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BOARD DIVERSITY AND PROXY DISCLOSURE

Thomas Lee Hazen and Lissa Lamkin Broome¹

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I. INTRODUCTION

The most recent report from the Alliance for Board Diversity shows only modest gains in the percentage of Fortune 100² board seats held by females and minorities between 2004 and 2010.³ The percentage of female-

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² All references to Fortune 100 and Fortune 500 companies are based on the 2009 rankings of the largest U.S. corporations. See *Fortune 500: Largest U.S. Corporations*, FORTUNE MAGAZINE, May 3, 2010, at F-1.

³ Alliance for Board Diversity, *Missing Pieces: Women and Minorities on Fortune 500 Boards 3* (July 21, 2011), available at http://www.catalyst.org/file/469/abd_2010_census.pdf [hereinafter *Missing Pieces (Revised)*]. The original report issued in May indicated that there had been a decline in the

occupied seats increased from 16.9% to 18% (an absolute increase of just 1.1% over a six-year period) and the percentage of minority-occupied seats increased from 14.9% to 15.4% (an absolute increase of 0.5%).⁴ These numbers are especially troubling when we consider that slightly over 50% of the population in the United States is female and 33.7% of the population is nonwhite, with the nonwhite percentage of the population increasing at a far faster rate than the white percentage.⁵ It is beyond dispute that women and minorities are extremely underrepresented on the boards of the country's largest companies. The picture gets more depressing when we consider that the Fortune 100 companies, the largest U.S. companies, have the *most* diversified boards. While 18% of the Fortune 100 board seats are occupied by women, only 15.7% of the Fortune 500 board seats are held by women.⁶ The minority percentage of 15.5% on Fortune 100 boards is greater than 12.9%, the percentage of Fortune 500 board seats held by nonwhites.⁷ Of the fifty largest public companies headquartered in North Carolina, only two of which are in the Fortune 100 and only fourteen of which are in the Fortune 500, women hold 12.2% of the board seats and minorities occupy only 7.1% of the board seats.⁸

Although it is now common for directors to be elected for one-year terms, instead of staggered three-year terms, it is still the case that the sitting directors are routinely re-nominated to continue their board service year after year. Some companies have mandatory retirement ages, while others have term limits for their directors. A small minority of companies use rigorous annual director assessments to avoid re-nominating the least effective directors. Other companies require that a director offer to resign if their principal job changes in a material way. Notwithstanding these measures, there is relatively little opportunity for the dynamic of directors to shift in any significant way because most sitting directors are re-nominated. The Directors Roster Report collected by Jim Kristie of Directors & Boards provides one hopeful note. Kristie reports that in the first quarter of 2011, 34% of all new directors elected (replacing those who were not continuing or filling new board seats) were women, down slightly from the 38% of new directors who were women for new board seats filled in the fourth quarter of

percentage of board seats held by minorities. Alliance for Board Diversity, *Missing Pieces: Women and Minorities on Fortune 500 Boards* 3 (2010), available at <http://www.slideshare.net/kacarter/missing-pieces-womenandminoritiesonfortune500boards>. This data was reported in error. *Missing Pieces (Revised)*.

⁴ *Missing Pieces (Revised)*, *supra* note 3, app. 1 at 8.

⁵ *Id.* at 2.

⁶ *Id.* at 3, 5.

⁷ *Id.*

⁸ UNC Sch. of Law Director Diversity Initiative, *North Carolina Corporate Board Diversity: 50 Largest North Carolina Companies*, UNC SCH. OF LAW, <https://ddi.law.unc.edu/boarddiversity/default.aspx> (last visited Dec. 30, 2011).

2010.⁹

In Part II, this Article describes some of the different approaches to tackling this lack of representation of women and minorities on corporate boards. Part III explores two aspects of proxy statement regulation—shareholder proposals related to corporate diversity and the recent amendments to the proxy regulations, which require that companies disclose how they consider diversity in nominating board members. Part IV presents the results of our analysis, which compares proxy statements of Fortune 100 companies in both the proxy year immediately preceding and immediately following the Proxy Disclosure Rule’s effective date. This analysis catalogs the initial effects of the rule regarding how companies discussed diversity in nominating board members. This Article concludes by suggesting that the Securities and Exchange Commission (SEC) should issue interpretive guidance to clarify its view requiring “consideration” of diversity in the director nomination process. The SEC actually implies that the company should implement a diversity “policy” and assess its effectiveness in its proxy disclosure statements. This Article suggests that the SEC should clarify this issue through specific guidelines instead of continuing to make this point only in the piecemeal proxy comment basis. Such guidance could also suggest including the following: disclosing the assessment of the diversity policy’s effectiveness instead of merely discussing “how” the policy is assessed, disclosing the demographic diversity of the director-nominee slate, and describing the concrete steps used to develop a diverse slate of director candidates; all of which would be viewed favorably by investors.

II. APPROACHES TO INCREASING BOARD DIVERSITY

The lack of board diversity described above is not confined to corporations headquartered in the United States. The overall percentage of board seats held by women in European-based companies is 11.7%, a number that is similar to that of the largest companies based in the United States.¹⁰ Some European countries, however, are reported to have female board representation in the single digits.¹¹ Other European countries now boast female board percentages of 40% (Norway), 28.2% (Sweden), and 26% (Finland).¹² In part, these differences represent the effects of dramatic efforts taken in some countries to address the lack of gender diversity on

⁹ Jim Kristie, *The Rostering of New Directors*, DIRS. & BDS. (May 2011), available at <http://www.directorsandboards.com/DBEBRIEFING/DBeletterMAY11.html> (for 2010, 34% of new board appointees were women, up from 25% in 2008).

¹⁰ Douglas M. Branson, *Women on Boards of Directors: A Global Snapshot 1* (Univ. of Pittsburg Sch. of Law Legal Studies Research Paper Series, Working Paper No. 2011-05, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1762615.

¹¹ *Id.* The five worst European countries in terms of female board representation are Portugal (0.6%), Italy (3.6%), Luxembourg (6%), Germany (7%), and Switzerland (approximately 7%). *Id.*

¹² *Id.*

boards.¹³ This part of the Article will describe some of these different approaches.

Those countries that mandate board gender diversity quotas illustrate the boldest approach to affecting board diversity. Norway was the first country to enact a quota law in 2005, which required listed companies to achieve at least 40% female board representation by 2008, or face delisting.¹⁴ Spain recently followed suit, with a 40% quota to be achieved by 2016.¹⁵ In the case of Spain, however, the quota is more aspirational than mandatory because there are no significant penalties for noncompliance.¹⁶ In late 2010, France adopted a 40% quota to be phased in with 20% female representation required by 2014 and 40% by 2017.¹⁷ Other countries, including Italy, the Netherlands, and Belgium, have actively discussed imposing a quota requirement.¹⁸

A second approach is for governments to suggest diversity targets or for companies themselves to voluntarily commit to diversifying their boards to achieve certain desired percentages of female representation. For instance, a report by the British government suggested that British companies strive to achieve 25% female board representation by 2015.¹⁹ In November 2010, some boards' chairs of the United Kingdom's largest companies founded a "30% Club" to achieve 30% female board representation by 2016.²⁰ Dutch companies that voluntarily sign a "Talent to the Top" pledge have also agreed to add women to their boards.²¹

A third approach to increasing board diversity involves monitoring board diversity, educating about its benefits, and identifying and placing qualified diverse candidates in board seats. Organizations in the United States, such as Catalyst, Inc., the Executive Leadership Council, and the Hispanic Association of Corporate Responsibility, among many others, have worked tirelessly on these fronts; but, in recent years at least, these efforts have not significantly changed the board diversity dynamic.²² An interesting example of such an approach has been spearheaded by the Australian Institute of Company Directors.²³ Potential female directors attend a board education program and join up with a mentor who is a

¹³ The board diversity conversation in other countries has focused almost exclusively on gender diversity rather than on racial or ethnic diversity. *See, e.g., id.* at 4.

¹⁴ *Id.* at 6.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 7.

¹⁸ *Id.* at 6.

¹⁹ Zoe Wood & Tom Bawden, *Inquiry Calls for More Women in Boardroom*, *GUARDIAN*, Feb. 24, 2011, <http://www.guardian.co.uk/business/2011/feb/24/davies-inquiry-women-boardroom-targets-quotas>.

²⁰ *See generally* 30% CLUB, <http://www.30percentclub.org.uk/> (last visited Jan. 15, 2012).

²¹ Branson, *supra* note 10, at 10.

²² *See, e.g., id.* at 12.

²³ *Id.*

corporate board chair who pledges to mentor the potential female director for one year and to help place her on a corporate board by the end of that one-year relationship.²⁴ The early returns from that effort are promising.²⁵

The fourth approach to increasing board diversity is explored in greater depth in this Article. This approach mandates disclosure of each company's policy on board diversity. In the United States, the SEC recently adopted a new proxy disclosure rule, which is discussed in more detail below.²⁶ Another example of a disclosure approach is in Australia where public corporations are subject to newly revised corporate governance principles and recommendations to: (a) explain their policy on gender diversity; (b) disclose measurable objectives for board gender diversity; and (c) assess the company's progress towards meeting those objectives.²⁷ In addition, the United Kingdom Financial Reporting Council is considering requiring a description of each board's policy on gender diversity, including any measurable objectives that have been set and progress made toward achieving those objectives.²⁸

The disclosure guideline in Australia goes several steps further than the SEC's amended rule by: requiring a diversity policy, which must be explained in the proxy; requiring disclosure of measurable objectives for board gender diversity; and requiring an assessment of the company's progress toward meeting those objectives.²⁹ The Australian approach seems similar to a voluntary quota, with each company being able to determine the "measurable objective" to which it will be held.³⁰ Notwithstanding the stronger language of the Australian approach, it is only a guideline—companies may either comply with it or explain why they do not believe the

²⁴ *Id.* at 12–13. Most Australian board chairs are not the corporation's CEO and therefore may have more time to engage in this mentoring effort. *See id.* at 14. In the United States, on the other hand, 84% of Fortune 1000 CEOs also occupy the corporate board chair seat. *Id.*

²⁵ *Id.* at 13.

²⁶ *See infra* Part III.B.3.

²⁷ AUSTRAL. SEC. EXCH., CORPORATE GOVERNANCE PRINCIPLES AND RECOMMENDATIONS WITH 2010 AMENDMENTS 3.2, at 24–25 (2d ed. 2010), available at http://www.asxgroup.com.au/media/PDFs/cg_principles_recommendations_with_2010_amendments.pdf [hereinafter CORPORATE GOVERNANCE PRINCIPLES]. These recommendations are not prescriptive, but are instead guidelines. *Id.* at 5. If a company believes that a recommendation is not appropriate for it, then it need not adopt it but must explain why—the “if not, why not” approach. *Id.*

²⁸ FINANCIAL REPORTING COUNCIL, CONSULTATION DOCUMENT: GENDER DIVERSITY ON BOARDS 5 (May 2011), available at <http://www.frc.org.uk/publications/pub2575.html>. The U.K. Corporate Governance Code, Supporting Principle B.2, which came into effect in June 2010, includes the statement: “the search for board candidates should be conducted, and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender.” *Id.* at 1. Lord Davies of Abersoch was then commissioned by the government to review board gender diversity. LORD DAVIES OF ABERSOCH, WOMEN ON BOARDS 4 (2011), available at <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf>. His February 2011 report recommended that the U.K. Corporate Governance Code be further amended “to require listed companies to establish a policy concerning boardroom diversity, including measurable objectives for implementing the policy, and disclose annually a summary of the policy and the progress made in achieving the objectives.” *Id.*

²⁹ CORPORATE GOVERNANCE PRINCIPLES, *supra* note 27, at 22–25.

³⁰ *See id.*

policy applies to them.³¹ It will be interesting to see whether the Australian companies elect not to comply or, if they do comply, whether they select a measurable objective that approaches the 40% quota adopted in Norway and other countries, or whether they will begin at much lower levels as they work to increase the gender diversity of their board candidates.³² In any event, this discussion should be instructive to the United Kingdom's Financial Reporting Council, as it considers whether and how to require disclosure of a diversity policy, any objectives for implementing that policy, and any progress in achieving those objectives.

With this background on alternative approaches, we next explore in detail how the U.S. proxy regulation affects board diversity.

III. PROXY REGULATION GENERALLY

The federal securities laws are aimed at full disclosure and investor protection.³³ Although the securities laws can have an impact on shaping corporate governance, that is not their primary focus; corporate governance matters are generally left to state law and, in particular, the law of the state in which a business is incorporated.³⁴ Notwithstanding this dichotomy between the federal securities laws and state corporate laws, there have been many instances in which the securities laws have had an impact on corporate governance and on issues relating to social responsibility. This article explores the intersection between the federal securities laws and other attempts to monitor diversity in the composition of corporate boards of directors.³⁵

As developed more fully below, the first action in this area arose with respect to shareholder proposals to the board to increase board diversity.³⁶ Over a number of years, these proposals were made and were often included in management's proxy solicitation materials. Although these efforts did not appear to have any significant impact on the expansion of diversity, they established board diversity as a matter of concern for many shareholders. This, in turn, set the background for the SEC's adoption of disclosure requirements. Until 2010, there were no laws or regulations directly addressing diversity on corporate boards, but as discussed below,

³¹ See *supra* note 27 and accompanying text.

³² See *supra* Part II.

³³ See 1 THOMAS LEE HAZEN, TREATISE ON THE LAW OF SECURITIES REGULATION § 1.2[3][A] (6th ed., 2009) [hereinafter HAZEN, SECURITIES REGULATION] (discussing the history and scope of the federal securities laws).

³⁴ See, e.g., Thomas L. Hazen, *Corporate Chartering and the Securities Markets: Shareholder Suffrage, Corporate Responsibility and Managerial Accountability*, 1978 WIS. L. REV. 391, 426–28 (discussing the distinction between investor protection laws and state corporate laws).

³⁵ For discussion of increasing concern over the lack of diversity on U.S. corporate boards, see the articles included in Symposium, *Board Diversity and Corporate Performance: Filling in the Gaps*, 89 N.C. L. REV. 715 (2011).

³⁶ See *infra* Part III.

new SEC rules require disclosure of board diversity policies.³⁷

Procedures and rules regarding election of corporate directors are governed by state corporate laws. State corporate laws provide that corporate directors are elected by the shareholders.³⁸ When publicly held corporations solicit shareholder votes or consent, the proxy solicitation materials are subject to the disclosure provisions set forth in the SEC rules and forms promulgated under § 14(a) of the Securities Exchange Act.³⁹ Neither state law nor federal law set forth requirements for director diversity or other board qualifications.⁴⁰

A. Shareholder Proposals for Increased Board Diversity

Diversity on corporate boards first emerged as an issue under the federal securities laws in the context of the SEC's shareholder proposal rule. SEC Rule 14a-8, which is better known as the shareholder proposal rule, determines instances in which management must include shareholder-generated proposals in management's proxy solicitation materials.⁴¹ Over the years, the shareholder proposal rule has proven a powerful tool for shareholders desiring to voice concerns relating to social issues. Even though shareholder proposals generally do not meet with much success when tallying votes, they have had a huge impact on raising corporate social consciousness.⁴²

Corporate managements' reluctance to rapidly diversify the makeup of corporate boards was mirrored in their attempts to block shareholder proposals questioning the lack of diversity. Under the shareholder proposal rule, once a shareholder makes a timely submission of a proposal for consideration at an upcoming shareholder meeting, management must include the proposal in management's proxy solicitation materials unless management can invoke one of the thirteen grounds listed in the rule for

³⁷ Proxy Disclosure Enhancements, Securities Act Release No. 33-9089, Exchange Act Release No. 34-61175, Investment Company Act Release No. IC-29092, 2009 WL 4857389, *18 (Dec. 16, 2009). In 2010, the SEC implemented amendments to its disclosure regulations to require a publicly held company to disclose its policy, if any, on the role of diversity in board selection. *Id.* (SEC release adopted the board diversity policy disclosure requirement). The SEC disclosure requirement is discussed *infra* Part III.B.

³⁸ See, e.g., DEL. CODE ANN. tit. 8, § 211(b) (2006) ("Unless directors are elected by written consent in lieu of an annual meeting as permitted by this subsection, an annual meeting of stockholders shall be held for the election of directors on a date and at a time designated by or in the manner provided in the bylaws."); MODEL BUS. CORP. ACT § 8.03(e) (2008) ("Directors are elected at the first annual shareholders' meeting and at each annual meeting thereafter unless their terms are staggered . . .").

³⁹ 15 U.S.C. § 78n(a) (2006); see also, 17 C.F.R. § 240.14a-2 (2011).

⁴⁰ See generally Jennifer K. Brooke & Tom R. Tyler, *Diversity and Corporate Performance: A Review of the Psychological Literature*, 89 N.C. L. REV. 715 (2011) (discussing various points of view as to whether board diversity should be encouraged or required).

⁴¹ 17 C.F.R. § 240.14a-8.

⁴² See 3 HAZEN, SECURITIES REGULATION, *supra* note 33, § 10.8[8] (discussing shareholder proposals and social responsibility).

excluding such a proposal.⁴³ One ground for excluding a proposal is that it relates to the election of a director.⁴⁴ This basis for excluding shareholder proposals applies solely to those proposals that would impact a particular office holder. It does not justify exclusion of proposals relating to policies or procedures concerning director qualifications and elections generally.⁴⁵

Starting nearly twenty years ago, the shareholder proposal rule brought concerns about director diversity into the public arena. Based on a review of no action letter requests involving shareholder proposals, interest in diversity on corporate boards surfaced in the 1990s.⁴⁶ In many instances, the SEC staff opined that properly drafted proposals regarding board diversity could not be excluded from management's proxy statement.⁴⁷ It is not surprising, however, that corporate management frequently tried to convince the SEC that these proposals should be excluded. For example, management attempted to exclude proposals under SEC Rule 14a-8(i)(1),⁴⁸ which allows exclusion of proposals involving subject matters not appropriate for shareholder action as determined by state law in the jurisdiction of incorporation.⁴⁹ The essence of management's argument was that diversity proposals require the board of directors to take certain actions, which violate state laws protecting the discretionary authority of board

⁴³ See 17 C.F.R. § 240.14a-8(i) (also requiring qualifications for a shareholder to submit a proposal).

⁴⁴ 17 C.F.R. § 240.14a-8(i)(8) (amended 2010) (permitting management to exclude a proposal relating to director elections).

⁴⁵ *Id.*; see also 3 HAZEN, SECURITIES REGULATION, *supra* note 33, § 10.8[9] (discussing the shareholder proposal rule as it relates to the election of directors).

