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CORPORATE AMERICA AND "THE PERKS" OF BEING A WOMAN: INCREASING GENDER DIVERSITY IN CORPORATE BOARDROOMS

ENKELENA GJUKA*

INTRODUCTION

Imagine the following: you are sitting, cap in hand, amongst the selected honor students at your college graduation. You cannot help but think back to four years ago when you made the decision to sacrifice employment to pursue a college education. You then recall the summer you spent entirely preparing for the SATs, the countless hours of studying in the library, and the extensive time you devoted to extracurricular activities. You are now proudly sitting in your black gown thinking to yourself, "I did it!" Now imagine that after graduating with honors you are offered an interview for your dream job but when you get there, the human resources director tells you "I just can’t hire you, honey, even though you are more than qualified. If I put you on the floor with all those men, I would never get any work done."¹

This scenario is based on Priscilla Berry’s story.² She graduated from the University of Mississippi with degrees in English, Literature, and Humanities.³ Priscilla was eager to find employment but was unable to—not because she was unqualified, but because she is a female.⁴ Priscilla’s experience is certainly not unheard of. She is just one among many other women who has been discriminated against in the workforce for being a woman.⁵ This could be you, your sister, your wife, or your best friend.

¹ See id. at 2.
² See id. at 1.
³ See id. at 8.
⁴ See id. at 2.
⁵ See DEBORAH L. RHODE & BARBARA KELLERMAN, WOMEN AND LEADERSHIP: THE STATE OF

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Women, especially those seeking positions on corporate boards, continue to face challenges that men do not. Although women and men currently comprise roughly equal portions of the population, only 3.6 percent of Fortune 500 companies have a female CEO and only 14.7 percent of U.S. companies have a female board member. Furthermore, although 25 percent more women than men graduate from college and women comprise almost half of the student bodies in business and law schools, 235 Fortune 500 companies have only one or no women on their board of directors.

Many women are more than qualified to attain board positions. On average, women enter and leave college with higher GPAs than men. Recently, women have also scored higher on IQ tests than men. Furthermore, roughly the same number of women and men graduate from professional schools. Although there is certainly no shortage of qualified women for corporations to recruit, the number of women in senior positions remains low.

See id.
13 Kramer et al., supra note 9, at 2.
14 See Berry & Frank, supra note 1, at 5. See also Boris Groysberg and Deborah Bell, Dysfunction in the Boardroom, HARVARD BUSINESS REVIEW (2013), available at https://hbr.org/2013/06/dysfunction-in-the-boardroom/at/1.
17 See Srivatsa, supra note 11; see also Chen, supra note 12.
leadership positions has declined in the past few years.  

There are other reasons for increasing board diversity besides promoting equality; corporations whose boards contain more women are more effectively and efficiently run than those that do not. Because women listen to and address controversial issues better than their male counterparts, they bring a leadership style that benefits the boardroom dynamics. Women are also more likely to make better investments than their male counterparts. Some studies provide that the global financial crisis could have been prevented if there had been more women on corporate boards and in financial banking. Accordingly, increasing board diversity would not only promote equality but would also increase profitability, enhance corporate governance, and benefit the community as a whole.

The United States Securities and Exchange Commission ("SEC") has recognized the importance of increasing board diversity. Accordingly, it has amended Regulation S-K Item 407(c)(2)(vi) to require corporations with a diversity policy to disclose how the policy is implemented and how the nominating committee “assesses the effectiveness of its policy.” However, the amended Regulation S-K alone will not dramatically increase female board membership because the regulation does not define the term “diversity” and it does not require corporations to consider diversity.

19 See Berry & Frank, supra note 1, at 3; see also Laura Basset, Mitt Romney's 'Binders Full of Women' Claim Misleads, HUFFINGTONPOST.COM (Oct. 17, 2012, 12:24 AM), http://www.huffingtonpost.com/2012/10/17/romney-binders-full-of-women_n_1972425.html (finding that the number of women in high-level appointed positions actually declined to 27.6 percent during Governor Romney's full tenure as governor).

20 Kramer et al., supra note 9, at 2.


22 Lesley Ciarula Taylor, Women Bankers Would've Prevented Economic Crises, ANALYSTS SAY, HEALTHZONE.CA (Jan. 10, 2012), http://www.healthzone.ca/health/newsfeatures/article/1113376--women-bankers-would-ve-prevented-economic-crises-analysts-say (providing that “[b]anks, governments and boardrooms ‘would have weathered things better’ during the economic crisis with a balance of risk-taking men and more prudent women.”); see also Stefan Padfield, Corporate Gender Inequality, the Meritocracy Fiction, and Other Related Points, THERACETOTHEBOTTOM.Org (May 5, 2012, 1:10 PM), http://www.theracethebottom.org/home/corporate-gender-inequality-the-meritocracy-fiction-and-who.html (stating that “having a few more women in positions of power in the financial industry might have actually allowed us to avoid the recent financial crisis.”).


24 Corporate Governance, 17 C.F.R. § 229.407 (2012). Regulation S-K is a regulation under the U.S. Securities Act of 1933 that lays out the reporting requirements for different SEC filings used by public companies.

25 The amended Regulation S-K only applies to corporations that have a diversity policy in place and it does not require corporations to have a diversity policy. See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68343-44; Harry S. Gerla, Afterword-Increasing Gender Diversity on Corporate Boards:
This Note proposes that the SEC, Congress, and corporations take measures to increase board diversity. First, the SEC should define the term “diversity” in Regulation S-K. Second, Congress should enact a law that would give corporations a tax credit for each female elected to their board. Third, corporations should implement their own diversity outreach programs.

