

A Duty to Diversify

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Fiduciary duties reflect the central role of leaders in corporate governance. Those with the most responsibility benefit the most from corporate success, but also bear commensurate fiduciary responsibilities. Diversity, equality, equity, and inclusion may seem an odd fit among other fiduciary duties. However, fiduciary duties are where governance imposes the burden of “doing the right thing.” Fiduciary duties involve normatively good behavior that proves essential to ensuring responsible decision-making and achieving positive outcomes for firms.

Corporate law allows, encourages and perhaps, today, even mandates, corporate leaders to do the right thing. Not only does it seem appropriate to ask corporate leaders, such as institutional investors, to carry this fiduciary duty, but imposing this duty on them may prove far more effective than other efforts. As a new generation of leaders rise to lead, the resulting changes may prove revolutionary, both for firms and investors.

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INTRODUCTION

In 2021, corporate boardroom equality and diversity continues to be a highly contested corporate law and governance issue. The push for equality and diversity on corporate boards has accelerated to new levels in the past few years, with particular pushes coming from revealed systemic inequalities that have been exacerbated by the COVID-19 global pandemic.¹ Unfortunately, the latest corporate governance reforms have mostly failed to address this problem.² Companies must do more than make mere verbal promises on commitments to diversity and ought to accelerate their slow and incremental progress.³

Academics, policymakers, institutional investors, activists, proxy advisors, and the public at large are pressuring corporations to make advances in Diversity, Equity, and Inclusion (“DEI”).⁴ To counter the argument that mandating such changes under corporate law would undermine shareholder primacy, academics and jurists have taken different positions on whether corporate fiduciaries may or must consider DEI in their management activities.⁵

1. See Anat Alon-Beck, Michal Agmon-Gonnen & Darren Rosenblum, *No More Old Boys’ Club: Institutional Investors’ Fiduciary Duty to Advance Board Gender Diversity*, 55 U.C. DAVIS L. REV. 101 (2021) (discussing methods for increasing gender diversity on corporate boards).

2. See *infra* Part II.

3. David Katz & Laura A. McIntosh, *Corporate Governance Update: Raising the Stakes for Board Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 25, 2020), <https://corpgov.law.harvard.edu/2020/07/25/corporate-governance-update-raising-the-stakes-for-board-diversity/> [https://perma.cc/Z2P6-R55Y].

4. *Id.* (“They are leveraging litigation, legislation, shareholder proposals, and direct engagement to push companies to increase their commitment to diversity, to disclose their diversity data, and to make significant financial investments in diversity initiatives.”).

5. Lisa M. Fairfax, *Clogs in the Pipeline: The Mixed Data on Women Directors and Continued Barriers to Their Advancement*, 65 MD. L. REV. 579, 580 (2006); Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91 (2020); Lucian A. Bebchuk, Kobi Kastiel & Roberto Tallarita, *For Whom Corporate Leaders Bargain*, 93 S. CAL. L. REV. (forthcoming 2021); Leo E. Strine, Jr., *Restoration: The Role Stakeholder Governance Must Play in Recreating a Fair and Sustainable American Economy—A Reply to Professor Rock*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Jan. 7, 2021), <https://corpgov.law.harvard.edu/2021/01/07/restoration-the-role-stakeholder-governance-must-play-in-recreating-a-fair-and-sustainable-american-economy-a-reply-to-professor-rock/>

Amid these varying positions, the question still remains as to what extent fiduciary duties ought to reflect diversity mandates. In their Article, *Duty and Diversity*, Professor Chris Brummer and the Honorable Leo E. Strine, Jr., former Chief Justice of the Delaware Supreme Court, maintain that corporate fiduciary duties are concordant with efforts aimed at DEI as a means to comply with civil rights and antidiscrimination laws and norms. We completely agree with them on the “positive role to play in supporting corporations in taking actions to promote DEI.”⁶ Corporate law and corporations indeed play a central role in modern economies and contribute to the world economy.⁷

However, where we differ is that Brummer and Strine consider whether directors have a right to consider DEI norms as part of their duties to the firm, while we argue that considering DEI is a specific fiduciary duty. In the context of the current profit-maximization approach that dominates U.S. corporate governance theory, their position advances the conversation. However, we believe that according directors the right to consider DEI may prove insufficient to change the long-term and deeply imbedded lack of diversity. We maintain that establishing a fiduciary responsibility to diversify would prove more beneficial.

In our Article, *No More Old Boys’ Club: Institutional Investors’ Fiduciary Duty to Advance Board Gender Diversity*, we originally recognized a new fiduciary duty to advance diversification and equality with regard to gender, which opened up additional conversations about the benefits of using private ordering to advance equality, equity, diversity, and inclusion more broadly.⁸ We presented a novel angle to this question: we asked whether all firms, but especially institutional investors, should bear a fiduciary duty to promote gender equality and push for diversity.

Fiduciary duties reflect the central role of directors and executives in corporate governance. Those with the most responsibility benefit the most from corporate success, but also bear commensurate

[<https://perma.cc/85CR-N86Y>]; Alma Cohen, Moshe Hazan & David Weiss, *Politics and Gender in the Executive Suite* (Harv. L. Sch. John M. Olin Ctr. Discussion Paper No. 1029, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3556713 [<https://perma.cc/QYP9-AD53>]; Jesse M. Fried, *Will Nasdaq’s Diversity Rules Harm Investors?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 8, 2021), <https://corpgov.law.harvard.edu/2021/04/08/will-nasdaqs-diversity-rules-harm-investors/> [<https://perma.cc/LV54-8HSU>].

6. Chris Brummer & Leo E. Strine, Jr., *Duty and Diversity*, 75 VAND. L. REV. 1 (2022).

7. See also Lynn A. Stout et al., *The Modern Corporation Statement on Company Law* (Oct. 6, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2848833 [<https://perma.cc/3CBB-3PDM>].

8. Alon-Beck, et al., *supra* note 1.

fiduciary responsibilities. At first glance, diversity, equity, and inclusion may seem an odd fit among other fiduciary duties. However, fiduciary duties are where governance imposes the burden of “doing the right thing.” Fiduciary duties require normatively good behavior that promotes responsible decisionmaking and achieving positive outcomes for firms.

