XII. Market Development of Gender Diversity

A. Introduction

The membership of a corporate board plays a highly influential role in the performance and success of a company.[1] There has been a recent push to improve corporate board effectiveness through gender diversity.[2] Women make up 26% of board membership of all the companies on the S&P 500.[3] It is important to note that this percentage varies among different industries, but when looked at as a whole, just over one quarter of corporate board membership is female.[4] Furthermore, 20% of the world's largest corporations have no female presence on their boards.[5]

As this push to increase female presence on corporate boards has continued, various studies have been conducted to analyze the influences of increased female membership on corporate boards, showing mixed results. The results of these studies are consistent with findings coming from several countries, including Norway, Sweden, Denmark, France, Spain, and Belgium, that have mandated that

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[1] Lynne L. Dallas, *The Multiple Roles of Corporate Board of Directors*, 40 SAN DIEGO L. REV. 781, 805 (2003) ("Thus, 'because of their prestige in their professions and communities, directors are able to extract resources for successful company operations. . . . [T]hese activities are believed to enhance the firm's legitimacy in society and to help it achieve goals of efficiency and improved performance.").

[2] Anat Alon-Beck et al., *No More Old Boys' Club: Institutional Investor's Fiduciary Duty to Advance Board Gender Diversity*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Dec. 10, 2021), https://corpgov.law.harvard.edu/2021/12/10/no-more-old-boys-club-institutional-investors-fiduciary-duty-to-advance-board-gender-diversity/[https://perma.cc/7FYA-CBZH] ("The past twenty years have brought a sea of change regarding corporate diversity. Most of the world's top ten economies have embraced some form of regulation to advance boardroom gender equality.").

[3] Liliana Nicoleta Simionescu et al., *Does board gender diversity affect firm performance? Empirical evidence from Standard & Poor's 500 Information Technology Sector*, SPRINGEROPEN 7, 8-9 (2021).

[4] *Id.*

[5] *Id.* at 16 ("However, women are still a minority on boards and other top management positions as almost 20% of the world's largest corporations have no women directors.").

corporate boards maintain female membership at a specified level.[6] Norway, for example, requires women to comprise at least 40% of board membership.[7] Although statistics show there is a large disparity between male and female presence on boards, gender diversity has become an important consideration for U.S. companies.[8]

Studies show that gender diversity will improve the market because gender diverse boards foster increased confidence from the general public, resulting in increased investment from both informed and uninformed investors.[9] Stock market, media, and governments react positively toward increased gender diversity resulting in stable and less volatile stock prices.[10] Gender diversity is also correlated with improved management and leadership skills, as well as increased

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[6] *Id.*; Claude Francoeur, et al., *Gender Diversity in Corporate Management*, J. OF BUS. ETHICS, 83, 84 (2008) ("Therefore, as many countries, such as Norway, Denmark, Spain, France, or Belgium, have understood the status of women in the boardroom of companies, gender quotas have been required for the number of females as board members (Adams and Funk 2012).").

[7] CATHRINE SEIERSTAD, ET AL., GENDER DIVERSITY IN THE BOARD ROOM VOLUME 1: THE USE OF DIFFERENT QUOTA REGULATIONS 25 (Palgrave Macmillan 2017) ("As illustrated in the introduction of this chapter, in 2002, the Norwegian Minister of Trade and Industry announced the suggestion of a law that would require a gender balance of a minimum of 40% of each sex on boards in Norwegian PLCs.").

[8] Dylan Kaseram, *Does Gender Diversity on Corporate. Boards. Affect Firm Performance?*, ALBERTA SCH. OF BUS. 781, 782 (2018); Alon-Beck et al., *supra* note 2 ("Despite these recent efforts in mandating diversity, corporate leadership continues to be a man's world – an Old Boy's Club. As of 2019, men constituted 80% of board members and 96% of CEOs.").

[9] Ferdinand A. Gul et al., *Does board gender diversity improve the informativeness of stock prices?*, 51 J. OF ACCT. AND ECON., 314, 315 (2011) ("Gender-diverse boards improve the quality of public disclosure through better monitoring. Increased public disclosure price-protects uninformed investors and is likely to increase confidence and encourage ownership by uninformed investors. Increased uninformed investor ownership also increases the marginal benefit of collecting and deploying private firm-specific information for informed investors.").