Part I of this Note will discuss how gender disparity in corporate boardrooms evolved, starting from gender-role standards and stereotypes to the process of electing board members. Part II will identify four major reasons why increasing board diversity is not only fair but also necessary. Part III will articulate the emerging trend among other countries of adopting formal quotas to increase gender diversity. It will also explain how and why, compared to other countries, the United States’ efforts to increase gender diversity have so far been ineffective. Part IV will advocate for the SEC to define the term “diversity,” for Congress to pass federal legislation to give tax credits to corporations that elect females to their board, and for corporations to implement diversity outreach programs. Finally, Part IV will also address any counterarguments.

I. WHY CAN’T CORPORATE AMERICA GET ON “BOARD” WITH GENDER EQUALITY?

From a young age, girls are expected to conform to historical roles and not achieve as much in their careers as boys. The belief that females are expected to be passive, supportive, and sensitive while males are expected to be independent, competitive, and assertive is still prevalent in the United States and around the world. Parents allow girls less autonomy than boys and expect boys to be more successful. Extra-familial influences also greatly affect gender roles in children. In children’s books and television shows, boys are generally portrayed as powerful, while girls are often

26 Gender Roles and Gender Differences, CHILD PSYCHOLOGY, http://highered.mcgraw-hill.com/sites/0072820144/student_view0/chapter15/ (last visited Oct. 25, 2012); Women’s History in America, WOMEN’S INTERNATIONAL CENTER, http://www.wic.org/misc/history.htm (last visited Jan. 12, 2012). Historically, wifehood and motherhood have been regarded as women’s most important roles. Thomas Aquinas, a theologian, said that woman was “created to be man’s helpmeet, but her unique role is in conception . . . since for other purposes men would be better assisted by other men.”

27 Id.

28 Id.

29 Id.
portrayed as in need of rescue.\textsuperscript{30} For instance, the prevalent characteristics for Disney princes are certainty, assertiveness, and athleticism, while the defining characteristics for Disney princesses include being affectionate, fearful, and tentative.\textsuperscript{31}

The conforming and dependent behaviors encouraged in girls at a young age can be detrimental for their later academic and career success.\textsuperscript{32} Research provides that compared to their male counterparts, women enter the workforce with less confidence, ambition, and expectation of reaching leadership positions.\textsuperscript{33} As a result, only 14 percent of women apply for job promotions.\textsuperscript{34} Also, the idea impressed upon many young girls that women should be family-oriented (as opposed to career-oriented) is reflected in decisions that women make later in their life. Work-related consequences follow because women tend to “choose to attend family obligations over work obligations.”\textsuperscript{35}

Although some women lack confidence or ambition to obtain leadership positions, many do not.\textsuperscript{36} The limited number of women in leadership roles has to do greatly with the popular view that the best leaders are men.\textsuperscript{37} In fact, the majority of the characteristics used to describe leaders are masculine: “dominance, authority, assertiveness and so forth.”\textsuperscript{38} It is not that women always lack confidence or ambitions to become leaders, but it is rather that women, especially those who have children, are considered to be “less competent and less available to meet workplace responsibilities.”\textsuperscript{39} Although in recent decades a growing number of women have acquired powerful leadership positions, women continue to face challenges that men

\textsuperscript{30} See generally id.
\textsuperscript{31} Gender Stereotypes within Disney Movies, http://www.youtube.com/watch?v=5oyGgwjPbLw (last visited Jan. 12, 2013); see also Bengu Aksu, Barbie Against Superman: Gender Stereotypes and Gender Equity in the Classroom, 1 J. LANG. LING. STUDIES 1, 13 (2005), http://www.jlls.org/Issues/Volume1/No.1/benguaksu.pdf (providing that in one of the most famous cartoons, “The Simpsons,” the mother is portrayed as the homemaker and the father as the breadwinner).
\textsuperscript{32} Gender Roles and Gender Differences, supra note 26.
\textsuperscript{33} INSTITUTE LEADERSHIP & MANAGEMENT, Ambition and Gender At Work, https://www.i-lm.com/-/media/ILM%20Website/Downloads/Insight/Reports_from_ILM_website/ILM_Ambition_and_Gender_report_0211%20pdfashx.
\textsuperscript{34} Id.
\textsuperscript{35} See Gerla, supra note 25, at 94.
\textsuperscript{36} While there are women whose career goals do not consist of attaining high leadership positions, the focus of this Note is not on this group of women. This Note is focused on qualified women who want to become board members and who have the education, confidence, and the experience to become board members, but cannot due to the extremely limited opportunities and social stereotypes associated with women.
\textsuperscript{37} RHODE \& KELLERMAN, supra note 5, at 6.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at 8.
do not. For instance, in selecting nominees for new board positions, boards continue to discriminate against women because the incumbent members tend to choose those who are similar to them in terms of gender, experience, age, and ethnicity. Board members are more likely to nominate and choose new board members who have “walked a mile in their shoes.” They want people who have been CEOs or members of the senior-management team with expertise in areas that are useful to a corporation. In the past, many boards were comprised of employees, family members, and friends. Although shareholders and government regulations now require boards to have independent directors, CEOs and board chairs continue to select people that they already know.

II. WHY YOUR NEXT BOARD MEMBER SHOULD BE A WOMAN: THE BENEFITS OF CORPORATE DIVERSITY

Increasing the number of qualified women on corporate boards will have a multitude of benefits. First, diversifying America’s corporate boards will promote gender equality. Second, a greater number of women leaders will enhance corporate governance. Third, gender-balanced boards will lead to greater profitability. And fourth, diverse boards will benefit the community at large.