Corporate law allows, encourages, and perhaps, today, even mandates, corporate leaders to do the right thing. Not only does it seem appropriate to ask corporate leaders, such as institutional investors, to carry this fiduciary duty, but imposing this duty on them may prove far more effective than other efforts.⁹ As a new generation begins leading firms, this new fiduciary duty may provide a novel, central means for improving governance.

Despite the fact that diversity and equality norms have been widely recognized to improve corporate governance, reduce the risk of groupthink, and increase the board’s independence and objectivity, there has yet to be a significant movement towards true diversification. While the United States has become increasingly diverse, the country’s corporate leadership has remained largely male and overwhelmingly white. The intensification of public and political pressure has done little to improve this situation. Institutional investors, with their large capital stakes in these firms, have had the most success in bringing DEI initiatives into the boardroom, but it is not enough.

Directors and officers of companies may not have nefarious reasons for avoiding diversity, but they exacerbate the problem with their increasingly interlocked networks. As boards, directors, and officers become increasingly interconnected, a shrinking pool of potential candidates remains, most of which largely lack in diversity. As the primary sources of replacements lack diversity, difficulties confront efforts at inclusion.

Regardless of the challenges associated with creating a diverse pool, boards and management must make improvements under their existing fiduciary duties. Courts need to account for the fact that the U.S. regulatory landscape is changing to deal with these developments. Investors are ramping up the pressure on boards, who must be diligent to avoid potential long-term liability.

9. Other efforts include attempts to increase diversity disclosure under existing federal securities law requirements. However, this has been met with opposition. *See* EllieMaria Toronto *ESA v. NortonLifeLock, Inc.*, No. 20-cv-05410-RS, 2021 U.S. Dist. LEXIS 164000, at *2 (N.D. Cal. Aug. 30, 2021) (“[W]ithout questioning that there may be systemic under-representation in corporate boardrooms, or plaintiff’s good faith in looking for legal recourse, the flaws in this putative class action complaint require dismissal[.]”).

Last year, many corporations made public statements on commitments to promote DEI and economic justice. But it remains unclear whether these companies are taking the required actions to combat inequality. The corporate landscape is changing, as evidenced by this proxy season where investors are calling for civil rights, racial, gender, and equity audits at major firms. Many companies, including Amazon, Johnson & Johnson, Bank of America, Wells Fargo, Citigroup, Goldman Sachs, and JPMorgan, received requests from investors to disclose a median gender and racial pay equity report.¹⁰ Moreover, large institutional players, like State Street, responded by implementing new policies to encourage the hiring of women and ethnic-minority candidates. This caused a media stir, which claimed that State Street now requires companies “to get special approval to hire a white man.”¹¹

This Article will proceed as follows: Part I will address the rationale for diversity and equality in the boardroom.¹² Part II will consider how we can change the rules.¹³ Part III will present a new fiduciary duty to diversify and promote equality.¹⁴ We will conclude by suggesting that a fiduciary duty may be an effective internal governance mechanism that could improve good governance through equality and diversity.

I. RATIONALE FOR EQUALITY AND DIVERSITY

Fiduciary duties may seem to be an odd location within corporate law for requiring stronger diversity, equity, and inclusion initiatives. It is unquestionably a novel place. Nevertheless, it is through fiduciary duties that the State articulates the behavior expected of duty holders. Indeed, fiduciary duties allow the State to deputize duty holders to act in ways that reflect widely accepted public governance norms.

10. *Shareholder Proposals, Proxy Season Review 2021*, GLASS LEWIS, <https://glasslewis.com/wp-content/uploads/2021/09/Shareholder-Proposals-2021-Proxy-Season-Review.pdf> (last visited Dec. 15, 2021) [<https://perma.cc/NBN9-TCH3>]; Courtenay Brown, “*Racial Audit*” *Playbook Pushed on Companies with Lacking Practices*, AXIOS (Oct. 27, 2021), <https://www.axios.com/racial-audit-playbook-pushed-on-companies-with-lacking-practices-93a6580c-8982-47d6-8ae2-2d053d62925d.html> [<https://perma.cc/ZYY6-6DWV>]; Ron S. Berenblat & Elizabeth R. Gonzalez-Sussman, *Racial Equity Audits: A New ESG Initiative*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Oct. 30, 2021), <https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative/> [<https://perma.cc/65YU-2HCE>].

11. Nóirín Hegarty & Robert Watt, *No Country for White Men as State Street Push Diversity*, TIMES (Nov. 7, 2021), <https://www.thetimes.co.uk/article/no-country-for-white-men-as-state-street-push-diversity-hlgttnw5h> [<https://perma.cc/7YJV-XRCC>].

12. See *infra* Part II.

13. See *infra* Part III.

14. See *infra* Part IV.

Critics dominant in the United States question whether the state should force companies to implement gender equality on boards. California is the first U.S. state to adopt such legislation. California's board gender diversity statute SB 826 requires public companies with principal executive offices in the state, regardless of where they are incorporated, to include a specified minimum numbers of women on their boards of directors.¹⁵ Unsurprisingly, several lawsuits followed, and the constitutionality of this mandate remains unresolved.¹⁶ While it faces substantial challenges in court,¹⁷ SB 826 has nonetheless inspired widespread compliance.¹⁸ This legislative effort only affects a small number of U.S. firms. Broad agreement among scholars exists that corporate governance suffers from a lack of diversity and equality.¹⁹ A fiduciary duty for diversity would complement such legislation.

A fiduciary duty locates the responsibility for diversity within the firm. It establishes that powerful market actors like institutional investors have a central role in guiding firms' actions. Many have

15. See also Christopher J. Riley, *An Equal Protection Defense of SB 826*, CALIF. L. REV. ONLINE (July 2020), <https://www.californialawreview.org/equal-protection-defense-sb826/> [<https://perma.cc/MD8A-B2AQ>]. With regards to AB 979, see Jackson Lewis, *AB 979 Requires California-Based Publicly Held Corporations To Diversify Their Boards Of Directors*, JD SUPRA (Oct. 1, 2020), <https://www.jdsupra.com/legalnews/ab-979-requires-california-based-17002/> [<https://perma.cc/225E-S5H6>].

