House passes Meeks’ corporate diversity bill*, QUEENS DAILY EAGLE (Nov. 20, 2019), <https://queenseagle.com/all/2019/11/20/house-passes-meeks-corporate-diversity-bill>.

<sup>72</sup> *H.R. 5084: Improving Corporate Governance Through Diversity Act of 2019*, GOVTRACK, <https://www.govtrack.us/congress/bills/116/hr5084> (last visited Nov. 12, 2020).

<sup>73</sup> See Anne Sherry, *Illinois’ new board diversity law favors disclosure over quotas*, WOLTERS KLUWER (Aug. 27, 2019), <https://rus.wolterskluwer.com/news/securities-regulation-daily/illinois-new-board-diversity-law-favors-disclosure-over-quotas/92989/>.

<sup>74</sup> *See id.*

<sup>75</sup> *See id.*

<sup>76</sup> *See id.*

<sup>77</sup> See Marco Becht, *Comply or just explain?*, in *COMPLY OR EXPLAIN: 20TH ANNIVERSARY OF THE UK CORPORATE GOVERNANCE CODE 11* (Fin. Reporting Council 2012).

<sup>78</sup> *See id.* at 12.

As Dhir states, “[r]equiring companies to either comply with a rule that they consider sociodemographic diversity in composing their boards (and follow other prescribed diversity-related practices) or explain their decision not to do so would nudge corporations with a bit more force than the pure disclosure model currently in effect.”<sup>79</sup>

## II. Limitations of Importing European Models for U.S. Corporate Governance

The goal of this paper is not to disparage the quota or disclosure systems. In the simplest terms, if those systems work, they work. The goal of this paper is to determine their shortcomings and propose alternative solutions that might have a more realistic chance of making a significant change in the U.S. corporate governance sphere. With that purpose in mind, this paper will proceed to lay out the potential issues of applying European-modeled regimes, most notably the quota system.

It is critical to distinguish between European corporate culture and U.S. corporate culture to determine its plausibility and effectivity in the United States. Three main factors that legislatures have failed to consider when using Norway and other European countries as a model are: (1) governance history, (2) the role of third-party actors (e.g., proxy advisors and institutional investors), and (3) demographics.<sup>80</sup>

### A. Governance History and Corporate Culture

In translating corporate governance structures, it is critical to consider the regulatory and cultural structures in which they function.<sup>81</sup> Legislation and regulation are not imported in a vacuum.<sup>82</sup> In essence, “organizations are embedded in institutional environments,” and therefore, “organizational practices tend to be responses to or larger reflections of the regulations and structures of the larger environment.”<sup>83</sup>

First, in the U.S., corporate governance is more focused on the rights of shareholders, whereas European governance traditionally takes a more

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<sup>79</sup> DHIR, *supra* note 3, at 230.

<sup>80</sup> See, e.g., Siri Terjesen et al., *Legislating a Woman’s Seat on the Board: Institutional Factors Driving Gender Quotas for Boards of Directors*, 128 J. BUS. ETHICS 233, 244 (2015) (describing institutional factors influencing corporate governance gender quota legislation); see also Michelle Celarier, *The Mysterious Private Company Controlling Corporate America*, INSTITUTIONAL INV. (Jan. 29, 2018), <https://www.institutionalinvestor.com/article/b16pv90bf0z8/the-mysterious-private-companycontrolling-corporate-america> (describing the power of proxy advisors in American corporate governance).

<sup>81</sup> DHIR, *supra* note 3, at 172; Terjesen et al., *supra* note 80, at 237.

<sup>82</sup> See DHIR, *supra* note 3, at 172; see also Terjesen et al., *supra* note 80, at 237.