A. A Greater Number of Female Board Members Will Foster Equality

Increasing female board membership will promote equality in the workforce. Women are highly underrepresented in high managerial positions. For instance, although in the United States “women outnumber

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40 Id. at 6.
41 Gerla, supra note 25, at 97.
42 Id.
44 Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2010) (providing that “[a]t least 1/2 of the board of directors, but not fewer than 2 of the members thereof, shall be independent of the nationally recognized statistical rating agency.”).
45 See 20 Questions About Boards, supra note 43; see also Gerla, supra note 25, at 97.
46 Women are still extremely underrepresented on corporate boards. Although some corporations have began expanding the scope of their search for qualified candidates by including women, women still hold only 14.7 percent of all U.S. companies board positions. Thus, allowing qualified women to hold board positions is necessary to foster equality. See Kramer et al., supra note 9.
men when it comes to finishing college and holding advanced degrees, 48
85.3 percent of corporate board seats are composed of men 49 and 96.4
percent of Fortune 500 CEOs are men. This phenomenon has social
implications because the limited number of women in leadership positions
can discourage other women from seeking board memberships 50 and can
negatively affect children by reinforcing the idea that men make better
leaders than women.

The limited number of women in leadership positions is mainly a result
of the gender stereotypes associated with women. 51 For many, men make
better leaders than women. 52 Increasing the number of women on boards
will provide equal opportunities to qualified women and will influence
other women to nominate themselves for board positions. 53 In addition,
having three or more women on corporate boards can create a critical mass
where women, who hold board positions, are no longer seen as outsiders by
other board members. 54 It would also recast and reframe our society’s view
of leaders from only males to both genders, and would change the
characteristics associated with leadership from only masculine traits to an
amalgam of leadership traits.

B. Qualified Female Board Members Enhance Corporate Governance

Women bring a “collaborative leadership style” that enhances
governance. 55 By increasing the amount of listening, social support, and
problem solving, women also benefit corporate dynamics. 56 Women are
more likely than men to ask tough questions and demand direct and
detailed answers, 57 which generally leads to a better understanding of work

48 Michael Cleveland, Women Over 25 More Educated Than Men, THE TELEGRAPH (May 11,
men.html; Jeffrey, supra note 10.
49 Kramer et al., supra note 9; Judy B. Rosener, The ‘Terrible Truth’ About Women On Corporate
50 See Kramer et al., supra note 9.
51 See RHODE & KELLERMAN, supra note 5, at 6.
52 See Berry & Frank, supra note 1, at 3 (providing that management has become heavily
characterized with masculinity; stating “Someone once said, ‘Think Manager . . . Think Male.’”).
53 Kramer et al., supra note 9, at 3.
54 Id.
55 “We find that women do make a difference in the boardroom. Women bring a collaborative
leadership style that benefits boardroom dynamics by increasing the amount of listening, social support,
and win-win problem-solving. Although women are often collaborative leaders, they do not shy away
from controversial issues. Many of our informants believe that women are more likely than men to ask
tough questions and demand direct and detailed answers.”).
56 Id.
57 Id. at 2; see also Rosener, supra note 49.
issues. Because women are different from men,\(^58\) they “add value” to corporate boards by bringing new perspectives to the table and “broadening the content of boardroom discussions to include perspectives of multiple stakeholders.”\(^59\) Studies provide that a gender-diverse board is more likely to hold CEOs accountable for poor performance,\(^60\) and that a diverse board makes better decisions than a more homogenous one, “even if the members of the latter group are more intelligent.”\(^61\)

Women also enhance corporate governance because their presence in boardrooms has a positive effect on the behavior of male board members.\(^62\) Women tend to have better attendance records at board meetings than their male counterparts, and male board members also have fewer attendance issues when the board is diversified.\(^63\) In addition, gender-diverse boards give male board members a better opportunity to receive equity-based compensation.\(^64\) Since equity-based compensation allows employees to gain partial stake in the company and can significantly increase their compensation level,\(^65\) male board members are likely to perform better when their personal interests are at stake.

C. The Greater the Number of Female Board Members the Greater the Profit

Gender-diverse boards also increase corporate profitability.\(^66\) In 2013, having a board comprised of all or nearly all men “simply doesn’t make

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58 Rosener, supra note 49.
59 Kramer et al., supra note 9, at 2.
62 See id.
63 Id.
64 Equity-based compensations allows employees to receive a partial stake in the company through the purchase or receipt of stocks. Renee B. Adams & Daniel Ferreira, Women on the Boardroom and their Impact on Governance and Performance, 94 J. FIN. ECON. 291, 292 (2009), http://personal.lse.ac.uk/FERREIRD/gender.pdf (providing that because diverse boards enhance performance and are more aligned with the interests of the shareholders, all board members have a better chance of getting equity-based compensation when there are more women on the board).
66 Heminway, supra note 21, at 80 (providing that “women in executive positions have a capacity to enhance the decision-making and profitability of corporations in various circumstances and in a variety of ways.”); Taylor, supra note 22.
economic sense.” 67 Women account for 85 percent of all consumer purchases. 68 Female board members “can have powerful economic effects throughout the various strata of a company” because they better understand the needs of female consumers and employees. 69 Studies show that “between 2004 and 2008, the top quartile of companies with the highest percentage of women board members outperformed companies in the quartile with the lowest percentage by 26 percent.” 70