16. In *Padilla*, the judge dismissed the lawsuit attempting to invalidate this new law on the basis of lack of standing, but the decision was reversed by the Ninth Circuit. *Meland v. Padilla*, No. 2:19-cv-02288-JAM-AC, 2020 WL 1911545 (E.D. Cal. Apr. 20, 2020), *rev'd sub nom.* *Meland v. Weber*, 2 F.4th 838 (9th Cir. 2021). The plaintiff's argument in was that the mandate was unconstitutional under the equal protection provisions of the 14th Amendment. The Ninth Circuit allowed the case, known now as *Meland v. Weber*. The Ninth Circuit held that the plaintiff has standing to challenge SB 826's constitutionality because he "plausibly alleged that SB 826 requires or encourages him to discriminate on the basis of sex[.]" *Weber*, 2 F.4th at 842. On October 19, 2021, in *Meland v. Weber*, the case returned to federal district court where a judge held a hearing on a motion for a preliminary injunction against California's board gender diversity statute (SB 826).

17. *Weber*, 2 F.4th at 842.

18. *Id.*; see Cydney S. Posner, *Hearing on Board Gender Diversity Statute*, HARV. L. SCH. F. ON CORP. GOVERNANCE (NOV. 16, 2021), <https://corpgov.law.harvard.edu/2021/11/16/hearing-on-board-gender-diversity-statute/> [<https://perma.cc/WEU2-4MJ9>].

19. See IRVING LESTER JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOES (2d ed. 1982); Renée B. Adams & Daniel Ferreira, *Women in the Boardroom and Their Impact on Governance and Performance*, 94 J. FIN. ECON. 291, 291 (2009); Douglas Cumming, T. Y. Leung & Oliver Rui, *Gender Diversity and Securities Fraud*, 58 ACAD. MGMT. J. 1572, 1572 (2015); Lisa M. Fairfax, "With Friends Like These . . .": *Toward a More Efficacious Response to Affinity-Based Securities and Investment Fraud*, 36 GA. L. REV. 63, 67 (2001); Jill E. Fisch & Steven Davidoff Solomon, *Centros, California's 'Women on Boards' Statute and the Scope of Regulatory Competition*, 20 EUR. BUS. ORG. L. REV. 493, 493 (2019); Sarah Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. (forthcoming 2022); Jasmin Joecks, Kerstin Pull & Katrin Scharfenkamp, *Perceived Roles of Women Directors on Supervisory Boards: Insights from a Qualitative Study*, 33 GER. J. HUM. RES. MGMT. 5, 5 (2019); Faith Stovelman & Sarah C. Haan, *Boards in Informational Governance*, 23 U. PA. J. BUS. L. 179, 181 (2020).

already made bold public statements on their commitments to pressure companies to increase board diversity and be more transparent on their current diversity practices. Large asset managers, such as BlackRock and State Street, are pressuring companies to change their practices and advance diversity.²⁰

We can draw three conclusions about the role of directors and executives from these developments with regard to institutional investors. First, in order to fulfill their responsibility to govern to the best of their ability, there is an obligation to consider DEI. Second, in order to fulfill what many consider to be their primary obligation, the maximization of profit, directors and managers again must consider DEI.²¹ Finally, an obligation to consider equality and DEI under fiduciary duties reflects the value which the public places on equality and diversity.²²

Strine and Brummer argue businesses have “a moral *and* business rationale” to work towards enhancing diversity.²³ They go on to argue these same enterprises are required to “focus on antidiscrimination practices to some meaningful extent.”²⁴ If they fail to do so, they run the peril of opening themselves up to “high financial, reputational, and legal risks[.]”²⁵ However, Strine and Brummer do not go beyond the point of permitting and encouraging directors to do so. They limit their framework and approach to the baseline compliance and “proceed at your own peril” methodology, while simultaneously advocating that directors and officers should go beyond their baseline duties for moral and business reasons.

While Strine and Brummer’s position is relatively radical within the context of the current profit-maximization approach dominating corporate governance, it may be insufficient to spark sufficient change to

20. *BlackRock, Vanguard and State Street Update Corporate Governance and ESG Policies and Priorities for 2022*, GIBSON, DUNN & CRUTCHER LLP (Jan. 25, 2022), <https://www.gibsondunn.com/blackrock-vanguard-and-state-street-update-corporate-governance-and-esg-policies-and-priorities-for-2022/> [<https://perma.cc/5KGG-BY43>].

21. Mike Fucci & Terri Cooper, *The Inclusion Imperative for Boards: Redefining Board Responsibilities to Support Organizational Inclusion*, DELOITTE (Apr. 2, 2019), <https://www2.deloitte.com/us/en/insights/topics/value-of-diversity-and-inclusion/redefining-board-responsibilities-to-support-organizational-inclusion.html> [<https://perma.cc/AQE8-6D83>]; see DELOITTE, TOWARD GENDER PARITY: WOMEN ON BOARDS INITIATIVE 2 (2016), <https://www2.deloitte.com/au/en/pages/economics/articles/toward-gender-parity-women-on-boards-initiative.html> [<https://perma.cc/L57Y-PKG7>].

22. See Dylan Bruce & Peter Rasmussen, *Analysis: Mandated Board Diversity Takes Center Stage in 2021*, BLOOMBERG L. (Nov. 16, 2020, 3:31 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-mandated-board-diversity-takes-center-stage-in-2021> [<https://perma.cc/UH83-MLDZ>].

23. Brummer & Strine, *supra* note 6, at 9.

24. *Id.* at 8.

25. *Id.* at 9.

address the long and deeply entrenched lack of diversity. We argue that establishing a fiduciary responsibility to diversify would prove much more effective.

Despite the research that indicates that diverse boards promote greater independence, objectivity, performance, innovation, and business outcomes, boards remain predominantly male and overwhelmingly white.²⁶ White directors represent eighty-four percent of current Fortune 500 board seats, with Black directors holding only 8.6 percent. Latinx directors are in even worse shape. Despite being one of the fastest growing groups in the population, doubling their overall share of the population since 1990, they have seen a mere three percent increase in overall board seats in the last two decades. The problem is just as apparent in the C-Suite, as whites constitute eighty-nine percent of all CEOs.²⁷

There is a clear disconnect between the data and the ultimate implementation of DEI initiatives. Diversification, and more importantly equity and inclusion, have the potential to further the long term goals of companies across the United States. Despite this, companies appear to be resistant to adopting such measures. While more and more institutional investors are beginning to exert pressure on their investee companies, this is likely insufficient.²⁸ Diversity mandates will increase company health in the long term, are morally justifiable, and are necessary for growth. However, absent true legal pressure, stemming from fiduciary duties, we cannot presume that these companies will voluntarily comply.