⁴⁶ See, e.g., Office Depot, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 306, at *5 (Mar. 7, 1994); PepsiCo, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 218, at *1 (Feb. 15, 1994); Texaco, Inc., SEC No-Action Letter, 1993 WL 93602, at *1 (Mar. 25, 1993).

⁴⁷ A review of fourteen properly submitted shareholder proposals requesting general plans to increase board diversity through greater consideration of women and minority candidates revealed that the SEC found all such proposals to be non-excludable and issued No-Action responses to that effect. E. I. du Pont de Nemours and Co., SEC No-Action Letter, 2003 WL 943024, at *1 (Mar. 3, 2003); Exxon Mobil Corp., SEC No-Action Letter, 2001 WL 65676, at *1 (Jan. 22, 2001); Exxon Mobil Corp., SEC No-Action Letter, 2000 WL 364070, at *1 (Mar. 22, 2000); Am. Power Conversion Corp., SEC No-Action Letter, 2000 WL 343456, at *1 (Mar. 10, 2000); Circuit City Stores, Inc., SEC No-Action Letter, 1999 WL 212715, at *1 (Apr. 12, 1999); Assocs. First Capital Corp., SEC No-Action Letter, 1999 WL 68604, at *1 (Feb. 12, 1999); Circuit City Stores, Inc., SEC No-Action Letter, 1998 WL 172789, at *1 (Apr. 3, 1998); Cypress Semiconductor Corp., SEC No-Action Letter, 1998 WL 113674, at *1 (Mar. 11, 1998); Texaco, Inc., SEC No-Action Letter, 1998 WL 56567, at *1 (Feb. 2, 1998); E. I. du Pont de Nemours and Co., SEC No-Action Letter, 1998 WL 40238, at *1 (Jan. 27, 1998); Archer-Daniels-Midland Co., SEC No-Action Letter, 1996 WL 426409, at *1 (July 29, 1996); Office Depot, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 306, at *1 (Mar. 7, 1994); PepsiCo, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 218, at *1 (Feb. 15, 1994); Texaco, Inc., SEC No-Action Letter, 1993 WL 93602, at *1 (Mar. 25, 1993).

⁴⁸ See The Cheesecake Factory, Inc., SEC No-Action Letter, 2006 WL 851099, at *8 (Mar. 22, 2006); Assocs. First Capital Corp., SEC No-Action Letter, 1999 WL 68604, at *1 (Feb. 12, 1999); see also Circuit City Stores, Inc., SEC No-Action Letter, 1998 WL 172789, at *3 (Apr. 3, 1998); Dayton Hudson Corp., SEC No-Action Letter, 1996 WL 94825, at *2 (Mar. 5, 1996); Texaco, Inc., SEC No-Action Letter, 1998 WL 56567, at *4 (Feb. 2, 1998); Texaco, Inc., SEC No-Action Letter, 1993 WL 93602, at *6 (Mar. 25, 1993).

⁴⁹ 17 C.F.R. § 240.14a-8(i)(1).

members to act in accord with their best judgment.⁵⁰ The typical response by proponents of these shareholder proposals was that the proposals do not mandate action, but rather *recommend* that certain criteria be considered in the board's exercise of best judgment.⁵¹ In addition, there were examples of management seeking to exclude the shareholder proposals from management's proxy statement because of SEC Rule 14a-8(i)(2), which permits exclusion of proposals that would force the company to violate state or federal law.⁵² The arguments here were similar to those made under subsection (1) of the SEC rule⁵³ and the shareholder response was generally the same.⁵⁴ Another argument put forth for exclusion under subsection (2), which was also rejected by the SEC, was that the proposals, if implemented, would force the company to violate federal law under Title VII of the Civil Rights Act of 1964.⁵⁵

Management also attempted to exclude proposals relating to board diversity under Rule 14a-8(i)(3),⁵⁶ which states that a proposal may be omitted if it is contrary to any of the Commission's proxy rules and regulations including Rule 14a-9, which proscribes inclusion of false or misleading information as to a material fact.⁵⁷ The two most prevalent arguments under this subsection are either that the proposal is misleading because it is too vague to be implemented, or that the proposal actually contains false or misleading statements.⁵⁸ The common shareholder

⁵⁰ See The Cheesecake Factory, Inc., SEC No-Action Letter, 2006 WL 851099, at *8 (Mar. 22, 2006); Assocs. First Capital Corp., SEC No-Action Letter, 1999 WL 68604, at *1 (Feb. 12, 1999); see also Circuit City Stores, Inc., SEC No-Action Letter, 1998 WL 172789, at *3 (Apr. 3, 1998); Texaco, Inc., SEC No-Action Letter, 1998 WL 56567, at *4 (Feb. 2, 1998) (company erroneously refers to Rule 14a-8(c)(1) as Rule 14a-8(c)(11)); Dayton Hudson Corp., SEC No-Action Letter, 1996 WL 94825, at *2 (Mar. 5, 1996); Texaco, Inc., SEC No-Action Letter, 1993 WL 93602, at *6 (Mar. 25, 1993) (company erroneously refers to Rule 14a-8(c)(1) as Rule 14a-8(c)(11)).

⁵¹ See, e.g., Assocs. First Capital Corp., SEC No-Action Letter, 1999 WL 68604, at *6 (Feb. 12, 1999).

⁵² See The Cheesecake Factory, Inc., SEC No-Action Letter, 2006 WL 851099, at *8 (Mar. 22, 2006); EMC Corp., SEC No-Action Letter, 2002 WL 571685, at *7 (Mar. 14, 2002); see also Circuit City Stores, Inc., SEC No-Action Letter, 1998 WL 172789, at *2-3 (Apr. 3, 1998); E. I. du Pont de Nemours and Co., SEC No-Action Letter, 1998 WL 40238, at *2 (Jan. 27, 1998); Mylan Labs., Inc., SEC No-Action Letter, 1995 WL 150687, at *3 (Apr. 6, 1995).

⁵³ See The Cheesecake Factory, Inc., SEC No-Action Letter, 2006 WL 851099, at *8 (Mar. 22, 2006); Circuit City Stores, Inc., SEC No-Action Letter, 1998 WL 172789, at *3 (Apr. 3, 1998).

⁵⁴ See, e.g., The Cheesecake Factory, Inc., SEC No-Action Letter, 2006 WL 851099, at *35 (Mar. 22, 2006).

⁵⁵ See EMC Corp., SEC No-Action Letter, 2002 WL 571685, at *7 (Mar. 14, 2002); Circuit City Stores, Inc., SEC No-Action Letter, 1998 WL 172789, at *4 (Apr. 3, 1998); Mylan Labs., SEC No-Action Letter, 1995 WL 150687, at *3 (Apr. 6, 1995).

⁵⁶ See 17 C.F.R. § 240.14a-8(i)(3) (2011).

⁵⁷ See *id.* § 240.14a-9.

⁵⁸ See, e.g., The Cheesecake Factory, Inc., SEC No-Action Letter, 2006 WL 851099, at *9 (Mar. 22, 2006) (arguing that the proposal is misleading because it is too vague and indefinite); E. I. du Pont de Nemours and Co., SEC No-Action Letter, 2003 WL 943024, at *2 (Mar. 3, 2003) (arguing that the proposal is misleading because the proponent has demonstrated that he does not support his own proposal); Exxon Mobil Corp., SEC No-Action Letter, 2002 WL 597371, at *5 (Mar. 19, 2002) (arguing that the proposal contains a number of false and unsupported statements); EMC Corp., SEC No-Action Letter, 2002 WL 571685, at *3 (Mar. 14, 2002) (arguing that the proposal is misleading because it is too vague and indefinite and that the proposal contains a number of false and misleading statements); Exxon

response to the vagueness argument, which is supported by precedent, was that there is nothing inherently vague about the proposals.⁵⁹ While the SEC has found that some proposals contained false or misleading statements, the Commission has generally opted not to exclude the entire proposal, but rather only exclude the individual false or misleading statements.⁶⁰ Alternatively, the SEC has said it would not approve the request to exclude a proposal in its entirety, provided the proponent corrected or deleted the offending statements.⁶¹ Relatively few companies have sought omission under Rule 14a-8(i)(6),⁶² which permits exclusion of proposals that are beyond the company's power to effectuate.⁶³ Several attempts to exclude proposals have been made under subsection (i)(7),⁶⁴ which allows exclusion of proposals that relate to the ordinary business matters of the company.⁶⁵ SEC staff responses rejected this argument because director nominations fall under the umbrella of corporate governance, which is not considered a matter of ordinary business.⁶⁶ A number of companies made unsuccessful attempts to exclude proposals under Rule 14a-8(i)(8),⁶⁷ which permits

Mobil Corp., SEC No-Action Letter, 2000 WL 364070, at *4 (Mar. 22, 2000) (arguing that the proposal is false and misleading because it misstates the current number of female and minority board members); Circuit City Stores, Inc., SEC No-Action Letter, 1999 WL 212715, at *3 (Apr. 12, 1999) (arguing that the proposal is misleading because the proponent has demonstrated that he does not support his own proposal); Assocs. First Capital Corp., SEC No-Action Letter, 1999 WL 68604, at *3 (Feb. 12, 1999) (arguing that the proposal is misleading because it is too vague and indefinite); E. I. du Pont de Nemours and Co., SEC No-Action Letter, 1998 WL 40238 (Jan. 27, 1998) (no explanation of argument given); PepsiCo, Inc., SEC No-Action Letter, 1994 SEC No-Act. LEXIS 218, at *4 (Feb. 15, 1994) (arguing that the proposal is misleading because it is too vague and indefinite and that the proposal contains a number of false and misleading statements); Texaco, Inc., SEC No-Action Letter, 1993 WL 93602, at *2 (Mar. 25, 1993) (arguing that the proposal is misleading because it is too vague and indefinite and that the proposal contains a number of false and misleading statements).

⁵⁹ See *The Cheesecake Factory, Inc.*, SEC No-Action Letter, 2006 WL 851099, at *33 (Mar. 22, 2006); Assocs. First Capital Corp., SEC No-Action Letter, 1999 WL 68604, at *6 (Feb. 12, 1999); Texaco, Inc., SEC No-Action Letter, 1993 WL 93602, at *10 (Mar. 25, 1993).

⁶⁰ See, e.g., *EMC Corp.*, SEC No-Action Letter, 2002 WL 571685, at *1 (Mar. 14, 2002).

⁶¹ *Texaco, Inc.*, SEC No-Action Letter, 1993 WL 93602, at *1 (Mar. 25, 1993).

⁶² See, e.g., *Circuit City Stores, Inc.*, SEC No-Action Letter, 1998 WL 172789, at *4 (Apr. 3, 1998) (arguing inability to implement the proposal because the shareholders and not the company ultimately elect the board members).

⁶³ See 17 C.F.R. § 240.14a-8(i)(6) (2011).

⁶⁴ See *Exxon Mobil Corp.*, SEC No-Action Letter, 2000 WL 364070, at *3 (Mar. 22, 2000) (arguing that nomination of directors falls within ordinary business matters); *Circuit City Stores, Inc.*, SEC No-Action Letter, 1998 WL 172789, at *2 (Apr. 3, 1998) (arguing that nomination of directors falls within ordinary business matters); *Cypress Semiconductor Corp.*, SEC No-Action Letter, 1998 WL 113674, at *6 (Mar. 11, 1998) (arguing that the proposal implicates its ethical standards, a matter of ordinary business, and issuance of reports to stockholders, which is also a matter of ordinary business).

⁶⁵ 17 C.F.R. § 240.14a-8(i)(7).

⁶⁶ See *Cypress Semiconductor Corp.*, SEC No-Action Letter, 1998 WL 113674, at *8 (Mar. 11, 1998).

⁶⁷ See *Assocs. First Capital Corp.*, SEC No-Action Letter, 1999 WL 68604, at *3-4 (Feb. 12, 1999) (arguing that the proposal results in an election contest that seeks to remove current board members and replace them with members of a specified group); *Cypress Semiconductor Corp.*, SEC No-Action Letter, 1998 WL 113674, at *5 (Mar. 11, 1998) (arguing that the proposal results in an election contest that seeks to remove current board members and replace them with members of a specified group); *Texaco, Inc.*, SEC No-Action Letter, 1998 WL 56567, at *3 (Feb. 2, 1998) (arguing that proposal is an improper attempt to criticize current board members and influence director elections); *Texaco, Inc.*, SEC No-Action Letter, 1993 WL 93602, at *5 (Mar. 25, 1993) (arguing that proposal is an improper attempt to criticize current board members and influence director elections).

exclusion of proposals relating to an actual election of officers.⁶⁸ The SEC did not permit exclusion because the proposals were focused on the characteristics of director-nominees and not on specific board elections.⁶⁹

As the foregoing overview demonstrates, the SEC staff was generally receptive to properly drafted shareholder proposals regarding director diversity, provided that the proposals were submitted in a timely manner. Notwithstanding managements' attempts to exclude board diversity proposals on various grounds, the SEC staff responses tended to deny the applicability of any substantive ground for exclusion.⁷⁰ After a number of proposals regarding board diversity in the 1990s and early 2000s, there appeared to be a decrease in shareholder proposals on this issue, in part because there were modest gains in diversity representation on corporate boards during this period. In addition, each year there is a new area of focus for shareholder proposals and issues relating to the corporate governance failures, such as Enron, that shift the focus of many activist shareholders to other types of governance reforms.⁷¹ In more recent years, risk management and credit or derivatives exposure has become a primary focus of many shareholder proposals.⁷²

⁶⁸ 17 C.F.R. § 240.14a-8(i)(8).

⁶⁹ See *Assocs. First Capital Corp.*, SEC No-Action Letter, 1999 WL 68604, at *5 (Feb. 12, 1999); *Cypress Semiconductor Corp.*, SEC No-Action Letter, 1998 WL 113674, at *7 (Mar. 11, 1998); *Texaco, Inc.*, SEC No-Action Letter, 1998 WL 56567, at *11 (Feb. 2, 1998); *Texaco, Inc.*, SEC No-Action Letter, 1993 WL 93602, at *8 (Mar. 25, 1993).

⁷⁰ See *E. I. du Pont de Nemours and Co.*, SEC No-Action Letter, 2003 WL 943024, at *1 (Mar. 3, 2003); *Exxon Mobil Corp.*, SEC No-Action Letter, 2001 WL 65676, at *1 (Jan. 22, 2001); *Exxon Mobil Corp.*, SEC No-Action Letter, 2000 WL 364070, at *1 (Mar. 22, 2000); *Am. Power Conversion Corp.*, SEC No-Action Letter, 2000 WL 343456, at *1 (Mar. 10, 2000); *Circuit City Stores, Inc.*, SEC No-Action Letter, 1999 WL 212715, at *1 (Apr. 12, 1999); *Assocs. First Capital Corp.*, SEC No-Action Letter, 1999 WL 68604, at *1 (Feb. 12, 1999); *Circuit City Stores, Inc.*, SEC No-Action Letter, 1998 WL 172789, at *1 (Apr. 3, 1998); *Cypress Semiconductor Corp.*, SEC No-Action Letter, 1998 WL 113674, at *1 (Mar. 11, 1998); *Texaco, Inc.*, SEC No-Action Letter, 1998 WL 56567, at *1 (Feb. 2, 1998); *E. I. du Pont de Nemours and Co.*, SEC No-Action Letter, 1998 WL 40238, at *1 (Jan. 27, 1998); *Archer-Daniels-Midland Co.*, SEC No-Action Letter, 1996 WL 426409, at *1 (July 29, 1996); *Office Depot, Inc.*, SEC No-Action Letter, 1994 SEC No-Act. LEXIS 306, at *1 (Mar. 7, 1994); *PepsiCo, Inc.*, SEC No-Action Letter, 1994 SEC No-Act. LEXIS 218, at *1 (Feb. 15, 1994); *Texaco, Inc.*, SEC No-Action Letter, 1993 WL 93602, at *1 (Mar. 25, 1993).

Management had more success in excluding shareholder proposals under Rule 14a-8(i)(11), which allows the omission of proposals that are identical to another proposal already planned to be included in the proxy statement. See *EMC Corp.*, SEC No-Action Letter, 2002 WL 571685, at *1 (Mar. 14, 2002); *Nucor Corp.*, SEC No-Action Letter, 1999 SEC No-Act. LEXIS 198, at *1 (Feb. 16, 1999); *Mylan Labs., Inc.*, SEC No-Action Letter, 1995 WL 150687, at *1 (Apr. 6, 1995).

⁷¹ See 3 HAZEN, SECURITIES REGULATION, *supra* note 33, § 10.8[1] at *d.* (July 2011 pocket pt.) (discussing various proposals over time).

⁷² *Id.*

B. SEC's Board Nomination Diversity Policy Disclosure Requirement

1. SEC's Request for Comments

The post-Enron and 2008 financial crises led the SEC to consider many corporate governance reforms.⁷³ Among those reforms were increased disclosures relating to director elections.

On July 10, 2009, the SEC proposed a number of amendments to the proxy disclosure rule.⁷⁴ In particular, the SEC proposals targeted providing shareholders with information regarding the relationship between a company's compensation policies and risk, director and nominee qualifications, company leadership structure, and the potential conflicts of interests of compensation consultants.⁷⁵ The SEC cited the increased desire among shareholders of publicly held companies to make informed voting and investment decisions as a motive behind these proposed amendments.⁷⁶

As part of its rule proposals, the SEC asked for comments addressing whether director diversity is a significant issue in light of the proposed goals of providing more meaningful information to the investors through the proxy statements.⁷⁷ The SEC explained that board diversity disclosure should be imposed: (a) to aid shareholders in their judgment of the relative fit of a director or nominee to a particular company; and (b) to allow more flexibility to companies in disclosing material information about the qualifications of a director or nominee.⁷⁸

⁷³ For example, under the Sarbanes-Oxley Act, there are audit committee independence requirements and the committee should include at least one financial expert. The Act requires a public company's chief executive officer and chief financial officer to certify that, to the best of their knowledge, the financial statements are accurately presented. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 302, 906 (2003).

⁷⁴ See Proxy Disclosure and Solicitation Enhancements, 74 Fed. Reg. 35,076 (proposed July 17, 2009) (codified at 17 C.F.R. pt. 229).

⁷⁵ See *id.* at 35,086.

⁷⁶ *Id.* at 35,076 ("We have decided to re-examine our disclosure rules to provide investors with important and relevant information upon which to base their proxy voting and investment decisions.").

⁷⁷ See *id.* at 35,076-77 (explaining that the proposed amendments "are designed to enhance the information included in proxy and information statements . . . [the SEC] believe[s] that some of [its] current disclosure requirements on these topics could be improved to elicit more informative disclosure for investors.").