Furthermore, women increase corporate profitability because they tend to make more reasonable investments than men. 71 Trading behaviors differ between female and male investors. 72 Women tend to seek more investment advice 73 and are more risk averse in their investments. 74 While men like to prove that they are smart and strong, women are also more realistic and less ego-driven. 75 Because female investors seek more advice, are less overconfident, and trade less frequently than male investors, they are more likely to make reasonable investments than their male counterparts. 76

Some financial analysts even question whether the recent financial crisis would have happened if female investors were not so scarce. 77 A study that tested 2000 professionals found that there is a major difference between female and male risk-taking types. 78 The study found that while “women were more than twice as likely to be wary and prudent,” men were more likely to be carefree and adventurous. 79 These results show that the recent financial crisis might not have occurred if investment banking institutions and boardrooms had a better balance of risk-taking men and more prudent women. 80 Recruitment of all risk types is vital; a corporation that lacks diversity of risk-types among its decision-makers will be “missing out on a

67 Taylor, supra note 22.
69 See Taylor, supra note 22.
70 Id.
71 Heminway, supra note 21, at 292.
72 Id. at 310.
73 Id. at 311.
74 Id. at 312.
76 Id. at 319-20.
77 Taylor, supra note 22; see also Padfield, supra note 22.
78 Taylor, supra note 22.
79 Id.
fundamental self-controlling mechanism.”

D. Gender-diverse Boards Benefit the Community

Corporations are powerful entities and decisions made by boards of directors can impact employees, shareholders, consumers, and the community. The board decides whether to buy, sell, or merge with another company; where facilities close or relocate; and how much priority the company gives to issues of profit and social responsibility. “Good corporate decision-making requires the ability to hear and consider different points of view, which comes from people who have different backgrounds, experiences, and perspectives.” Because the United States is one of the most diverse countries in the world, having more female board members will benefit the community because the more diverse a board is, the more heterogeneous the board’s decisions will be.

III. THE UNITED STATES’ EFFORTS TO INCREASE BOARD DIVERSITY ARE INADEQUATE, ESPECIALLY WHEN COMPARED TO OTHER POWERFUL NATIONS

A. Other Countries Have Adopted Formal Quotas to Increase Board Diversity

Other countries have recognized the importance of increasing gender diversity on corporate boards and have taken extreme measures to raise the number of females on boards. Some European countries have adopted formal quotas to increase gender diversity on corporate boards. For instance, in 2003, the Norwegian legislature passed a law requiring boards

81 Taylor, supra note 22.
83 Id.
84 Id.
86 See Jennifer L. Schenker, EU’s Reding Eyes Quotas for Women on Boards, DLD-CONFERENCE.COM, http://www.dld-conference.com/events/event/dldwomen-12_news-detail_aid=3321 (last visited Oct. 25, 2012) (“I am not a fan of quotas, but I do like the results they bring. At the present rate of progress, it would take decades to reach something approaching gender balance on company boards in Europe, that is to say at least 40% women. In these difficult economic times when we are facing the challenges of an aging population and skills shortage Europe cannot afford to waste time and precious human capital.”); see Gerla, supra note 25, at 95.
87 Gerla, supra note 25, at 95.
of public companies to have 33 to 50 percent of each gender. 88 France, 89 Spain, 90 Belgium, 91 and Canada 92 have also either adopted or proposed adoption of similar quotas. The European Commission Vice-President, Viviane Reding, stated that while she is not a fan of quotas, without them, it would take decades to reach gender balance on company boards, and that in these difficult economic times, Europe “cannot afford to waste time and precious human capital.” 93 Although it is too early to predict whether these countries will benefit economically by imposing quotas, it is already clear that quotas are increasing gender diversity in boardrooms. 94

Legally, a quota system is unlikely to work in the United States. 95 The Equal Protection Clause of the Fourteenth Amendment does not allow unequal treatment of people based on their gender. 96 Also, courts in the


§ 6–11a. Requirement regarding the representation of both sexes on the board of directors

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

The rules in no. 1 to 4 apply correspondingly for elections of deputy directors.


93 Schenker, supra note 86.

94 Aagot Storvik & Mari Teige, Women on Board – The Norwegian Experience, 8 (June 2010), http://library.fes.de/pdf-files/idipa/07309.pdf. Norway is an example of a country that has drastically increased the number of women on corporate boards by imposing a quota system. Before the implementation of the quota system, women accounted for two to four percent of the Norwegian corporate boards. Since the Norwegian legislature required all public companies to have forty percent female membership on corporate boards, “the proportion of women gradually increased, rising to 6 percent in 2002, 9 percent in 2004, 12 percent in 2005, 18 percent in 2006, 25 percent in 2007, 36 percent in 2008, and finally 40 percent in 2009.” Id.; see generally Schenker, supra note 86.

95 Gerla, supra note 25, at 95.

96 See U.S. CONST. amend. XIV (“No State shall make or enforce any law which shall abridge the
United States have not looked favorably on quotas. In *Regents of University of California v. Bakke*, the Supreme Court held that the University’s special admission program, which reserved 16 out of 100 positions in the class for minority students, violated the Equal Protection Clause of the Fourteenth Amendment. The Court reasoned that a suspect class cannot be the only factor considered in the admissions process. Thus, adopting a quota where a specific number of board positions would be reserved only for women is likely to be found unconstitutional.

Quotas are also unlikely to be successful in American society because the “American culture is one where we see ourselves as members of a meritocracy.” Many believe that anyone can grow up to be the President if one commits and works hard towards his or her goals. In addition, freedom of choice is highly valued in the United States; thus, forcing corporations to have a specific number of women is unlikely to be successful. In fact, the majority of corporations is against quotas and object to “government interference when it comes to how their businesses are run.”