<sup>83</sup> Terjesen et al., *supra* note 80, at 237.

holistic approach, considering all stakeholders.<sup>84</sup> For example, Germany employs a system known as codetermination that requires employees to be on their boards to promote harmony between labor and shareholders.<sup>85</sup> Moreover, European culture is generally more receptive to regulation than culture in the U.S.<sup>86</sup> Specifically in relation to Nordic corporate governance, regulations are often based on a strong comply-or-explain concept, with a focus on transparency.<sup>87</sup>

Second, a country's previous institution and adoption of social welfare policies influence how board diversity legislation, such as the quota system, will be met and implemented.<sup>88</sup> Analysts have concluded, "countries with greater family policies, especially as related to maternity benefits, are more likely to be aligned with the logic of gender equality and therefore, more likely to initiate quota legislation and regulation policies to provide opportunities for women to serve on boards, given their overall country cultural and societal values."<sup>89</sup>

For example, the U.S. does not mandate companies to provide parental leave.<sup>90</sup> In comparison, many European countries offer extensive leave for new parents.<sup>91</sup> One notable country, Norway, offers over a year of paid parental leave.<sup>92</sup> Countries that have previously embraced social policies are traditionally more receptive to social policies, such as a quota system to promote board diversity.<sup>93</sup>

European countries, including Norway, are more left-centric and have enacted more social welfare and family-based legislation.<sup>94</sup> The shift to a quota-based approach is less shocking to the system which may be why more progressive states, such as California, have tried to introduce similar legislation.<sup>95</sup>

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<sup>84</sup> Heidi Hylton Meier & Natalie C. Meier, *Corporate Governance: An Examination of U.S. and European Models*, 9 CORP. BD.: ROLE, DUTIES & COMPOSITION 6, 7–8 (2013).

<sup>85</sup> *Id.* at 9.

<sup>86</sup> Ari Shapiro, *Why Europe Is Willing to Regulate Tech More Than the U.S.*, NPR (Jan. 2, 2018), <https://www.npr.org/2018/01/02/575168206/why-europe-is-willing-to-regulate-tech-more-than-the-u-s>.

<sup>87</sup> Terjesen et al., *supra* note 80, at 245.

<sup>88</sup> *Id.* at 237–38.

<sup>89</sup> *Id.* at 238.

<sup>90</sup> Gretchen Livingston & Deja Thomas, *Among 41 countries, only U.S. lacks paid parental leave*, PEW RSCH. CTR. (Dec. 16, 2019), <https://www.pewresearch.org/fact-tank/2019/12/16/u-s-lacks-mandated-paid-parental-leave/>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> See Nili, *supra* note 13, at 193.

<sup>94</sup> See generally Livingston & Thomas, *supra* note 90 (noting that Norway has enacted family based legislation to allow maternal and paternal family leave).

<sup>95</sup> See DELOITTE & ALL. FOR BD. DIVERSITY, *supra* note 3, at 29.

Third, the political sphere in which these institutions exist influence the adoption and implementation of board diversity policies.<sup>96</sup> Legal issues are bound to arise with a quota system; California's law has already been challenged constitutionally.<sup>97</sup> Due to the backdrop of U.S. corporate governance and institutional norms, the quota system may not be the most realistic or popular option for change.<sup>98</sup>

The quota system is not popular among U.S. directors. Over 80% of directors (including some female executives) do not support quota legislation.<sup>99</sup> Some women oppose quotas in fear that their qualifications and experience will be overlooked and that they will instead be viewed as "tokens" to check a box.<sup>100</sup> And without a regulatory backdrop for social welfare, new female board members may face resentment.<sup>101</sup>

### *B. Role of Third-Party Actors*

Another factor many legislators do not consider when translating European corporate governance policies is the prevalent role of proxy advisors and institutional investors in U.S.-based public companies.<sup>102</sup> The U.S. has a rich tradition of proxy advisory and other third-party actors such as institutional investors, especially in relation to board seat recommendations.<sup>103</sup>

The role that proxy advisory firms such as Institutional Shareholder Services, Inc. (ISS) and Glass, Lewis & Co, Inc. (Glass Lewis) have cannot be overstated when determining board seats.<sup>104</sup> For example, one journalist observed, "[a] recommendation from ISS does not guarantee an activist win, but it's virtually impossible for an activist to win without the recommendation of ISS."<sup>105</sup>

In a cyclical relationship, proxy advisors have a considerable influence on institutional investor votes.<sup>106</sup> The role of proxy advisory firms is to "provide

<sup>96</sup> See generally Nili, *supra* note 13, at 193–94 (noting that quotas are an unlikely avenue in the United States because they would likely face legal hurdles).

<sup>97</sup> See Green, *supra* note 37.