[10] Simionescu, *supra* note 3, at 42 ("Consistent with Dang et al., the findings advise that companies should consider a larger share of women on board as long as their presence may positively influence firm performance. Further, increased diversity may enhanced productivity, creativity, and innovation. Similarly, governments and market regulators should impose gender quotas for women on board like in European nations.").

collaboration between board members, resulting in less fraudulent activity and workplace harassment.[11]

However, opponents of mandated gender diversity argue that such mandates would be unconstitutional because they require discrimination on the basis of gender.[12] They further argue that mandates made by stock exchanges overstep the authority granted to them by the federal securities laws and the Bill of Rights.[13] Their argument is strengthened by showing that, although there are benefits of board gender diversity, it does not translate into financial benefit.[14] In fact, expenses typically increase as boards diversify, and stock prices suffer when firms are pressured to hire new directors for diversity reasons.[15] Therefore, in many cases, board gender diversification is not compatible with corporations' goals.[16]

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[11] Jared Landaw, *Maximizing the Benefits of Bd. Diversity: Lessons Learned from Activist Investing*, HARV. L. SCH. F. ON CORP. GOVERNANCE (July 14, 2020), https://corpgov.law.harvard.edu/2020/07/14/maximizing-the-benefits-of-board-diversity-lessons-learned-from-activist-investing/[https://perma.cc/59A9-NW7P]; Simionescu, *supra* note 3, at 14 ("A more demographically diverse board may also help a company be more attuned to, and avoid, sexual harassment and other potential workplace liabilities.") ("Women on boards exert a significant impact on firm performance because they can improve managerial duties through their preparation of meetings, different viewpoints, and leadership skills compared to men.").

[12] Kevin Lacroix, *Court Challenge to Nasdaq Board Diversity Rules Filed*, THE D&O DIARY (Aug. 22, 2021) https://www.dandodiary.com/2021/08/articles/corporate-governance/court-challenge-to-nasdaq-board-diversity-rules-filed/[https://perma.cc/4D7G-AAN9] ("The organization explained its move in an August 18, 2021 press release, stating that it sought to challenge because it 'will compel many of our nation's largest publicly traded corporations to illegally discriminate on the basis of gender, race, and sexual orientation' in selecting directors.").

[13] *Id.*

[14] Simionescu, *supra* note 3, at 17 ("We observe that the mean ROA is higher in companies with at least one woman on board than in firms with no female director, but after the threshold of four females, the performance decreases.").

[15] *Id.*; Lacroix, *supra* note 12; Larelle Chapple & Jacquelyn E. Humphrey, *Does Board Gender Diversity Have a Financial Impact? Evidence Using Stock Portfolio Performance*, 122 J. OF BUS. ETHICS, 709, 711, 722 (2013).

[16] Lacroix, *supra* note 12 ("What gets lost in this discussion of mandates is the fundamental need for an organization's board to consider, discuss and address the organization's goals and objectives. What an organization needs

Whether by natural means or mandated reform, there are several mechanisms through which significant developments can be made to promote gender diversity. These developments can be effectuated through the actions of the Securities and Exchange Commission (SEC) and stock exchange platforms.[17] Through creating and mandating gender diversity requirements of all corporations traded on that platform, legislative action through quotas or other means, and shareholders' private actions that encourage directors to make gender diversity a priority.[18]

B. SEC and Stock Exchange Action

In an effort to diversify corporate boards, on August 6, 2021, the SEC voted and approved the new rules required by the Nasdaq Stock Market LLC.[19] In order to comply with these new rules, corporations that are publicly traded on the Nasdaq must annually disclose their aggregated statistical information about their boards'

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is a board composed of persons who understand the organization's industry and who can help the company adopt strategies that will aid the company to achieve its objectives. This imperative is not in any way incompatible with the goals of board diversity.").