B. The United States’ Efforts to Increase Board Diversity Have Thus Far Been Ineffective

The importance of board diversity has also been recognized by the United States but our efforts do not go far enough to effectively increase the number of women on corporate boards. In 2009, the SEC amended

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”).

97 See Regents of University of California v. Bakke, 438 U.S. 265, 267 (1978) (providing that “[r]acial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner’s special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal and therefore invalid under the Equal Protection Clause.”); see also Gerla, supra note 25, at 95.

98 438 U.S. at 267.

99 Id.

100 See id.

101 Gerla, supra note 25, at 95.

102 Id.


Regulation S-K and adopted a requirement for all companies that have a board diversity policy in place to disclose:

[How, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director nominees, describe how this policy is implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.]107

In amending this regulation, the SEC commissioners recognized that disclosure about a board’s diversity is important information for investors. The SEC’s goal was also to increase board diversity, noting that there is a “meaningful relationship between diverse boards and improved corporate financial performance.” However, while the amended Regulation S-K is a positive step towards increasing gender diversity on corporate boards, it will be insufficient, on its own, to solve the issue.

First, the amended Regulation S-K only applies to those companies that already have a diversity policy in place, but does not affirmatively require companies to have diversity policies in the fist place. The amended Regulation S-K does not require all nominating committees to consider diversity. Diversity consideration is only required when a nominating committee has a diversity policy to follow. Thus, companies without diversity policies are completely unaffected by the amended Regulation S-K.

Second, even for those companies that have diversity policies in place, they are free to define diversity without any mention of gender at all. Regulation S-K does not define the term diversity. The commissioners

106 The primary purpose of SEC regulations is to disclose important information about the companies’ financial status and business practices to help investors make informed investment decisions. The Investor’s Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, SEC.gov (June 10, 2013), http://www.sec.gov/about/whatwedo.shtml.

107 17 C.F.R. § 229.407.


109 Id. at 68343.

110 Hazen, supra note 25, at 57; Lisa M. Fairfax, Board Diversity Revisited: New Rationale, Same Old Story?, 89 N.C.L. Rev., 855, 874-75 (2011). Not requiring corporations to have a diversity policy in place may have “the unintended consequences of limiting boards’ willingness to formalize their diversity efforts.” Id.

111 Proxy Disclosure Enhancements, 74 Fed. Reg. at 68343; see 17 C.F.R. § 229.407; see also Hazen, supra note 25, at 57.

112 Hazen, supra note 25, at 57.

113 Proxy Disclosure Enhancements, 74 Fed. Reg. at 68344; Gerla, supra note 25, at 95.
stated that corporations may have their own definitions of diversity. For example, some companies focus on diversity concepts such as race, gender, and national origin, while others focus on differences in viewpoint, professional experiences, education, and other individual qualities. The SEC stated that corporations should "define diversity in ways they consider appropriate." Accordingly, under the Regulation S-K, a corporation is free to define diversity solely as "differences of viewpoint" and exclude concepts such as gender and race. Exclusion of these concepts can limit the extent to which the amended Regulation S-K increases the number of women on corporate boards. Many corporations may have no incentive to gender diversify their boards because, based on the current criteria, an all-male and all-white board can be considered diverse if, for example, the board members have had diverse experiences.

Unsurprisingly, Regulation S-K has thus far been ineffective in increasing the number of women on corporate boards. A survey of the Fortune 500 companies conveyed by Professor Barbara Black after the amendment of Regulation S-K shows that most companies continue to exclude gender from their diversity considerations. Thus, unless incentives to elect female board members are implemented or requirements to increase gender diversity are imposed on corporations, America's corporate boards will continue to be male-dominated.

IV. THE PROPOSAL: INCREASING BOARD DIVERSITY WILL BE A DIFFICULT BATTLE UNLESS ADDITIONAL MEASURES ARE TAKEN

A. The SEC, Congress, and Corporations Acting Together Can Make a Positive Change

In light of the dearth of women in corporate leadership positions, this Note proposes that the SEC define diversity in Regulation S-K, Congress enact a law which would give corporations a tax credit for every female elected to their board, and corporations implement outreach programs to

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115 Id at 68344.
116 Id.
117 See id.
118 Fairfax, supra note 110, at 875.
119 Id.
increase board diversity.

1. Define “Diversity”

First, the SEC must define the term “diversity.”

To increase gender diversity on corporate boards, “diversity” cannot be left for companies to define “in ways that they consider appropriate.” Therefore, the SEC should amend Regulation S-K to define the term “diversity” in the following way:

Diversity refers to many demographic variables, including, but not limited to, race, gender, religion, national origin, education, professional experiences, differences of viewpoint, and other individual qualities that contribute to board heterogeneity.

This proposed definition of diversity would be effective because corporations with a diversity policy in place would no longer be able to exclude traditional diversity characteristics such as gender, race, and national origin. Corporations would have to adhere to the SEC’s proposed definition of diversity and thus, would no longer be able to exclude gender from their diversity policies. The proposed definition also allows corporations to consider non-traditional diversity components such as professional experiences and differences of viewpoint, because these types of components enhance corporate governance. Overall, the proposed definition will bring us one step closer to increasing gender diversity of boards because it will remind corporations with a diversity policy to consider gender every time they elect a member and it will no longer allow corporations with a diversity policy to define diversity as they wish.

Some scholars have argued that defining diversity in the Regulation S-K will discourage corporations from adopting a policy all together. That is

121 Fairfax, supra note 110, 874-75 (stating that “the most devastating [matter] to the rule’s potential effectiveness, is the SEC’s refusal to define diversity.”).