<sup>98</sup> See Packel, *supra* note 22, at 194.

<sup>99</sup> Danielle Paquette, *Why American women hate board quotas*, WASH. POST (Feb. 9, 2015), <https://www.washingtonpost.com/news/on-leadership/wp/2015/02/09/why-american-women-hate-board-quotas/>.

<sup>100</sup> *Id.*

<sup>101</sup> Tyler Winters & Madhuri Jacobs-Sharma, *Gender Diversity on Corporate Boards: The Competing Perspectives in the U.S. and the EU*, PENN LAW: LEGAL SCHOLARSHIP REPOSITORY 35–37 (2016).

<sup>102</sup> See Celarier, *supra* note 80.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> David F. Larcker et al., *The Big Thumb on the Scale: An Overview of the Proxy Advisory Industry*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 14, 2018),

institutional investors with research, data, and recommendations on management and shareholder proxy proposals that are voted on at a company's annual meeting."<sup>107</sup>

The influence of proxy advisors is significant because institutional investors have significant shareholder voting power.<sup>108</sup> In fact, a recent study by Broadridge and PricewaterhouseCoopers found that institutional investors "own 70% of outstanding shares of publicly traded corporations in the United States" with "significantly higher voting participation rates."<sup>109</sup>

On the other hand, proxy advisory "has only recently evolved in European markets, and there is no empirical data on the presence or the role of these institutions other than anecdotal evidence."<sup>110</sup> The role of institutional investors across Europe varies more greatly than that of proxy advisors.<sup>111</sup> Norway has a lower rate of "capital raised from institutional investors" than the rest of Europe.<sup>112</sup> On the other hand, the United Kingdom is the closest country to the United States in terms of institutional investor holdings.<sup>113</sup>

A major flaw in comparative governance relating to board diversity initiatives is not considering the influence of these actors. The significance of these third-party actors is that they present an avenue for board diversity promotion that may be preferable and more effective than quota-legislation for corporations.<sup>114</sup> For example, importing the quota model from Norway may be less effective in the U.S. compared to importing the comply-or-explain system used by the United Kingdom due to similarities in the role of third-party actors.

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<https://corpgov.law.harvard.edu/2018/06/14/the-big-thumb-on-the-scale-an-overview-of-the-proxy-advisory-industry/>.

<sup>107</sup> *Proxy Advisory Firms*, CTR. ON EXEC. COMP., <https://execcomp.org/Issues/Issue/proxy-advisory-firms> (last visited Nov. 12, 2020).

<sup>108</sup> Larcker, *supra* note 106.

<sup>109</sup> *Id.*

<sup>110</sup> Nico Lehmann & Joerg-Markus Hitz, *Empirical evidence on the role of proxy advisors in European capital markets 2* (Göttingen Univ., Working Paper, 2016).

<sup>111</sup> See Francesco Fancello & Nadia Linciano, *Institutional Investors' Shareholdings in Large European Non-Financial Listed Companies*, OXFORD BUS. L. BLOG (Mar. 26, 2018), <https://www.law.ox.ac.uk/business-law-blog/blog/2018/03/institutional-investors-shareholdings-large-european-non-financial>.

<sup>112</sup> Sigurd Opedal & Wikborg Rein, *Private equity in Norway: market and regulatory overview*, PRACTICAL LAW (Apr. 1, 2013), [https://content.next.westlaw.com/9-500-9675?\\_lrTS=20200804152553847&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://content.next.westlaw.com/9-500-9675?_lrTS=20200804152553847&transitionType=Default&contextData=(sc.Default)&firstPage=true).

<sup>113</sup> Compare Fancello & Linciano, *supra* note 111, with Larcker et al., *supra* note 106.

<sup>114</sup> See generally Darren Rosenblum & Yaron Nili, *Board Diversity by Term Limits?*, 71 ALA. L. REV. 211, 225, 256 (discussing institutional investors' methods to pressure companies and industries to become more diverse, in part relying on natural competition and efforts to avoid formal regulations).

### C. Demographics

While it is important to discuss the significance of having a diverse board based on gender, it is also important to ensure that women of all races are being given the same opportunities for advancement. The number of women on boards is low, but the number of non-white women is staggeringly low.<sup>115</sup> Finding an effective means of increasing board diversity means ensuring that women of all color are given equal opportunities.

