

PATHWAYS TO THE BOARDROOM FOR WOMEN

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I. OVERVIEW OF WOMEN IN POSITIONS OF ORGANIZATIONAL LEADERSHIP

Despite comprising approximately half of the workforce in the United States, women are underrepresented on corporate boards.¹ Although there has been a slight increase in female representation on corporate boards since 2018,² the number of new female directors appointed to boards decreased in 2023.³ Recently and alarmingly, in June 2024, Equilar reported that the percentage of new female directors added to corporate boards in the first quarter of 2024 is the lowest that it has been in over seven years.⁴

In 2015, the U.S. Government Accountability Office (GAO) estimated that if the then rate of female representation on boards continued, without sustained, concentrated support from companies, it will likely take *over four decades* for women's representation on corporate boards to equal that of men.⁵ Moreover, with companies and agencies seemingly retreating from explicit diversity requirements, female representation in corporate America is under

1. See Bettina C.K. Binder, Terry Morehead Dworkin, Niculina Nae, Cindy A. Schipani, & Irina Averianova, *The Plight of Women in Positions of Corporate Leadership in the United States, the European Union, and Japan: Differing Laws and Cultures, Similar Issues*, 26 MICH. J. GENDER & L. 279, 283 (2020); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-30, CORPORATE BOARDS: STRATEGIES TO REPRESENTATION OF WOMEN INCLUDE FEDERAL DISCLOSURE REQUIREMENTS (2015) (available at <https://www.gao.gov/assets/gao-16-30.pdf> [<https://perma.cc/RT4V-K6UP>]) (“In 2014, women comprised about 16 percent of board seats in the S&P 1500, up from 8 percent in 1997.”).

2. *How Board Diversity Can Contribute to Board Effectiveness*, ESAUAGE, THE CONFERENCE BOARD 2 (Nov. 02, 2023), <https://www.conference-board.org/pdfdownload.cfm?masterProductID=49284> (“The percentage of female directors continues to rise, albeit slowly.”).

3. *How Board Diversity Can Contribute to Board Effectiveness*, supra note 2 (“In the S&P 500, the share of new directors who are female decreased from 43% in 2022 to 38% in 2023, and in the Russell 3000 it decreased from 42% to 39%. This drop explains why the percentage of all directors who are female has risen more slowly in 2023 than previously, from 31% in 2022 to 32% in 2023 in the S&P 500, and from 27% to 28% in the Russell 3000.”).

4. Amit Batish, *Q1 2024 Equilar Gender Diversity Index: The Addition of Women on Russell 3000 Boards Drops to Lowest Mark Since 2017*, EQUILAR (Jun. 24, 2024), <https://www.equilar.com/reports/112-q1-2024-equilar-gender-diversity-index.html?sbr=1KSuxAUmnny0bzk-jm3ZYA%3D%3D%24ruCnHtjDkl69dVGgQvBW2w%3D%3D> (“[The p]ercentage of New Women Directors Reaches Lowest Point Since 2017 30.6% of new directors are women. This marks the lowest percentage since Q4 2017, when just 28.6% of new director appointments were women.”).

5. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-30, CORPORATE BOARDS: STRATEGIES TO REPRESENTATION OF WOMEN INCLUDE FEDERAL DISCLOSURE REQUIREMENTS (2015), <https://www.gao.gov/assets/gao-16-30.pdf> [<https://perma.cc/3MVT-SXQE>].

threat.⁶ The GAO's report also found that gender-diverse board appointments tend to slow down after one or two women have been appointed.⁷ This raises concerns of tokenism on corporate boards without further intention to achieve actual gender parity.⁸

On September 30, 2018, California adopted Senate Bill 826 (SB 826), legislation mandating women's presence on boards of directors of California companies.⁹ Although SB 826 was struck down in 2022, an appeal is pending. Regardless, SB 826 appears to have increased the number of female directors on corporate boards.¹⁰ Notably, empirical data from SB 826 shows that corporations complied with SB 826 and that the mandate nearly tripled female representation in California.¹¹ The findings from SB 826 highlight the need for continuing reforms to encourage equal female representation on corporate boards.

This Article examines whether the newly appointed women on boards of California companies come to those boards with traditional work experiences for board membership, i.e., well-qualified to serve on boards. Part I outlines the history of women's underrepresentation in organizational leadership positions. It highlights the need for gender parity on corporate boards, especially as companies and agencies are retreating from imposing explicit diversity

6. See Faten Alqaseer, Lisa R. Davis, & Rose James Teneo, *DEI in an Era of Unrest: A Few Truths and a Path Forward*, HARV. L. SCH. F. ON CORP. GOV. (Feb. 26, 2024), <https://corpgov.law.harvard.edu/2024/02/26/dei-in-an-era-of-unrest-a-few-truths-and-a-path-forward/>, [<https://perma.cc/9Q7Y-FHPW>].

7. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-30.

8. *Id.*

9. See CAL. CORP. CODE § 301.3 (a) (2023) (“a publicly held domestic or foreign corporation whose principal executive offices . . . are located in California shall have a minimum of one female director on its board. A corporation may increase the number of directors on its board to comply with this section.”); *Bill Text: Senate Bill No. 826*, CALIFORNIA LEGISLATIVE INFORMATION, https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB826 [<https://perma.cc/V6SW-QLCM>].

10. See Alisha Haridasani Gupta, *Another Board Diversity Law was Struck Down, But It Already Had a Big Impact*, THE N.Y. TIMES (May 19, 2022), <https://www.nytimes.com/2022/05/19/business/california-board-diversity-women.html>

11. See *Women on Boards Facts: Facts about Women on Corporate Boards in California (Data as of Sept. 30, 2023)*, CALIFORNIA PARTNERS PROJECT, <https://www.calpartnersproject.org/womenonboardsfacts#:~:text=Enacted%20in%202018%2C%20SB%20826,by%20the%20State%20of%20California> [<https://perma.cc/SNB7-CKCQ>], (“The benefits of SB 826 are clear: California nearly tripled the number of women on its public company boards in three years, and companies are experiencing first-hand the advantages of diversifying their boards, finding that board gender diversity is good for business, good for the economy, and good for California.”).

requirements. Part II discusses California's mandate, SB 826, followed by our empirical study regarding the experiences women bring to California boards in Part III, in which we found that new board members in California are highly qualified. Part IV continues with a discussion about how including women at the table may augment company value. Part V provides our recommendations for improving gender diversity on boards. This Article concludes that California's gender mandate appears to have improved gender diversity on the boards of California companies by appointing well-qualified women.

Women have held corporate board positions as early as 1900, but remain underrepresented in organizational leadership positions to this day.¹² The overall percentage of female directors in U.S. public companies is slowly rising, though the percentage of new female directors fell in 2023 and continues to stagnate.¹³ In addition, only twenty-eight percent of the top C-suite level positions in corporate America are held by women.¹⁴

In the first quarter 2024, it was reported that "just 30.6% of new directors during the quarter were women, marking the lowest percentage since Q4 2017 when 28.6% of new board seats were

12. Binder et al., *supra* note 1. See also Boris Groysberg & Deborah Bell, *Dysfunction in the Boardroom* (Jun. 2023), <https://hbr.org/2013/06/dysfunction-in-the-boardroom> [<https://perma.cc/5KJZ-SJAP>]; Phyllis King, *Gender Diversity on Corporate Boards: Spotlighting Wisconsin*, 32 *Wis. J. L. GENDER & Soc'y* 1, 7 (2017); *WOMEN IN THE BOARDROOM: A GLOBAL PERSPECTIVE*, DELOITTE (8th ed. 2023), <https://www2.deloitte.com/sg/en/pages/cxo-programs/articles/women-in-the-boardroom-global-perspective-eighth-edition.html> [<https://perma.cc/VL2E-JMUC>] ("Globally, women hold only 23.3 percent of board seats, 8.4 percent of board chair, 6 percent of CEO, and 17.6 percent of CFO positions."); Carey Oven, Dan Konigsburg, & Sharon Thorne, *Women in the Boardroom: 2022 Update* (Mar. 25, 2022), <https://corpgov.law.harvard.edu/2022/03/05/women-in-the-boardroom-2022-update/> [<https://perma.cc/U4H8-MZ4M>].

13. Emily Field et al., *Women in The Workplace: Key Findings 2023*, LEANIN.ORG & MCKINSEY AND COMPANY, https://leanin.org/women-in-the-workplace?gad_source=1&gclid=Cj0KCQiAoKeuBhCoARIsAB4WxtcgjpoXZS5nvGsk-zjgO569N-idkQPvxLB5R80OwIxlRvTaIyMbocaAqlcEALw_wcB, [<https://perma.cc/J7R5-NFZ2>].

14. Merel Spierings, *US Public Company Board Diversity in 2023: How Corporate Director Diversity Can Contribute to Board Effectiveness*, *Harv. L. Sch. F. on Corp. Gov.* (Nov. 24, 2023), <https://corpgov.law.harvard.edu/2023/11/24/us-public-company-board-diversity-in-2023/>, [<https://perma.cc/TWA9-XVQU>] ("The share of female directors grew from 23% in 2018 to 32% in 2023 in the S&P 500. While the percentage of female directors in the Russell 3000 continues to be lower than in the S&P 500, the gap is narrowing. The share of female directors in the Russell 3000 grew by 11 percentage points, from 17% in 2018 to 28% in 2023.")

appointed to women.”¹⁵ A milestone was reached in Q2 of 2024 when for the first time, women comprised 30.1% of the Russell 3000 board seats.¹⁶ But by Q3, progress had again stalled.¹⁷ The percentage remains the same at 30.1%.¹⁸ Additionally, the number of boards within the Russell 3000 that have no female directors is rising. In Q2 2024, this number was 59, and it jumped 17% to 69 in Q3 2024.¹⁹ As documented by the Pew Research Center, progress in closing the gender pay gap has “all but stalled in the 21st century.”²⁰

The problem of underrepresentation is not caused by a lack of women in the workforce. In fact, with focused efforts, companies can accomplish meaningful diversity.²¹ Women comprise almost forty percent of MBA graduates and managers in the United States.²² Women and men have an equal chance of being hired into male-dominated positions of white-collar work.²³ Women, however, are not promoted to upper-managerial and Chief Executive Officer (CEO) positions as frequently as men.²⁴ Only one in four C-suite leaders are women, and one in sixteen are women of color.²⁵ Generally, higher percentages

15. See Batish, *supra* note 4.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. See Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, PEW RESEARCH CENTER (Mar. 1, 2023), www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/ [<https://perma.cc/92A3-DEA7>].

21. *How Board Diversity Can Contribute to Board Effectiveness*, *supra* note 2. (“As shown by the increase in the number of women on corporate boards, companies can, through concerted efforts, significantly enhance diversity in the boardroom.”).

22. Marcus Noland & Tyler Moran, *Study: Firms with More Women in the C-Suite Are More Profitable*, PETERSON INSTITUTE OF ECONOMICS, HARV. BUS. REV. (Feb. 8, 2016), <https://hbr.org/2016/02/study-firms-with-more-women-in-the-c-suite-are-more-profitable> [<https://perma.cc/U38Y-CV4C>].

23. See, e.g., Field et al., *supra* note 13; Jill E. Yavorsky, *Inequality in Hiring: Gendered and Classed Discrimination in the Labor Market* (2017) (Ph.D. dissertation, Ohio State University) (available at https://etd.ohiolink.edu/acprod/odb_etd/etd/r/1501/10?clear=10&p10_accession_num=osu1492542664842056 [<https://perma.cc/B3NK-Z72E>]); Laura Hospido et al., *The Gender Promotion Gap: Evidence from Central Banking* (Banco de Espana Working Paper No. 1915, 2019) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3373009 [<https://perma.cc/6ENJ-SHRP>]); Jared D. Simmer, *Women Don't Ask: But Why Aren't They Willing to Learn How? Testing a Four Factor Model* (2013) (Ed.D. dissertation, Duquesne University).

24. See, e.g., Field et al., *supra* note 13 (“Progress is slower for women at the manager and director levels, creating a weak middle in the pipeline and impacting the majority of women in corporate America.”)

25. *Id.*

of female board directors appear on boards of larger companies.²⁶ This indicates a correlation between company size and gender diversity in the boardroom.²⁷

A. *Diversity, Equity, and Inclusion Efforts*

Much media attention has been given to the current political backlash surrounding diversity, equity, and inclusion (DEI) initiatives in the private sector.²⁸ Current events, especially in the courts, have given rise to many concerns about the future of DEI. Some organizations backed by opponents of DEI initiatives have begun to target those initiatives through lawsuits. For example, over the last several years, conservative activist Edward Blum's foundation, American Alliance for Equal Rights (AAER), has initiated lawsuits against diversity-focused programs across sectors.²⁹ Recently, AAER made headlines regarding its lawsuit against the Fearless Fund.³⁰ In that lawsuit, a three-judge panel on the Eleventh Circuit suspended a Fearless Fund grant program for businesses that are majority owned by Black women.³¹

Although gender parity on corporate boards has not yet been reached, agencies and companies in the United States are seemingly starting to retreat from requiring explicit commitments to DEI.³² Anti-diversity sentiments are not new, but they have been resurrected and intensified, perhaps as a result of the U.S. Supreme Court's ruling on affirmative action³³ "and the divisive nature of

26. Matteo Tonello & Paul Hodgson, *Corporate Board Practices in the Russell 3000, S&P 500, and S&P Mid-Cap 400*, HARV. L. SCH. F. ON CORP. GOV. (Nov. 6, 2021), <https://corpgov.law.harvard.edu/2021/11/06/corporate-board-practices-in-the-russell-3000-sp-500-and-sp-mid-cap-400/>, [<https://perma.cc/58E4-W6UA>] ("For example, according to 2021 proxy disclosure, 31.5 percent of directors at manufacturing and nonfinancial services companies in the Russell 3000 with annual revenue of \$50 billion or more are women, compared to only 20.4 percent of those in smaller companies with annual revenue of \$100 million or less. In the financial and real estate sectors, the 30.9 percent of female directors disclosed by companies with asset value of \$100 billion or more compares to the 14 percent found at companies valued under \$500 million.").

27. *Id.*

28. See, e.g., Associated Press, *Grant Program for Black Women Business Owners is Discriminatory, Appeals Court Rules*, NPR (Jun. 3, 2024, 8:38 PM ET), <https://www.npr.org/2024/06/03/g-s1-2649/fearless-fund-grant-program-appeal-ruling> [<https://perma.cc/57RD-3WVK>].

29. *Id.*

30. *Id.*

31. *Id.*

32. Alqaseer, et al., *supra* note 6 ("Although legal implications remain unclear, some companies have changed aspects of their DEI programs.").