122 See Proxy Disclosure Enhancements, 74 Fed. Reg. at 68343 (2009); see also Fairfax, supra note 110, at 874-75.

123 See Fairfax, supra note 110, at 875.

124 The proposed SEC definition of diversity will encourage and remind the board to consider gender in the election because of the requirement to report and because corporations can no longer exclude gender from their diversity definitions. For example, corporations with a diversity policy in place will have to adhere to the proposed definition of diversity, which includes gender, and thus, will have to consider gender as a diversity factor every time a board member is elected.

125 See Fairfax, supra note 110, at 876. The amended Regulation S-K could discourage corporations from adopting a diversity policy because corporations could fear that they “would be unable to adequately defend its effectiveness” and would rather not deal with the disclosing requirements posed by the SEC. Id. But see, Hazen, supra note 25, at 57 (providing that although the new disclosure requirements have posed extra burdens on corporations, the new rule has significantly increased the number of corporations addressing board diversity in some respect).
unlikely to happen because, although corporations with a diversity policy in place would have to adhere to the SEC’s definition of diversity, the proposed definition of diversity is broad and there is no requirement that all diversity characteristics must be met. Defining diversity, however, will make the regulation more effective because it will encourage corporations with a diversity policy in place to consider a broader range of potential candidates, including women, and cause positive changes in board composition.

2. Provide Tax Incentives

Second, this Note calls for legislative action. This Note proposes Congress pass an act that would give corporations a tax credit for every female they elect to their board. The act should be implemented as a seven-year program to encourage 20 percent female membership on corporate boards by 2020. It is well established that tax credits have been used by Congress to further goals that would benefit the country as a whole. More specifically, Congress has used tax incentives to encourage companies to hire certain categories of individuals, like veterans.

To increase board diversity, Congress should pass an act that mimics the Veteran Opportunity to Work Act of 2011 (“VOW”). To encourage hiring veterans, VOW gave a tax credit for each qualified veteran that an

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126 A nominating committee with a diversity policy in place is required to disclose how they have considered diversity in identifying nominees for director. Since the SEC has not defined diversity, nominating committees are allowed to use their own diversity definitions. However, if the SEC defines diversity, the nominating committees would have to disclose how they have considered diversity, as defined by the SEC, in their board elections. See generally 17 C.F.R. § 229.407.

127 See supra Part IV.A.1.

128 See Hazen, supra note 25, at 57. Women will have a better chance of getting nominated and ultimately elected for board membership when corporations include gender in their diversity policy because of the corporations’ requirement to report how the board members are nominated and how their diversity policy is implemented. In addition, positive results in board compositions can occur when there is a larger number of female board members because diverse boards tend to perform better than homogeneous boards.


130 See 26 U.S.C.A. § 51 (stating that VOW “provides seamless transition for Service members, expands education and training opportunities for Veterans, and provides tax credits for employers who hire Veterans with service-connected disabilities”).

131 Id.
employer hired.\footnote{132}{Id. (providing that a qualified veteran must “[h]ave served on active duty (not including training) in the U.S. Armed Forces for more than 180 days or have been discharged or released from active duty for a service-connected disability, and [n]ot have a period of active duty (not including training) of more than 90 days that ended during the 60-day period ending on the hiring date”).} VOW was a limited-time program that allowed employers to claim a tax credit for veterans hired before January 2013.\footnote{133}{Id.} Similarly, Congress should enact a law which gives corporations a tax credit for each female elected to their board. The act would also be limited in time, not allowing corporations to claim the tax credit after 2020. There are two reasons for the time limit: (1) corporations will likely be more prompt in electing female board members when the tax incentive is a limited time offer, and (2) by 2020, corporations will likely realize the benefits of a larger number of female board members, so tax incentives will no longer be needed.

While it is too soon to assess the success of the VOW, other similar tax credits given by the government to further a national goal have been effective.\footnote{134}{One Million Electric Vehicles by 2015, DEPARTMENT OF ENERGY, http://www1.eere.energy.gov/vehiclesandfuels/pdfs/1_million_electric_vehicles_rpt.pdf (last visited Oct. 31, 2012); see Rachel Gold and Steven Nadel, Energy Efficiency Tax Incentives, 2005-2011: How Have They Performed?, (June 2011), http://aceee.org/files/pdf/white-paper/Tax%20incentive%20white%20paper.pdf. Since the adoption of the International Energy Conservation Code, which gives a $2000 tax credit to “builders of homes that use 50% less energy for space heating and cooling,” the number of homes participating in the credit grew four-fold between 2006 and 2009. Id.} For instance, in 2011, President Obama announced the goal of putting one million electric vehicles on the road by 2015.\footnote{135}{One Million Electric Vehicles by 2015, supra note 134.} To further this goal, he offered tax credits to those purchasing electric vehicles.\footnote{136}{Id.}\footnote{137}{Id.} These tax incentives have proved effective in providing the additional boost for consumers to choose electric vehicles.\footnote{138}{See Phil Rabinowitz & Bill Berkowitz, Using Tax Incentives to Support Community Health and Development, THE COMMUNITY TOOL BOX, http://ctb.ku.edu/en/tablecontents/chapter25_section3_main.aspx (last visited Oct. 12, 2013). A tax incentive is a financial benefit offered to encourage a person or a business to do something specific. “Often, a well-thought-out combination of tax and other incentives, careful regulation and enforcement, and participatory planning can yield the best results.” Id.} Tax credits are generally effective and financially beneficial because they minimize the amount of taxes that one has to pay.\footnote{138}{Id.} Thus, because corporations generally care about profitability, tax credits will offer an additional incentive to elect women as opposed to men.