The demographics between Norway and the U.S. are different.<sup>116</sup> Norway is mainly Nordic in ethnicity, establishing more homogeneity.<sup>117</sup> Only 8.5% of the population is not Nordic or not European.<sup>118</sup> In contrast, the U.S. demographics are 72.4% White, 12.6% Black, 4.8% Asian, 0.9% Amerindian and Alaska native, 0.2% native Hawaiian and Pacific Islander, 6.2% “other,” and 2.9% two or more races.<sup>119</sup> The U.S. is significantly more diverse than Norway so more challenges are presented to ensure full representation.<sup>120</sup> In the U.S., board diversity should be defined to include not only women, as the Norway quota did, but also be inclusive of race.

While most countries have complex relationships with minority groups, it is not a secret that the U.S. has a particularly troubled history.<sup>121</sup> In a law review article on race and economic implications the author astutely states, “the U.S. has some disturbing aspects of its past that are inextricably woven into its identity but are largely absent from its conscious memory (e.g., slavery).”<sup>122</sup>

In finding a meaningful system to increase board diversity, it is critical to consider the historical impacts of racial disparity and the diverse culture that creates the United States. Modeling a board diversity system based upon a

<sup>115</sup> See DELOITTE & ALL. FOR BD. DIVERSITY, *supra* note 3 (finding in 2018 that *Fortune* 100 board seats were composed of 25% women and 5.8% minority women).

<sup>116</sup> Compare *The World Factbook: United States*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/geos/us.html> (last visited Oct. 27, 2020) (noting that the U.S. population is 332 million people, 72.4% of which is white, and no single denomination of religion as a majority), with Jan Christensen, *Norway*, BRITANNICA (Oct. 23, 2020), <https://www.britannica.com/place/Norway> (noting that the Norwegian population is 5.4 million people, 83.2% of which are ethnic Norwegian, and more than 80% of the population belonging to the Evangelical Lutheran national church).

<sup>117</sup> Christensen, *supra* note 116.

<sup>118</sup> *Norway Population 2020 (Live)*, WORLD POPULATION REV., <https://worldpopulationreview.com/countries/norway-population> (last visited Nov. 12, 2020).

<sup>119</sup> *United States*, MIGRATION POL’Y INST., <https://www.migrationpolicy.org/country-resource/united-states> (last visited Nov. 1, 2020).

<sup>120</sup> Compare *Norway Population 2020 (Live)*, *supra* note 118, with *United States*, *supra* note 119.

<sup>121</sup> See Carlton Waterhouse, *Total Recall: Restoring the Public Memory of Enslaved African-Americans and the American System of Slavery Through Rectificatory Justice and Reparations*, 14 J. GENDER, RACE & JUST. 703, 704 (2011).

<sup>122</sup> *See id.*

more homogeneous culture puts the goal of instituting meaningful change at risk. The reception of affirmative action in the U.S. is likely reflective of how other diversity initiatives, such as a quota system, may be received in the corporate sphere. Affirmative action has existed in the U.S. for over fifty years.<sup>123</sup> However, as recent as this year, affirmative action is still being challenged in courts.<sup>124</sup>

A recent study by Pew Research Center found that up to 73% of Americans do not believe colleges should “consider race or ethnicity when making decisions about admissions.”<sup>125</sup> This resistance to affirmative action is a critical component to consider when advocating for the most feasible means of expanding board diversity as similar governmental initiatives to create diversity will likely face similar challenges.

### III. Moving Forward in an American Focused Approach

#### A. Government-Based Solutions

##### 1. Shifting Toward a Comply-Or-Explain Regime

An efficient and long-term approach to increasing board diversity should begin with effective and clear-cut government regulations to propel the movement forward. It is important to consider the environment in which these regulations take place. As this paper has discussed, the U.S. has a unique corporate culture and legal environment that significantly differs from European countries.