[17] Andrew Ramonas & Clair Hao, *SEC Poised to Bless Nasdaq Plan to Spur Diverse Corporate Boards*, BLOOMBERG (Aug. 3, 2021), https://www.bloomberg.com/news/articles/2021-08-03/sec-poised-to-bless-nasdaq-plan-to-spur-diverse-corporate-boards[https://perma.cc/8XDC-22AH]; Jessie K. Liu, et al., *Shareholder Suits Demand More Progress on Diversity*, SKADDEN (April 13, 2021), https://www.skadden.com/insights/publications/2021/04/the-informed-board/shareholder-suits-demand-more-progress[https://perma.cc/3CAS-5632] ("In a striking illustration of today's significant and increasing focus on diversity and inclusion in corporate America, at least 12 public companies recently have been sued by their own shareholders, who accuse directors and officers of failing to diversify their boards and C-suites and comply with anti-discrimination laws.").

[18] John J. Cannon III, et al., *Washington State Becomes Next to Mandate Gender Diversity on Board*, SHEARMAN & STERLING (May 28, 2020), https://www.shearman.com/perspectives/2020/05/washington-state-becomes-next-to-mandate-gender-diversity-on-boards[https://perma.cc/UU9X-LZ7M]; Ramonas & Hao, *supra* note 17; Liu et al., *supra* note 17.

[19] Elizabeth Ising, et al., *SEC Approves New Nasdaq Board Diversity Rules*, GIBSON DUNN, 1, 1 (2021).

gender diversity.[20] More specifically, corporations listed on the Nasdaq Global Select Market or Nasdaq Capital Market must have at least one diverse director or explain why it is failing to comply with the new rule by August 6, 2023, or the date they file their proxy materials.[21] Under the same deadline, boards with five or more members will be required to have at least two diverse members.[22]

To ensure that these new rules have a lasting effect, Nasdaq has mandated continual compliance with these requirements.[23] Nasdaq recognizes that, although potentially beneficial, these new requirements may introduce additional burdens on corporations, and accordingly have provided resources for these corporations to empower them to achieve compliance.[24] Nasdaq has also instituted a cure period of 180 days to allow boards to find new board members if they ever fall out of compliance.[25]

Nasdaq and proponents of the new rules argue that investors will benefit as a result of the increased diversity.[26] Minority groups make up 40% of the population in the United States, but that same group of people only makes up 12% of the corporate board membership, and women make up 21% of board membership.[27] These new rules will help to bring the population of corporate decision makers in closer proportion to the diversity in the United States.[28]

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[20] *Id.*

[21] *Id.* at 4; Ramonas & Hao, *supra* note 17.

[22] Ising, *supra* note 19, at 4 ("A company listed on the Nasdaq Global Select Market or Nasdaq Global Market with more than five directors must have, or explain why it does not have, at least two Diverse Directors.").

[23] *Id.* at 1.

[24] *Id.* at 8.

[25] *Id.* at 6.

[26] Richard W. Painter, *Why Board Diversity and the Nasdaq Rule Requiring it Make Sense*, THE CLS BLUE SKY BLOG (April 26, 20210, https://clsbluesky.law.columbia.edu/2021/04/26/why-board-diversity-and-the-nasdaq-rule-requiring-it-make-sense/[https://perma.cc/2VB3-P8A3].

[27] *Id.*

[28] *Id.* ("A company with nine directors that complies with the proposed Nasdaq rule would have one underrepresented minority and one female director, putting that company very close to the current average for underrepresented ethnic and racial groups on corporate boards but well below the average for the number of women directors – to meet the average, the company would need two female directors. The Nasdaq rule that Professor Fried criticizes thus is aimed at the laggards that bring the averages down. It is these companies that are given a chance to increase

Additionally, one of the chief concerns of the SEC and stock exchange markets is accurate disclosure of public securities. Studies show that the firm performance and accuracy in disclosure of information improves as female presence on boards increases.[29] Thus, increasing board gender diversity will more accurately reflect the populations in the United States and the securities markets will become more reliable, which encourages investment and financial growth.[30] This is because minority groups are more likely to trust their finances with organizations that make accurate disclosures, understand them, and share their values and concerns. These highly beneficial outcomes will also result in spurring market development of gender diversified boards because these mandates ensure that the relevant parties are continually analyzing and implementing changes to their firm's gender diversity. The market on gender diversity will develop because corporations are forced to work with it, and it is in their best interest to deal with it effectively and efficiently.