⁷⁸ See *id.* at 35,083.

The proposed amendments are designed to provide investors with more meaningful disclosure to help them in their voting decisions by better enabling them to determine whether and why a director or nominee is a good fit for a particular company, and to allow companies flexibility in disclosing material information on the background and specific qualifications of each director and nominee, including information that goes beyond the five-year biographical requirement of Item 401.

Id.

We submitted a comment letter urging the SEC to consider requiring disclosure of the board's make-up in terms of race, gender, and ethnicity. See Letter from Lissa Lamkin Broome & Thomas Lee Hazen, Professors of Law, Univ. of N.C., to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-65.pdf> (urging such a disclosure requirement). However, as discussed below, the SEC requirements do not go this far.

2. Comments Addressing Board Diversity Disclosure

Various individuals and organizations responded with comments regarding enhanced disclosure of director and nominee qualifications and mentioned that a board's diversity policy was important information for investors.⁷⁹ A number of the comments that discussed diversity disclosure also considered board diversity as an important factor influencing the voting decisions of investors.⁸⁰ There were over 130 comment letters submitted to the SEC in response to this amendment.⁸¹ Most of the letters were submitted by groups with a specific interest in diversity or by institutional investors, including mutual funds, pension funds, and socially responsible investment funds.⁸² Fifty-six of the comment letters specifically commented on the diversity disclosure aspects of the proposed rule.⁸³ The proposed rule

⁷⁹ See Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,342 (Dec. 23, 2009) (codified at 17 C.F.R. pt. 229).

⁸⁰ *Id.* at 68,355 ("Board diversity policy is an important factor in the voting decisions of some investors.").

⁸¹ *Id.*

⁸² See *Comments on Proposed Rule: Proxy Disclosure and Solicitation Enhancements*, U.S. SEC. AND EXCH. COMM'N, available at <http://www.sec.gov/comments/s7-13-09/s71309.shtml> (last visited Jan. 3, 2012).

⁸³ See *id.*; Comment Letter from Gary Brouse to Mary Schapiro, Chairperson, SEC (Nov. 8, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-159.pdf>; Comment Letter from Jeffrey W. Rubin, Chair of the Committee on Federal Regulation of Securities, American Bar Association, to U.S. Securities and Exchange Commission (Oct. 16, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-152.pdf>; Comment Letter from Dr. Andrea C. Hall, Governance Committee Chair, American Century Investments, to Elizabeth M. Murphy, Secretary, SEC (Oct. 8, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-151.pdf>; Comment Letter from Paul M. Neuhauser, on behalf of the Interfaith Center on Corporate Responsibility, to Elizabeth M. Murphy, Secretary, SEC (Sept. 20, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-139.pdf>; Comment Letter from Anne Simpson, Senior Portfolio Manager, Global Equity, California Public Employees' Retirement System, to Elizabeth M. Murphy, Secretary, SEC (Sept. 16, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-146.pdf>; Comment Letter from Ashbel C. Williams, Executive Director and CIO, State Board of Administration of Florida, to Elizabeth M. Murphy, Secretary, SEC (Sept. 16, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-132.pdf>; Comment Letter from William M. Tartikoff, Senior Vice President and General Counsel, Calvert Group, Ltd. and Ivy Wafford Duke, Assistant Vice President and Deputy General Counsel, Calvert Group, Ltd., to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-130.pdf>; Comment Letter from Carl Brooks, President and CEO, The Executive Leadership Council, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-142.pdf>; Comment Letter from Wendy Beecham, CEO, Forum for Women Entrepreneurs & Executives, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-122.pdf>; Comment Letter from Mary Kay Craig, Sisters of Charity, BVM, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-119.pdf>; Comment Letter from Cleary Gottlieb Steen & Hamilton LLP to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-118.pdf>; Comment Letter from Ernst & Young LLP to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-110.pdf>; Comment Letter from Eleanor Bloxham, CEO, The Value Alliance and Corporate Governance Alliance, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-107.pdf>; Comment Letter from Denise L. Nappier, State Treasurer, Connecticut State Treasurer, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-104.pdf>; Comment Letter from Gerald W. McEntee, International President, American Federation of State, County and Municipal Employees, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-103.pdf>; Comment Letter from Ilene H. Lang, President and CEO, Catalyst, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-103.pdf>.

09/s71309-100.pdf; Comment Letter from Sara Watkins, DC Friend of Board Room Bound, to U.S. Securities and Exchange Commission (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-95.pdf>; Comment Letter from Ruth Strauss, Strauss Consulting, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-92.pdf>; Comment Letter from Glyn A. Holton, Executive Director, United States Proxy Exchange, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-83.pdf>; Comment Letter from John B. Keane, American Electric Power Company, Inc., to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-81.pdf>; Comment Letter from Ryan J. Maley, Software Technologies Group, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-80.pdf>; Comment Letter from David H. Zellner, Chief Investment Officer, General Board of Pension and Health Benefits of the United Methodist Church, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-79.pdf>; Comment Letter from Cheryl Smith, President, Trillium Asset Management Corporation, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-72.pdf>; Comment Letter from Alexander M. Cutler, Chairman and Chief Executive Officer of Eaton Corporation, Chair of Corporate Leadership Initiative, Business Roundtable, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-69.pdf>; Comment Letter from Lissa Lamkin Broome, Wachovia Professor of Banking Law, Director, Center for Banking and Finance Director, Director Diversity Initiative University of North Carolina School of Law and Thomas Lee Hazen, Cary C. Boshamer Distinguished Professor of Law, Working Group Member, Director Diversity Initiative, Board of Advisors, Center for Banking and Finance, University of North Carolina School of Law, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-65.pdf>; Comment Letter from Rev. Seamus P. Finn, Director of the Justice, Peace and Integrity of Creation Office, Missionary Oblates of Mary Immaculate, to Elizabeth M. Murphy, Secretary, SEC (Sept. 14, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-145.pdf>; Comment Letter from Nancy Sims, President, The Robert Toigo Foundation, to Elizabeth M. Murphy, Secretary, SEC (Sept. 14, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-140.pdf>; Comment Letter from Christopher Ailman, Chief Investment Officer, California State Teachers' Retirement System, to Elizabeth M. Murphy, Secretary, SEC (Sept. 14, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-84.pdf>; Comment Letter from Patrick M. Prout, President and CEO, The Prout Group, to Elizabeth M. Murphy, Secretary, SEC (Sept. 14, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-74.pdf>; Comment Letter from Timothy Smith, Senior Vice President, Walden Asset Management, to Elizabeth M. Murphy, Secretary, SEC (Sept. 14, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-71.pdf>; Comment Letter from Miriam Burgess, President, Board of Directors Network, Inc., to Elizabeth M. Murphy, Secretary, SEC (Sept. 14, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-67.pdf>; Comment Letter from Chloe Drew, Executive Director, The Council of Urban Professionals, to Elizabeth M. Murphy, Secretary, SEC (Sept. 14, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-62.pdf>; Comment Letter from Dawn K. Wolfe, Associate Director of ESG Research, Boston Common Asset Management; John Horning, Executive Director, WildEarth Guardians; Carole Lombard csj, Director of Justice and Peace, Sisters of St. Joseph; Steve Mason, Director, Brethren Foundation, Church of the Brethren Benefit Trust; Pleroma Foundation; Susan Vickers, RSM, VP Community Health, Catholic Healthcare West; and Stephen Viederman, Christopher Reynolds Foundation, to Elizabeth M. Murphy, Secretary, SEC (Sept. 14, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-59.pdf>; Comment Letter from Linda K. Bolliger, Founder and Board Chair, Boardroom Bound, to Elizabeth M. Murphy, Secretary, SEC (Sept. 11, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-57.pdf>; Comment Letter from Lisa N. Woll, CEO, Social Investment Forum, to Elizabeth M. Murphy, Secretary, SEC (Sept. 14, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-55.pdf>; Comment Letter from Ellen Toplin, President, The Forum of Executive Women, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-53.pdf>; Comment Letter from Jorge C. Corralejo, Chairman and CEO, Latino Business Chamber of Greater Los Angeles, to Mary L. Schapiro, Chairman, SEC (Sept. 11, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-143.pdf>; Comment Letter from Julie F. Gorte, Ph.D., Pax World Management Corp., and Tracey C. Rembert, Sustainability Analyst and Governance Advocate, Pax World Management Corp., to Elizabeth M. Murphy, Secretary, SEC (Sept. 12, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-45.pdf>; Comment Letter from Kathryn J. Hayley, Chief Executive Officer, Aon Consulting (Sept. 10, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-42.htm>; Comment Letter from Kathleen C. Stone, President, The Boston Club, to Elizabeth M. Murphy, Secretary, SEC (Sept. 10, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-138.pdf>; Comment Letter from Carol Bowie, Head of the Governance Institute, RiskMetrics Group, to Elizabeth M. Murphy, Secretary, SEC (Sept. 10, 2009), *available at*

did not define diversity, but twenty-seven of the commenters mentioned gender diversity, eighteen commented on racial diversity, and thirteen mentioned ethnic diversity.⁸⁴ Two commenters mentioned diversity of background and skills.⁸⁵ Five of the fifty-six comment letters relating to the diversity disclosure did not favor such disclosure.⁸⁶

<http://www.sec.gov/comments/s7-13-09/s71309-39.pdf>; Comment Letter from Carla Rutley, Executive Director, Milwaukee Women Inc., to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-66.pdf>; Comment Letter from Rona Wells, President, InterOrganization Network, to Elizabeth M. Murphy, Secretary, SEC (Sept. 8, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-43.pdf>; Comment Letter from Justin Levis, Senior Research Associate, Council of Institutional Investors, to Elizabeth M. Murphy, Secretary, SEC (Sept. 8, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-33.pdf>; Comment Letter from Hye-Won Choi, Senior Vice President and Head of Corporate Governance, TIAA-CREF, to Elizabeth M. Murphy, Secretary, SEC (Sept. 8, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-32.pdf>; Comment Letter from Roger Clegg, President and General Counsel, Center for Equal Opportunity, to Securities and Exchange Commission (Sept. 1, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-26.htm>; Comment Letter from Diana Oleskevich, Sisters of St. Joseph of Carondelet, to Elizabeth M. Murphy, Secretary, SEC (Sept. 2, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-49.pdf>; Comment Letter from John C. Guerra, Jr., Chief Executive Officer, New America Alliance, to Elizabeth M. Murphy, Secretary, SEC (Sept. 2, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-31.pdf>; Comment Letter from Diana Oleskevich, Sisters of St. Joseph of Carondelet (Aug. 31, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-24.htm>; Comment Letter from Carlos F. Orta, President and Chief Executive Officer, Hispanic Association on Corporate Responsibility, to Mary L. Schapiro, Chairman, SEC (Aug. 31, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-23.pdf>; Comment Letter from Valerie Heinonen, o.s.u., Consultant, Corporate Social Responsibility, on behalf of the Ursuline Sisters of Tildonk, to Elizabeth M. Murphy, Secretary, SEC (Aug. 26, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-18.pdf>; Comment Letter from Valerie Heinonen, o.s.u., Consultant, Corporate Social Responsibility, on behalf of the Dominican Sisters of Hope, to Elizabeth M. Murphy, Secretary, SEC (Aug. 25, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-20.pdf>; Comment Letter from Valerie Heinonen, o.s.u., Consultant, Corporate Social Responsibility, on behalf of Mercy Investment Program, to Elizabeth M. Murphy, Secretary, SEC (Aug. 25, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-19.pdf>; Comment Letter from Valerie Heinonen, o.s.u., Consultant, Corporate Social Responsibility, on behalf of the Sisters of Mercy Regional Community of Detroit Charitable Trust, to Elizabeth M. Murphy, Secretary, SEC (Aug. 25, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-17.pdf>; Comment Letter from Sumner M. Grant, Executive Director, The Ministers and Missionaries Benefit Board, (Aug. 25, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-16.pdf>; Comment Letter from Catherine Rowan (Aug. 22, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-14.htm>.

⁸⁴ See *supra* note 83. In a 2010 speech, SEC Commissioner Aguilar noted that the comment “letters were overwhelmingly supportive, with approximately 90% expressing support for disclosure of information related to race and gender diversity on the board.” Luis A. Aguilar, Comm’r, U.S. Sec. and Exch. Comm’n, Diversity in the Boardroom is Important and, Unfortunately, Still Rare, at 2 (Sept. 16, 2010), *available at* <http://www.sec.gov/news/speech/2010/spch091610laa.htm> (given at the SAIS Center for Transatlantic Relations Conference on Closing the Gender Gap: Global Perspectives on Women in the Boardroom).

⁸⁵ Comment Letter from Dr. Andrea C. Hall, Governance Committee Chair, American Century Investments, to Elizabeth M. Murphy, Secretary, SEC (Oct. 8, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-151.pdf> (“diversity of background, skills, race and gender brings broader perspective to our deliberations as a board”); Comment Letter from Chloe Drew, Executive Director, Council of Urban Professionals, to Elizabeth M. Murphy, Secretary, SEC (Sept. 14, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-62.pdf> (“diversity of backgrounds and skills”).

⁸⁶ Comment Letter from Jeffrey W. Rubin, Chair of the Committee on Federal Regulation of Securities, American Bar Association, to U.S. Securities and Exchange Commission (Oct. 16, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-152.pdf>; Comment Letter from Cleary Gottlieb Steen & Hamilton LLP to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-118.pdf>; Comment Letter from Alexander M. Cutler, Chairman and Chief Executive Officer of Eaton Corporation, Chair of Corporate Leadership Initiative, Business Roundtable, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at*

The commenters urging adoption of the disclosure requirement mentioned various reasons for their support: that shareholders generally value diversity; that diverse boards may perform better than non-diverse boards; that diverse boards reduce workplace discrimination and improve employee recruiting, retention, and productivity; and that diverse boards will better reflect the diversity of employees, customers, and other corporate stakeholders.⁸⁷

In the five comments that opposed diversity disclosure, three stated that diversity was an important value.⁸⁸ However, two of those three thought additional disclosure about diversity would not be helpful, and the other commenter stated that mentioning diversity as a factor in board nomination would degrade female and minority candidates if this quality was misunderstood as being the nominee's "qualification" to be a director.⁸⁹ A fourth commenter stated that proxies currently discuss diversity if that is a factor considered in nominating directors, and therefore no further disclosure related to diversity is necessary.⁹⁰ A final commenter was strongly opposed to any consideration of race or ethnicity in selecting board members.⁹¹

TIAA-CREF, a large institutional shareholder, submitted a comment letter that urged the SEC to leave "diversity" undefined.

We do not believe, however, that diversity should be defined in the same way for all companies. Diversity of

<http://www.sec.gov/comments/s7-13-09/s71309-69.pdf>; Comment Letter from Roger Clegg, President and General Counsel, Center for Equal Opportunity, to Securities and Exchange Commission (Sept. 1, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-26.htm>; Comment Letter from John C. Guerra, Jr., Chief Executive Officer, New America Alliance, to Elizabeth M. Murphy, Secretary, SEC (Sept. 2, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-31.pdf>.

⁸⁷ See *supra* note 83.

⁸⁸ Comment Letter from Cleary Gottlieb Steen & Hamilton LLP to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-118.pdf>; Comment Letter from Alexander M. Cutler, Chairman and Chief Executive Officer of Eaton Corporation, Chair of Corporate Leadership Initiative, Business Roundtable, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-69.pdf>; Comment Letter from John C. Guerra, Jr., Chief Executive Officer, New America Alliance, to Elizabeth M. Murphy, Secretary, SEC (Sept. 2, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-31.pdf>.

⁸⁹ Comment Letter from Cleary Gottlieb Steen & Hamilton LLP to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-118.pdf>; Comment Letter from Alexander M. Cutler, Chairman and Chief Executive Officer of Eaton Corporation, Chair of Corporate Leadership Initiative, Business Roundtable, to Elizabeth M. Murphy, Secretary, SEC (Sept. 15, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-69.pdf> (additional diversity disclosure would not be helpful); Comment Letter from John C. Guerra, Jr., Chief Executive Officer, New America Alliance, to Elizabeth M. Murphy, Secretary, SEC (Sept. 2, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-31.pdf> (mentioning diversity as a factor would degrade female and minority candidates).

⁹⁰ Comment Letter from Jeffrey W. Rubin, Chair of the Committee on Federal Regulation of Securities, American Bar Association, to U.S. Securities and Exchange Commission (Oct. 16, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-152.pdf>.

⁹¹ Comment Letter from Roger Clegg, President and General Counsel, Center for Equal Opportunity, to Securities and Exchange Commission (Sept. 1, 2009), *available at* <http://www.sec.gov/comments/s7-13-09/s71309-26.htm>.

perspectives can be achieved through consideration of a number of different criteria, including gender, ethnicity, geographical origin, educational background, professional experience or any number of other factors. Each company should take into account factors based on its own business model and specific needs and disclose the rationale for the criteria used.⁹²

In adopting its final rule, the Commission acknowledged that disclosure of “how the board considers and addresses diversity, as well as the board’s assessment of the implementation of its diversity policy, if any,” would be useful to investors in evaluating the leadership of the companies.⁹³ Furthermore, the Commission observed that a large number of commenters considered board diversity a significant means to: (a) provide relevant information to shareholders about corporate culture and governance practices, allowing them to make informed voting and investment decisions; and (b) measure the financial performance and recruiting ability of the companies.⁹⁴ In the light of the positive response regarding board diversity disclosure, the Commission adopted amendments requiring disclosure in proxy statements of any company policy relating to board diversity.⁹⁵

3. Requiring Diversity Disclosure: The Final Rule

On December 16, 2009, the SEC amended Item 407(c)(2)(vi) of Regulation S-K⁹⁶ to require disclosure of

whether, and if so how, the nominating committee (or the board) considers diversity in identifying nominees for director. If the nominating committee (or the board) has a policy with regard to the consideration of diversity in identifying director-nominees, describe how this policy is

⁹² Comment Letter from Hye-Won Choi, Senior Vice President and Head of Corporate Governance, TIAA-CREF, to Elizabeth M. Murphy, Secretary, SEC (Sept. 8, 2009), available at <http://www.sec.gov/comments/s7-13-09/s71309-32.pdf>; see also Coll. Ret. Equity Fund, Proxy Statement 24, 25 (Form DEF 14A) (Jun. 9, 2010) (“Although CREF does not have a formal policy regarding diversity, in preparing a slate of Trustee candidates, the Nominating and Governance Committee seeks to ensure a broad, diverse representation of academic, business and professional experience and gender, race and age.”).