33. *Students for Fair Admissions, Inc. v. President & Fellows of Harv.*

current politics and policy.”³⁴ In *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, the Supreme Court held that Harvard College and the University of North Carolina’s race conscious college admissions programs violated the Equal Protection Clause of the Fourteenth Amendment.³⁵ Yet, the issue of female representation on corporate boards is more relevant now than ever, as over twenty states have restricted diversity efforts.³⁶

On the other hand, some studies suggest that corporate DEI programs may be expanding, or at least not being eliminated as some media coverage indicates. In fact, when polled, a majority of C-suite executives stated that recent rulings from the U.S. Supreme Court have not decreased their commitment to DEI.³⁷ More than fifty percent of surveyed U.S. executives have expanded their organization’s DEI strategies over the past year, with another thirty-six percent continuing their existing level of commitment to DEI.³⁸ Apprehension of mounting legal and political scrutiny, however, seems to be a factor in the decision-making process of those organizations that have decreased their levels of commitment to DEI.³⁹ Of the executives who have scaled down DEI efforts, a majority cited both general “concerns about legal liability” and recent Supreme Court rulings regarding affirmative action as motivating factors.⁴⁰

To assess the current state of diversity efforts, this Part examines DEI policies of a regulator (the Securities Exchange Commission), a stock exchange (Nasdaq), some institutional investors, proxy advisors as well as some company efforts.

Coll., 600 U.S. 181, 188 (2023).

34. *Id.*

35. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 188 (2023) (finding that both programs “lack[ed] sufficiently focused and measurable objectives warranting the use of race, unavoidably employ[ed] race in a negative manner, involve[d] racial stereotyping, and lack[ed] meaningful end points.”).

36. Alqaseer et al., *supra* note 6. *See also* Spierings, *supra* note 14 (“While the percentage of companies disclosing racial/ethnic diversity is plateauing in the S&P 500, the reported levels of racial/ethnic diversity may have plateaued in the Russell 3000.”); *How Board Diversity Can Contribute to Board Effectiveness*, *supra* note 2 (“Companies that do not already disclose director race/ethnicity may want to consider disclosing the makeup of the board on an aggregate level, as this might be clearer and easier for stakeholders to understand than individual-level disclosures.”).

37. *Inclusion, Equity and Diversity C-Suite Survey Report*, LITTLER (Jan. 2024), https://www.littler.com/sites/default/files/2024_littler_csuite_survey_report.pdf?lec6tn7bd [<https://perma.cc/UN3Q-2QDW>].

38. *Id.*

39. *Id.*

40. *Id.*

1. Securities and Exchange Commission's Diversity Equity Report

In 2015, the Securities Exchange Commission (SEC) released a Policy Statement outlining a Diversity Assessment Report for companies to self-assess their diversity initiatives.⁴¹ For the purposes of this assessment, diversity includes both racial and gender composition.⁴² The Policy Statement establishes standards to better assess firms' diversity policies and commitment to DEI efforts, and it outlines a way for firms to make these assessments.⁴³ The Diversity Assessment Report asks businesses to provide information regarding DEI, such as the contact information of its Diversity and Inclusion Officer and its Business Diversity Officer.⁴⁴ It further requests a self-assessment of metrics such as "organizational commitment to diversity and inclusion" and implementation of employment practices to promote workforce diversity through responding to a series of yes or no statements.⁴⁵ In addition, the self-assessment further asks for demographic information about the company's board as well as all levels of management.⁴⁶ The Policy Statement is, however, only advisory; companies are not required to follow it.⁴⁷

Although the Policy Statement does not create new legal obligations pertaining to diversity and inclusion, it does provide a self-assessment framework for regulated entities.⁴⁸ The SEC's Office of Minority and Women Inclusion (OMWI)⁴⁹ set out these standards to encourage companies to conduct voluntary self-assessments

41. Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33016 (Jun. 10, 2015).

42. *Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Securities and Exchange Commission - Frequently Asked Questions*, SECURITIES AND EXCHANGE COMMISSION, <https://www.sec.gov/files/OMWI-DAR-FAQ.pdf> [<https://perma.cc/Q8SQ-SMU6>], "[F]or purposes of the Policy Statement, 'diversity' refers to 'minorities,' as the term is defined in Section 342(g)(3) of the Act (Black Americans, Native Americans, Hispanic Americans, and Asian Americans), and women."

43. 80 Fed. Reg. 33016 (2015).

44. *Diversity Assessment Report for Entities Regulated by the SEC*, SECURITIES AND EXCHANGE COMMISSION, https://www.sec.gov/files/OMWI-DAR-23.pdf_0.pdf [<https://perma.cc/SL8P-8UZU>].

45. *Id.*

46. *Id.*

47. *Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Securities and Exchange Commission - Frequently Asked Questions*, *supra* note 42.

48. *Id.* See also 80 Fed. Reg. 33016 (2015).

49. See 12 U.S.C. § 5452.

regarding their diversity policies.⁵⁰ The Policy Statement suggests that regulated entities conduct self-assessments at least annually, but the reports are only submitted to the SEC upon request.⁵¹ The SEC OMWI Director plans to collect these assessments from businesses every two years.⁵²

The first category of the Policy Statement's standards, "Organizational Commitment to Diversity and Inclusion," places an emphasis on board involvement.⁵³ The Policy Statement emphasizes the importance of governing bodies, such as corporate boards, demonstrating a commitment to DEI.⁵⁴ It anticipates that corporate boards will serve a supervisory role over DEI initiatives.⁵⁵ This first category envisions that entities take "proactive steps to promote a diverse pool of candidates" when selecting members of its board.⁵⁶ However, the Policy Statement does not provide specific targets for board diversity. Consequently, companies have wide discretion as to their DEI initiatives so long as they provide disclosure and explanation when requested.

2. Nasdaq's Diversity Requirements

Pursuant to its fundamental purpose of full disclosure in the securities industry, the Nasdaq Stock Market (Nasdaq) proposed a rule requiring publicly-listed companies to disclose demographic information about its board members.⁵⁷ The rule also provided certain firms with access to board recruiting services.⁵⁸ Specifically, the rule requires company boards to have at least one "director who identifies as female, a member of an underrepresented racial or ethnic minority, or LGBTQ+"⁵⁹ Should companies fail to

50. Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, 80 Fed. Reg. 33016, 33021, *supra* note 41.

51. *Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Securities and Exchange Commission - Frequently Asked Questions*, *supra* note 42.

52. *Id.*

53. Final Interagency Policy Statement Establishing Joint Standards for Assessing the Diversity Policies and Practices of Entities Regulated by the Agencies, *supra* note 41.

54. *Id.*

55. *Id.*

56. *Id.*

57. NASDAQ, *Nasdaq's Board Diversity Rule: What Companies Should Know* 1–3 (Feb. 28, 2023), <https://listingcenter.nasdaq.com/assets/Board%20Diversity%20Disclosure%20Five%20Things.pdf> [<https://perma.cc/5U4P-QY6P>].

58. *Id.*

59. Jody Godoy, *US Court Upholds Nasdaq Board Diversity Rule*,

meet this goal by the end of 2023, they must provide an explanation for that failure. Generally, companies are expected to appoint two underrepresented directors by 2026 to be in compliance with the rule.⁶⁰ Companies are also expected to annually disclose “how board members identify in those categories, although the individuals can decline to answer.”⁶¹ Nasdaq further proposes providing companies “with free access to a network of board-ready diverse candidates” to aid in diversifying their boards.⁶²

The SEC approved the rule in 2021, emphasizing that the rule prioritizes disclosure rather than quotas.⁶³ Additionally, the SEC stated that it would not “assess the substance of the company’s explanation” in cases where companies did not meet the suggested targets and instead put forth explanations for noncompliance.⁶⁴ In approving the rule, the SEC emphasized the right of investors to access this information.⁶⁵

The National Center for Public Policy Research and the Alliance for Fair Board Recruitment challenged the rule, arguing that it violated “the U.S. Constitution’s prohibition of discriminatory laws and restraints on free speech.”⁶⁶ The plaintiffs further argued that Nasdaq was also subject to these restrictions because the SEC, a government actor, could penalize Nasdaq for not enforcing the rule.⁶⁷

On December 11, 2024, the Fifth Circuit Court of Appeals struck Nasdaq’s board diversity rule.⁶⁸ The court rejected the SEC’s argument that the Rules were tied to the purposes of the Exchange Act, which it said exists “primarily to protect investors and the macroeconomy from speculative, manipulative, and fraudulent practices,

REUTERS (Oct. 18, 2023), <https://www.reuters.com/sustainability/boards-policy-regulation/us-court-upholds-nasdaq-board-diversity-rule-2023-10-18/> [<https://perma.cc/EC4B-AG99>].

60. *Id.*

61. *Id.*

62. *Self-Regulatory Organizations; the Nasdaq Stock Mkt. LLC; Notice of Filing of Proposed Rule Change to Adopt Listing Rules Related to Bd. Diversity*, Release No. 90574 (Dec. 4, 2020).

63. Order Approving SR-NASDAQ-2020-081 and SR-NASDAQ-2020-082, Exchange Act Release No. 34-92590, (Aug. 6, 2021), <https://www.sec.gov/files/rules/sro/nasdaq/2021/34-92590.pdf> [<https://www.sec.gov/files/rules/sro/nasdaq/2021/34-92590.pdf>].

64. *Id.*

65. *Id.*

66. Godoy, *supra* note 59.

67. *Id.*

68. *All. for Fair Bd. Recruitment v. Sec. & Exch. Comm’n*, No. 21-60626, 2024 WL 5078034 (5th Cir. Dec. 11, 2024).

and to promote competition in the market for securities transactions.”⁶⁹ Further, the Fifth Circuit elaborated that:

It is not unethical for a company to decline to disclose information about the racial, gender, and LGTBQ+ characteristics of its directors. We are not aware of any established rule or custom of the securities trade that saddles companies with an obligation to explain why their boards of directors do not have as much racial, gender, or sexual orientation diversity as Nasdaq would prefer.⁷⁰

Nasdaq expressed disappointment with the ruling but declined to appeal.⁷¹ This ruling shows that gender diversity is still under attack. Efforts to protect and advance gender diversity and equality are more important now in the face of ongoing legal challenges to such efforts.

3. BlackRock’s Proxy Voting Guidelines

Proxy advisory firms provide recommendations to investors for their consideration when voting shares.⁷² Institutional investors typically hire proxy firms to vote their shares.⁷³ The investment advisory firm, BlackRock, appears to be retreating from its earlier stance advocating a thirty percent diversity standard. Although its policy on board composition had previously referenced a thirty percent diversity standard, the policy was changed in 2023 to merely mention meaningful diversity and compliance with local regulatory requirements.⁷⁴

Yet, BlackRock continued its policy of encouraging at least thirty percent diversity on corporate boards, two female directors, and “at least one director who identifies as a member of an

69. *Id.*

70. *Id.* at 25.

71. *Fifth Circuit Strikes Down Nasdaq Board Diversity Rules*, VINSON & ELKINS (Dec. 13, 2024), <https://www.velaw.com/insights/fifth-circuit-strikes-down-nasdaq-board-diversity-rules/> [<https://perma.cc/ZY3Q-2P4E>].

72. David F. Larcker & Brian Tayan, *Seven Questions about Proxy Advisors*, HARV. L. SCH. F. ON CORP. GOV. (May 13, 2024), <https://corpgov.law.harvard.edu/2024/05/13/seven-questions-about-proxy-advisors/> [<https://perma.cc/2RGU-FSUH>].

73. *Id.*

74. Daniel Chang, *BlackRock Updated 2023 U.S. Proxy Voting Guidelines*, GEORGESON (Jan. 11, 2023), <https://www.georgeson.com/us/insights/proxy/blackrock-updated-2023-us-voting-guidelines#:~:text=In%20addition%20to%20continuing%20its,perceived%20benefits%20of%20board%20diversity%2C> [<https://perma.cc/5R2Y-7CXL>], (“This change likely has been made to account for instances when a company has exhibited sufficient progress to date, however, may require additional time to fulfill its overall expectations of building a strong and diverse board.”).

underrepresented group.”⁷⁵ The 2023 guidelines also added a discussion of the benefits of board diversity, stating that “[a] strong board provides a competitive advantage to a company, providing valuable oversight and contributing to the most important management decisions that support long-term financial performance.”⁷⁶

BlackRock, however, further updated its proxy voting guidelines in January 2024.⁷⁷ The updated guidelines encourage boards to incorporate diverse viewpoints, and expressly acknowledges the benefits that a diverse board has for companies, such as minimizing group think, encouraging robust group discussions, and promoting better economic outcomes for companies in the long term.⁷⁸ But BlackRock also emphasizes a new case-by-case analysis to evaluating board diversity.⁷⁹ In this approach, BlackRock considers several factors in determining whether companies are “at least consistent with local regulatory requirements and best practices, while recognizing that building a strong, diverse board can take time.”⁸⁰ These factors include the size of the board, the size of the company, and the company’s business model, location, and strategy.⁸¹

BlackRock states that its intent is not to mandate a specific board composition and that it merely requires that companies disclose the process they use for board member selection.⁸² Specifically, BlackRock asks boards to disclose how diversity is considered in board composition, including professional characteristics, such as

75. *Id.*

76. *Id.* (“BlackRock further states, ‘Increasingly, we see leading boards adding members whose experience deepens the board’s understanding of the company’s customers, employees, and communities.’”).

77. See Daniel Chang, *BlackRock Updated 2024 U.S. Proxy Voting Guidelines*, GEORGESON <https://www.georgeson.com/us/insights/blackrock-updated-2024-us-proxy-voting-guidelines>, [<https://perma.cc/GBM6-5BJB>]. See also Daniel Chang & Rajeev Kumar, *BlackRock Updated 2024 U.S. Proxy Voting Guidelines*, HARV. L. SCH. F. ON CORP. GOV. (Feb. 29, 2024), <https://corpgov.law.harvard.edu/2024/02/29/blackrock-updated-2024-u-s-proxy-voting-guidelines/> [<https://perma.cc/XDU3-GVY2>].

78. *Our Approach to Engagement on Board Quality and Effectiveness: Investment Stewardship*, BLACKROCK (Jan. 2024) <https://www.blackrock.com/corporate/literature/publication/blk-commentary-engaging-on-board-quality.pdf> [<https://perma.cc/PQL5-EYKK>].

79. See *BlackRock Investment Stewardship: Proxy Voting Guidelines for U.S. Securities*, BLACKROCK 8 (Jan. 2024), <https://www.blackrock.com/corporate/literature/fact-sheet/blk-responsible-investment-guidelines-us.pdf> [<https://perma.cc/XBA9-SKCV>], (“We encourage boards to periodically review director qualifications and skills to ensure relevant experience and diverse perspectives are represented in the boardroom.”).