Gender equality efforts have repeatedly returned to a focus on women's ability to "step up" their own representation.²⁹ This pressure

26. See *id.*; see also Jena McGregor, *Corporate boards are still mostly white, mostly male—and getting even older*, WASH. POST (Apr 24, 2018), <https://www.washingtonpost.com/news/on-leadership/wp/2018/04/24/corporate-boards-are-still-mostly-white-mostly-male-and-getting-even-older/> [<https://perma.cc/V5TV-SPWN>]; Meera Jagannathan, *America's most prestigious corporate boards are still being filled by mostly white men* (June 19, 2021, 11:11 AM), MARKET WATCH, <https://www.marketwatch.com/story/progress-on-corporate-board-diversity-has-been-painfully-slow-did-2020s-racial-reckoning-make-a-difference-11623266503> [<https://perma.cc/HNG4-TUVW>].

27. See Brummer & Strine, *supra* note 6, at 16; see also Jeff Green, *Focus on Black Directors Has Latinos Asking: What About Us?*, BLOOMBERG (Sept. 18, 2020, 10:01 AM), <https://www.bloomberg.com/news/articles/2020-09-18/latinos-call-for-board-seats-left-out-of-efforts-to-promote-black-directors> [<https://perma.cc/AKK9-XC8G>]; HISP. ASS'N ON CORP. RESP., 2013 CORPORATE GOVERNANCE SURVEY (2013) [<https://perma.cc/9AE2-4GLR>].

28. See Dylan Bruce & Peter Rasmussen, *Analysis: Mandated Board Diversity Takes Center Stage in 2021*, BLOOMBERG L. (Nov. 16, 2020, 5:31 AM), <https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-mandated-board-diversity-takes-center-stage-in-2021> [<https://perma.cc/UH83-MLDZ>].

29. Joe Coscarelli, *Grammys President Faces Backlash After Saying Women Need to 'Step Up'*, N.Y. TIMES (Jan. 30, 2018), <https://www.nytimes.com/2018/01/30/arts/music/grammys-step-up-neil-portnow-backlash.html> [<https://perma.cc/2KH8-X82W>]; see TIFFANY BURNS, JESS HUANG,

to “lean in” falls generally short.³⁰ It presumes that women on their own can secure more representation even though male elites have little incentive to yield their *droit de seigneur* over corporate leadership, despite the evidence that it will benefit the companies to which they owe their fiduciary duties.³¹

Yet, private efforts—whether those of shareholder activists or motivated individuals—cannot on their own generate structural transformation. This limitation exists both within firms and more broadly.³² Voluntary measures come and go as new controversies draw activist shareholder attention. Activists, whether institutional shareholders or nongovernmental organizations, ebb and flow in their influence. “Leaning in” is an excellent form of consciousness-raising among market actors, but for such efforts to take root, the state’s norm-setting authority plays an essential role.

There is also the inevitability of time facing many of these corporations. As Michal Barzuza, Quinn Curtis, and David Webber note, millennials and Generation Z now represent a majority of the U.S. population.³³ Millennials are expected to comprise seventy-five percent of the global workforce by 2025.³⁴ They are also poised to inherit nearly \$25 trillion in assets as baby boomers continue to retire and eventually die.³⁵ This represents, in the words of Larry Fink, “the largest asset transfer in history.”³⁶

With this asset transfer and emerging workforce dominance, millennials and Generation Z are beginning to exert their power to

ALEXIS KRIVKOVICH, ISHANAA RAMBACHAN, TIJANA TRKULJA & LAREINA YEE, MCKINSEY & CO., WOMEN IN THE WORKPLACE 2021 (Sept. 27, 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace> [<https://perma.cc/9KVL-S6MP>].

30. Sheryl Sandberg’s manifesto, *Lean In*, urged women to engage in a concerted social effort to bring other women up to diversify the corporate hierarchy. SHERYL SANDBERG, *LEAN IN: WOMEN, WORK, AND THE WILL TO LEAD* 9–11 (2013). This push to get women to “lean in” promotes a notion of individualized autonomy to general social change.

31. *Id.* at 8; see also BURNS ET AL., *supra* note 29.

32. See ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 291 (2d ed. 1993).

33. Michal Barzuza, Quinn Curtis & David H. Webber, *The Millennial Corporation*, B.U.L. REV. (forthcoming 2022) (manuscript at 15).

34. *Id.*

35. Letter from Larry Fink, Chairman and Chief Exec. Officer of BlackRock, to CEOs (2019), <https://www.blackrock.com/americas-offshore/en/2019-larry-fink-ceo-letter> [<https://perma.cc/L287-J3P3>]. Generation X is receiving an even larger inheritance comprising of nearly \$40 trillion. See Ben Eisen & Anne Tergesen, *Older Americans Stockpiled a Record \$35 Trillion. The Time Has Come to Give It Away*, WALL ST. J. (July 2, 2021, 10:00 AM), <https://www.wsj.com/articles/older-americans-35-trillion-wealth-giving-away-heirs-philanthropy-11625234216> [<https://perma.cc/D8SM-TKLG>].

36. Letter from Larry Fink, *supra* note 35.

influence their employers and the companies they choose to invest in.³⁷ They carry with them their liberal political positions,³⁸ willingness to publicly seek accountability for ethical, environmental, and social governance (“EESG”) commitments,³⁹ and ability to vote with their feet when it comes to both employment and investment decision.⁴⁰ A phenomenon known as the “Sustainability Wage Gap” has been measured by Philipp Krueger, Daniel Metzger, and Jiaxin Wu, which shows that members of these groups are willing to take less pay in exchange for firms which reflect their values.⁴¹ As their purchasing and investing power grows from its already considerable levels, the effects of this upon corporate entities will become increasingly acute.⁴²

If managers and directors are unwilling to yield their positions in the present, millennials and Generation Z need only bide their time and their purses until they dominate the corporate landscape. However, these groups do not appear to be waiting at all. Studies have shown both groups prioritize purpose over salary.⁴³ With their fluency in social media, they have the ability to magnify their impact beyond that of the singular “disgruntled [] employee” and seek support inside and outside companies.⁴⁴ As Barzuza, Curtis, and Webber described, the

37. Barzuza, Curtis & Webber, *supra* note 33; see also Sergio Alberto Gramitto Ricci & Christina M. Sautter, *Corporate Governance Gaming: The Power of Retail Investors*, 22 NEV. L.J. (forthcoming 2022).