⁹³ Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343 (Dec. 23, 2009) (codified at 17 C.F.R. pt. 229).

⁹⁴ See *id.* (noting that the commenters cited “meaningful relationship between diverse boards and improved corporate financial performance, and that diverse boards can help companies more effectively recruit talent and retain staff”).

⁹⁵ *Id.* (“Consequently, we are adopting amendments to Item 407(c) of Regulation S-K to require disclosure of whether, and if so how, a nominating committee considers diversity in identifying nominees for director.”).

⁹⁶ 17 C.F.R. § 229.407(c)(2)(vi) (2011). Regulation S-K contains the SEC’s disclosure guidelines that explain in detail what needs to be disclosed in the various SEC Forms and Schedules that set forth the line-item disclosure requirements. See also 2 HAZEN, SECURITIES REGULATION, *supra* note 33, § 9.4 (generally discussing Regulation S-K).

implemented, as well as how the nominating committee (or the board) assesses the effectiveness of its policy.⁹⁷

Prior to this amendment, the SEC only required “disclosure of any specific minimum qualifications that a nominating committee believes must be met by a nominee for a position on the board.”⁹⁸ The amendment became effective as of February 28, 2010.⁹⁹ The impact of the new disclosure requirement is discussed in Part IV below.

a. No Definition of Diversity

The SEC explicitly refused to define diversity.¹⁰⁰ Rather, the amendment left the definition of diversity open for companies to individually define.¹⁰¹ The Commission recognized that a company might conceptualize diversity in different ways and place varying emphasis on certain traits it considered diverse.¹⁰² Although not defining diversity for the purpose of the enhanced disclosure requirements, the SEC Commission identified traits that might constitute diversity: different viewpoints, professional experience, education, skill, race, gender, national origin, and other individual qualities that contribute to board heterogeneity.¹⁰³ The Commission further noted that leaving companies to define diversity for themselves seemed appropriate in light of the purpose behind the amendment.¹⁰⁴

Some observers have criticized the SEC’s failure to define diversity.¹⁰⁵ We believe, however, that providing companies the opportunity to craft their own definition gives investors additional insights as to what the company deems important with respect to diversity on the board.¹⁰⁶ In a

⁹⁷ 17 C.F.R. § 229.407(c)(2)(vi).

⁹⁸ See Proxy Disclosure Enhancements, 74 Fed. Reg. 35,076, 35,084 (July 17, 2009) (codified at 17 C.F.R. pt. 229) (discussing disclosure requirements that did not include diversity, as Item 407(c)(2)(v) of Regulation S-K currently requires).

⁹⁹ Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334 (Dec. 23, 2009) (codified at 17 C.F.R. pt. 229).

¹⁰⁰ *Id.* at 68,344 (“[W]e have not defined diversity in the amendments.”).

¹⁰¹ *Id.*

¹⁰² *Id.* (“We recognize that companies may define diversity in various ways, reflecting different perspectives.”).

¹⁰³ *Id.* (“[S]ome companies may conceptualize diversity expansively to include differences of viewpoint, professional experience, education, skill and other individual qualities and attributes that contribute to board heterogeneity, while others may focus on diversity concepts such as race, gender and national origin.”).

¹⁰⁴ *Id.* (“We believe that for purposes of this disclosure requirement, companies should be allowed to define diversity in ways that they consider appropriate.”).

¹⁰⁵ See Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855, 874 (2011) (identifying the absence of a definition as “perhaps most devastating to the rule’s potential effectiveness”).

¹⁰⁶ See Thomas Lee Hazen, *Diversity on Corporate Boards: Limits of the Business Case and the Connection Between Supporting Rationales and the Appropriate Response of the Law*, 89 N.C. L. REV. 887, 896–97 (2011).

Reasonable people can differ as to what type of diversity is beneficial to corporate governance. Limiting the concept of diversity would seem to be at odds with the

later section, we discuss the various approaches companies have taken in response to the enhanced disclosure requirement.¹⁰⁷

b. Diversity Policy is Not Mandated

While Regulation S-K, as amended, requires disclosure of whether (and, if so, how) diversity is considered in identifying director-nominees, it does not require the nominating committee to consider diversity.¹⁰⁸ Regulation S-K, as amended, does not require the nominating committee to have a diversity “policy.”¹⁰⁹ However, if there is such a policy, the proxy must disclose both how the policy is implemented and how the nominating committee assesses the effectiveness of the policy.¹¹⁰ Thus, disclosure is required only for those companies that choose to consider diversity as a factor in their director nomination process. The disclosure requirement could have a salutary impact. For example, in discussing the potential effects of the diversity disclosure rule, the Commission noted that some companies might consider it beneficial to adopt a formal diversity policy in light of the new disclosure rule.¹¹¹ This, in turn, might encourage boards to consider a wider range of potential candidates and cause changes in board composition.¹¹² As discussed below, the majority of companies appear to have included a reference to board diversity in their proxies even if they have not formally adopted a diversity policy.¹¹³ A review of proxy statements before and after the new disclosure requirements reveals that the new rule significantly increased the number of companies addressing board diversity in some respect in their proxy statement.

c. Possible Collateral Impact—Board Diversity and Director Independence

The SEC observed that requiring diversity disclosure might have unintended positive benefits on director independence.¹¹⁴ As previously

purpose of the rule. The required disclosures are designed to inform investors as to what diversity policies are in place. A definition of diversity might result in unduly limiting what investors can learn from the disclosures.

Id. at 896.

¹⁰⁷ See *infra* Part IV.

¹⁰⁸ Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,343–44 (Dec. 23, 2009) (codified at 17 C.F.R. pt. 229).

¹⁰⁹ *Id.*

¹¹⁰ See *id.* at 68,355 (discussing how amendments were not intended to “steer” companies’ behavior into adopting diversity policy).

¹¹¹ See *id.* (“A board may determine, in connection with preparing its disclosure, that it is beneficial to disclose and follow a policy of seeking diversity.”).

¹¹² See *id.* (discussing how the new rule may “induce beneficial changes in board composition . . . [s]uch a policy may encourage boards to conduct broader director searches, evaluating a wider range of candidates and potentially improving board quality”).

¹¹³ See *infra* Part IV.B.

¹¹⁴ Proxy Disclosure Enhancements, 74 Fed. Reg. 68,334, 68,355 (Dec. 23, 2009) (“To the extent that boards branch out from the set of candidates they would ordinarily consider, they may nominate

discussed, diversity disclosure may encourage boards to consider a wider range of candidates in the nomination process, including candidates who might be less likely to have ties to the current board. Finally, the Commission noted, an “increase in board independence could potentially improve governance [of the company] . . . by encouraging consideration of a broader range of views.”¹¹⁵

4. SEC Comment Letters on Diversity Disclosure Proxy Language

The SEC has issued several comment letters on proxies submitted after the effective date of the diversity disclosure rule that have questioned the adequacy of a company’s disclosure of its consideration of diversity in nominating directors. For instance, in a letter dated April 7, 2010, to Baxter International, Inc., the SEC commented on the company’s proxy filed on March 19, 2010:

We note your disclosure . . . that “[d]iversity of background” is a relevant factor in the selection of directors process. In future filings please describe how this policy is implemented, as well as how the corporate governance committee assesses the effectiveness of its policy as requested by Item 407(c)(2)(vi) of Regulation S-K.¹¹⁶

The company’s response to this comment indicated that it believed that it had described how diversity was “considered,” and that because it did not view this statement as a diversity “policy,” it was not obligated to then also describe how the policy was implemented and assessed.

The disclosure referred to . . . was intended to address the requirements set forth in Item 407(c)(2)(vi) of Regulation S-K that companies indicate whether, and if so how, diversity is *considered* in identifying directors. As disclosed, Baxter’s Corporate Governance Guidelines provide that “[d]iversity of background, including diversity of gender, race, ethnic or national origin, age, and experience in business, government and education and in healthcare, science, technology and other areas relevant to the Company’s activities,” is a *factor* in the director selection process. As a result of this *guideline*, the Corporate Governance Committee may *consider* diversity of background as a *relevant factor* in the director nomination

directors who have fewer existing ties to the board or management and are, consequently, more independent.”).

¹¹⁵ *Id.*

¹¹⁶ Letter from Kate Tillan, Assistant Chief Accountant, SEC, to Robert M. Davis, Chief Financial Officer, Baxter International, Inc. (Apr. 7, 2010), *available at* <http://www.sec.gov/Archives/edgar/data/10456/00000000010018837/filename1.pdf>.

process If such a *policy* is adopted, we will provide disclosure on the existence of the policy as well as how such policy is *implemented* and *assessed* for effectiveness in future filings. Based on your comment, we will however clarify our use of diversity in the director nomination process in future filings.¹¹⁷

The specific language of Item 407(c)(2)(vi) was being read differently, perhaps more loosely, by the SEC staff than by Baxter International, as demonstrated by the exchange between the SEC and Baxter International above. Indeed, Commissioner Luis A. Aguilar, the SEC Commissioner who spearheaded this new rule, in a speech on September 16, 2010, criticized those companies that “provided only abstract disclosure – often times limiting their disclosure to a brief statement indicating diversity was something considered as part of an informal policy.”¹¹⁸ Such a statement, however, appears to us to meet the requirements of the Item, which we read as distinguishing between *considering* diversity and *implementing* and *assessing* a diversity *policy* if one exists. Commissioner Aguilar and the SEC staff seem to be concluding that if a company considers diversity as a factor in board nominations, it has a *policy* with respect to diversity, as to which implementation and assessment must be discussed. It is clear that a number of companies, as do we, read the language differently.¹¹⁹

IV. COMPLIANCE WITH THE DIVERSITY DISCLOSURE RULE

We examined the proxy statements of the Fortune 100 companies in the year following the effective date of the new diversity policy disclosure rule. We then compared the discussion of the board nomination process included in those proxies with the language used by the companies in the year preceding the effective date of the rule.¹²⁰

¹¹⁷ Letter from Robert M. Davis, Chief Financial Officer, Baxter International, Inc., to Kate Tillan, Assistant Chief Accountant, SEC (Apr. 30, 2010), available at <http://sec.gov/Archives/edgar/data/10456/000095012310042066/filename1.htm> (emphasis added).

¹¹⁸ Aguilar, *supra* note 84, at 2. Commissioner Aguilar’s description of the rule is that it requires a company to disclose “whether diversity is a factor in considering candidates for nomination to the board of directors, how diversity is considered in that process, and how the company assesses the effectiveness of its policy for considering diversity.” *Id.*

¹¹⁹ See *infra* note 128.

¹²⁰ See Thomas Lee Hazen & Lissa Lamkin Broome, *Board Diversity Research*, UNC SCHOOL OF LAW, <https://ddi.law.unc.edu/research/default.aspx> (last visited Jan. 3, 2012) (providing a spreadsheet compiling our results).

A. Consideration of Diversity in the Nomination of Directors

Ninety of the Fortune 100 companies issued proxies in both of the relevant years.¹²¹ Two of these ninety companies, Hewlett-Packard Company¹²² and American Express Company,¹²³ did not specifically address

¹²¹ Four of the Fortune 100 companies are mutual insurance companies owned by policyholders and are not publicly traded. State Farm Assoc. Funds Trust, Proxy Statement 10 (Form DEF 14A) (Apr. 22, 2005); LIBERTY MUT. INS. GRP., 2010 ANNUAL REPORT 72 (2011); New York Life Ins. Co., *About New York Life*, N.Y. LIFE INS. CO., available at <http://www.newyorklife.com/financialstrength> (last visited Jan. 3, 2011); *Our Company*, MASSMUTUAL FIN. GRP., <http://www.massmutual.com/aboutmassmutual/ourcompany/mutualstructure> (last visited Jan. 3, 2011). Two additional companies went into government conservatorship in September 2008; so, their federal regulator, the Federal Housing Finance Agency, has selected and approved the directors. *Corporate Governance Under Conservatorship*, FREDDIE MAC, <http://www.freddiemac.com/governance/> (last visited Jan. 3, 2011); *Corporate Governance: Board of Directors*, FANNIE MAE, <http://www.fanniemae.com/kb/index?page=home&c=aboutus> (last visited Jan. 3, 2011). One company, Motors Liquidation Company, is the former General Motors Corporation, which filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on June 1, 2009. MOTORS LIQUIDATION COMPANIES, <http://www.motorsliquidation.com> (last visited Jan. 3, 2011). The eighth company, Enterprise GP Holdings, L.P., merged in 2010 into Enterprise Products Partners, L.P., so there was no proxy issued by Enterprise GP Holdings after the effective date of the diversity policy disclosure rule. GP Holdings L.P., Current Report 1 (Form 8-K) (Nov. 22, 2010). The ninth company, CHS Inc., is an agricultural cooperative that does not issue proxy statements. See *Corporate Governance*, CHS INC., http://www.chsinc.com/portal/server.pt/community/2corporate_governance/353 (last visited Jan. 3, 2011). Its board members must be members of the cooperative, active farmers or ranchers, and representatives of specific regions. *Id.* The tenth company, HCA, Inc., went private in 2006. *Our History*, HCA, INC., <http://hcahealthcare.com/about/our-history.dot> (last visited Sept. 13, 2011).

Although Motors Liquidation Co is not included in this sample because it did not issue proxy statements during the two years studied, its predecessor company's pre-insolvency DEF 14A (Apr. 25, 2008) and the post-insolvency DEF 14A (Apr. 21, 2011), are virtually identical except that the latter version includes several new sentences regarding diversity and defining it broadly to mean a variety of opinions, perspectives, personal and professional experiences, and backgrounds, such as gender, race, ethnicity, or country of origin. See Gen. Motors Corp., Proxy Statement (Form DEF 14A) (Apr. 25, 2008); Gen. Motors Co., Proxy Statement 13 (Form DEF 14A) (Apr. 21, 2011). Further, the proxy states that the company believes diversity will "improve the quality of . . . decision making and enhance business performance by enabling [the company] to respond more effectively to the needs of customers, employees, suppliers, stockholders, and other stakeholders worldwide." Gen. Motors Co., Proxy Statement 13 (Form DEF 14A) (Apr. 21, 2011).

¹²² Both Hewlett-Packard Company's February 1, 2011 and January 27, 2010 proxy statements were identical with respect to the criteria for board nominees, stating: "[M]embers of the Board should have the highest professional and personal ethics and values, consistent with longstanding HP values and standards. They should have broad experience at the policy-making level in business, government, education, technology or public service." Compare Hewlett-Packard Co., Proxy Statement 18 (Form DEF 14A) (Feb. 1, 2011), with Hewlett-Packard Co., Proxy Statement 18 (Form DEF 14A) (Jan. 27, 2010) (issued after the final rule was published but before its February 28, 2010 effective date).

¹²³ The language in the American Express Company's March 16, 2010 proxy and in its March 16, 2009 proxy was identical with respect to the minimum qualifications for director-nominees:

The minimum characteristics that the Nominating Committee believes must be met for a candidate to be nominated include integrity, independence, energy, forthrightness, strong analytical skills and the willingness to devote appropriate time and attention to the Company's affairs. Candidates should also demonstrate a willingness to work as part of a team in an atmosphere of trust and a commitment to represent the interests of all shareholders rather than those of a specific constituency. Candidates are assessed based on their history of achievement, background, specific skills, expertise or experience, personal attributes and professional dealings.

Am. Express Co., Proxy Statement 10 (Form DEF 14A) (Mar. 15, 2010); Am. Express Co., Proxy Statement 8-9 (Form DEF 14A) (Mar. 13, 2009). The 2011 proxy, however, added the following sentence: "The Nominating Committee considers diversity, including gender and racial diversity, in its recruitment of directors and considers that the current Board reflects diversity of skills, backgrounds, and experiences." Am. Express Co., Proxy Statement 11 (Form DEF 14A) (Mar. 22, 2011).

whether diversity is considered in identifying director-nominees. One could argue that by omitting any reference to diversity as a consideration, the companies do not specifically consider diversity in their director nomination process, and additionally that they do not have a specific diversity policy. Absent this construction of the proxies, it would seem that failure to address diversity violates the amended Regulation S-K. One company, Berkshire Hathaway, Incorporated, complied with the new requirement by stating that it does not have a policy regarding consideration of diversity in nominating directors, and, further, that it “does not seek diversity, however defined,” thereby explaining how the company “considers” diversity in the nomination process.¹²⁴ This leaves eighty-eight of ninety companies¹²⁵ that

¹²⁴ The proxy issued after the effective date of the Regulation S-K Amendments specifically added to its prior year’s language regarding director nomination: “Berkshire does not have a policy regarding the consideration of diversity in identifying nominees for director. In identifying director-nominees, the Governance, Compensation and Nominating Committee does not seek diversity, however defined.” Berkshire Hathaway Inc., Proxy Statement 5 (Form DEF 14A) (Mar. 12, 2010). The criteria cited for director-nominees were “very high integrity, business savvy, an owner-oriented attitude and a deep genuine interest in the Company.” *Id.* Similar language was included in the 2009 proxy: “individuals who have a meaningful interest in Berkshire stock, are shareholder-oriented and possess business savvy.” Berkshire Hathaway Inc., Proxy Statement 4 (Form DEF 14A) (Mar. 13, 2009).