Norway’s corporate governance environment is one of the most dissimilar environments from the U.S. corporate governance realm.<sup>126</sup> While the quota system was successful in Norway, it is not likely to be as successful in the U.S. The quota system does not translate well in the U.S. corporate governance scheme because of U.S. resistance to strict regulatory mandates regarding corporate actions.<sup>127</sup> As the California cases and affirmative action cases

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<sup>123</sup> See Anemona Hartocollis, *50 Years of Affirmative Action: What Went Right, and What It Got Wrong*, N.Y. TIMES (Mar. 30, 2019), <https://www.nytimes.com/2019/03/30/us/affirmative-action-50-years.html>.

<sup>124</sup> See Anemona Hartocollis, *The Affirmative Action Battle at Harvard is Not Over*, N.Y. TIMES (Feb. 18, 2020)

<https://www.nytimes.com/2020/02/18/us/affirmative-action-harvard.html>.

<sup>125</sup> Nikki Graf, *Most Americans say colleges should not consider race or ethnicity in admissions*, PEW RSCH. CTR. (Feb. 25, 2019), <https://www.pewresearch.org/fact-tank/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions/>.

<sup>126</sup> See Aaron A. Dhir, *What Norway Can Teach the U.S. About Getting More Women Into Boardrooms*, ATLANTIC (May 4, 2015), <https://www.theatlantic.com/business/archive/2015/05/what-norway-can-teach-the-us-about-getting-more-women-into-boardrooms/392195/>.

<sup>127</sup> See DHIR, *supra* note 3, at 229.



display, constitutional challenges, primarily in the equal protection realm, are rampant for strict government regulations requiring quotas for diversity.<sup>128</sup>

Conversely, the United Kingdom has the most similar corporate structure to the U.S.<sup>129</sup> Therefore, successful board diversity initiatives in the United Kingdom will be more likely to translate in the U.S. Specifically, the United Kingdom's comply-or-explain model of diversity disclosure would be an effective hybrid system between the quota and disclosure approach.

The idea of comply-or-explain regulation is not new to the U.S.<sup>130</sup> The U.S. has adopted comply-or-explain rules before; in the Sarbanes-Oxley Act of 2002, companies must report if their board has at least one financial expert on the audit committee.<sup>131</sup> If they do not they must explain.<sup>132</sup> The significance of this is that it would not be a radical change to the corporate governance sphere to include a comply-or-explain system for board diversity. Moreover, a comply-or-explain regime would allow corporations flexibility to explain for not meeting diversity standards, while promoting positive publicity for complying.

Further supplementing a comply-or-explain act should be expert reports and recommendations for companies not meeting standards, such as the state of Illinois has enacted.<sup>133</sup> The University of Illinois writes detailed reports on companies that do not provide sufficient board representation.<sup>134</sup> This report not only provides an analysis of current diversity standards but also finds detailed and workable recommendations for corporations.<sup>135</sup>

## 2. Reforming Current Disclosure Regulations

Perhaps the best way to increase board diversity is by defining diversity meaningfully. The SEC has not explicitly defined the term "diversity."<sup>136</sup> Companies are then able to interpret diversity to include "differences of viewpoint, professional experience, [and] education."<sup>137</sup> While it is a good

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<sup>128</sup> See e.g., Green, *supra* note 37 (discussing legal challenges to California's mandatory quota for women on corporate boards); Anemona Hartocollis, *supra* note 124.

<sup>129</sup> See Rivka Weill, *Declassifying the Classified*, 31 DEL. J. CORP. L. 891, 934–35 (2006).

<sup>130</sup> See DHIR, *supra* note 3, at 241.

<sup>131</sup> See *id.*

<sup>132</sup> See *id.*

<sup>133</sup> Sherry, *supra* note 73.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> Tamara S. Smallman, *The Glass Boardroom: The SEC'S Role in Cracking the Door Open So Women May Enter*, 2013 COLUM. BUS. L. REV. 801, 812 (2013).