38. See Barzuza, Curtis & Webber, *supra* note 33 (manuscript at 16); see also Johnathan C. Peterson, Kevin B. Smith & John R. Hibbing, *Do People Really Become More Conservative as They Age?*, 82 J. POL. 600, 600–11 (2019); see also CARROLL DOHERTY ET AL., PEW RSCH. CTR., THE GENERATION GAP IN AMERICAN POLITICS (2018), <https://www.pewresearch.org/politics/2018/03/01/the-generation-gap-in-american-politics/> [<https://perma.cc/2YGG-22JU>] (“Millennials remain the most liberal and Democratic of the adult generations.”).

39. See Barzuza, Curtis & Webber, *supra* note 33 (manuscript at 17–18).

40. *Id.* (manuscript at 17–18).

41. Philipp Krueger, Daniel Metzger & Jiaxin Wu, *The Sustainability Wage Gap* 34–35 (Eur. Corp. Governance Inst. Working Paper No. 718/2020, 2021).

42. Barzuza, Curtis & Webber, *supra* note 33 (manuscript at 16); see also *How Can Consumer-Facing Companies Weave Social Justice into Their DNA?*, PWC, <https://www.pwc.com/us/en/industries/consumer-markets/library/esg-metrics-influence-buying.html> (last visited Nov. 17, 2021) [<https://perma.cc/56BS-5EMZ>].

43. Barzuza, Curtis & Webber, *supra* note 33 (manuscript at 17); Afdhel Aziz, *The Power of Purpose: The Business Case for Purpose (All the Data You Were Looking for Pt 2)*, FORBES (Mar. 7, 2020, 12:04 PM), <https://www.forbes.com/sites/afdhelaziz/2020/03/07/the-power-of-purpose-the-business-case-for-purpose-all-the-data-you-were-looking-for-pt-2/?sh=48495ce93cf7> [<https://perma.cc/6GWT-N2R8>]; see also Lauren Vesty, *Millennials want purpose over paychecks. So why can't we find it at work?*, GUARDIAN (Sept. 14, 2016, 3:25 PM), <https://www.theguardian.com/profile/lauren-vesty> [<https://perma.cc/5FL4-7Z4T>]; Zameena Mejia, *Nearly 9 out of 10 millennials would consider taking a pay cut to get this*, CNBC (June 28, 2018, 2:24 PM), <https://www.cnbc.com/2018/06/27/nearly-9-out-of-10-millennials-would-consider-a-pay-cut-to-get-this.html> [<https://perma.cc/D9M6-PKFH>].

44. Barzuza, Curtis & Webber, *supra* note 33 (manuscript at 16); see also Ricci & Sautter, *supra* note 37.

paradoxical nature of the power of millennials and Generation Z stems from their willingness to be the solitary disgruntled employee.⁴⁵ Regardless of what anyone else does, “each millennial will [consume and work in firms they value is important to their identity] even if others do not.”⁴⁶ This allows them to prioritize values over returns.

With this context in mind, it becomes all the more important for firms to consider their actions, plans, and intentions on DEI.⁴⁷ Along with environmental considerations, it is the most important consideration for Millennials and Generation Z.⁴⁸

Just as these groups will come to dominate the workforce, they will also become the majority of elected officials. Corporations should take affirmative steps now to address these concerns, rather than have them handed down. Should future congresses decide to become involved, shareholder suits seeking to enforce fiduciary duties, which we believe already require such action, will become small nuisances compared to enforcement actions by federal and state regulators.

II. CHANGE THE RULES

Perhaps the strongest indicator of the problem facing women and minority directors is the pool from which directors are often drawn. Strine and Brummer acknowledge that directors are often candidates with experience running business units or having operations-centered positions. This generally translates to “a pool of fewer female and minority candidates.”⁴⁹ While they point to alternative potential sources in the government, military, educational institutions, and the legal profession—where these groups have made greater inroads—they acknowledge the reality of interlocking directors makes this an unlikely approach to true diversification and inclusion.⁵⁰

Directors often already know one another, and CEOs look for directors with whom they have a baseline of trust and rapport already built.⁵¹ It is a self-perpetuating problem. Candidates are often former or current executives from companies known to the other members of the board or C-suite. Such individuals are considered candidates by virtue of their participation in social circles and networks that only

45. Barzuza, Curtis & Webber, *supra* note 33 (manuscript at 16).

46. *Id.* (manuscript at 28).

47. *Id.* (manuscript at 6, 9, 16).

48. *Id.* (manuscript at 16).

49. Brummer & Strine, *supra* note 6, at 14.

50. *Id.*

51. *Id.*; see generally Udi Hoitash, *Should Independent Board Members with Social Ties to Management Disqualify Themselves from Serving on a Board?*, 99 J. BUS. ETHICS 399 (2011).

those with the same elite background and network can participate in. Women and, in particular, ethnically diverse candidates, are excluded from such networks.⁵² These directors with prior connections to the incumbent board enhance the homogeneity of the board.⁵³

As a result of interlocking, firms are able to connect on a high board level and coordinate strategic decisions, a thin line from illegal collusive activity.⁵⁴ Directors are able to enhance their preexisting social and professional networks, increasing their overall societal influence and prestige.⁵⁵ This results in a so called “extra-market form of economic organization.”⁵⁶ It has resulted in the consolidation of capital and the continued exclusion of ethnic minorities and women.⁵⁷

Rather than addressing this locked-in disparity in the corporate boardroom, director networks have taken their interests beyond only business to ensure that their position is unable to be challenged by future generations. Directors often join boards of foundations, universities, social clubs, business associations, think tanks, and forums fostering even more interconnectedness.⁵⁸ As a result, the “social space of the elite” shrinks further, allowing directors access to policy, intellectual legitimacy, and political leaders to project a broader ranged unified voice.⁵⁹ Universities and economic policy planning groups are particularly susceptible to such interlocks, while the former also serves as the primary means for the production and reproduction of the elites necessary to continue the interlocked networks.⁶⁰

52. Brummer & Strine, *supra* note 6, at 16; *see also* Anat Alon-Beck & Moran Ofir, *Interlocking Directors* (2022) (unpublished manuscript) (on file with authors).