¹²⁵ Wal-Mart Stores, Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 19, 2010); ExxonMobil Corp., Proxy Statement 10 (Form DEF 14A) (Apr. 13, 2010); Chevron Corp., Proxy Statement 8 (Form DEF 14A) (Apr. 15, 2010); Gen. Elec. Co., Proxy Statement 16 (Form DEF 14A) (Mar. 9, 2010); Bank of Am. Corp., Proxy Statement 15 (Form DEF 14A) (Mar. 17, 2010); ConocoPhillips, Proxy Statement 13 (Form DEF 14A) (Mar. 31, 2010); AT&T Inc., Proxy Statement 4 (Form DEF 14A) (Mar. 11, 2010); Ford Motor Co., Proxy Statement 5 (Form DEF 14A) (Apr. 1, 2010); JPMorgan Chase & Co., Proxy Statement 1 (Form DEF 14A) (Mar. 31, 2010); Berkshire Hathaway Inc., Proxy Statement 5 (Form DEF 14A) (Mar. 12, 2010); Citigroup Inc., Proxy Statement 7 (Form DEF 14A) (Mar. 12, 2010); Verizon Commc’ns Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 22, 2010); McKesson Corp., Proxy Statement 12 (Form DEF 14A) (Jun. 21, 2010); Am. Int’l Grp., Inc., Proxy Statement 23 (Form DEF 14A) (Apr. 12, 2010); Cardinal Health, Inc., Proxy Statement 26 (Form DEF 14A) (Sept. 15, 2010); CVS Caremark Corp., Proxy Statement 5 (Form DEF 14A) (Mar. 29, 2010); Wells Fargo & Co., Proxy Statement 41–42 (Form DEF 14A) (Mar. 18, 2010); Int’l Bus. Machs. Corp., Proxy Statement 8 (Form DEF 14A) (Mar. 8, 2010); UnitedHealth Grp. Inc., Proxy Statement 13 (Form DEF 14A) (Apr. 14, 2010); The Procter & Gamble Co., Proxy Statement 5 (Form DEF 14A) (Aug. 27, 2010); The Kroger Co., Proxy Statement 15 (Form DEF 14A) (May 14, 2010); AmerisourceBergen Corp., Proxy Statement 18 (Form DEF 14A) (Jan. 14, 2011); Costco Wholesale Corp., Proxy Statement 7 (Form DEF 14A) (Dec. 13, 2010); Valero Energy Corp., Proxy Statement 6 (Form DEF 14A) (Mar. 19, 2010); Archer-Daniels-Midland Co., Proxy Statement 5 (Form DEF 14A) (Sept. 24, 2010); The Boeing Co., Proxy Statement 3 (Form DEF 14A) (Mar. 15, 2010); The Home Depot, Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 7, 2010); Target Corp., Proxy Statement 13 (Form DEF 14A) (Apr. 29, 2010); WellPoint, Inc., Proxy Statement 10–11 (Form DEF 14A) (Apr. 2, 2010); Walgreen Co., Proxy Statement 16 (Form DEF 14A) (Nov. 22, 2010); Johnson & Johnson, Proxy Statement 3 (Form DEF 14A) (Mar. 17, 2010); Medco Health Solutions, Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 31, 2010); Microsoft Corp., Proxy Statement 9 (Form DEF 14A) (Sept. 30, 2010); United Tech. Corp., Proxy Statement 15 (Form DEF 14A) (Feb. 25, 2011); Dell Inc., Proxy Statement 3 (Form DEF 14A) (May 27, 2010); The Goldman Sachs Grp., Inc., Proxy Statement 7 (Form DEF 14A) (Apr. 7, 2010); Pfizer Inc., Proxy Statement 6, 12–13 (Form DEF 14A) (Mar. 16, 2010); Marathon Oil Corp., Proxy Statement 15 (Form DEF 14A) (Mar. 8, 2010); Lowe’s Cos. Inc., Proxy Statement 14 (Form DEF 14A) (Apr. 12, 2010); United Parcel Serv., Inc., Proxy Statement 11 (Form DEF 14A) (Mar. 15, 2010); Lockheed Martin Corp., Proxy Statement 11 (Form DEF 14A) (Mar. 12, 2010); Best Buy Co., Proxy Statement 16 (Form DEF 14A) (May 11, 2010); The Dow Chem. Co., Proxy Statement 10 (Form DEF 14A) (Mar. 31, 2010); Supervalu Inc., Proxy Statement 8 (Form DEF 14A) (May 12, 2010); Sears Holdings Corp., Proxy Statement 9–10 (Form DEF 14A) (Apr. 6, 2010); Int’l Assets Holding Corp., Proxy Statement 13–14 (Form DEF 14A) (Jan. 14, 2011); PepsiCo, Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 23, 2010); MetLife, Inc., Proxy Statement 19 (Form DEF 14A) (Mar. 23, 2010); Safeway Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 1, 2010); Kraft Foods Inc., Proxy Statement 1–2 (Form DEF 14A) (Mar. 30, 2010); Sysco Corp.,

at least considered diversity in their proxies after the effective date of the rule, compared to sixty-two companies¹²⁶ that discussed diversity in the

Proxy Statement 6 (Form DEF 14A) (Sept. 29, 2010); Apple Inc., Proxy Statement 10–11 (Form DEF 14A) (Jan. 7, 2011); The Walt Disney Co., Proxy Statement 6 (Form DEF 14A) (Jan. 28, 2011); Cisco Sys., Inc., Proxy Statement 14 (Form DEF 14A) (Sept. 21, 2010); Comcast Corp., Proxy Statement 15 (Form DEF 14A) (Apr. 9, 2010); FedEx Corp., Proxy Statement 22 (Form DEF 14A) (Aug. 16, 2010); Northrop Grumman Corp., Proxy Statement 13 (Form DEF 14A) (Apr. 9, 2010); Intel Corp., Proxy Statement 4 (Form DEF 14A) (Apr. 2, 2010); Aetna Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 12, 2010); Prudential Fin., Inc., Proxy Statement 4, 9 (Form DEF 14A) (Mar. 22, 2010); Caterpillar Inc., Proxy Statement 12 (Form DEF 14A) (Apr. 19, 2010); Sprint Nextel Corp., Proxy Statement 11 (Form DEF 14A) (Mar. 29, 2010); The Allstate Corp., Proxy Statement 9 (Form DEF 14A) (Apr. 1, 2010); Gen. Dynamics Corp., Proxy Statement 16 (Form DEF 14A) (Mar. 19, 2010); Morgan Stanley, Proxy Statement 3 (Form DEF 14A) (Apr. 12, 2010); The Coca-Cola Co., Proxy Statement 14 (Form DEF 14A) (Mar. 5, 2010); Humana Inc., Proxy Statement 15 (Form DEF 14A) (Mar. 9, 2010); Honeywell Int'l Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 11, 2010); Abbott Labs., Proxy Statement 9 (Form DEF 14A) (Mar. 15, 2010); News Corp., Proxy Statement 15 (Form DEF 14A) (Aug. 30, 2010); Sunoco, Inc., Proxy Statement 3 (Form DEF 14A) (Mar. 17, 2010); Hess Corp., Proxy Statement 9 (Form DEF 14A) (Mar. 25, 2010); Ingram Micro Inc., Proxy Statement 16–17 (Form DEF 14A) (Apr. 20, 2010); Time Warner Inc., Proxy Statement 16 (Form DEF 14A) (Apr. 5, 2010); Johnson Controls, Inc., Proxy Statement 19 (Form DEF 14A) (Dec. 10, 2010); Delta Air Lines, Inc. Proxy Statement 5 (Form DEF 14A) (May 17, 2010); Merck & Co., Proxy Statement 22 (Form DEF 14A) (Apr. 12, 2010); E. I. du Pont de Nemours and Co., Proxy Statement 12 (Form DEF 14A) (Mar. 19, 2010); Tyson Foods, Inc., Proxy Statement 14 (Form DEF 14A) (Dec. 17, 2010); Rite Aid Corp., Proxy Statement 18 (Form DEF 14A) (May 21, 2010); Coll. Ret. Equities Fund, Proxy Statement 24–25 (Form DEF 14A) (Jun. 9, 2010); Philip Morris Int'l Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 1, 2010); Raytheon Co., Proxy Statement 6 (Form DEF 14A) (Apr. 26, 2010); Express Scripts, Inc., Proxy Statement 5 (Form DEF 14A) (Mar. 24, 2010); The Hartford Fin. Servs. Grp., Inc., Proxy Statement 23 (Form DEF 14A) (Apr. 8, 2010); The Travelers Cos., Proxy Statement 18 (Form DEF 14A) (Mar. 17, 2010); Publix Super Mkts., Inc., Proxy Statement 6 (Form DEF 14A) (Mar. 1, 2010); Amazon.com, Inc., Proxy Statement 7 (Form DEF 14A) (Apr. 14, 2010).

¹²⁶ Wal-Mart Stores, Inc., Proxy Statement 7, 15 (Form DEF 14A) (Apr. 20, 2009); ExxonMobil Corp., Proxy Statement 7 (Form DEF 14A) (Apr. 13, 2009); Chevron Corp., Proxy Statement 19 (Form DEF 14A) (Apr. 13, 2009); Gen. Elec. Co., Proxy Statement 12 (Form DEF 14A) (Mar. 3, 2009); ConocoPhillips, Proxy Statement 13 (Form DEF 14A) (Mar. 31, 2009); Ford Motor Co., Proxy Statement 15 (Form DEF 14A) (Apr. 3, 2009); JPMorgan Chase & Co., Proxy Statement 4 (Form DEF 14A) (Mar. 31, 2009); Citigroup Inc., Proxy Statement A-1 (Form DEF 14A) (Mar. 20, 2009); Verizon Commc'ns Inc., Proxy Statement 9 (Form DEF 14A) (Mar. 23, 2009); Am. Int'l Grp., Inc., Proxy Statement A-2 (Form DEF 14A) (Jun. 5, 2009); Cardinal Health, Inc., Proxy Statement 22 (Form DEF 14A) (Sept. 23, 2009); CVS Caremark Corp., Proxy Statement 4 (Form DEF 14A) (Mar. 25, 2009); Int'l Bus. Machs. Corp., Proxy Statement 9 (Form DEF 14A) (Mar. 9, 2009); UnitedHealth Grp. Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 23, 2009); The Procter & Gamble Co., Proxy Statement 13 (Form DEF 14A) (Aug. 28, 2009); AmerisourceBergen Corp., Proxy Statement 15 (Form DEF 14A) (Jan. 22, 2010); Costco Wholesale Corp., Proxy Statement 6 (Form DEF 14A) (Dec. 18, 2009); Archer-Daniels-Midland Co., Proxy Statement 10 (Form DEF 14A) (Sept. 25, 2009); The Boeing Co., Proxy Statement 14 (Form DEF 14A) (Mar. 13, 2009); WellPoint, Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 3, 2009); Walgreen Co., Proxy Statement 8 (Form DEF 14A) (Nov. 24, 2009); Johnson & Johnson, Proxy Statement 15 (Form DEF 14A) (Mar. 11, 2009); Medco Health Solutions, Inc., Proxy Statement 14 (Form DEF 14A) (Apr. 7, 2009); Microsoft Corp., Proxy Statement 6 (Form DEF 14A) (Sept. 29, 2009); United Techs. Corp., Proxy Statement 15 (Form DEF 14A) (Feb. 26, 2010); Dell Inc., Proxy Statement 40 (Form DEF 14A) (Jun. 1, 2009); The Goldman Sachs Grp., Inc., Proxy Statement 6 (Form DEF 14A) (Apr. 6, 2009); Pfizer Inc., Proxy Statement 5, 10 (Form DEF 14A) (Mar. 12, 2009); Marathon Oil Corp., Proxy Statement 14 (Form DEF 14A) (Mar. 9, 2009); United Parcel Serv., Inc., Proxy Statement 9 (Form DEF 14A) (Mar. 16, 2009); Lockheed Martin Corp., Proxy Statement 10 (Form DEF 14A) (Mar. 13, 2009); Sears Holdings Corp., Proxy Statement 8 (Form DEF 14A) (Mar. 16, 2009); Int'l Assets Holding Corp., Proxy Statement 10–11 (Form DEF 14A) (Jan. 15, 2010); PepsiCo, Inc., Proxy Statement 18 (Form DEF 14A) (Mar. 24, 2009); Kraft Foods Inc., Proxy Statement 11 (Form DEF 14A) (Mar. 31, 2009); Sysco Corp., Proxy Statement 8 (Form DEF 14A) (Oct. 8, 2009); Apple Inc., Proxy Statement 10 (Form DEF 14A) (Jan. 12, 2010); The Walt Disney Co., Proxy Statement 5 (Form DEF 14A) (Jan. 22, 2010); Cisco Sys., Inc., Proxy Statement 10 (Form DEF 14A) (Sept. 17, 2009); Comcast Corp., Proxy Statement 14 (Form DEF 14A) (Apr. 3, 2009); Intel Corp., Proxy Statement 7 (Form DEF 14A) (Apr. 3, 2009); Aetna Inc., Proxy Statement 15 (Form DEF 14A) (Apr. 20, 2009); Prudential Fin., Inc., Proxy

context of director nominations in the year preceding the rule's effective date.¹²⁷

B. Board Policy on Diversity in Director Nominations

Although all but two of the ninety proxy-filing companies discussed how they “considered” diversity in director nominations after the rule's effective date, only ten arguably had a formal diversity policy.¹²⁸ In some instances, the proxy identified a diversity “policy,” and in others, the proxy's reference to the company's corporate governance guidelines or principles seemed to provide the basis for the policy. For example, WellPoint, Incorporated's (“Wellpoint”) 2010 proxy provides:

Our Corporate Governance Guidelines provide that our Governance Committee is to take into account the overall diversity of the Board when identifying possible nominees for director. The Committee *implements* that *policy*, and *assesses* its effectiveness, by examining the diversity of all the directors on the Board when it selects nominees for directors. The diversity of directors is one of the factors that the Governance Committee *considers*, along with the

Statement 16 (Form DEF 14A) (Mar. 20, 2009); Sprint Nextel Corp., Proxy Statement 24 (Form DEF 14A) (Mar. 30, 2009); Humana Inc., Proxy Statement 13 (Form DEF 14A) (Mar. 10, 2009); Honeywell Int'l, Inc., Proxy Statement 12 (Form DEF 14A) (Mar. 12, 2009); News Corp., Proxy Statement 10 (Form DEF 14A) (Aug. 20, 2009); Sunoco, Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 17, 2009); Hess Corp., Proxy Statement 7 (Form DEF 14A) (Mar. 26, 2009); Ingram Micro Inc., Proxy Statement 12 (Form DEF 14A) (Apr. 21, 2009); Time Warner Inc., Proxy Statement 11–12 (Form DEF 14A) (Apr. 8, 2009); Johnson Controls, Inc., Proxy Statement 12 (Form DEF 14A) (Dec. 4, 2009); Delta Air Lines, Inc., Proxy Statement 5 (Form DEF 14A) (Apr. 30, 2009); Merck & Co./Schering-Plough Corp., Proxy Statement 17 (Form DEF 14A) (Apr. 24, 2009); E. I. du Pont de Nemours and Co., Proxy Statement 4 (Form DEF 14A) (Mar. 20, 2009); Rite Aid Corp., Proxy Statement 18 (Form DEF 14A) (May 14, 2009); Philip Morris Int'l Inc., Proxy Statement 9 (Form DEF 14A) (Mar. 26, 2009); Raytheon Co., Proxy Statement 5 (Form DEF 14A) (Apr. 24, 2009); Express Scripts, Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 16, 2009); The Hartford Fin. Servs. Grp., Inc., Proxy Statement 16 (Form DEF 14A) (Apr. 13, 2009); The Travelers Cos., Proxy Statement 17 (Form DEF 14A) (Mar. 17, 2009); Amazon.com, Inc., Proxy Statement 6 (Form DEF 14A) (Apr. 17, 2009).

¹²⁷ The number of companies that discussed their consideration of diversity before the rule's effective date could reflect companies that issued proxies after the final rule was published on December 16, 2009, but before its effective date, or companies that issued proxies after the proposed rule was issued on July 10, 2009.

¹²⁸ See *supra* note 125 (listing all the companies that did consider diversity). The companies that arguably had a formal diversity policy after February 28, 2010, were The Procter & Gamble Company, Costco Wholesale Corporation, The Boeing Company, WellPoint, Incorporated, The Goldman Sachs Group, Incorporated, Marathon Oil Corporation, Best Buy Company, Sysco Corporation, Hess Corporation, and Delta Air Lines, Incorporated. The Procter & Gamble Co., Proxy Statement 6 (Form DEF 14A) (Aug. 27, 2010); Costco Wholesale Corp., Proxy Statement 7 (Form DEF 14A) (Dec. 13, 2010); The Boeing Co., Proxy Statement 3 (Form DEF 14A) (Mar. 18, 2010); WellPoint, Inc., Proxy Statement 12 (Form DEF 14A) (Apr. 1, 2010); The Goldman Sachs Grp., Inc., Proxy Statement 12 (Form DEF 14A) (Apr. 1, 2010); Marathon Oil Corp., Proxy Statement 16 (Form DEF 14A) (Mar. 8, 2010); Best Buy Co., Proxy Statement 18 (Form DEF 14A) (May 26, 2010); Sysco Corp., Proxy Statement 6 (Form DEF 14A) (Sept. 29, 2010); Hess Corp., Proxy Statement 10 (Form DEF 14A) (Mar. 25, 2010); Delta Air Lines, Inc., Proxy Statement 5 (Form DEF 14A) (May 17, 2010).

other selection criteria described above.¹²⁹

Thus, WellPoint “considers” diversity as one of the selection criteria and also has a “policy” regarding diversity. WellPoint disclosed how the policy was implemented and assessed when it stated that director diversity is examined when the nominees for directors are selected. But there is no way to discern from this disclosure the result of that assessment. That is, does the WellPoint board believe it fulfilled its diversity policy? The language used in the proxy may be sufficient to satisfy the SEC’s requirements, but failure to require disclosure of the assessment of the diversity policy’s success may demonstrate a shortcoming of the rule as it is currently constructed.

In some of the other ten instances in which we identified a diversity “policy,” however, the language is less clear.¹³⁰ Marathon Oil Corporation (“Marathon Oil”) stated in its 2010 proxy:

The Corporate Governance and Nominating Committee is responsible for reviewing with the Board the appropriate skills and characteristics required of board members in the context of the current make-up of the Board. When we have an opening on the Board, we will always look at a diverse pool of candidates. In accordance with our Corporate Governance Principles, the *assessment* of the Board’s characteristics includes diversity, skills, such as an understanding of financial statements and financial reporting systems, manufacturing processes, technology and international experience. We view and define diversity in its broadest sense, which includes gender, ethnicity, education, experience and leadership qualities.¹³¹

It is clear that Marathon Oil “considers” diversity in identifying director-nominees. It is less clear whether, by reference to its “Corporate Governance Principles,” Marathon Oil has implicated a specific diversity “policy.” If so, has it sufficiently articulated how the policy should be implemented? Perhaps it has, by reference to its statement that when there are board openings it will always look at a diverse pool of candidates. Moreover, if this is a diversity “policy,” has it detailed how it assesses the effectiveness of this policy? The proxy statement uses the word “assessment” in reference to the board’s characteristics, including diversity, but without disclosure of the result of that assessment, we are left empty-handed.

¹²⁹ WellPoint, Inc., Proxy Statement 11 (Form DEF 14A) (Apr. 2, 2010) (emphasis added).

¹³⁰ See *supra* note 128 and accompanying text.

¹³¹ Marathon Oil Corp., Proxy Statement 15 (Form DEF 14A) (Mar. 8, 2010) (emphasis added).