80. *Id.* at 9.

81. *Id.*

82. See Chang, *supra* note 77.

a director's relevant industry experience, specialist areas of expertise and geographic location; as well as demographic characteristics such as gender, race/ethnicity, and age."⁸³ Instead of requiring certain percentages of board diversity or mandating strict equality, BlackRock's updated proxy guidelines articulate aspirations for companies to reach thirty percent diversity in board membership.⁸⁴

The 2024 guidelines represent, at best, a maintenance of the status quo, and potentially indicate that BlackRock intends to deemphasize board diversity in investment considerations. The 2023 and 2024 proxy voting guidelines depart from a previous trend in which voting guidelines emphasized a commitment to board diversity. For example, as previously mentioned, in 2023, the guidelines replaced the previous reference to "a 30% diversity standard" with a comparatively vague standard of "meaningful diversity."⁸⁵ Previous proxy voting guidelines suggested that boards have at least two female directors, and in 2022 the guidelines also suggested that corporate boards have "at least one director who identifies as a member of an underrepresented group."⁸⁶ Although this suggestion is still present in the 2024 guidelines, it was moved several paragraphs down to the "Board Diversity" section, and it was only mentioned after description of the case-by-case approach.⁸⁷ This deemphasis after several years of continued ramp-up of diversity targets and initiatives suggests a potential attempt to gradually retreat from explicit targets of gender or racial diversity and similar DEI initiatives.

In 2025, Black Rock again revised its policy regarding diversity on boards.⁸⁸ In its 2025 guidelines, although not providing metrics for measuring diversity, Black Rock notes that many S&P 500 companies have benefited from their current levels of diversity.⁸⁹ Black Rock, however, does state that it may vote on a case-by-case basis against members of the nominating/governance committee "to the extent an S&P 500 company board is an outlier and does not have a mix of professional and personal characteristics that is

83. *BlackRock Investment Stewardship: Proxy Voting Guidelines for U.S. Securities*, *supra* note 79.

84. *Id.* at 9.

85. Chang, *supra* note 74.

86. Lee Anne Hagel, Hannah Orowitz & Donald Cassidy, *BlackRock Updates 2022 U.S. Proxy Voting Guidelines and Stewardship Expectations and Publishes Annual Letter to CEOs*, GEORGESON <https://www.georgeson.com/us/insights/esg/blackrock-updates-2022> [<https://perma.cc/89A8-HB6L>].

87. *BlackRock Investment Stewardship: Proxy Voting Guidelines for U.S. Securities*, *supra* note 79, at 8.

88. *Id.* at 9.

89. *Id.*

comparable to market norms.”⁹⁰ Black Rock further notes that 98% of S&P 500 firms have 30% or greater diverse representation in the boardroom.⁹¹

4. State Street’s Proxy Voting Guidelines

State Street Global Advisors (State Street), the fourth largest global investment advisory firm, updated its proxy voting guidelines in March 2024 and again in March 2025. The 2024 guidelines set out comparatively forceful instructions.⁹² In addition to explicit gender diversity targets, the guidelines include actions that State Street may take if these targets are left repeatedly unmet.

In the 2024 guidelines, State Street expected boards to have at least one female board member.⁹³ If a company was unable to comply with this expectation for three consecutive years, State Street reserved the right to take action, such as voting against current members of the nominating committee or anyone responsible for board nominations.⁹⁴ Further, companies listed on certain major indices were expected to have at least thirty percent female representation on their boards.⁹⁵ If this target was not met, State Street may vote against members of the nominating committee or anyone responsible for board nominations.⁹⁶ This thirty percent gender diversity target could have been deferred if the company engaged with State Street and provided a concrete timeline and plan for reaching the target.⁹⁷

But, like its peer financial institutions, State Street appears to be retreating from its board diversity initiatives. Despite its previous commitment to DEI, in March 2025, State Street released a revised Global Proxy Voting and Engagement Policy⁹⁸ that shifted away from specific diversity targets.⁹⁹ Although State Street still

90. *Id.*

91. *Id.* at note 6.

92. *Global Proxy Voting and Engagement Policy*, STATE STREET GLOBAL ADVISORS (Mar. 25, 2024), <https://web.archive.org/web/20240331115520/https://www.ssga.com/library-content/assets/pdf/global/asset-stewardship/proxy-voting-and-engagement-policy.pdf> [<https://perma.cc/3J9P-Y92A>].

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Global Proxy Voting and Engagement Policy*, STATE STREET GLOBAL ADVISORS (Mar. 2025), <https://www.ssga.com/library-content/assets/pdf/global/asset-stewardship/proxy-voting-and-engagement-policy.pdf> [<https://perma.cc/Q9D5-P34S>].

99. In its 2024 guidelines, “State Street had stated the firm expected boards of companies in major indexes to be 30% female, while S&P 500

notes that diversity is a necessary part of “effective oversight of a company’s long-term business strategy,” it explains that the board nominating and governance processes are the best processes to determine effective board composition.¹⁰⁰ Thus, State Street too is following the trend of retreating from gender diversity targets.¹⁰¹

As with institutional investors, environmental, social, and governance (ESG) initiatives including board diversity have become an area of focus for shareholders and proxy advisory firms. These firms and their voting guidelines can serve as critical bellwethers in anticipating what will be major issues for shareholders and their respective companies. Glass Lewis and Institutional Shareholder Services (ISS) are the largest proxy advisory firms, making up approximately ninety-seven percent of the market.¹⁰² The 2023 proxy voting season featured an evolution of proxy voting guidelines for both firms with respect to gender diversity and board representation.¹⁰³ Board diversity was at the forefront of the 2023 proxy season. According to an ISS digest, the proxy season as a whole prominently featured both board diversity and ESG initiatives in general.¹⁰⁴ Within proxy voting topics specific to corporate boards, the percentage of women in leadership positions and on boards was a key topic.¹⁰⁵ But although these concepts are gaining prevalence, support has decreased.¹⁰⁶ Additionally, even though boards have continued to diversify, board member support has become weaker.¹⁰⁷ Within Russell 3000 company boards, director vote support has “eroded steadily by about 1% over the past five

companies were also expected to have at least one racial or ethnic minority director.” Those directives are not included in the 2025 guidelines. David Lynn, *State Street Updates Global Proxy Voting and Engagement Policy*, THE CORPORATE COUNSEL (Mar. 3, 2025), <https://www.thecorporatecounsel.net/blog/2025/03/state-street-updates-global-proxy-voting-and-engagement-policy.html> [<https://perma.cc/35HS-TGF6>].

100. *Id.*

101. *Id.*

102. Ike Brannon, *Diminishing the Power of Proxy Advisory Firms*, CAPITAL POLICY ANALYTICS 2, <https://www.sec.gov/comments/s7-22-19/s72219-6702944-206071.pdf> [<https://perma.cc/2ZKU-KJK5>].

103. See Maia Gez et al., *Proxy Advisory Firms Issue 2023 Voting Guideline*, WHITE & CASE (Dec. 21, 2022), <https://www.whitecase.com/insight-alert/proxy-advisory-firms-issue-2023-voting-guidelines> [<https://perma.cc/7ZXQ-KZXQ>].

104. *2023 Proxy Season Digest*, ISS CORPORATE SOLUTIONS 3 (Aug. 18, 2023), <https://insights.issgovernance.com/posts/2023-proxy-season-digest/> [<https://perma.cc/A2DY-6HAS>].

105. *Id.*

106. *Id.*

107. *Id.*

years.”¹⁰⁸ Women and members of other underrepresented groups, however, still receive slightly higher levels of support for their nominations than their counterparts.¹⁰⁹

Despite the growth in representation in recent years, there may be cause for concern going forward. As previously mentioned, support for underrepresented groups in board nominating processes appears to be losing support at a steady rate.¹¹⁰ Additionally, ESG-related shareholder proposals are becoming less popular.¹¹¹ This may be yet another consequence of the current political and judicial climate surrounding affirmative action and DEI.

ISS is the largest proxy advisory firm in the market.¹¹² Regarding gender makeup on boards, the 2024 Proxy Voting Guidelines specify that ISS will typically vote against the chair of a nominating committee on a board with no women.¹¹³ But in February, 2025, ISS changed its policy and announced that it will indefinitely halt consideration of gender, race, and ethnic diversity on a company’s board when making recommendations.¹¹⁴

Glass Lewis, the second largest proxy advisory firm, featured board diversity in both its 2024 ESG Shareholder Proposal Guidelines¹¹⁵ and its 2024 US Benchmark policies,¹¹⁶ as well as its 2025 US Benchmark policies.¹¹⁷ In 2023, Glass Lewis began a transition from fixed-number guidelines to percentage-based

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. See Chong Shu, *The Proxy Advisory Industry: Influencing and Being Influenced*, HARV. L. SCH. F. ON CORP. GOV. (May 2, 2024), <https://corpgov.law.harvard.edu/2024/05/02/the-proxy-advisory-industry-influencing-and-being-influenced/> [<https://perma.cc/XQ3C-EMCX>].

113. *Proxy Voting Guidelines Benchmark Policy Recommendations*, ISS 12 (Jan. 2024), <https://www.issgovernance.com/file/policy/active/americas/US-Voting-Guidelines.pdf?v=1> [<https://perma.cc/3F5E-MYG9>].

114. *Statement Regarding Consideration of Diversity Factors in U.S. Director Election Assessments*, ISS Insights (Feb. 11, 2025) <https://insights.issgovernance.com/posts/statement-regarding-consideration-of-diversity-factors-in-u-s-director-election-assessments/> [<https://perma.cc/8UAA-F536>].

115. *Shareholder Proposals and ESG Related Issues: 2024 Benchmark Policy Guidelines*, GLASS LEWIS (2024), <https://resources.glasslewis.com/hubfs/2024%20Guidelines/2024%20Shareholder%20Proposals%20ESG%20Benchmark%20Policy%20Guidelines.pdf> [<https://perma.cc/9HT5-4CYQ>].

116. *2024 Benchmark Policy Guidelines*, GLASS LEWIS 42 (2024), <https://www.glasslewis.com/wp-content/uploads/2023/11/2024-US-Benchmark-Policy-Guidelines-Glass-Lewis.pdf> [<https://perma.cc/7MXB-YX24>].

117. *2025 Benchmark Policy Guidelines*, GLASS LEWIS (2024), <https://resources.glasslewis.com/hubfs/2025%20Guidelines/2025%20US%20Benchmark%20Policy%20Guidelines.pdf> [<https://perma.cc/E35H-PFA9>].

guidelines for gender diversity on boards. Instances where a Russell 3000 company's board is not at least thirty percent gender diverse, in 2023, Glass Lewis would typically recommend voting against the chair of that board's nominating committee.¹¹⁸ Other companies outside of the Russell 3000 were expected to have at least one female board member.¹¹⁹ More broadly, the guidelines recognized the importance of boards composed of directors with a "diversity of skills, thought and experience" as this will yield large benefits to these companies.¹²⁰ Thus, again, the guidelines appeared to take a case-specific approach that highlights diversity beyond gender, race, and sexuality.

In March, 2025, Glass Lewis issued a Supplemental Statement on Diversity Considerations at U.S. Companies.¹²¹ Glass Lewis is now giving its clients two recommendations – one that considers "gender or underrepresented community diversity" and one that does not, giving clients a choice regarding which recommendation they wish to consider.¹²²

5. Company Responses

Companies have begun to adjust their approaches to DEI in response to the SEC's current posture on ESG disclosure requirements.¹²³ Only fifteen S&P 500 companies have disclosed ESG reports thus far.¹²⁴ All fifteen companies mention DEI in their reports.¹²⁵ Forty percent of them have already established DEI objectives; however, two companies deleted specific objectives and are ambiguous about whether they still have DEI-related goals.¹²⁶

Although this small sample of companies shows a continuing commitment to DEI,¹²⁷ it is troubling that certain companies are removing references to specific DEI objectives in their reports.¹²⁸

118. Gez et al., *supra* note 103.

119. *Id.*

120. *See* 2024 *Benchmark Policy Guidelines*, *supra* note 116.

121. Supplemental Considerations on Diversity Considerations at U.S. Companies, GLASS LEWIS (Mar. 2025), <https://resources.glasslewis.com/hubfs/Supplementary%20Guidance/2025%20Supplemental%20Statement%20on%20Diversity%20Consideration%20at%20US%20Companies.pdf> [<https://perma.cc/48HC-7TS4>].

122. *Id.* at 2.

123. *See* Alqaseer et al., *supra* note 6.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* ("Over 70% of these companies maintain talent programs for under-represented groups and supplier diversity programs, both of which are under scrutiny in the current political climate.")

128. *Id.*

These language changes may also indicate a retreat from DEI efforts in the absence of more stringent requirements from the SEC.¹²⁹

Additionally, the seeming retreat from DEI initiatives could be in response to increasingly unclear legal implications of the Supreme Court's current attitude toward affirmative action.¹³⁰ Although ninety-two percent of global CEOs expressed an intention to stay the course on ESG policies in spite of political uncertainty,¹³¹ only half of U.S.-based CEOs have committed to continuing or accelerating their policies, with a third of them reevaluating altogether.¹³² When surveyed, seventy-six percent of North American CEOs reported having made changes in their business operations due to the politicization of ESG.¹³³ Yet, it is important that agencies, institutional investors, proxy advising firms, and companies remain committed to diversity by identifying and working toward specific objectives in order for gender parity to become a reality on corporate boards.

B. *Factors Contributing to Underrepresentation*

Although promotion of gender diversity is not a new prerogative, successful implementation of gender equality efforts has alluded many organizations. OnBoard's 2022 Board Effectiveness Survey found that "only 62% of organizations rated themselves as effective [regarding] board diversity."¹³⁴ There are several factors contributing to female underrepresentation in corporate leadership positions. These factors include: the perpetuation of various myths concerning corporate diversity; a promotion gap between women and men following initial hirings into entry-level positions; socio-cultural expectations of femininity; systemic bias within corporate America; few women in roles that serve as a pipeline to board service, such as CEO positions or previous board membership;¹³⁵ and low turnover of board seats.¹³⁶ These factors are discussed below.¹³⁷

129. *Id.*

130. *See e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

131. *Where is the World Going in 2024 and Beyond? CEO Investor and Outlook Survey*, TENO 4 (Dec. 19, 2023) <https://www.teneo.com/app/uploads/2023/12/Teneo-Vision-2024-CEO-and-Investor-Outlook-Survey.pdf> [<https://perma.cc/L8SP-G28G>].