Opponents might argue that offering a tax credit to corporations that elect women will not truly increase board diversity because corporations
might elect women for the sole purpose of receiving the tax credit and then remove them from the board once they receive the credit. However, removing board members before their term limit is up is generally a very long and difficult process\(^{139}\) because seventy percent of corporate boards have term limits for board members.\(^{140}\) Generally, the term limits are three years long.\(^{141}\) In addition, the majority of members serve two consecutive three-year terms.\(^{142}\) Thus, for the majority of the corporations, removing an elected board member is unlikely to happen until at least three years have passed.\(^{143}\) Furthermore, nominating and electing board members is time-consuming and labor intensive;\(^{144}\) thus, even the limited number of corporations that do not have term limits are unlikely to elect women for the sole purpose of taking advantage of the tax credit.\(^{145}\)

Opponents might also argue that tax credits will give corporations an incentive to elect women regardless of their qualifications. However, powerful entities like corporations will not risk great consequences and choose an unqualified member for the sole purpose of receiving a tax credit. Corporations are highly selective of their board members, especially since boards generally consist of a few members\(^{146}\) who are responsible to govern the entire corporation.\(^{147}\) In addition, this Note suggests that the tax credit should be great enough to give corporations an extra incentive to consider electing female board members but not so high as to be the only reason for electing women.

\(^{139}\) See Board Member FAQs, CONDOGURU, http://www.californiacondoguru.com/bmfaqs.html#fire (last visited, Oct. 27, 2012) ("Board of directors cannot take anyone's board position away unless they go to court and get a court order related to competency, criminal activities, or gross abuse of discretion. This means the board member has to have done something really bad, or be incompetent and evidence has to be available for the board to take to court."); see also BoardSource Nonprofit Governance Index 2010, 19, BOARDSOURCE.ORG (2010), http://www.boardsource.org/dl.asp?document_id=884.

\(^{140}\) Board Member FAQs, supra note 139.

\(^{141}\) Id.

\(^{142}\) Id.

\(^{143}\) Id.


\(^{145}\) See generally PROS & CONS on the Proposed MESA Bylaws Changes, supra note 144.

To ensure that employers do not simply hire veterans and fire them as soon as they receive the tax credit, VOW requires that every hired veteran is employed for at least 120 hours before the employer can request the tax incentive. See 26 U.S.C.A. § 51. Similarly, Congress can impose a time limit before a corporation can ask for the tax credit for hiring a female board member.

\(^{146}\) See 20 Questions About Boards, supra note 43.

3. Implement Outreach Programs

Third, corporations should take measures and implement programs to increase board diversity.\textsuperscript{148} Outreach programs are generally effective\textsuperscript{149} and will likely increase the number of women on boards since many women need encouragement or information to become board members.\textsuperscript{150} There are many methods that corporations can use to promote board diversity. For instance, a corporation can choose to enforce term limits and rotate committee memberships, develop board registries where qualified and interested women could submit their names, or have human-resources managers and CEOs identify potential female candidates.\textsuperscript{151} A corporation could also encourage “retention sponsorship where senior women reach out to younger women for encouragement” to nominate themselves for board positions.\textsuperscript{152}

While some outreach programs can be pricey,\textsuperscript{153} there are also low-cost programs, and corporations are free to choose whichever program best

\textsuperscript{148} Corporations should take measures and increase gender diversity on corporate boards because board diversity is highly beneficial. Sue Shellenbarger, \textit{The XX Factor: What's Holding Women Back?}, \textit{Wall St. J.} (May 7, 2012), http://online.wsj.com/article/SB10001424052702304746604577381953238775784.html (stating that “when McKinsey & Co. asked senior executives at 60 big companies recently why they are trying to advance women, ‘they laughed at us.’ . . . Almost nine in 10 CEOs agree that tapping female talents is important to ‘getting the best brains’ and competing in markets where women now make most of the purchasing decisions.”).

\textsuperscript{149} See Rosa Mary Wentling, \textit{Diversity Initiatives in the Workplace}, http://ncrve.berkeley.edu/CWS2/Diversity.html (last visited Oct. 31, 2012); see also Eriko O. Wada & Michael R. Cousineau, \textit{Assessing Community-Based Outreach and Enrollment Activities and Outcomes Relative to Need in Los Angeles County}, (Oct. 2006), http://www.urban.org/UploadedPDF/411464_Assessing_Community.pdf. An outreach program used to identify and link uninsured and eligible children and their families with a proper health insurance program “has shown remarkable success.” During the first two years of the program, more than 45,000 children were enrolled. Id.

\textsuperscript{150} Id.\textsuperscript{148} See generally Shellenbarger, supra note 148.

\textsuperscript{151} Id. In May of 2013, the Wall Street Journal convened the Women in the Economy conference where 200 top leaders in business, government, and academia gathered to promote economic growth and identify ways to increase the number of women in leadership positions. At the conference, the leaders agreed that the best ways to increase the number of female board members is by (1) improving governance; (2) developing board registries; (3) identifying women candidates; and (4) adopting succession planning for gender diversity.

\textsuperscript{152} Id. (stating that Google, for example, “must invest extra effort to persuade women engineers to nominate themselves for promotions,” but the company is successful in “promot[ing] women engineers at about the same rate as men”).