<sup>137</sup> *Id.* at 812–13.

goal to have diversity of thought and experience, by defining diversity so broadly, nearly anyone could fit into that category.<sup>138</sup>

By creating such a broad interpretation, the definition loses its meaning and the chance to create meaningful change.<sup>139</sup> Dhir states this dilemma best by writing, “[w]hile other forms of diversity may be underrepresented in organizations, the historical causes informing this exclusion are likely to differ from those that have caused demographic underrepresentation, and even the causes for the exclusion of varying forms of sociodemographic difference will not be the same.”<sup>140</sup> Additionally problematic, a corporation may choose to not even disclose information to the SEC.<sup>141</sup>

The disclosure system is effective in its ability to potentially shame companies into increasing board diversity and it is more realistic for implementation within the U.S. corporate governance sphere.<sup>142</sup> However, concerns have been raised about its lax implementation which allows for broad definitions thus not making space specifically for women of color.<sup>143</sup> In other words, “broadening the definition of diversity has allowed boards to claim inroads regarding experience-based diversity at the expense of demographic diversity.”<sup>144</sup> Additionally, the disclosure system by itself may not be effective enough to enact meaningful change in a way that a more holistic commitment may.<sup>145</sup> While disclosure systems are a good start, corporate culture itself must make changes to ensure long-lasting change and inclusive policies.

*B. Using America’s Resistance to Regulation to Apply Non-Regulatory Change*

*1. Expanding the Recruitment Lens*

For companies wanting to make meaningful change, expanding the lens of recruitment is essential to avoid the “golden skirt” issue and to find enough qualified board members. It is a common trope in the business community that to be on a board, one needs to already be a board member.<sup>146</sup> Seeing that

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<sup>138</sup> *Id.* at 813.

<sup>139</sup> *Id.* at 840.

<sup>140</sup> See DHIR, *supra* note 3, at 232.

<sup>141</sup> Smallman, *supra* note 136, at 836.

<sup>142</sup> See DHIR, *supra* note 3, at 86.

<sup>143</sup> Marta Geletkanycz et al., *Research: When Boards Broaden Their Definition of Diversity, Women and People of Color Lose Out*, HARV. BUS. REV. (Oct. 3, 2018), <https://hbr.org/2018/10/research-when-boards-broaden-their-definition-of-diversity-women-and-people-of-color-lose-out>.

<sup>144</sup> See *id.*

<sup>145</sup> See *id.*

<sup>146</sup> See *id.*

low board representation stretches back decades, selecting board members who are already on other boards will not alone create meaningful change. Additionally, low CEO diversity representation exists.<sup>147</sup> Of all of the Fortune 500 organizations, only 6.4% of CEOs are women.<sup>148</sup> Therefore, when boards only look for previous board members or executive positions, the lens excludes many talented and qualified candidates.<sup>149</sup>

Rather than viewing a wider lens as selecting potential members that have less experience, companies may view this as an opportunity to invigorate boards with new perspectives and leadership qualities found elsewhere.<sup>150</sup> One executive search firm, Toft Group, suggests that the recruitment pool be widened to be “one that is less about prior CEO or Board experience; but rather focused on achievements, aptitude, network connections, and personal experience.”<sup>151</sup> The firm suggests that companies widen the lens to consider leadership in operations, finance, and research and development company departments.<sup>152</sup>

In order to achieve true diversity, networking and social circles need to be expanded so connecting people should be a focus on management.<sup>153</sup> It is up to those who already hold board positions and management positions to be aware of opportunities to expand networking circles and spark the conversation.<sup>154</sup>

Additionally, it is important for women and minorities to be strategic with networking which may feel unnatural for some.<sup>155</sup> Experts suggest that women who feel uncomfortable with networking view it as an opportunity to provide their own value to someone else rather than only receiving benefits.<sup>156</sup> While not in the explicit realm of corporate governance, joining networking groups, such as The American College of Corporate Directors, the National

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<sup>147</sup> Lisa D. Ellis, *How Networking Can Help Women Secure Board Seats*, HARV. T.H. CHAN SCH. OF PUB. HEALTH, <https://www.hsph.harvard.edu/ecpe/networking-help-women-board-seats/> (last visited Nov. 1, 2020) (noting the lack of diversity in the CEO context).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Recruiting for a Diverse and Qualified Board*, TOFTGROUP, <https://thoftgroup.com/board-search/> (last visited Nov. 12, 2020).

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> See Betty Liu, *The Secret to Making Boards More Diverse: Better Networking*, BARRON'S (Feb. 5, 2020), <https://www.barrons.com/articles/diverse-boards-make-better-companies-so-the-nyse-is-taking-action-51580927401>.