132. *Id.*

133. *Id.*

134. *2024 Boardroom Insights Survey*, ONBOARD, ATLAS LEADERSHIP SERIES WEBINAR (2024), <https://www.onboardmeetings.com/resources/2024-board-insight-survey/>.

135. U.S. GOV'T ACCOUNTABILITY OFF., GAO-16-30.

136. *Id.*

137. *2024 Boardroom Insights Survey*, *supra* note 134.

1. Perpetuation of Corporate Diversity Myths

There are a variety of myths that companies perpetuate that may contribute to a lack of diversity among board members.¹³⁸ For example, certain boards may think they are sacrificing a traditionally-qualified candidate in order to hire an underrepresented candidate.¹³⁹ Yet, the two traits are not mutually exclusive.¹⁴⁰ A well-qualified board member may also be a woman, a person of color, or a member of another minority group.¹⁴¹ In addition, companies may believe satisfying simple regulatory requirements, such as Nasdaq's one-woman-and-one-person-of-color requirement, is sufficient.¹⁴² But increasing board diversity is not a single-step task.¹⁴³ Instead, because gender parity has not yet been reached on corporate boards, improving gender diversity should be a continuous effort.¹⁴⁴

2. Promotion Gap between Men and Women

A promotion gap between women and men at higher-level positions may contribute to female underrepresentation on corporate boards. Women are hired at a slightly lower rate than men at the entry level,¹⁴⁵ and although women and men enter into negotiations for promotion at the same rate, women are promoted less frequently.¹⁴⁶ A 2023 study by McKinsey & Company found that the first promotion to manager presents the largest hurdle to women's corporate advancement: "for every 100 men promoted from entry-level to manager, 87 women are promoted."¹⁴⁷

138. *Id.*

139. *Id.*

140. *Id.* The authors observe that qualified candidates abound in underrepresented groups and can be found by employers casting a wider net.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. Field et al., *supra* note 13. (Fifty-two percent of entry-level positions were held by men at the start of 2023 and forty-eight percent of positions were held by women, up three percent from 2022.).

146. See Benjamin Artz, Amanda Goodall & Andrew J. Oswald., *Research: Women Ask for Raises as Often as Men, but Are Less Likely to Get Them*, HARV. BUS. REV. (Jun. 25, 2018), <https://hbr.org/2018/06/research-women-ask-for-raises-as-often-as-men-but-are-less-likely-to-get-them> [<https://perma.cc/W78H-FNF9>], (stating that "The true gender pay-gap is not known with certainty, but, when comparing equally qualified people doing the same job, most estimates by labor economists put it at 10% – 20% One common explanation is that women are less likely to negotiate their salaries.").

147. Field et al., *supra* note 13.

The promotional gap from entry-level positions to managerial positions thus prevents women from gaining positions of leadership in corporate America.¹⁴⁸ Reaching the first level of management is the most difficult step.¹⁴⁹ Notably, “[e]ntry-level women are 18 percent less likely to receive promotions than are their male colleagues”¹⁵⁰ Even when women are promoted to higher-level positions, they still constitute the minority. At the managerial level, twenty-seven percent of positions are held by women, twenty-seven percent also hold senior manager positions, twenty-six percent hold vice president (VP) positions, twenty-one percent hold senior vice president (SVP) positions, and twenty-two percent hold positions in the top C-suite level.¹⁵¹

The promotion gap may also exacerbate a gap between male and female career aspirations.¹⁵² Low expectations for promotion may be due to the reality that promotions tend to be elusive for women. Sixty percent of men report having high career aspirations to become corporate partners. In contrast, only thirty-two percent of women report similarly high aspirations.¹⁵³ Thirty-one percent of women have relatively low career aspirations, as opposed to only thirteen percent of men.¹⁵⁴ This career aspiration gap may explain as much as fifty percent of the gender gap in promotions.¹⁵⁵ The gap in career aspirations, however, has been improving post-Covid. Post-Covid statistics show that younger women are particularly ambitious. Ninety percent of women under thirty years old want to be promoted, and seventy-five percent aspire to senior leadership.¹⁵⁶ Significantly, “[w]omen of color are even more ambitious

148. *Id.*; see also Yavorsky, *supra* note 23 (“Aggregate evidence shows that women have made far fewer entrances into working-class male dominated occupations than white-collar male-dominated occupations”); Ghazala Azmat et al., *Gender Promotion Gaps: Career Aspirations and Workplace Discrimination 2*, IZA INSTITUTE OF LABOR ECONOMICS DP NO. 12902 (2020), <https://docs.iza.org/dp12902.pdf> [<https://perma.cc/E9PJ-5QWA>].

149. See Sandrine Devillard, Vivian Hunt & Lareina Yee, *Still Looking for Room at the Top: Ten Years of Research on Women in the Workplace*, MCKINSEY QUARTERLY (March 2018), <https://www.mckinsey.com/featured-insights/gender-equality/still-looking-for-room-at-the-top-ten-years-of-research-on-women-in-the-workplace> [<https://perma.cc/CYJ9-UBQH>].

150. *Id.*

151. Field et al., *supra* note 13.

152. Azmat et al., *supra* note 148.

153. *Id.*

154. *Id.*

155. *Id.*

156. Field et al., *supra* note 13.

than women overall: 96% say that their career is important to them, and 88% want to be promoted to the next level.”¹⁵⁷

3. Gender Biases and Sociocultural Expectations of Femininity

Gender biases and sociocultural expectations of femininity may also contribute to female underrepresentation on corporate boards.¹⁵⁸ When attempting to advance in their careers, women must contend with how they are perceived by predominantly male senior leadership.¹⁵⁹ Gender stereotypes perpetuate gender inequalities in organizations by sorting women and men in different occupational roles.¹⁶⁰ Underrepresentation of women generally and the promotional gap specifically are due at least in part to biases which favor the promotion of men.¹⁶¹ Although overt gender discrimination in the workplace has subsided, subconscious biases still exist.¹⁶²

Traditional views of femininity tend to consider leadership positions unsuitable for women, despite qualifications that indicate the contrary.¹⁶³ Additionally, individuals perceived as performing gender-incongruent occupations may be penalized.¹⁶⁴ In fact, “women job seekers were perceived to be less likable and received fewer offers when they self-presented in less feminine ways for male-dominated jobs, suggesting that gender norms for femininity are still expected of women.”¹⁶⁵ These biases result in women being judged more harshly than their male counterparts, which impedes women from being promoted to higher leadership roles, such as corporate board positions.¹⁶⁶ Further, women who succeed

157. *Id.*

158. Terry M. Dworkin, Cindy A. Schipani, Frances J. Milliken, & Madeline K. Kneeland, *Assessing the Progress of Women in Corporate America: The More Things Change, The More They Stay the Same*, 55 AM. BUS. L. J. 721, 725 (2018).

159. *Id.*

160. Kathrin J. Hanek & Stephen M. Garcia, *Barriers for Women in the Workplace: A Social Psychological Perspective*, 16 SOC. PERSONAL. COMPASS., Date and Time Accessed, at 3 (“As such, society’s gender role beliefs, or stereotypes, both derive from and perpetuate the uneven distribution of women and men into differing social (and occupational) roles.”).

161. Yavorsky, *supra* note 23 (“Hiring processes, especially during early stages, are prone to biases and prejudices because hiring managers often have minimal information on candidates aside from what is offered on a resumé.”)

162. Dworkin et al., *supra* note 158.

163. See Victoria L. Brescoll et al., *Hard Won and Easily Lost: The Fragile Status of Leaders in Gender-Stereotype-Incongruent Occupation*, 21 PSYCHOLOGICAL SCIENCE 1640 (2010).

164. *Id.*

165. Hanek & Garcia, *supra* note 160.

166. See Brescoll et al., *supra* note 163.

in traditionally-male positions are generally perceived as unlikeable and less competent than their “gender-congruent counterparts after making a single mistake.”¹⁶⁷ Moreover, evidence indicates that when female representation in senior positions reaches twenty percent, men cease feeling positive about the addition of more women and instead begin to feel threatened.¹⁶⁸ These harsh perceptions of women in traditionally-male roles contribute to the failure to hire women on corporate boards, as men may perceive female counterparts in non-traditional roles as incompetent.¹⁶⁹

4. Lack of Prioritizing Recruitment of Diverse Candidates

As articulated in Subsection B(1), companies tend to perpetuate myths regarding diversity efforts. As a result, they may not prioritize the recruitment of diverse, qualified board candidates. Reports compiled by the U.S. Government Accountability Office found that the lack of gender and racial representation on corporate boards was due to “not prioritizing diversity in recruiting efforts”¹⁷⁰ Stakeholders reported that board directors often use their own personal networks when searching for new board candidates. Because the majority of board members are men, and “peoples’ professional networks often resemble themselves, relying on [board members’] own networks is not likely to identify as many women board candidates.”¹⁷¹ Beyond their personal networks, board directors’ unconscious biases may cause them to search for individuals who resemble themselves.¹⁷² Additionally, a 2019 FHLBank Report found that institutions tended to “prioritize other

167. *Id.*, at 1642 (Perceptions of women and others in “gender-incongruent occupations” does not end after the initial hiring process. Notably, “the high status achieved by some men and women in gender-incongruent occupations can be unstable, vulnerable, and ultimately fragile. Though women and minorities have made progress in reaching high-status positions, the present research draws attention to an unsettling bias that may readily undermine these achievements.”).

168. Dworkin et al, *supra* note 158. See also Cristian L. Dezsö & David Gaddis Ross, *Does Female Representation in Top Management Improve Firm Performance? A Panel Data Investigation*, 33 STRATEGIC MGT. J. 1072, 1077 (2012).

169. See Brescoll et al., *supra* note 163.

170. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-30, CORPORATE BOARDS: STRATEGIES TO REPRESENTATION OF WOMEN INCLUDE FEDERAL DISCLOSURE REQUIREMENTS (2015).

171. U.S. GOV’T ACCOUNTABILITY OFF., GAO-19-637T, BOARD DIVERSITY: STRATEGIES TO INCREASE REPRESENTATION OF WOMEN AND MINORITIES 13 (2019), [<https://perma.cc/8UBJ-MP7M>]

172. U.S. GOV’T ACCOUNTABILITY OFF., GAO-16-30.

considerations over diversity, such as a candidate's name recognition."¹⁷³

5. Low Turnover of Board Seats

Another factor resulting in a lack of female representation on corporate boards is the low turnover of board seats.¹⁷⁴ A July 2022 Survey by The Conference Board found that election of new directors has plateaued over the past few years.¹⁷⁵ Few companies have term limits, and in fact many companies are abandoning policies that mandate seat turnover.¹⁷⁶ Mandatory retirement age policies are losing popularity, with the share of S&P 500 companies with these policies dropping from seventy percent to sixty-seven percent between 2018 and 2022.¹⁷⁷ Similarly, the share of Russell 3000 companies with these policies declined from forty percent to thirty-six percent in the same period.¹⁷⁸ Further, companies are raising mandatory retirement ages.¹⁷⁹ “[T]he share of S&P 500 companies with a retirement age of 75 rose from 39 percent in 2018 to 49 percent as of July 2022, and from 42 to 52 percent in the Russell 3000.”¹⁸⁰

Low turnover of board members continues to contribute to low numbers of women and minorities on corporate boards. Additionally, directors' elections are often uncontested, which prevents new candidates from being elected.¹⁸¹ Yet, because directors often stay on boards for six years or longer, term limits could help speed up the diversification process.¹⁸² Another potential solution is adding either temporary or permanent seats to these boards.¹⁸³

173. U.S GOV'T ACCOUNTABILITY OFF., GAO-19-637T.

174. “The diversification of US corporate boards is also limited by low the level of turnover on corporate boards and the fact that approximately 65% to 70% of the US board-age population is non-Hispanic White,” *US Corporate Board Diversity: Boards Are More Diverse Than Ever, But the Pace of Growth is Slowing*, THE CONFERENCE BOARD (NOV. 9, 2023), <https://www.conference-board.org/press/press-release-board-diversity-2023> [<https://perma.cc/87UQ-3LYS>].

175. *See Board Refreshment and Evaluations*, THE CONFERENCE BOARD 2, 1–16 (2022), <https://www.conference-board.org/pdfdownload.cfm?masterProductID=39579> [<https://perma.cc/RX7K-LB65>].

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *Barriers to Board Diversity*, ONBOARD, ATLAS LEADERSHIP SERIES WEBINAR (Jul 28, 2022), <https://www.onboardmeetings.com/webinars/barriers-to-board-diversity/> [<https://perma.cc/2KKT-7JJ3>].

182. *How to Diversify Corporate Boards*, HOWARD U. SCH. OF BUS. (May 4, 2022), <https://onlinemba.howard.edu/blog/how-to-diversify-corporate-boards/> [<https://perma.cc/2ZN6-GUQN>].

183. *Id.*

II. CALIFORNIA'S MANDATE: WOMEN ON BOARDS (SENATE BILL 826)

California is the first state in the nation to enact a gender mandate requiring corporations whose principal executive offices are located in the state to have at least one female director on their boards.¹⁸⁴ SB 826 was enacted “to advance equitable gender representation on California corporate boards.”¹⁸⁵ In 2018, twenty-five percent of California’s public companies had women on their boards.¹⁸⁶ By December 2021, the impacted corporations were required to have a minimum number of female directors depending on the size of the corporation’s board of directors.¹⁸⁷ The relevant text of SB 826 reads:

(a) No later than the close of the 2019 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation’s SEC 10-K form, are located in California shall have a minimum of one female director on its board. A corporation may increase the number of directors on its board to comply with this section.

(b) No later than the close of the 2021 calendar year, a publicly held domestic or foreign corporation whose principal executive offices, according to the corporation’s SEC 10-K form, are located in California shall comply with the following:

(1) If its number of directors is six or more, the corporation shall have a minimum of three female directors.

(2) If its number of directors is five, the corporation shall have a minimum of two female directors.

(3) If its number of directors is four or fewer, the corporation shall have a minimum of one female director.¹⁸⁸

The California Secretary of State’s Office is charged with reviewing the impacted corporations’ compliance with SB 826.¹⁸⁹ There were 716 publicly-held corporations with a California principal executive office in 2021.¹⁹⁰ Of these corporations, 358 filed a

184. See California Secretary of State, *Women on Boards*, <https://www.sos.ca.gov/business-programs/women-boards>. [<https://perma.cc/2ZQY-LSQ3>].

185. *Id.* (“Women on Boards is an important step in diversity and inclusion, as well as for the advancement of women.”).