Opponents to Nasdaq's plan argue that the new set of rules are unlawful because it "fails to advance any legitimate exchange purpose."[31] Opponents cite studies that show that it is not necessarily the diversity of gender or race within a corporate board that produces positive results, but rather the diverse backgrounds, education, experiences, and thought processes that increase productivity.[32] Harvard Law professor Jesse Fried argues that, "stock returns suffer when firms are pressured to hire new directors for diversity reasons."[33] Opponents argue that requiring corporations to hire gender diverse candidates results in board members engaging in tasks where they have little experience and for which they are untrained because they are being selected for their gender rather than their capabilities as a board member.[34] Opposition to mandated gender diversity requirements also argues that such requirements instituted by the SEC overreaches the authority given to it by the Securities Act of 1933, which grants the SEC the power to require corporate disclosure of

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minority and female representation up to today's – not very impressive – averages or explain why not.")

[29] *Id.*

[30] *Id.*; Michael W. Frerichs, *The Investment Case for Board Diversity*, OFF. OF THE ILL. STATE TREASURER 4 (2020).

[31] Ramonas & Hao, *supra* note 17.

[32] Landaw, *supra* note 11.

[33] Lacroix, *supra* note 12.

[34] *Id.*

information, the Securities Exchange Act of 1934, which imbues the SEC with broad authority over the securities industry, and the Bill of Rights, which guarantees protection against speech and discrimination based on sex.[35] Opponents argue that none of these authorities empower the SEC to mandate gender diversity.[36]

C. Legislative Action

Several states, such as California, Washington, New York, Illinois, and Maryland have already enacted mandates that require corporations to meet certain board member characteristic criteria.[37] Other states, such as Hawaii, Massachusetts, Minnesota, and New Jersey are currently considering mandating board diversity requirements.[38] California and Washington, for example, have enacted laws that require each public corporation incorporated in that state to have a "gender diverse" board.[39] If they don't have a gender diverse board, then they must explain in their annual proxy statement to shareholders or on their primary website why they do not have the required gender diversity (similar to the Nasdaq requirements).[40] Recently, however, the California statute has been held unconstitutional in Los Angeles Superior Court in *Crest v. Padilla*.[41] States that have not yet mandated gender diversity are likely paying close attention to what developments occur in states like California and Washington and especially to how California will respond to this

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[35] *Id.* ("Commissioner Hester Pierce's statement, it which she contends that the SEC's approval of the guidelines is 'outside the scope of the [Exchange] Act and contrary to the fundamental Constitutional principles'").
[36] *Id*.
[37] *Id.*
[38] Cannon III et al., *supra* note 17.
[39] *Id*.
[40] *Id.* ("Pursuant to the recently-amended Washington Business Corporation Act (WBCA), effective June 11, 2020, corporations subject to the WBCA that are public companies will be required to either have a "gender-diverse board" by January 1, 2022 or comply with new board diversity disclosure requirements. . . Washington's bill follows similar legislation passed in California in 2018.").
[41] 20 STCV 37513 (Super. Ct. Cal. Apr. 1, 2022) (order granting motion for summary judgement) (finding that the Secretary of California failed to "define a specific arena in which the discrimination has occurred" for there to be a compelling interest).

recent ruling.[42] Other proposed legislative action could include quotas or required documentation of corporate efforts to actively interview and seek out gender diverse board members.[43]

Although quotas can be very effective, they also require significant policing to achieve their intended objectives.[44] These quotas could be effective in prompting market development by increasing the number of women on corporate boards because they would ensure that all corporations are either working towards diversifying their boards or making plans to ensure they remain in compliance to avoid negative state consequences. Furthermore, legislative mandates requiring increased numbers of female board members are likely to increase female representation, but this does not necessarily mean equality.[45] Similar to mandates by stock exchanges, men and women on these corporate boards may feel that the female board members who were appointed as a result of the mandates are only there to avoid penalties, rather than because they are the most qualified or the best suited candidate for the position.[46] If the goal of gender diversity is to promote equality, meaning that men and women are perceived as equals, this may not achieve that goal, and could have a negative impact on developing a market of gender equality.[47]

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[42] It is not yet clear whether California will appeal this decision or pursue an alternative statute. *See* Erin Griffith, *California Law Requiring Board Diversity Is Struck Down*, N.Y. TIMES (Apr. 4, 2022), https://www.nytimes.com/2022/04/03/business/california-board-diversity-law.html.