C. Specific Board Demographic Information

Three of the ten companies that may have diversity “policies” provided more specific information about their board demographics to assist shareholders in forming their own judgments about the effectiveness of the board’s diversity policy.¹³² The Procter & Gamble Company, Costco Wholesale Corporation, and Sysco Corporation each reported the number of female and ethnically-diverse members on their boards.¹³³ Three other companies also volunteered specific information about the demographic composition of their boards.¹³⁴ This information permits investors to judge for themselves how successful the company has been in considering diversity. Indeed, we wrote a comment letter to the SEC on the proposed rule urging it to require disclosure of each board’s demographic characteristics, along with other background information mandated for each director-nominee.¹³⁵

D. Disavowal of Diversity Policy

Twenty-eight companies specifically stated that they did *not* have a formal diversity policy even though they may have “considered” diversity in selecting director-nominees.¹³⁶ These companies may have elected not to

¹³² See *supra* note 128 (lists companies that arguably have a diversity policy); *infra* notes 134, 135 (listing companies that provided specific information about their board demographics).

¹³³ The Procter & Gamble Co., Proxy Statement 5 (Form DEF 14A) (Aug. 27, 2010) (“Three [board members] are women; two are African-American; one is Mexican; and one is Indian.”); Costco Wholesale Corp., Proxy Statement 7 (Form DEF 14A) (Dec. 13, 2010) (“Currently, of the fourteen directors on the Board, two are women and one is African American.”); Sysco Corp., Proxy Statement 6 (Form DEF 14A) (Sept. 29, 2010) (“Because we value gender and racial diversity among our Board members, four of our current Board members are women, including one African American, the Chairman of the Board is Hispanic and two of current Board members are from outside the United States.”).

¹³⁴ JPMorgan Chase & Co., Proxy Statement 1 (Form DEF 14A) (Mar. 31, 2010) (“Of the 11 director-nominees, two are women and one is African-American.”); FedEx Corp., Proxy Statement 22 (Form DEF 14A) (Aug. 16, 2010) (“The Board is committed to diversity and inclusion and is always looking for highly qualified candidates, including women (such as Dr. Jackson and Ambassador Schwab) and minorities (such as Dr. Jackson and Mr. J. Smith), who meet our criteria.”); Aetna Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 12, 2010) (“We also currently have four women Directors and three African American Directors.”).

¹³⁵ Letter from Lissa Lamkin Broome & Thomas Lee Hazen, *supra* note 78. However, as discussed, the SEC requirements do not go this far.

¹³⁶ ConocoPhillips, Proxy Statement 13 (Form DEF 14A) (Mar. 31, 2010); AT&T Inc., Proxy Statement 4 (Form DEF 14A) (Mar. 11, 2010); Berkshire Hathaway Inc., Proxy Statement 5 (Form DEF 14A) (Mar. 12, 2010); McKesson Corp., Proxy Statement 12 (Form DEF 14A) (June 21, 2010); Am. Int’l Grp., Inc., Proxy Statement 23 (Form DEF 14A) (Apr. 12, 2010); CVS Caremark Corp., Proxy Statement 5 (Form DEF 14A) (Mar. 29, 2010); Wells Fargo & Co./MN, Proxy Statement 41–42 (Form DEF 14A) (Mar. 18, 2011); UnitedHealth Grp. Inc., Proxy Statement 13 (Form DEF 14A) (Apr. 14, 2010); AmerisourceBergen Corp., Proxy Statement 18 (Form DEF 14A) (Jan. 14, 2011); Medco Health Solutions, Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 31, 2010); Sears Holding Corp., Proxy Statement 10 (Form DEF 14A) (Apr. 6, 2010); PepsiCo, Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 23, 2010); Kraft Foods Inc., Proxy Statement 1 (Form DEF 14A) (Mar. 30, 2010); Northrop Grumman Corp., Proxy Statement 13 (Form DEF 14A) (Apr. 9, 2011); Aetna Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 12, 2010); Prudential Fin., Inc., Proxy Statement 9 (Form DEF 14A) (Mar. 22, 2010); Caterpillar Inc., Proxy Statement 12 (Form DEF 14A) (Apr. 19, 2010); Morgan Stanley, Proxy Statement 3 (Form DEF 14A) (Apr. 12, 2010); The Coca-Cola Co., Proxy Statement 4 (Form DEF 14A) (Mar. 5, 2010); Humana Inc., Proxy Statement 15 (Form DEF 14A) (Mar. 9, 2010); Honeywell Int’l Inc.,

adopt a policy (as well as to affirmatively disavow the existence of one even though they “consider” diversity) because of the Regulation’s extra requirements that the proxy discussion disclose how the diversity policy is implemented and how the company assesses the effectiveness of the diversity policy. The remaining companies did not affirmatively disavow a policy and did not specifically state that they had a policy or guidelines relating to diversity.¹³⁷ Fifty out of the eighty-eight companies that considered diversity fell into this category.¹³⁸

Proxy Statement 17 (Form DEF 14A) (Mar. 11, 2010); News Corp., Proxy Statement 15 (Form DEF 14A) (Aug. 30, 2010); Time Warner Inc., Proxy Statement 16 (Form DEF 14A) (Apr. 5, 2010); Merck & Co., Proxy Statement 22 (Form DEF 14A) (Apr. 12, 2010); E. I. du Pont de Nemours & Co., Proxy Statement 12 (Form DEF 14A) (Mar. 19, 2010); Tyson Foods, Inc., Proxy Statement 14 (Form DEF 14A) (Dec. 17, 2010); Coll. Ret. Equities Fund, Proxy Statement 24, 25 (Form DEF 14A) (Jun. 9, 2010); The Travelers Cos., Proxy Statement 18 (Form DEF 14A) (Mar. 17, 2010).

¹³⁷ Wal-Mart Stores, Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 19, 2010); ExxonMobil Corp., Proxy Statement 10 (Form DEF 14A) (Apr. 13, 2010); Chevron Corp., Proxy Statement 8 (Form DEF 14A) (Apr. 15, 2010); Gen. Elec. Co., Proxy Statement 16 (Form DEF 14A) (Mar. 9, 2010); Bank of Am. Corp., Proxy Statement 15 (Form DEF 14A) (Mar. 17, 2010); Ford Motor Co., Proxy Statement 5 (Form DEF 14A) (Apr. 1, 2010); JPMorgan Chase & Co., Proxy Statement 1 (Form DEF 14A) (Mar. 31, 2010); Citigroup Inc., Proxy Statement 7 (Form DEF 14A) (Mar. 12, 2010); Verizon Commc’ns Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 22, 2010); Cardinal Health, Inc., Proxy Statement 26 (Form DEF 14A) (Sept. 15, 2010); Int’l Bus. Machs. Corp., Proxy Statement 8 (Form DEF 14A) (Mar. 8, 2010); The Kroger Co., Proxy Statement 15 (Form DEF 14A) (May 14, 2010); Valero Energy Corp., Proxy Statement 6 (Form DEF 14A) (Mar. 19, 2010); Archer-Daniels-Midland Co., Proxy Statement 5 (Form DEF 14A) (Sept. 24, 2010); The Home Depot, Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 7, 2010); Target Corp., Proxy Statement 13 (Form DEF 14A) (Apr. 29, 2010); Walgreen Co., Proxy Statement 16 (Form DEF 14A) (Nov. 22, 2010); Johnson & Johnson, Proxy Statement 3 (Form DEF 14A) (Mar. 17, 2010); Microsoft Corp., Proxy Statement 9 (Form DEF 14A) (Sept. 30, 2010); United Techs. Corp., Proxy Statement 15 (Form DEF 14A) (Feb. 25, 2011); Dell Inc., Proxy Statement 3 (Form DEF 14A) (May 27, 2010); Pfizer Inc., Proxy Statement 6, 12–13 (Form DEF 14A) (Mar. 16, 2010); Lowe’s Cos. Inc., Proxy Statement 14 (Form DEF 14A) (Apr. 12, 2010); United Parcel Serv., Inc., Proxy Statement 11 (Form DEF 14A) (Mar. 15, 2010); Lockheed Martin Corp., Proxy Statement 11 (Form DEF 14A) (Mar. 12, 2010); The Dow Chem. Co., Proxy Statement 10 (Form DEF 14A) (Mar. 31, 2010); Supervalu Inc., Proxy Statement 8 (Form DEF 14A) (May 12, 2010); Int’l Assets Holding Corp., Proxy Statement 13–14 (Form DEF 14A) (Jan. 14, 2011); MetLife, Inc., Proxy Statement 19 (Form DEF 14A) (Mar. 23, 2010); Safeway Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 1, 2010); Apple Inc., Proxy Statement 10–11 (Form DEF 14A) (Jan. 7, 2011); The Walt Disney Co., Proxy Statement 6 (Form DEF 14A) (Jan. 28, 2011); Cisco Sys., Inc., Proxy Statement 14 (Form DEF 14A) (Sept. 21, 2010); Comcast Corp., Proxy Statement 15 (Form DEF 14A) (Apr. 9, 2010); FedEx Corp., Proxy Statement 22 (Form DEF 14A) (Aug. 16, 2010); Intel Corp., Proxy Statement 4 (Form DEF 14A) (Apr. 2, 2010); Sprint Nextel Corp., Proxy Statement 11 (Form DEF 14A) (Mar. 29, 2010); The Allstate Corp., Proxy Statement 9 (Form DEF 14A) (Apr. 1, 2010); Gen. Dynamics Corp., Proxy Statement 16 (Form DEF 14A) (Mar. 19, 2010); Abbott Labs., Proxy Statement 9 (Form DEF 14A) (Mar. 15, 2010); Sunoco, Inc., Proxy Statement 3 (Form DEF 14A) (Mar. 17, 2010); Ingram Micro Inc., Proxy Statement 16–17 (Form DEF 14A) (Apr. 20, 2010); Johnson Controls, Inc., Proxy Statement 19 (Form DEF 14A) (Dec. 10, 2010); Rite Aid Corp., Proxy Statement 18 (Form DEF 14A) (May 21, 2010); Philip Morris Int’l Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 1, 2010); Raytheon Co., Proxy Statement 6 (Form DEF 14A) (Apr. 26, 2010); Express Scripts, Inc., Proxy Statement 5 (Form DEF 14A) (Mar. 24, 2010); The Hartford Fin. Servs. Grp., Inc., Proxy Statement 23 (Form DEF 14A) (Apr. 8, 2010); Publix Super Mkts., Inc., Proxy Statement 6 (Form DEF 14A) (Mar. 1, 2010); Amazon.com, Inc., Proxy Statement 7 (Form DEF 14A) (Apr. 14, 2010).

¹³⁸ See *supra* note 137.

E. Definition of Diversity

As previously noted, the SEC did not define diversity.¹³⁹ Ten companies discussed diversity without providing a definition of it, including Berkshire Hathaway, Incorporated, which stated that “however defined” diversity was not considered.¹⁴⁰ Companies that defined diversity generally defined it in one of three ways: demographics such as gender, race, or ethnicity; general factors such as viewpoints or perspectives; or both gender and general diversity characteristics. By our count, thirty-nine of the ninety proxy-submitting companies described diversity with reference to demographic factors and other more general diversity factors such as experience, viewpoints, and perspective.¹⁴¹ Thirty-three companies referred only to these general diversity factors.¹⁴² Six companies referred only to

¹³⁹ See *supra* notes 100–102 and accompanying text.

¹⁴⁰ These companies are: ConocoPhillips, Proxy Statement 13 (Form DEF 14A) (Mar. 31, 2010); AT&T Inc., Proxy Statement 4 (Form DEF 14A) (Mar. 11, 2010); Ford Motor Co., Proxy Statement 5 (Form DEF 14A) (Apr. 1, 2010); Berkshire Hathaway Inc., Proxy Statement 5 (Form DEF 14A) (Mar. 12, 2010); Sears Holdings Corp., Proxy Statement 9–10 (Form DEF 14A) (Apr. 6, 2010); PepsiCo, Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 23, 2010); Prudential Fin., Inc., Proxy Statement 9 (Form DEF 14A) (Mar. 22, 2010); Johnson Controls, Inc., Proxy Statement 19 (Form DEF 14A) (Dec. 10, 2010); Express Scripts, Inc., Proxy Statement 5 (Form DEF 14A) (Mar. 24, 2010).

¹⁴¹ ExxonMobil Corp., Proxy Statement 10 (Form DEF 14A) (Apr. 13, 2010); Chevron Corp., Proxy Statement 8 (Form DEF 14A) (Apr. 15, 2010); Bank of Am. Corp., Proxy Statement 15 (Form DEF 14A) (Mar. 17, 2010); Citigroup Inc., Proxy Statement 7 (Form DEF 14A) (Mar. 12, 2010); McKesson Corp., Proxy Statement 12 (Form DEF 14A) (Jun. 21, 2010); Am. Int’l Grp., Inc., Proxy Statement 23 (Form DEF 14A) (Apr. 12, 2010); Cardinal Health, Inc., Proxy Statement 26 (Form DEF 14A) (Sept. 15, 2010); CVS Caremark Corp., Proxy Statement 5 (Form DEF 14A) (Mar. 29, 2010); The Procter & Gamble Co., Proxy Statement 5 (Form DEF 14A) (Aug. 27, 2010); Archer-Daniels-Midland Co., Proxy Statement 5 (Form DEF 14A) (Sept. 24, 2010); The Boeing Co., Proxy Statement 3 (Form DEF 14A) (Mar. 15, 2010); Walgreen Co., Proxy Statement 16 (Form DEF 14A) (Nov. 22, 2010); Johnson & Johnson, Proxy Statement 3 (Form DEF 14A) (Mar. 17, 2010); Medco Health Solutions, Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 31, 2010); Microsoft Corp., Proxy Statement 9 (Form DEF 14A) (Sept. 30, 2010); The Goldman Sachs Grp., Inc., Proxy Statement 7 (Form DEF 14A) (Apr. 7, 2010); Pfizer Inc., Proxy Statement 6, 12–13 (Form DEF 14A) (Mar. 16, 2010); Marathon Oil Corp., Proxy Statement 15 (Form DEF 14A) (Mar. 8, 2010); United Parcel Serv., Inc., Proxy Statement 11 (Form DEF 14A) (Mar. 15, 2010); Best Buy Co., Proxy Statement 16 (Form DEF 14A) (May 11, 2010); Supervalu Inc., Proxy Statement 8 (Form DEF 14A) (May 12, 2010); Sysco Corp., Proxy Statement 6 (Form DEF 14A) (Sept. 29, 2010); Comcast Corp., Proxy Statement 15 (Form DEF 14A) (Apr. 9, 2010); FedEx Corp., Proxy Statement 22 (Form DEF 14A) (Aug. 16, 2010); Northrop Grumman Corp., Proxy Statement 13 (Form DEF 14A) (Apr. 9, 2010); Intel Corp., Proxy Statement 4 (Form DEF 14A) (Apr. 2, 2010); Aetna Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 12, 2010); Morgan Stanley, Proxy Statement 3 (Form DEF 14A) (Apr. 12, 2010); The Coca-Cola Co., Proxy Statement 14 (Form DEF 14A) (Mar. 5, 2010); Humana Inc., Proxy Statement 15 (Form DEF 14A) (Mar. 9, 2010); Honeywell Int’l Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 11, 2010); Abbott Labs., Proxy Statement 9 (Form DEF 14A) (Mar. 15, 2010); News Corp., Proxy Statement 15 (Form DEF 14A) (Aug. 30, 2010); Sunoco, Inc., Proxy Statement 3 (Form DEF 14A) (Mar. 17, 2010); Merck & Co., Proxy Statement 22 (Form DEF 14A) (Apr. 12, 2010); Coll. Ret. Equities Fund, Proxy Statement 24–25 (Form DEF 14A) (Jun. 9, 2010); Philip Morris Int’l Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 1, 2010); The Hartford Fin. Servs. Grp., Inc., Proxy Statement 23 (Form DEF 14A) (Apr. 8, 2010); The Travelers Cos., Proxy Statement 18 (Form DEF 14A) (Mar. 17, 2010).

¹⁴² Wal-Mart Stores, Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 19, 2010); Gen. Elec. Co., Proxy Statement 16 (Form DEF 14A) (Mar. 9, 2010); Verizon Commc’ns Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 22, 2010); Wells Fargo & Co., Proxy Statement 41–42 (Form DEF 14A) (Mar. 18, 2010); Int’l Bus. Machs. Corp., Proxy Statement 8 (Form DEF 14A) (Mar. 8, 2010); AmerisourceBergen Corp., Proxy Statement 18 (Form DEF 14A) (Jan. 14, 2011); Costco Wholesale Corp., Proxy Statement 7 (Form DEF 14A) (Dec. 13, 2010); Target Corp., Proxy Statement 13 (Form DEF 14A) (Apr. 29, 2010); WellPoint, Inc., Proxy Statement 10–11 (Form DEF 14A) (Apr. 2, 2010);

demographic diversity factors¹⁴³ including gender and race by two companies;¹⁴⁴ gender, race, and ethnicity by three companies;¹⁴⁵ and gender, race, and national origin by one company.¹⁴⁶ Some companies also discussed national origin as a diversity factor. The general diversity definitions included a broad range of factors. For instance, the following phrases were included in at least one of the proxy statements examined: viewpoints, experiences, skills, talent, background, international background, cultural background, education, age, geographic origin, and leadership qualities.¹⁴⁷

It is clear, however, that many more companies talked about diversity after the effective date of the amended Regulation S-K than in the preceding year. By our count, while sixty-two of the ninety Fortune 100 companies filing proxies mentioned diversity in connection with board nominations in the proxy year immediately preceding the effective date of Revised Regulation S-K, eighty-six companies (twenty-four more) added diversity as at least a consideration in the proxy year following the

United Techs. Corp., Proxy Statement 15 (Form DEF 14A) (Feb. 25, 2011); Dell Inc., Proxy Statement 3 (Form DEF 14A) (May, 27, 2010); Lowe's Cos. Inc., Proxy Statement 14 (Form DEF 14A) (Apr. 12, 2010); Lockheed Martin Corp., Proxy Statement 11 (Form DEF 14A) (Mar. 12, 2010); The Dow Chem. Co., Proxy Statement 10 (Form DEF 14A) (Mar. 31, 2010); MetLife, Inc., Proxy Statement 19 (Form DEF 14A) (Mar. 23, 2010); Safeway Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 1, 2010); Kraft Foods Inc., Proxy Statement 1-2 (Form DEF 14A) (Mar. 30, 2010); The Walt Disney Co., Proxy Statement 6 (Form DEF 14A) (Jan. 28, 2011); Cisco Sys., Inc., Proxy Statement 14 (Form DEF 14A) (Sept. 21, 2010); Caterpillar Inc., Proxy Statement 12 (Form DEF 14A) (Apr. 19, 2010); Sprint Nextel Corp., Proxy Statement 11 (Form DEF 14A) (Mar. 29, 2010); The Allstate Corp., Proxy Statement 9 (Form DEF 14A) (Apr. 1, 2010); Gen. Dynamics Corp., Proxy Statement 16 (Form DEF 14A) (Mar. 19, 2010); Hess Corp., Proxy Statement 9 (Form DEF 14A) (Mar. 25, 2010); Ingram Micro Inc., Proxy Statement 16-17 (Form DEF 14A) (Apr. 20, 2010); Time Warner Inc., Proxy Statement 16 (Form DEF 14A) (Apr. 5, 2010); Delta Air Lines, Inc., Proxy Statement 5 (Form DEF 14A) (May 17, 2010); E. I du Pont de Nemours and Co., Proxy Statement 12 (Form DEF 14A) (Mar. 19, 2010); Tyson Foods, Inc., Proxy Statement 14 (Form DEF 14A) (Dec. 17, 2010); Rite Aid Corp., Proxy Statement 18 (Form DEF 14A) (May 21, 2010); Raytheon Co., Proxy Statement 6 (Form DEF 14A) (Apr. 26, 2010); Publix Super Mkts., Inc., Proxy Statement 6 (Form DEF 14A) (Mar. 1, 2010); Amazon.com, Inc., Proxy Statement 7 (Form DEF 14A) (Apr. 14, 2010).