<sup>154</sup> Ellis, *supra* note 147.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

Association of Corporate Directors, and Women Corporate Directors, may help broaden networking opportunities.<sup>157</sup>

## 2. Promote Training and Mentorship Programs

In order to have enough qualified board members, more training and leadership opportunities should be provided to diverse candidates lower down the corporate ladder. Moreover, employees and managers should be trained about bias and cultivate an inclusive environment.

In order for a diversity program to be successful, however, care must be taken to establish quality programs and ensure managers are on board.<sup>158</sup> Studies have found that voluntary programs, rather than top-down mandatory programs, may yield better results.<sup>159</sup> Social pressures and accountability increase management attendance as managers see themselves as helping rather than being punished.<sup>160</sup>

Mentorship programs and college recruitment programs have shown wonderfully positive results.<sup>161</sup> Voluntary programs allow the most willing and passionate employees to create positive change in their company.<sup>162</sup> Statistically, mentorship programs have been shown to boost representation of minority groups from 9% to 24%.<sup>163</sup>

A case study of Coca-Cola shows the positive effects over time that mentoring programs have displayed.<sup>164</sup> After being sued for discrimination, the court-mandated a mentorship program at Coca-Cola.<sup>165</sup> A specialized task force helped the company construct measurable goals to recruit more diverse candidates and enlisted the help of leaders at all levels in the company.<sup>166</sup> After only five years, “80% of mentees had climbed at least one rung in management.”<sup>167</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> Frank Dobbin & Alexandra Kalev, *Why Diversity Programs Fail*, HARV. BUS. REV. (July-Aug. 2016), <https://hbr.org/2016/07/why-diversity-programs-fail>.

<sup>159</sup> *Id.*

<sup>160</sup> *See id.*

<sup>161</sup> *Id.*

<sup>162</sup> *See id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

### C. *Using the Role of Third-Party Actors to Implement Lasting Policies*

Rather than feeling discouraged by the barrier third-party actors present in regulating the corporate sector, supporters of board diversity should put the onus on these institutions to create meaningful change. Additionally, third-party actors should be considered as a factor in drafting legislation and in rule promulgation.

#### 1. *Search Firms*

Search firms should seek diverse candidates by expanding their lens and circles.<sup>168</sup> Additionally, companies should select recruitment firms that prioritize diversity as a qualification.<sup>169</sup> To use a current example, Goldman Sachs has made it a priority to find a search firm to help clients create more board diversity.<sup>170</sup>

In fact, Goldman Sachs has stated that it will not take a company public without a diverse board.<sup>171</sup> While the investment bank did not define diversity and only requires one diverse member, this example highlights the influence that third-party actors may play.<sup>172</sup> The role of Goldman Sachs also highlights the roles of other institutions, such as underwriters in promoting board diversity.

#### 2. *Proxy Advisory Firms*

Many proxy advisory firms do have diversity policies. ISS' updated 2020 Proxy Voting Guidelines state: "For companies in the Russel 300 or S&P 1500 indices, generally voting against or withhold from the chair of the nominating committee (or other directors on a case-by-case basis) at companies where there are no women on the company's board."<sup>173</sup> While on its face this policy seems like a step in the right direction, it goes on to list mitigating factors, with one being "relevant factors as applicable."<sup>174</sup>

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<sup>168</sup> See Crystal Kim, *Goldman to Hire Search Firm to Help IPO's Board Diversity*, BLOOMBERG (Jan. 30, 2020), <https://www.bloomberg.com/news/articles/2020-01-30/goldman-is-said-to-tap-search-firm-to-aid-ipos-board-diversity>.

<sup>169</sup> See *id.*

<sup>170</sup> *Id.*

<sup>171</sup> Kim Elsesser, *Goldman Sachs Won't Take Companies Public if They Have All-Male Corporate Boards*, FORBES (Jan. 23, 2020), <https://www.forbes.com/sites/kimelsesser/2020/01/23/goldman-sachs-wont-take-companies-public-if-they-have-all-male-corporate-boards/#5dda5a2f9475>.