186. *Id.*

187. *Id.*

188. CAL. CORP. CODE § 301.3.

189. *Women on Boards*, *supra* note 184.

190. Shirley N. Weber, *Diversity on Boards: March 2022 Report—Corporations Code Sections 301.3 and 301.4*, CALIFORNIA SECRETARY OF STATE (2022), <https://bpd.cdn.sos.ca.gov/div-on-boards/dob-report-2022.pdf>. [<https://perma.cc/RSE8-9GCW>].

2021 Corporate Disclosure Statement.¹⁹¹ One hundred eighty-six of these corporations disclosed compliance with SB 836 in their Corporate Disclosure Statement.¹⁹²

A. *Legal Challenges to SB 826*

Four lawsuits were filed after SB 826 was implemented.¹⁹³ Interestingly, none of these lawsuits were brought by a corporation affected by SB 826.¹⁹⁴

SB 826 was ultimately overturned by the Superior Court of the State of California in June 2022.¹⁹⁵ That decision is awaiting appeal.¹⁹⁶

B. *Compliance with SB 826*

SB 826 has increased the presence of women on corporate boards.¹⁹⁷ Overall, compliance with SB 826 gradually increased from 2019 to 2020, with 186 impacted corporations reporting compliance with the SB 826 requirements on their 2021 Corporate Disclosure Statement.¹⁹⁸ In fact, compliance peaked in 2021.¹⁹⁹ By June 30, 2023, only 2.2 percent of corporations that filed a Corporate Disclosure Statement with the California Secretary of State Office were not in compliance with SB 826 and had zero women on their boards.²⁰⁰

According to the California Partners Project, before SB 826 was passed in 2018, twenty-eight percent of companies in California had zero female directors.²⁰¹ In 2021, after SB 826 was implemented, only *one percent* of California companies had no female directors.²⁰²

191. *Id.*

192. *Id.*

193. *See* Complaint, All. for Fair Board Recruitment v. Weber, No. 2:21-cv-01951-JAM-AC (C.D. Cal. July 12, 2021); Complaint, Nat'l Ctr. for Pub. Pol'y Rsch. v. Weber, No. 2:21-at-01111 (E.D. Cal. Nov. 22, 2021); Meland v. Weber, No. 2:19-cv-02288-JAM-AC, 2021 WL 6118651 (E.D. Cal. Dec. 27, 2021); Crest v. Padilla, No. 19STCV27561, 2022 WL 1565613 (Cal. Super. Ct. May 13, 2022).

194. Nikki Williams, *Making Mandates Last: Increasing Female Representation on Corporate Boards in the U.S.*, 29 MICH. J. GENDER & L. 211, 224 (2022).

195. *See Women on Boards*, *supra* note 184.

196. *Crest v. Padilla* (Los Angeles Superior Court No. 19STCV27561), Appeal No. B322276. The appeal is in the Second Appellate District of the California Court of Appeal.

197. Gupta, *supra* note 10.

198. Weber, *supra* note 190.

199. *See Tracking the Representation of Women on California Public Company Boards (2018–2023)*, EQUILAR, CALIFORNIA PARTNERS PROJECT, https://www.calpartnersproject.org/_files/ugd/2ceb15_f4c0b1158b204ca58d2d3defd1369ad9.pdf, [<https://perma.cc/6YNP-PN8N>].

200. *Id.*

201. Gupta, *supra* note 10.

202. *Id.*

That same year, thirty-one percent of board seats were held by women, which is more than twice the percentage of seats held by women in 2018.²⁰³ Women comprised more than 33.3 percent of California board members by September 2022, compared to 15.5 percent in 2018.²⁰⁴ Additionally, many new female board directors in 2019 were first-time directors, indicating that SB 826 created a broader pool of candidates.²⁰⁵

But only half of the impacted corporations filed a Corporate Disclosure Statement in 2022, let alone reported compliance on that Statement.²⁰⁶ This halting or regressing of disclosure was likely the result of the court decision which declined to uphold the legality of SB 826.

It is worth noting the increase in women on corporate boards between 2018 and 2022 while SB 826 was in effect.²⁰⁷ Six hundred fifty public companies headquartered in California were subject to SB 826.²⁰⁸ Although men still held many more seats on corporate boards in California than did women, there was a significant decrease in the gap between the number of board seats held by men and women.²⁰⁹ As documented by the California Partners Project,²¹⁰ the number of board seats held by women peaked at 2103 (33.3 percent), followed by a slight decline after September 30, 2022.²¹¹

Further, the California Partners Project found that there were significant decreases in the percentage of companies with zero female directors between June 30, 2018 and June 30, 2020.²¹²

203. *Id.*

204. Kim Elssesser, *Fewer Women On Corporate Boards After California Law Deemed Unconstitutional*, FORBES (Dec. 18, 2023, 01:47pm EST), <https://www.forbes.com/sites/kimelsesser/2023/12/18/fewer-women-on-corporate-boards-after-california-law-deemed-unconstitutional/?sh=23c46b726e9c>, [<https://perma.cc/Q7VD-GMPU>].

205. *See* Gupta, *supra* note 10 (citing a 2020 report published by accounting KPMG).

206. Three-hundred-fifty-eight of 716 impacted corporations (fifty percent) filed a 2021 Publicly Traded Corporate Disclosure Statement as required under Corporations Code Sections 301.3 and 301.4 (SB 826). *See* Weber, *supra* note 190, at 3.

207. *See Women on Boards Facts: Facts about Women on Corporate Boards in California*, *supra* note 11.

208. *Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards*, CALIFORNIA PARTNERS PROJECT 7 (2020), https://www.calpartnersproject.org/_files/ugd/38234c_191242fa1af74ab0bc813355749816c5.pdf, [<https://perma.cc/96YG-CSP2>].

209. *See Tracking the Representation of Women on California Public Company Boards (2018–2023)*, *supra* note 199.

210. *Id.*

211. *Id.*

212. *Id.*

Twenty-nine percent of companies had zero women on their boards in 2018.²¹³ Although the percentage of companies with zero women directors fluctuated between 2020 and 2022, the percentage remained low, below 2.3 percent.²¹⁴ In 2020, fifteen companies (2.3 percent) had zero women on their board of directors.²¹⁵ There was a slight increase in companies with zero women directors from March 1, 2022 to June 30, 2023, but the percentage is still below two percent.²¹⁶

One hundred eighty-three companies (28.2 percent) met the gender requirement that would have come into effect on December 31, 2021 had SB 826 not been overturned.²¹⁷ Four hundred sixty-seven (71.8 percent) of affected companies only needed one more female board member to meet the December 2021 gender requirement.²¹⁸ Only 766 board of director seats in California were held by women in 2018.²¹⁹ By contrast, in 2020, 1275 seats were held by women—an increase of 66.5 percent—²²⁰ and more women (50.4 percent) joined public company boards in California than men, most likely for the first time in history.²²¹

C. *Effect of Overturning SB 826 on Gender Diversity in California*

Despite the positive effects of SB 826 while in effect, in a state-by-state analysis of gender diversity on corporate boards, Equilar reported that California is now lagging in gender diversity.²²² Specifically, in its Q1 2024 Equilar Gender Diversity Index, Equilar stated that:

213. *Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards*, *supra* note 208.

214. *Tracking the Representation of Women on California Public Company Boards (2018–2023)*, *supra* note 199.

215. *Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards*, *supra* note 208.

216. *See Tracking the Representation of Women on California Public Company Boards (2018–2023)*, *supra* note 199.

217. *Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards*, *supra* note 208.

218. *Id.*

219. *Id.*

220. *Id.*

221. *Mapping Inclusion: Women's Representation on California's Public Company Boards by Region and Industry*, CALIFORNIA PARTNERS PROJECT 1 (2021), https://www.calpartnersproject.org/_files/ugd/38234c_8c718638a4d3495ea26100657c70284f.pdf, [<https://perma.cc/29C5-PEVM>].

222. *See Batish*, *supra* note 4.

California, a state historically at the forefront of diversity legislation, saw a notable shift in its ranking. Falling from third to fifth place in female board representation nationally, California's decline could signal early impacts from the overturning of Senate Bill 826. The legislation, which mandated gender diversity on corporate boards, was overturned in 2022, potentially influencing corporate behaviors and priorities regarding board composition.²²³

III. OUR EMPIRICAL STUDY

Research has identified desirable qualifications for board candidates as CEO positions, prior director experience, financial expertise, marketing expertise, and military experience.²²⁴ A survey of S&P 500 company directors conducted by Spencer Stuart found that a wish list for new board directors backgrounds and identities include: active CEO/COO (48%), minorities (47%), women (44%), retired CEO/COO (33%), financial expertise (49%), industry expertise (48%), international expertise (37%), regulatory/government expertise (20%), risk expertise (20%), technology expertise (19%), marketing expertise (17%), human resource expertise (3%), and legal expertise (1%).²²⁵

We examined the characteristics of the newly appointed female board members to evaluate how they stacked up against the wish-list characteristics. Ultimately, we found that the new women board members in California are highly qualified. Our findings suggested a correlation between SB 826 and increased numbers of qualified women being appointed to California boards while in effect.

A. Objectives

Our study had three phases. First, we analyzed the board composition of impacted California companies (as defined in SB 826) by gender and compliance with the law. Second, we researched the qualifications and characteristics of active female board members as of the end of the 2021 calendar year. In conducting this research, we examined the prior experiences of the women appointed to California boards considering (1) board experience; (2) relevant work experience in the C-Suite, Senior Vice President, Vice President, Director (excluding board directorships); and (3) manager roles. We then compared these criteria among women

223. *Id.*

224. Lawrence J. Trautman, *The Matrix: The Board's Responsibility for Director Selection and Recruitment*, 11 FLA. ST. U. BUS. REV. 75, 133 (2012).

225. *Id.* at 99.

appointed (1) before 2016, (2) between 2016 and 2018, (3) in 2019, (4) in 2020, and (5) in 2021. Finally, we compared the prior experiences of women appointed to boards in California companies with their male counterparts.

B. *Data Collection*

We collected data pertaining to active female board members of publicly held corporations in California as of December 2021. These data were compiled from the corporations listed on the California Secretary of State's March 2021 Report,²²⁶ which includes publicly held corporations that showed an executive office in California on their annual report.²²⁷

Data pertaining to board members in California were collected from the webpages of the 647 corporations that filed publicly traded corporate disclosure statements in 2020, based on the March 2021 Report. This dataset contains board member data from 582 of the 647 corporations, as the remaining corporations were either acquired or merged, or data were otherwise unavailable. For the 582 corporations, the name of each female board member was recorded in addition to their appointment year, the total number of board members, and corporate compliance with SB826, as of the end of 2021. There are 582 corporations in our SB 826 dataset (Company Compliance Dataset), and a total of 1512 female board members.

Specific data pertaining to each active female board member includes past work and board of director experience, in addition to the number of current board seats held by female members as of December 2021. Of the 582 corporations included in the SB 826 Company Compliance Dataset, 538 corporations were included. Corporations that were not included in this dataset were due to repeats for female board members or unavailable data. There are a total of 1221 total female board members in this dataset.

C. *Methodology*

To analyze the qualifications of current women board members in California, data were collected pertaining to past board membership and past work experience. Prior board experience refers to the number of board positions held prior to appointment to California public board and includes positions that are active

226. Shirley Weber, *Women on Boards: March 2021 Report*, STATE OF CALIFORNIA (2021), <https://bpd.cdn.sos.ca.gov/women-on-boards/wob-report-2021-02.pdf> [<https://perma.cc/D89T-N4WF>].

227. *Id.* (Annual report filed with the United States Securities and Exchange Commission (SEC) pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 (Form 10-K) during the 2020 calendar year.).

as of December 2021. Current board positions, on the other hand, include only active board seats. Both prior board positions and current board positions may include seats located outside of the state of California but are restricted to the board of directors and hence exclude board of trustees and other similar titles. In order to quantify the past work experience of active female board members, work experiences going back twenty years prior to appointment to active board are considered, and the highest position held is recorded. In the case of early retirement, the experiences back to twenty years prior to retirement may instead be used. The highest position held over the twenty-year period is then recorded as either C-Suite, Senior Vice President (SVP), Vice President (VP), Director, Manager, or N/A. Information pertaining to work and board experiences were collected from executive profiles on company webpages and LinkedIn.

We reviewed McKinsey and Company's 2020 Women in the Workplace Report for an analysis of what is known as the corporate pipeline.²²⁸ McKinsey and Company identified the corporate pipeline starting at the entry level, then Senior Manager/Director, followed by Vice President, President, and C suite.²²⁹ In order to standardize McKinsey's pipeline with positions held across varying industries, generalized hierarchical structures were combined.²³⁰

D. Results

Our research has three phases: (1) analyzing board composition by gender and compliance with SB 826, (2) analyzing

228. Sarah Coury et al., *Women in the Workplace 2020*, LEANIN.ORG & MCKINSEY AND COMPANY (2020), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/women-in-the-workplace-archive#section-header-2020> [https://perma.cc/Q737-2ANW].

229. *Id.*

230. See, e.g., *Pharmaceutical Company Hierarchy*, HIERARCHY STRUCTURE https://hierarchystructure.com/pharmaceutical-company-hierarchy/#google_vignette [https://perma.cc/6V9D-7FGK]; see also @Jacopo, PREP LOUNGE (Aug. 23, 2019), <https://www.preplounge.com/en/consulting-forum/position-levels-in-mckinsey-1126> [https://perma.cc/8BJB-C7X2]; see also *Academic Career Hierarchy*, HIERARCHY STRUCTURE, <https://www.hierarchystructure.com/academic-career-hierarchy/> [https://perma.cc/AJX7-SCUH]; *What is the Typical Law Firm Organizations Structure? What is the Hierarchy of Different Positions Inside of Law Firms?*, BCG ATTORNEY SEARCH, <https://www.bcgsearch.com/article/900049093/Class-Divisions-and-Hierarchies-within-Major-Law-Firms/#:~:text=Law%20firms%20are%20further%20divided,contract%20attorneys%20at%20the%20bottom> [https://perma.cc/SBX7-RLH5]; *What Do Law Firm Titles Mean*, CALIFORNIA DESERT TRIAL ACADEMY COLLEGE OF LAW (Mar. 23, 2024), <https://web.archive.org/web/20240228230703/https://cdtalaw.com/cdta/what-do-law-firm-titles-mean/> [https://perma.cc/MNX5-T5QG].

characteristics of active female board members in California as of the end of the 2021 calendar year, and (3) comparing female board members' prior experiences with those of male board members for California companies. Consistent with these objectives, our findings are summarized below.