\textsuperscript{153} Outreach programs can sometimes be expensive because some companies decide to pay for advertisement, hold press releases, and use other marketing plans to communicate their message to a specific audience. See PROS & CONS on the Proposed MESA Bylaws Changes, supra note 144; but see Jamie Thompson, \textit{Community Outreach Can Protect Fire Department Budgets, FRI Session Told}, \textit{FIRE RESCUE1} (Aug. 25, 2011), http://www.firescuel.com/fire-department-management/articles/1112495-Community-outreach-can-protect-fire-department-budgets-FRI-session-told/ (last visited Oct. 27, 2012) (stating that “community outreach programs don’t have to break the budget.”).
matches their financial ability. This Note recommends a variety of approaches that a corporation may choose to increase board diversity. On one hand, an affluent corporation might choose to implement more than one outreach program. On the other hand, a corporation that wants to increase board diversity but has limited funds might choose one of the lower cost programs. For instance, having human-resources managers and CEOs identify potential female board candidates would be one option for the latter corporation.

Implementing these programs to elect female board members, however, might make some men feel excluded or inferior. Nevertheless, current gender diversity statistics for corporate boards show that men have no reason to feel inferior. Among the Fortune 500 companies, 182 have one woman on their board, 189 have two, 76 have three or more, and 53 do not have any. Since the average board size is 16, those statistics provide that men hold 85.3 percent of all board positions of Fortune 500 companies. Accordingly, it is women who have reason to feel excluded. It is not only fair, but also necessary that corporations engage in programs that promote board diversity.

B. Other Possible Counterarguments

Opponents of affirmative action have criticized the use of preferential treatment for minimizing discrimination. In Grutter v. Bollinger, in his dissenting opinion, Justice Thomas stated that black students do not need and should not get preferential treatment for admission to law schools.

154 Supra Part IV.A.3.
155 See supra Part IV.A.3. Having managers and CEOs identify potential female board candidates is likely to be cost-effective because it does not require a company to do outside research or pay for adds or similar listings when searching for a new board member. This option merely requires that managers, based on their experience with employees, identify those who they think are fit to serve as board members.
156 See PROS & CONS on the Proposed MESA Bylaws Changes, supra note 144.
157 See Kramer et al., supra note 9.
158 Id.
159 BoardSource Nonprofit Governance Index 2011, supra note 139, at 19.
160 See Kramer et al., supra note 9.
161 See Fairfax, supra note 110, at 856-57.
162 See Grutter v. Bollinger, 539 U.S. 306, 349-50 (2003) (Thomas, J., dissenting) ("No one would argue that a university could set up a lower general admissions standard and then impose heightened requirements only on black applicants. Similarly, a university may not maintain a high admissions standard and grant exemptions to favored races. The Law School, of its own choosing, and for its own purposes, maintains an exclusionary admissions system that it knows produces racially disproportionate results. Racial discrimination is not a permissible solution to the self-inflicted wounds of this elitist admissions policy.").
because they can be successful without the additional help. The same argument has been made against giving preferential treatment to women in the workforce. However, while applying to law schools is open to all students regardless of their race, board membership is open only to those who are first nominated by the board. Since boards continue to disproportionately nominate more men than women, additional measures are needed not because women cannot do it on their own but because women are not getting the same opportunities as men to become board members.

It is also possible that, with time, the number of female board members will increase on its own. However, waiting for change to occur on its own is not a good choice because over the past decade, “the percentage of women on boards of U.S. companies has remained stagnant . . . .” Even if the number of women on boards will increase on its own, the United States, just like Europe, cannot afford to waste time in these difficult economic times. “It is more important than ever to take advantage of everyone’s skills: both female and male.”

CONCLUSION

This Note’s proposal is likely to be effective because it would give women a better chance to get elected to a board. For example, when a corporation is seeking to elect a new board member, the proposed SEC definition of diversity will encourage and remind the board to consider gender in the election. This is because of the requirement to report and because corporations can no longer exclude gender from their diversity definitions. Additionally, the corporation would have an extra incentive to consider gender because it would receive a tax credit for electing women as opposed to men. Moreover, that corporation’s engagement in diversity outreach programs would create a larger pool of women to nominate,

163 Id. (“I believe blacks can achieve in every avenue of American life without the meddling of university administrators.” Justice Thomas also quoted Frederic Douglas: “[t]he American people have always been anxious to know what they shall do with us.... I have had but one answer from the beginning. Do nothing with us! Your doing with us has already played the mischief with us.”).
165 See 20 Questions About Boards, supra note 43.
167 See Schenker, supra note 86.
168 Id.
169 See supra Part IV.A.1.
giving women an additional opportunity to become board members.\(^{170}\) For instance, women would have a better chance of becoming board members if, when electing a new board member, the corporation allows interested employees to nominate themselves for board membership.

“A woman . . . is not better, wiser, stronger, more creative, or more responsible than a man. Likewise, she is never less.”\(^{171}\) This quote represents a reality that many have chosen to ignore. It is time that we, just like many other countries,\(^{172}\) take additional measures to increase diversity in the workforce, and more specifically in the boardroom. Having 85.3 percent of board positions in the Fortune 500 companies composed of men\(^{173}\) not only is unfair to women, but it also decreases a corporation’s profitability, reduces the quality of governance, and negatively affects society in general. Unless the SEC, Congress, and corporations across the country take measures, the battle to increase board diversity will continue to be a difficult one.\(^{174}\)

\(^{170}\) See Shellenbarger, supra note 148.


\(^{172}\) See Gerla, supra note 25, at 95.

\(^{173}\) Kramer et al., supra note 9.

\(^{174}\) See Gerla, supra note 25, at 95.