[43] Alon-Beck et al., *supra* note 2 ("Quotas are generally effective at improving corporate diversity. . . Many law firms now recommend that clients adopt a process akin to the "Rooney Rule," which mandates that an National Football League team must interview at least one minority candidate for head coach or manager positions.").

[44] *Id*.

[45] Anastasia Boden, *Op-Ed: Setting quotas on women in the boardroom is probably unconstitutional and also doesn't work*, L.A. TIMES, (July 8, 2019) https://www.latimes.com/opinion/op-ed/la-oe-boden-quotas-women-corporate-boards-unconstitutional-20190708-story.html ("While quotas may add a handful of women to corporate boards, they come at the expense of the broader goal of equality – which requires not equal numbers, but equal dignity for women.").

[46] *Id.* ("Worse, the laws will likely undermine many future gains women make by casting doubt on whether a woman is being hired based on her merit or to meet a quota.").

[47] *Id.* ("It's often the case that when the government seeks to regulate businesses, it creates a host of unintended consequences. Here, the proposed

However, if quotas are instituted by the state governments, this would result in significant state governance into the inner workings of corporations in order to enforce these quotas.[48]

Another option for legislative action to help develop the market for gender diversity on corporate boards is what some call the "Rooney Rule", which has been implemented by the National Football League (NFL), Facebook, Xerox, and Amazon.[49] Under the Rooney Rule, "the NFL mandates that an National Football League team must interview at least one minority candidate for head coach or manager positions" when they come available.[50] The NFL does not require that the minority candidate be selected at any point, but it does ensure minority presence in the selection process.[51] Although less strict than quotas, under the Rooney Rule, minority board members who are selected would be selected for their credentials and achievements without the stigma of selection based upon their immutable characteristics. Thus, legislative action has several avenues through which it could effectively promote the development of gender diversity in the current market.

D. Private Action Brought by Shareholders

As discussed previously, gender diversity on corporate boards has become a significant topic of debate and discussion in recent years.[52] The popularity of this topic alone may be one of the most influential factors to development in this area of the market. Since corporate board gender diversity is such a pervasive topic, it is necessarily a relevant issue in the minds of private shareholders. Although not yet legally included as a fiduciary duty, there are shareholders who believe that a corporation is not acting with due care when their board is not sufficiently diverse.[53] In recent lawsuits, "at least 12 public companies

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mandates penalize companies even when there's no evidence of discrimination, ignore the gains that women are making without quotas and undermine the achievements of future female hires.").

[48] *Id*.

[49] Alon-Beck et al., *supra* note 2.

[50] *Id*.

[51] *Id.*

[52] *Id*. ("The past twenty years have brought a sea of change regarding corporate diversity. . .Critics, mostly in the United States, question whether the State should force companies to implement gender diversity on boards.").

[53] Liu et al., *supra* note 17; Alon-Beck et al., *supra* note 2.

recently have been sued by their own shareholders, who accuse directors and officers of failing to diversify their boards and C-suites and comply with anti-discrimination laws", arguing that they have failed to sufficiently diversify their board membership.[54] Private shareholders also can bring claims against the corporation for lack of gender diversity in violation of antidiscrimination laws.[55] As this push for gender diversity persists, board members who resist diversification or fail to make it a priority could face replacement or lawsuits, encouraging the consideration of diverse candidates, continual discussion on diversity and inclusion, and monitoring of diversity within the corporation as a whole. While it is unlikely that a single shareholder pushing for gender diversity could successfully instigate this development, institutional investors with this mindset could.

As corporate board gender diversity continues to be a topic of ongoing discussion and gains more traction, it will increasingly attract the attention of institutional investors such as Vanguard or Blackrock.[56] Studies show that the percentage of outstanding shares owned by institutional investors has been increasing since the 1930s.[57]

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[54] Liu et al., *supra* note 17.

[55] *Id.* ("Prior governmental enforcement actions, civil suits and settlements have been cited in some derivative complaints as evidence that directors have breached their fiduciary duties to ensure compliance with anti-discrimination laws and have endorsed false or misleading statements about their companies' policies and conduct.").