53. Ralph A. Walking, *Director Appointments—Is It “Who You Know”?*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 7., 2017), <https://corpgov.law.harvard.edu/2017/04/07/director-appointments-is-it-who-you-know/> [<https://perma.cc/29LF-S2QR0>].

54. J.P. Sapinski & William K. Carroll, *Interlocking Directorates and Corporate Networks*, in HANDBOOK OF THE INTERNATIONAL POLITICAL ECONOMY OF THE CORPORATION 46 (Andreas Nölke & Christian May, eds., 2018) (citing Mark S. Mizruchi, *What Do Interlocks Do? An Analysis, Critique, and Assessment of Research on Interlocking Directorates*, 22 ANN. REV. SOCIO. 271 (1996)).

55. *Id.* (citing Mizruchi, *What Do Interlocks Do? An Analysis, Critique, and Assessment of Research on Interlocking Directorates*, 22 ANN. REV. SOCIO. 271 (1996)).

56. *Id.* (citing John Scott, *Theoretical Framework and Research Design*, in NETWORKS OF CORPORATE POWER: A COMPARATIVE ANALYSIS OF TEN COUNTRIES 2 (Frans N. Stokman, Rolf Ziegler & John Scott eds., 1985)).

57. *Id.* at 48.

58. *Id.* at 50 (citing Roy C. Barnes, *Structural Redundancy and Multiplicity within Networks of US Corporate Directors*, 43 CRITICAL SOCIO. 37 (2015)).

59. *Id.*

60. *Id.* (first citing William K. Carroll, *Networks of Cognitive Praxis: Transnational Class Formation from Below?*, 10 GLOBALIZATIONS 691 (2013); then Sheila Slaughter et al., *Institutional Conflict of Interest: The Role of Interlocking Directorates in the Scientific Relationships Between Universities and the Corporate Sector*, 85 J. HIGHER EDUC. 1 (2014)).

This continual locking out of potential sources of future diversity seems to suggest that the current pool of largely male and overwhelmingly white directors and managers are, at the very least, unable to consciously diversify in good faith. Even if their actions are the result of unconscious bias, they are extending these unconscious efforts into the very institutions which should check to their actions.

Due to these shortcomings, in *No More Old Boys' Club* we suggested a major change to the rule—companies should add more than a token woman (or other diversity candidate) to their pool of candidates and nominees.⁶¹ According to research by Stefanie Johnson, David Hekman, and Elsa Chan, when there is only one woman in the candidate pool, there is statistically no chance of her being hired.⁶² However, this statistical result changes dramatically if there is more than one woman in the candidate pool.⁶³

Unfortunately, we also recognize that each additional woman (or diversity candidate) that is added to the pool does not automatically increase the probability of hiring a woman (or diversity candidate).⁶⁴ To improve the chances of hiring a diversity candidate, Johnson, Hekman, and Chan found that having an equal number of men and women candidates makes a significant difference rather than just token interviewees.⁶⁵ Therefore, we propose that board members should be elected from an approximately equal number of diverse and non-diverse candidates.

III. A NEW DUTY TO DIVERSITY AND EQUALITY

The murder of George Floyd reignited a national conversation on systemic racism and injustice. Calls for diversity and racial justice are heard all over the United States, including in Delaware, where the foundations of business law and its judicial system are on trial.

A group called Citizens for a Pro-Business Delaware spent more than \$550,000 on a television advertising campaign where Reverend Al Sharpton criticized the Delaware judiciary for its lack of diversity.⁶⁶ It

61. Alon-Beck et al., *supra* note 1.

62. Stefanie K. Johnson, David R. Hekman & Elsa T. Chan, *If There's Only One Woman in Your Candidate Pool, There's Statistically No Chance She'll Be Hired*, HARV. BUS. REV. (Apr. 26, 2016), <https://hbr.org/2016/04/if-theres-only-one-woman-in-your-candidate-pool-theres-statistically-no-chance-shell-be-hired> [<https://perma.cc/H7MA-PDQP>].

63. *Id.*

64. *Id.*

65. *Id.*

66. Betsy Price, *Pro-Business Delaware Launches \$550,000 Ad Urging Diversity on Courts*, TOWNSQUARELIVE (Aug. 2, 2021), <https://townsquaredelaware.com/pro-business-delaware-launches-550000-ad-urging-diversity-on-courts/> [<https://perma.cc/W94G-KLC5>].

should be noted that earlier this year, on the sixty-seventh anniversary of the U.S. Supreme Court's historic *Brown v. Board of Education* decision,⁶⁷ Delaware Supreme Court Chief Justice Collins J. Seitz, Jr. announced the establishment of the Delaware Bench and Bar Diversity Project.⁶⁸ We praise this great initiative. The project is striving to build a more diverse Delaware bench and bar.

The Delaware judiciary and bar are not the only ones under attack. Many Delaware corporations are now struggling with how to make their workplaces more equitable, diverse, and inclusive. Some of them are also facing legal battles over equality and diversity with activist shareholders demanding change.

Shareholder derivative lawsuits are targeting both major public and private companies.⁶⁹ The main legal argument is that these companies' boards of directors breached their fiduciary duties as a result of an "old boys' club" corporate culture.⁷⁰ Despite making public commitments to diversity, the pursuit of equality, and inclusion, boards often fall short, and the reality is very different.

This new dawn brings with it challenges to the conduct of public (and private) company directors. Directors are now subject to new lawsuits based on alleged breaches of fiduciary duty to diversify. There is a shift to a focus on corporate culture.⁷¹ Many lawsuits unequivocally focus on the board's lack of attention to equality and diversity.⁷²

67. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

68. DEL. BENCH AND BAR DIVERSITY PROJECT, <https://courts.delaware.gov/forms/download.aspx?id=126558> (last visited Nov. 17, 2021) [<https://perma.cc/VEM9-BVLX>].