¹⁴³ In total, seventy-eight companies provided definitions of diversity, ten did not define diversity, and the remaining two reporting companies did not address diversity at all in their description of the director nomination process.

¹⁴⁴ UnitedHealth Grp. Inc., Proxy Statement 21 (Form DEF 14A) (Apr. 13, 2011); Apple Inc., Proxy Statement 10-11 (Form DEF 14A) (Jan. 7, 2011).

¹⁴⁵ JPMorgan Chase & Co., Proxy Statement 1 (Form DEF 14A) (Mar. 31, 2010); The Kroger Co., Proxy Statement 15 (Form DEF 14A) (May 14, 2010); The Home Depot, Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 7, 2010).

¹⁴⁶ Valero Energy Corp., Proxy Statement 6 (Form DEF 14A) (Mar. 19, 2010).

¹⁴⁷ Wal-Mart Stores, Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 19, 2010) (viewpoints and experiences); McKesson Corp., Proxy Statement 12 (Form DEF 14A) (Jun. 21, 2010) (skills); Gen. Elec. Co., Proxy Statement 16 (Form DEF 14A) (Mar. 9, 2010) (age, background, and experience); Wells Fargo & Co., Proxy Statement 41-42 (Form DEF 14A) (Mar. 18, 2010) (education); The Procter & Gamble Co., Proxy Statement 5 (Form DEF 14A) (Aug. 27, 2010) (gender and international background); Archer-Daniels-Midland Co., Proxy Statement 5 (Form DEF 14A) (Sept. 24, 2010) (geographic origin); Marathon Oil Corp., Proxy Statement 15 (Form DEF 14A) (Mar. 8, 2010) (leadership qualities); Sysco Corp., Proxy Statement 6 (Form DEF 14A) (Sept. 29, 2010) (cultural background).

amendments.¹⁴⁸ The revised disclosure rule has resulted in additional consideration of diversity, and in all cases but one,¹⁴⁹ a positive consideration of diversity as a factor in selecting board nominees. Moreover, although there was no SEC-provided definition of diversity, many more companies referenced one or more of the demographic diversity factors, gender, race, and ethnicity, than referenced in the past. Only nine companies referenced gender as a factor in director selection in the proxy year preceding the amendments to the rule, while forty-one referenced gender in the proxy year following the rule, a 356% increase.¹⁵⁰ Only two

¹⁴⁸ These companies included: Bank of Am. Corp., Proxy Statement 15 (Form DEF 14A) (Mar. 17, 2010); AT&T Inc., Proxy Statement 4 (Form DEF 14A) (Mar. 10, 2011); McKesson Corp., Proxy Statement 12 (Form DEF 14A) (Jun. 21, 2010); Wells Fargo & Co., Proxy Statement 41 (Form DEF 14A) (Mar. 18, 2010); The Kroger Co., Proxy Statement 15 (Form DEF 14A) (May 14, 2010); Valero Energy Corp., Proxy Statement 6 (Form DEF 14A) (Mar. 19, 2010); The Home Depot, Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 7, 2010); Target Corp., Proxy Statement 13 (Form DEF 14A) (Apr. 29, 2010); Lowe's Cos. Inc., Proxy Statement 14 (Form DEF 14A) (Apr. 12, 2010); Best Buy Co., Proxy Statement 16 (Form DEF 14A) (May 11, 2010); The Dow Chem. Co., Proxy Statement 10 (Form DEF 14A) (Mar. 31, 2010); Supervalu Inc., Proxy Statement 8 (Form DEF 14A) (May 12, 2010); MetLife, Inc., Proxy Statement 19 (Form DEF 14A) (Mar. 23, 2010); Safeway Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 1, 2010); FedEx Corp., Proxy Statement 22 (Form DEF 14A) (Aug. 16, 2010); Northrop Grumman Corp., Proxy Statement 13 (Form DEF 14A) (Apr. 9, 2010); Caterpillar Inc., Proxy Statement 12 (Form DEF 14A) (Apr. 19, 2010); Gen. Dynamics Corp., Proxy Statement 16 (Form DEF 14A) (Mar. 19, 2010); Morgan Stanley, Proxy Statement 3 (Form DEF 14A) (Apr. 12, 2010); The Coca-Cola Co., Proxy Statement 14 (Form DEF 14A) (Mar. 5, 2010); Abbott Labs., Proxy Statement 9 (Form DEF 14A) (Mar. 15, 2010); Tyson Foods, Inc., Proxy Statement 14 (Form DEF 14A) (Dec. 17, 2010); Coll. Ret. Equities Fund, Proxy Statement 24 (Form DEF 14A) (Jun. 9, 2010); Publix Super Mkts., Inc., Proxy Statement 6 (Form DEF 14A) (Mar. 1, 2010).

¹⁴⁹ Berkshire Hathaway "does not seek diversity, however defined." Berkshire Hathaway Inc., Proxy Statement 5 (Form DEF 14A) (Mar. 12, 2010).

¹⁵⁰ The companies that referenced gender in the proxy year preceding the amendments to the rule were: The Procter & Gamble Co., Proxy Statement 13 (Form DEF 14A) (Aug. 28, 2009); Johnson & Johnson, Proxy Statement 15 (Form DEF 14A) (Mar. 11, 2009); Microsoft Corp., Proxy Statement 5 (Form DEF 14A) (Sept. 29, 2009); Pfizer Inc., Proxy Statement 5, 10 (Form DEF 14A) (Mar. 12, 2009); Apple Inc., Proxy Statement 10 (Form DEF 14A) (Jan. 12, 2010); News Corp., Proxy Statement 10 (Form DEF 14A) (Aug. 20, 2009); Sunoco, Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 17, 2009); Time Warner Inc., Proxy Statement 12 (Form DEF 14A) (Apr. 8, 2009); Merck & Co./Schering-Plough Corp., Proxy Statement 17 (Form DEF 14A) (Apr. 24, 2009).

The forty-one companies that referenced gender in the year following the rule were: ExxonMobil Corp., Proxy Statement 10 (Form DEF 14A) (Apr. 13, 2010); Chevron Corp., Proxy Statement 8 (Form DEF 14A) (Apr. 15, 2010); JPMorgan Chase & Co., Proxy Statement 1 (Form DEF 14A) (Mar. 31, 2010); Citigroup Inc., Proxy Statement 7 (Form DEF 14A) (Mar. 12, 2010); McKesson Corp., Proxy Statement 12 (Form DEF 14A) (Jun. 21, 2010); Am. Int'l Grp., Inc., Proxy Statement 23 (Form DEF 14A) (Apr. 12, 2010); Cardinal Health, Inc., Proxy Statement 26 (Form DEF 14A) (Sept. 15, 2010); CVS Caremark Corp., Proxy Statement 5 (Form DEF 14A) (Mar. 29, 2010); UnitedHealth Grp. Inc., Proxy Statement 13 (Form DEF 14A) (Apr. 14, 2010); The Procter & Gamble Co., Proxy Statement 5 (Form DEF 14A) (Aug. 27, 2010); The Kroger Co., Proxy Statement Proxy Statement 15 (Form DEF 14A) (May 14, 2010); Valero Energy Corp., Proxy Statement 6 (Form DEF 14A) (Mar. 19, 2010); Archer-Daniels-Midland Co., Proxy Statement 5 (Form DEF 14A) (Sept. 24, 2010); The Boeing Co., Proxy Statement 3 (Form DEF 14A) (Mar. 15, 2010); The Home Depot, Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 7, 2010); Walgreen Co., Proxy Statement 16 (Form DEF 14A) (Nov. 22, 2010); Johnson & Johnson, Proxy Statement 3 (Form DEF 14A) (Mar. 17, 2010); Medco Health Solutions, Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 31, 2010); Microsoft Corp., Proxy Statement 9 (Form DEF 14A) (Sept. 30, 2010); Pfizer Inc., Proxy Statement 6, 12-13 (Form DEF 14A) (Mar. 16, 2010); Marathon Oil Corp., Proxy Statement 15 (Form DEF 14A) (Mar. 8, 2010); United Parcel Serv., Inc., Proxy Statement 11 (Form DEF 14A) (Mar. 15, 2010); Best Buy Co., Proxy Statement 16 (Form DEF 14A) (May 11, 2010); Supervalu Inc., Proxy Statement 8 (Form DEF 14A) (May 12, 2010); Sysco Corp., Proxy Statement 6 (Form DEF 14A) (Sept. 29, 2010); Apple Inc., Proxy Statement 10-11 (Form DEF 14A) (Jan. 7, 2011); Comcast Corp., Proxy Statement 15 (Form DEF 14A) (Apr. 9, 2010); FedEx Corp., Proxy

companies mentioned race in the year preceding the proxy rule amendments, while twenty-five companies included race as a factor in the year following the rule, an 1150% increase.¹⁵¹ Finally, ethnicity and national origin as diversity factors increased from seven instances in the year preceding the effective date of the rule to twenty-seven instances in the year following the effective date of the rule, a 286% increase.¹⁵²

Statement 22 (Form DEF 14A) (Aug. 16, 2010); Northrop Grumman Corp., Proxy Statement 13 (Form DEF 14A) (Apr. 9, 2010); Intel Corp., Proxy Statement 4 (Form DEF 14A) (Apr. 2, 2010); Aetna Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 12, 2010); The Coca-Cola Co., Proxy Statement 14 (Form DEF 14A) (Mar. 5, 2010); Humana Inc., Proxy Statement 15 (Form DEF 14A) (Mar. 9, 2010); Honeywell Int'l Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 11, 2010); Abbott Labs., Proxy Statement 9 (Form DEF 14A) (Mar. 15, 2010); News Corp., Proxy Statement 15 (Form DEF 14A) (Aug. 30, 2010); Sunoco, Inc., Proxy Statement 3 (Form DEF 14A) (Mar. 17, 2010); Merck & Co., Proxy Statement 22 (Form DEF 14A) (Apr. 12, 2010); Coll. Ret. Equities Fund, Proxy Statement 24-25 (Form DEF 14A) (Jun. 9, 2010); The Hartford Fin. Servs. Grp., Inc., Proxy Statement 23 (Form DEF 14A) (Apr. 8, 2010); The Travelers Cos., Proxy Statement 18 (Form DEF 14A) (Mar. 17, 2010).

¹⁵¹ The two companies that mentioned race in the year preceding the rule were: The Procter & Gamble Co., Proxy Statement 14 (Form DEF 14A) (Aug. 28, 2009); Merck & Co./Schering-Plough Corp., Proxy Statement 17 (Form DEF 14A) (Apr. 24, 2009).

The twenty-five companies that mentioned race after the rule were: Chevron Corp., Proxy Statement 8 (Form DEF 14A) (Apr. 15, 2010); JPMorgan Chase & Co., Proxy Statement 1 (Form DEF 14A) (Mar. 31, 2010); Citigroup Inc., Proxy Statement 7 (Form DEF 14A) (Mar. 12, 2010); McKesson Corp., Proxy Statement 12 (Form DEF 14A) (Jun. 21, 2010); Cardinal Health, Inc., Proxy Statement 26 (Form DEF 14A) (Sept. 15, 2010); CVS Caremark Corp., Proxy Statement 5 (Form DEF 14A) (Mar. 29, 2010); UnitedHealth Grp. Inc., Proxy Statement 13 (Form DEF 14A) (Apr. 14, 2010); The Procter & Gamble Co., Proxy Statement 5 (Form DEF 14A) (Aug. 27, 2010); The Kroger Co., Proxy Statement 15 (Form DEF 14A) (May 14, 2010); Valero Energy Corp., Proxy Statement 6 (Form DEF 14A) (Mar. 19, 2010); Archer-Daniels-Midland Co., Proxy Statement 5 (Form DEF 14A) (Sept. 24, 2010); The Boeing Co., Proxy Statement 3 (Form DEF 14A) (Mar. 15, 2010); The Home Depot, Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 7, 2010); Walgreen Co., Proxy Statement 16 (Form DEF 14A) (Nov. 22, 2010); Medco Health Solutions, Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 31, 2010); United Parcel Serv., Inc., Proxy Statement 11 (Form DEF 14A) (Mar. 15, 2010); Sysco Corp., Proxy Statement 6 (Form DEF 14A) (Sept. 29, 2010); Northrop Grumman Corp., Proxy Statement 13 (Form DEF 14A) (Apr. 9, 2010); Aetna Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 12, 2010); The Coca-Cola Co., Proxy Statement 14 (Form DEF 14A) (Mar. 5, 2010); Humana Inc., Proxy Statement 15 (Form DEF 14A) (Mar. 9, 2010); Merck & Co., Proxy Statement 22 (Form DEF 14A) (Apr. 12, 2010); Coll. Ret. Equities Fund, Proxy Statement 24 (Form DEF 14A) (Jun. 9, 2010); The Hartford Fin. Servs. Grp., Inc., Proxy Statement 23 (Form DEF 14A) (Apr. 8, 2010); The Travelers Cos., Proxy Statement 18 (Form DEF 14A) (Mar. 17, 2010).

¹⁵² Companies which included ethnicity in the year preceding the rule were: Johnson & Johnson, Proxy Statement 3 (Form DEF 14A) (Mar. 17, 2010); Microsoft Corp., Proxy Statement 5 (Form DEF 14A) (Sept. 29, 2009); Pfizer Inc., Proxy Statement 5, 10 (Form DEF 14A) (Mar. 12, 2009); News Corp., Proxy Statement 10 (Form DEF 14A) (Aug. 20, 2009); Sunoco, Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 17, 2009); Time Warner Inc., Proxy Statement 12 (Form DEF 14A) (Apr. 8, 2009); Merck & Co./Schering-Plough Corp., Proxy Statement 17 (Form DEF 14A) (Apr. 24, 2009).

Companies which included ethnicity in the year after the rule were: ExxonMobil Corp., Proxy Statement 10 (Form DEF 14A) (Apr. 13, 2010); Chevron Corp., Proxy Statement 8 (Form DEF 14A) (Apr. 15, 2010); JPMorgan Chase & Co., Proxy Statement 1 (Form DEF 14A) (Mar. 31, 2010); Citigroup Inc., Proxy Statement 7 (Form DEF 14A) (Mar. 12, 2010); McKesson Corp., Proxy Statement 12 (Form DEF 14A) (Jun. 21, 2010); The Kroger Co., Proxy Statement 15 (Form DEF 14A) (May 14, 2010); Valero Energy Corp., Proxy Statement 6 (Form DEF 14A) (Mar. 19, 2010); The Boeing Co., Proxy Statement 3 (Form DEF 14A) (Mar. 15, 2010); The Home Depot, Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 7, 2010); Walgreen Co., Proxy Statement 16 (Form DEF 14A) (Nov. 22, 2010); Johnson & Johnson, Proxy Statement 3 (Form DEF 14A) (Mar. 17, 2010); Medco Health Solutions, Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 31, 2010); Microsoft Corp., Proxy Statement 9 (Form DEF 14A) (Sept. 30, 2010); Pfizer Inc., Proxy Statement 12 (Form DEF 14A) (Mar. 16, 2010); Marathon Oil Corp., Proxy Statement 15 (Form DEF 14A) (Mar. 8, 2010); Best Buy Co., Proxy Statement 16 (Form DEF 14A) (May 11, 2010); Supervalu Inc., Proxy Statement 8 (Form DEF 14A) (May 12, 2010); Sysco Corp., Proxy Statement 6 (Form DEF 14A) (Sept. 29, 2010); Intel Corp., Proxy Statement 4 (Form DEF 14A)

F. Proxies of Smaller Companies

We also looked at the proxies of smaller companies during the same time period—the proxy year preceding the new rule’s February 28, 2010 effective date and the proxy year following that date—to see if there were similar patterns in response to the rule. For this sample, we chose the fifty largest companies headquartered in North Carolina, as reported in *Business North Carolina* in 2010.¹⁵³ Only two of these companies, Bank of America Corporation and Lowe’s Companies, Incorporated, were also in the previously described sample of Fortune 100 companies.¹⁵⁴ Three of the fifty North Carolina companies did not mention diversity as a consideration in selecting director-nominees.¹⁵⁵ The other forty-seven companies did list diversity as a factor,¹⁵⁶ compared to only twenty-two companies listing this in the proxy year preceding the February 28, 2010 effective date.¹⁵⁷ Only one company arguably had a formal diversity policy¹⁵⁸ and twenty-four companies specifically stated that they did not have a formal diversity

(Apr. 2, 2010); Aetna Inc., Proxy Statement 18 (Form DEF 14A) (Apr. 12, 2010); The Coca-Cola Co., Proxy Statement 14 (Form DEF 14A) (Mar. 5, 2010); Humana Inc., Proxy Statement 15 (Form DEF 14A) (Mar. 9, 2010); Honeywell Int’l Inc., Proxy Statement 17 (Form DEF 14A) (Mar. 11, 2010); Abbott Labs., Proxy Statement 9 (Form DEF 14A) (Mar. 15, 2010); News Corp., Proxy Statement 15 (Form DEF 14A) (Aug. 30, 2010); Sunoco, Inc., Proxy Statement 3 (Form DEF 14A) (Mar. 17, 2010); Merck & Co., Proxy Statement 22 (Form DEF 14A) (Apr. 12, 2010).

¹⁵³ Frank Maley, *Top 75 Public Companies*, BUSINESS N.C., AUG. 2010, at 33.