[56] Laura H. Posner, *Board Diversity Is Critical to Protect Shareholders, Bottom Line*, BLOOMBERG LAW (Sept. 15,2021), https://news.bloomberglaw.com/class-action/board-diversity-is-critical-to-protect-shareholders-bottom-line ("There is growing recognition of the need to increase gender diversity in corporate America, but progress has been frustratingly slow. An unlikely group of players, however, are finally having some success in forcing corporations to change – institutional investors.").

[57] Lucian A. Bebchuk et al., *The Agency Problems of Institutional Investors*, 31 J. OF ECON. PERSPECTIVES, 89, 91 (2017) ("Berle and Means (1932, p. 47) argued that "[d]ispersion in the ownership of separate enterprises appears to be inherent in the corporate system. It has already proceeded far, it is rapidly increasing, and appears to be an inevitable development." However, the trend toward dispersion has been reversed in subsequent decades by the rise of institutional investors. The rise of institutional investors has been driven by investor recognition of the value of low-cost diversification and encouraged by favorable regulatory and tax treatment. Whereas institutional investors held 6.1 percent of outstanding corporate equity in 1950 (Tonello and Rabimov 2010), they held 63 percent of outstanding public corporate equity in 2016.").

By 2017, institutional investors owned approximately 70% of all outstanding shares.[58] These institutional investors manage the investments of their client investors and exercise voting rights on their behalf.[59] Therefore, institutional investors own a majority of shares on the market and have the ability to vote and make decisions, dealing with issues such as corporate board membership.[60] Institutional investors could spur significant development in this market because they own a majority of the shares of the market and can exercise voting rights on a case-by-case basis to require corporate board gender diversity for each individual corporation.[61] Shareholders, the institutional investors, could significantly promote widespread market development through active voting in favor of gender diversity in individual corporations and litigating instances where gender diversity is not made a priority.[62]

Additionally, institutional investors now offer environmental, social, and governmental funds (ESG funds) exchange traded funds (ETF) and mutual funds that allow investors to purposefully invest into companies that align with the social benefits that the investor cares about.[63] ESG looks at issues such as carbon emissions, waste

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[58] *Id*. at 93 ("Data from ISS Voting Analytics shows that the mean percentage of shares outstanding voted at the 2015 annual meetings of these corporations for the election of directors was 68.7 percent (median of 70.8 percent.").

[59] *Id.* at 93.

[60] *Id.* ("The largest 50 institutional investors thus cast a substantial majority of the votes at these annual meetings. Thus, large institutional shareholders hold sufficiently sizable positions in each large corporation to have a non-negligible effect on the outcomes of shareholder votes.").

[61] Posner, *supra* note 54. ("What is, perhaps, less well known are the efforts institutional investors have taken to force companies to diversify their boards. According to TIAA President and CEO Thasunda Brown Duckett, Nuveen, TIAA's asset manager, encouraged about 325 of the 450 companies in the U.S. that did not have a single woman on their board to add a female director. State Street announced earlier this year that it will now vote against the chair of the nominating and governance committee at companies in the S&P 500 and FTSE 100 that do not disclose the racial and ethnic composition of their boards; and in 2022, it will vote against them if they do not have at least one director from an underrepresented community.").

[62] Posner, *supra* at note 50; Bebchuk, *supra* note 53, at 91-3.

[63] *Gender diversity investing*, FIDELITY CHARITABLE, https://www.fidelitycharitable.org/articles/gender-diversity-investing.html#:~:text=The%20concept%20behind%20gender%20diversity,

management, data security, labor practices, and internal governmental corruption, to name a few.[64] The purpose of these funds is to align the interests of the investors and the companies to produce positive change as well as profitable returns.[65] One of the areas that investors concerned about ESG topics can invest into is corporate board gender diversity.[66] This means that a person who cares about corporate board gender diversity who wants to encourage companies to increase board diversity can support companies with a strong female presence through investing into the ESG funds that target these companies.[67] In the last four years, investments under the management of ESG funds have increased 42% since 2018.[68] Thus, as popularity for these issue specific investments continues to grow, the market for increased board gender diversity will have a easily accessible avenue to incite change instigated by individual investors.