1. Research Phase One: Analyze Board Composition by Gender and Compliance with SB826.

Our first objective was to evaluate company compliance with SB 826. Our data set consists of 582 corporations. There are 4874 board members in this dataset, 1512 of whom are female. As of December 2021, 371 of 582 (64.09%) corporations complied with the requirements of SB826. Recall that by December 2021, the SB 826 mandated varying numbers of female directors which were dependent on the size of the board.

The law states:

- (1) If its number of directors is *six or more*, the corporation shall have a minimum of **three** female directors.
- (2) If its number of directors is **five**, the corporation shall have a **minimum of two** female directors.
- (3) If its number of directors is **four or fewer**, the corporation shall have a **minimum of one** female director.²³¹

After analyzing the impacted companies, we found that 1512 of 4874 (31.02%) of board members are female. Twelve of the 582 (2.07%) corporations have zero female board members. Five hundred sixty-eight of the 582 (97.93%) corporations have at least one female board member. Four hundred ninety of the 582 (84.51%) corporations have at least two female board members. Three hundred forty of the 582 (59.04%) corporations have three or more female board members. Finally, thirty-four of the 582 (5.85%) corporations have 50% or more female board members.

2. Research Phase Two: Characteristics of Active Female Board Members in California as of the End of the 2021 Calendar Year

Our examination of the background qualifications and characteristics of members of California boards included 1221 female board members from 538 different companies. Our results are summarized below.

231. CAL. CORP. CODE § 301.3.

a. Board Experience, C-Suite Experience, and Other Executive Experience

Seven hundred thirty-seven (60.36%) female board members had board experience prior to their appointment to the California board. *See Figure 1.* Eight hundred seventy-eight (71.91%) female board members held a C-Suite position as their highest position prior to their appointment to the active California board, while 201 (16.46%) held an SVP position, sixty-eight (5.57%) held a VP position, sixty-two (5.08%) held a director position, and eight (0.66%) held a managing position, while the remaining did not have prior work experience. *See Figure 2.* Five hundred seventy-one (46.76%) board members had both C-Suite and past board experience. *See Figure 3.*

One thousand forty-four (85.50%) active female board members had either C-Suite or past board experience prior to their appointment to California board; 1134 (92.87%) have held either C-suite, SVP, or have past board experience. One thousand one hundred seventy-six (96.31%) active female board members have held either C-suite, SVP, VP, or had past board experience.

The middle fifty percent of female board members held between zero and two prior board experiences, the maximum being eight. The middle fifty percent of female board members currently hold between one and three board positions, the maximum being ten.²³²

232. 8.11% were appointed on or before 2012, 2.87% in 2013, 3.36% in 2014, 3.85% in 2015, 5.57% in 2016, 6.55% in 2017, 9.17% in 2018, 19.41% in 2019, 16.71% in 2020, and 24.41% in 2021. (41 appointed in 2014, 47 in 2015, 68 in 2016, 80 in 2017, 112 in 2018, 237 in 2019, 204 in 2020, and 298 in 2021).

Figure 1

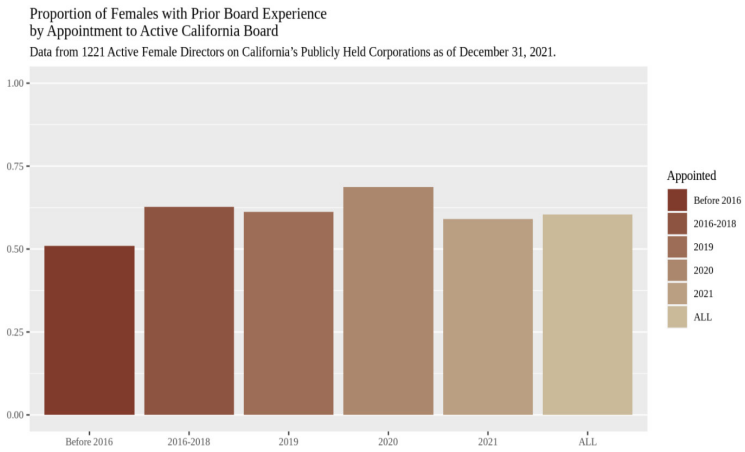
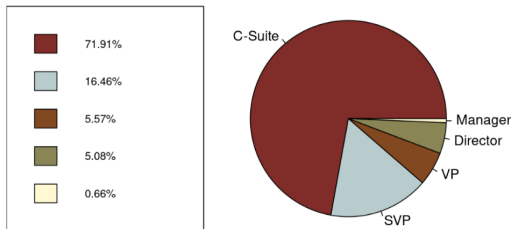
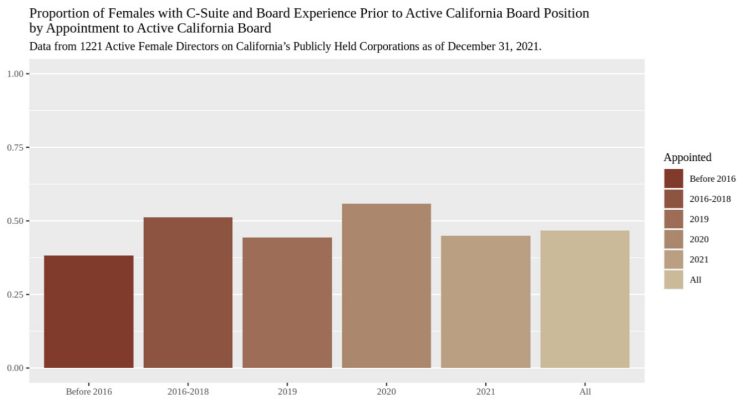


Figure 2

Current Female Board Directors by Highest Work Position Held Prior to Appointment



Data from 1221 Active Female Directors on California's Publicly Held Corporations as of December 31, 2021.

Figure 3

b. Female Board Members' Prior Experiences between 2016–2021

Next, we broke down the backgrounds of the women board members appointed within the relevant time frames before and after the enactment of SB 826: (1) before 2016, (2) between 2016 and 2018, (3) in 2019, (4) in 2020, and (5) in 2021. Our findings are as follows.

i. Before 2016 Subset

Before 2016, 222 active female board members were appointed in California. One hundred thirteen (50.90%) of these women had board experience prior to their appointment to the California board. Comparatively, 151 (68.02%) had C-Suite experience. Eighty-five (38.29%) women had both prior C-Suite and board experience. One hundred seventy-nine (80.63%) had either prior C-Suite or board experience. One hundred ninety-eight women (89.19%) had prior C-Suite, SVP, or prior board experience.

The mean number of board positions held prior to appointment is 1.35. The middle fifty percent of past board experiences for this subset lie between zero and two, with a maximum of eight positions held prior to appointment to active California board. The mean number of current board positions is 2.84. The middle fifty percent of current board positions lie between two and four, with a maximum of ten current board positions.

ii. Between 2016 and 2018 Subset

Two hundred sixty active female board members in California were appointed between 2016 and 2018. One hundred sixty-three women (62.69%) had board experience prior to their appointment to the California board. One hundred ninety-three women (74.23%) had C-Suite experience. One hundred thirty-three women (51.15%) had both prior C-Suite and board experience. Two hundred twenty-three women (85.77%) had either prior C-Suite or board experience. Two hundred forty-two women (93.08%) had prior C-Suite, SVP, or prior board experience.

The mean number of board positions held prior to appointment is 1.77. The middle fifty percent of past board experiences for this subset lie between zero and three, with a maximum of eight positions held prior to appointment to active California board. The mean number of current board positions is 2.77. The middle fifty percent of current board positions lie between one and four, with a maximum of ten current board positions.

iii. 2019 Subset

Two hundred thirty-seven active female board members in California were appointed in 2019. One hundred forty-five women (61.18%) had board experience prior to their appointment to the California board. One hundred sixty-seven women (70.46%) had prior C-Suite experience. One hundred five women (44.30%) had both prior C-Suite and board experience. Two hundred seven women (85.54%) had either prior C-Suite or board experience. Two hundred twenty-four women (92.56%) had prior C-Suite, SVP, or prior board experience.

The mean number of board positions held prior to appointment is 1.64. The middle fifty percent of past board experiences for this subset lie between zero and two, with a maximum of eight positions held prior to appointment to active California board. The mean number of current board positions is 2.48. The middle fifty percent of current board positions lie between one and four, with a maximum of seven current board positions.

iv. 2020 Subset

Two hundred four active female board members in California were appointed in 2020. One hundred forty (68.63%) women had board experience prior to their appointment to the California board. One hundred fifty-five (75.98%) women had C-Suite experience. One hundred fourteen (55.88%) women had both prior C-Suite and board experience. One hundred eighty-one (88.73%) women had

either prior C-Suite or board experience. One hundred ninety-five (95.59%) women had prior C-Suite, SVP, or prior board experience.

The mean number of board positions held prior to appointment is 1.73. The middle fifty percent of past board experiences for this subset lie between zero and three, with a maximum of eight positions held prior to appointment to active California board. The mean number of current board positions is 2.51. The middle fifty percent of current board positions lie between one and three, with a maximum of eight current board positions.

v. *2021 Subset*

Finally, two hundred ninety-eight active female board members in California were appointed in 2021. One hundred seventy-six (59.06%) women had board experience prior to their appointment to the California board. Two hundred twelve (71.14%) women had C-Suite experience. One hundred thirty-four (44.97%) women had both prior C-Suite and board experience. Two hundred fifty-four (85.23%) women had either prior C-Suite or board experience. Two hundred seventy-five (92.28%) women had prior C-Suite, SVP, or prior board experience.

The mean number of board positions held prior to appointment is 1.53. The middle 50% of past board experiences for this subset lie between zero and two, with a maximum of eight positions held prior to appointment to active California board. The mean number of current board positions is 2.18. The middle 50% of current board positions lie between one and three, with a maximum of nine current board positions. *See Figure 4* for details of our data set.

Figure 4

| Dataset | Number of females on board | Percentage on boards prior to appointment | Percentage in C-suites prior to appointment | Percentage in C-suites AND on boards prior to appointment | Percentage in C-suites OR on boards prior to appointment | Percentage in C-suites, SVP, OR on boards prior to appointment |
|---------------------------|----------------------------|---|---|---|--|--|
| <i>All</i> | 1221 | 60.36% | 71.91% | 46.76% | 85.50% | 92.87% |
| <i>Before 2016 Subset</i> | 222 | 50.90% | 68.02% | 38.29% | 80.63% | 89.19% |
| <i>2016–2018 Subset</i> | 260 | 62.69% | 74.23% | 51.15% | 85.77% | 93.08% |
| <i>2019 Subset</i> | 237 | 61.18% | 70.46% | 44.30% | 85.54% | 92.56% |
| <i>2020 Subset</i> | 204 | 68.63% | 75.98% | 55.88% | 88.73% | 95.59% |
| <i>2021 Subset</i> | 298 | 59.06% | 71.14% | 44.97% | 85.23% | 92.28% |

Ultimately, as this data illustrate, women appointed to California boards are highly qualified. Overall, nearly ninety-three percent of women appointed to boards in California have either prior board experience, C-Suite experience, or experience as a Senior Vice President. In fact, the qualifications of women have increased in the corporate pipeline since 2016, when only approximately eighty-nine percent of women had prior board, C-Suite, or Senior Vice President experience.

3. Research Phase Three: Comparison with Male Board Members

In 2023, we sampled forty California companies to compare the qualifications and experiences of male and female members. In this sample, there were 212 men. We found that 88.21% of the men had prior board experience. There were ninety-one women in the sample of forty companies, eighty-nine of whom had board experience. Approximately 93% of the men had C-Suite experience compared to 64.84% of the women. While 47.17% of the men had other executive experience, 32.97% of the women had similar experience. *See Figures 5 and 6.*

Figure 5

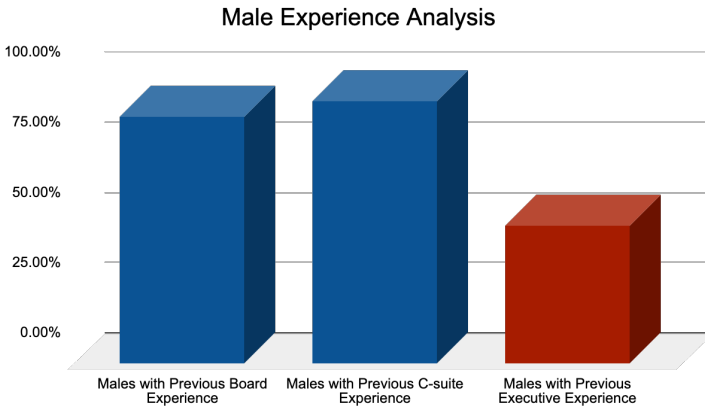
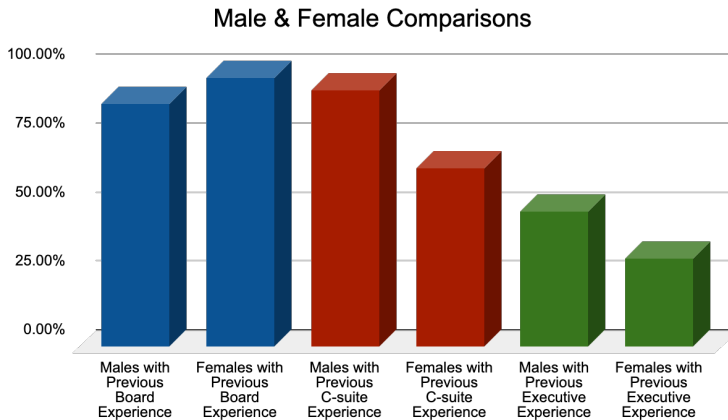


Figure 6

E. *Conclusions from Our Empirical Study*

Our findings suggest that after the enactment of SB 826, women appointed to California boards held various prior leadership positions that are desirable to companies when seeking prospective board members. Notably, as of 2023, women had *more* previous board experience compared to men appointed during the same during the lifespan of SB 826. Although women appointed to boards did not possess as much prior C-Suite or executive experiences as men prior to 2021, women continued to garner exemplary work experience.

As demonstrated by our empirical study, SB 826 did not result in unqualified women sitting on corporate boards. Instead, SB 826 served as a catalyst for making a positive step toward gender parity. The bill provided additional or new opportunities for qualified women to sit on corporate boards.

In comparing the data of male and female board members, we found that women had more prior board experience than men during the lifespan of SB 826. We found that 88.21% of the men had prior board experience. In comparison, of the sample of ninety-one women, 97.8% of women had prior board experience.