69. See Samantha Burdick, Bianca DiBella, Pamela Palmer, Alexandra Peurach & Howard Privette, *A New Wave of Board Diversity Derivative Litigation*, JD SUPRA (Oct. 21, 2020), <https://www.jdsupra.com/legalnews/a-new-wave-of-board-diversity-89301/> [<https://perma.cc/7LDB-QLDJ>]; see generally Verified Shareholder Derivative Complaint at 5, *Klein v. Ellison*, No. 20-cv-04439 (N.D. Cal. July 2, 2020) (filing suit against Oracle for its lack of diversity); Verified Shareholder Derivative Complaint at 3, *Ocegueda v. Zuckerberg*, No. 20-cv-04444 (N.D. Cal. July 2, 2020) (filing suit against Facebook for its lack of diversity); Verified Shareholder Derivative Complaint at 2, *Falat v. Sacks*, No. 8:20-cv-01782 (C.D. Cal. Sept. 18, 2020) (filing suit against Monster Beverage Corporation for its lack of diversity).

70. Burdick et al., *supra* note 69; Jessie K. Liu, Susan L. Saltzstein & Tansy Woan, *Shareholder Suits Demand More Progress on Diversity*, SKADDEN (Apr. 13, 2021), <https://www.skadden.com/insights/publications/2021/04/the-informed-board/shareholder-suits-demand-more-progress> [<https://perma.cc/37MY-CFR2>].

71. See Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 U.C. DAVIS L. REV. 1913, 1947 (2021) ("This marks a clear departure from the traditional shareholder focus on adequate compliance, training, and reporting systems and is yet another power example of a shift from an era of compliance to an era of culture.").

72. See Third Amended Class Action Complaint for Violations of the Federal Securities Laws at 61, *In re Signet Jewelers Ltd. Sec. Litig.*, No. 1:16-cv-06728-JMF, 2018 WL 2191300 (S.D.N.Y. Nov. 26, 2018); Notice of Pendency and Proposed Settlement of Derivative Actions, *In re Alphabet S'holder Derivative Litig.*, No. 19CV341522, 2020 Cal. Super. LEXIS 1493 (Cal. Super. Ct. Oct. 22, 2020); Complaint, *Stein v. Knight*, No. 18CV38553 (Or. Cir. Ct. Aug. 31, 2018); Miazad, *supra* note 71; Kevin

These developments present a challenge to the Delaware courts: should they require directors to play a more direct and active role in pushing for equality and diversity or in overseeing corporate diversity initiatives? If so, what standard should govern directors' liability for failure to do so?

Delaware's decision on how broad (or narrow) to make directors' diversity duties and ensuing liability will have a huge impact on the business community. Delaware has been very successful in maintaining its title as the preeminent state of choice for public corporations, including most Fortune 500 companies. Delaware also dominated the market for initial public offerings for companies becoming public entities for the first time. Approximately eighty-nine percent of all U.S. companies that did an initial public offering last year chose to incorporate in Delaware.⁷³

According to Delaware law, directors are subject to fiduciary duties of care and loyalty, including good faith, oversight and disclosure. What about equality and diversity? According to § 141(a) of the Delaware General Corporation Law, directors have a duty to manage the firm. Which obligations does the duty to manage the firm impose on directors?

In the past, directors were able to exercise oversight indirectly. In *Grimes v. Donald*,⁷⁴ the Court held that directors could exercise their power by simply hiring and firing corporate officers. However, the Delaware court's attitude towards director oversight changed due to changes in federal criminal law. Due to these outside developments, Delaware reformed its previous approach to director oversight duties.⁷⁵

Delaware decided to respond to these changes and finally recognized a director duty of oversight with regards to compliance with criminal laws. In *In re Caremark International Inc. Derivative Litigation*, Chancellor William Allen changed Delaware law by recognizing a director's duty to actively monitor.⁷⁶ However, he also limited director liability for failure to monitor, unless there was bad

LaCroix, *Nike Board Hit with Sexual Misconduct-Related Derivative Suit*, D&O DIARY (Oct. 30, 2018), <https://www.dandodiary.com/2018/10/articles/director-and-officer-liability/nike-board-hit-sexual-misconduct-related-derivative-suit/> [https://perma.cc/2PUX-QHM7].

73. DEL. DIV. OF CORPS., 2019 ANNUAL REPORT STATISTICS (2019), <https://corpfiles.delaware.gov/Annual-Reports/Division-of-Corporations-2019-Annual-Report.pdf>. [https://perma.cc/6VGV-JLJR].

74. *Grimes v. Donald*, 673 A.2d 1207 (Del. 1996).

75. Jennifer Arlen, *The Story of Allis-Chalmers, Caremark, and Stone: Directors' Evolving Duty to Monitor* 2–3 (N.Y.U. Law & Econ. Rsch. Paper Series, Working Paper No. 08-57, 2008), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1304272 [https://perma.cc/RA85-QH9J].

76. 698 A.2d 959 (Del. Ch. 1996).

faith.⁷⁷ Directors were only liable if they acted in bad faith—which virtually eliminated director liability exposure.

As noted by Jennifer Arlen, “*Caremark* did not succeed, however, in inducing directors to exercise the level of active oversight over legal compliance that federal authorities want.”⁷⁸ Therefore, following a series of corporate scandals, Congress and the national exchanges interfered in the regulation of corporate governance.⁷⁹

History is repeating itself. Powerful market actors are not waiting for Delaware to act and are again interfering in the regulation of corporate governance. Stock exchanges, for example, are making an effort to engage with their clients to integrate diversity practices and disclosures. They are committing to the implementation of identity-based diversity factors and policies, including explanations of how these commitments align with fiduciary duties.

The U.S. Congress might also step in and amend securities laws to require disclosure of diversity workforce information on hiring, promotion, compensation, firing, and other employment policies and practices. It can also empower the Securities and Exchange Commission to promote gender equity, diversity, and inclusion in the workforce, notably by adopting policies to ensure employee health and well-being during the current COVID-19 pandemic.⁸⁰

Institutional investors also interfere and actively promote such initiatives in the workforce by taking meaningful steps to advance diversity and inclusion. We believe that they not only *can* play but *must* play a central role in developing uniform and agreed-upon standards to assess the equality and diversity policies and practices of the entities they invest in. This is especially important as public companies will struggle to provide their workers with equal opportunities and thus will fail to attract or retain the talent that will help them grow and compete.