<sup>172</sup> *Id.*

<sup>173</sup> INSTITUTIONAL S'HOLDER SERVS., AMERICAS: PROXY VOTING GUIDELINES UPDATES FOR 2020, at 6 (2019), <https://www.issgovernance.com/file/policy/latest/updates/Americas-Policy-Updates.pdf>.

<sup>174</sup> *Id.*

Pressure should be put on proxy advisory firms to create more firm guidelines, perhaps with added regulation by the SEC. Recently, the SEC promulgated a “warning for proxy advisers that they must convey correct information to shareholders.”<sup>175</sup> This rule was challenged in court and the case has been stayed.<sup>176</sup> When a ruling on this case is announced, it will likely impact the scope in which the SEC may promulgate rules for proxy advisors in the future, such as rules promoting diversity.<sup>177</sup>

### 3. Institutional Investors

Adding to this complex relationship is the role of institutional investors such as BlackRock, Vanguard Group, and State Street Corp, which are huge clients of proxy advisory firms.<sup>178</sup> Institutional investors have already contributed positively to increased board diversity, with State Street leading the way.<sup>179</sup> In 2017, State Street began a “Fearless Girl” campaign to increase board diversity.<sup>180</sup>

As the initiative, “State Street will vote against the entire slate of board members on the nominating committee of any company not meeting its gender diversity criteria.”<sup>181</sup> Since this policy was enacted, 681 companies have added board members who are women.<sup>182</sup> In order to continue this momentum, it is critical to put pressure on all institutional investors.

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<sup>175</sup> Cezary Podkul, *Proxy Advisory Firm Sues SEC Over New Rules*, WALL ST. J. (Nov. 1, 2019), <https://www.wsj.com/articles/proxy-advisory-firm-sues-sec-over-new-rules-11572600608>.

<sup>176</sup> Nicolas Grabar et al., *The SEC Takes Action on Proxy Advisory Firms*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 19, 2020), <https://corpgov.law.harvard.edu/2020/08/19/the-sec-takes-action-on-proxy-advisory-firms/> (“The action was stayed pending action on the Proposal, and ISS will now need to decide whether to pursue it.”).

<sup>177</sup> Steven Friedman, *The Basis for ISS’ Lawsuit Against the SEC*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 31, 2019), <https://corpgov.law.harvard.edu/2019/11/05/the-basis-for-iss-lawsuit-against-the-sec/>.

<sup>178</sup> Celarier, *supra* note 80.

<sup>179</sup> Subodh Mishra, *U.S. Board Diversity Trends in 2019*, HARV. L. SCH. F. ON CORP. GOVERNANCE (June 18, 2019), <https://corpgov.law.harvard.edu/2019/06/18/u-s-board-diversity-trends-in-2019/>.

<sup>180</sup> Amy Whyte, *State Street to Turn Up the Heat on All-Male Boards*, INSTITUTIONAL INV. (Sept. 27, 2018), <https://www.institutionalinvestor.com/article/b1b4fh28ys3mr9/State-Street-to-Turn-Up-the-Heat-on-All-Male-Boards>.

<sup>181</sup> *Id.*

<sup>182</sup> *State Street Global Advisors Marks Third Anniversary and Progress of Fearless Girl Campaign, Reports 681 Companies Added Female Board Members*, BUS. WIRE (Mar. 5, 2010), <https://www.businesswire.com/news/home/20200305005491/en/State-Street-Global-Advisors-Marks-Anniversary-Progress>.

## CONCLUSION

Using the analysis of the different qualities that create American corporate governance, we may uncover the most effective means for positive change that may be more feasible in the corporate sphere. A collaborative effort between the government and corporations has the best chance for successful board diversity improvements. Congressional legislation and administrative rules for corporations and third-party actors can best propel the movement forward while companies can take individual steps to cement the progress.

The key to moving forward is encompassing a holistic, multi-factorial approach that takes into consideration the unique challenges that American corporate governance presents with a focus on long-term institutional change. “Real change,” Justice Ginsburg also remarked, “enduring change, happens one step at a time.”<sup>183</sup>

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<sup>183</sup> *RBG's iconic quotes on law, love and the fight for equality*, CBS NEWS (Sept. 19, 2020), <https://wtop.com/supreme-court/2020/09/rbgs-iconic-quotes-on-law-love-and-the-fight-for-equality/>.