Before SB 826 came into effect, 183 of California's publicly traded companies had entirely male boards.²³³ Four years later, this number has dropped to *nine companies*.²³⁴ Additionally, in 2022, forty percent of new board seats of Fortune 500 firms were occupied

233. Elsesser, *supra* note 204.

234. *Id.*

by women. The previous year forty-five percent of those new seats had gone to women.²³⁵

This decrease between 2022 and 2021 may be due to organizations prioritizing potential directors with CEO and CFO experience.²³⁶ Due to the Covid pandemic, some firms perceive prior CEO and CFO experience as particularly helpful in navigating continuing economic and political unpredictability.²³⁷

This preference negatively impacts female potential board candidates. There are far fewer female CEOs, with only ten percent of Fortune 500 CEOs and twelve percent of CFOs being women.²³⁸ This trend holds true for other companies in the United States as well.²³⁹ Looking at Russell 3000 companies, the percentage of new board seats going to women also declined from 2022 to 2023.²⁴⁰

SB 826 provided more opportunities for qualified women to serve on corporate boards. Women appointed to California boards following SB 826's enactment tended to possess the relevant, desirable prior work experience sought-after by companies.

IV. EFFECT OF GENDER DIVERSITY ON COMPANY VALUE

Appointing women on corporate boards has been found to add value to companies in both tangible and intangible ways. Tangibly, studies have suggested that companies can expect an increase in value on various financial metrics following the appointment of women to corporate boards.²⁴¹ That is, some studies have found that female board members have a greater positive impact on companies' financial performance compared to when they are appointed in non-executive director positions.²⁴² Additionally, reports have shown profits for a sample of companies with more women to increase by six percent.²⁴³

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. See Tim Smedley, *Diversity at the Top Pays Dividends*, FIN. TIMES (Mar. 7, 2016), <https://www.ft.com/content/82a3aee2-d97d-11e5-a72f-1e7744c66818> [<https://perma.cc/V4XW-XC77>] (citing Marcus Noland & Tyler Moran, *Study: Firms with More Women in the C-Suite Are More Profitable*, PETERSON INSTITUTE OF ECON., HARV. BUS. REV. (Feb. 8, 2016), <https://hbr.org/2016/02/study-firms-with-more-women-in-the-c-suite-are-more-profitable> [<https://perma.cc/U38Y-CV4C>]).

242. *Id.*

243. *Id.*

Diversity on boards not only brings new perspectives, but also enhances organizational trust which leads to more effective boards.²⁴⁴ A review of studies included in the *Progress Report* published by the California Partners Project found that the presence of women on corporate boards enhanced key business metrics.²⁴⁵ Notably, a study by Credit Suisse concluded that women on corporate boards improves stock performance with large-cap companies with women on their boards outperforming share value of comparable firms with entirely male boards by twenty-six percent.²⁴⁶ Additionally, companies with strong female representation at high-level management roles have been found by the consulting firm McKinsey & Company to be the most profitable.²⁴⁷

Companies in the top quartile for gender diversity in executive teams were likely to outperform on profitability and value creation.²⁴⁸ Though not much empirical data are available in the context of SB 826 since it was overturned, some data suggest non-negative, and maybe positive, consequences for California firms resulting from the legislation.²⁴⁹ This directly counters the assertion that mandated gender diversity has negative consequences for firm value.²⁵⁰

Women's presence in corporate leadership correlates with firm characteristics such as firm size and nondiscriminatory attitudes towards female executives.²⁵¹ Companies with more women on their boards have been found to experience less shareholder dissent and more board collaboration.²⁵² The GAO echoes this sentiment,

244. Spierings, *supra* note 14, "For example, 59% of S&P 500 companies now publicly disclose aggregate racial and ethnic diversity, and 29% disclose sexual orientation. Directors who share their personal backgrounds and experiences can spark discussions that deepen understanding and trust among the board members."

245. *See Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards*, *supra* note 208.

246. *Id.* ("Research shows the financial benefit and enhanced innovation that comes with an increased presence of women on boards and in leadership roles.") (citing *Gender Diversity and Corporate Performance*, CREDIT SUISSE RESEARCH INSTITUTE (2012)).

247. *Id.*

248. Devillard et al., *supra* note 149.

249. Abigail Allen & Aida Wahid, *Regulating Gender Diversity: Evidence from California Senate Bill 826*, 70 MGMT. SCIENCE, at 1, 4 (2023).

250. *Id.*

251. *See e.g.*, Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS 15 (Feb. 2016), <https://www.piie.com/sites/default/files/documents/wp16-3.pdf> [<https://perma.cc/PZ6A-ESD2>].

252. *Diversity on Corporate Boards: More Profit, Lower Risk*, WHARTON

finding that better decisions result from diverse groups, because the group members had to reconcile different perspectives to reach a consensus before reaching their decision.²⁵³

Additionally, boards with more women are also more likely to reach consensus on significant decisions because women tend to place an emphasis on outside research to ensure a fair process in recruiting new directors.²⁵⁴ Female directors may also serve as a benefit to boards by reducing overconfidence in problem solving.²⁵⁵ Studies also suggest that an increased proportion of women in leadership can trend with positive financial outcomes. For example, companies with at least one woman on the board tend to experience “higher levels of EBITDA margin” after several years.²⁵⁶

In addition to tangible benefits related to firm value, more diverse leadership can help with employee retention and help address the gender wage gap.²⁵⁷ Female presence on corporate boards is associated with reducing male CEO overconfidence,²⁵⁸ thus better insulating companies against fraud and other improprieties.²⁵⁹ Thus, gender diversity may enhance employees’, companies’, and the public-at-large’s trust in the board’s efficacy.²⁶⁰

Finally, a 2020 study found that firms in societies with general acceptance of working women reaped many more of the benefits that accompany gender diversity in the workplace, as opposed to firms in societies with merely regulatory support for gender

@ WORK (Oct. 2023), <https://executiveeducation.wharton.upenn.edu/thought-leadership/wharton-at-work/2023/10/diversity-on-corporate-boards/> [<https://perma.cc/J5HB-9VK7>].

253. U.S. GOV'T ACCOUNTABILITY OFF., GAO-19-637T, BOARD DIVERSITY: STRATEGIES TO INCREASE REPRESENTATION OF WOMEN AND MINORITIES 13 (2019), <https://www.congress.gov/116/meeting/house/109690/witnesses/HHRG-116-BA00-Wstate-GurkinC-20190620.pdf> [<https://perma.cc/8UBJ-MP7M>].

254. *Board Diversity and Effectiveness in FTSE 350 Companies*, LONDON BUSINESS SCHOOL 9 (Jul. 2021), <https://downloads.ctfassets.net/hxo16fanegqh/2bnvaruy1KDKblph2XdFIW/2a951715edd7c5d67c9f04dd5ef09ae5/frc-board-diversity-and-effectiveness-in-ftse-350-companies.pdf> [<https://perma.cc/3THF-8NP3>].

255. *Id.*

256. *Id.*

257. Dworkin et al., *supra* note 158.

258. *Why Diversity and Inclusion Matter: Quick Take*, CATALYST (Jun. 24, 2020), <https://www.catalyst.org/research/why-diversity-and-inclusion-matter/> [<https://perma.cc/MYS8-952T>].

259. See Yan Jung Hyun et al., *Women on Boards and Corporate Social Responsibility*, 8 Sustainability 300, 306 (2016).

260. “Directors who share their personal backgrounds and experiences can spark discussions that deepen understanding and trust among the board members.” Spierings, *supra* note 14.

diversity.²⁶¹ A widespread cultural belief that women belong in corporate environments leads to a higher probability that the benefits mentioned above will accompany greater gender diversity at a company.

Many firms appear to be taking notice of these benefits. Of the 626 new directors appointed to the boards of the 3000 largest U.S. companies in 2023, more than forty percent were women.²⁶² However, given cultural and political backlash against DEI initiatives and gender quota programs, it is unclear if these upward trends will continue. In fact, it seems that gender diversity on boards is stalling out, with first quarter 2024 new female directors on Russell 3000 company boards hitting the lowest percentage since the end of 2017.²⁶³

Therefore, it is not enough that corporations simply add women on boards and be done with diversity. Female representation on corporate boards should be encouraged and cultivated.

V. RECOMMENDATIONS

SB 826, while in effect, improved female representation on corporate boards. More action is needed both state-wide and nationally to bring female representation on corporate boards to be par with that of men. If SB 826 had applied nationally, over 3500 women may have been added to corporate leadership.²⁶⁴ The legislature is not the only institution that is equipped to support female empowerment and representation. Corporations can and should integrate more women on corporate boards. Because women are entering the workforce in entry-level positions at similar rates to men, additional support is needed at higher levels to facilitate the promotion of women to boards and close the gender-based promotion gap. Yet merely relying on companies to voluntarily comply with suggested best practices has resulted in underrepresentation of women in corporate environments for decades.²⁶⁵

261. Letian Zhang, *An Institutional Approach to Gender Diversity and Firm Performance*, ORGANIZATIONAL SCIENCE 7–9 (Feb. 2020), https://www.hbs.edu/ris/Publication%20Files/An%20Institutional%20Approach%20to%20Gender%20Diversity%20and%20Firm%20Performance_4c0479f3-9d13-4af8-82da-7f1713af940d.pdf.

262. *Diversity on Corporate Boards: More Profit, Lower Risk*, *supra* note 252.

263. Batish, *supra* note 4.

264. See *Claim Your Seat: A Progress Report on Women's Representation on California Corporate Boards*, *supra* note 208.

265. Allen & Wahid, *supra* note 249.

We have four recommendations to help close the gender gap between men and women on boards. First, corporations should provide networking and mentoring opportunities for both prospective and current female employees. Second, proxy voting guidelines should expressly indicate that DEI is and continues to be a priority using clear language and clear DEI initiatives. Third, legislation should be modeled after the European requirements soft quotas to increase board opportunities for women. Finally, instituting advisory boards is imperative as it would benefit corporations by providing impartial, expert advice and provide supervision over DEI efforts within the corporation. Furthermore, advisory boards would also provide women with opportunities to gain relevant experience for future board membership. These recommendations are discussed next.

A. *Networking and Mentorship Opportunities*

Our first recommendation for helping to close the gender gap on corporate boards is for companies to provide networking opportunities and mentorships. These opportunities will help diminish biases that prevent women from gaining positions of leadership.²⁶⁶

For example, networking efforts and female mentorship can facilitate intergroup contact situations.²⁶⁷ Intergroup contact refers to situations between ingroup²⁶⁸ and outgroup²⁶⁹ members, even among prejudice-prone persons.²⁷⁰ Contact between dominant

266. In the context of college student mentoring, “mentoring programs can potentially create and support optimal conditions for diverse interactions that can ultimately lead to prejudice reduction and other positive outcomes for college students serving as mentors.” Joanna M. Lee, Lauren J. Germain, Edith C. Lawrence, & Jenna H. Marshall, “*It opened my mind, my eyes. It was good.*” *Supporting College Students’ Navigation of Difference in a Youth Mentoring Program*, 89 EDUC. HORIZONS, 33, 34 (2010).

267. Dolores Frias-Navarro et al., *Intergroup Contact and Opposition to Same-Sex Parents: The Mediation Effect of Satisfaction with Contact*, 17 SEXUALITY RES. SOC. POL’Y 619, 620 (2020); see also Jake Harwood, *Intergroup Contact*, OXFORD RSCH. ENCYCLOPEDIAS, COMM’N (2017) at 2 (“[Intergroup c]ontact works.”).

268. We define “ingroup” as men or males or other genders not identifying as male.

269. We define “outgroup” as women or females.

270. See Frias-Navarro et al., *supra* note 267. See also *Predisposed to Prejudice but Responsive to Intergroup Contact? Testing the Unique Benefits of Intergroup Contact Across Different Types of Individual Differences*, 22 GRP. PROCESSES & INTERGROUP REL. 1, 1 (2019) (“Examining a broad range of intergroup criterion measures (e.g., racism, support for racial profiling) we reveal that greater contact quality is associated with lower levels of intergroup hostility for those both lower and higher on a variety of indicators of prejudice proneness, simultaneously considered.”).

ingroups and outgroups has been found to reduce prejudice, particularly against out-group members (women).²⁷¹ Intergroup contact situations may also reduce bias against out-group members not directly involved in contact.²⁷² Thus, intergroup contact may help reduce biases that prevent women from gaining positions of leadership.²⁷³

Corporations should thus encourage intergroup contact situations in order to decrease biases against female outgroups within the corporation. These opportunities also allow ingroup members to socialize with more female outgroup members, which in turn will work to reduce biases held against the female outgroup. Positive interactions with members of an advantaged group can increase aspirations and success among those from outside the group, promoting social mobility.²⁷⁴ Consequently, increasing positive interactions among both men and women and between women within the workplace will likely help reduce gender biases and promote female confidence in seeking higher-level corporate roles.

Mentoring relationships are one way to promote intergroup contact. These relationships should consist of one-on-one mentoring as well as group mentoring and networking opportunities.²⁷⁵

271. See Harwood, *supra* note 267.

272. See Jeanne A. Novak & Patricia M. Rogan, *Social Integration in Employment Settings: Application of Intergroup Contact Theory*, 48 INTELL. AND DEVELOPMENTAL DISABILITIES 31 (2010); Nour S. Kteily et al., *Predisposed to Prejudice but Responsive to Intergroup Contact? Testing the Unique Benefits of Intergroup Contact Across Different Types of Individual Differences*, 22 GRP. PROCESSES & INTERGROUP REL. 1, 3 (2019).

273. Jennifer Boddy, *Challenging Gender Role Stereotypes and Creating Pathways for Goal Achievement: A Study of a Group Mentoring Programme for Women from Disadvantaged Communities*, 8 QUALITATIVE SOCIAL WORK 489, 491 (2009); see also Ruth E. Zambrana et al., “Don’t Leave Us Behind”: The Importance of Mentoring for Underrepresented Minority Faculty, 52 AM. EDUC. RES. J. 40, 44 (2015); Lillia Cervantes et al., *A Hospitalist Mentoring Program to Sustain Interest in Healthcare Careers in Under-Represented Minority Undergraduates*, 9 J. HOSPITAL MEDICINE 586 (2014); Novak & Rogan, *supra* note 272.

274. Nicole Tausch et al., *How Does Intergroup Contact Affect Social Change? Its Impact on Collective Action and Individual Mobility Intentions among Members of a Disadvantaged Group*, 71 J. SOCIAL ISSUES 536, 548 (2015).

275. “[The Young Women Leaders Program] combined one-on-one and group mentoring as well as its yearlong weekly training and supervision may provide a useful model for mentoring programs using college students as mentors.” See also Lee et al., *supra* note 266; Boddy, *supra* note 273, at 504. (“[G]roup mentoring may be used as a tool by social workers to promote equitable access to social, economic and political resources with individuals, groups and communities, while assisting those being mentored achieve their goals and fulfil their needs.”).