¹⁵⁴ See *Fortune 500: Largest U.S. Corporations*, FORTUNE MAGAZINE, May 3, 2010, at F-1, F-3.

¹⁵⁵ Carlisle Cos. Inc., Proxy Statement 16 (Form DEF 14A) (Mar. 18, 2010); Ingles Mkts. Inc., Proxy Statement 5, 7 (Form DEF 14A) (Dec. 21, 2010); Sealy Corp., Proxy Statement 14 (Form DEF 14A) (Mar. 5, 2010).

¹⁵⁶ See *infra* notes 161–164.

¹⁵⁷ Reynolds Am., Inc., Proxy Statement 18 (Form DEF 14A) (Mar. 23, 2009); Salix Pharm., Ltd., Proxy Statement 7 (Form DEF 14A) (Apr. 30, 2009); Hanesbrands, Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 12, 2009); Polymer Grp., Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 23, 2010); Tekelec, Proxy Statement 10 (Form DEF 14A) (Apr. 15, 2009); Martin Marietta Materials, Inc., Proxy Statement A-1 (Form DEF 12A) (Apr. 21, 2009); Lab. Corp. of Am. Holdings, Proxy Statement 9 (Form DEF 14A) (Mar. 24, 2009); Nucor Corp., Proxy Statement 12 (Form DEF 14A) (Mar. 25, 2009); First Bancorp, Proxy Statement 10 (Form DEF 14A) (Apr. 8, 2009); POZEN Inc., Proxy Statement 11 (Form DEF 14A) (Apr. 22, 2009); Tanger Factory Outlet Ctrs., Inc., Proxy Statement 6 (Form DEF 14A) (Mar. 27, 2009); Highwoods Props., Inc., Proxy Statement 4 (Form DEF 14A) (Apr. 2, 2009); Cree, Inc., Proxy Statement 52 (Form DEF 14A) (Sept. 4, 2009); Lorillard, Inc., Proxy Statement 11 (Form DEF 14A) (Apr. 8, 2009); Lance, Inc., Proxy Statement 7–8 (Form DEF 14A) (Mar. 26, 2010); RF Micro Devices, Inc., Proxy Statement 8 (Form DEF 14A) (Jun. 18, 2009); The Pantry, Inc., Proxy Statement 6 (Form DEF 14A) (Jan. 22, 2010); Insteel Indus., Inc., Proxy Statement 9 (Form DEF 14A) (Jan. 5, 2010); Pike Elec. Corp., Proxy Statement 10 (Form DEF 14A) (Oct. 22, 2009); Polypore Int’l, Inc., Proxy Statement 5 (Form DEF 14A) (Apr. 8, 2009); The Cato Corp., Proxy Statement 7 (Form DEF 14A) (Apr. 20, 2009); Speedway Motorsports, Inc., Proxy Statement 7 (Form DEF 14A) (Mar. 25, 2009).

¹⁵⁸ Tekelec was the company that came closest to having a formal diversity policy, although the language in its proxy could be interpreted as only a factor. The Tekelec proxy did state that the diversity of the board is evaluated each year. Tekelec, Proxy Statement 10–11 (Form DEF 14A) (Apr. 7, 2010).

Pursuant to its charter, the Nominating and Corporate Governance Committee considers the diversity of backgrounds, experience and competencies of director-nominees as they relate to existing representation on the Board. The current members of the Board have diverse educational backgrounds and career experiences and represent different genders and geographies. The Board evaluates the diversity of the Board during the annual self-assessment process.

Id.

policy.¹⁵⁹ Only one company, Reynolds American, Incorporated, reported the demographic composition of its board.¹⁶⁰ Of the forty-seven companies that considered diversity as a factor in director selection, four companies did not define diversity,¹⁶¹ only two companies defined diversity exclusively by demographic diversity factors,¹⁶² twenty-one companies defined diversity by general factors (e.g., viewpoints, experiences, skills, background, education),¹⁶³ and twenty companies defined diversity by reference to some combination of demographic diversity and general diversity.¹⁶⁴ Prior to the

¹⁵⁹ Salix Pharm., Ltd., Proxy Statement 7 (Form DEF 14A) (Apr. 30, 2010); Hanesbrands, Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 12, 2010); Piedmont Natural Gas Co., Proxy Statement 31 (Form DEF 14A) (Jan. 14, 2011); Red Hat, Inc., Proxy Statement 5 (Form DEF 14A) (Jun. 25, 2010); Progress Energy, Inc., Proxy Statement 19 (Form DEF 14A) (Mar. 31, 2010); Family Dollar Stores, Inc., Proxy Statement 15 (Form DEF 14A) (Dec. 2, 2010); SPX Corp., Proxy Statement 12 (Form DEF 14A) (Mar. 24, 2010); Polymer Grp., Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 23, 2010); Martin Marietta Materials, Inc., Proxy Statement 20 (Form DEF 14A) (Apr. 23, 2010); First Bancorp, Proxy Statement 12 (Form DEF 14A) (Apr. 8, 2010); Ruddick Corp., Proxy Statement 16 (Form DEF 14A) (Dec. 27, 2010); The Coca-Cola Bottling Co. Consol., Proxy Statement 15, 16 (Form DEF 14A) (Mar. 30, 2010); First Citizens BancShares, Inc./DE, Proxy Statement 16 (Form DEF 14A) (Mar. 19, 2010); POZEN Inc., Proxy Statement 11 (Form DEF 14A) (Apr. 27, 2010); Aviat Networks, Inc., Proxy Statement 12 (Form DEF 14A) (Sept. 27, 2010); Pharm. Prod. Dev., Inc., Proxy Statement 7 (Form DEF 14A) (Apr. 1, 2010); Lorillard, Inc., Proxy Statement 11 (Form DEF 14A) (Apr. 5, 2010); MedCath Corp., Proxy Statement 13 (Form DEF 14A) (Jun. 27, 2011); Ingles Mkt., Inc., Proxy Statement 5, 7 (Form DEF 14A) (Dec. 21, 2010); The Pantry, Inc., Proxy Statement 7 (Form DEF 14A) (Jan. 28, 2011); Insteel Indus., Inc., Proxy Statement 11 (Form DEF 14A) (Dec. 30, 2010); Polymore Int'l, Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 13, 2010); Speedway Motorsports, Inc., Proxy Statement 12 (Form DEF 14A) (Mar. 25, 2010); Old Dominion Freight Line Inc./VA, Proxy Statement 12 (Form DEF 14A) (Apr. 19, 2010).

¹⁶⁰ Reynolds Am., Inc., Proxy Statement 22 (Form DEF 14A) (Mar. 22, 2010) (“The Board’s diversity also is reflected by the fact that it counts three women, two African Americans and four non-U.S. citizens among its members.”).

¹⁶¹ Salix Pharm. Ltd., Proxy Statement 7 (Form DEF 14A) (Apr. 30, 2010); First Bancorp, Proxy Statement 12 (Form DEF 14A) (Apr. 8, 2010); Ruddick Corp., Proxy Statement 16 (Form DEF 14A) (Dec. 27, 2010); Pharm. Prod. Dev., Inc., Proxy Statements 7 (Form DEF 14A) (Apr. 1, 2010).

¹⁶² Hanesbrands, Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 12, 2010) (race, ethnicity and gender); Nucor Corp., Proxy Statement 12 (Form DEF 14A) (Mar. 24, 2010) (race and gender).

¹⁶³ Reynolds Am. Inc., Proxy Statement 22 (Form DEF 14A) (Mar. 22, 2010); VF Corp., Proxy Statement 12 (Form DEF 14A) (Mar. 19, 2010); CommScope, Inc., Proxy Statement 4 (Form DEF 14A) (Mar. 19, 2010); BB&T Corp., Proxy Statement 23–24 (Form DEF 14A) (Mar. 8, 2010); Progress Energy, Inc., Proxy Statement 19 (Form DEF 14A) (Mar. 31, 2010); Inspire Pharm., Inc., Proxy Statement 17 (Form DEF 14A) (Apr. 23, 2010); SPX Corp., Proxy Statement 12 (Form DEF 14A) (Mar. 24, 2010); Lowe’s Cos. Inc., Proxy Statement 14 (Form DEF 14A) (Apr. 12, 2010); POZEN Inc., Proxy Statement 11 (Form DEF 14A) (Apr. 27, 2010); Highwoods Prop., Inc., Proxy Statement 5 (Form DEF 14A) (Mar. 31, 2010); Cree, Inc., Proxy Statement 56 (Form DEF 14A) (Sept. 3, 2010); Lorillard, Inc., Proxy Statement 11 (Form DEF 14A) (Apr. 5, 2010); MedCath Corp., Proxy Statement 13 (Form DEF 14A) (Jun. 27, 2011); Snyder’s-Lance, Inc., Proxy Statement 13 (Form DEF 14A) (Mar. 30, 2011); Insteel Indus., Inc., Proxy Statement 11 (Form DEF 14A) (Dec. 30, 2010); EnPro Indus., Inc., Proxy Statement 15 (Form DEF 14A) (Mar. 31, 2010); Pike Elec. Corp., Proxy Statement 14, 15 (Form DEF 14A) (Oct. 20, 2010); Sonic Auto., Inc., Proxy Statement 9 (Form DEF 14A) (Mar. 5, 2010); The Cato Corp., Proxy Statement 9 (Form DEF 14A) (Apr. 8, 2010); Speedway Motorsports, Inc., Proxy Statement 12 (Form DEF 14A) (Mar. 25, 2010); Old Dominion Freight Line, Inc., Proxy Statement 12 (Form DEF 14A) (Apr. 19, 2010).

¹⁶⁴ Krispy Kreme Doughnuts, Inc., Proxy Statement 19 (Form DEF 14A) (May 7, 2010); Piedmont Natural Gas Co., Proxy Statement 31 (Form DEF 14A) (Jan. 14, 2011); Red Hat, Inc., Proxy Statement 5 (Form DEF 14A) (Jun. 25, 2010); Family Dollar Stores, Inc., Proxy Statement 15 (Form DEF 14A) (Dec. 2, 2010); Bank of Am. Corp., Proxy Statement 15 (Form DEF 14A) (Mar. 17, 2010); Polymer Grp., Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 23, 2010); Goodrich Corp., Proxy Statement 16 (Form DEF 14A) (Mar. 11, 2010); Tekelec, Proxy Statement 11 (Form DEF 14A) (Apr. 2, 2010); Martin Marietta Materials, Inc., Proxy Statement 20 (Form DEF 14A) (Apr. 23, 2010); Lab. Corp. of Am. Holdings,

February 28, 2010 effective date of the revised Regulation S-K, only three companies mentioned gender, race, or ethnicity as part of their proxy definition of diversity.¹⁶⁵ After that date, however, eleven companies listed race as part of the definition of diversity,¹⁶⁶ eleven companies listed ethnicity as a component of diversity,¹⁶⁷ and seventeen companies listed gender.¹⁶⁸

V. CONCLUSION

The amended proxy disclosure rule regarding board diversity is a positive step that may increase discussion of diversity issues in board nominating committees. It supplements ongoing efforts by various groups focused on increasing board diversity, but it does so in a way that is far less intrusive than the quota approach adopted in several other countries. In

Proxy Statement 3 (Form DEF 14A) (Apr. 1, 2010); The Coca-Cola Bottling Co. Consol., Proxy Statement 15, 16 (Form DEF 14A) (Mar. 30, 2010); First Citizens BancShares, Inc., Proxy Statement 16 (Form DEF 14A) (Mar. 19, 2010); Tanger Factory Outlet Ctr., Inc., Proxy Statement 3 (Form DEF 14A) (Mar. 31, 2010); Aviat Networks, Inc., Proxy Statement 12 (Form DEF 14A) (Sept. 27, 2010); RF Micro Devices, Inc., Proxy Statement 11 (Form DEF 14A) (Jun. 24, 2010); The Pantry, Inc., Proxy Statement 7 (Form DEF 14A) (Jan. 28, 2011); Duke Energy Corp., Proxy Statement 45 (Form DEF 14A) (Mar. 22, 2010); Alliance One Int'l, Inc., Proxy Statement 8 (Form DEF 14A) (Jul. 13, 2010); Polymore Int'l, Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 13, 2010); Hatteras Fin. Corp., Proxy Statement 11, 12 (Form DEF 14A) (Mar. 26, 2010).

¹⁶⁵ Hanesbrand, Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 12, 2009); Martin Marietta Materials, Inc., Proxy Statement A-1 (Form DEF 14A) (Apr. 21, 2009); Nucor Corp., Proxy Statement 12 (Form DEF 14A) (Mar. 25, 2009).

¹⁶⁶ Krispy Kreme Doughnuts, Inc., Proxy Statement 19 (Form DEF 14A) (May 7, 2010); Hanesbrand, Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 12, 2010); Piedmont Natural Gas Co., Proxy Statement 31 (Form DEF 14A) (Jan. 14, 2011); Red Hat, Inc., Proxy Statement 5 (Form DEF 14A) (Jun. 15, 2010); Polymer Grp., Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 23, 2010); Goodrich Corp., Proxy Statement 16 (Form DEF 14A) (Mar. 11, 2010); Nucor Corp., Proxy Statement 14 (Form DEF 14A) (Mar. 24, 2010); First Citizens BancShares, Inc./DE, Proxy Statement 16 (Form DEF 14A) (Mar. 19, 2010); Aviat Networks, Inc., Proxy Statement 12 (Form DEF 14A) (Sept. 27, 2010); Duke Energy Corp., Proxy Statement 45 (Form DEF 14A) (Mar. 22, 2010); Polypore Int'l, Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 13, 2010).

¹⁶⁷ Krispy Kreme Doughnuts, Inc., Proxy Statement 19 (Form DEF 14A) (May 7, 2010); Hanesbrand, Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 12, 2010); Piedmont Natural Gas Co., Proxy Statement 31 (Form DEF 14A) (Jan. 14, 2011); Family Dollar Stores, Inc., Proxy Statement 15 (Form DEF 14A) (Dec. 7, 2010); Polymer Grp., Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 23, 2010); Martin Marietta Materials, Inc., Proxy Statement 20 (Form DEF 14A) (Apr. 23, 2010); Lab. Corp. of Am. Holdings, Proxy Statement 3 (Form DEF 14A) (Apr. 1, 2010); The Pantry, Inc., Proxy Statement 7 (Form DEF 14A) (Jan. 28, 2011); Duke Energy Corp., Proxy Statement 45 (Form DEF 14A) (Mar. 22, 2010); Alliance One Int'l, Inc., Proxy Statement 8 (Form DEF 14A) (Jul. 13, 2010); Polymore Int'l, Inc., Proxy Statement 10 (Form DEF 14A) (Apr. 13, 2010).

¹⁶⁸ Krispy Kreme Doughnuts, Inc., Proxy Statement 19 (Form DEF 14A) (May 7, 2010); Hanesbrand, Inc., Proxy Statement 10 (Form DEF 14A) (Mar. 12, 2010); Piedmont Natural Gas Co., Proxy Statement 31 (Form DEF 14A) (Jan. 14, 2011); Red Hat, Inc., Proxy Statement 5 (Form DEF 14A) (Jun. 24, 2010); Family Dollar Stores, Inc., Proxy Statement 15 (Form DEF 14A) (Dec. 7, 2010); Polymer Grp., Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 23, 2010); Goodrich Corp., Proxy Statement 16 (Form DEF 14A) (Mar. 11, 2010); Tekelec, Proxy Statement 11 (Form DEF 14A) (Apr. 2, 2010); Martin Marietta Materials, Inc., Proxy Statement 20 (Form DEF 14A) (Apr. 22, 2010); Lab. Corp. of Am. Holdings, Proxy Statement 3 (Form DEF 14A) (Apr. 1, 2010); Nucor Corp., Proxy Statement 14 (Form DEF 14A) (Mar. 24, 2010); First Citizens BancShares Inc./DE, Proxy Statement 16 (Form DEF 14A) (Mar. 19, 2010); Aviat Networks, Inc., Proxy Statement 11 (Form DEF 14A) (Sept. 27, 2010); The Pantry, Inc., Proxy Statement 7 (Form DEF 14A) (Jan. 28, 2011); Duke Energy Corp., Proxy Statement 45 (Form DEF 14A) (Mar. 22, 2010); Alliance One Int'l, Inc., Proxy Statement 8 (Form DEF 14A) (Apr. 13, 2010).

several years, it will be interesting to compare board diversity figures with the comparable numbers as of the February 28, 2010 effective date of the rule to see whether the rule's adoption correlates with any significant increase in board diversity.

It is obvious, however, that companies and the SEC are interpreting the new rule differently. The vast majority of companies do not seem to equate "consideration" of diversity with having a diversity "policy," although the SEC's comments on several proxies and Commissioner Aguilar's public statements seem to conflate the two. Many companies have parsed the rule's language and view consideration of diversity in nominating directors as different and distinct from having a formal diversity policy. Many even affirmatively state that they do *not* have a diversity policy, and therefore they do not trigger the rule's requirements of discussing implementation of the policy and how the company assesses the effectiveness of the policy.

We urge the SEC to issue interpretive guidance on the amended rule to explicate that any consideration of diversity in board nominations reflects a policy to consider diversity, therefore implementation and assessment of that policy must then be discussed. This would be preferable to the piecemeal proxy comment process, which is now the only guidance companies are receiving about the SEC's interpretation of the rule.

Any such guidance from the SEC might also suggest other elements in the diversity disclosure that might be viewed favorably by the investors who commented so enthusiastically on the diversity disclosure aspects of the proposed rule amendments. For instance, in addition to discussing *how* the diversity policy is assessed, investors would benefit from knowing the results of the assessment. Did the company fulfill its diversity policy or is it still working toward that goal? Companies may wish to consider voluntarily disclosing the gender, racial, and ethnic composition of their slate of director-nominees. Commissioner Aguilar suggested in a speech that companies might wish to discuss "concrete steps taken to develop a slate of diverse candidates," such as interviewing female or minority candidates, instructing a search firm to seek women or minority candidates, and soliciting recommendations for director-nominees from organizations focused on identifying nominees with diverse backgrounds.¹⁶⁹

¹⁶⁹ Aguilar, *supra* note 84.

DIVERSITY DISCLOSURES IN PROXIES

	Fortune 100 # (90 proxy issuers)	Fortune 100 %	NC 50 #	NC 50 %
Diversity not considered as a factor	2	2.2%	3	6%
Formal diversity policy	10	11.1%	1	2%
Stated that no formal diversity policy existed	28	31.1%	24	48%
Reported board's demographic diversity	6	6.7%	1	2%
Diversity definition				
- No definition	10	11.1%	4	8%
- Demographic only	6	6.7%	2	4%
- General only	33	36.7%	21	42%