If disclosure is made mandatory, portfolio investee companies will comply. Now, more than ever, public company directors must step up, make sure that their interests are represented in governance decisions, and integrate culture and “human capital considerations into

77. This was upheld by the Supreme Court in *Stone ex rel. AmSouth Bancorporation v. Ritter*, 911 A.2d 362 (Del. 2006) (en banc). See Arlen, *supra* note 75, at 4 (“[T]he Delaware Supreme Court held that directors have a duty to monitor corporate compliance efforts, contrary to its prior holding in *Allis-Chalmers*.”).

78. Arlen, *supra* note 75, at 4.

79. *Id.* at 5.

80. See Anat Alon-Beck, *Times They Are a-Changin’: When Tech Employees Revolt!*, 80 MD. L. REV. 120 (2020); see also David Katz & Laura A. McIntosh, *Corporate Governance Update: EESG and the COVID-19 Crisis*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 31, 2020), <https://corpgov.law.harvard.edu/2020/05/31/corporate-governance-update-eesg-and-the-covid-19-crisis/> [<https://perma.cc/7DEN-R7WR>].

the overarching strategy to create long-term value.”⁸¹ Directors have a duty to diversify to reach for equality. Under current Delaware law, they will be insulated from liability when making such decisions to diversify. In *Stone v. Ritter*, the Delaware Supreme Court held that directors should only be liable for failure to monitor legal compliance if they act in bad faith.⁸² Bad faith is further defined as a systematic and sustained failure to address compliance, and requires a conscious or knowing failure to serve the firm.

Under this analysis, directors would likely not be insulated from liability if they systematically fail to push for equality and diversity as this could amount to acting in bad faith and dereliction of duties. This fiduciary duty to change the old boys’ club culture and push for equality presents a practical way to advance inclusion in corporate governance by placing the burden on decisionmakers to implement diversity.

This duty crosses both the duty of care and the duty of loyalty. The duty of care obligates leaders to make informed decisions in a reasonably prudent fashion. We argue that the duty of loyalty also encompasses a duty for diversity, gender equality, and inclusion. Directors must exercise oversight over a corporation and can be sued if they fail to act and if the failure is further “sustained or systematic.”⁸³

However, directors should be able to continue to enjoy limited liability and the protections afforded by the business judgement rule after making an informed decision and adopting plans of action that push for equality and diversity. Many actors, including institutional investors, already act as if such a duty exists. Therefore, directors ought to enjoy the protections of the business judgement rule, and the court should abstain from evaluating the merits of a company’s diversity program.

CONCLUSION

Institutional investors have made bold public statements on their commitments to pressure companies to increase board diversity

81. Stephen Klemash, Jennifer Lee & Jamie Smith, *Human Capital: Key Findings from a Survey of Public Company Directors*, HARV. L. SCH. F. ON CORP. GOVERNANCE (May 24, 2020), <https://corpgov.law.harvard.edu/2020/05/24/human-capital-key-findings-from-a-survey-of-public-company-directors/> [<https://perma.cc/W5ZK-CVHF>]; see also Anat Alon-Beck, *Stakeholder Capitalism: Should Employees Demand Change?*, FORBES (June 11, 2020, 7:50 AM), <https://www.forbes.com/sites/anatalonbeck/2020/06/11/stakeholder-capitalism-should-employees-demand-change/#69b05f193b7d> [<https://perma.cc/MDE7-E6PV>].

82. 911 A.2d 362 (Del. 2006).

83. *Id.* at 364 (first quoting *In re Caremark Int’l Inc. Derivative Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996); then Daniel Hemel & Dorothy Shapiro Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1630 (2018)).

and be more transparent on their current diversity practices.⁸⁴ Stakeholders and stockholders will evaluate institutional investors not merely on their statements but also on their actions and whether their boards and the boards of the firms they invest in remain largely homogenous.

In light of these developments, Delaware will have to answer the following questions: is the duty to diversify and push for equality located within the firm and its ownership structure? Moreover, if so, what is the standard of liability? Finally, do institutional investors have a duty to focus on corporate culture and specifically push for gender equality in the boardroom? As we know from history, derivative lawsuits can provide a fertile ground to change our understanding of the law and corporate governance.

84. See, e.g., BLACKROCK, OUR APPROACH TO ENGAGEMENT ON BOARD DIVERSITY 1 (2021), <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engaging-on-diversity.pdf> [<https://perma.cc/BD6Y-U5W5>] (“This is why we expect companies to . . . demonstrate how diversity is accounted for within the proposed board’s composition.”); Rebecca Sherratt, *Board Diversity Deliberations*, 8 PROXY MONTHLY 5, 7 (2021), https://www.proxyinsight.com/wp-content/uploads/dlm_uploads/2021/08/Proxy-Monthly-July-2021.pdf [<https://perma.cc/KZ9H-NCXE>] (noting that “BlackRock voted against the re-election of AT&T nomination committee chair Matthew Rose . . . due to concerns over insufficient steps taken to address board diversity” and that “[BlackRock] expects companies to ‘disclose their approach to ensuring appropriate board diversity . . .’”); Phil Brown, *Institutional Investors Turn Up Pressure on Companies to Embrace Diversity*, CORP. COMPLIANCE INSIGHTS (Mar. 29, 2019), <https://www.corporatecomplianceinsights.com/institutional-investors-turn-up-pressure-on-companies-to-embrace-diversity/> [<https://perma.cc/7SZN-M5EV>] (“[T]he EY Center for Board Matters singled out board composition and enhanced diversity as investors’ top priorities for companies.”); *State Street Insists on Board Diversity Disclosure*, FAIR PLAY TALKS (Jan. 13, 2021), <https://www.fairplaytalks.com/2021/01/13/STATE-STREET-INSISTS-BOARDS-DISCLOSE-ETHNIC-RACIAL-COMPOSITION/> [<https://perma.cc/3PYR-9CZG>] (“State Street Global Advisors is the latest financial institution to insist that firms disclose the racial and ethnic composition of their boards, applying further pressure on companies to diversify their boards.”); 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> [<https://perma.cc/S8H7-2XK4>] (noting that State Street Global Advisors “will update new proxy voting guidelines in 2020 for firms that have no women on their board and have failed to engage in ‘successful dialogue on State Street Global Advisor’s board diversity program’”).