Finally, shareholders could also incite development of gender diversity in the market through incorporating gender diversity into corporate fiduciary duties.[69] "A fiduciary duty is an acceptance of

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advance%20female%20lives%2C%20without%20sacrificing[https://perma.cc/V5AA-Q2CQ] (last visited April 1, 2022).

[64] Alana Benson, *Environmental, Social and Governance (ESG) Investing and How to Get Starte*d, NERD WALLET, (Mar. 14, 2022) https://www.nerdwallet.com/article/investing/esg-investing[https://perma.cc/7MLX-2LNJ].

[65] *Gender diversity investing*, *surpa* note 61.

[66] Benson, *supra* note 62.

[67] *Greener Possibilities Together*, INVESCO, (Oct. 7, 2021) https://www.invesco.com/us/en/insights/investing-for-brighter-tomorrow-with-invesco-esg etfs.html?gclid=CjwKCAjwxZqSBhAHEiwASr9n9MnOQHzEepQKX3d_QS9GQZqhOPIhn6uInYBJTicII10ApUC-MRWvFBoC--oQAvD_BwE[https://perma.cc/2L5T-VB3A]; *Gender diversity investing*, *supra* note 61 ("The concept behind gender diversity investing is that by investing in companies that support women, you can help promote pay equality, greater female participation in the economy, women's access to start-up capital, and the production of goods and services that improve or advance female lives without sacrificing investment returns.").

[68] Benson, *supra* note 62 ("According to the US SIF Foundation's 2020 trends report, U.S. assets under management using ESG strategies grew to $17.1 trillion at the beginning of 2020. That's a 42% increase from $12 trillion at the beginning of 2018.").

[69] Alon-Beck et al., *supra* note 2 ("Fiduciary duties may seem at first blush an odd location within corporate law for equality requirements. It is unquestionably a novel place. Nevertheless, it is through fiduciary duties

responsibility to act in the best interests of another person or entity."[70] Implementing gender diversity as part of corporate fiduciary duties will also necessarily relate to the other instrumental areas of the corporation that board members have direct influence on, such as corporate culture, equality, and governance.[71] Implementation would be compatible with the current fiduciary duties of care and loyalty because increased gender diversity in the corporation has been shown to improve disclosure, monitoring of employees, awareness when making decisions, and market knowledge.[72] This would naturally ensure that board members act prudently and in the best interest of the corporation, the purpose of the duties of care and loyalty, while also accomplishing the goal of improving gender equality.[73] Shareholders pursuing claims against corporate boards for violating their fiduciary duties when not making gender diversity a priority could lead to this implementation and development.[74]

E. Conclusion

Developments in the market through SEC and stock exchange action, legislative action, and private actions brought by shareholders will continue to persist, and changes made through these mechanisms could have a profound effect on the corporate world. Mandates, such as quotas, the Rooney Rule, or other new rules, could provide regulation that requires and thus increases board gender diversity. Furthermore, voting action by institutional investors

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that the State articulates the behavior expected of duty holders. Fiduciary duties allow the State to deputize duty holders to act in ways that reflect widely accepted public governance norms.").

[70] Adam Barone, *What Are Some Examples of Fiduciary Duty*?, INVESTOPEDIA (Nov. 302021), https://www.investopedia.com/ask/answers/042915/what-are-some-examples-fiduciary-duty.asp#:~:text=A%20fiduciary%20duty%20is%20an,a%20guardian%20and%20a%20ward[https://perma.cc/XB8L-8VHT].

[71] Alon-Beck et al., *supra* note 2.

[72] *Id*.

[73] *Id.;* Smith v. Van Gorkom, 488 A.2d 858, 873 (1985); Guth v. Loft, 5 A.2d 503, 510 (1939) ("The duty of care obligates leaders to make informed decisions in a reasonably prudent fashion. The duty of loyalty also encompasses a duty for diversity, equality, and inclusion. Directors must oversee their corporation and can be liable if they fail to act and the failure is "sustained or systematic.").

[74] Alon-Beck et al., *supra* note 2.

and individual investor's opportunity to invest into companies that value board gender diversity through ESG funds could have a significant impact on the development of this market. Incorporating board gender diversity into fiduciary duties could also effectively instigate development of the market. Each of these mechanisms have potential to result in significant change, the challenge now is to determine the best ways to bring about these desired developments.

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