Notably, these models will support longevity of mentoring relationships and promote interactions across differences other than gender for mentors.²⁷⁶

Initially, differences between the mentee and mentor as well as structural inequalities should be addressed, as well as outgroup disadvantages.²⁷⁷ Preparation workshops should be provided for both mentor and mentee to support contact intergroup contact. Preparation workshops for mentors could include goal setting, teamwork, implicit bias, workplace marginalization, and value of diversity.²⁷⁸ Preparation workshops for mentees might include goal setting, teamwork, implicit bias, and workplace marginalization.²⁷⁹

As the mentorship relationship develops, group members become salient through the development of friendships. Studies support the proposition that the development of friendships will aid in increasing female outgroup confidence as well as support the reduction of biases against female outgroups.²⁸⁰ Long-term support and the development of friendships can be promoted through intergroup cooperation, repeated contact, equal status, and institutional support.²⁸¹ “Long-term support (through meetings or telephone calls) which is encouraging, sensitive, and non-judgemental is important for women to successfully move into new roles and ‘enter new worlds.’”²⁸² It is important that corporations encourage female-to-female and cross-gender relationships to reduce biases against the female outgroup and increase group cohesion and

276. *Id.*

277. Tausch et al., *supra* note 274, (“Research on the predictors of collective action has underlined the importance of awareness of structural inequalities” In regard to collective action, debate persists “about whether positive intergroup contact could in fact increase disadvantaged group members’ acceptance of a biased system, weaken their motivation to act for equality, and, ultimately, contribute to social stability rather than change”); *see also* Zambrana et al., *supra* note 273 (“By recognizing that identities are socially constructed within a power dominance relationship system, and therefore fluid, an intersectionality lens challenges the view that identities are permanent, fixed, singular polarizing constructs where one ‘most’ salient aspect of someone’s identity shapes their experience.”).

278. *See Corporate Mentorship Programs in the Workplace*, EWF INTERNATIONAL (Jun. 18, 2024), <https://ewfinternational.com/corporate-mentorship-programs/> [https://perma.cc/VM6P-RYH6].

279. *See, e.g.,* Amanda Schneiders, *Mentorship Topics to Discuss with Mentors & Mentees*, CHRONUS (Jan. 23, 2024), <https://chronus.com/blog/how-to-discuss-sensitive-topics-with-mentor-or-mentee> [https://perma.cc/5E3M-HQ4D].

280. *See* Frias-Navarro et al., *supra* note 267, at 620.

281. Boddy, *supra* note 273.

282. *Id.* at 491.

confidence. Further, mentoring may contribute to female management retention as well as success.²⁸³

We also propose providing opportunities for networking, along with mentorship, to increase integration of women into corporate spaces and encourage individual career growth. Networking is the creation and maintenance of relationships for the assistance with current work or career trajectory, or the potential to do so.²⁸⁴ A study of twelve large United Kingdom-based corporate female networking groups found that networking leads to an increase in job opportunities, stronger job performance, and higher career satisfaction, among other things.²⁸⁵ Networking leads to collaboration and allows for more access to information such as career advice and business leads.²⁸⁶ Thus, networking is vital to individual career growth.²⁸⁷ Ironically, women are often excluded from male-dominated social events or other workplace situations, despite placing greater importance on these social interactions.²⁸⁸ Companies should implement networking opportunities for both men and women, while specifically encouraging women to attend such events. It is imperative that companies go beyond merely offering networking events. It is important that women feel included and confident to pursue higher-level corporate opportunities.

Both individual women and corporations will benefit from investing in women's networks.²⁸⁹ For women, corporate networking opportunities tend to facilitate social interaction, which is of particular importance for women with family responsibilities.²⁹⁰ Further, companies would benefit from enhanced human capital as a result of more expertise, additional role models and mentoring relationships, and better retention of female employees in addition to strengthening corporate opportunities for women.²⁹¹

283. Zambrana et al., *supra* note 273, at 42.

284. Val Singh et al., *Women in Formal Corporate Networks: An Organisational Citizenship Perspective*, 21 *WOMEN IN MGMT. REV.* 458, 459 (2006).

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.* at 460, (“The implication is that women with family responsibilities may remain at a serious disadvantage, should out-of-hours [socializing] result in important work-related outcomes (e.g. receiving critical information or important job assignments).”).

291. *Id.*

Group mentoring and networking are also critical because they support the continuation of collective action.²⁹² Collective action refers to groups of women working together to achieve full integration into the workplace. Group mentoring and networking opportunities support the socialization of female outgroups.²⁹³

B. *Proxy Voting Guidelines*

Companies should not retreat from DEI efforts. As discussed above, some proxy advisory firms and institutional investors have removed explicit goals from their proxy voting guidelines. Top proxy voting advisory firms such as Glass Lewis and ISS are using increasingly vague language in describing board diversity objectives.²⁹⁴ For example, these firms use terms such as *aspire* when describing diversity targets. Additionally, although at one time firms were consistently putting forth numerical or percentage targets for gender composition on boards, this appears to be increasingly less common.²⁹⁵

Instead of including broad, non-explicit statements regarding DEI efforts, these firms should continue to expressly incorporate DEI objectives in their proxy voting guidelines.²⁹⁶ Initially, “[b]oards should implement and disclose a policy used to ensure that diversity is appropriately considered as part of the nomination process.”²⁹⁷ Thereafter, proxy advisory firms should continue or resume using explicit targets for gender diversity and these targets should be increased. Instead of a gender diversity target of thirty percent on corporate boards, the target should be increased to fifty percent, true gender parity. Additionally, proxy advisory firms should use more concrete language, indicating that gender diversity on boards is and will continue to be a top priority in corporate governance.

C. *Legislation*

Mandates have been shown to be effective in increasing gender diversity on corporate boards.²⁹⁸ After the passage of SB

292. Tausch et al., *supra* note 274.

293. *Id.*

294. See, e.g., Gez et al., *supra* note 103; 2023 *Proxy Season Digest*, *supra* note 104; 2024 *Benchmark Policy Guidelines*, *supra* note 116.

295. See, e.g., Chang, *supra* note 74.

296. See, e.g., Gez et al., *supra* note 103; 2023 *Proxy Season Digest*, *supra* note 104.

297. *Proxy Voting Principles and Guidelines*, CPP INVESTMENTS 15 (Feb. 2023), <https://www.cppinvestments.com/wp-content/uploads/2023/03/PVPGs-2023-Final-Englishv1.pdf> [<https://perma.cc/8LPN-8SLL>].

298. Williams, *supra* note 194.

826, the number of women on boards in California almost tripled.²⁹⁹ This has enabled these companies to reap the many benefits of increased gender diversity as discussed in Section IV. Gender mandates have also been successful in other instances. In 2022, the European Parliament passed a directive requiring all large publicly traded companies to have a board comprised of at least forty percent of women by the summer of 2026.³⁰⁰ A directive is legislation from the European Parliament that sets out a goal that member states must achieve, though each member state is free to draft its own laws to help meet that goal.³⁰¹ Notably, the Women on Boards Directive requires that merit remain a key selection criterion and that companies must “provide information about gender representation on their boards”³⁰² EU member states set their own penalties, such as fines, for not reaching these gender diversity targets by 2026. The legislation also provides that a “judicial body could . . . annul a decision concerning the selection of directors or to declare it null and *void*.”³⁰³

Although some countries, like those in the EU, have established soft or non-binding quotas, binding quotas have been demonstrated to be much more effective in promoting gender diversity.³⁰⁴ In countries with no quotas, female representation on boards increased from 13.2% in 2010 to 18.0% in 2022.³⁰⁵ Soft quotas increased gender diversity from 12.4% to 30.7% in that same span of time.³⁰⁶ Most impressively, countries with binding quotas increased gender diversity from 10.6% to 38.8% in that span of

299. *Women on Boards Facts: Facts about Women on Corporate Boards in California*, *supra* note 11.

300. 2022 O.J. (L 315), <https://eur-lex.europa.eu/eli/dir/2022/2381/oj> [<https://perma.cc/S3JL-D5YQ>]; *see also* Paolo Gaudiano, *EU Law Set to Increase Gender Diversity on Company Boards*, *FORBES* (Nov. 30, 2022), <https://www.forbes.com/sites/paologaudiano/2022/11/30/eu-law-set-to-increase-gender-diversity-on-company-boards/> [<https://perma.cc/U88T-QXYG>].

301. Types of Legislation, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en [<https://perma.cc/L8TF-STQH>].

302. European Parliament Press Release, Parliament Approves Landmark Rules to Boost Gender Equality on Corporate Boards (Nov. 22, 2022), <https://www.europarl.europa.eu/news/en/press-room/20221118IPR55706/parliament-approves-landmark-rules-to-boost-gender-equality-on-corporate-boards> [<https://perma.cc/5G26-QWDJ>].

303. 2022 O.J., *supra* note 300.

304. Gaudiano, *supra* note 300.

305. *Id.*

306. *Id.*

time, nearly reaching the 40% goal that the European Parliament has set out.³⁰⁷

Despite the effectiveness of these types of laws, in the United States, legislatures must be wary of the potential constitutional challenges they will likely face.³⁰⁸ As seen with current trends in litigation, it is becoming increasingly common to mount equal protection challenges against these laws.³⁰⁹ Opponents of DEI initiatives argue that these programs violate the Equal Protection Clause because they treat individuals differently on account of protected classifications such as race and sex.³¹⁰ Thus, statutes must be drafted to withstand these constitutional challenges. Perhaps soft mandates, such as requirements to encourage meeting gender goals without imposing penalties for failure to meet them, will pass the test. Furthermore, if the lower court decision overturning SB 826 is reversed, the California law could serve as a model for other states. If the decision is not reversed, perhaps the law could be amended in such a way to overcome the constitutional challenge.

D. *Advisory Boards*

Another action firms might take to increase pathways for women to the boardroom is to create advisory boards. An advisory board is an informal group of experts used by companies to supplement their knowledge regarding certain matters.³¹¹ Advisory boards are created when businesses want to address a market weakness or explore a new market.³¹² These boards are used successfully in industries such as banking, technology, and healthcare.³¹³ Advisory boards are flexible, as they oversee discrete tasks rather than entire companies or governance initiatives and provide non-binding advice to corporate management.³¹⁴

307. *Id.*; 2022 O.J., *supra* note 300

308. Williams, *supra* note 194.

309. *See e.g.*, *Grant Program for Black Women Business Owners is Discriminatory*, *Appeals Court Rules*, *supra* note 28. *See also Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 188 (2023).

310. Williams, *supra* note 194.

311. Adam Wire, *How an Advisory Board Can Boost Your Business*, BUS. DEV. BANK OF CANADA (Jun. 14, 2022), <https://www.onboardmeetings.com/blog/what-is-an-advisory-board/> [<https://perma.cc/J9KT-2MGJ>].

312. *Barriers to Board Diversity*, *supra* note 181.

313. *Id.*; *see also* Jessica Tasman-Jones, *What are advisory boards and why are they becoming so popular?*, FINANCIAL TIMES PROFESSIONAL, <https://professional.ft.com/en-gb/blog/what-are-advisory-boards-and-why-are-they-becoming-so-popular/> [<https://perma.cc/W6JC-93H3>].

314. *Barriers to Board Diversity*, *supra* note 181.

A 2014 BDC study conducted in Canada found that six percent of Canadian entrepreneurs have an advisory board for their business.³¹⁵ Eighty-six percent of entrepreneurs who have an advisory board say implementing such a board “had a significant impact on their business.”³¹⁶ Because members of advisory boards tend to be industry experts, membership on an advisory board may be another viable pathway for women to gain seats on corporate boards, as such boards have “the potential to serve as a source for future members for the board of directors.”³¹⁷ Advisory boards can serve as a tool to train the next generation of board members.³¹⁸ For example, younger professionals and those who belong to underrepresented groups could use these advisory boards as an opportunity to gain meaningful corporate experience that will position them well for later board roles. Thus, companies should keep in mind the goal of increased gender diversity when assembling these advisory boards. These boards are an opportunity to cultivate talent and give women and other minorities desired corporate qualifications current directors seek when electing new directors.

VI. CONCLUSION

California’s SB 826 was the first of its kind in the United States in terms of statewide legislation mandating reducing the gender gap on corporate boards. Additionally, our empirical study shows that the women appointed to California boards in the wake of the legislation have exemplary qualifications. Our data support the notion that women are just as qualified as men to serve on corporate boards. The majority of women appointed had prior director experience and comparable C-suite and executive experiences to their male counterparts prior to their appointments. One area where experience differed was with respect to CEO experience as fewer women came to boards with this background.

315. Wire, *supra* note 311.

316. *Id.*

317. *Advisory Boards: What, Why, Who, When and How*, DLA PIPER (2024), <https://www.dlapiperaccelerate.com/knowledge/2017/advisory-boards-what-why-who-when-and-how.html> [<https://perma.cc/VGP6-WZSY>]. (“Simply put, the advisory board should consist of experts in the company’s industry.”).

318. *Id.* (“An advisory board is a flexible, informal body that is created by the board of directors to provide the company’s management team with non-binding strategic advice. Advisory boards can help budding companies acquire subject matter expertise, coach a CEO or management team, accelerate access to customers and channel partners by making industry-appropriate introductions that increase sales.”).

SB 826 supports the proposition that gender mandates work in increasing corporate board opportunities for qualified women. Most impacted corporations complied with SB 826 before it was overturned.³¹⁹ Yet, some agencies and companies are beginning to retreat from specific DEI objectives, and some courts have overturned efforts to promote gender equality.³²⁰ Therefore, we suggest that companies act now and adopt explicit DEI goals to continue to reach gender parity on boards. Companies should provide mentoring and networking opportunities to enable women to attain the experiences they need to serve as effective board members. Finally, we call on state legislatures to carefully consider enacting gender mandates. Time will tell if the California mandate requiring a minimum number of women on boards may be reinstated on appeal. If not, it will be interesting to see if the legislation can be redrafted to withstand constitutional scrutiny. California has been a leader in promoting gender diversity on boards. Leadership in this area is needed now more than ever.

319. See Gupta, *supra* note 10. See also *Women on Boards Facts: Facts about Women on Corporate Boards in California*, *supra* note 11.

320. See *e.g.*, *All. for Fair Bd. Recruitment v. Sec. & Exch. Comm'n*, No. 21-60626, 2024 WL 5078034 (5th Cir. Dec. 11, 2024); *Crest v. Padilla*, No. 19STCV27561, 2022 WL 1565613 (Cal. Super. Ct. May 13, 2022).